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British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Ms. Sara Hardgrave, Acting Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Energy Inc. ("FEI")
Application for a Certificate of Public Convenience and Necessity for the Tilbury Liquefied Natural Gas Storage Expansion Project

We enclose for filing a public version of FEI's Final Submissions in the above-noted proceeding.

Portions of paragraphs 23, 51, 65, 106, 108, 110-111, 179 are redacted as they contain security sensitive information from confidential Exhibits B-1-3-1, B-23-2 and B-26-2. The BCUC has treated this information as confidential in this proceeding, in accordance with Order and Decision G-147-21. Public disclosure of this information (inadvertent or otherwise) could pose a risk to FEI's system – which in turn would have potentially severe consequences for FEI's customers and all British Columbians.

We are filing an unredacted version of these Final Submissions with the BCUC under separate cover. Consistent with Order G-147-21, FEI is providing the unredacted version directly to those participants who signed the Non-Disclosure Agreement and Undertaking in Appendix A to Exhibit B-10.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Matthew Ghikas
Personal Law Corporation

MTG/lh
Enclosure

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF

THE UTILITIES COMMISSION ACT

RSBC 1996, CHAPTER 473

AND

FORTISBC ENERGY INC.

APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

FOR THE TILBURY LIQUEFIED NATURAL GAS STORAGE EXPANSION PROJECT

FINAL SUBMISSIONS OF FORTISBC ENERGY INC.

FASKEN MARTINEAU DuMOULIN LLP

MATTHEW GHIKAS, DANI BRYANT, NIALL RAND and MADISON GRIST

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PART ONE: INTRODUCTION

1. Resiliency has become an increasingly important consideration in the energy industry, just as it has for other vital infrastructure. We have collectively witnessed instances of low probability, high-impact events in recent years – the failure of the Texas electric grid during record low temperatures, the shut-down of the Colonial oil pipeline serving the Eastern seaboard due to a ransomware cyberattack, the Colorado outage caused by vandalism, the destruction of Fort McMurray due to wildfires, and flooding of the Sumas Prairie following record flows in adjacent rivers, to name a few. These types of events are inevitably followed by forensic examination, frequently accompanied by finger-pointing about why proactive preventative steps had not been taken to avoid catastrophic harm from occurring when a plausible, albeit low probability, risk materializes. This Application[1] presents an opportunity to proactively mitigate the potential for catastrophic harm to result from a winter no-flow event on Westcoast Energy's T-South system.

2. In October 2018, FortisBC Energy Inc. ("FEI") experienced the situation that this Application is intended to address: a no-flow event on the T-South system ("T-South Incident"), on which FEI must rely for most of its supply to the Lower Mainland. Many factors had to go in FEI's favour to allow it to withstand that two-day no flow period, chief among which was the time of year / warmer weather. The Lower Mainland will, without question, experience a widespread outage on the very first day of a similar no-flow event occurring any time during a typical winter. Hundreds of thousands of FEI customers in the Lower Mainland will lose service for up to nine or ten weeks, leaving customers without heat or hot water, impairing the ability of businesses and social service providers to operate, and cascading economic impacts throughout the Province.

3. Following the T-South Incident, the BCUC requested that FEI file an assessment of risks to gas supply resiliency and a discussion of alternatives available to mitigate these risks as part of

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[1] Exhibit B-1-3-1, Revised Confidential Application; Exhibit B-1-4, Application.

approving the utility's 2020/21 Annual Contracting Plan ("ACP").[2] FEI completed and filed that assessment as requested.[3] The reality is that guarding against this known catastrophic outcome requires more than just Westcoast dedicating additional resources to maintenance and integrity management on the T-South system. In spite of engineering best efforts and operator due diligence, the risk of integrity-related incidents can never be zero; industry statistics demonstrate a high cumulative probability of an integrity-related outage even on well-maintained pipelines. Recent disruptions on other North American utility infrastructure have also shown that supply interruptions can occur for non-integrity reasons, including deliberate actions by bad actors that are timed and targeted to maximize impacts. Ultimately, FEI's ability to avoid the known catastrophic harm associated with any type of event that disrupts flow for more than a day in a typical winter depends on the capabilities of FEI's own infrastructure. FEI's unique location in the region, and the more limited capabilities of its infrastructure, make FEI far more exposed than other North American utilities to a supply disruption.

4. FEI's Tilbury LNG Facility ("Base Plant") has provided significant gas supply benefits to the FEI system since 1971, as well as some level of resiliency. However, the regasification constraint means that the Base Plant can only support a fraction of the daily winter Lower Mainland load. It is impractical to increase regasification capacity only; the storage tank is still too small, such that a higher rate of regasification would exhaust the LNG very quickly. Further, as the Base Plant is now over 50 years old, much of the onsite infrastructure is reaching the end of its useful life and will require replacement. Simply put, the Base Plant remains the right type of infrastructure, but it is aging and undersized.

5. The Tilbury LNG Storage Expansion ("TLSE") Project will provide FEI with dependable gas supply in the heart of the Lower Mainland. FEI's analysis shows that adding more on-system regasification and storage is the only practical and effective way to bridge a winter no-flow event

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[2] Letter L-31-20, dated June 5, 2020. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/480150/index.do.

[3] Exhibit B-1-3-1, Revised Confidential Application, Confidential Appendix C.

on T-South. The associated regasification equipment, sized at 800 MMcf/day, will be capable of supporting the daily Lower Mainland demand on all but the coldest design day. FEI will reserve sufficient LNG in a new 3 Bcf tank (also referred to as the "TLSE tank") so that FEI can always bridge a no-flow event lasting 3 days (a 2 Bcf reserve based on current load). The remaining 1 Bcf in the TLSE tank (i.e., the "third Bcf") will provide a resiliency margin, replace the gas supply functions the Tilbury Base Plant provides today, and deliver a variety of other operational benefits. The financial value of the gas supply portfolio benefits alone that are associated with the "third Bcf" exceeds the incremental capital cost of the larger tank. All of these benefits will continue for decades.

6. FEI submits that the expected consequences of a winter no-flow event on T-South are too significant to be left unmitigated. The BCUC should approve the TLSE Project as proposed in the draft Order Sought.[4]

7. These Final Submissions are organized according to the following points:

- **Part Two – TLSE Project Is a Resiliency Project:** The TLSE Project is a resiliency investment supporting safe and reliable service to FEI customers, with other associated supply and operational benefits for FEI customers. It is neither an export project, nor does it include additional liquefaction to serve increased LNG demand.

- **Part Three – It Is in the Public Interest to Mitigate the Potential for a Widespread and Prolonged Outage in the Lower Mainland:** A T-South no-flow event lasting even a single day in a normal winter will result in catastrophic consequences. Mitigating this known catastrophic risk is in the public interest. Experience and industry data shows that reasonable and effective mitigation means having enough alternative supply to bridge a three-day no-flow period.

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[4] Exhibit B-1-4, Application, Appendix T2.

- **Part Four – Storage, Pipeline and Load Management Alternatives:** Constructing new on-system storage and regasification capacity is the only practical and effective way to withstand and recover from a winter gas supply interruption on the T-South system without widespread outages. Other alternatives, while providing resiliency and other benefits, could not prevent widespread loss of load in the initial no-flow period.

- **Part Five – Appropriate Sizing of the TLSE Project:** The best option in terms of sizing is 800 MMcf/day of regasification capacity and a 3 Bcf tank. This sizing significantly mitigates the identified risk. It also provides a variety of valuable ancillary benefits, including gas supply benefits with a financial value greater than the incremental cost of the "third Bcf".

- **Part Six – Project Construction:** The TLSE Project is being planned and constructed in conjunction with experts, and according to applicable safety standards.

- **Part Seven – Project Costs, Accounting Treatment and Rate Impacts:** FEI's cost estimate accords with the Certificate of Public Convenience Necessity ("CPCN") Guidelines.[5] It is appropriate to assess rate impacts, as FEI has done, over the 67 year accounting life of the asset; however, the TLSE Project still makes sense for customers even if a shorter horizon is used.

- **Part Eight – Environmental and Archaeological Impacts:** The TLSE Project facilities will be constructed entirely within an existing brownfield site that has hosted industrial operations for many decades. Assessments undertaken to date, in addition to the robust environmental assessment process which remains ongoing, confirm that potential environmental and archaeological impacts associated with the TLSE Project can be mitigated.

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[5] Order G-20-15. Online: https://docs.bcuc.com/documents/Guidelines/2015/DOC_25326_G-20-15_BCUC-2015-CPCN-Guidelines.pdf.

- **Part Ten – Indigenous and Public Engagement:** The evidence demonstrates that FEI's approach to consultation and engagement is ensuring that Indigenous groups and the public have a meaningful opportunity to engage and provide input regarding the TLSE Project, consistent with BCUC's CPCN Guidelines. The recent agreement and collaboration with Musqueam Indian Band ("Musqueam") is reflective of efforts to build strong relationships with Indigenous groups regarding the TLSE Project, to meaningfully engage with potentially affected Indigenous groups and to seek their free, prior and informed consent. Consultation with Tsleil-Waututh Nation ("TWN") has met any legal standard at this point given the nature of the approval sought in this Application and the ongoing consultation and engagement activities with TWN. These activities will continue as development of the TLSE Project progresses.

- **Part Eleven – Consistency with BC's Energy Objectives and Long-term Resource Plan:** The TLSE Project is consistent with the applicable statutory "British Columbia's energy objectives", which focus on economic factors. It is also consistent with FEI's latest Long-Term Resource Plan, which addresses resiliency and contemplates a long-term role for natural gas infrastructure.

PART TWO: THE TLSE PROJECT IS A RESILIENCY PROJECT

A. INTRODUCTION

8. In light of some of the commentary and questions from interveners in this proceeding, it is important to reiterate at the outset what the TLSE Project is, and what it *is not*. As Mr. Finke, the Director of LNG Operations at FEI, explained: "…the TLSE project is for resiliency."[6] The expert evidence and objective facts bear that out. FEI makes the following points in this Part:

- First, the TLSE Project mitigates the potential for widespread, prolonged outages in the Lower Mainland by adding more regasification and LNG storage at the Tilbury facility.

- Second, the TLSE Project incorporates no new liquefaction to serve exports or the marine fueling market, but rather, supports FEI's existing customers.

- Third, although resiliency is the driver of the TLSE Project, a significant portion of the project cost would have to be incurred at some point regardless since the existing Base Plant is nearing the end of its useful life.

B. PROJECT ADDS REGASIFICATION AND STORAGE TO WITHSTAND A NO-FLOW EVENT

9. Resiliency, as defined by Guidehouse Inc. ("Guidehouse") and echoed by FEI, "is the ability to stand up to, respond, recover from and adapt to a high impact low likelihood disruption event, such as extreme weather, a cyber-attack, an accident or a malfunction of the system."[7] Resiliency, along with integrity and reliability, collectively underpin utility service to customers, as depicted in Figure 3-1 from the Application:[8]

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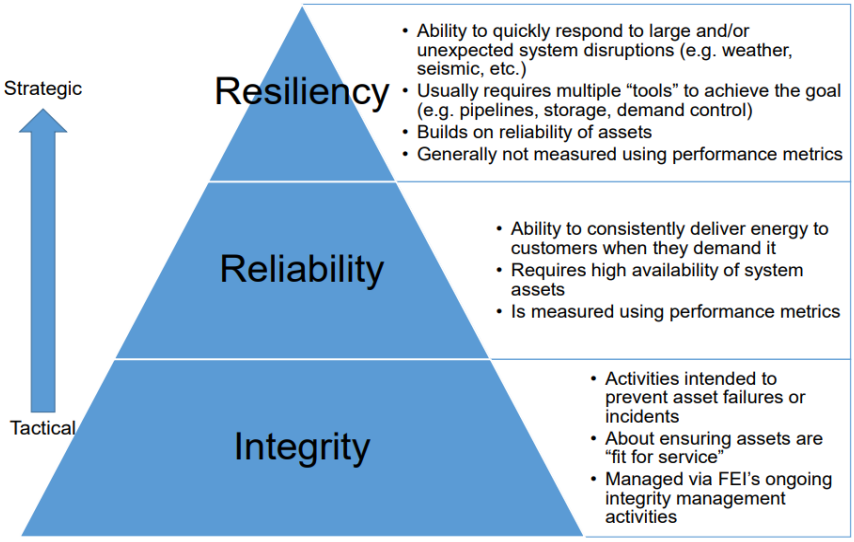
6 Tr. 1, p. 202, l. 26 to p. 203, l. 9 (Finke).

7 Tr. 1, p. 111, ll. 18-24 (Moran); see also Tr. 1, p. 27, l. 22- p. 28, l. 5 (Chernikhowsky). See also: Exhibit B-1-4, Application, Appendix A, p. 6; see also Exhibit B-5, Workshop Guidehouse Presentation, Slide 6.

8 Exhibit B-1-4, Application, p. 25.

Figure 3-1: Integrity, Reliability and Resiliency as Building Blocks of Customer Service



10. As described in Part Three below, FEI's specific concern is a no-flow event on the T-South system, since most of the gas entering the FEI system (approximately 85 percent in 2018) is shipped on the T-South system.[9] FEI's objective is "to have the ability to withstand and recover from a three-day no-flow event on the T-South system, without having to shut down portions of our gas distribution system that would result in our firm customers being without natural gas."[10] Guidehouse concluded, and FEI agrees, that "on-system storage is the most effective means of risk management for FEI to mitigate the risk of an upstream supply disruption."[11]

11. As discussed later in Part Five, FEI has indicated that it would be setting aside sufficient capacity in the tank as a minimum resiliency reserve to support the daily Lower Mainland load (2 Bcf based on current load). FEI identified that the "third Bcf" provides additional resiliency above the minimum, replaces the supply and operational functions currently served by the Base Plant, and provides other potential optionality. The financial value of the gas supply benefits associated

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9 Exhibit B-1-4, Application, p. 37.

10 Tr. 1, p. 71, ll. 8-13 (Sam). See also: Tr. 1, p. 15, ll. 4-14 (Chernikhowsky).

11 Exhibit B-1-4, Application, Appendix A, p. 46. Guidehouse was retained by FEI to develop a framework to inform FEI's resiliency decision-making and not to necessarily recommend a particular project: Tr. 1, p. 108, ll. 18-23 (Moran).

with the "third Bcf" alone outweigh the incremental cost of a larger tank, making the 3 Bcf tank ultimately a less costly resiliency investment for FEI's customers than a 2 Bcf tank.[12]

C. PROJECT SUPPORTS DOMESTIC CUSTOMERS AND RELIES ON EXISTING LIQUEFACTION

12. As Mr. Leclair explained: "[…] the TLSE project supports the delivery of energy that is currently being used or consumed. It does not create a new demand or the need for additional liquefaction."[13]

13. The TLSE Project is not an LNG export project and does not involve marine shipping or operations in the Fraser River.[14] Nor will the TLSE tank increase the amount of LNG that can be moved through the Tilbury Marine Jetty. The jetty will be connected to the existing Tilbury 1A storage tank, which was constructed for the purpose of LNG sales.[15] Therefore, the amount of LNG that can be transferred to the jetty will not increase as a result of the TLSE tank.

14. The need that will be met by the TLSE tank is also not dependent on the liquefaction facility that is part of the Tilbury Phase 2 LNG Expansion Project ("Phase 2 Liquefaction Facility"), or *visa versa*. The TLSE tank is configured so that it can serve its intended purpose of storing LNG produced by Tilbury 1A liquefaction capacity,[16] and Mr. Leclair confirmed that FEI will not use LNG produced by the Liquefaction Facility.[17] Similarly, the Phase 2 Liquefaction Facility does not require the storage capacity proposed for the TLSE Project. Indeed, the Liquefaction Facility may not require any new storage at all, depending on the facility's ultimate sizing (i.e., the existing Tilbury 1A alone could support a smaller facility).[18]

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12 Exhibit B-15, BCUC IR 23.6.

13 Tr. 1, p. 20, ll. 17-20 (Leclair).

14 Exhibit B-25, TWN IR1 12.1, 12.2.

15 Exhibit B-25, TWN IR1 4.1, 12.1, 12.2.

16 Tr. 1, p. 199, l. 25 to p. 200, l. 3 (Finke). Mr. Finke explained that "The filling of the tank will be facilitated by a connection between the new tank and the existing T1A tank. This connection will allow us to use liquefaction from the T1A liquefier to fill the new tank." Exhibit B-28, RCIA IR2 39.3, 39.4. Exhibit B-21, MS2S IR1 8.i

17 Tr. 1, p. 22, ll. 11-18 (Leclair); Tr. 1, p. 24, ll. 10-12 (Leclair); Exhibit B-28, RCIA IR2 39.7; Exhibit B-28, RCIA IR2 40.2.

18 Exhibit B-15, BCUC IR1 23.1.

15. The fact that the TLSE tank is a component of the Tilbury Phase 2 LNG Expansion Project (along with the Phase 2 Liquefaction Facility) is a function of the law governing the scope of environmental assessments under the *Environmental Assessment Act*[19] ("BC EAA") and the *Impact Assessment Act*[20] ("IAA"), .[21] Those principles are not relevant to the question of whether the TLSE Project is in the public convenience and necessity.

16. The technical potential to make a portion of the "third Bcf" of storage capacity available to support bunkering or to provide storage for the Liquefaction Facility is: (i) subject to FEI's own resiliency, gas supply and operational needs; (ii) one option among many; (iii) speculative at present; and (iv) subject to BCUC oversight.[22] It should be understood as a potential and contingent means of offsetting some of the cost of service of the TLSE Project for the benefit of ratepayers rather than a justification for the Project.

D. THE EXISTING BASE PLANT WILL NEED TO BE REPLACED REGARDLESS

17. Although the TLSE Project is properly characterized as a resiliency project, it would be incorrect to conceptualize the full project cost as the cost of increasing resiliency. As explained in Part Five, Section D, the TLSE Project also replaces the existing Tilbury Base Plant tank, which is now over 50 years old – well-beyond its expected service life. In the absence of the TLSE Project, FEI would still need to maintain the current gas supply and operational benefits provided by the Base Plant.[23] Given the tank's age, even with significant additional capital investment, the extent of additional operational life that FEI would be able to achieve is unclear.[24] FEI's financial analysis shows that customers are better off replacing the Base Plant now, as proposed.[25]

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19 S.B,C. 2018, c. 51.

20 S.C. 2019, c. 28, s. 1.

21 Exhibit B-26, BCUC IR2 86.4; Exhibit B-15, BCUC IR1 23.3.

22 Exhibit B-1-4, Application, Section 4.4.1.5. Exhibit B-15, BCUC IR1 23.1, 23.2, 23.2.2 and 23.3; 23.3.3 and 23.3.3.1.

23 FEI would need to contract 150 MMcf/day of supply as part of the existing gas supply resource stack to replace the Tilbury Base Plant, which is estimated to cost approximately $30 million/year: Exhibit B-15, BCUC IR1 22.7 and 46.2; see also Exhibit B-15, BCUC IR1 16.21.

24 Exhibit B-22, RCIA IR1 18.1

25 Exhibit B-1-3-1, Application, pp. 99-101; Exhibit B-15, BCUC IR1 16.22; Exhibit B-26, BCUC IR2 79.3.

PART THREE: IT IS IN THE PUBLIC INTEREST TO MITIGATE THE POTENTIAL FOR A WIDESPREAD, PROLONGED OUTAGE IN THE LOWER MAINLAND

A. INTRODUCTION

18. In this Part, FEI addresses the nature and extent of FEI's exposure to a no-flow event on the T-South system (i.e., project need). The evidence, discussed below, demonstrates that a T-South no-flow event is FEI's single largest supply risk.[26] A no-flow event much shorter than the October 2018 T-South Incident, occurring any time during a normal winter, will – with absolute certainty – result in hundreds of thousands of Lower Mainland customers losing service for up to nine or 10 weeks. FEI submits that it is in the public interest to mitigate this known, and very real, catastrophic risk.

19. The subsections in this Part address the following supporting points:

- First, FEI must rely on the T-South system for most of its supply.
- Second, the potential for a multi-day no-flow event on the T-South system is demonstrated by the fact that it has already happened, and it was only fortuitous that it occurred during a non-winter month. Industry data and JANA Corporation's ("JANA") cumulative probability analysis reinforce that a reoccurrence is not only a possibility, but likely.
- Third, a no-flow event on T-South deprives FEI of both capacity and energy. FEI's ability to continue serving customers in a no-flow event depends on the extent to which FEI has both: (1) the ability to deliver enough alternate supply to meet FEI's daily Lower Mainland load (i.e., capacity, measured in MMcf/day), and (2) enough alternate supply within FEI's control to continue meeting that daily load each day until the T-South no-flow event is resolved (i.e., energy, measured in Bcf). In the

[26] Exhibit B-17, BCOAPO IR1 1.4. As described in Exhibit B-22, RCIA IR1 16.1, FEI has already mitigated significant single point of failure risks on its own system.

context of an LNG facility, regasification equipment determines capacity, whereas the tank size is what determines available energy.

- Fourth, the consequences of the expected outcome of a winter no-flow event on T-South are so significant as to be unacceptable without mitigation.

- Fifth, the experts – Guidehouse, JANA and PricewaterhouseCoopers ("PwC") – all agree that sound risk management requires mitigating known catastrophic consequences from plausible events, in this case T-South no-flow event occurring in winter.

- Sixth, reasonable risk mitigation for a no-flow event on the T-South system means being able to withstand a 3-day interruption without widespread loss of load in the Lower Mainland – a risk-specific planning objective that FEI has, as convenient short-hand, termed the Minimum Resiliency Planning Objective ("MRPO").

B. FEI RELIES HEAVILY, AND WILL NEED TO CONTINUE RELYING, ON THE T-SOUTH SYSTEM

20. As described below, FEI is uniquely dependent on the T-South system by virtue of the limited infrastructure in BC and the US Pacific Northwest, the limited interconnectedness of that infrastructure, and the location of FEI's service territory in relation to it.[27] Approximately 85 percent of the gas entering FEI's system during 2018 was shipped on the T-South system.[28]

(a) Limited Infrastructure in the Region Means FEI Must Rely Heavily on T-South

21. FEI obtained an independent expert report from Guidehouse, whose team (including Paul Moran, who spoke at the Workshop) have substantial expertise in the field of natural gas distribution and gas market analysis and forecasting.[29] Guidehouse highlighted that BC "has a relatively low amount of interconnectedness compared to other regions of North America".[30] BC

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[27] Exhibit B-1-4, Application, p. 37; Tr. 1, p. 147, ll. 5-17 (Chernikhowsky).

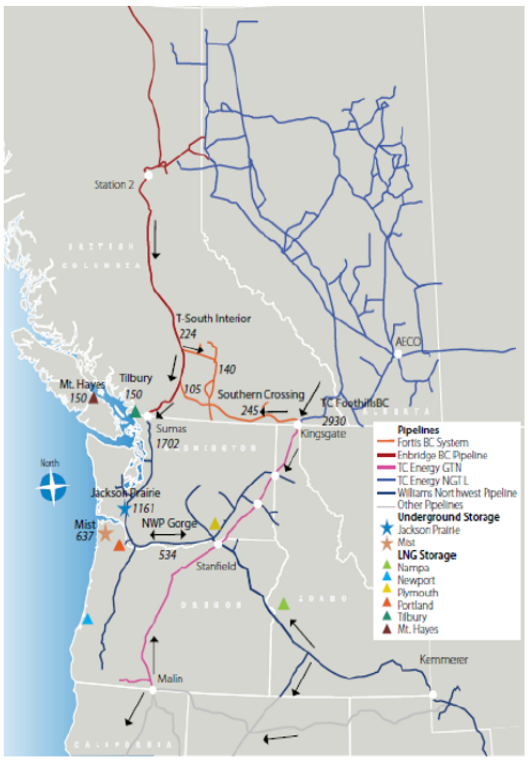
[28] Exhibit B-1-4, Application, p. 37.

[29] Exhibit B-1-4, Appendix A of Appendix A (CV of Paul Moran).

[30] Exhibit B-1-4, Application, Appendix A, p. 30.

is also "highly dependent on a single midstream pipeline for natural gas supply and has minimal on- and off-system storage, resulting in a system that does not have an abundance of inherent resiliency."[31] This is evident in Figure 3-4 of the Application, reproduced below.[32]

Figure 3-4: Regional Gas Infrastructure



Pipeline	Daily Deliverability[1] (MMcf/day)
Enbridge T-South (Huntingdon Delivery Area)[2]	1702
Enbridge T-South (BC Interior)	224
FortisBC ITS (Oliver North)	140
FortisBC SCP (Oliver to Kingsvale)	105
FortisBC SCP (Yahk to Oliver)	245
TC FoothillsBC	2930
NWP Gorge	534

Market Area Storage	Daily Deliverability (MMcf/day)	Storage Capacity (Bcf)
Jackson Prairie (JPS)	1161	25
Mist	637	19

On System Storage	Daily Deliverability (MMcf/day)	Storage Capacity (Bcf)
Mt. Hayes LNG	150	1.5
Tilbury LNG	150	1.35

1. Daily deliverability is the maximum amount of gas that can flow on the pipeline or the maximum amount of gas that can be withdrawn out of storage. It is important to note that the daily deliverability out of the market area storage is assuming storage inventories are full. These resources do have withdrawal rates decline as working gas volumes decline.

2. Including 105 MMcf/day T-South Kingsvale to Huntingdon capacity.

22. As discussed below, there are physical limitations on the extent to which FEI can rely on supply from the Southern Crossing Pipeline ("SCP") and the Williams Northwest pipeline ("Williams") in the US Pacific Northwest during a T-South no-flow event.

Southern Crossing Pipeline Capacity Is Only a Fraction of T-South Capacity

23. As shown in the figure above, FEI's ability to source gas through the SCP is physically constrained by its daily deliverability. In particular, the 105 MMcf/day east to west capacity on the SCP represents only approximately [redacted] of the total Lower Mainland design day

31 Exhibit B-1-4, Application, Appendix A, p. 51.

32 Exhibit B-1-3-1, Revised Confidential Application, p. 39.

demand for 2019/2020.[33] The SCP also relies on a 172 km segment of the T-South system (Kingsvale to Huntingdon) to deliver gas to the Lower Mainland, such that SCP supply would be inaccessible to FEI in the event that the T-South disruption occurred south of Kingsvale.[34]

Winter Access to Gas from US Pacific Northwest Depends on Continuous T-South Flows

24. There is an interconnection at Sumas with the Williams pipeline in Washington State. The Williams pipeline is, in turn, interconnected with Jackson Prairie ("JPS") and Mist, the two underground storage facilities the US Pacific Northwest. It is also interconnected with pipelines throughout the Western US. However, the prevailing flows on the Williams pipeline are southbound and system hydraulics preclude physical flows northwards across the border in winter.[35] FEI's access to its stored supply at JPS and Mist during the winter period is contractual (by displacement), not physical. From a physical standpoint, FEI is receiving gas molecules from T-South, while contractual counterparties in the US are receiving the gas molecules from JPS and Mist. [36] The key point is that displacement transactions require gas to be flowing on the T-South system. The interruption of physical gas flows on the T-South system thus prevents contractual access to gas from the US.[37] As Mr. Slater stated: "So if T-South is interrupted and there is no gas flowing, we can't rely on our storage assets that are off system…".[38]

25. Mr. Moran also highlighted this issue in his Workshop presentation:[39]

> The utility does have contractual relationships with storage assets in the Pacific Northwest, but it doesn't have operational control over these assets. And as has been mentioned by others this morning as well, if there were to be a disruption on the T-South Pipeline, for example, that significantly limits the ability to displace the volumes that would come up from the South, from the Mist and the other storage asset to serve FEI. So, again it's the dependency on a single pipeline for a

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33 Exhibit B-1-3-1, Revised Confidential Application, p. 39.

34 Exhibit B-1-4, Application, p. 39.

35 Exhibit B-1-4, Application, p. 71. Tr. 1, p. 52, ll. 2-20 (Hill).

36 Exhibit B-1-4, Application, p. 70.

37 Exhibit B-1-4, Application, p. 70.

38 Tr. 1, p. 61, l. 23 to p. 62, l. 13 (Slater).

39 Tr. 1, p. 121, l. 12 to p. 123, l. 9 (Moran).

> significant portion of deliverability that is a critical source of the lack of resiliency today on the FEI system.

(b) US PNW Utilities, by Contrast, Have Abundant On-System Storage and Pipeline Diversity

26. Utilities in the US Pacific Northwest are far less exposed to a disruption on the T-South system than FEI because of their access to significant on-system storage and pipeline diversity. The underground gas storage facilities at Mist and JPS are located in the heart of the service territories of major gas utilities in the US Pacific Northwest. They provide approximately 44 Bcf of on-system storage and up to 1,798 MMcf/day of regasification capacity – approximately 73 times more storage and 11 times more regasification than the Tilbury Base Plant.[40] Mr. Moran of Guidehouse explained at the Workshop:[41]

> The gas service territories in Oregon and Washington have a greater level of inherent resiliency because they have access directly to on-system storage, so they have the operational control and responsiveness and they have a greater level of it on their system (audio drops) FEI. And so again, we have to think about FEI in its own unique context. It has a -- as I believe I've outlined here, a very high dependency on a single pipeline that's unique to it relative to its neighbours, ….

27. An east-to-west interconnecting pipeline in the Columbia River Gorge corridor also provides 534 MMcf/day of daily deliverability for the utilities in the US Pacific Northwest, five times more than SCP can provide for the Lower Mainland.[42] Whereas SCP interconnects with T-South over 100 kilometres north of the Lower Mainland, the Gorge is a completely separate pipeline path serving the US Pacific Northwest.

28. The TLSE Project is intended to replicate, on a smaller scale, the same type of risk mitigation against a T-South no-flow event that utilities in the US Pacific Northwest receive from having underground storage located in their service territories. Even with the TLSE Project, FEI

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[40] Exhibit B-1-4, Application, p. 38.

[41] Tr. 1, p. 141, l. 21 to p. 142, l. 1 (Moran).

[42] Exhibit B-1-4, Application, pp. 38-39. Ontario has even more proximate storage than the US Pacific Northwest (248 Bcf) storage, and greater pipeline diversity: Exhibit B-1-4, Application, Appendix A, p. 36.

will remain more exposed to an extended T-South no-flow event than the US Pacific Northwest utilities but the risk will be significantly mitigated.

C. MULTI-DAY NO-FLOW EVENT ON T-SOUTH HAS HAPPENED AND WILL LIKELY HAPPEN AGAIN

29. The T-South Incident provides definitive proof that a real potential exists for a multi-day T-South no-flow event, so as to make it an appropriate planning consideration. Moreover, JANA's cumulative probability assessment based on industry data on integrity-related rupture events indicates that a reoccurrence of a multi-day no-flow event over the expected service life of the TLSE Project is not only a possibility, but likely. No-flow events can also occur for non-integrity related reasons, as illustrated by recent malicious incidents in North America.

(a) Prior Incidents on T-South Demonstrate that Future Disruptions Are a Realistic Scenario

30. The 2018 T-South Incident was a significant disruption, and there have been other incidents and near misses. FEI's planning should account for the potential for another disruption to occur. In 2020, the BCUC recognized this in directing FEI to file the following in accepting its 2020/21 ACP:[43]

> [A]n assessment of risks to gas supply resiliency, including both commodity and capacity considerations, in the near-term (1 year) and mid-term (5 years) and a discussion of alternatives available to mitigate these risks. This document should discuss potential contracts, investments, capital expenditures and strategies under consideration to address the risk of resiliency.

31. FEI filed the requested compliance report on August 31, 2020 which describes the utility's plans to address resiliency in the short, medium and long terms, including development of the TLSE Project (please refer to Confidential Attachment C).[44]

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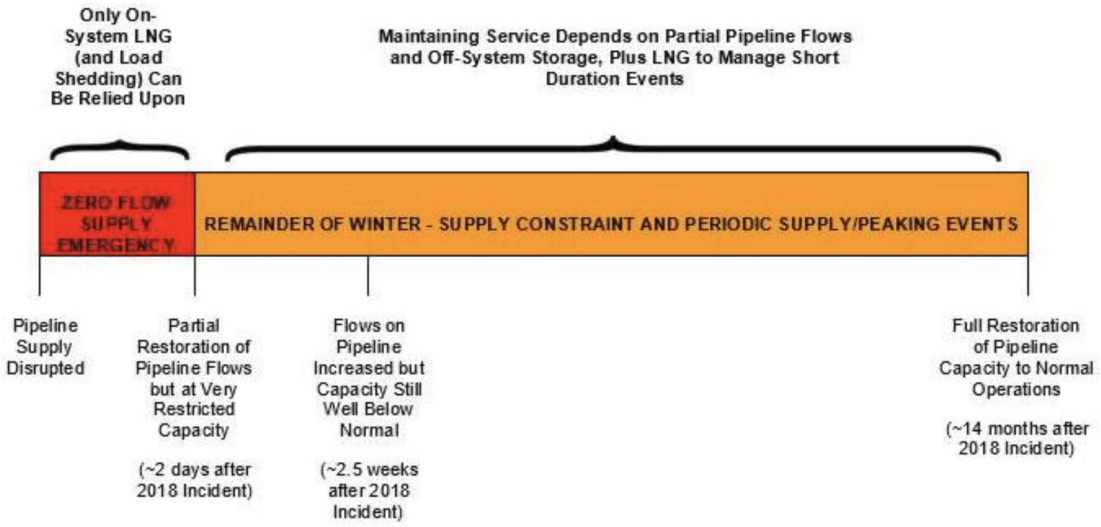
[43] Letter L-31-20, dated June 5, 2020. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/480150/index.do.

[44] Exhibit B-1-3-1, Revised Confidential Application.

T-South Incident Involved a Two Day No-Flow Period, Plus Months of Constraint

32. FEI described the 2018 T-South Incident in Section 3.4.2.2 of the Application. In essence, one of the two pipelines in the common right-of-way ruptured. The adjacent pipeline was also shut down as a precaution and monitored to evaluate its condition, an expected response given their proximity, diameters and operating pressures. [45] The incident resulted in a no-flow event lasting approximately two days, during which a hydraulic collapse of the Lower Mainland system was a material risk. That period was followed by months of supply constraint. The timeline of the T-South Incident is depicted in the following figure:[46]

Figure 3-3: Illustrative Timeline of T-South Supply Emergency and Available Resources



33. As discussed in Part Three, Section E below, the T-South Incident would have resulted in the Lower Mainland losing service on the first day had it occurred in a normal winter instead of during warmer temperatures in October. There is no reasonable basis to conclude that a no-flow event could only occur in non-winter months.[47]

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[45] Exhibit B-1-4, Application, pp. 39-40. Exhibit B-31, MS2S IR2 1.1; Exhibit B-30, BCSEA IR2 13.4. TCPL also shut down adjacent pipelines following the Otterburne event in Manitoba: Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 53.

[46] Exhibit B-1-4, Application, Figure 3-3 (p. 33) and pp. 39-49.

[47] Exhibit B-1-4, Application, p. 4.

Other Disruptions and Near Misses Have Occurred on T-South

34. The T-South Incident, although by far the most significant disruption on T-South to date, was not an isolated incident. There have been other supply disruptions on T-South due to a number of factors, including production problems for upstream operators, operational upsets experienced by the pipeline itself, operating difficulties on downstream interconnecting pipelines, and because commercial arrangements have failed.[48] In at least one of these cases (August 2000 rupture of NPS 30 between Merritt and Hope), the limited extent of impacts on FEI customers was simply the product of good fortune – the rupture occurred during a period of very low summer flows in 2000. The T-South pipeline has high utilization in winter.[49] Last November the Coquihalla River overflowed its banks and submerged the T-South system – a good reminder of potential for natural events to disrupt flows to the Lower Mainland.

Maintenance Work on T-South Since 2018 Cannot Prevent All Disruptions

35. Westcoast has reviewed its integrity management program for the T-South system since the T-South Incident[50], and the Canada Energy Regulator has not identified any outstanding concerns or corrective actions that it required Westcoast to undertake.[51] Nevertheless, no amount of integrity management work can eliminate the risk of an integrity-related rupture (as JANA's analysis, discussed next, shows).[52] No-flow events can also occur for non-integrity reasons.

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48 Exhibit B-15, BCUC IR1 3.1 includes a listing the incidents dating back to 2000.

49 Exhibit B-15, BCUC IR1 3.1.

50 Exhibit B-15, BCUC IR1 1.3.1. Further, integrity-related personnel from both FEI and Enbridge (Westcoast) have met to facilitate high-level technical information sharing (for example, most recently through a discussion on April 19, 2021). Exhibit B-15, BCUC IR1 1.6. Exhibit B-15, BCUC IR1 1.7

51 Exhibit B-32, BCOAPO IR2 3.1.

52 Tr. 1, p. 54, l. 11 to p. 55, l. 1 (Chernikhowsky): ""Yes, all operators do run inspection tools, but as Mr. Sam referred to, no tool is perfect, and sometimes features are missed." See also: Tr. 1, p. 50 l. 8 to p. 51, l. 1 (Sam) and Exhibit B-15, BCUC IR1 2.1.1.

(b) JANA's Analysis: High Cumulative Probability of Another Multi-Day No-Flow Event During the Expected Financial Life of the TLSE Project

36. Some interveners appear to have been under the impression that the risk of another no-flow event occurring is very remote, which is not the case. JANA's analysis, discussed below, demonstrates that the TLSE Project will very likely be called upon to withstand a multi-day no-flow event.[53] Later in Part Three, Section G, we explain how, regardless of the cumulative probability, risk management principles articulated by all three experts in this proceeding (Guidehouse, PwC and JANA) and applied by the BCUC in the context of dam safety, favour mitigating catastrophic harm known to flow from plausible events.

Very High Cumulative Probability of Rupture or Ignited Rupture

37. JANA, who are pipeline industry experts whose evidence the BCUC has previously relied on,[54] have estimated the cumulative probability of rupture or ignited rupture – an integrity-related event affecting the pipeline tubes[55] – for an average performing transmission pipeline the length of the T-South system. JANA determined that, over the 67 year expected economic life of the TLSE Project, the forecast cumulative probability of a rupture event is between **83.1% to 97.9%** and the forecast cumulative probability of an ignited rupture is between **53.4% and 73.9%.** JANA summarized the results in the figure below:[56]

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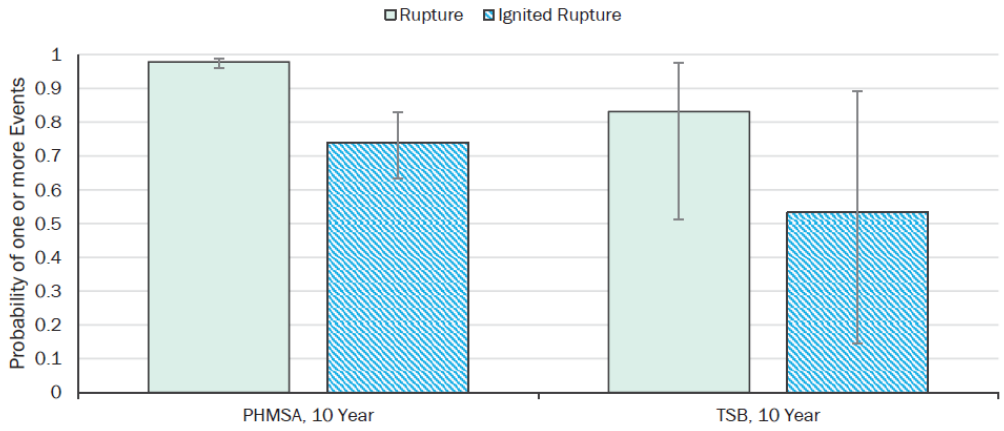
[53] Exhibit B-15, BCUC IR1 1.5, Attachment 1.5C (Assessment of Outage Probability – JANA Project 2347 White Paper). Exhibit B-15, BCUC IR1 9.1. In the *Coastal Transmission System- Transmission Integrity Management Capabilities project* decision, the BCUC indicated it was "…satisfied that the quantification of risk provided in the confidential JANA reports and the additional evidence of consequence of failure is adequate for the purpose of assessing the need to mitigate the risk of undetected cracks in the CTS ": Decision and Order C-3-22, p. 11. Online: https://docs.bcuc.com/Documents/Proceedings/2022/DOC_66603_C-3-22-FEI-CTS-TIMC-CPCN-Decision.pdf ("CTS TIMC Project Decision").

[54] Exhibit B-15, Attachments 1.5A and 1.5B; see also Exhibit B-32, Confidential Attachment 2.1 for the scope of JANA's requested work.

[55] Exhibit B-30, BCSEA IR2 13.3.

[56] Exhibit B-15, BCUC IR1 1.5 and Attachment 1.5C, Figure 3 (p. 6). Exhibit B-32, MS2S IR2 1.4.

Figure 3: Cumulative Probability Estimates for Rupture of an 1,834 km long Transmission Pipeline



	PROBABILITY OF ONE OR MORE RUPTURES (%)			PROBABILITY OF ONE OR MORE IGNITED RUPTURES (%)		
	Mean	Lower Limit*	Upper Limit*	Mean	Lower Limit*	Upper Limit*
PHMSA, 10 Year	97.9	96.2	98.9	73.9	63.4	82.9
TSB, 10 Year	83.1	51.1	97.4	53.4	14.6	89.2

* Limits are for a 95% confidence level

38. JANA's methodology, which it described in detail,[57] was sound.

- JANA explained that calculating cumulative probabilities is a standard statistical approach for assessing probabilities over time and is applicable for any analysis assessing a probability over time.[58] As FEI confirmed in response to a BCUC IR, it is statistically incorrect to equate a low *annual* probability (on the order of 1 to 3 percent per year per 1,000 km of pipeline according to JANA) with a low probability *over a period of time* – the probabilities accumulate.[59]

- JANA used Pipeline and Hazardous Materials Safety Administration ("PHMSA") and Transportation Safety Board of Canada ("TSB") average reported rupture rates for the last 10 years.[60] JANA explained that these datasets "represent

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57 E.g., Exhibit B-26, BCUC IR2 68 series.

58 Exhibit B-30, BCSEA IR2 13.1.

59 Exhibit B-26, BCUC IR2 106.1.

60 Exhibit B-15, Attachment 1.5C, p. 1.

roughly 476,366 km and 48,388 km of transmission pipelines, respectively, and the collective pipeline performance for North American pipeline operators employing currently available integrity management practices and are considered to provide a reasonable basis for estimating future potential ruptures."[61] FEI submits that there is no basis to conclude that the integrity of the T-South pipeline would be a material outlier from the industry average used by JANA, either favourable or unfavourable. Westcoast is subject to widely-used industry standards (e.g., CSA Z662:19)[62] and regulation by the Canada Energy Regulator.[63]

- JANA used an 1834 km pipeline length, representing the combined length of the NPS 30 and NPS 36 pipes that are operated as a single system in the same right-of-way. As JANA explained, any rupture – ignited or not – on a transmission system with the features of the T-South system would be expected to result in a no-flow event:[64]

> After a rupture of one pipeline in a shared ROW, a likely outcome is that the adjacent pipeline would be taken out of service, such as was done in the case of the T-South incident, until an investigation can be conducted to ensure a base level of integrity of the pipeline. This would be expected to occur for ruptures on pipelines the size of the two T-south pipelines whether the gas released from the rupture ignites or not and that is why the assessment considered a rupture as a "common mode" failure that would result in a loss of flow for both pipelines.

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61 Exhibit B-15, Attachment 1.5C, p. 3.

62 Exhibit B-15, BCUC IR1 1.5.

63 Exhibit B-32, BCOAPO IR2 3.1; see also Exhibit -1-4, Application, Appendix A, p. 19.

64 Exhibit B-32, MS2S IR2 1.4. Exhibit B-1-4, Application, p. 38. FEI explained in the Application that the two pipelines tied together by common headers and compressor stations and hence are operated as a single pipeline See also: Exhibit B-15, BCUC IR1 1.3; Exhibit B-26, BCUC IR2 66.2, 66.2.1, 66.3, 66.4.

Ruptures on T-South, Ignited or Not, Will Result in a Multi-Day No-Flow Event

39. As discussed further in Part Three, Section H, JANA explained that, as occurred with the T-South Incident: "Any rupture of a 30" or 36" NPS transmission pipeline would be expected to result in an outage of at least two days duration and most likely three days or greater followed by some period of reduced capacity on the lines, whether the rupture ignites or not."[65] JANA's observation is based on actual industry experience:[66]

- 100 percent of PHMSA reported ruptures for pipelines 30" NPS or greater with reported outage durations had an outage duration ≥ 2 days (26 of 26) and 96% ≥ 3 days (25 of 26). For ignited ruptures, 100 percent of reported incidents had outage durations ≥ 3 days (20 of 20). Of the 4 TSB reported ruptures with outage durations for pipelines 30" and greater, 3 of 4 were ≥ 2 days and 2 of 4 were ≥ 3 days. For ignited ruptures, 100% of reported incidents had outage durations ≥ 2 days and 2 of 3 ≥ 3 days.

- After a rupture of one pipeline in a shared ROW, a likely outcome is that the adjacent pipeline would be taken out of service, (as was done following the T-South pipeline rupture), therefore resulting in an outage on both lines. This outage would also be expected to be on the order of two to three days based on the sequence of steps involved: get to site, conduct investigation of site, assess potential impact on adjacent line, determine if and additional integrity confirmations required, approve putting line back into service, etc. (it was two days for the T-South system).

- Upon resumption of flow it is common industry practice to operate at 80% of pre-rupture pressures until additional investigations and confirmation of integrity can be conducted (both the 30" and 36" T-South lines were returned to service at 80 percent operating pressure). This could require supplemental gas supply through this extended period.

An outage duration of three days, therefore, for any rupture on the system seems to be a reasonable minimum duration.

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[65] Exhibit B-30, BCSEA IR2 13.4. See also: Exhibit B-32, MS2S IR2 1.4.

[66] Exhibit B-30, BCSEA IR2 13.4.

(c) Ruptures Considered by JANA Are Not the Only Potential Cause of Disruptions

40. Since the JANA analysis only addressed ruptures, their estimated cumulative probability understates the probability of a multi-day no-flow event. Other possible causes that could result in a multi-day gas supply disruption to the Lower Mainland include:[67]

(a) The failure of a major facility or equipment at a compressor station;[68]

(b) A cyber-attack which disrupts Westcoast's ability to control or operate the T-South system. For example, the 2021 'ransomware attack' affecting the Colonial Pipeline oil pipeline, which carries nearly half of the fuel consumed along the US East Coast, resulted in a six-day outage.[69] The BCUC has also recognized the increasing volume and sophistication of cyber threats.[70]

(c) Sabotage. For example, vandalism at three Black Hills Energy facilities in Aspen, Colorado in 2020 resulted in a gas outage impacting 3,500 customers and required a manual shutdown of the system to prevent a total system collapse.[71]

(d) Natural events, such as a washout or landslide.[72] In November 2021, Westcoast reduced volumes on the T-South system below seasonal averages (approximately 75% capacity) following record rainfall in the region. While shutting down the NPS 30 pipeline was a precautionary measure, it illustrates the increasing risk posed by natural events, such as wildfires, floods and earthquakes and landslides to

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67 Exhibit B-15, BCUC IR1 1.3.

68 Exhibit B-26, BCUC IR2 66.5. JANA specifically identified this as another cause of disruption not included in its study: Exhibit B-15, Attachment 1.5C, p. 3.

69 Exhibit B-18, BCSEA IR1 6.1. Exhibit B-33, CEC IR2 100.1.

70 Decision and Order G-187-21, BC Hydro F2022 Revenue Requirement, p. 32. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/499111/1/document.do.

71 Exhibit B-15, BCUC IR1 5.2.1. Exhibit B-33, CEC IR2 100.1.

72 Exhibit B-15, BCUC IR1 1.3; see also Exhibit B-21, MS2S IR1 1.iii. Tr. 1, p. 54, l. 11 to p. 55, l. 1 (Chernikhowsky).

energy infrastructure. Most climate scientists agree that events such as wildfires and floods are anticipated to increase in frequency and severity.[73]

(d) Customers Recognize the Importance of Resiliency

41. A 2021 survey of 2,125 FortisBC MyVoice community panel members confirmed that, cost aside, respondents feel reliability and resiliency are very important.[74] In particular, customer comments emphasized their reliance on gas for a variety of essential purposes and a desire to avoid service disruptions through proactive rather than reactive efforts.[75] For example, approximately one-quarter of respondents attributed the importance of a resilient energy network for their personal comfort and maintaining energy for heating, hot water and running appliances in their homes and the need for consistent service with a quick recovery after disruption. One-fifth of respondents cited concerns about potential catastrophic events such as earthquakes and cyber-attacks, noting the recent gas disruptions in Texas.[76] The majority of respondents (66 percent) indicated that energy utilities are facing more, or much more, risk today than 10 years ago.[77]

42. FEI recognizes that customers' views on specific reliability and resiliency measures will be influenced by costs. However, the survey shows that the BCUC was aligned with customer sentiment when in 2020 it initiated a more detailed discussion around FEI's proposed alternatives to mitigate resiliency-related risks.

D. WITHSTANDING A NO-FLOW EVENT ON T-SOUTH REQUIRES PHYSICAL ASSETS THAT PROVIDE BOTH DEPENDABLE CAPACITY AND DEPENDABLE ENERGY

43. This section provides essential context for understanding FEI's current capabilities to withstand a T-South no-flow event.

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73 Exhibit B-33, CEC IR2 120.1.

74 Exhibit B-15, BCUC IR1 7.1 and Attachment 7.1, p. 3. Exhibit B-26, BCUC IR2 71.1.

75 Exhibit B-15, BCUC IR1 7.5.

76 Exhibit B-15, BCUC IR1 7.5.

77 Exhibit B-15, Attachment 7.1, p. 3.

(a) Contracts Alone Are Insufficient to Ensure Alternative Gas Supply Is Available in a Supply Emergency

44. As Guidehouse emphasized: "…from the perspective of resiliency, the inherent value of a natural gas supply contract to provide commodity in the event of a system disruption rests upon the functionality of the delivery asset."[78] Put another way, FEI's ability to withstand a T-South no-flow event depends on access to, and control over, other physical – not just contractual - assets that will be available in an emergency.[79]

45. FEI has been mitigating the risk of capacity constraints on T-South for a number of years by contracting with other shippers on T-South for contingency capacity resources. Contracting for greater capacity has likely avoided supply issues in the short to medium term in response to load growth.[80] It has also provided some resiliency benefits; in the event of a *partial* pro-rata curtailment on T-South, FEI will be allocated more of the available capacity than it otherwise would have received. However, holding contractual rights to additional gas supply and T-South pipeline capacity are of no assistance to FEI in circumstances where there is no gas flowing at all on T-South (i.e., a larger pro-rate share of zero gas is still zero gas).[81] Mr. Hill explained:[82]

> One thing that I want to mention before we turn to the next slide relates to the idea of physical versus commercial. As we know, the natural gas business is very reliable, so we often think of these two concepts as being the same thing. But we need to distinguish these concepts when we view resources through the lens of resiliency. Under emergency events, commercial arrangements like our annual contracting plan or our gas supply portfolio would get suspended. This leads us to the issue we're trying to answer today. What physical resources do you have under your control to manage the situation?

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78 Exhibit B-1-4, Application, Appendix A, p. 18.

79 Exhibit B-1-4, Application, p. 22 and Appendix A, pp. 20-21.

80 Exhibit B-24, Sentinel IR1 30.

81 Exhibit B-24, Sentinel IR1 55. Contractual rights are subject to suspension for force majeure, which occurred during the T-South Incident: Exhibit B-26, BCUC IR2 94.1; Exhibit B-17, BCOAPO IR1 2.4. Exhibit B-33, CEC IR2 106.1; Exhibit B-24, Sentinel IR1 30. Holding more capacity to mitigate supply risk will also no longer be an option once the Woodfibre LNG project goes into service and ceases reselling its contracted capacity; there will be a sizable capacity shortfall.

82 Tr. 1, p. 38, l. 24 to p. 39, l. 9 (Hill); see also Tr. 1, p. 60, l. 20 to p. 61, l. 14 (Hill).

46. In practice, access to physical supply in an emergency is a function of the utility having operational control over the supply and what Mr. Moran referred to as "geographic adjacency" (i.e., whether there is nearby infrastructure that FEI has secured that will not be rendered inaccessible by physical or technological disruption or system hydraulics).[83]

47. FEI explains later in Part Four, Section C that on-system storage is the only dependable source of supply when a T-South no-flow event occurs in winter – it is located at the heart of FEI's Lower Mainland system and is entirely under FEI's control.[84] Other potential sources are either not available in a winter no-flow event due to system hydraulics (JPS and Mist storage, mutual aid, Mt. Hayes LNG), or may not be accessible depending on the cause / location of the disruption (SCP, T-South linepack).

(b) Capacity and Energy Are Both Critical Considerations when Planning for a Supply Emergency

48. All energy systems – FEI's being no exception – are planned having regard to both capacity and energy. FEI's supply portfolio (reflected in its ACP) ensures that, in normal operating conditions, FEI has sufficient **capacity** to serve peak demand at a given point in time and access to sufficient **energy** to serve demand consistently over a period of time. Similarly, FEI's ability to withstand a no-flow event on the T-South system without significant loss of load requires both sufficient alternative capacity and energy to make up for the loss of capacity and energy associated with T-South. In this context:

- **Capacity** refers to the physical ability to deliver enough alternate supply to meet FEI's daily Lower Mainland load (measured in MMcf/day). The capacity provided by an LNG storage facility refers to the capability of regasification equipment to convert stored LNG back into gas for use by customers.[85] Any capacity shortfall

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[83] Tr. 1, p. 117, 7-14 (Moran). Exhibit B-1-4, Application, Appendix A, p. 18.

[84] Exhibit B-1-4, Application, Appendix A, p. 6.

[85] Exhibit B-1-4, Application, p. 94.

will manifest in FEI being unable to serve a corresponding portion of its customers beginning on the first day of the no-flow event; and

- **Energy** refers to having a sufficient alternate supply to continue meeting daily load each day during a supply disruption and until it is resolved (measured in Bcf).[86] The energy provided by an LNG storage facility is a function of the volume of the storage tank. Following a no-flow event on T-South, any energy shortfall will result in FEI running out of alternate supply to serve customers before service on T-South is restored.

49. Most of the IRs exploring FEI's current capabilities at Tilbury were focussed on energy (tank size), with very few directed at capacity (regasification capability). It is critically important to understand that the existing capacity limitations will dictate FEI's response during the brief window immediately following a no-flow event. That is, although the current storage volume (i.e., tank size) at Tilbury is also insufficient, the primary limiting factor currently is the regasification rate. Regardless of how much LNG is stored at Tilbury, FEI cannot re-gasify it fast enough to maintain operating pressure in FEI's Coastal Transmission System in order to support the Lower Mainland daily demand in many months of the year.[87] The storage tank size only comes into play if the regasification constraint is remedied; the faster rate of regasification would quickly empty the existing Base Plant tank. As discussed next, the capacity and energy constraints at the existing Tilbury facilities becomes particularly critical in winter, when other alternative sources of capacity and energy would be physically unavailable.

E. THE LOWER MAINLAND WILL, WITHOUT QUESTION, EXPERIENCE A WIDESPREAD OUTAGE ON DAY 1 OF ANY WINTER NO-FLOW EVENT

50. As demonstrated below, stored LNG at Tilbury is the only available source of supply for the Lower Mainland during a winter no-flow event affecting the southern portion of the T-South system. If a disruption only affects the northern portion of T-South (such that SCP capacity is

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[86] Exhibit B-1-4, Application, p. 94.

[87] Exhibit B-26, BCUC IR2 76.1; BCUC IR2 78.1.

available), FEI is still reliant on LNG at Tilbury to serve the vast majority of the Lower Mainland load. In either case, the existing regasification equipment at the Tilbury facility is much too small to support the Lower Mainland daily load in the winter. As a result, irrespective of the amount of LNG stored at Tilbury, there would be widespread and prolonged outages on the first day of a T-South no-flow event occurring during the winter months.

(a) Lower Mainland Only Survived the T-South Incident Due to Warm Weather and Distant Rupture Location

51. After curtailing interruptible load and large industrial customers and public appeals, FEI met the remaining Lower Mainland demand on the day following the T-South Incident with a combination of SCP supply, mutual aid from utilities in the US Pacific Northwest, LNG from Mt. Hayes and linepack. Figure 3-8 from the Application (Security Confidential), reproduced below, show the specific breakdown of resources.[88]

Inability to access one or more of these resources would have resulted in a corresponding loss of customer load in the Lower Mainland, meaning a widespread and prolonged outage.[89]

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[88] Exhibit B-1-3-1, Revised Confidential Application, p. 45. Figure 3-7 conveys similar information as a schematic.

[89] Exhibit B-1-4, Application, p. 44. Tr.1, p. 85, ll. 3-13 (Sam).

52. Contrary to what was suggested or implied in some IRs, it would not have taken a confluence of low probability events for FEI to lose the ability to rely on these alternative sources of supply. None of these alternative resources, apart from LNG at Tilbury, would have been available to FEI in 2018 but for the time of year / warm weather and the location of the rupture.

53. In Subsections (b) to (h) below, FEI expands on the various reasons why FEI's system would experience outages on the first day of a no-flow event occurring during the winter months.

(b) Reason #1 for Day 1 Outage: Winter Demand is High and People Need Heat

54. FEI's BCUC-approved System Preservation and Restoration Plan ("P&R Plan"),[90] which governs FEI's response to a no-flow event, contemplates that FEI will immediately curtail all interruptible customers and make public appeals to reduce consumption.[91] FEI estimates that these steps reduced expected natural gas demand by approximately 20 percent on Day 1 of the T-South Incident, but "customers quickly reverted back to their previous energy consumption patterns".[92] In winter, there are two factors that further limit the efficacy of such load management measures in withstanding an interruption in T-South supply.

55. First, the amount of interruptible demand is proportionally small on colder days relative to the firm load or total load – representing only approximately 10 to 15 percent of FEI's load when the temperature is below minus 5 degrees Celsius.[93]

56. Second, while the scenarios in BCUC IR2 78.1 (also discussed later) assume that FEI is able to achieve the same degree of voluntary conservation as was achieved following the T-South Incident, this is optimistic in winter. Much of the winter load in the Lower Mainland is

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90 The Plan is filed confidentially in Exhibit B-48-1. In Letter L-32-18, the BCUC found that the Plan was in the public interest and not unduly discriminatory as it is in accordance with FEI's approved tariff: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/351450/index.do?q=L-32-18.

91 Exhibit B-48, BCSEA IR3 14.2, Attachment 14.2. See also: Exhibit B-1-4, Application, p. 58.

92 Exhibit B-15, BCUC IR1 13.3; see also Exhibit B-1-4, Application, p. 60.

93 Exhibit B-1-4, Application, p. 59; see also Exhibit B-15, BCUC IR1 12.1.

attributable to space and water heating, both of which are important for health and safety. As described in the Application:[94]

> The non-discretionary nature of this load imposes inherent limitations on the extent to which load can be managed during a supply emergency. It is reasonable to expect that the customer response to public appeals for conservation [following the T-South Incident] would have been materially reduced had the event occurred during cold winter weather.

57. Put simply, the public's response and conservation of their demand cannot be relied upon with a timely and guaranteed response, particularly during cold winter weather.[95] Load shedding via public appeals also does not address the fundamental problem during a no-flow event, which is a lack of gas supply.[96]

(c) Reason #2 for Day 1 Outage: Mt. Hayes LNG Cannot Support the Lower Mainland in Winter

58. The regasification equipment at the Mt. Hayes LNG facility is sized to support Vancouver Island load, and does not have enough capacity to support the Lower Mainland as well.[97] There is also a hydraulic limitation preventing FEI from relying on Mt. Hayes during the winter to serve the Lower Mainland.[98] As indicated previously, the only reason FEI was able to rely on Mt. Hayes to support the Lower Mainland following the T-South Incident was the warm temperatures and low demand in the region.

(d) Reason #3 for Day 1 Outage: FEI Can Only Access JPS and Mist Inventory When T-South is Operational

59. As discussed in Part Three, Section B (b), FEI's access to JPS and Mist storage inventory in winter relies on commercial transactions involving displacement. The interruption of gas flows

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94 Exhibit B-1-4, Application, p. 60.

95 Exhibit B-22, RCIA IR1 22.1.

96 Exhibit B-15, BCUC IR1 13.1.

97 Tr. 1, p. 175, ll. 7-11 (Hill),

98 Tr. 1, p. 174, ll. 23-26 (Hill). "Basically, the main restriction to that is in cold events we cannot backflow gas at a V1 compressor station, basically to get gas back into the Lower Mainland, if you will." See also: Exhibit B-15, BCUC IR1 11.8.

on T-South precludes deliveries by displacement, meaning that FEI cannot access off-system storage inventory.

(e) Reason #4 for Day 1 Outage: Mutual Aid Resources Unavailable in Winter

60. FEI has mutual aid agreements with US entities which use, operate or control natural gas transportation and/or storage facilities in the Pacific Northwest.[99] Under these arrangements, FEI can make a request for mutual aid and parties make best efforts to provide natural gas.[100] In practice, mutual aid agreements rely on one or more of the members having physical access to gas that: (1) is in excess of what is required to prevent hydraulic collapse on their own systems; and (2) can be physically moved to where it is most needed.[101]

61. While FEI relied heavily on mutual aid following the T-South Incident[102], it was only able to do so because of the low demand in Washington and Oregon during the mild October 2018. When demand is higher in Washington and Oregon, as it is in a typical winter, the utilities in these areas need their contracted gas supply to serve their own load.[103] As discussed in the previous section, system hydraulics actually preclude gas from physically flowing northwards across the border.[104] Mr. Moran of Guidehouse explained:[105]

> We did take a look at the adjacent infrastructure, from the perspective of geographic adjacency and market utilization, and it's through those two lenses together that we can conclude that the assets in the region, in British Columbia, north Washington State and Oregon are so highly utilized over a period of peak demand that even with the most effective mutual aid there isn't sufficient capacity, infrastructure capacity, across both storage and transportation to mitigate the risk of a supply disruption to the Lower Mainland system of FEI.

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99 Exhibit B-1-4, Application, p. 43. See Exhibit B-15, BCUC IR1 IR 4.2 and Attachment 4.2 for a copy of the current NWMAA agreement. Exhibit B-26, BCUC IR2 74.1.

100 Exhibit B-19, CEC IR1 14.1.

101 Exhibit B-1-4, Application, p. 75. Exhibit B-26, BCUC IR2 74.1.

102 Exhibit B-1-3-1, Revised Confidential Application, Figure 3-8 (p. 45).

103 Exhibit B-26, BCUC IR2 74.1; Exhibit B-24, Sentinel IR1 37.

104 Exhibit B-1-4, Application, p. 52.

105 Tr. 1, p. 155, l. 26 to p. 156, l. 11 (Moran).

(f) Reason #5 for Day 1 Outage: Linepack Is Not Dependable and Is, at Best, Limited

62. Linepack is the amount of natural gas stored in the pipeline at any given time.[106] At the Workshop, Mr. Moran of Guidehouse cautioned against relying on linepack when planning for a supply emergency:[107]

> Line pack is the next alternative that's been discussed a little bit today, but it's our finding that we really can't think about line pack as a source of supply. Line pack is actually a function of how much gas is in the system, so it offers very limited duration and volumes and it's not a dependable resiliency option to mitigate the single point of failure of the Keystone [sic – T-South] pipeline.

63. It is not possible operationally to completely expend the linepack and then continue operating the system.[108] FEI would, at best, be able to expend a small fraction of the linepack in each daily peak period.[109]

64. FEI had access to appreciable linepack immediately following the T-South Incident only because of the location of the rupture and the time of year. First, the T-South Incident occurred far to the north, leaving the maximum potential line pack available; a break occurring near Huntingdon would leave insignificant linepack.[110] Second, the T-South Incident occurred during October, not mid-winter when regional demand is at its highest. Since all of the US Pacific Northwest relies on T-South, higher regional load would have depleted linepack faster.[111]

(g) Reason #6 for Day 1 Outage: SCP Supply Would Either Be Inaccessible or Insufficient

65. The delivery capacity of SCP to T-South at Kingsvale is 105 MMcf/day, and then T-South is used to deliver SCP gas to the Lower Mainland. While that delivery capacity was sufficient to support [redacted] percent of the Lower Mainland load on the day following the T-South Incident, it

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106 See Exhibit B-1-4, Application, Appendix A, p. 12 for a further description of linepack.

107 Tr. 1, p. 133, ll. 13-20 (Moran).

108 Exhibit B-21, MS2S IR1 6.i.

109 Exhibit B-31, MS2S IR2 1.3.

110 Exhibit B-1-4, Application, p. 52. Tr. 1, p. 73 l. 9 to p. 74, l. 8 (Sam).

111 Exhibit B-1-4, Application, p. 52.

represents a much smaller portion of the Lower Mainland load in colder weather (e.g., just over 10 percent of the peak winter load).[112] That is, if only SCP volumes and the Tilbury Base Plant were available, FEI could expect to lose approximately three-quarters of the Lower Mainland peak winter load – amounting to hundreds of thousands of customers.

66. FEI was only able to rely on SCP volumes following the T-South Incident because the rupture occurred north of Kingsvale (where SCP joins the T-South system).[113] FEI would be unable to access any SCP supply if the incident prevents flows on the T-South system to the south of Kingsvale. This could take the form of, for instance, a rupture or other physical event occurring anywhere along the 172 km segment of the T-South system between Kingsvale and Huntingdon, or a cyberattack that shuts down operations on T-South.[114] FEI has no way to predict where or how a supply disruption may occur.

(h) Reason #7 for Day 1 Outage: Tilbury's 150 MMcf/day of Regasification Can Only Serve a Fraction of Daily Winter Load

67. The discussion above demonstrates that Tilbury provides the only available or reliable source of supply for the Lower Mainland during a winter disruption. However, the total regasification capacity at Tilbury (all of which is part of the Base Plant) is 150 MMcf/d, which is only a fraction of the daily Lower Mainland load during winter. Regardless of how much LNG is stored at Tilbury at the time of a no-flow event, FEI would be unable to regasify it fast enough to support the Lower Mainland system load on day one of the no-flow event.

68. The extent of the shortfall is very significant when assessed against the design curve, the approach typically used in utility planning. The regasification capacity at Tilbury (150 MMcf/day) will provide only 17 percent of gas required to meet the Lower Mainland design day load (871

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112 Exhibit B-1-3-1, Revised Confidential Application, Figure 3-8 (p. 45).

113 The T-South pipeline that is north of Kingsvale (i.e., between Station 2 and Kingsvale) is approximately 744 km, which is 81 percent of the total length of the T-South pipeline: Exhibit B-26, BCUC IR2 75.1.

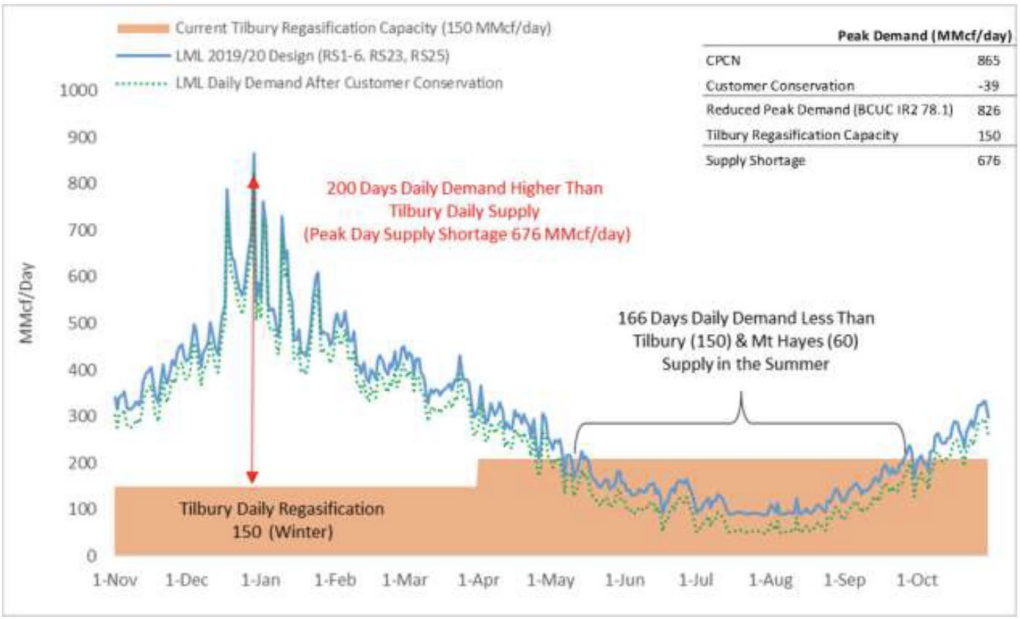
114 Exhibit B-26, BCUC IR2 75.1.1.

MMcf/day).[115] Most customers in the Lower Mainland will thus lose service on the first day following a no-flow event occurring at the design day.

69. FEI's response to BCUC IR2 78.1 assesses various scenarios to determine the extent of any shortfall relative to the design year after assuming successful demand management steps (curtailment of interruptible customers and public appeals). FEI summarized the results as follows, and provided the following figure in support:[116]

> For approximately 200 days of the year, FEI [i.e., the Tilbury facility] would not be able to supply the single-day load requirements of the Lower Mainland. Large portions of the Lower Mainland system, equivalent to entire municipalities, would have to be shut down within hours of a no-flow event on the T-South system occurring in a normal winter. This is due to the fact that, no matter how much storage is assumed to be available at Tilbury (including the Tilbury T1A tank), the limited regasification capacity at Tilbury (150 MMcf/day) constrains FEI's ability to regasify and send-out stored volumes of LNG at Tilbury into FEI's Lower Mainland system.

Figure 1: Single Day Capacity View – 200 Days of Supply Shortfall During Winter due to Regasification Capacity Constraints



[115] Exhibit B-1-4, Application, pp. 15, 33.

[116] Exhibit B-26, BCUC IR2 78.1.

70. It is a similar story when measured against actual recent winters, which is afar more optimistic basis for assessing FEI's capabilities than is typically used in utility planning. Figure 3-14 (reproduced below) shows the extent of the shortfall in Tilbury regasification capacity relative to actual Lower Mainland load in 2016/17 (left side) and 2014/15 (right side).[117] The 2016/17 year was the coldest winter season in the last 10 years. The 2014/15 year was the warmest winter season in the last 10 years.[118] The data demonstrates:

- In the year with the coldest winter of the last decade (left side), Lower Mainland daily load exceeded the regasification capacity at Tilbury for eight months of the year; and

- Even in the year with the warmest winter of the last decade (right side), Lower Mainland daily load exceeded the regasification capacity at Tilbury for seven-and-a-half months of the year.

71. As discussed next, during periods where the daily demand exceeds 150 MMcf/day and there are no alternative supply sources available and physically accessible (i.e., during winter), FEI would have to shed load in excess of 150 MMcf/day immediately to avoid hydraulic collapse of the entire Lower Mainland system.

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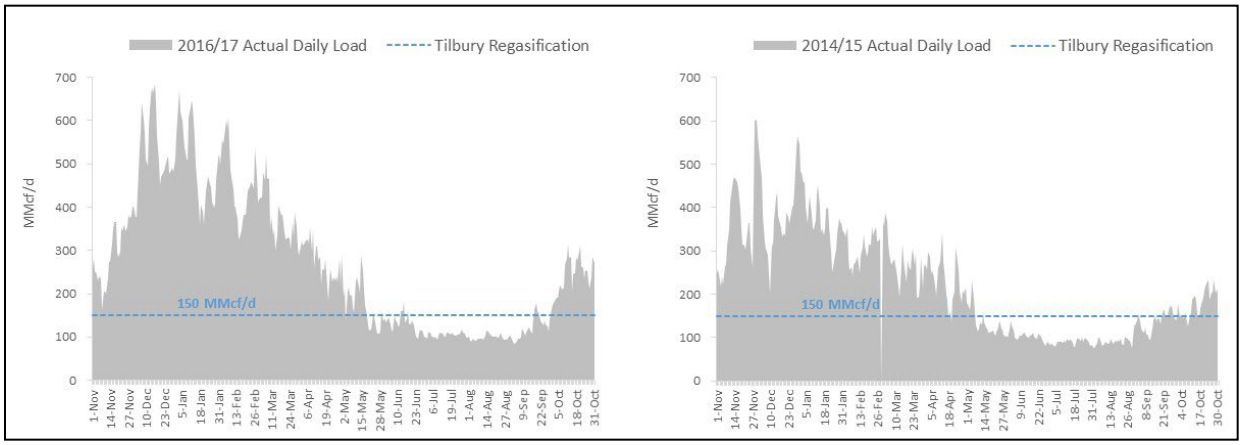
[117] Exhibit B-1-4, Application, Figure 3-14 (p. 65).

[118] Exhibit B-1-4, Application, p. 65.

Figure 3-14: Tilbury Regasification Capacity Relative to Lower Mainland Load



(i) FEI Has, At Most, Only Hours to Initiate Controlled Shutdown to Prevent Uncontrolled Shutdown

72. There are circumstances, described in confidential materials, where a disruption on T-South would likely cause a dangerous uncontrolled shut-down to occur before FEI could initiate a controlled shut-down.[119] FEI would otherwise only have a matter of hours following a winter no-flow event to initiate a controlled shut-down to forestall an uncontrolled shut-down.

73. An uncontrolled shutdown is a rapid, system-wide depressurization.[120] FEI explained the associated dangers as follows:[121]

> An uncontrolled outage is chaotic because, as customers continue to consume gas within a wide geographical region, some locations would randomly experience critical low pressures creating dangerous fluctuations in supply during the collapse that cannot be controlled or predicted in advance. These unpredictable fluctuations can result in customers losing, then temporarily regaining, and then losing supply during the collapse, which creates a more dangerous situation than if FEI is able to shut down the system methodically.

74. Currently, in the context of a winter no-flow event, avoiding an uncontrolled shut-down requires FEI to proactively, and very quickly, close system valves to stop gas flowing to whole

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[119] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 10.

[120] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 9.

[121] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 9; Exhibit B-50, RCIA IR3 43.1.

areas or municipalities.[122] The isolated portions of the system depressurize, and all customers in those areas lose service until such time as FEI is able to restore service.[123] The BCUC-approved P&R Plan sets out how FEI would undertake a controlled shut-down to minimize overall harm, including the order in which customers and areas would be disconnected from the system.[124]

75. As a controlled shut-down takes time to implement, FEI must initiate the shut-down many hours before alternate supply is expected to run out.[125] Delaying the initiation of a shut-down requires reliable real-time information as to when flows will resume, and obtaining reliable information is a challenge in the midst of a supply emergency. Mr. Sam demonstrated this point at the Workshop by walking through the hour-by-hour timeline of the T-South Incident.[126] It had taken Westcoast almost a day to obtain and relay to FEI reliable information about the nature and severity of the supply emergency, despite conditions that had facilitated Westcoast's access to the site of the rupture. [127] Mr. Sam added:[128]

> Unlike the electric industry, we have very limited real-time consumption data on which to base our response. And in the absence of real-time reliable data, we are forced to be more conservative to avoid an uncontrolled shutdown. Which with hindsight may result in unnecessary, planned customer outages. From the previous slide, I've shown that even expedited efforts will take many hours to coordinate the response to balance the demand with the supply. And many decisions need to be made, most relying on multiple parties to manage through an emergency like this.

F. HUNDREDS OF THOUSANDS OF CUSTOMERS LOSING SERVICE FOR OVER TWO MONTHS IS A CATASTROPHIC AND UNACCEPTABLE OUTCOME

76. The evidence discussed below demonstrates that the consequences of a winter no-flow event for customers and society will be so severe as to be unacceptable without mitigation.

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122 Exhibit B-26, BCUC IR2 78.1.

123 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 9.

124 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 3.

125 Tr. 1, p. 77, l. 6 to p. 79, l. 6 (Sam).

126 Tr. 1, p. 77, l. 14 to p. 78, l. 5 (Sam).

127 Exhibit B-1-4, Application, p. 53.

128 Tr. 1, p. 77, l. 6 to p. 79, l. 6 (Sam). See also: Exhibit B-4, Workshop Presentation, Slide 22.

Hundreds of thousands of Lower Mainland customers – including residences, businesses and critical service providers - will lose their primary source of heat and hot water in the middle of winter, while industry will lose a critical fuel source. Customers can reasonably be expected to be without gas for up to nine or ten weeks "even in circumstances that are very favourable to the restoration work."[129] PwC's independent expert report ("PwC Report")[130] shows that a widespread outage will have direct health and safety and economic impacts as well as cause cascading harm to British Columbians generally.

(a) Restoring Service to Hundreds of Thousands of Customers Will Take at Least 9 or 10 Weeks

77. As discussed below, FEI's estimates of the time to fully restore service to the Lower Mainland are well-supported, objectively reasonable, and corroborated by the experience of other utilities.

Time Estimates Reflect BCUC-Approved P&R Plan, Regulations and Standards

78. FEI's evidence regarding system restoration was prepared by five internal experts with a combined 150 years of relevant experience in gas system operations.[131] The processes and procedures that FEI has described, and the associated time estimates for restoring service, align with FEI's BCUC-approved[132] P&R Plan.[133] As such, the restoration time estimates that FEI has presented reflect:

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[129] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 3.

[130] Exhibit B-1-4, Application, Appendix B

[131] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 1-3.

[132] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 3; Exhibit B-48, BCSEA IR3 14.2.

[133] Exhibit B-50, RCIA IR3 49.1. FEI characterized the P&R Plan as "realistic and actionable plans that would best allow it to respond so as to minimize harm to customers and the public generally." It consolidates FEI's various operating and emergency procedures. It includes detailed information regarding order of curtailment and shut-down, anticipated access to resources, necessary operational steps, time estimates and a communications plan.

(a) Section 53(2) of the *Gas Safety Regulation* ("GSR"), which requires certain steps to be taken before repressurizing the distribution system;[134]

(b) Applicable Canadian Standards Association standards relevant to leak surveys and purging of gas systems (CSA Z662-19);[135]

(c) Well-established operating procedures that are in place and used routinely to ensure the safety of the public, FEI's customers, and field personnel;[136] and

(d) Realistic expectations about the personnel available, including full utilization of local contractors and personnel available under mutual aid agreements.[137]

FEI Provided the Rationale for Each Step in the Detailed Work Schedules

79. FEI showed the duration of each major step, along with explanations of the key inputs and a working spreadsheet.[138] The supporting information demonstrates the rigour that FEI employed when developing the P&R Plan and the associated time estimates, and that FEI was using realistic inputs.

80. The anticipated work schedule in the absence of AMI, and the cumulative number of customers restored under that schedule, is shown in the following figures.[139] The timeline will be extended to the extent that there was a delay in resumption of flows on the T-South system.

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[134] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 12.

[135] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 12-13.

[136] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 12.

[137] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 3; Exhibit B-50, RCIA IR3 55.1 to 55.3.

[138] Exhibit B-46-1, Rebuttal Evidence to RCIA, Appendix B.

[139] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 19-20.

Figure 1: Restoration timeline for the Lower Mainland following a T-South no-flow prior to the implementation of AMI)

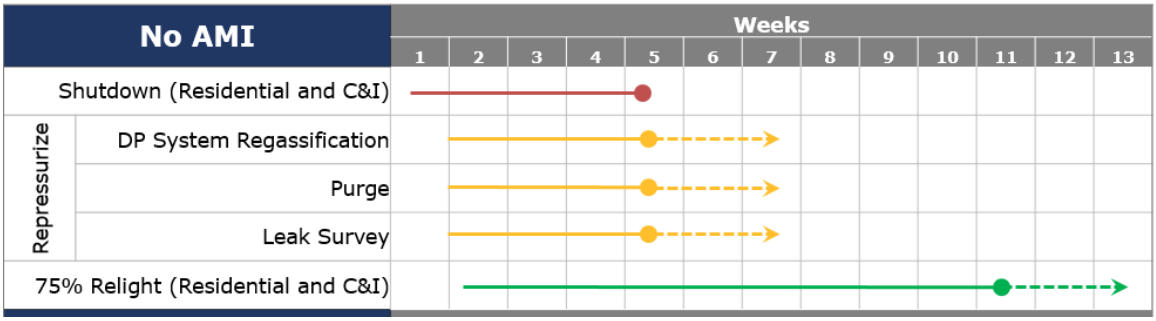
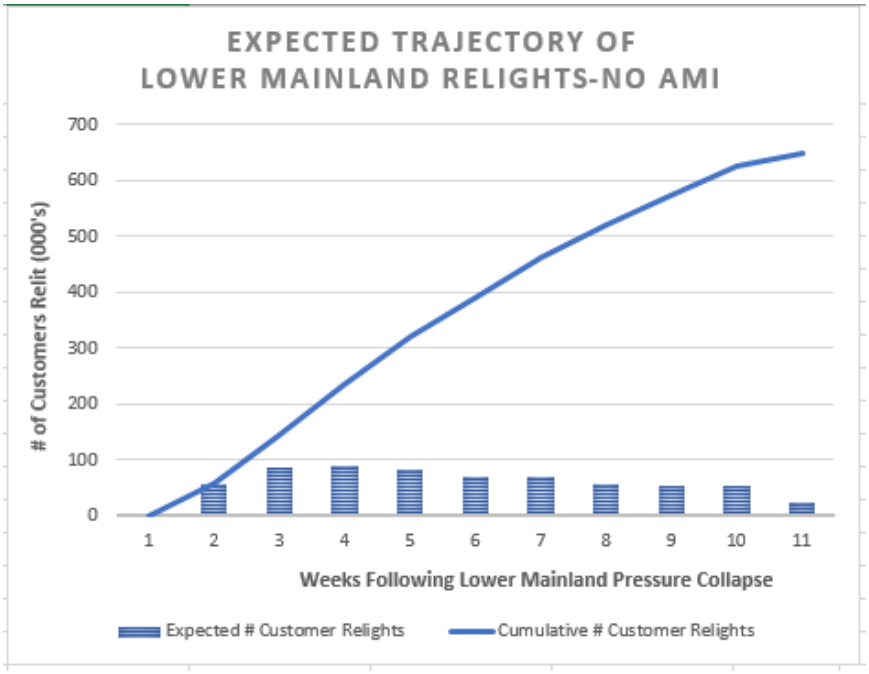


Figure 2: Timeline of cumulative number of customers restored (prior to the implementation of AMI)



81. FEI explained that, even in a best case scenario, during the first four weeks following a pressure collapse, FEI will be closing meter valves manually (to comply with the GSR requirements, discussed later), repressurizing segments of the collapsed system, and relighting

customers. Prior to the end of Week 5, FEI will expect to have repressurized the entire Lower Mainland system. Relighting the last of FEI's customers will conclude in Week 11.[140]

82. Under FEI's P&R Plan, repressurization, leak surveys and relights will occur in parallel, on an area-by-area basis.[141] As a result, in many circumstances (particularly in the initial weeks of the restoration process), there will be little time between a specific area being repressurized and FEI visiting customer premises in that area to perform relights.[142] FEI's area-by-area approach will allow for the efficient deployment of crews, avoiding unnecessary travel and stand-by time.[143]

83. The implementation of AMI for residential and small commercial customers will reduce aspects of the timeline,[144] as shown in Figures 3 and 4 below.[145] Once AMI is in place, FEI would need to visit approximately 50,000 large commercial and industrial premises over approximately 3-4 days to manually turn off meter valves, rather than visiting hundreds of thousands of customer premises over approximately 4 weeks.[146] AMI will permit portions of the system to remain pressurized, rendering purging and leak surveys unnecessary. However, even with AMI, it would still take almost 9 weeks from the time FEI starts closing meter valves before restoring service to all Lower Mainland customers. The timeline will be extended to the extent that there was a delay in resumption of flows on the T-South system.

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140 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 19.

141 Exhibit B-22, RCIA IR1 8.12: "While FEI crews continued to safely repressurize remaining sections of the collapsed system, FEI would have other dedicated groups of employees working in parallel, relighting customers connected to sections of the system that are safe to resume operation."

142 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 29.

143 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 3.

144 Exhibit B-28, RCIA IR2 36.1 (shut-down time).

145 Exhibit B-46-1, Rebuttal Evidence to RCIA, Figures 3 and 4 (pp. 21-22).

146 Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 23-24.

Figure 3: Restoration timeline for the Lower Mainland following a T-South no-flow event (after the implementation of AMI)

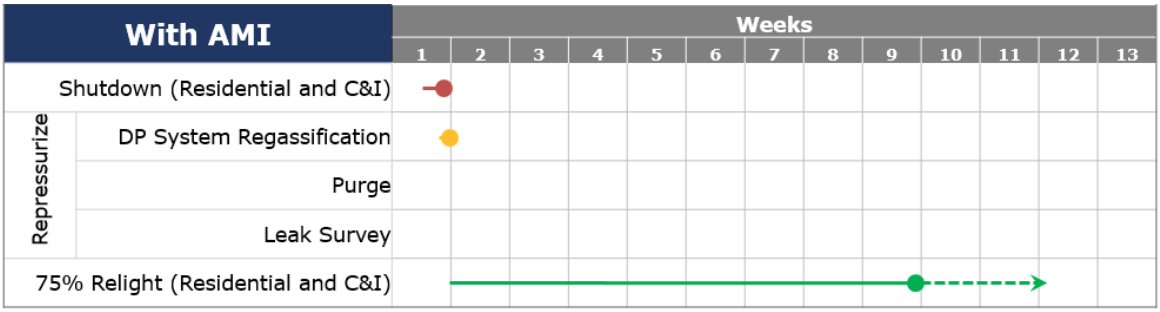
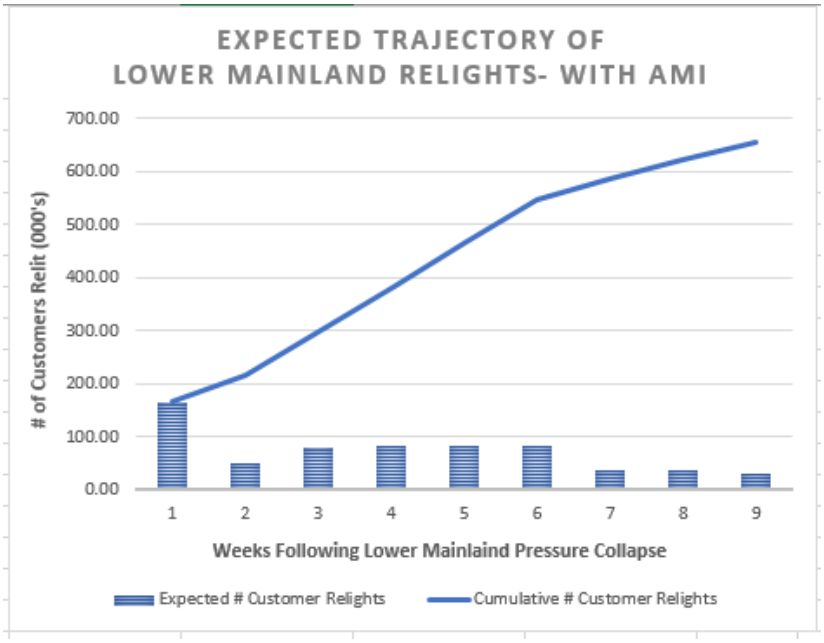


Figure 4: Timeline of cumulative number of customers restored (after to the implementation of AMI)



84. FEI recognizes that the timeline for restoration could vary from what is set out in the four figures above, but observed that the potential for time variances is asymmetrical:[147]

> FEI recognizes that an actual event would vary somewhat from the assumptions used; however, the potential for time variances is asymmetrical. That is, although unforeseen events (e.g., identification of major leaks, bad weather, competing demands limiting mutual aid assistance) could cause significant delays in the

[147] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 19.

> restoration work, it is much less likely that opportunities for time savings would meaningfully shorten the time required. FEI has performed its own sensitivity testing of the working model (refer to the response to Q36) to test the assumptions and does not foresee any realistic scenario where there could be time savings of the magnitude hypothesized by REL.

85. For instance, FEI cautioned that there is a "high probability" that FEI will have to repair damage to its system, which may result in repressurization taking longer than the anticipated three and half weeks. Should the effort to repressurize FEI's system take significantly longer for any reason, completion of customer relights may also be delayed. [148]

Other Utilities' Experience Corroborates FEI's Time Estimates to Fully Restore Service

86. FEI corroborated the reasonableness of its restoration time estimates against the experience of ATCO Gas following the Fort McMurray wildfires and the Black Hills Company service disruption that occurred in Aspen, Colorado in December, 2020. FEI's time estimates generally correspond. If anything, the experience of ATCO Gas and Black Hills Company suggests longer, not shorter, times than those yielded by FEI's P&R Plan modelling.[149]

(b) REL's Recommendations to Accelerate Restoration Would Be Unlawful and Elevate Safety Risk Without Saving Much Time

87. An apparent premise of Ryall Engineering Limited's ("REL") evidence, on behalf of RCIA, is that investment in infrastructure for resiliency is unjustified if the anticipated outage from a no-flow event is shorter than FEI's estimated 9 or 10 weeks. FEI submits that the BCUC should reject that premise, as losing heat even for several days during cold temperatures is a dangerous situation for vulnerable people – as demonstrated by the approximately 150 hyperthermia-related deaths in Texas linked to the devastating storm that knocked out power, heat and water in the state in 2021.[150] In any event, there is "no plausible scenario in which service to all Lower

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148 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 19.

149 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 51.

150 Exhibit B-15, BCUC IR1 8.4 referring to https://www.dallasnews.com/news/weather/2021/04/30/number-of-texas-deaths-linked-to-winter-storm-grows-to-151-including-23-in-dallas-fort-worth-area/.

Mainland customers could be restored in a matter of days, as [REL] appears to suggest."[151] As discussed below, REL's recommendations to shorten the restoration time contradict BC's safety regulations, and would expose the public to elevated risk of fire and explosions without saving much time. FEI will "take all steps it could legally and safely take to accelerate the process of restoring service, but FEI would not – and should not be expected to – base its response to a widespread Lower Mainland outage on REL's recommendations."[152]

BC Gas Safety Regulation Precludes One of REL's Key Recommendations

88. REL has recommended that, to save time, FEI skip the step of turning off meter valves at customer premises before repressurizing FEI's gas system. In other words, REL advocates relying on appliance safety valves and customers being present to smell any gas escaping into each premises. The GSR precludes this approach.

89. The GSR applies to any pipe operating below 700 kPa, which encompasses the vast majority of the residential and small commercial customers in the Lower Mainland.[153] It requires that, a "person" (in this case, FEI) must not turn the gas supply on again until that person "carefully checks all outlets and pilots to ascertain that they are relighted or turned off."[154]

90. In order to comply with this requirement of the GSR, FEI will close the meter set valve following the loss of gas supply to the customer's premises. Otherwise, the only way FEI could meet the requirement "carefully checks all outlets and pilots to ascertain that they are relighted or turned off" would be to have a technician standing by at every premises on a portion of the distribution system that is being repressurized, ready to enter the home as soon as gas is flowing.

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[151] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 3; see also Exhibit B-16, Confidential BCUC IR1 15.3.

[152] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 3-4.

[153] Exhibit B-50, RCIA IR3 42.4. GSR, s. 3.

[154] Section 53(2): "If a gas supply has been turned off, a person must not turn the supply on again until the person (a) notifies all affected consumers, and (b) carefully checks all outlets and pilots to ascertain that they are relighted or turned off." See Exhibit B-52, BCUC IR3 109.1 for further explanation.

As FEI observed, this "is not a practical scenario due to both resource constraints as well as the fact that not all occupants will be present to provide access to the premises."[155]

Dispensing With Purging / Leak Surveys Would Increase Safety Risk and Save Little Time

91. REL recommends dispensing with leak surveys and purging to save time. However, the evidence demonstrates that taking on this additional safety risk would not materially change the restoration duration.

92. Purging and leak surveys are safety-driven measures contemplated in CSA standards as well as FEI's well-established operating procedures. They are intended to prevent explosions and fires upon repressurization that could result in serious injury or death and damage to property.[156]

93. REL's recommendation is based on the erroneous assumption that FEI would first repressurize the entire system and make customers "wait additional…weeks, or months for FEI to complete leak surveys before allowing them to restore gas service". In fact, FEI's leak survey work will occur in parallel with customer relights and can be completed much faster than the relighting of customer appliances. FEI will make risk-based determinations as to when to undertake purging and leak surveys, and the approach will be adapted based on the information learned on the ground.[157] FEI's workplan assumes that the purging work can be done without any of the more time-consuming tasks (e.g., excavating mains, installing purge points, and conducting nitrogen purging), such that it will take only approximately one to two hours per section.[158]

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[155] Exhibit B-52, BCUC IR3 109.2.

[156] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 40.

[157] Exhibit B-52, BCUC IR3 110.1 and 110.2. To gauge how much air has actually entered a collapsed system, FEI will initially purge gas through a number of accessible meter sets, located at system endpoints. Based on how much air FEI finds in the gas that is being purged through these endpoints, FEI will either continue with the same amount of purging when the next system segment is repressurized or will increase or decrease the amount of purging.

[158] Exhibit B-50, RCIA IR3 47.4.

94. Since these activities are not a bottleneck, theoretically dispensing with leak surveys altogether would only affect the overall time to fully restore service in the Lower Mainland to the extent that personnel responsible for leak surveys and purging could be reallocated to relight activities. Only a very small percentage of the personnel will be engaged in leak surveys and purging - likely less than 5 percent before AMI. Once AMI is in place, the percentage of personnel performing leak surveying will be even smaller, as FEI will have been able to maintain pressure on much of the system. In other words, REL's recommendation to do away with leak surveys and purging altogether would increase the risk of injury or death and property damage without reducing the time estimate for full restoration of service to mere days as REL seems to anticipate.[159]

95. It is reasonable for the P&R Plan and the associated restoration time estimates to account for leak surveys and purging conducted in the interests of safety, as FEI has done.

REL Has Unrealistic Expectations Regarding Customer Self-Relights

96. REL contends that the restoration time can be reduced significantly by FEI encouraging customers to relight their own appliances and by publishing relight instructions. However, FEI's P&R Plan and the time estimates in Figures 1 to 4 above already assume that 25 percent of Lower Mainland customers – almost 175,000 customers - will perform their own relights. There are numerous reasons why the 25 percent assumption for self-relights is reasonable in the context of a widespread Lower Mainland outage.

- First, as REL recognizes, a certain portion of the customer base will be unable to perform the work (e.g., elderly or disabled individuals), and many people will be very hesitant about reigniting gas appliances on their own.[160]

- Second, since the system will be repressurized on an area-by-area basis concurrent with FEI's crews visiting individual premises, customers in the earlier

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[159] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 29-30, 40.

[160] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 41.

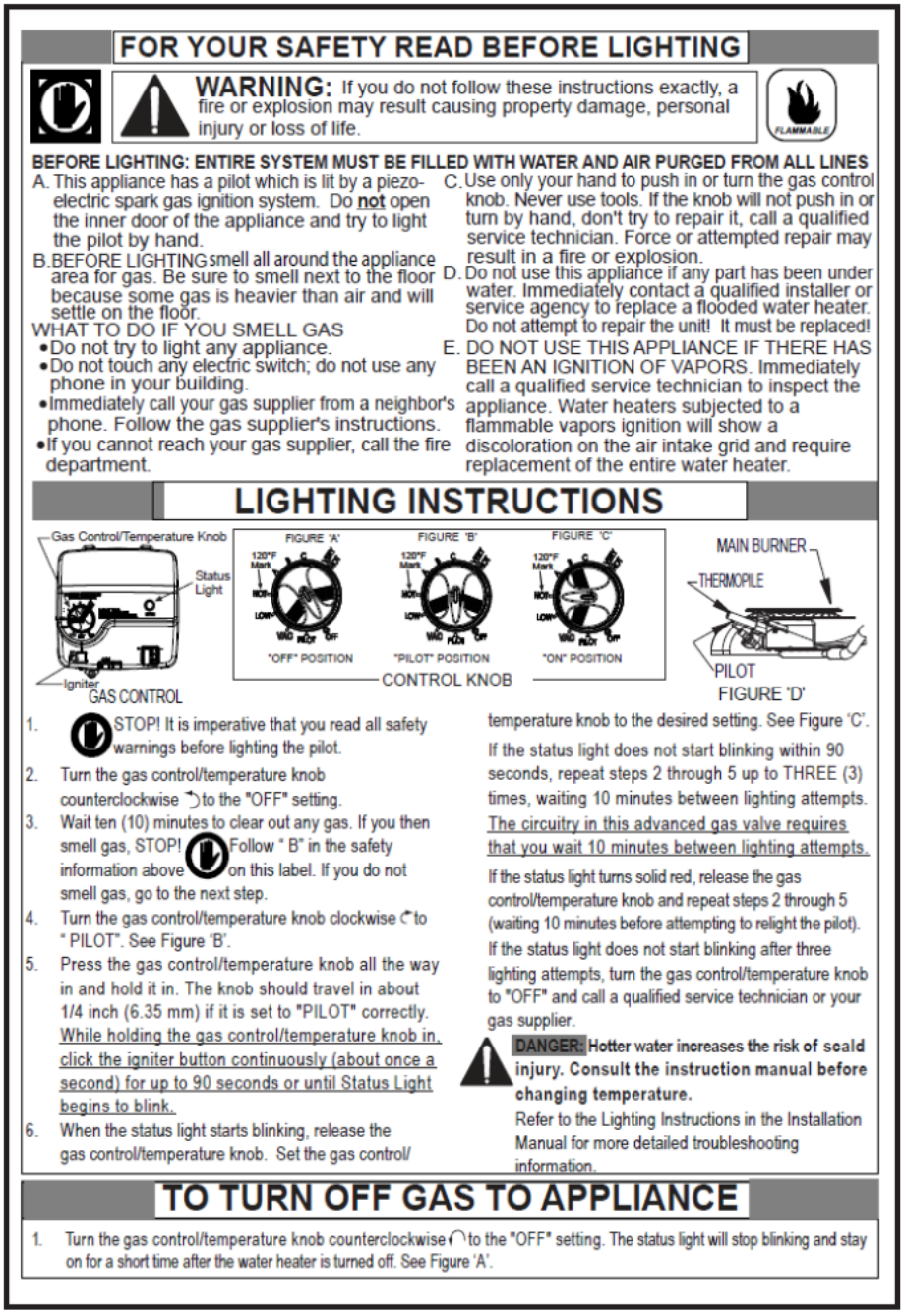
areas being regasified would save little time by performing their own relights rather than waiting for a crew in the neighbourhood to reach them.[161] In other words, the incentive to perform the self-relights (faster resumption of service) is muted in many cases.

- Third, there are limits as to how much public messaging can simplify the relight process for people. FEI explained that, given the large variety of types and vintages of appliances, FEI would be limited to directing customers to where they could find the detailed relighting instructions (e.g., placards on the appliance, printed instruction manuals, or the manufacturer's website).[162] FEI included a copy of a 38 page instruction manual for a typical gas water heater to illustrate how daunting it could be for someone to try relighting their own appliance. The instructions for relighting (excerpt reproduced below) include multiple warnings along the following lines: "**WARNING: If you do not follow these instructions exactly, a fire or explosion may result causing property damage, personal injury or loss of life.**" Warnings of this nature, in combination with the complexity of the steps that must be followed "exactly" will deter many people from attempting to relight their own appliances.[163]

[161] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 41.

[162] Exhibit B-52, BCUC IR3 112.1.

[163] Exhibit B-52, BCUC IR3 112.1.



FOR YOUR SAFETY READ BEFORE LIGHTING

WARNING: If you do not follow these instructions exactly, a fire or explosion may result causing property damage, personal injury or loss of life.

FLAMMABLE

BEFORE LIGHTING: ENTIRE SYSTEM MUST BE FILLED WITH WATER AND AIR PURGED FROM ALL LINES

A. This appliance has a pilot which is lit by a piezo-electric spark gas ignition system. Do **not** open the inner door of the appliance and try to light the pilot by hand.

B. BEFORE LIGHTING smell all around the appliance area for gas. Be sure to smell next to the floor because some gas is heavier than air and will settle on the floor.

WHAT TO DO IF YOU SMELL GAS
- Do not try to light any appliance.
- Do not touch any electric switch; do not use any phone in your building.
- Immediately call your gas supplier from a neighbor's phone. Follow the gas supplier's instructions.
- If you cannot reach your gas supplier, call the fire department.

C. Use only your hand to push in or turn the gas control knob. Never use tools. If the knob will not push in or turn by hand, don't try to repair it, call a qualified service technician. Force or attempted repair may result in a fire or explosion.

D. Do not use this appliance if any part has been under water. Immediately contact a qualified installer or service agency to replace a flooded water heater. Do not attempt to repair the unit! It must be replaced!

E. DO NOT USE THIS APPLIANCE IF THERE HAS BEEN AN IGNITION OF VAPORS. Immediately call a qualified service technician to inspect the appliance. Water heaters subjected to a flammable vapors ignition will show a discoloration on the air intake grid and require replacement of the entire water heater.

LIGHTING INSTRUCTIONS

1. STOP! It is imperative that you read all safety warnings before lighting the pilot.
2. Turn the gas control/temperature knob counterclockwise to the "OFF" setting.
3. Wait ten (10) minutes to clear out any gas. If you then smell gas, STOP! Follow " B" in the safety information above on this label. If you do not smell gas, go to the next step.
4. Turn the gas control/temperature knob clockwise to " PILOT". See Figure 'B'.
5. Press the gas control/temperature knob all the way in and hold it in. The knob should travel in about 1/4 inch (6.35 mm) if it is set to "PILOT" correctly. While holding the gas control/temperature knob in, click the igniter button continuously (about once a second) for up to 90 seconds or until Status Light begins to blink.
6. When the status light starts blinking, release the gas control/temperature knob. Set the gas control/ temperature knob to the desired setting. See Figure 'C'.

If the status light does not start blinking within 90 seconds, repeat steps 2 through 5 up to THREE (3) times, waiting 10 minutes between lighting attempts. The circuitry in this advanced gas valve requires that you wait 10 minutes between lighting attempts.

If the status light turns solid red, release the gas control/temperature knob and repeat steps 2 through 5 (waiting 10 minutes before attempting to relight the pilot).

If the status light does not start blinking after three lighting attempts, turn the gas control/temperature knob to "OFF" and call a qualified service technician or your gas supplier.

DANGER: Hotter water increases the risk of scald injury. Consult the instruction manual before changing temperature.

Refer to the Lighting Instructions in the Installation Manual for more detailed troubleshooting information.

TO TURN OFF GAS TO APPLIANCE

1. Turn the gas control/temperature knob counterclockwise to the "OFF" setting. The status light will stop blinking and stay on for a short time after the water heater is turned off. See Figure 'A'.

- Fourth, language barriers can also present a significant obstacle for customer appliance self-relights. Appliance instructions are almost exclusively available in English and French. In 2016, approximately 39 percent of Lower Mainland residents reported a non-English/French mother tongue, and approximately 23 percent mostly commonly speak a language other than English or French at home.

Hence, many of FEI's customers would effectively be prevented from relighting their own appliances due to a lack of understandable instructions.[164]

- Fifth, 75 percent of Lower Mainland customers request assistance relighting appliances when FEI restores service to a premises after outages due to a local gas emergency, lock-off, or routine meter exchange. While some of these requests may be motivated by convenience, there are indications that this is not the only reason. FEI explained that even during the early lockdowns associated with the COVID-19 pandemic (a time characterized by uncertainty, fear and mounting hospitalizations), "the majority of FEI's customers still wanted an FEI technician to enter their premises and relight the gas appliances despite the additional COVID-19 exposure risk this represented."[165]

- Sixth, FEI's work plan and time estimates already assume that it will be "fully engaging the available contractor population in the Lower Mainland".[166] Encouraging people to retain their own contractor would not be fruitful, and could be detrimental to the overall restoration effort.

- Seventh, convincing customers to perform their own relights is only part of the challenge. A material portion of the time associated with relights is travel time, which could only be avoided if the customer informs FEI of a self-relight and FEI is able to adjust its work plan. There is reason to doubt that this would occur in many instances. It is typical for customers who relight their appliances after a meter exchange (change and leave off) or an emergency outage not to advise FEI. In the context of a massive mobilization effort for relighting, there are logistical challenges even if customers report their relight status. FEI indicated that

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164 Exhibit B-52, BCUC IR3 112.1.

165 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 41; Exhibit B-52, BCUC IR3 112.1.

166 Exhibit B-52, BCUC IR3 112.1.

continually revising job packages to be issued to the field on a daily basis "would be impractical".[167]

- Eighth, the remote reconnect process that FEI could consider once AMI is in place would still require the customer to perform its own relights.[168]

- Ninth, REL is assuming that, if meter valves were to be left open at the time of repressurization, many appliances will relight themselves, and that FEI would be able to identify them in advance and direct crews to areas where they are absent. This is an unsound basis for planning:

  - Relying on an appliance to relight itself would not meet the GSR requirement to "carefully check" the appliance valves and outlets are off.

  - There are many appliances in use in the Lower Mainland that predate 2010 when electronic ignition was mandated for new high-efficiency furnaces. FEI expects there are potentially hundreds of thousands of appliances with standing pilots.[169]

  - FEI has confirmed both through discussions with equipment manufacturers, and through its own testing of typical equipment, that electronic ignition appliances will likely not perform as described by REL in its submission. In most cases, appliances with electronic ignition will automatically "lock out" for safety reasons when they attempt (and fail) to automatically light during the period while gas supply to the customer is disrupted. This lock-out condition will persist indefinitely, even after gas supply is restored to the appliance. The process of resetting the appliance

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[167] Exhibit B-52, BCUC IR3 109.6. Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 44.

[168] Exhibit B-50, RCIA IR3 48.1 and 56.1.

[169] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 43; Exhibit B-50, RCIA IR3 60.1 and 60.2.

is more complicated than a simple pilot relight, and thus a site visit is even more likely to be required. [170]

- FEI does not maintain a database on the age or type of its customer appliances so as to be able to establish its P&R Plan on that basis. Even if it did, "Expecting FEI's technicians to traverse the Lower Mainland so the next prioritized area or customer is relit will result in a very inefficient effort, in terms of overall restoration time for the Lower Mainland." [171]

97. FEI "recognizes that there is judgment involved in the 25 percent estimate, which is why FEI included the sensitivity analysis."[172] However, the evidence does not support FEI basing its P&R Plan on the assumption of a materially higher percentage of self-relights. Moreover, FEI's sensitivity analysis showed that, even if one were to assume that 75 percent of customers were willing and able to perform their own relights and then promptly tell FEI once completed – a "highly improbable" and "unrealistic scenario" – it would still take approximately 5 weeks to restore service without AMI and 4 weeks to restore service with AMI. The sensitivity analysis scenarios demonstrate that there is no reasonable scenario in which service to the entire Lower Mainland could be restored within a short period of time as suggested by REL.[173]

Basing a Response Plan on the Otterburne Outage, as REL Advocates, Is Unreasonable

98. A fundamental problem with REL's opinion is that it is based on Centra Gas Manitoba's response to the Otterburne outage. As FEI stated, "The Otterburne rupture event is not a reasonable comparator."[174] The Otterburne outage occurred under a different regulatory framework, in different circumstances, and on a totally different scope and scale from the outage that will follow a no-flow event on T-South.

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[170] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 43.

[171] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 43-44.

[172] Exhibit B-50, RCIA IR3 51.4.

[173] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 42.

[174] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 5.

99. Steps taken by Centra Gas in the Otterburne outage have a profoundly different risk profile when applied in the context of a widespread, prolonged Lower Mainland outage. As FEI put it:[175]

> Extrapolation of the response during the Otterburne incident suggests that the likelihood for unsafe situations is much higher in the Lower Mainland given that the number of customers exposed is almost 200 times larger, particularly when combined with the fact that the outage would be occurring in a heavily urbanized area (the Lower Mainland) which has a generally milder climate that is more conducive to year-round excavation activities (and consequent potential system damages).

100. The elevated risk profile in the Lower Mainland is illustrated by the following comparison table, in which FEI responds to each of the considerations that REL cited in respect of the Otterburne outage.[176]

Otterburne Outage in Manitoba (per REL)	**Outage following T-South No-Flow Event**
The outage affected 3623 customers.	The restoration will occur in segments, with approximately 220 segments of 3000 customers each. That is, the total number of customers impacted in the Otterburne incident is approximately the size of a single Lower Mainland restoration segment.[177]
Centra shut off some restaurant meter valves because "REL understands that not all commercial appliances have automatic shutoff valves, such as commercial cooking appliances. Hence, it was important that commercial services to restaurants were shut off." Residential customer's meter shutoff valve remained open and unverified.	Closing meter valves before repressurizing is the only practical way to comply with the GSR in an outage of this size. FEI is confident there would be thousands to tens of thousands more customers with manual shutoff valves on appliances in the Lower Mainland, relative to Otterburne. FEI would not know which premises have these appliances, and which do not, at any given time.
No leak surveys or purging the distribution system.	"FEI likely would have made the same determination in Centra Gas' circumstances with respect to purging and surveys" for the following reasons: (i) the outage was contained to a small geographic area, with limited gas distribution infrastructure; (ii) the area was predominantly rural, with limited development activity; (iii) the outage was fully resolved, with service fully restored, within 63 to 73 hours; and (iv) it occurred mid-winter during extreme sub-zero temperatures

[175] Exhibit B-50, RCIA IR3 42.6.

[176] The table summarizes the more detailed information at Exhibit B-46-1, FEI's Rebuttal Evidence, starting at p. 46.

[177] Exhibit B-50, RCIA IR3 50.2.

	(CBC reported at the time that it was minus 20°C, or minus 34°C with wind chill), which is not conducive to outdoor activities such as ground excavation.[178] FEI has taken a similar approach in more analogous situations.[179] By contrast, a Lower Mainland outage would have the following characteristics: (i) the outage would affect a very large geographic area with thousands of kilometers of gas lines; (ii) the area is predominantly urban, and portions are experiencing significant construction projects and development; (iii) the construction season is year-round (as shown in the underground locate request data); and (iv) the length of the outage is also necessarily going to be significantly longer than the Otterburne event because of the number of customers requiring restoration.
No purging customer houselines to remove air.	REL may have misinterpreted FEI's evidence. The activity that FEI was referring to is a "normal process that a technician undertakes" when relighting appliances. It normally just involves relighting a cooktop to check whether air in the lines cause it to flameout, and repeating until the appliance remains lit. There are no potential time savings here.

REL's Optimism and High Safety Risk Tolerance Are a Poor Basis for System Planning

101. As the table below illustrates, REL's evidence reflects: (1) unjustified optimism in the ability of FEI's gas system to respond, and how customers and the public respond to an outage; and (2) a high tolerance for significant safety risks during the restoration process. Regulations and industry practises, as well as FEI's operating procedures, are in place to prevent explosions leading to injury, fatality and extensive property damage. Many things have to go exactly right for REL's approach to conclude without tragic results, to the point of incredulity. FEI wishes to state, in no uncertain terms, that the professionals at FEI responsible for emergency response and planning regard REL's suggestions as highly problematic in the context of the type of event we are considering, and will not adopt them.

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[178] Data provided in Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 46 to 49, shows the historical wintertime drop-off of excavation activity (and the consequential number of system damages) is much more pronounced in Manitoba than it is in the Lower Mainland.

[179] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 47, fn 56.

Apparent Premise of REL's Recommendation	Reality
REL's premise: If meter valves are left open upon repressurization (contrary to the GSR), the safety devices for several hundred thousand customer appliances function correctly in all cases to prevent gas entering premises upon repressurization or people will be present to detect the leak. **AND**	This assumption is moot because the step is precluded by the GSR. In any event, REL is underestimating the extent of the risk associated with not following the GSR. In the ordinary course, FEI encounters many appliance leaks, defective control valves or pilot safety control defects (e.g., over 517 between October 2020 and October 2021 alone). The latent failure of an automatic safety device will not be evident during normal system operation and appliance usage. It is only once gas supply is restored after having been turned off that the problem can be observed.[180] Many Lower Mainland premises would be unoccupied, such that no one would be present to detect leaking gas. As one example, following a wide-scale outage, thousands of restaurants in the Lower Mainland would be closed due to a lack of gas to operate their appliances. Further, there are many vacant or unoccupied homes in the Lower Mainland in the ordinary course.[181]
REL's premise: If meter valves are left open upon repressurization (contrary to the GSR), none of the hundreds of thousands of appliances with manual shut-off will be inadvertently left on by customers, or if they do will be present to detect gas upon repressurization and address it before it becomes a safety hazard. **AND**	This assumption is moot because the step is precluded by the GSR. In any event, a non-exhaustive list of appliances that typically have manual shutoffs include many commercial grills, residential stoves and barbeques, Bunsen burners and gas valves in educational and research labs, welding torches, and small process kilns. REL's assumptions about customer behaviour do not reflect FEI's operating experience. FEI and contractors performing service calls do, from time to time, find appliances being left in the open position when gas service to a premises has been disrupted.[182] As stated above, many premises in the Lower Mainland are unoccupied at any given time.
REL advocates dispensing with purging and leak surveys. REL's premise: No underground system damage occurs while the system is depressurized (that could lead to unsafe air entrainment) because third parties will see FEI messaging and voluntarily cease to perform excavation work throughout the Lower Mainland, and every person digging, erecting poles or signs etc. calls BC One Call for a pipe locate. **AND**	There will be large portions of the Lower Mainland system that will remain depressurized for weeks; developers are unlikely to voluntarily absorb stand-down costs for that length of time.[183] FEI experiences, on average, approximately three reported damage incidents each day system-wide from a variety of causes. FEI's damage statistics also show that, on an annual basis, approximately two-thirds of

[180] Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 25-26; Exhibit B-50, RCIA IR3 57.2.

[181] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 27; Exhibit B-50, RCIA IR3 46.1.1.

[182] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 28.

[183] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 31.

	the damages to FEI's system are committed by third-parties who have not obtained a BC 1 Call ticket and locate information, despite a legal requirement to do so. In FEI's experience, even with a live and pressurized gas system, damages occur that are not reported with the incident location left in an unsafe condition.[184]
REL advocates dispensing with purging and leak surveys. REL's premise: If a third party does cause damage while the system is depressurized, the party causing the damage immediately reports the damage to FEI or a member of the public detects it before it results in a safety hazard. **AND**	There will be no blowing gas when someone strikes a depressurized line. In FEI's experience, even with a live and pressurized gas system, damages occur that are not reported with the incident location left in an unsafe condition. FEI included photos of instances where contractors actively tried to conceal damage. FEI expects the number of unreported incidents will increase when there is no blowing gas. [185] Alternatively, FEI technicians and emergency responders across the Lower Mainland would have to respond to multiple near-simultaneously reported gas leaks. This would "further impair FEI's restoration capabilities which may already be resource constrained."[186]
REL advocates dispensing with purging and leak surveys. REL's premise: Air in house lines in the absence of AMI "is not the significant safety issue that FEI claims" because "When relighting such appliances, these lines are effectively purged back into service through the pilot flow or through electronic ignition start cycles". **AND**	REL's characterization of the risk "is consistent with a normal localized shutdown but is under representing the additional possibility of larger amounts of air entering FEI system as a result of the extended nature of the much larger outages considered here." Air in FEI's system could move into premises previously successfully relit snuffing the appliance pilot and leaving the customer premise reliant on proper functioning of the safety. This creates a similar situation to re-pressurizing against an open meter valve (which FEI would not do) although it would affect a smaller population of premises.[187]
REL's premise: Customers will be able to perform self-relights correctly if encouraged to do so.	Safe relights require following instructions properly, and many people may lack the competency and/or language skills to do so.

102. FEI's Rebuttal Evidence included photos of an explosion in Fort McMurray that occurred upon ATCO Gas' regasification following an outage.[188] The explosion, which occurred in a neighbourhood that was "untouched by May's wildfire",[189] destroyed a house and did significant

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184 Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 31-32, 37; Exhibit B-50, RCIA IR3 58.1 and 58.2.

185 Exhibit B-46-1, Rebuttal Evidence to RCIA, pp. 31-34, 37; Exhibit B-52, BCUC IR3 111.1.

186 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 37.

187 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 39.

188 Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 14.

189 Exhibit B-50, RCIA IR3 59.1.

damage to neighbouring homes; no one was hurt because the homes were unoccupied at the time. The explosion prompted a multi-million dollar class action lawsuit alleging that ATCO Gas was negligent for allegedly failing to take the types of steps that FEI will be taking.[190] Keeping in mind that FEI's restoration efforts would involve the entirety of the most populous and developed region of British Columbia, the Fort McMurray explosions underscore the importance of taking a measured and deliberate approach to the restoration of service that places a high priority on public safety. The steps FEI is planning to take are intended to mitigate the risk of such events.[191]

103. FEI's customers share FEI's views on the importance of public safety. In surveys conducted quarterly over a five year period, customers evaluated customer and public safety as 9.7 on a scale where 1 is "not at all important" and 10 is "extremely important." This score was comparable to the results associated with perceptions about the importance of natural gas service reliability.[192]

104. FEI submits that the P&R Plan, which the BCUC has determined to be in the public interest, is a more appropriate basis for assessing the impacts of a potential no-flow event in this proceeding.

(c) Anticipated Widespread and Lengthy Outage Has Very Significant Social and Economic Impacts

105. It is to state the obvious that depriving the most populous and urbanized part of the province of the most common source of space and water heating, and a major fuel for businesses and industry, for two months or more will have catastrophic socio-economic consequences. The PwC Report[193] uses three illustrative scenarios to identify the types of economic, social and

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[190] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 13 and Appendices A and B.

[191] Exhibit B-52, BCUC IR3 113.1.

[192] Exhibit B-46-1, Rebuttal Evidence to RCIA, p. 54.

[193] Exhibit B-1-4, Application, Appendix B.

environmental harm that can occur when gas supply is interrupted.[194] The scenarios did not depend on cause, likelihood,[195] or readiness.[196] In addition to cataloguing the types of potential harm, PwC's scenarios provide a clear directional indication that the consequences of a widespread and prolonged winter outage will be severe.[197]

107. PwC identified the key determinants of economic, social and environmental harm under as being: (1) the breadth of an outage; (2) whether an outage is affecting an area that is a driver of economic activity; (3) the duration of an outage; and (4) whether the temperature at the time is above or below two thresholds, 16 degrees Celsius (Occupational Health & Safety ("OH&S")

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194 Exhibit B-1-4, Application, p. 50; Exhibit B-15, BCUC IR1 65.6; Exhibit B-26, BCUC IR2 108.1.

195 PwC did not explore likelihood, beyond the broad qualifier of plausibility, because it is not related to the magnitude of the potential financial, social or economic impact of a disruption event: Exhibit B-33, CEC IR2 119.1.

196 Exhibit B-19, CEC IR1 78.1.

197 Please refer to RCIA Confidential IR1 27.1 (Exhibit B-23-2) which explains the basis for the scenarios used in PwC's assessment; see also Exhibit B-15, BCUC IR1 3.3 and 65.2; Exhibit B-20, Confidential CEC IR1 79.5; Exhibit B-21, MS2S IR1 15.i and Exhibit B-26-2, BCUC IR2 107.2.

198 Exhibit B-1-3-1, Revised Confidential Application, Appendix B, p. 9; see also Exhibit B-19, CEC IR1 76.1.

threshold) and 0 degrees Celsius (pipes or equipment freezing).[199] These are the primary inputs in PwC's modelling.

108. The PwC Report identifies key social and environmental impact of an outage in the Lower Mainland. [redacted]

109. Given the extent to which natural gas space and water heating contribute to FEI's Lower Mainland load in winter,[203] it is not realistic to assume customers can temporarily switch to electric space and water heating during a no-flow event. Many people would lack financial means to make the switch. Customers who had the financial means would quickly exhaust any local inventory of portable space heaters, electric hot water tanks, and electric hot plates.[204] Moreover, even if one assumes fuel switching of this kind is practicable or economical, the province's electrical grid would struggle to accommodate the load. The peak load on FEI's system is roughly 1.5 times larger than BC Hydro's peak generation capacity.[205]

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199 Exhibit B-1-4, Application, Appendix B, p. 4.

200 Exhibit B-1-3-1, Revised Confidential Application, Appendix B, p. 11.

201 Exhibit B-1-3-1, Revised Confidential Application, Appendix B, p. 11.

202 Exhibit B-1-3-1, Revised Confidential Application, Appendix B, p. 10.

203 Exhibit B-33, CEC IR2 101.1; see also Exhibit B-15, BCUC IR1 13.3.

204 Exhibit B-21, MS2S IR1 4iii.

205 Exhibit B-33, CEC IR2 101.2; Exhibit B-21, MS2S IR1 4iii; Tr. 1, p. 89, l. 3 to p. 90, l. 7 (Sam).

[redacted]

206 Exhibit B-26-2, BCUC IR2 105.1. [redacted]

207 Exhibit B-23-2, Confidential RCIA IR1 27.2.1.

208 Exhibit B-26-2, BCUC IR2 105.1; see also Exhibit B-16, Confidential BCUC IR1 15.6.

209 Exhibit B-1-3-1, Revised Confidential Application, Appendix B, p. 10.

111. While individual inputs of the PwC scenarios do not perfectly align with the Lower Mainland, the PwC report analysis aligns with what one would intuitively expect – i.e., that a no-flow event resulting in a lengthy loss of supply to hundreds of thousands of Lower Mainland customers would result in

G. APPROPRIATE RISK MANAGEMENT IS TO MITIGATE KNOWN CATASTROPHIC HARM ASSOCIATED WITH PLAUSIBLE EVENTS

112. As described below, Guidehouse, JANA and PwC all agree that the appropriate risk management approach in cases like this one where consequences from a plausible event are known to be unacceptably severe is to mitigate the consequences to tolerable levels irrespective of calculated probabilities of the triggering event. The BCUC has taken this approach in the context of dam safety, and should do so here as well.

(a) Guidehouse, JANA and PwC United on Appropriate Risk Management Approach

113. Although JANA calculated the cumulative probability of a no-flow event at FEI's request, JANA emphasized that unacceptable consequences from a plausible event justifies mitigation steps regardless of calculated probability. JANA's paper *Managing Low Probability – High*

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[210] Exhibit B-1-3-1, Revised Confidential Application, Appendix B, p. 9; Exhibit B-15, BCUC IR1 65.5. PwC cites a number of operational outages associated with a disruption event that exceed 6 weeks in duration (e.g., Enbridge T-South Rupture, TC Line 100 Explosion and Fire): Exhibit B-16-2, Confidential BCUC IR1 15.2.

[211] Exhibit B-26-2, BCUC IR2 107.2.

Consequence Pipeline Risk explored the management theory in relation to pipeline risk, explaining the approach in the case of low probability-high consequence risk as follows:[212]

> When we land in Quadrant IV, what we must do is 1.) Accept that we cannot predict what will happen, or when; 2.) Reject all narratives and projections that try to tell us what will happen and when; and 3) Work towards mitigating the consequence of such an occurrence.
>
> The fourth quadrant, then, as defined by Taleb, is about the areas in our domain (in our case, pipelines) where our knowledge is limited AND that limitation has the capability to result in an event of high consequence. Also, while we may know the probability of an event occurring, due to the complexity of the system, we will not be able to predict it in terms of where and when. This need not imply that we need to be a victim of the situation. We can take action to change our risk position.

114. PwC similarly distinguished the present resiliency investment decision from a typical risk management decision. In essence, when consequences are less severe such that one can live with them, one can afford to give weight to the likelihood of occurrence, or undertake risk-adjusted spending. In a circumstance where one cannot accept the outcome, the outcome should be mitigated until it is acceptable. PwC states:[213]

> Natural gas disruption represents "black swan" events that are of an unforeseen, binary nature that either happen or they don't. For this reason a probabilistic or risk adjusted approach is not applicable and system resiliency investment decisions should be considered on the basis of total potential impact that may occur in the event of disruption.

115. Guidehouse concurs, referencing the work of Zuppinger and the Project Management Institute ("PMI"):[214]

> Black swan events, although improbable, are not impossible and if the consequence is too severe to be tolerated, the risk must be managed effectively so that they do not take us by surprise. Probability is important, but can be

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[212] Exhibit B-32, BCOAPO IR2 2.3.

[213] Exhibit B-15, BCUC IR1 3.4.

[214] Exhibit B-28, RCIA IR2 31.2. See also: Exhibit B-28, RCIA IR2 34.3. See Assessing Risk is it a Black Swan, 2012. https://www.pmi.org/learning/library/assessing-risk-black-swan-fukushima-6084.

misleading in risk assessment by creating biases that convince of the unlikeliness without understanding the real severity of the risk in question.

116. Guidehouse draws an analogy between resiliency investments and insurance, where the probability of an event occurring "can cloud" decision making: "We do not purchase insurance based on a probability adjusted basis. We purchase insurance based on whether or not we can tolerate the consequences of the event." [215] That is, people purchase earthquake insurance or fire insurance annually because they cannot afford the consequences of an earthquake or fire, not because there is a high probability of an earthquake occurring within the next year.

(b) The BCUC Has Applied this Risk Management Approach With Dam Safety

117. The BCUC has similarly accepted investments in dam safety on the basis that: (1) the initiating event can occur (based on a review and assessment of historical information); and (2) the resulting consequences of a failure occurring in response to an occurrence of the initiating event would be unacceptable. FEI provided a number of examples of BCUC decisions related to dam safety[216] which indicate, in particular, unwillingness on the part of the BCUC or industry standards organizations to accept unmitigated catastrophic risk of dam failure based on a probabilistic analysis showing that the event has a low probability of occurrence.[217]

118. The FortisBC Inc. ("FBC") Corra Linn Dam Spillway Gate Replacement Project is one example.[218] In order to establish the possibility of a large flood or seismic event, as part of this proceeding, FEI provided an analysis of historical data to estimate the magnitude of design seismic or design flood events. There was no evidence, nor was there any discussion in the BCUC decision of the cumulative probability of the initiating event over the life of the Corra Linn dam or spillway. Similarly, in this proceeding, FEI has identified historical incidents over the life of the

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[215] Exhibit B-28, RCIA IR2 31.2. Exhibit B-18, BCSEA IR1 2.1; Exhibit B-15, BCUC IR1 10.8.

[216] E.g., FortisBC Inc. (FBC) - Corra Linn Dam Spillway Gate Replacement Project (2017); BC Hydro - WAC Bennett Dam Riprap Upgrade Project (2016); BC Hydro - John Hart Generating Station Replacement Project (2013); BC Hydro - Ruskin Dam and Powerhouse Upgrade Project (2012); and BC Hydro - Hugh Keenleyside Spillway Gates Project (2010).

[217] Exhibit B-39, BCUC Panel IR1 4.1.

[218] Exhibit B-39, BCUC Panel IR1 4.1.

T-South system where there has been a loss of gas supply, with the most significant being the T-South Incident in 2018.[219]

119. A no-flow event occurring in winter will, without question, result in a lengthy Lower Mainland outage. A winter outage affecting hundreds of thousands of people is, like a dam failure, capable of leading to injury or death and serious economic harm. A similar risk management approach should be applied.

H. REASONABLE HARM MITIGATION MEANS OUTLASTING A 3-DAY NO-FLOW EVENT WITHOUT A WIDESPREAD PROLONGED SHUTDOWN

120. The potential duration of a winter no-flow event on T-South is effectively a moot point today from the standpoint of maintaining uninterrupted service to the Lower Mainland, since FEI will shut down the system within hours of the event. However, the potential duration of a no-flow event becomes very important when planning to mitigate the risk of catastrophic outcomes from a no-flow event to tolerable levels. There is a solid empirical basis for targeting, at a minimum, being able to withstand, and recover from, a 3-day no-flow event on the T-South system without having to shut down portions of FEI's distribution system or otherwise lose significant firm load. Meeting this target will not mean eliminating the risk - a supply disruption could be longer than three days or the triggering event could occur in a location that leaves insufficient time to respond - but targeting three days does mitigate the risk substantially. FEI encapsulated this assessment in what it termed, only as convenient shorthand, the MRPO.[220]

121. The evidence supporting a minimum 3-day period includes:

- The T-South Incident no-flow period lasted 2 days despite Westcoast's response efforts being hastened by the following favourable circumstances:

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[219] Exhibit B-39, BCUC Panel IR1 4.1.

[220] Exhibit B-1-4, Application, p. 35. The MRPO is not a general planning standard: Exhibit B-15, BCUC IR1 8.1 and 8.2; Exhibit B-17, BCOAPO IR1 1.5. FEI is also not seeking approval of the MRPO in principle or for general application, and regardless, such approval is not required: Exhibit B-32, BCOAPO IR2 4.6; Exhibit B-26, BCUC IR2 72.5.

- The incident occurred in an road-accessible location near Prince George[221];
- The weather conditions in October 2018 were favourable for performing the work, the temperature was mild and there was no snow[222]; and
- Westcoast was able to determine quickly that the rupture only affected one of the two lines, such that Westcoast was able to get clearance from its regulator quickly to resume flows on the other line.[223]

Many parts of the T-South system are more remote, accessible only by long roads that are less well maintained in winter. FEI's assessment is that "the very real potential exists under somewhat less favourable conditions for a 'no-flow' supply emergency to last three days, and it could conceivably last longer."[224]

- Industry data compiled by JANA shows that it is typical for three days to be required to restore service after an integrity-related disruptions. JANA concluded that any rupture of a 30" or 36" NPS transmission pipeline, ignited or not, would be expected to result in an outage of at least two days duration and most likely three days or greater followed by some period of reduced capacity on the lines.[225]
- A recent cyberattack on Colonial Pipeline prompted a six day outage.

122. Planning based on a lesser duration no-flow event (e.g., 2 days vs. 3 days) would reduce the time FEI has before it is forced to initiate a controlled shutdown so as to forestall an uncontrolled shut-down. This materially increases the likelihood of significant loss of load. A no-flow event could, of course, last longer than three days, which is why FEI has characterized 3-

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221 Exhibit B-1-4, Application, p. 52.

222 Tr. 1, p. 81, l. 8 to p. 82 l. 2 (Sam).

223 Exhibit B-1-4, Application, p. 52.

224 Exhibit B-1-4, Application, p. 52; Tr. 1, p. 71, ll. 20-25 (Sam).

225 Exhibit B-26, BCUC IR2 68.2.

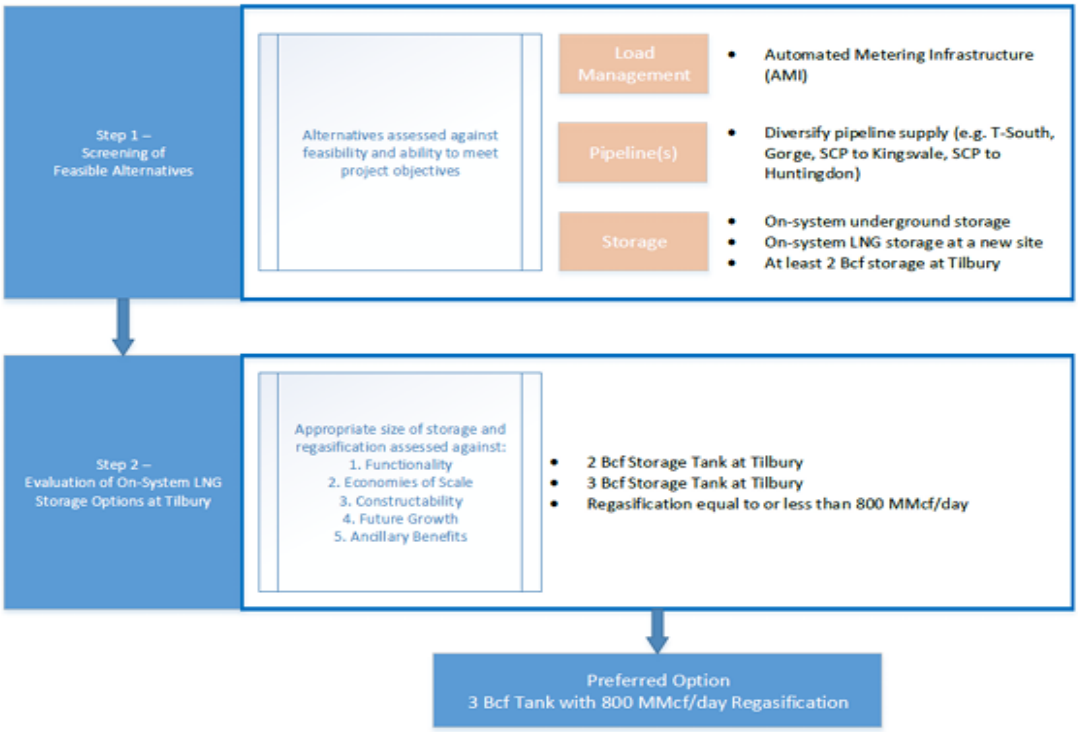
days as a reasonable minimum and sees benefit in having the resiliency margin afforded by the "third Bcf" that will enable FEI to withstand a longer no-flow event.

PART FOUR: STORAGE, PIPELINE AND LOAD MANAGEMENT ALTERNATIVES

A. INTRODUCTION

123. FEI used a structured two-step alternatives analysis framework, shown in Figure 4.1 below, to assess feasible project alternatives to mitigate the known consequences of a winter T-South no-flow event. Step 1 (addressed in this Part of this Final Submission) assessed potential storage, pipeline and load management alternatives.[226] Step 2 (addressed in Part Five of this Final Submission) assessed the optimal sizing of storage and regasification.

Figure 4-1: Two-Step Alternatives Analysis



124. The Step 1 assessment demonstrated that more on-system storage and regasification capacity at Tilbury is the only practical and effective way for FEI to avoid a widespread and prolonged winter outage, or alternatively to materially reduce the scale of the outage.

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[226] Exhibit B-1-4, p. 77. The Table omits off-system storage from the list of options as FEI determined it was not a feasible alternative. In Part Four, Section C (b) of this Submission, FEI explains why off-system storage is not a feasible alternative as it would not prevent or limit a winter outage.

125. The subsections in this Part demonstrate the following supporting points:

- First, FEI's Step 1 alternatives analysis was comprehensive, with options encompassing all three major elements of a resilient system; namely: (1) storage; (2) pipeline diversity; and (3) load management tools. FEI considered the options in terms of feasibility, effectiveness in mitigating the identified risk and compatibility with FEI's optimal supply portfolio.

- Second, pipelines and load management tools, while complementary to on-system storage, are not practical and effective solutions to avoid or limit the scale of the outage that will occur upon a winter no-flow event on T-South.[227]

- Third, other scenarios identified by participants are impractical and would be insufficient to avoid or limit the scale of the Lower Mainland outage.

B. FEI ASSESSED VARIOUS OPTIONS FOR FEASIBILITY, EFFECTIVENESS AND COMPATIBILITY WITH OPTIMAL SUPPLY PORTFOLIO

126. As depicted in Figure 4.1 above, FEI's Step 1 analysis was comprehensive. FEI considered all of the potential storage, pipeline and load management options identified by FEI and Guidehouse that would contribute to the resiliency of FEI's system.[228] Specifically:

Additional on-system LNG storage at Tilbury
On-system underground storage in the Fraser Valley
Additional on-system LNG at a new site
Additional off-system storage (e.g., JPS / Mist)
AMI
Four potential regional pipeline developments

127. FEI analysed the options from the perspective of feasibility, effectiveness in mitigating the identified risk and compatibility with FEI's optimal supply portfolio.

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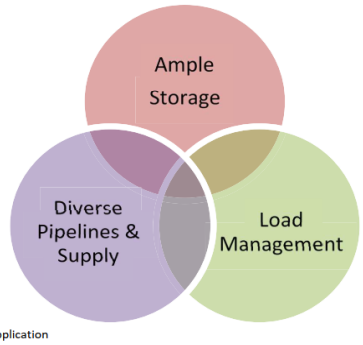
[227] Exhibit B-32, BCOAPO IR2 4.2.

[228] Exhibit B-4, Workshop Presentation, slide 30.

(a) Resiliency Is the Product of a Unique Combination of Pipeline Diversity, Ample Storage and Load Management

128. FEI's Step 1 analysis recognized that, conceptually, resiliency of a utility system is derived from a circumstance-specific combination of diverse pipelines and supply, ample storage and load management.

129. FEI depicted this concept in the Venn diagram reproduced below.[229] Mr. Chernikhowsky explained that "employing multiple complimentary solutions allows one to move to the centre of that Venn diagram where you can achieve resiliency in the most optimal and cost-effective manner."[230] He added: "As the utility on the west coast of British Columbia, with most of our load in the Lower Mainland and on Vancouver Island, we have some unique considerations that don't necessarily apply to utilities in Alberta or Ontario, for example."[231]



Source: Figure 3-2, p. 28 of the Application

Resiliency comes from controllable physical infrastructure and not contracts that are expected to be suspended during emergencies

130. Guidehouse's Mr. Moran, like Mr. Chernikhowsky, emphasized that "[t]here is no one-size-fits-all answer to improving resiliency."[232] In light of the specific risk facing FEI (loss of most of FEI's supply due to a disruption on the T-South system), he highlighted supply-side solutions in particular:

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229 Exhibit B-4, Workshop Presentation, slide 12.

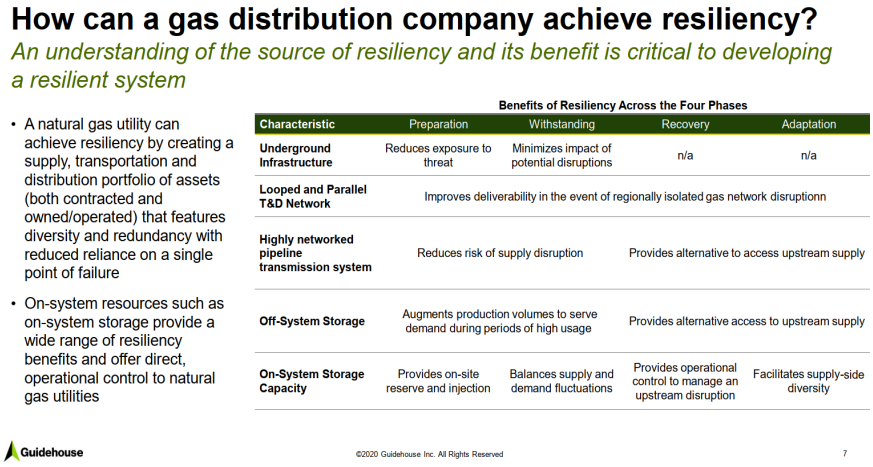
230 Tr. 1, p. 30, l. 7 to p. 31, l. 18 (Chernikhowsky).

231 Tr. 1, p. 31, l. 21 to p. 32, l. 5 (Chernikhowsky).

232 Tr. 1, p. 120, ll. 22-23 (Moran).

> Resiliency solutions need to be customized to the specific resiliency need. And so we need to think through, okay, what is the source or what is the cause of the lack of resilience? And in the case of FEI, it's a single point of failure risk on the T-South pipeline. And so we need to think through a balance portfolio of capabilities. You know, the ability to maintain system pressure, provide customers with supply must factor into the resiliency solution that is that meets the needs of the Lower Mainland system, the overall FEI system.[233]

131. Mr. Moran used the following slide to depict how pipeline and storage infrastructure can contribute to a resilient gas distribution system.[234] FEI's Step 1 alternatives analysis included all of these approaches for building resiliency.



How can a gas distribution company achieve resiliency?

An understanding of the source of resiliency and its benefit is critical to developing a resilient system

- A natural gas utility can achieve resiliency by creating a supply, transportation and distribution portfolio of assets (both contracted and owned/operated) that features diversity and redundancy with reduced reliance on a single point of failure
- On-system resources such as on-system storage provide a wide range of resiliency benefits and offer direct, operational control to natural gas utilities

Benefits of Resiliency Across the Four Phases

Characteristic	Preparation	Withstanding	Recovery	Adaptation
Underground Infrastructure	Reduces exposure to threat	Minimizes impact of potential disruptions	n/a	n/a
Looped and Parallel T&D Network	Improves deliverability in the event of regionally isolated gas network disruptionn			
Highly networked pipeline transmission system	Reduces risk of supply disruption		Provides alternative to access upstream supply	
Off-System Storage	Augments production volumes to serve demand during periods of high usage		Provides alternative access to upstream supply	
On-System Storage Capacity	Provides on-site reserve and injection	Balances supply and demand fluctuations	Provides operational control to manage an upstream disruption	Facilitates supply-side diversity

Guidehouse

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(b) Resiliency Portfolio Should Dovetail With an Optimal Supply Portfolio

132. FEI's Step 1 alternatives assessment recognized that, just as FEI's ACP combines assets with distinct attributes to meet the shape of FEI's load profile, a portfolio approach to resiliency provides a cost-effective means of achieving resiliency.[235] The optimal resiliency portfolio should align with the optimal gas supply portfolio, rather than driving sub-optimal gas supply decisions.[236]

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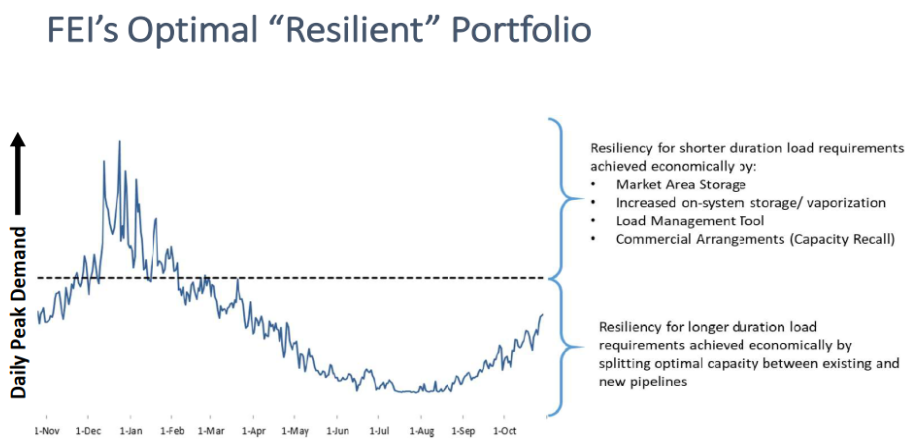
233 Tr. 1, p. 140, ll. 2-12 (Moran).

234 Exhibit B-5, slide 7.

235 Exhibit B-19, CEC IR1 18.1.

236 Exhibit B-4, Workshop Presentation, slide 35.

133. The following slide from the Workshop depicts how a solution like on-system LNG storage is well-suited to respond immediately to a critical emergency, enhancing the survival of FEI's system (i.e., Phase 1 of the T-South Incident), but has limitations in addressing long-term capacity shortfalls or long-duration issues (i.e., Phases 2 and 3 of the T-South Incident).[237] In contrast, expanded pipeline diversity is better suited for long duration *restricted* flow events.[238]



134. Mr. Sam, FEI's Executive Vice President Operations and Engineering, explained the above slide as follows:

> If I move to slide 35, we've talked about an optimal portfolio from a gas supply perspective and that is effectively using storage to manage your peaks and interruptible load to manager [sic] the demand peaks and using current pipeline capacity for longer duration supply. That methodology holds the same when planning for a more resilient portfolio.
>
> The most cost-effective solution in our situation is a balance of the three tools of load management, storage and pipeline capacity. For example, to build a storage tank farm to compensate for the long-term pipeline issue is not economical, when one considers the volume of gas that would need to be supplied by this storage. Building a second pipeline system to manage a peak load event is also not cost-

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[237] Exhibit B-19, CEC IR1 18.1.

[238] T. 1, p. 162, ll. 17-21.

> effective, as I've shown earlier. And load management tools like AMI can help minimize the impact to customers through the potential avoidance of a shutdown, or limit the shutdown, but only if there is adequate time available to assess, analyze and implement the plan.
>
> In conclusion, for a short-term resiliency event, they are most economically managed by storage tools and load management tools, while resiliency for longer duration pipeline concerns need to be achieved by splitting an optimal capacity between existing and new pipelines.[239]

135. At the Workshop, Mr. Moran of Guidehouse echoed that, "[s]torage assets are efficient for short duration supply disruptions and peak shaving applications. The pipelines offer a longer duration and they are more efficient for longer deliverability applications."[240]

136. The TLSE Project is aimed at avoiding the outage that will otherwise occur almost immediately following a winter no-flow event on T-South by bridging the no-flow period, or alternatively reducing the scale of the outage by buying FEI time to tailor the shut-down response.[241] The supply it will provide is finite, but it is immediately available and does not depend on the physical or contractual availability of alternate pipeline capacity upstream of FEI's system.[242] The TLSE Project is one key element of an overall portfolio of resiliency measures. AMI, which is being proposed for non-resiliency reasons, offers additional load management capability, and will shorten the restoration time should the TLSE Project prove insufficient to outlast the no-flow period. Any potential future extension of the SCP would add pipeline diversity and improve FEI's ability to manage subsequent partial supply constraints (e.g., Phases 2 and 3 of the T-South Incident).

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[239] Tr. 1, p. 164, l. 26 to p. 166, l. 1 (Sam). See also: Tr. 1, p. 30, l. 7 to p. 31, l. 18 (Chernikhowsky).

[240] Tr. 1, p. 131, ll. 19-23 (Moran).

[241] Exhibit B-15, BCUC IR1 14.5.

[242] Exhibit B-19, CEC IR1 18.1.

C. STORAGE AT TILBURY IS THE ONLY PRACTICAL AND EFFECTIVE OPTION FOR MITIGATING THE KNOWN CONSEQUENCES OF A WINTER NO-FLOW EVENT

137. The evidence discussed below demonstrates that, among the various load management, pipeline and storage options considered, additional on-system storage at Tilbury is the only practical and effective way to prevent hundreds of thousands of Lower Mainland customers losing gas service on Day 1 of a winter no-flow event.[243]

(a) Additional On-System Natural Gas Storage at Tilbury Is Feasible, Within FEI's Control and Highly Responsive

138. As discussed below, additional on-system storage will provide FEI with unique resiliency benefits, as it is both within FEI's control and highly responsive.[244] In practice, the practical and most beneficial on-system storage option is to add both regasification capacity and a larger tank at the existing Tilbury site.

The Unique Benefits of On-System Storage: Control and Responsiveness

139. Guidehouse observed that "on-system storage is the most effective means of risk management for FEI to mitigate the risk of an upstream supply disruption."[245] At the Workshop, Mr. Moran emphasized the control and responsiveness provided by on-system storage when compared to other infrastructure:[246]

> On-system storage, unlike upstream transportation, unlike line pack, unlike off-system storage, on-system storage gives FEI control, and huge responsiveness. Specifically what that means is, in the event of a significant upstream supply disruption, the on-system storage is a tool that helps mitigate the potential for hydraulic collapse, and a loss of the entire system […]. And so, in terms of mitigating the consequences of an upstream supply disruption, it's really only on-system storage from the perspective of efficacy and availability that offers a remedy to the single point of failure risk that we're trying to mitigate, that is really the source of the lack of resiliency on the Lower Mainland system, on FEI.

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243 Exhibit B-32, BCOAPO IR2 4.2.

244 Exhibit B-32, BCOAPO IR2 4.5.

245 Exhibit B-1-4, Application, Appendix A, p. 46; see also Tr. 1, p. 140, ll. 16-21 (Moran).

246 Tr. 1, p. 134, l. 16 to p. 135, l. 5 (Moran).

140. Mr. Moran also stated:[247]

> On-storage system capacity offers a unique set of resiliency benefits. First off, it's on-site, so it's an amount of storage that is impervious to upstream supply disruptions. So the ability to store, amount of volume, and inject it, we'll call it the deliverability or the vaporization. That enables the natural gas utility to prepare for potential resiliency event.
>
> On-system storage also can balance supply and demand fluctuations, you know, across the day enough to meet peak demand or during periods of extreme seasonal demand. And then very importantly, it provides operational control to manage an upstream disruption. Earlier Mr. Doyle Sam talked about the implications of a hydraulic collapse on the system. On-system storage can -- it's a significant benefit in enabling the natural gas utility to order a controlled shutdown because that storage and that vaporization, that deliverability is actually on the system.

141. One of the key benefits of on-system storage is that it "buys time" for FEI to gather information, assess the situation, and either avoid a significant outage altogether or initiate a controlled shut-down that minimizes overall harm. It is far more likely, with the TLSE Project, that portions of the system will not require isolation and will remain fully pressurized and functional when gas flows on T-South resume, permitting uninterrupted service to the customers in those areas.

New Tilbury Facility Is the Practical and Most Beneficial On-System Storage Option

142. One of FEI's Step 1 alternatives was to site on-system storage elsewhere on FEI's system. Constructing an underground on-system storage facility in the Lower Mainland is a non-starter, for a variety of reasons.[248] As discussed below, there are significant advantages to siting on-system LNG storage at the existing Tilbury facility, relative to other locations in the Lower Mainland or Interior.

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[247] Tr. 1, p. 114, l. 12 to p. 115, l. 5 (Moran).

[248] Exhibit B-15, BCUC IR1 16.12.

143. First, using the centrally-located Tilbury facility site provides greater resiliency benefits compared to a site at the periphery of the Lower Mainland system (e.g., near Huntingdon).[249] The Tilbury facility is in a "very good" location hydraulically because the site is near: (1) existing major transmission pipelines that head north from the Tilbury Valve Station delivering gas to Richmond and Vancouver; (2) other large pipelines that deliver gas from Tilbury eastward toward the rest of the Lower Mainland; and the major demand centers of Metro Vancouver and Surrey/Delta.[250].

144. Second, locating a new facility at Tilbury avoids a number of significant costs. It will allow FEI to take advantage of existing liquefaction at the site, avoiding a very significant capital cost.[251] A new facility site would also require new land acquisition, site preparation, power, and pipeline infrastructure in excess of what is required for the TLSE Project.[252] There is lower construction cost risk at Tilbury, since the completion of the Tilbury 1A tank has provided FEI with a seismic understanding of the site, and has facilitated early engineering for the 3 Bcf tank.[253]

145. Third, as explained in the Workshop, and depicted in the slide reproduced below, locating the TLSE Project at Tilbury in the Lower Mainland provides over 1,500 km of pipeline resiliency benefits for the Interior Transmission System.[254] By contrast, locating on-system storage in the Interior would not provide the same benefits for the Lower Mainland.

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[249] Exhibit B-15, BCUC IR1 16.18.

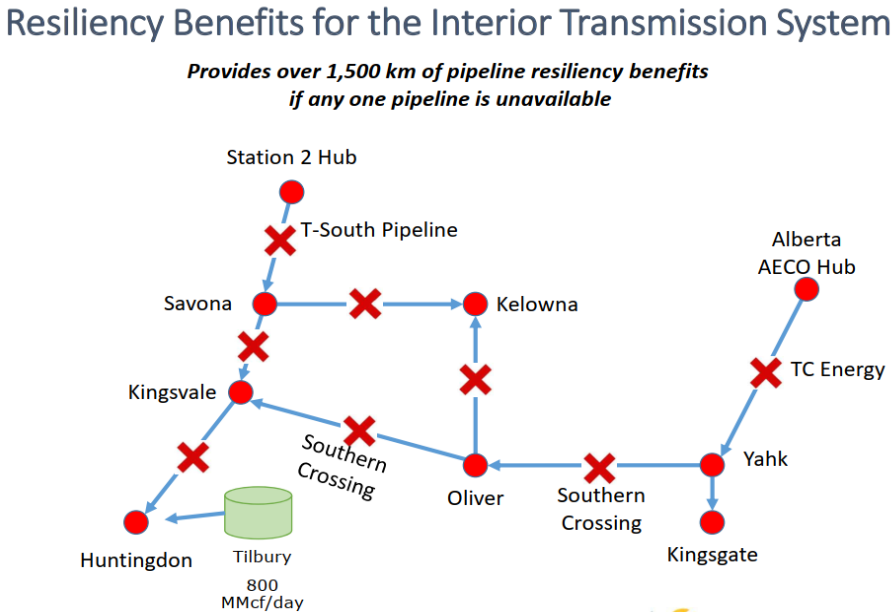
[250] Exhibit B-15, BCUC IR1 24.3 and BCUC IR1 16.18.

[251] Tr. 1, p. 171, 25 to p. 172, l. 9 (Sam).

[252] Exhibit B-15, BCUC IR1 16.18.

[253] Exhibit B-24, Sentinel IR1 77.

[254] Exhibit B-4, Workshop Presentation, slide 46.



146. Mr. Chernikhowsky explained:[255]

> In fact, this is where I'd like to dispel the perception that the TLSE project solely benefits customers in the Lower Mainland Region. In reality, it will provide improved resiliency for customers all the way from Vancouver, to Kelowna, to Cranbrook. And that's because it would allow us to lose supply from any one gas transmission line in the Interior, and yet still be able to meet customer demand for the vast majority of the year. And that is what we're showing on the slide.
>
> Those red x's represent a pipeline path that is out of service. Now, to be clear, it's not intended to say that the system can survive with all of the lines out of service, but rather if any one of those pipelines were out of service, for either planned or unplanned reasons, the capacity provided by the TLSE project would allow us to augment the system gas flows through the displacement process that Shawn [Hill, Director Gas Supply] just described. So by supplying more gas into the Lower Mainland, more gas would be available in the Interior. Effectively, the gas in the Interior would stay in the Interior, and be rerouted to supply load in that area. While at the same time the Lower Mainland load is temporarily supplied from the storage at Tilbury.
>
> So, if you could only build one resiliency project, either one in the Interior, or one in the Lower Mainland, then the Lower Mainland makes much more sense because it allows you to address resiliency for both areas at once. And further,

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[255] Tr. P. 186, l. 23 to p. 188, l. 12 (Chernikhowsky); see also Tr. 1, p. 48, ll. 2-9 (Hill).

> between the resiliency already provided to Vancouver Island through the Mt. Hayes facility, the addition of the TLSE will basically allow us to provide resiliency for all our customers in our major customer service areas.

(b) Contracting for More Off-System Storage Would Not Prevent or Limit a Winter Outage

147. As part of the Step 1 analysis, FEI considered the potential to avoid or materially reduce the scope of the expected outage by acquiring more off-system storage at JPS and Mist, the two underground storage facilities in the Pacific Northwest region.[256] These facilities serve an important function in normal operations, balancing customer loads during both the summer and winter; however, acquiring additional off-system storage would not prevent or mitigate the catastrophic consequences of a winter T-South no-flow event.[257]

148. Guidehouse explained that off-system storage inherently provides less resiliency to an LDC than on-system storage", simply by virtue of being dependent on the transmission system for delivery.[258] Mr. Moran also observed that, in the case of FEI, acquiring more off-system storage would mean "subscribing to transportation or storage capacity on the same set of assets [JPS and Mist], and given that there's just a lack of diversity of deliverability assets, across storage and transportation, that there's just limited opportunities to execute in a way that's meaningful to strengthening resiliency."[259]

149. The problem goes beyond that:

- As described in Part Three, Section D, JPS and Mist gas is physically unavailable to FEI during a winter disruption on the T-South system, regardless of any contractual rights. Acquiring further storage capacity at JPS and Mist would thus not mitigate FEI's exposure to widespread outages following a winter T-South no-flow event.[260]

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[256] See Exhibit B-1-4, Application, Figure 3-18 which depicts the location of these.

[257] Exhibit B-1-4, Application, p. 69.

[258] Exhibit B-1-4, Application, Appendix A, p. 14.

[259] Tr. 1, p. 133, ll. 3-12 (Moran).

[260] Exhibit B-15, BCUC IR1 16.14.

- Although gas can physically flow northwards in the non-winter months, FEI's ability to access supply from the US Pacific Northwest during non-winter periods is still predicated on voluntary mutual aid assistance.[261] The provision of mutual aid will always be contingent upon a utility first meeting its own needs.[262]

- In any event, FEI's ability to contract for additional gas storage at JPS and Mist is also increasingly in question.[263] JPS and Mist have been fully contracted since 2013 and the cost of off-system storage has steadily increased.[264]

150. Increasing LNG storage at Tilbury through the TLSE Project represents for FEI what JPS and Mist are for utilities in the Pacific Northwest – on-system storage accessible even during a disruption to upstream supply.[265]

(c) Load Management: AMI Is Complementary to TLSE Project, Not An Alternative

151. FEI's Step 1 analysis considered the potential for AMI, as a load management tool, to avoid or mitigate the Lower Mainland outage that will occur on Day 1 of a winter no-flow event on T-South. As discussed below, AMI is complementary to the TLSE Project, but is not a true alternative.

152. AMI technology will allow FEI to monitor, in near-real time, the performance of all stations throughout FEI's system and automatically shut-off customer meter valves.[266] AMI does add resiliency in the sense that it: (1) improves FEI's response time when shutting-down the system, thereby mitigating the risk of an uncontrolled system pressure collapse; (2) offers greater

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261 See also, Exhibit B-19, CEC IR1 25.1 which explains why expanded storage at JPS and Mist does not rectify the underlying factors that make off-system storage a poor resiliency solution for FEI.

262 Exhibit B-15, BCUC IR1 16.16.

263 Factors affecting contracting additional storage include increasing demand charges and limited opportunities for the expansion of off-system storage capacity: see e.g., Exhibit B-46.1, Exhibit B-19, CEC IR1 25.1 and 25.2.

264 Exhibit B-15, BCUC IR1 46.1.

265 Exhibit B-24, Sentinel IR1 45.

266 Exhibit B-15, BCUC IR1 16.1.

potential to scale the load shedding to match any remaining supply; [267] and (3) as discussed in Part Three, Section F above, accelerates aspects of the outage restoration process. However, AMI does not add supply. Mr. Moran stated at the Workshop, for instance:

> Industrial curtailment and demand response measures. These are very important measures in order to -- (inaudible) when thinking through how to respond to a significant supply disruption and bringing down the system by lowering demand, lowering the required pressure support and hopefully preventing hydraulic failure and collapsing the entire system. A curtailment and demand response are not the same thing as supply. They are tools to mitigate the consequences of a supply disruption, but they don't help provide supply as a means of conjuring [sic] that upstream supply disruption.[268]

153. As discussed in Part Three above, the current facilities at the Tilbury site are only capable of serving 17 percent of the peak Lower Mainland load, and there is also a significant shortfall in a normal winter. In other words, adding AMI without addressing the supply shortfall means that the majority of Lower Mainland customers would still lose service on the first day of a winter no-flow event. Even with AMI, it would take over two months to fully restore service to the Lower Mainland.

154. The TLSE Project will make AMI far more effective as a resiliency tool. TLSE Project provides FEI with the time to use near real-time system demand and supply information to delay load shedding or scale and refine its response to minimize harm. FEI will be able avert an uncontrolled pressure collapse in almost all situations.[269]

(d) None of the Four Pipeline Options Could Prevent a Widespread Lower Mainland Outage

155. FEI's Step 1 analysis also examined the four different regional pipeline options that have been discussed in the industry: (1) an SCP expansion to T-South at Kingsvale; (2) an SCP expansion to Huntingdon; (3) a T-South expansion; and (4) the Gorge Expansion project in Oregon. Figure

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[267] Exhibit B-15, BCUC IR1 16.1 and 16.2.

[268] Tr. 1, p. 133, l. 26 to p. 134, l. 6 (Moran). See also: Tr. 1, p. 157, l. 24- p. 159, l. 17 and p. 100, l. 25 to p. 101, l. 3 (Sam).

[269] Exhibit B-26, BCUC IR2 69.1.

4-4 of the Application, reproduced below, shows these potential regional pipeline expansions.[270] The evidence discussed below demonstrates that, while the extension of SCP would provide beneficial pipeline diversity, none of the pipeline options could avoid a widespread Lower Mainland outage on the first day of a winter no-flow event.

Figure 4-4: Potential Regional Pipeline Infrastructure Expansions

Contracting More Capacity on Expanded T-South Would Not Help During No-Flow Event

156. T-South, although consisting of twin pipelines, operates as a single system in the same right-of-way. FEI expects that any future T-South expansions would maintain this model.[271] Mr. Moran of Guidehouse observed that contracting for more capacity on the T-South system "would

[270] Exhibit B-1-4, Application, Figure 4-4 (p. 85).

[271] Exhibit B-1-4, Application, Section 4.3.4.2.

not be strengthening resiliency."[272] A T-South system expansion leaves FEI exposed to the current single point of failure risk.[273]

Gorge Capacity Expansion Would Leave FEI Exposed

157. An expansion of the NWP Gorge pipeline in Oregon would not avoid or mitigate the known consequences of a winter no-flow event on T-South.[274] As discussed in Part Three, Section B above, in normal operations gas physically flows southbound across the border and cannot flow northbound in winter. FEI's access to supply from the US Pacific Northwest relies on displacement or notional deliveries, which are premised on uninterrupted flows southbound on the T-South system. A winter no-flow event on T-South would thus prevent FEI from making use of any new NWP Gorge capacity through displacement.[275]

SCP Extensions Could Not Prevent Widespread Outages in a Winter No-Flow Event

158. The two SCP extension projects are routing options being considered for FEI's Regional Gas Supply Diversity ("RGSD") project, which if pursued would be unlikely to be in service before 2030.[276] While the construction of either of these options would be beneficial from a resiliency standpoint, neither would eliminate the need for the TLSE Project.

159. The expansion of SCP to Huntingdon would provide a new separate path to the Lower Mainland, while extending the SCP to Kingsvale would help maintain supply to the Lower Mainland in the event that an incident on T-South occurred north of Kingsvale.[277] However, in order for an SCP extension to avoid hundreds of thousands of Lower Mainland customers losing service on the first day of a winter no-flow event on T-South (i.e., provide the same benefit that new on-system storage will provide), FEI would need to hold <u>double</u> the pipeline capacity it

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[272] Tr. 1, p. 132, l. 23 to p. 133, l.2 (Moran).

[273] Exhibit B-33, CEC IR2 106.2.

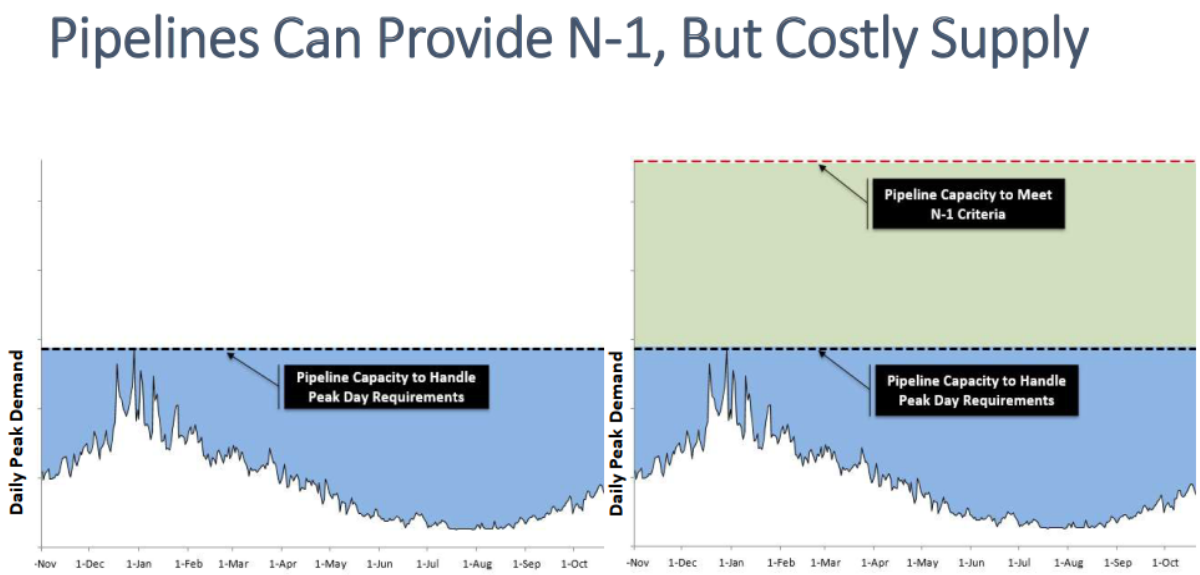
[274] Exhibit B-1-4, Application, pp. 86-87.

[275] Exhibit B-1-4, Application, pp. 86-87; Exhibit B-15, BCUC IR1 16.5.

[276] Exhibit B-1-4, Application, pp. 88.

[277] Exhibit B-1-4, Application, p. 87. All of the gas from SCP would have to travel on that 172 km segment of the T-South system to reach the load centre in the Lower Mainland.

requires for ordinary operations. Significant pipeline capacity would remain unused except during a winter no-flow event. This is illustrated in the following Workshop slide.[278]



*Pipelines are an important solution, but relying **solely** on pipelines to improve resiliency would drive inefficient and uneconomic supply outcomes*

160. It might not even be feasible to build a new SCP pipeline extension big enough so as to be able to, on its own, serve most of the Lower Mainland load during a winter no-flow event on the T-South system.[279] Regardless, it would not be cost-effective.[280] FEI would incur significantly higher annual costs holding that much pipeline capacity compared to its optimal supply portfolio under the ACP.[281]

161. This is a good illustration of the merits of a portfolio approach to resiliency, discussed briefly in Part Four, Section B. On-system storage (i.e., the TLSE Project) is best suited to serve Lower Mainland load during a short duration no-flow event. Splitting the optimal amount of pipeline capacity (as defined by the Annual Contracting Plan) between the T-South system and

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278 Exhibit B-4, Workshop Presentation, slide 33.

279 Exhibit B-15, BCUC IR1 16.9.

280 Exhibit B-15, BCUC IR1 16.3.

281 Exhibit B-1-3, Confidential Application, pp. 90-91.

the new pipeline would then limit the potential risks associated with longer-term partial constraints.

D. ADDING REGASIFICATION AT TILBURY WITHOUT ALSO ADDING STORAGE IS UNREALISTIC AND INSUFFICIENT

162. Some parties inquired about the potential to address the regasification (capacity) constraint at Tilbury on its own, without adding storage capability (energy). This approach is problematic for two reasons.

(a) It Is Impractical to Add Regasification Capacity Without also Replacing Base Plant Tank

163. First, there would be significant costs and engineering challenges with this approach, so as to render it impractical. An AACE Class 5 cost estimate for the minimum infrastructure investment alone is approximately $215 million.[282] This new equipment would still be connected to storage assets that were not designed to operate with a five-fold increase in regasification output. There would be other significant engineering and capital costs to ensure the existing system could operate reliably under very different operating parameters.[283] Before even attempting that work, FEI might need to drain the tank to conduct an internal inspection and complete structural reinforcements to ensure the ability of the tank to meet current seismic requirements.[284] Regardless, the Base Plant tank is also over 50 years old, and would still need to be replaced at some point.[285]

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[282] This included: (1) new high pressure pumps (200 MMcf/day each) with a new pump house and changes to the existing Base Plant tank piping; (2) new ancillary piping and pipe racks including an 18 inch line connecting the Base Plant tank to the Tilbury 1A tank; and (3) new vapourizers sized to meet the required capacity and response times: Exhibit B-26, BCUC IR2 78.1.

[283] Please refer to Exhibit B-26, BCUC IR2 78.1 which provides further considerations which were not included in the cost estimate.

[284] Exhibit B-26, BCUC IR2 78.1. 1.The Base Plant tank is also operated at approximately half of its 0.6 Bcf design inventory at present (0.35 Bcf) while FEI considers whether the tank needs to be derated for seismic reasons.

[285] Exhibit B-26, BCUC IR2 78.1.

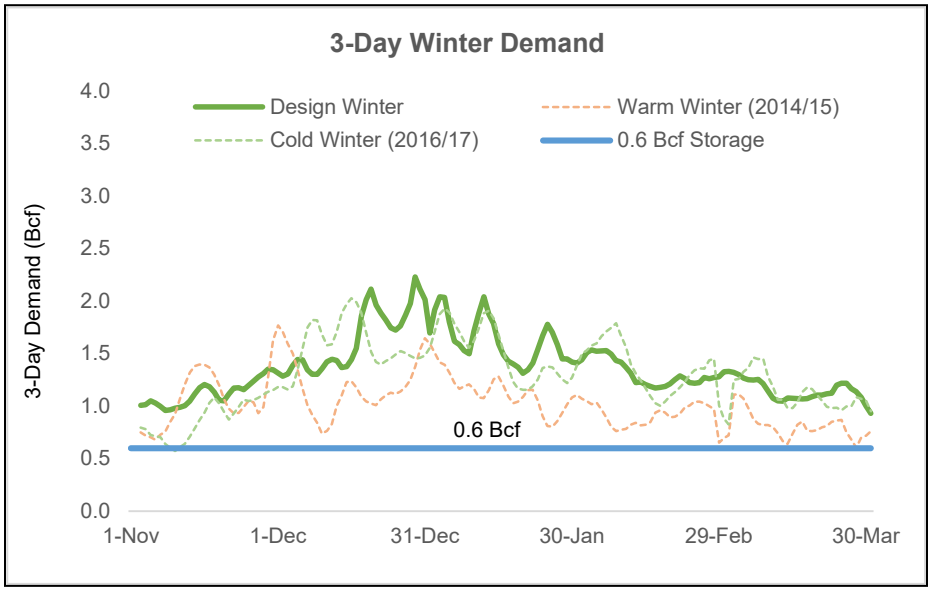
(b) A Higher Rate of Regasification Would Quickly Exhaust the Stored LNG at Tilbury

164. In any event, a higher rate of regasification would consume the LNG faster, and there would be insufficient LNG at Tilbury to outlast a winter no-flow event of any appreciable duration.

165. In order to illustrate this point, FEI analysed how long various volumes of LNG would last if there was no regasification constraint at Tilbury (i.e., in a hypothetical scenario where FEI has 800 Mmcf/day of regasification, rather than the existing 150 MMcf/day).

166. The figure below shows that 0.6 Bcf of LNG would last less – generally significantly less – than three days at any point during the design winter (the typical basis for utility planning) or the coldest and warmest winters of the past decade.[286] It would take only approximately 17 to 18 hours to consume 0.6 Bcf of LNG during winter peak load conditions.[287]

Figure 3-15: Cumulative 3-Day Lower Mainland Load



[286] Exhibit B-1-4, Application, p. 57. The figure presents the Lower Mainland rolling 3-day winter loads, not only for a design winter (solid green line), but also data from the warmest (orange dashed line 2014/15) and coldest (green dashed line 2016/17) winters in the last 10 years. A shortfall exists during any times where the winter load lines are above the horizontal blue 0.6 Bcf line, which represents the amount of load that Tilbury can serve during the 3-day period if it was completely full to start with.

[287] Exhibit B-1-4, Application p. 65; see also Tr. 1, p. 18, ll. 13-16 (Leclair).

167. In the response to BCUC IR2 78.1, FEI also performed further hypothetical calculations. They reinforce that FEI would not be able to withstand a winter disruption on the T-South system and FEI needs both additional regasification capacity and storage at Tilbury for resiliency purposes (i.e., a minimum of 2 Bcf of storage and 800 MMcf/day of regasification).[288]

168. Finally, it should be recognized that using the 0.6 Bcf current design capacity of the Base Plant tank in these hypothetical scenarios is very optimistic as the current operational capacity of the tank has been reduced to 0.35 Bcf.[289] It would take only approximately 9 hours to consume 0.35 Bcf in peak conditions. Moreover, FEI uses the tank for peak shaving so the stored volume will sometimes be less than 0.35 Bcf, which would further shorten the duration.[290]

Tilbury 1A LNG Inventory Is Not Dependable and Would Still Be Insufficient in Any Event

169. In order to further illustrate the point, FEI expanded the hypothetical "no regasification constraint" scenario to include Tilbury T1A LNG volumes.[291] FEI's analysis in its response to BCUC IR2 78.1 shows that, even hypothetically assuming (in particular): (1) access to 1.27 Bcf of Tilbury supply (comprising 0.6 Bcf design capacity of the Base Plant tank and the annual average level of the 0.67 Bcf from the Tilbury T1A); and (2) customer demand can be reduced by 39 MMcf/day through conservation, FEI's LNG inventory would be exhausted well before three days had lapsed.[292] Again, this scenario is very optimistic. As described in the previous paragraph, the Base Plant is currently operated to a maximum of 0.35 Bcf. Further, as explained in Part Five, Section E, it would be inappropriate to assume the entire 1 Bcf at Tilbury T1A would be available in an emergency because it is designed for, and actively used for, other purposes.

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288 Exhibit B-15, BCUC IR1 78.1.

289 Exhibit B-35, Sentinel IR2 10.

290 See Exhibit B-40, Confidential BCUC Panel IR1 1.4. for further discussion regarding the storage inventory of the Base Plant tank.

291 Exhibit B-1-4, Application, pp. 62-66.

292 Exhibit B-26, BCUC IR2 78.1.

PART FIVE: APPROPRIATE SIZING OF THE TLSE PROJECT

A. INTRODUCTION

170. This Part addresses the second stage of FEI's alternatives analysis, which was to identify the appropriate sizing of regasification and storage at Tilbury. As Mr. Sam stated: "Our current on-site LNG storage assets and regasification equipment are an ideal solution, they are just not big enough."[293] The preferred alternative of a new 3 Bcf tank with 800 MMcf/day of new regasification capacity avoids or reduces the catastrophic impacts of a winter no-flow event on T-South, and is ultimately less costly for customers than a 2 Bcf tank due to the financial benefits associated with the "third Bcf".

171. The subsections in this Part demonstrate the following points:

- First, FEI's sizing analysis incorporates the considerations that Guidehouse has identified as important.
- Second, 800 MMcf/day, provided by four 200 MMcf/day units, is optimal from the perspective of meeting daily Lower Mainland load in winter and providing other operational and reliability benefits.
- Third, a new 3 Bcf tank will allow FEI to reserve a portion (2 Bcf based on current load), and the financial value of the supply benefits from the "third Bcf" on their own will more than offset the incremental capital cost of a larger tank.
- Fourth, refurbishing and augmenting the existing Base Plant with a new smaller (less than 2 Bcf) tank is not an effective or efficient approach and lacks the ancillary benefits of a larger tank.

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[293] Tr. 1, p. 166, ll. 11-13 (Sam).

- Fifth, the economies of scale and associated cost/benefits diminish for a tank above 3 Bcf, such that it is not the preferred option.

B. FEI'S SIZING ANALYSIS ACCOUNTS FOR FACTORS IDENTIFIED BY GUIDEHOUSE

172. Guidehouse explained that that facility sizing should be informed by reference to the time required for a specific utility – in this case, FEI - to prepare for, withstand and recover from a high impact event.[294] This is depicted in the following slide from Mr. Moran's presentation at the Workshop:[295]

Considerations for Optimal Amount of On-System Storage

Framework for Determining Necessary Storage and Vaporization

Capability	Attributes	Critical Defining Factors
Preparation	The ability to prepare for and prevent initial system disruption	• The anticipated time required to conduct a planned shutdown, i.e., an orderly curtailment of customers to reduce the amount of work and time required to restore service.
Withstanding	The ability to withstand, mitigate, and manage system disruption	• The amount of load on the system at the time of disruption • The amount of load needed to be retained in the event of a supply disruption in order to prevent a collapse of the system, i.e., hydraulic failure.
Recovery	The ability to quickly recover normal operations and repair system damage	• The time of year, i.e., a disruption in the beginning of winter may exhaust the stored gas, requiring time to refill and limits the ability to respond to subsequent disruptions. A disruption in the summer will have a different impact • The anticipated time, level of effort and expense required to restore a supply disruption.

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173. Mr. Moran, referencing the above slide, described the decision-making process with respect to each capability: [296]

> So what goes into decision-making in terms of preparation? It's the amount of time required to conduct a planned shutdown. The amount of time needed to kind of think through, okay, what just happened, and what do we need to do, you know, curtailing customers, using curtailment, using demand response. Because if we can bring down demand in an effectively meaningful way, then that helps kind of mitigate the amount of time required to ease the system back up and it will also

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294 Exhibit B-1-4, Application, Appendix A, p. 49. Mr. Moran of Guidehouse also stated at the Workshop: "We need to think about how much time is required to respond to a system disruption, and how much volume is required in that amount of time to mitigate the risk that we're trying to prevent." Tr. 1, p. 135, l. 20 to p. 136, l. 2 (Moran).

295 Exhibit B-5, slide 21.

296 Tr. 1, p. 137, l. 17 to p. 138, l. 23 (Moran).

> minimize the level of supply disruption so that we can impact the least amount of customers as possible, especially during the wintertime. So that's what goes into preparation.
>
> In terms of withstanding, we need to understand the amount of load on the system at the time of the disruption. This is why I've been talking about the load profile, demand profile, the FEI customer base. We need to understand the amount of load that needs to be retained in the event to a supply disruption so that we can prevent wholesale collapse of the system, i.e. the hydraulic failure, and minimize the impact of a supply disruption.
>
> And then recovery, you know, the amount of time it will take to bring the system back up, the time of year that it occurs, the amount of time that's required to refill the tank, all of those things kind of go into decision-making in terms of the amount of storage required and the amount spend that would require. And so the amount of anticipated time, the level of effort and the expense that's required to restore a supply disruption, that goes into decision making around recovery.

174. As shown next, FEI's approach to sizing of regasification and the storage tank draws on these principles.

C. REGASIFICATION CAPACITY: 800 MMCF/D IS OPTIMAL

175. FEI described in Part Three of this Submission how the primary existing constraint at Tilbury is the limited regasification capacity of 150 MMcf/d, which falls well short of being able to meet the daily Lower Mainland load in winter. As outlined below, regasification capacity of 800 MMcf/day is optimal in light of FEI's daily winter load and other reliability and operational considerations.

(a) Proposed 800 MMcf/d Will Serve All But Peak Design Day Load

176. FEI determined the regasification capacity requirements based on peak demand in the Lower Mainland, in consideration of design demand[297] and actual demand over the last 10 years.[298]

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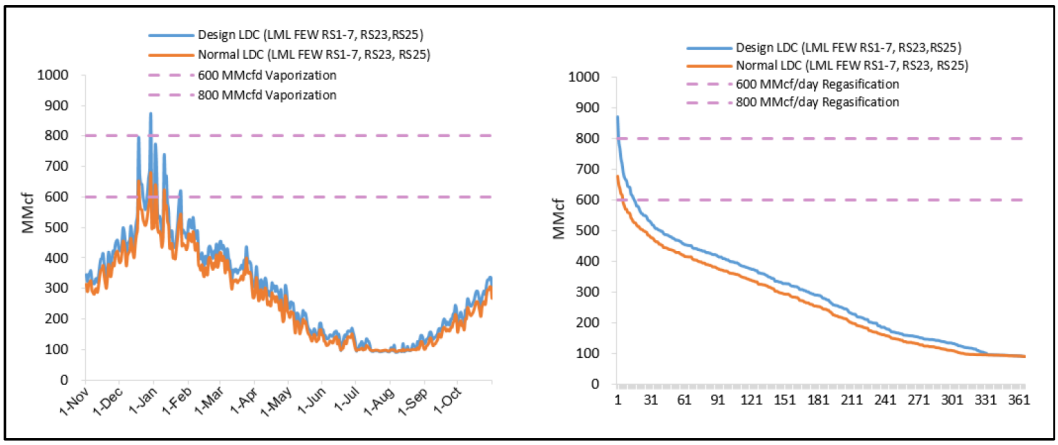
[297] Utility system planning is typically conducted based on a "design year", so as to ensure customers can be reliably served in all conditions.

[298] FEI did not consider it reasonable to rely on voluntary curtailment in sizing the regasification capacity for the reasons outlined in the response to BCUC IR1 19.2 (Exhibit B-15).

177. FEI will use regasification units with a capacity of 200 MMcf/day, since they offer a flexible output range and maximize cost and space requirements.[299] Thus, in practice, the options for regasification are 600 MMcf/day and 800 MMcf/day. Anything less than that (i.e., 200 or 400 MMcf/day) would come nowhere close to supporting Lower Mainland load during much of the year, such that there will still be widespread outages on the first day of a winter no-flow event.

178. Figure 4-12 of the Application, reproduced below, shows the extent to which 600 MMcf/day and 800 MMcf/day of regasification could serve Lower Mainland load in the absence of other sources of supply (i.e., the figure assumes that interruptible service customers have all been curtailed). The blue line is the 2019/20 design year daily firm load. The orange line reflects actual firm demand over the last 10 years. Anything above the horizontal dashed lines would, in essence, represent firm load lost on Day 1 of a winter no-flow event with regasification capacity of 600 MMcf/day or 800 MMcf/day:

Figure 4-12: Lower Mainland Load Duration Curves[103]



179. The figure shows that:

- 800 MMcf/day of regasification will be sufficient to serve Lower Mainland load during a no-flow event on all but the 2019/20 peak design day (it will support about [redacted] of the system load on that day). It will also serve approximately

[299] Exhibit B-1-4, Application. p. 116; see also Exhibit B-15, BCUC IR1 19.3.

100 percent of the customers under the 2019/2020 normal winter load scenario.[300]

- 600 MMcf/day of regasification capacity could support only 69 percent of design peak demand for the 2019/20 design year, and would fall well short of 2019/20 design year demand on other days.[301] It would be able to serve actual firm daily demand over the last 10 years on most, but not all days.

(b) Incremental Benefits of the One Additional Unit Outweigh the Incremental Cost

180. Although three regasification units (600 MMcf/d) would significantly limit or avoid a disruption on Day 1 of a winter no-flow event, customers benefit from having an additional unit (for a total of 800 MMcf/d) in ways other than the capability of serving additional load on very cold days. The additional unit will support future load growth and provide back-up if a problem with one regasification unit were to occur.[302]

181. The incremental cost of obtaining this additional resiliency, reliability and optionality is modest, relative to the overall cost of the project. The costs savings of reducing the regasification capacity from 800 MMcf/day to 600 MMcf/day (i.e., a reduction of one vapourizer) would amount to between $14.5 to $23.5 million.[303] FEI submits that it is in the best interest of customers to make the additional investment.

D. STORAGE CAPACITY: A 3 BCF TANK IS THE BEST OPTION FOR CUSTOMERS

182. As discussed below, approximately 2 Bcf of dependable LNG storage is required to serve Lower Mainland firm load for three days in the winter. Conceptually, the required 2 Bcf of dependable energy at Tilbury could be achieved in different ways:

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[300] Exhibit B-1-4, Application, Appendix A, p. 48.

[301] Exhibit B-15, BCUC IR1 19.3 and 19.6.

[302] Exhibit B-15, BCUC IR1 19.3.

[303] Exhibit B-15, BCUC IR1 19.5.

(a) a new 3 Bcf tank, reserving 2 Bcf for resiliency based on the current Lower Mainland load and using the "third Bcf" to replace the current functions of the Base Plant and derive other benefits for customers;

(b) a new 2 Bcf tank, reserving the entire volume for resiliency and going to market to replace the current functions of the Base Plant; or

(c) a new smaller tank to supplement the existing Base Plant tank, reserving the entire combined volume for resiliency, and going to market to replace the current functions of the Base Plant.

The evidence discussed below demonstrates that a new 3 Bcf tank is the most cost-effective way to avoid or mitigate a widespread outage following a no-flow event, and provides a variety of ancillary benefits unavailable with a smaller tank.

(b) 2 BCF of Dependable Energy Is Required to Outlast No-Flow Period

183. As discussed in Part 3 of this Final Submission, it is reasonable to expect that the next no-flow event will be at least two days and more likely three days in winter conditions. Assuming that regasification equipment is sized so as to eliminate any constraint (i.e., 600 MMcf/d or 800 MMcf/d), simple mathematics indicate how much LNG would be required to serve the current firm load in the Lower Mainland for three days.

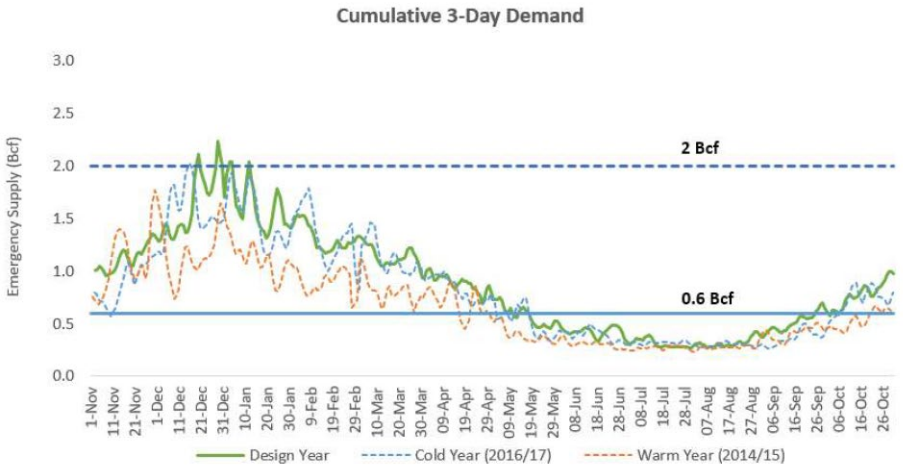
184. The figure below[304] depicts the extent to which 2 Bcf will serve the cumulative 3-day Lower Mainland 2019/20 design year demand. It also shows the actual demand of the warmest and coldest year experienced by the Lower Mainland in the past ten years (2014/15 and 2016/17, respectively), although it is most appropriate to plan based on design year demand for reasons discussed previously. The figure shows that:

[304] Exhibit B-4, Workshop Presentation, slide 39; Exhibit B-15, BCUC IR1 11.1.

- 2 Bcf would generally allow FEI to withstand and recover from a 3-day no-flow event on the T-South system without having to shut down significant portions of FEI's distribution system or otherwise causing firm customers to lose service. However, 2 Bcf would leave little, if any, margin to address subsequent gas supply constraints of the nature that occurred following the T-South Incident no-flow period.

- An LNG reserve less than 2 Bcf would have resulted in a material shortfall in portions of the 2019/20 design winter or an actual cold winter.

Adequacy of Current Storage - Duration

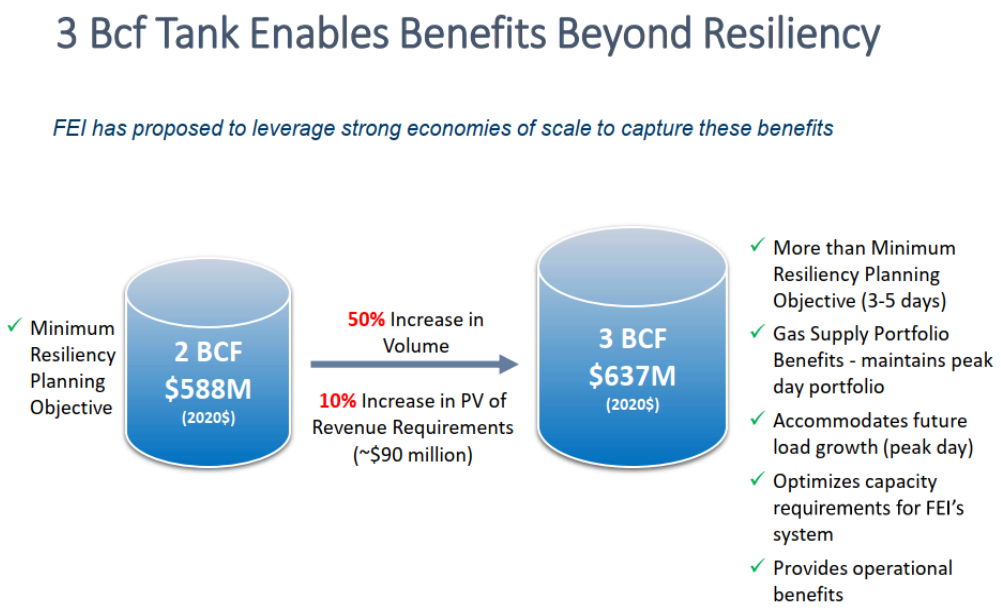


(c) Relative to a 2 Bcf Tank, a 3 BCF Tank Provides Additional Resiliency and Ancillary Benefits With a Financial Value that Exceeds the Incremental Cost

185. FEI evaluated the 2 Bcf and 3 Bcf sizing options against a number of criteria.[305] As discussed below, the comparison consistently favours a 3 Bcf storage tank. FEI can reserve 2 Bcf (based on current load) solely for resiliency, while the "third Bcf" provides a resiliency margin

[305] Exhibit B-1-4, Application, pp 103-104. Table 4-5 of the Application summarizes the results of the evaluation.

and other gas supply and operational benefits consistent with those provided by the existing Base Plant.[306] The following Workshop slide encapsulates those benefits:[307]



Criterion 1 (Functionality Across a Range of Emergencies and Gas Supply Events) Favours 3 Bcf Tank

186. A 3 Bcf tank will provide a much greater ability to manage a range of emergency and gas supply events.

187. An additional Bcf of LNG will support the Lower Mainland winter load for up to an additional two days (i.e., approximately 5 days total). In contrast, 2 Bcf of LNG would cover a 5-day event for less than half of the winter period.[308]

188. Alternatively, FEI would be better positioned to manage subsequent gas supply events that occur following the initial emergency where the initial no-flow event is resolved within two or three days.[309] Supply shortfalls occurred several times during the winter following the T-South

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306 The base plant has is used for emergency supply and capacity, speaking supply, and operations support/flexibility: Exhibit B-18, BCSEA IR1 4.2.

307 Exhibit B-4, Workshop Presentation, slide 41.

308 Exhibit B-1-4, Application, Figure 4-8 (p. 105).

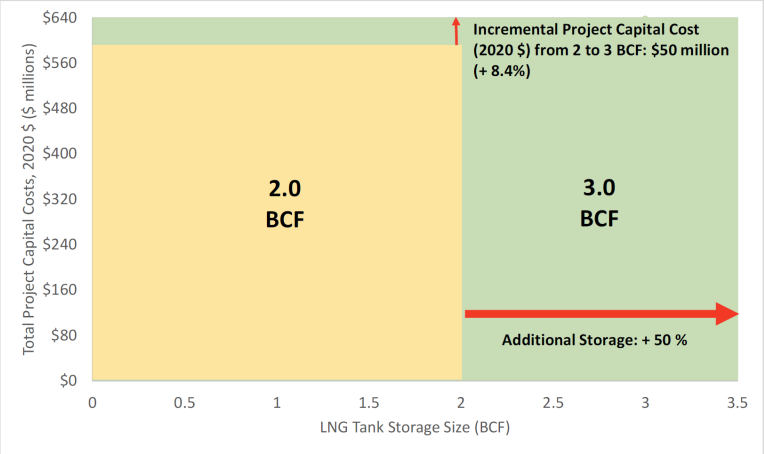
309 Exhibit B-1-4, Application, p. 105; see also Exhibit B-26, BCUC IR2 88.1.2.

Incident – which was only an average winter – while T-South operated at reduced capacity.[310] If multiple no-flow events exceed the 3 Bcf capacity of the storage tank, FEI would use the additional time provided by the storage to shut down the system in a controlled manner.[311] Further, access to additional supply from another pipeline, such as that contemplated in the RGSD project, would help prolong the supply held in the TLSE tank and thus mitigate the residual risk.[312]

Criterion 2 (Capital Cost and Economies of Scale) Favours 3 Bcf Tank

189. The incremental cost difference between 2 Bcf and 3 Bcf is relatively small as a result of inherent economies of scale.[313] As shown in Figure 4-10 of the Application (reproduced below), the financial comparison demonstrates that 50 percent more storage can be achieved for approximately $50 million in 2020 dollars, or an additional 8.4 percent in capital cost.[314]

Figure 4-10: Graphical Illustration of Economies of Scales Between 2 and 3 Bcf Tank Sizes



190. For a typical FEI residential customer consuming 90 GJ per year, the additional levelized delivery rate impact for a 3 Bcf tank is only approximately $2.30 per year. Ultimately, the

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310 Exhibit B-1-4, Application, Figure 4-9 (p. 106)

311 Exhibit B-26, BCUC IR2 88.1.2.

312 Exhibit B-26, BCUC IR2 88.1.1.

313 Exhibit B-1-4, Application, p. 107.

314 Exhibit B-1-4, Application, Figure 4-10 (p. 108).

economies of scale significantly favour a 3 Bcf tank versus a 2 Bcf tank. In the response to BCUC IR1 16.27, FEI compares the estimated capital costs and includes the financial evaluation of on-system storage at Tilbury with a tank size of 1.0 Bcf, 1.5 Bcf, 2.0 Bcf, 3.0 Bcf, and 3.5 Bcf.[315]

Criterion 3 (Constructability) Is Similar for Both Tank Sizes

191. FEI has not identified any safety of or constructability risks with either tank size.[316]

Criterion 4 (Flexibility to Accommodate Future Growth) Favours 3 Bcf Tank

192. A larger 3 Bcf tank and regasification capacity not only provides better functionality to meet current demands, but also provides the potential to continue to meet Lower Mainland load for three days even if the load in the region increases.[317] That is, the portion of the tank set aside solely for resiliency purposes could be adjusted depending on the Lower Mainland load so as to provide the consistent level of resiliency (i.e., support the load for three days).

Criterion 5 (Ancillary Benefits): Incremental Cost of "Third Bcf" Are Offset by Avoided Annual Gas Supply Costs

193. There are a number of ancillary benefits associated with the "third Bcf". The financial value of the gas supply benefits alone is so significant as to more than offset the incremental capital cost of the larger tank.

194. FEI's current gas supply resource stack includes approximately 0.35 Bcf of storage and 150 MMcf/day of regasification capacity at the Tilbury Base Plant, and those requirements will continue. With a smaller 2 Bcf tank, it would not be possible to reserve 2 Bcf exclusively for resiliency without foregoing the gas supply and operational function that the current Base Plant has served since 1971.[318] FEI would need to procure these resources in the market, at a cost of approximately $30 million per year. By contrast, a 3 Bcf tank would enable FEI to reserve 2 Bcf

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315 Exhibit B-15, BCUC IR1 16.27.

316 Exhibit B-1-4, Application, p. 108.

317 Exhibit B-1-4, Application, pp. 109-110.

318 Exhibit B-26, BCUC IR2 88.2.

for resiliency, replace the existing gas supply benefits provided by the Base Plant, and still leave some tank capacity for other beneficial uses.[319]

195. Mr. Hill, who is responsible for managing FEI's gas supply portfolio, explained the basis of the $30 million annual estimate as follows:

> So, as we've discussed today already, you know, putting a gas supply portfolio together there's cost-effective resources to meet that load profile that we have. And basically the Tilbury base plant, the gasification part of it, and 0.3 Bcf of storage of the inventory at the base plant is part of our ACP today for our rates 1 through 7 [i.e. firm service] customers. So maintaining this benefit to customers in the gas supply has a lot of benefits to customers and absent this renewal of this resource, as the Tilbury facility ages, we'd have to go try to find this incremental resource in the open market. We estimate that this incremental avoided cost for customers is about $30 million a year and that's simply taking -- trying to find this capacity off the West Coast system, taking the existing toll today and multiplying by 365 days, which gives us about $30 million a year. So, again, the benefit of this asset is it maintains our existing gas supply benefits. So absent this resource or maintaining Tilbury over time, we're going to have to find something else to meet our requirements in our annual gas supply portfolio. [320]

196. When factoring in the additional annual costs required to secure capacity from the market, the total PV of incremental revenue requirement over a 67-year period for a 2 Bcf tank would be $313 million higher than the proposed TLSE Project. A 2 Bcf tank scenario would also result in a higher levelized delivery rate impact over 67 years by approximately 2.01 percent and a higher cumulative delivery rate impact from 2022 to 2027 by approximately 2.68 percent.[321] Put simply, it would be significantly more costly for customers to contract for a peaking resource than using the storage available from the proposed 3 Bcf storage tank.

197. FEI explained that the estimated annual cost of $30 million that FEI used in this analysis is conservative because FEI used current Westcoast tolls to calculate the cost. In reality, resources in the Pacific Northwest region are fully contracted, likely necessitating that FEI pay a premium

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[319] Exhibit B-4, Workshop Presentation, slide 42.

[320] Tr. 1, p. 182, l. 1 to p. 183, l. 15 (Hill). See also: Tr. 164, ll. 2-21 (Sam).

[321] Exhibit B-15, BCUC IR1 46.2.

over the Westcoast toll to acquire the capacity.[322] This only improves the financial case for a 3 Bcf tank.

Criterion 5 (Ancillary Benefits): "Third Bcf" Avoids Supply and Capital Costs Where Peak is Growing

198. Replacing the Base Plant resources will only require a portion of the "third Bcf", leaving a portion to be used flexibly for other purposes. Mr. Hill described at the Workshop how the incremental 1 Bcf of LNG storage and increased gasification capacity would also represent a potential supply resource to meet future load growth, displacing additional pipeline supply and avoiding the need to construct new compression in the Interior.

199. Mr. Hill demonstrated how the TLSE Project, sized as proposed, could serve load growth using a scenario, depicted in the following slide, where load in the Oliver to Kelowna corridor increased by 30 MMcf/day with the Okanagan Capacity Upgrade project; however, he emphasized that the same principle applies in the context of growth in the Lower Mainland.[323] Mr. Hill stated:

> So what we would do, from a gas, commercial gas supply perspective, is we would reduce our obligation or our flow rate on the [Southern Crossing Pipeline from] 105 to 75 [MMcf/d] and backfill from Tilbury because we have increased gasification over the 150 today. So that 30 million [MMcf/d] in a sense is displacement, just like JPS and Mist is, to our existing facilities today. This is how Tilbury works across over service territories to provide benefits to customers from a gas cost perspective.
>
> So basically just to reiterate, we're buying the same amount of gas on the east side, we reduce the flow on a cold day event and backfill. Absent this resource or the gasification at Tilbury, we'd have to find incremental resources in the open market to buy more gas than the 245 [MMcf/d].

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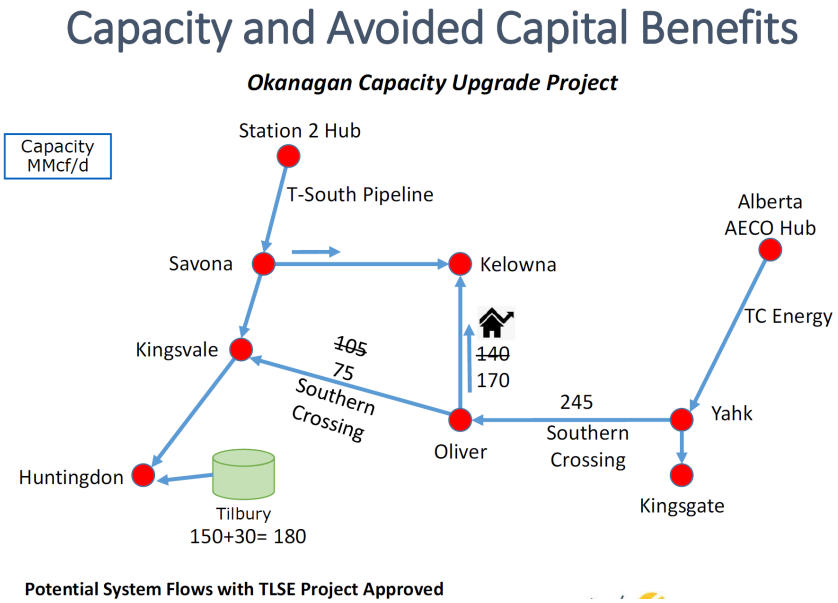
[322] Exhibit B-15, BCUC IR1 46.2.

[323] Exhibit B-4, Workshop Presentation, slide 45; Tr. 1, p. 184, ll. 25-26 to p. 185, ll. 1-20 and p. 186, ll. 7-18 (Hill).



200. For this reason, the "third Bcf" would defer the need for FEI to construct a costly ($20 to 30 million) compression upgrade at the East Kootenay exchange in the future.[324]

Criterion 5 (Ancillary Benefits): Operational Benefits

201. The "third Bcf" offers enhanced daily balancing capability and increased operational flexibility and efficiency, including injecting larger quantities of gas into the system during periods of system constraint.[325] While these benefits are not easily quantifiable, they are a benefit that is not available with a 2 Bcf tank.

Criterion 5 (Ancillary Benefits): "Third Bcf" Provides Security of Supply and Backstopping

202. Mr. Hill identified two other supply benefits associated with the "third Bcf": security of supply and backstopping of other assets:

> It also helps to avoid some mitigation of some long-term third-party storage that we hold at Mist. You know, the incremental storage helps us, gives us flexibility around those renewals with that third party. We do not have renewal rights on those Mist contracts with Northwest Natural.

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[324] Tr. 1, p. 186, ll.2-6 (Hill).

[325] Exhibit B-1-4, Application, pp. 110-116; see also Exhibit B-18, BCSEA IR1 4.1.

> The final thing that I would say, that I'd like to point out, is that because we're going to have more increase gasification in the sense of greater than the 150 that we have today, this system actually helps us -- will help us backstop other resources in our annual contracting plan, such as if there's a failure or a force majeure event at JPS or Mist on a cold day or even a normal day. This asset, because if the gasification is greater than that 150, that will help us provide some backstopping just in normal operations.[326]

203. These benefits, while difficult to quantify in financial terms, are nonetheless real benefits for customers.

Contracting Portion of "Third Bcf" to Others Is an Option to Further Offset TLSE Project Cost of Service

204. FEI identified that another potential option for the "third Bcf", which would not be available with a 2 Bcf tank without foregoing some of the resiliency reserve, would be to offer storage to a third-party (most likely an affiliate of FEI) to generate revenue to offset the cost of service of the TLSE Project.[327] In the response to BCUC IR2 95.3, FEI provided a hypothetical calculation to illustrate how customers could benefit under such an arrangement:[328]

> …if an entity contracts for 20 percent (or X percent) of the storage, then 20 percent (or X percent) of the fully allocated cost of service would be recovered from that entity, thereby reducing the levelized delivery rate impact of the TLSE Project over the 67-year analysis period by 20 percent (or X percent). A 20 percent reduction to the forecast levelized delivery rate impact of 6.67 percent results in an impact of 5.33 percent (i.e., 5.33 percent = 6.67 percent x (1 - 20 percent)).

205. However, FEI also confirmed that:

(a) The option is only conceptual; nothing is contemplated at present and any such arrangement would be market-dependant.[329]

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[326] Tr. 1, p. 182, l. 1 to p. 183, l. 15.

[327] Exhibit B-1-4, Application, p. 115; Exhibit B-15, BCUC IR1 46.3; Exhibit B-26, BCUC IR2 95.2.

[328] Exhibit B-26, BCUC IR2 95.3.

[329] Exhibit B-15, BCUC IR1 46.3; Exhibit B-26, BCUC IR2 95.1.

(b) The TLSE Project is not predicated on any such opportunity arising; rather, it is among a number of options to offset the Project's cost of service for the benefit of customers. Before pursuing any such option, FEI would have to consider the needs of its own customers and any value that FEI would obtain from retaining use of some or all of the "third Bcf" (e.g., the value of using a portion of the "third Bcf" to replace the role currently served by the Base Plant, versus looking to the market).[330]

(c) The BCUC would have oversight of any such arrangements. FEI is subject to a BCUC-approved Code of Conduct and Transfer Pricing Policy for all its dealings with affiliates.[331]

(d) A New 2 or 3 Bcf Tank Is Better for Customers than Keeping and Supplementing the Base Plant Tank

206. The evidence demonstrates that retaining the existing Base Plant and constructing a new tank of less than 2 Bcf (e.g., 1.4 Bcf) tank is an undesirable option for a variety of reasons, including that it results in higher costs for customers and has feasibility challenges.

Unfavourable Economics of Keeping Base Plant Tank and Adding Smaller New Tank

207. While a new 1.4 Bcf storage tank would have a lower total capital cost ($547 million in 2020 dollars) than either the 2 Bcf or 3 Bcf tank options, this does not translate into being financially better for customers.

208. First, it is much higher cost on a per unit basis in light of the strong economies of scale inherent in LNG storage tanks. For instance, the capital cost per Bcf of storage for a 3 Bcf tank (the preferred alternative) is $212 million versus $365 million for augmenting the Base Plant. Put

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330 Exhibit B-26, BCUC IR2 95.5.

331 Exhibit B-15, BCUC IR1 23.3.

another way, customers are getting more for every dollar spent on a 3 Bcf tank with 800 MMCf/d of regasification.[332]

209. Second, keeping and augmenting the Base Plant with a 1.4 Bcf tank would end up being far more costly for customers, given the need to replace the Base Plant in the future.[333] The Base Plant tank has been in service since 1971 (approximately 50 years), and has already exceeded its financial life by 10 years.[334] FEI has not assessed the Base Plant tank's expected remaining operational life, given the difficulty and cost associated with this work.[335] However, FEI's present value analysis (see Table 4-4 from the Application, reproduced below) shows that, even if the Base Plant tank could remain in service for another 20 years it is still financially beneficial to FEI's customers to replace the Base Plant tank now with a new larger storage tank.[336]

Table 4-4: Comparison of the Capital Costs to Build a Single, Larger Tank (2020$)

Scenario	Comparison	Tilbury Base Plant Tank Age at Replacement			
		~55 Years (2025)	~60 Years (2030)	~65 Years (2035)	~70 Years (2040)
2 Bcf Tank and 800 MMcf/d regasification now	PV of Capital Costs ($ millions)	588	588	588	588
1.4 Bcf Tank and 650 MMcf/day now + second 0.6 Bcf tank and 150 MMcf/day in the future	PV of Capital Costs ($ millions)	785	742	706	676
Difference	PV of Capital Costs ($ millions)	**(197)**	**(154)**	**(118)**	**(88)**
2 Bcf Tank and 800 MMcf/d regasification now	PV of Annual Rev. Requirements ($ millions)	951	951	951	951
1.4 Bcf Tank and 650 MMcf/day now + second 0.6 Bcf tank and 150 MMcf/day in the future	PV of Annual Rev. Requirements ($ millions)	1263	1,145	1,093	1,049
Difference	PV of Annual Rev. Requirements ($ millions)	**(312)**	**(194)**	**(142)**	**(98)**

210. In fact, the Base Plant would have to remain in service until it is at least 94 years old to be financially beneficial versus the alternative of constructing a new 2 Bcf tank and regasification

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332 Exhibit B-15, BCUC IR1 16.27; Exhibit B-26, BCUC IR2 82.1.

333 Exhibit B-1-4, Application, pp. 99-100. Tr. 164, ll. 2-21 (Sam).

334 Exhibit B-15, BCUC IR1 40.1; Exhibit B-19, CEC IR1 52.1; Exhibit B-28, RCIA IR2 37.1.

335 Exhibit B-22, RCIA IR1 18.3.

336 This analysis reflects the very conservative (unrealistic) assumption that no further capital maintenance activities for the Tilbury Base Plant would be required: Exhibit B-15, BCUC IR1 16.21; see also Exhibit B-1-4, Application, p. 100.

capacity now. It would be unreasonable to rely on the Base Plant to operate for at least another almost 50 years.[337]

211. Third, replacing the Base Tank would reduce the overall operation and maintenance costs for the overall Tilbury facility by: (1) reducing the number of tanks (two tanks versus three tanks); and (2) confining maintenance activities to much newer equipment.[338] For context, the 2020 operating and maintenance costs for the Base Plant facilities (including the tank) were approximately $2.2 million.[339] While FEI could continue to perform sustaining capital maintenance on the Base Plant tank, the additional operational life that might be achieved through such sustaining capital activities is uncertain given that the tank is already 50 years old.[340]

The Feasibility of Storing 0.6 Bcf In the Base Plant Tank Is in Doubt

212. The Base Plant, in its current form, could not provide 0.6 Bcf of dependable energy and it is questionable whether restoring its design capacity is technically or financially feasible. FEI recently completed a seismic analysis of the Base Plant tank that led to derating the operating capacity of the Base Plant tank to align with current day seismic design standards. FEI currently operates the Base Plant tank at a maximum of 0.35 Bcf. While the Base Plant tank remains in safe operation today, and is compliant with all regulatory requirements, further work would be required to determine the extent of the capital improvements necessary to return the tank back to full operating capacity.[341] None of these costs are factored in to the present value analysis, such that the cost of keeping and augmenting the Base Plant is understated.[342]

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337 Exhibit B-15, BCUC IR1 16.21.

338 Exhibit B-15, BCUC IR1 16.22.

339 Exhibit B-28, RCIA IR2 37.3.

340 Exhibit B-22, RCIA IR1 18.1.

341 Exhibit B-22, RCIA IR1 18.3.

342 Exhibit B-15, BCUC IR1 16.21.

Other Environmental, Reliability and Operational Benefits With a New Tank

213. Other operational advantages to building a new modern tank, over retaining and augmenting the Base Plant include improved environmental performance, improved reliability and response time, and decreased time to fill the tank.[343]

There Are Construction Advantages to Removing the Base Plant Now

214. Removing the Base Plant facilities as part of the TLSE Project facilitates planning and project execution.[344]

(e) A Tank Larger than 3 Bcf Is Neither Practical Nor Cost Effective

215. FEI ruled out a tank larger than 3 Bcf, as it would not be cost-effective. The economies of scale associated with larger tanks begin to diminish at sizes larger than 3 Bcf, primarily to the increased complexity of the associated design and construction.[345] FEI assessed that the increased costs, complexities, and risks associated with building a tank larger than 3 Bcf outweigh any additional ancillary benefits that a larger tank may provide. A 3 Bcf tank strikes the appropriate balance between constructability and cost, while maximizing ancillary benefits.[346]

E. TANK SIZE SHOULD NOT BE BASED ON THE ASSUMPTION THAT FEI CAN ACCESS TILBURY T1A INVENTORY

216. The TLSE tank should not be sized based on the assumption that FEI would be able to access Tilbury 1A volumes during a no-flow event. Despite the fact that adding regasification capacity as part of the TLSE Project would make any Tilbury 1A volumes accessible in an emergency, planning on the basis that the Tilbury 1A volumes will be present when needed would be overly optimistic and inconsistent with the regulatory framework for Tilbury 1A:[347]

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[343] Exhibit B-1-4, Application, p. 101.

[344] Exhibit B-15, BCUC IR1 16.22. Exhibit B-28, RCIA IR2 37.2.

[345] Exhibit B-19, CEC IR1 9.2.

[346] See also Exhibit B-15, BCUC IR1 16.27.

[347] Put another way, in the context of a supply emergency, FEI will look at all possible solutions to mitigate the consequences, including accessing any available Tilbury T1A inventory. The issue here is how the system

- First, Tilbury T1A was built to serve the LNG market under RS 46 and the inventory fluctuates with the needs of LNG customers. Many LNG sales customers are firm customers with similar expectations as natural gas customers for firm service.[348] Some RS 46 customers are using LNG to displace higher carbon intensity fuels for power generation and industrial uses that have seasonal variations, such that the LNG volumes stored in the tank will be drawn down during the winter months.[349] At the Workshop, Mr. Leclair observed,: "It's not simply about who pays, it's really about whether or not there will be any LNG in the tank when its required. We can't count on it being there."[350]

- Second, Direction No. 5 to the BCUC would preclude the BCUC from requiring FEI to reserve those volumes for resiliency planning. The Tilbury 1A facilities were built pursuant to Direction No. 5 to support LNG sales under RS 46, which the BCUC was directed to approve. Section 5(4) of Direction No. 5 provides: "(4) The commission must not exercise a power under the Act in a way that would directly or indirectly prevent FortisBC Energy Inc. from providing LNG dispensing service under the LNG rate schedule." [351]

F. PROPOSED SIZING SUPPORTED BY LONG-TERM LOAD PROJECTIONS

217. FEI's long-term load projections support the proposed regasification capacity and tank sizing.[352]

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should be planned, not how it would be used if more favourable circumstances came to pass. Tr. 1, p. 177, l. 18 to p. 178, l. 1 (Slater).

348 Exhibit B-15, BCUC IR1 11.9.1; see also Exhibit B-26, BCUC IR2 78.1.

349 Exhibit B-1-4, Application, p. 64; Exhibit B-15, BCUC IR1 11.9; Exhibit B-26, BCUC IR2 76.1 and 77.1. Other customers include BC Ferries and Seaspan: Tr. 1, p. 204, ll. 1-4 (Leclair).

350 Tr. 1, p. 178, ll. 6-9 (Leclair); see also: Tr. 1, p. 177, l. 18 to p. 178, l. 1 (Slater).

351 Order in Council (OIC) No. 557/2013.

352 Exhibit B-39, BCUC Panel IR1 1.1.

218. The peak demand forecasts discussed in the responses to the BCUC Panel IRs[353] contemplate a diversified approach to energy delivery and emissions reductions to British Columbians, as adjusted to reflect only the customer demand in the Lower Mainland that would be supported by the TLSE Project.[354] As FEI's forecasts currently only extend to 2042 in the 2022 Long Term Gas Resource Plan ("2022 LTGRP"), FEI projected the observed trajectory of the forecasts out to 2050.[355]

2030 Projected Peak Demand

Diversified Energy Future Peak Demand Forecasts	2019	2030							
				Scenario A			Scenario B		
	Base Year Peak demand (TJ/day)	Total Peak Demand (TJ/day)	Hydrogen (TJ/day)	NG and RNG (TJ/day)	NG and RNG (MMcf/day)	Volume Required to Support Three Coldest Winter Days (Bcf)	NG, RNG & H2 (TJ/day)	NG, RNG & H2 (MMcf/day)	Volume Required to Support Three Coldest Winter Days (Bcf)
High (Traditional peak+10%)	950	1104	40.8	1063	968	2.40	1084	987	2.40
Traditional Peak	950	1048	38.8	1009	919	2.37	1029	937	2.39
Low (Traditional Peak-25%)	950	910	33.7	876	798	2.20	893	813	2.26
End Use Peak (theoretical method)	950	891	33.0	858	781	2.11	875	796	2.19

2042 Projected Peak Demand

Diversified Energy Future Peak Demand Forecasts	2019	2042							
				Scenario A			Scenario B		
	Base Year Peak demand (TJ/day)	Total Peak Demand (TJ/day)	Hydrogen (TJ/day)	NG and RNG (TJ/day)	NG and RNG (MMcf/day)	Volume Required to Support Three Coldest Winter Days (Bcf)	NG, RNG & H2 (TJ/day)	NG, RNG & H2 (MMcf/day)	Volume Required to Support Three Coldest Winter Days (Bcf)
High (Traditional peak+10%)	950	1271	284.7	986	898	2.39	1129	1028	2.40
Traditional Peak	950	1156	258.9	897	817	2.26	1027	935	2.40
Low (Traditional Peak-25%)	950	867	194.2	673	613	1.71	770	701	1.96
End Use Peak (theoretical method)	950	794	177.9	616	561	1.57	705	642	1.79

2050 Projected Peak Demand

Diversified Energy Future Peak Demand Forecasts	2019	2050							
				Scenario A			Scenario B		
	Base Year Peak demand (TJ/day)	Total Peak Demand (TJ/day)	Hydrogen (TJ/day)	NG and RNG (TJ/day)	NG and RNG (MMcf/day)	Volume Required to Support Three Coldest Winter Days (Bcf)	NG, RNG & H2 (TJ/day)	NG, RNG & H2 (MMcf/day)	Volume Required to Support Three Coldest Winter Days (Bcf)
High (Traditional peak+10%)	950	1383	481.3	902	821	2.27	1142	1040	2.40
Traditional Peak	950	1230	428.0	802	730	2.04	1016	925	2.40
Low (Traditional Peak-25%)	950	838	291.6	546	497	1.39	692	630	1.76
End Use Peak (theoretical method)	950	738	256.8	481	438	1.22	610	555	1.55

219. These forecasts establish the following with respect to the proper sizing of the regasification and the tank storage capacity:[356]

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353 FEI assessed the sizing of regasification and storage based on the following four demand forecasts: (1) traditional peak forecast; (2) high forecast; (3) low forecast; (4) peak end use demand.

354 The Diversified Energy Future scenario is associated with FEI's 2022 Long Term Gas Resource Plan.

355 Exhibit B-39, BCUC Panel IR1 1.1.

356 Exhibit B-39, BCUC Panel IR1 1.1.

- With respect to regasification capacity, more than 600 MMcf/day of send-out would be needed until at least 2042 in all but the most conservative forecast.[357] This indicates the proposed 800 MMcf/day of regasification capacity is sized appropriately to meet forecast need until at least 2042 and that there continues to be two scenarios[358] where more than 600 MMcf/day of regasification is needed in 2050.

- With respect to tank storage capacity, more than 2 Bcf is required in all forecasts beyond 2030 to support demand over the coldest three days of the year. In 2050, assuming equipment can use a varying blend of methane and hydrogen or can fuel switch between the two fuels, the 'Low' forecast volume remains close to 2 Bcf.

220. The conclusions above are consistent with the forecast peak demand FEI expects to serve using a combination of natural gas and RNG.[359] This demand could be supported by the TLSE Project's storage and regasification capacity. While hydrogen is expected to become more widely available, making up a greater proportion of the resource mix later in the planning horizon beyond 2030,[360] RNG will form an increasing part of FEI's resource mix throughout the planning horizon. This reflects FEI's plan for gas resources made up of increasing amounts of renewable and low carbon gas over the next 20 years and beyond.[361]

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[357] FEI described the peak end use demand forecast as follows (Exhibit B-39, BCUC Panel IR1 1.1): In its 2022 LTGRP, FEI explores a potential alternative method for forecasting peak demand using end-use energy equipment information derived from FEI's long term end-use annual demand forecast results. This method remains hypothetical because empirical evidence linking changes to energy equipment and customer behavior to reductions in peak demand has not been identified but merits further investigation. Since this hypothetical or exploratory method results in a lower peak demand than the method FEI employs, FEI believes including it in this analysis offers a conservatively broad spectrum of peak demand forecasts with which to prepare this response.

[358] The 'traditional peak' forecast and the 'high' forecast.

[359] Exhibit B-39, BCUC Panel IR1 1.1.

[360] Exhibit B-39, BCUC Panel IR1 1.2.

[361] Exhibit B-39, BCUC Panel IR1 1.2.

221. FEI's evidence also establishes that it will need to continue relying on upstream infrastructure (currently primarily the T-South system) in a significant way to obtain its gas supply. As FEI explains:[362]

> …the existing upstream infrastructure that FEI relies on for gas supply will continue to be an integral part of BC's clean energy future. Although there will be a significant amount of RNG incorporated into FEI's resource mix by 2030, the majority of this supply will be acquired outside of FEI's service territory (i.e., off-system) and received at the AECO/NIT or Station 2 hubs by way of displacement. Therefore, FEI will still require the same level of contracted third-party pipeline infrastructure such as T-South to deliver gas (whether conventional or renewable) to FEI's Lower Mainland load centre.

[362] Exhibit B-39, BCUC Panel IR1 1.2.1.

PART SIX: PROJECT CONSTRUCTION

A. INTRODUCTION

222. In this Part, FEI addresses the evidence on project construction. FEI demonstrates:

- First, the TLSE Project is being planned and constructed according to applicable safety standards and best practices, including seismic standards; and
- Second, FEI's ongoing progress reporting will provide appropriate BCUC oversight during the development and construction phases.

B. TLSE PROJECT WILL BE BUILT TO MEET OR EXCEED ALL SAFETY STANDARDS

223. The TLSE Project is being designed and engineered with the assistance of organizations which possess industry-leading expertise in order to meet or exceed all applicable statutory requirements (i.e., federal and provincial laws and regulations), FEI and industry codes and standards, and accepted industry best practices.[363] FEI will also require a number of safety-related regulatory approvals, including those from the BC Oil and Gas Commission ("BCOGC") and Technical Safety BC, in order to construct the Project. In particular, the BCOGC will regulate the design, construction, and operations of the TLSE assets to ensure the environment and public safety are protected.[364]

224. Information requests focused on the safety of the proposed LNG tank. FEI explained:

- The 3 Bcf LNG tank will consist of a double-wall, insulated storage tank, with: (1) a cryogenic steel inner vessel will contain the LNG liquid; and (2) a concrete outer tank, also lined with steel, which will provide protection from the environment and external elements. This type of tank is an industry standard that has been

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[363] Exhibit B-1-4, Application, p. 121 and Exhibit B-15 BCUC IR1 25.2; see also Exhibit B-15 BCUC IR1 25.1 for a list of FEI internal standards.

[364] Exhibit B-18, BCSEA IR1 4.6.

developed for at least 50 other projects worldwide over the span of the last 40 years.[365]

- The TLSE Project will include multiple layers of safety measures to prevent and mitigate LNG leaks, including design measures, instrumentation and automated control systems, operational procedures, and gas detection systems. In the event of a breach of the inner steel tank, the 3 Bcf TLSE tank has been designed to contain the entire volume of stored LNG in most cases (i.e., a 'full-containment' tank).[366] Both the inner and outer tanks are designed to maintain their structural integrity after a Safe Shutdown Earthquake event[367] with a return period of 2475 years.[368]

- FEI has decades of experience in safely and effectively operating the Tilbury facility.[369] The TLSE tank will also benefit from modern design standards and best practices that offer improved safety and environmental performance over the Base Plant tank.[370]

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365 Exhibit B-1-4, Application, p. 124; Exhibit B-15, BCUC IR1 27.1; see also Exhibit B-15, BCUC IR1 26.2, 2.6.2.1, 26.2.2.

366 Designed in accordance with CSA Z276, API 625 and ACI 376: Exhibit B-1-4, Application, p. 125; see also Tr. 1, p. 199, ll. 18-24 (Finke).

367 In an SSE scenario, the tank system will be designed to provide for no loss of containment capability of the primary container and it will be possible to isolate and maintain the tank system during and after the event: Exhibit B-19, CEC IR1 38.2.

368 Exhibit B-19, CEC IR1 37.2, 37.4. The foundations supporting the new tank and its secondary containment system will be designed to withstand the Operating Basis Event ("OBE") and SSE seismic events. The implementation of the proposed deep ground improvement measures will provide the necessary safety margins and will control the foundation displacements or deformations to ensure the integrity of the storage tank: Exhibit B-33, CEC IR2 110.1.

369 Exhibit B-19, CEC IR1 37.3; Exhibit B-21, MS2S IR1 19.i, ii, iii. FEI has undertaken a quantitative risk analysis ("QRA") of event types and associated risks: Exhibit B-33, CEC IR2 111.1.

370 Exhibit B-22, RCIA IR1 18.1.

C. FEI WILL REPORT ON PROGRESS AND ANY MATERIAL CHANGES

225. As is typical with other large infrastructure projects, aspects of the TLSE Project design can only be finalized at the Detailed Design Phase.[371] FEI's proposed reporting regime, set out below, is consistent with the approach adopted by the BCUC in the context of other FEI CPCN applications. It provides an appropriate level of ongoing BCUC oversight.[372]

- **Contract Finalization Report:** To be filed within 30 days of the finalization of the construction contract, which is expected to be complete in 60 days following the final negotiated contract with the construction contractor and receipt of firm bids.

- **Periodic Progress Reports:** Starting three months after the finalization of the construction contract and outlining actual costs incurred to date, these reports (to be filed within 30 days of the end of each reporting period) will contain an updated forecast of costs, project progress, and the status of project risks.

- **Material Change Reports:** FEI would file material change reports as soon as practicable and in any event within 30 days of the date on which any material change occurs. These reports would identify and explain: (1) any significant delays or material (i.e., exceeding 5 percent) cost variances and the reasons for each delay or cost variance; and (2) FEI's consideration of project risks and the options available to, and actions taken by, FEI to address the issue.[373]

- **Final Report:** FEI will file the Final Report within six months of the Project's in-service date. This concluding report will include a breakdown of the final project costs compared to the initial cost estimates, including an explanation and justification of any material cost variances.

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[371] The BCUC recognized this, for instance, in its Decision on the FEI Pattullo Gas Line Replacement Project CPCN - Order C-2-21, Decision p. 19.

[372] Exhibit B-32, BCOAPO IR2 6.1.

[373] For example, Exhibit B-19, CEC IR1 87.2; Exhibit B-33, CEC IR2 123.1.

226. The BCUC's decision regarding FEI's Pattullo Gas Line Replacement ("PGR") project sets out appropriate parameters for these reports.[374]

[374] Decision and Order C-2-21, p. 49. Online: https://docs.bcuc.com/Documents/Orders/2021/DOC_63276_C-2-21-FEI-Pattullo-Gas-Line-Replacement-CPCN-Decision-Final-Order.pdf ("PGR Project Decision").

PART SEVEN:PROJECT COSTS, ACCOUNTING TREATMENT AND RATE IMPACTS

A. INTRODUCTION

227. This Part addresses financial matters raised in the Application and IRs. In particular,

- First, FEI's cost estimate for the TLSE Project is a reasonable basis for the BCUC to assess the TLSE Project.
- Second, FEI's rate impact analysis is based on parameters consistent with the most recent depreciation study and a BCUC decision.
- Third, FEI's proposed depreciation and net salvage rate for the tank component of the TLSE Project aligns with the BCUC-approved methodology and Concentric's recommendations.
- Fourth, the proposed regulatory accounts are appropriate for the circumstances of this project.

B. THE CAPITAL COST ESTIMATE IS AN APPROPRIATE BASIS FOR CONSIDERING THE APPLICATION

228. The cost estimate for the TLSE Project is $768.998 million in as-spent dollars and including AFUDC. FEI provided a breakdown of the TLSE Project cost estimate in Table 6-1 of the Application, which is reproduced below.[375]

[375] Exhibit B-1-4, Application, Table 6-1 (p. 159).

Table 6-1: Breakdown of the TLSE Project Cost Estimate ($ millions)

	2020 $	As-Spent $	Reference
Engineering and Development	23.653	25.609	Section 5.4.1 and Confidential Appendix J4 (2020 $)
Material	144.589	151.623	Section 5.4.1 and Confidential Appendix J4 (2020 $)
Construction - Direct and Indirect	317.043	357.325	Section 5.4.1 and Confidential Appendix J4 (2020 $)
Base Plant Demolition	12.297	13.827	Section 5.4.1 and Confidential Appendix J4 (2020 $)
FEI Project Management and Owner's Costs	31.521	32.928	Section 5.4.1 and Confidential Appendix J4 (2020 $)
Subtotal Capital Cost	529.103	581.312	See Note 1 for As-spent $
Contingency	108.200	118.384	Section 5.4.4.4 and see Note 1 for As-spent $
Subtotal Project Capital Costs w/ Contingency	637.303	699.696	Table 6-2; Row 7; Col 1 (2020 $) & Col 2 (As-spent $)
CPCN Application	0.600	0.600	Section 6.4.4
CPCN Preliminary Stage Development	1.546	1.546	Section 6.4.4
Subtotal w/ Deferral Costs	639.449	701.842	Table 6-2; Row 11; Col 1 (2020 $) & Col 2 (As-spent $)
AFUDC	-	69.796	Table 6-2; Row 11; Col 3
Tax Offset	-	(2.640)	Table 6-2; Row 11; Col 4
TOTAL Project Cost	***639.449***	***768.998***	***Table 6-2; Row 11; Col 1 (2020 $) & Col 5 (As-spent $)***

Notes:

1. *The as-spent cost is equal to the amount in 2020 dollars plus escalation. The total escalation is $62.393 million (Section 5.4.4.5), which includes $52.209 million of escalation on capital cost and $10.184 million of escalation on contingency.*

229. The Project capital cost estimate meets the criteria for an AACE Class 3 Cost Estimate[376] as required by the BCUC's CPCN Guidelines. It is an appropriate basis for determining this Application. Importantly, as FEI explained in Part Two, Section D of this Submission, a significant portion of the project cost would have to be incurred at some point regardless since the existing Base Plant is nearing the end of its useful life. As such, the entire cost of the Project cannot be attributed as a cost to increasing resiliency. Moreover, based on FEI's financial analysis, customers are better off replacing the Base Plant now (as proposed).

(a) Cost Estimate Was Prepared with, and Validated by, Expert Consultants

230. FEI developed the Project cost estimate with Linde, Clough Enercore ("Clough"), Horton CB&I ("HCBI"), Golder, and Solaris Management Consultants Inc. ("SMCI"),[377] based on criteria

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[376] The typical variation in low and high accuracy ranges at an 80% confidence interval for an AACE Class 3 estimate fall between -10% to -20% on the low side and +10% to +30% on the high side.

[377] FEI reviewed the credentials and experience of each consultant as part of the selection process: see Exhibit B-1-4, Application, Appendix D.

from AACE International Recommended Practices 18R-97 and 97R-18.[378] FEI drew upon its own experience from the Mt. Hayes and Tilbury 1A facilities.[379]

231. The base cost estimate breakdown, which includes the estimates developed by FEI and various consultants, is included in Confidential Appendix J-4 of the Application.[380] The Basis of Estimate is included in Confidential Appendix J-1.[381]

232. The Project cost estimate was subject to quality assurance and validation, as follows:[382]

- Internal, Linde, Clough, HCBI, Golder and SMCI reviews that included peer reviews, document quality checks, and independent reviews;
- Validation reviews involving both Linde, Clough, HCBI, Golder and SMCI, and FEI team members, throughout the estimate development process to confirm that the estimate assumptions were valid and that a well-documented, reasonable and defensible estimate was developed;
- An external independent review by Validation Estimating LLC, USA ("Validation Estimating"), a company that provides services in estimate validation, risk analysis, and contingency estimation, to verify and validate all the constituent estimates to confirm that they were well-documented, reasonable and defensible, and ultimately, suitable for inclusion in the AACE Class 3 estimate;[383]
- As discussed further below, Yohannes Project Consulting Inc. ("YPCI") prepared a AACE Class 3 qualitative risk assessment to inform the contingency and escalation analyses.

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[378] Exhibit B-1-4, Application, p. 134.

[379] See e.g., Exhibit B-16-1, Confidential BCUC IR1 11.2.

[380] Exhibit B-1-3-1.

[381] Exhibit B-1-3-1.

[382] Exhibit B-1-4, Application, pp. 138-139.

[383] See Exhibit B-19, CEC IR1 46.1.1 for a summary of review process.

(b) Development of the Contingency and Escalation Amounts Addresses Foreseeable Risks and Changes in Market Conditions Over Time

233. FEI recognizes that economic and market conditions evolve, and that some time has passed since the Application was filed. However, the estimate provided in the Application remains an appropriate basis for determining this CPCN Application for the following reasons.

234. First, there is an escalation factor, in addition to the contingency, reflected in the estimate. FEI has set the Project contingency at $108.200 million (20 percent) and an escalation of $62.393 million, reflecting a P50 confidence level. The contingency is expected to be spent and addresses known and likely to be encountered risks, while escalation addresses changes in technical, economic and market conditions over time.[384]

235. FEI retained YPCI to prepare a AACE Class 3 qualitative risk assessment to assist with mitigating remaining uncertainty to the greatest extent possible and to inform the contingency and escalation analyses (as per AACE guidelines). This assessment informed the following estimates prepared by Validation Estimating:[385]

- **Contingency Estimation (Appendix K-2):** using a quantitative analysis by applying an integrated parametric and expected value methodology that is aligned with AACE International Recommended Practice 42R-08: *Risk Analysis and Contingency 1 Determination Using Parametric Estimating* and 65R-11: *Integrated Cost and Schedule Risk Analysis and Contingency Determination Using Expected Value* applied in an integrated hybrid approach (RP 113R-20).[386]

- **Cost Escalation Estimate (Appendix K-3):** including a probabilistic assessment of the impact of uncertainty in pricing and cost contingency based on AACE Recommended Practices. Escalation per AACE is "a provision in costs or prices for

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384 Exhibit B-1-4, Application, pp. 138-139.

385 Exhibit B-1-4, Application, pp. 139.

386 Exhibit B-1-4, Application, pp. 139-140. Exhibit B-19, CEC IR1 46.1; see also Exhibit B-1-3-1, Revised Confidential Application, Confidential Appendix K-2.

> uncertain changes in technical, economic, and market conditions over time. Inflation (or deflation) is a component of escalation."[387]

236. FEI expects to update the cost estimate once the EPC contractor has been selected and work has been completed to optimize the TLSE Project for cost and schedule efficiencies, amongst other factors, which will occur after a CPCN is granted.[388] As indicated in Part 6, Section C of this Submission, FEI will report on any material changes in cost.

(c) FEI's Approach to Cost Estimating is Consistent with Past Practice

237. The approach that FEI has taken to develop and validate its cost estimates is similar to the approach that the BCUC considered to be appropriate in the recent PGR Project decision:[389]

> The Panel is satisfied with FEI's approach to cost estimating, specifically, that FEI worked with Mott MacDonald, its consultant, in developing the cost estimate; that the cost estimate was reviewed by UPI and Validation Estimating, two external parties; that the risk analysis was prepared by YPCI, an independent, external party; and that the contingency estimate and escalation estimate were prepared by Validation Estimating, an independent external party. The Panel also considers the choice of a P50 level of confidence, implying a 24 percent allowance for contingencies, to be appropriate.

C. FEI HAS UNDERTAKEN APPROPRIATE RATE IMPACT ANALYSIS

238. FEI has undertaken rate impact analysis in the manner required by the BCUC's CPCN Guidelines, using appropriate inputs. Although the TLSE Project will increase customer rates, the additional costs for customers represents an important investment in avoiding or mitigating the known catastrophic consequences in the event of a winter no-flow event.

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387 Exhibit B-1-4, Application, pp. 141-142.

388 Exhibit B-19, CEC IR1 87.2; ; see also Exhibit B-1-3-1, Revised Confidential Application, Confidential Appendix K-3.

389 PGR Project Decision, p. 29.

(a) Overview of Results

239. The TLSE Project will result in a present value ("PV") of the incremental revenue requirement of approximately $1,042 million and an estimated levelized delivery rate impact of 6.66 percent over the 67-year analysis period, which is equivalent to $0.301 per GJ for a typical FEI residential customer over the life of the assets.[390] Over the period from 2022 to 2027 (assuming all capital costs have entered FEI's rate base by 2027), the TLSE Project is estimated to have a cumulative incremental delivery rate impact of 9.07 percent, or equivalent to $0.409 per GJ for FEI's non-bypass customers.[391]

240. At the time the Application was filed was the expected period from commencement of construction to when it is complete in rate base. As construction did not start in 2022, the incremental delivery rate impacts will accordingly shift later (2024 to 2027, assuming regulatory approvals are obtained in 2023).

(b) The 67-Year Horizon for the Rate Impact Analysis is Appropriate

241. The 67-year analysis period is based on a 60-year post-Project analysis period plus seven prior years for the estimated Project schedule. FEI submits that this is the appropriate analysis period, but shorter periods do not materially alter the value proposition of the TLSE Project.

242. FEI selected a 60-year post-Project analysis period based on the recommendation of Concentric Advisors, ULC ("Concentric"), who completed FEI's most recent Depreciation Study approved by BCUC Order G-165-20 as part of FEI's 2020-2024 Multi-Year Rate Plan ("MRP") Application. The analysis period reflects the average service life for a new 3 Bcf LNG tank, as discussed further in the next section.[392] In the PGR CPCN Application Decision, the BCUC endorsed using an analysis period that aligns with average service life: "The Panel finds FEI's use

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390 Exhibit B-27, Confidential Attachment 21.1 (revised Schedule 9 of Confidential Appendix M-1).

391 Exhibit B-1-4, Application, Table 6-6 (p. 168); see also Exhibit B-19, CEC IR1 53.3 for the estimated bill impacts per year for FEI's customers in Rate Schedules 1 to 7.

392 Exhibit B-1-4, Application, p. 160; Exhibit B-26, BCUC IR2 91.1.

of a 68-year project life for its analysis of the PGR Project to be reasonable because it aligns with the average service life of IP pipelines in FEI's 2017 Depreciation Study."[393]

243. BCUC Staff IRs asked FEI to recalculate the PV of the incremental revenue requirement and the levelized delivery rate assuming the useful life of the proposed 3 Bcf LNG tank ended in 2050.[394] However, calculating rate impacts assuming the asset will not reach its average service life due to changes in public policy would be inconsistent with the approach that the BCUC recently endorsed in its Decision regarding the PGR Project. In that case, the BCUC determined that considerations such as the net-zero target for 2050 are best addressed in the Long-Term Resource Plan rather than in the context of a CPCN application.[395] Moreover, FEI expects to utilize the new facility for the duration of the assets' expected average service life.[396]

244. The rate impacts are reasonable even if 2050 is used in the analysis. First, when assuming the same 67-year analysis period used in the Application in conjunction with a useful life of the proposed 3 Bcf tank to the end of 2050, the levelized delivery rate impact over the 67-year analysis period would be reduced from 6.67 percent to 5.64 percent:[397]

	Useful Life of 24 years (to 2050) for the proposed 3 Bcf LNG Tank	Useful life of 60 years for the proposed 3 Bcf Tank as per Application
PV of Incremental Revenue Requirement 67 years ($ millions)	880.800	1,041.925
Delivery Rate Impact in 2027 (%)	11.90%	9.07%
Levelized Delivery Rate Impact 67 years (%)	5.64%	6.67%
Levelized Delivery Rate Impact 67 years ($/GJ)	0.254	0.301

393 PGR Project Decision, p. 36.

394 Exhibit B-26, BCUC IR2 91.4; Exhibit B-39, BCUC Panel IR1 7.1.

395 PGR Project Decision, p. 36, 47.

396 Exhibit B-19, CEC IR1 52.2.

397 Exhibit B-26, BCUC IR2 91.4. Please refer to Exhibit B-27, Confidential BCUC IR2 21.1 which explains that the levelized delivery impact over the 67-year analysis would be 6.66 percent (instead of 6.67) due to a formula error.

245. Second, when assuming the same useful life to 2050 but using a shorter 31-year analysis period (24 years useful life to 2050 plus 7 years of construction), the levelized delivery rate impact is 6.90 percent versus 6.67 percent – with a higher delivery rate impact in 2027:[398]

	Financial Analysis over 31 years (24 years Useful Life to 2050 plus 7 years of construction)	Financial Analysis over 67 years (60 years Useful Life plus 7 years of construction) as per Application
PV of Incremental Revenue Requirement ($ millions)	896.744	1,041.925
Delivery Rate Impact in 2027 (%)	11.90%	9.07%
Levelized Delivery Rate Impact (%)	6.90%	6.67%
Levelized Delivery Rate Impact ($/GJ)	0.311	0.301

D. PROPOSED DEPRECIATION AND NET SALVAGE RATE ALIGNS WITH APPROVED METHODOLOGY AND CONCENTRIC'S RECOMMENDATIONS

246. FEI is seeking approval pursuant to sections 59-61 of the UCA for a depreciation rate for the 3 Bcf TLSE storage tank of 1.67 percent (or 60 years) and a net salvage rate of 0.67 percent.[399] FEI notes the proposed depreciation rate and net salvage rate is for the new 3 Bcf LNG tank only. The depreciation and net salvage rates for the ground improvement, regasification, and auxiliary system will be based on the approved depreciation rates at the time they are included in rate base.[400]

247. FEI currently has a depreciation rate of 1.23 percent (equivalent to 81 years) and a net salvage rate of 1.12 percent approved by the BCUC for the Tilbury Base Plant facility.[401] The current rate of 1.23 percent was primarily determined based on historical assets within the same class (i.e., Tilbury Base Plant), and therefore, includes accumulated gains or losses embedded that existed at the time of the depreciation study that are not relevant to the new TLSE storage

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398 Exhibit B-39, BCUC Panel IR1 7.1.

399 Exhibit B-1-4, Application, p. 163.

400 The currently approved depreciation rate for ground improvements in asset class LNG Gas Structures & Improvements (44200) 1 is 2.20 percent, or 45 years; and for regasification and auxiliary systems under asset class LNG Send Out Equipment (44861) is 2.41 percent, or 41 years.

401 FEI Depreciation Study approved by Order G-165-20 as part of FEI's 2020-2024 MRP Application.

tank.[402] Moreover, using the currently approved depreciation rate would result in a significant overdue cost recovery of the new LNG tank relative to the expected average service life (currently 1.23 percent for 81 years vs. the proposed 1.67 percent for 60 years). In other words, the costs of the LNG tank would still be recovered, but recovery would take approximately 21 years longer.[403]

248. FEI's proposal reflects the use of the straight-line Average Service Life method,[404] which was recommended by Concentric and is consistent within FEI's current depreciation methodology for its assets (including the existing LNG tanks). As FEI explained:[405]

> The estimated average service life of 60 years for the proposed 3 Bcf tank is recommended by Concentric based on the newer Mt. Hayes LNG storage tank, which entered service in 2011. The Mt. Hayes storage tank has been recorded under a separate asset class (44305) and is included in FEI's 2017 Depreciation Study with the estimated average service life determined to be 60 years. Concentric advised that using a 60 year average service life, consistent with the Mt. Hayes tank, to calculate the depreciation and salvage rates for the proposed new TLSE tank is reasonable and appropriate given the similarity of materials and construction technology between the Mt. Hayes tank and the proposed TLSE tank. The TLSE tank is considered to be more comparable to the Mt. Hayes tank than the Tilbury Base Plant tank due to the relative age of the tanks and the resulting changes in materials, technology and construction over time. As described above, the use of the tank was not a consideration in the service life of the Base Plant tank compared to the proposed new TLSE tank.

249. Concentric explained that it is appropriate to use a straight-line methodology in this context:[406]

> At the time of the application for the CPCN for the Tilbury LNG Expansion Project, FEI had recently filed a depreciation study with the British Columbia Utilities

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402 Exhibit B-1-4, Application, p. 163; Exhibit B-15, BCUC IR1 40.1.

403 Exhibit B-19, CEC IR1 58.1.

404 Utilizing estimates for retirement dispersion (an Iowa curve), average service life, and net salvage estimate, as detailed in the Concentric depreciation study approved by the British Columbia Utilities Commission's decision G-165-20: Exhibit B-39, BCUC Panel IR1 6.1.

405 Exhibit B-15, BCUC IR 40.1.

406 Exhibit B-39, BCUC Panel IR1 6.2.

> Commission where the straight-line Average Service Life method had been approved for all asset groups. The use of mixed methods is rare and usually results from specific and unique circumstances to the utility and used only when an alternative method may provide a better recognition of the consumption of the assets or to phase in a different and more appropriate approach.
>
> Concentric investigated various depreciation methods in the completion of the recent depreciation study in order to find the most appropriate option for the specific circumstances of FEI. Given that Concentric views the service value of all FEI assets is consumed evenly over the average service life, Concentric recommended the straight-line, Average Service Life method of depreciation applied on a remaining life basis in this depreciation study. Concentric continues to believe that this method is appropriate for all asset groups for FEI at this time.

250. As Concentric goes on to explain, accelerated methods are also not generally accepted for return of investment in rate regulated utilities because of concerns about intergenerational equity.[407] Regardless, the difference in the delivery rate impact and in the PV of the incremental revenue requirement is small had FEI used non-straight line accelerated depreciation methods.[408]

E. REGULATORY ACCOUNT PROPOSALS ARE REASONABLE

251. FEI is proposing two regulatory accounts, which are just and reasonable and should be approved under sections 59-61 of the UCA.

(a) Three-Year Amortization of Application and Preliminary Stage Development Costs Is Reasonable and Consistent with Past Practice

252. FEI is seeking BCUC approval for deferral treatment of both Application and Preliminary Stage Development costs.[409] The forecast balance in the account is a credit of $0.381 million, consisting of:[410]

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[407] Exhibit B-39, BCUC Panel IR1 6.5.

[408] Exhibit B-39, BCUC Panel IR1 6.3.

[409] Exhibit B-1-4, Application, p. 165.

[410] Exhibit B-1-4, Application, p. 165.

- **Project Application Costs:** FEI will incur costs for the regulatory preparation and disposition of the Application. These expenses include the written hearing process, external legal review, consultant and studies costs, BCUC costs, and BCUC-approved intervener costs. Consistent with past CPCN applications, FEI will record all costs, net of tax, related to the preparation and disposition of the Application up to the date of BCUC approval in this deferral account.[411]

- **Preliminary Stage Development Costs:** FEI is proposing to record the actual costs, net of tax, incurred to engage third party-consultants for feasibility evaluation, preliminary development, and assessment of the potential design and alternatives as required to complete this Application in this deferral account. It will also capture the income tax recovery related to development costs that are incurred prior to BCUC approval but are capitalized. These costs are eligible for deduction for income tax purposes in the year incurred, as such are included in the deferral account.[412]

253. FEI will record the actual costs incurred for the application costs and preliminary stage development costs in the proposed new non-rate base deferral account, attracting FEI's weighted average cost of capital until it enters rate base. Consistent with FEI's previous CPCN applications, and following FEI's assessment of amortization periods of 7 years or less,[413] FEI proposes to transfer the balance in the deferral account to rate base on January 1 of the year following BCUC approval of the Application and commence amortization over a three-year period thereafter.[414]

254. The continuity of the TLSE Application and Preliminary Stage Development Costs deferral accounts can be found in Confidential Appendix M-1, Financial Schedule 9.[415]

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411 Exhibit B-1-4, Application, p. 165 and Table 6-5 (p. 166).

412 Exhibit B-1-4, Application, p. 165 and Table 6-5 (p. 166).

413 With the exception of the 1-year amortization period, there is no difference in the annual delivery rate impact for amortization periods of 2 to 7 years when rounded to 3 decimal places: Exhibit B-15, BCUC IR1 44.1

414 Exhibit B-1-4, Application, p. 165.

415 Exhibit B-1-3-1.

(b) Capturing Mark to Market Valuations Is Beneficial to Both FEI and Customers

255. FEI is also seeking BCUC approval for a "TLSE FX Mark to Market" deferral account, capturing the mark-to-market valuation of any foreign currency forward contracts entered related to construction of the TLSE Project.

256. FEI forecasts that approximately 27.8 percent of the total Project capital cost is expected to include USD payments,[416] reflecting that some expenditures for materials or expertise will unavoidably be in US dollars instead of Canadian dollars.[417]

257. FEI submits that approval of this deferral account will mitigate against external uncontrollable income statement volatility if there are movements in foreign exchange rates.[418] Importantly, the deferral account:[419]

- will not attract a financing return, as the mark-to-market adjustments are non-cash;
- treatment of the mark-to-market adjustments related to the foreign exchange rate hedging for the Project will have no impact on customer rates;
- will not result in any incremental cost or revenue impacts;
- will not increase or decrease the expected cost of the Project; and
- at the end of the Project, the amount of the deferral account will be zero.

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[416] Exhibit B-15, BCUC IR1 45.1; see also Exhibit B-33, CEC IR2 114.1.

[417] Exhibit B-26, BCUC IR2 93.1.

[418] Exhibit B-15, BCUC IR1 45.4. Further, foreign exchange forward contracts are considered derivative instruments under FASB Accounting Standards Codification 815, Derivatives and Hedging, and therefore, in the absence of an approved deferral account, fair value (mark-to-market) adjustments would be included in FEI's earnings for the period: Exhibit B-1-4, Application, p. 166.

[419] Exhibit B-1-4, Application, pp. 166-167; Exhibit B-15, BCUC IR1 45.3.

258. This approach is consistent with similar deferral accounts approved for the Mt. Hayes LNG Facility CPCN[420] and the Customer Care Enhancement CPCN.[421] [422]

259. Ultimately, the requested deferral account is beneficial to FEI and its customers, and ensures mutually fair treatment.[423] FEI will report on the use of this deferral account as part of the Project progress reports filed with the BCUC.

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[420] Order G-145-08. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/116831/1/document.do.

[421] Order G-23-10. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/117690/1/document.do.

[422] See Exhibit B-19, CEC IR1 61.1 for a list of projects involving US dollar payments.

[423] Exhibit B-15, BCUC IR1 45.5.

PART EIGHT: FEI WILL MITIGATE ENVIRONMENTAL AND ARCHAEOLOGICAL IMPACTS

A. INTRODUCTION

260. The TLSE Project facilities will be constructed entirely within an existing brownfield site that has hosted industrial operations for roughly half a century.[424] The photograph below depicts the existing industrial development on the Tilbury site, including the Tilbury Base Plant and the Tilbury 1A Expansion facilities.[425]

261. The subsections in this Part demonstrate the following points:

- First, assessments undertaken to date confirm that potential environmental and archaeological impacts associated with the TLSE Project can be mitigated.

- Second, components of the TLSE Project are also subject to a separate environmental assessment process, necessitating separate approvals from both

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[424] Exhibit B-44, Rebuttal Evidence to TWN, p. 22.

[425] Exhibit B-44, Rebuttal Evidence to TWN, p. 22.

the federal and provincial government. This assessment is comprehensive and inclusive of Indigenous communities.

- Third, FEI has performed appropriate archaeological surveys to date, and will continue to monitor and reflect results of further work.

B. POTENTIAL ENVIRONMENTAL IMPACTS CAN BE MITIGATED

262. The Environmental Overview Assessment ("EOA") of the TLSE Project, completed by Jacobs Consultancy Canada Inc. ("Jacobs"), is included as Appendix O of the Application.[426] The EOA describes the existing conditions on the entire Tilbury site and the TLSE Project's potential adverse effects on the environment.[427] The EOA assesses a range of biophysical receptors and concludes that the overall environmental risk of the Project is moderate, before taking into consideration mitigation measures.[428] Only two biophysical receptors presented more than a 'low' risk (prior to the implementation of any mitigation); namely: (1) the atmospheric biophysical receptor; [429] and (2) the contaminated soils and groundwater biophysical receptor.[430] In both cases, elevated risk was attributed to the need to conduct further assessments. For example, Jacobs recommended completing Stage 1 and 2 Preliminary Site Investigations ("PSIs") to further understand the potential for contamination.[431] FEI has now completed the Stage 1 and 2 PSIs and will update the risk ratings presented in Appendix O based on the findings of the final Stage 2 PSI report.[432]

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426 Exhibit B-1-4.

427 Exhibit B-1-4, Application, p. 170 and Appendix O; see also Exhibit B-15, BCUC IR1 48.1.

428 The EOA includes an assessment of the following biophysical receptors: surface water, atmospheric environment, contaminated soils and groundwater, fish and fish habitat, vegetation and wetlands, and wildlife and wildlife habitat.

429 The main source of emissions associated with the TLSE Project are related to the occasional use of the vaporizers, and their operation will be infrequent. Given this, FEI anticipates the eCEA will have little to no impact on the cost or timing of the TLSE Project: Exhibit B-15, BCUC IR1 49.2; see also Exhibit B-1-4, Application, pp. 173-174

430 Exhibit B-1-4, Application, p. 174; Exhibit B-19, CEC IR1 62.1, 62.2, 62.3.

431 Exhibit B-1-4, Application, p. 172.

432 Exhibit B-15, BCUC IR1 50.1; Exhibit B-26, BCUC IR2 97.1; Exhibit B-44, Rebuttal Evidence to TWN, Appendix D, p. 10-2.

263. Any potential environmental impacts associated with the TLSE Project can be mitigated through permitting processes, including the environmental assessment process described below, and the implementation of standard best management practices, which FEI will follow during construction.[433] FEI will also prepare an Environmental Management Plan as part of the Project tendering process, followed by an Environmental Protection Plan specific to the TLSE Project. FEI has accounted for the costs to implement specialized mitigation measures or follow-up work (if any) as part of the TLSE Project-wide contingency.[434]

C. ENVIRONMENTAL ASSESSMENT PROCESS IS COMPREHENSIVE AND PROGRESSING

264. As described below, the TLSE tank forms part of the environmental assessment for the Tilbury Phase 2 LNG Expansion Project. The remaining components of the TLSE Project are considered as part of the cumulative effects assessment in the environmental assessment.[435] Thus, although the BCUC is only assessing the TLSE Project as presented in the Application, the components will be subject to additional regulatory scrutiny to identify, evaluate and mitigate any potential impacts associated with the TLSE Project.

265. The Tilbury Phase 2 LNG Expansion Project, of which the proposed 3 Bcf TLSE storage tank is a component, triggers the requirements for both a federal Impact Assessment[436] and a provincial Environmental Assessment.[437] Both processes have undergone considerable revision to enhance public confidence and participation and provide a robust structure for reviewing the direct, indirect and cumulative effects of a given project and how they potentially affect

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433 Exhibit B-1-4, Application, pp. 170, 174, Appendix O, Table 6-1.

434 Exhibit B-15, BCUC IR1 49.1.

435 Those components of the TLSE Project which are not specifically in scope of the Tilbury Phase 2 LNG Expansion Project environmental assessment have been identified as reasonably foreseeable projects, and will be considered as part of that processes cumulative effects assessment: Exhibit B-44, Rebuttal Evidence to TWN, p. 5; see also Exhibit B-51, CEC IR3 118.1 and 118.2.

436 See *Physical Activities Regulations*, s. 38(d).

437 See *Reviewable Projects Regulation*, Part 4, Table 8, Column 3, Criteria (1)(b).

Indigenous nations and the associated rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.[438]

266. For example, the environmental assessment process in British Columbia was 'revitalized' in 2018 to, in particular, advance reconciliation with Indigenous peoples by: (1) supporting the implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"); (2) recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision-making in matters that would affect their rights; (3) collaborating with Indigenous nations in relation to reviewable projects; and (4) acknowledging the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982* in the course of assessments and decision-making. This is achieved through consensus-seeking opportunities throughout the environmental assessment process, mandated consideration of consent (or lack of consent) from a participating Indigenous nation, and ultimately, additional opportunities for meaningful dialogue and negotiation over the course of a project from its initial planning through to its implementation.[439]

267. In the context of the Tilbury Phase 2 LNG Expansion Project, the British Columbia Environmental Assessment Office ("BC EAO") will undertake a single assessment through a 'substituted' assessment process, with both the federal and provincial governments ultimately independently deciding whether to grant approval based on the considerations defined in each respective statute (collectively referred to as the "environmental assessment process").[440] This will include an assessment of the Project's cumulative effects, which accounts for (among other things) the aspects of the TLSE Project not specifically part of the Tilbury Phase 2 Expansion Project (e.g., vaporization/regasification and ancillary equipment).[441]

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438 Exhibit B-44, Rebuttal Evidence to TWN, pp. 5-9.

439 Exhibit B-44, Rebuttal Evidence to TWN, pp. 13-14.

440 See Exhibit B-44, Rebuttal Evidence to TWN, p. 15 and Appendix A, p. 8; see also Exhibit B-49, TWN IR3 7.1.

441 Exhibit B-44, Rebuttal Evidence to TWN, p. 23.

268. The environmental assessment process for the Tilbury Phase 2 LNG Expansion Project has progressed concurrently with this Application and remains ongoing. Through this process, the TLSE Project will undergo a rigorous assessment of its environmental and other impacts including, as noted above, the Project's effects on Indigenous nations and rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.[442] As discussed in Part Nine of these Final Submissions, five Indigenous-led assessments, including those undertaken by TWN and Musqueam, will also form part of the Project's environmental assessment process – each reflecting the unique considerations raised by participating Indigenous nations.[443]

269. Reviewable projects assessed by the BC EAO must progress through a number of phases according to a legislated timeline.[444] The assessment of the Tilbury Phase 2 LNG Expansion Project has now progressed to the 'Process Planning' phase.[445] FEI expects that the assessment process will continue until Q2 2023, with a decision no earlier than Q4 2023.[446]

270. In short, the environmental assessment process is comprehensive. It provides another opportunity to consider the impacts of the TLSE Project and to assess the suitability of any proposed mitigations above and beyond the identification and preliminary assessment of potential effects that FEI has undertaken in support of this Application.

D. POTENTIAL ARCHAEOLOGICAL IMPACTS WILL CONTINUE TO BE ASSESSED AND MONITORED

271. FEI retained Golder Associates Ltd. ("Golder") to complete an Archaeology Overview Assessment ("AOA") for the Project, included as Appendix P of the Application. The AOA determined that the likelihood of impact to archaeological resources, prior to undertaking any

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442 Exhibit B-49, TWN IR3 1.1.

443 See section 19(4) of the *BC Environmental Assessment Act*; see also Exhibit B-44, Rebuttal to TWN, p. 16 and Exhibit B-51, CEC IR3 120.1.

444 See Exhibit B-44, Rebuttal Evidence to TWN, Figure 3 (p. 7).

445 Exhibit B-44, Rebuttal Evidence to TWN, p. 16.

446 These dates are estimates only and may change as the assessment process continues.

mitigation steps, is low to moderate but requires further assessment.[447] Since filing the Application, FEI has continued to progress archaeological assessment work, and will continue to monitor as development of the Project progresses.

272. The purpose of the AOA was to develop a comprehensive understanding of the archaeological resource potential of the area, including the entire Tilbury site with the exception of the Tilbury 1A area (which was investigated through an Archaeological Impact Assessment ("AIA") conducted in 2013), and to provide guidance on the need for and, if required, the scope of future archaeological assessments.[448] FEI obtained all required Indigenous heritage investigation permits prior to commencing the AOA, invited Indigenous communities to participate in preliminary field reconnaissance activities and expects that all aspects of the TLSE Project will conform to Indigenous permitting policies.[449]

273. Where Golder identified archaeological potential within the AOA area, Golder refined their recommendations through an evaluation of archaeological sensitivity. The results are provided in Figures 9 and 10 of Appendix P to the Application.[450] Golder provided specific recommendations for each of the 13 assessment areas,[451] concluding that potential impacts to archaeological resources as a result of the TLSE Project can be mitigated.[452]

274. Since filing the Application, FEI has completed a detailed AIA of the TLSE Project area based on the recommendations of the AOA – a draft of which has been provided to Indigenous nations. To date, no archaeological resources have been identified at the Tilbury site.[453] FEI will continue to notify Indigenous communities about archaeological assessment work – including

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447 Exhibit B-1-4, Application, p. 176 and Appendix P.

448 Exhibit B-1-4, Application, p. 176 and Figure 7-1 (p. 177); Exhibit B-15, BCUC IR1 51.1.

449 Exhibit B-1-4, Application, p. 180; Exhibit B-15, BCUC IR1 51.2, 52.2; Exhibit B-19, CEC IR1 64.1.

450 Exhibit B-1-4, Application, Appendix P.

451 Exhibit B-1-4, Application, Appendix P, Figure 11.

452 Mitigation measure include additional assessment, standard provincial and Indigenous permitting processes, and the implementation of standard best management practices.

453 Exhibit B-44, Rebuttal Evidence to TWN, p. 28; see also Exhibit B-15, BCUC IR1 52.3 and Exhibit B-15, BCUC IR1 52.4.

providing an opportunity to participate in these assessments. Finally, Indigenous groups, including TWN and Musqueam, will have the opportunity to comment on the site-specific chance find management procedure.[454]

[454] Exhibit B-25, TWN IR1 7.1.

PART NINE: INDIGENOUS AND STAKEHOLDER ENGAGEMENT

275. This Part addresses consultation with the public and Indigenous groups. FEI has been consulting with the public and engaging with Indigenous groups throughout the development of the TLSE Project. FEI will continue to do so, including through other regulatory processes such as the federal impact assessment and provincial environmental assessment processes (collectively being undertaken as a substituted process by the BC EAO and referred to as the "environmental assessment process" above) and BCOGC permitting processes. The evidence demonstrates that FEI's approach to consultation and engagement is ensuring that Indigenous groups and the public have a meaningful opportunity to engage and provide input regarding the TLSE Project consistent with BCUC's CPCN Guidelines.

A. PUBLIC CONSULTATION HAS BEEN SUFFICIENT AND IS ONGOING

276. The evidence demonstrates that its general stakeholder consultation activities in relation to the TLSE Project to date meet the requirements of the BCUC's CPCN Guidelines. Public engagement is ongoing.

277. In Section 8.3 of the Application, FEI outlined its consultation activities with stakeholders, including customers, residents, businesses and landowners near the Tilbury facility, provincial and local governmental bodies and industry and community groups.[455] FEI has been engaging with stakeholders regarding development at Tilbury generally since 2012 and the TLSE Project specifically as early as 2019. FEI has proactively identified key issues and interests, and has responded to all concerns and comments raised by stakeholders.

278. In particular, FEI synchronized public consultation regarding the TLSE process with the ongoing environmental assessment process for the Tilbury Phase 2 LNG Expansion Project – which involves significant consultation.[456] FEI, together with FortisBC Holdings Inc. (collectively referred to as "FortisBC"), has developed an overarching Engagement Plan to ensure Indigenous

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[455] Exhibit B-1-4, Application, pp. 185-196 and Appendix Q-3.

[456] Exhibit B-1-4, Application, pp. 184-185; see also Exhibit B-18, BCSEA IR1 3.4.

groups and stakeholders are informed and engaged about the TLSE Project and that FEI identifies and responds to concerns raised by stakeholders and Indigenous groups.[457] This approach ensures engagement is robust, efficient and transparent.[458]

279. Most stakeholder feedback regarding the TLSE Project has mirrored topics that FEI proactively identified, including safety, potential environmental impacts, rate impacts, engagement opportunities for the community and business opportunities for stakeholders.[459] FEI has also provided responses to questions regarding the purpose of the TLSE Project (namely, resiliency), accidents and malfunctions and decommissioning.[460] FEI considers that all comments received to date have been addressed, but recognizes that consultation is a long-term and ongoing process.

280. FEI will continue to update stakeholders regarding Project timelines, construction activities and public safety, and address any feedback that could be considered to be 'negative'.[461] Ultimately, FEI recognizes and appreciates that all comments and feedback, including those received from municipalities and other government agencies, are constructive and a fundamental part of the project development process.

B. INDIGENOUS CONSULTATION AND ENGAGEMENT HAS BEEN MEANINGFUL, TIMELY AND SUFFICIENT

281. The evidence demonstrates that consultation, including FEI's engagement, with Indigenous groups has been meaningful, timely and sufficient to date, given the nature of the approval sought. Consultation and engagement with Indigenous groups is consistent with the BCUC's CPCN Guidelines, is in alignment with other FEI applications approved by the BCUC and

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457 Exhibit B-1-4, Appendix Q-2.

458 Exhibit B-1-4, Application, p. 185.

459 Exhibit B-1-4, Application, Table 8-3 (pp. 193-194) and Appendix Q-4, Q-7 (as updated in Exhibit B-15, Attachment 62.1); Exhibit B-15, BCUC IR 56.1, 60.1.

460 Exhibit B-15, BCUC IR1 54.1; Exhibit B-26, BCUC IR2 103.1.

461 E.g., Exhibit B-26, BCUC IR2 104.1, 104.2, 104.2.1.

reflects the TLSE Project's current stage of development.[462] The following subsections focus on the following supporting points:

- Consultation, including FEI's engagement, with Indigenous groups to date has been sufficient and has included the provision of notice, project information, responses to questions and concerns, and consultation and engagement activities through the environmental assessment process.

- The recent agreement and collaboration with Musqueam is reflective of FEI and FortisBC Holdings Inc.'s collective efforts to build strong relationships with Indigenous groups regarding the TLSE Project, to meaningfully engage with potentially affected Indigenous groups and to seek their free, prior and informed consent.

- Consultation with TWN has met any legal standard at this point given the nature of the approval sought in this Application. Consultation and engagement activities with TWN will continue as development of the TLSE Project progresses, including throughout the environmental assessment and BCOCG permitting processes.

(a) Consultation with Indigenous Groups Has Been Sufficient to Date

282. As set out in Section 8.4 of the Application, FEI's engagement with Indigenous groups with respect to the TLSE Project has been guided by FEI's Engagement Plan (Appendix Q-2) and Statement of Indigenous Principles (Appendix R-1). Consultation has, to date, been meaningful, timely and sufficient.

283. FEI's engagement with Indigenous groups with respect to the TLSE Project is taking place both with respect to this CPCN Application and the environmental assessment process for the Tilbury Phase 2 LNG Expansion Project, which includes the TLSE Project in the manner described in Part Two of these Final Submissions.

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[462] For example, CTS TIMC Project Decision, pp. 52-54.

284. In recognition that there are concurrent regulatory processes underway for the TLSE Project, that FEI understands that Indigenous groups are facing resource constraints, and in the interests of providing a holistic picture and transparent engagement, FEI sought to limit consultation fatigue by synchronizing engagement activities where possible. FEI applies comments received from Indigenous groups through this synchronized process to all applicable aspects of the developments at Tilbury to ensure they are appropriately captured and addressed.[463]

Inclusive and Proactive Engagement Efforts

285. As set out in the Application, FEI identified 20 Indigenous groups to engage with specifically in respect of the TLSE Project. This is more inclusive than the list provided by a review of the provincial Consultative Areas Database (which identified 17 Indigenous groups). FEI included Indigenous groups that expressed interest in other projects in the vicinity of the Project.[464]

286. FEI commenced engagement with Indigenous groups in July 2019 while the initial scope of the TLSE Project was being developed.[465]

287. Prior to filing this Application, FEI engaged with the 20 identified Indigenous groups by sharing Project information, identifying next steps in the regulatory processes, and responding to questions and recording concerns. Notification letters and emails sent to Indigenous groups during this time included notice of relevant Project milestones, Project materials and identified opportunities for review and comment. FEI also attended Project meetings with five Indigenous groups (as requested by those Indigenous groups) to discuss questions or comments related to the Project. FEI facilitated a site visit in response to a request by an Indigenous group.[466]

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[463] Exhibit B-1-4, Application, p. 199.

[464] Exhibit B-1-4, Application, p. 197, Table 8-4 and Appendix R-2.

[465] Exhibit B-1-4, Application, p. 199, Table 8-5.

[466] Exhibit B-1-4, Application, p. 198; Exhibit B-15, BCUC IR1 58.2

288. Since filing the Application, FEI has continued to engage with the Indigenous groups regarding the TLSE Project. As of November 10, 2021, this engagement included active two-way communication between FEI and 15 Indigenous groups regarding the TLSE Project.[467]

289. FEI has responded to the questions and concerns raised by Indigenous groups regarding the TLSE Project. Where comments have required additional information that is not available at this stage of Project development, FEI has committed to provide the requested information to those Indigenous groups when the information becomes available.[468] Further, a number of the interests raised in those comments will be assessed or addressed in the environmental assessment or BCOGC permitting processes.

290. FEI has also supported and adapted engagement activities with Indigenous groups during the COVID-19 pandemic by offering to provide technological equipment to staff members of these groups who were working from home, and engaged with Indigenous groups over email rather than mail. FEI also communicated its willingness to assist in providing methods for remote monitoring of the Project.[469]

Consultation and Engagement with Indigenous Groups in the Environmental Assessment Process

291. A significant amount of consultation with Indigenous groups has taken place as part of the environmental assessment process, including:

- FortisBC commenced engagement with Indigenous groups and sought feedback regarding its draft Initial Project Description ("IPD") in July 2019, prior to formally submitting the IPD in February 2020. FortisBC later sought feedback on its draft Detailed Project Description ("DPD"). Feedback received by Indigenous groups informed the final draft of the DPD.[470] FortisBC also sought feedback from

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[467] Exhibit B-26, BCUC IR2 102.1; Exhibit B-15, BCUC IR1 58.1.

[468] Exhibit B-1-4, Application, p. 204 & Table 8-6; Exhibit B-15, BCUC IR1 59.1; Exhibit B-26, BCUC IR2 103.1.

[469] Exhibit B-1-4, Application, p. 198; Exhibit B-44, Rebuttal Evidence to TWN, pp. 19-20..

[470] Exhibit B-15, BCUC IR1 55.1

Indigenous groups regarding the draft Valued Components and draft Application Information Requirements ("dAIR").[471]

- FEI provided or offered capacity funding to thirteen Indigenous groups to support their engagement with FortisBC and their involvement in the environmental assessment process.[472]

- The BC EAO and the Impact Assessment Agency of Canada ("IAAC") have consulted with Indigenous groups throughout the environmental assessment process. The BC EAO sought consensus with participating Indigenous nations, with respect to the Readiness Decision, and Process Order, which includes the Application Information Requirements ("AIR"), the Assessment Plan and the scope and timing of Indigenous-led assessments.[473]

- The BC EAO also sent Indigenous groups an information sheet providing a background on the TLSE CPCN Application process to Indigenous groups that were inquiring about the process.[474]

Consultation and Engagement with Indigenous Groups is Ongoing and Will Continue

292. FEI will continue to engage with those Indigenous groups who wish to receive further information as development of the TLSE Project continues. Further consultation and engagement activities with potentially affected Indigenous groups will include, in particular:

- Continued engagement between FEI and potentially affected Indigenous groups that have expressed interest in the TLSE Project to better understand any

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471 Exhibit B-44, Rebuttal Evidence to TWN, pp. 15-16; Exhibit B-15, BCUC IR1 58.1.

472 Exhibit B-15, BCUC IR1 61; Exhibit B-24, BCUC IR2 101.2 & 101.3.

473 Exhibit B-44, Rebuttal Evidence to TWN, pp. 16-17, Appendix B; Exhibit B-51, CEC IR3 119.1.

474 Exhibit B-15, Response to BCUC IR1 54.2 & Attachment 54.2b.

questions or concerns that may arise and to work collaboratively to address these concerns.[475]

- Continued consultation by the BC EAO and IAAC throughout the environmental assessment process. The BC EAO will seek consensus with participating Indigenous nations throughout the remaining phases of the environmental assessment process, including acceptance of the application for an environmental assessment certificate ("EAC"), the content of the assessment report and project conditions and recommendation to the ministers. The five Indigenous groups that have elected to undertake an Indigenous-led assessment will also undertake their own assessment of potential effects on those Indigenous groups and their rights recognized and affirmed in section 35 of the *Constitution Act, 1982* ("Section 35 Rights"). These processes will also address many of the preliminary concerns raised by Indigenous groups including those regarding potential cumulative effects, greenhouse gas emissions, air quality and in-stream impacts.[476]

- Continued engagement by FortisBC with Indigenous groups during the remaining phases of the environmental assessment process as set out in the Process Plan, including gathering and incorporating feedback, addressing concerns, developing the application for an EAC and incorporating Indigenous knowledge into the assessment materials.[477] FEI will also continue to work towards capacity funding agreements with Indigenous groups to support their involvement in the environmental assessment process.[478]

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[475] Exhibit B-1-4, Application, p. 204.

[476] Exhibit B-51, CEC IR3, Attachment 119.1; Exhibit B-44, pp. 13-14, Appendices A & B.

[477] Exhibit B-51, CEC IR3, Attachment 119.1; Exhibit B-15, BCUC IR1 55.1 & 61.3; Exhibit B-44, Rebuttal Evidence to TWN, p. 18.

[478] Exhibit B-26, BCUC IR2 101.3.

- Engagement by FEI during development of management plans and conditions associated with the EAC (should it be issued).[479]

- Follow-up meetings with FEI and Indigenous groups that have expressed interest in business opportunities as that information becomes available.[480]

- Consultation by the BCOGC and other regulators as part of required permitting process for the TLSE Project. FEI will support the BCOGC's consultation process by responding to technical questions and attending meetings where appropriate. This process will address concerns raised about tank demolition, among other things.[481]

(b) Collaboration and Partnership with Musqueam Embodies the Spirit of Reconciliation and Demonstrates FEI's Commitment to Robust Engagement

293. Musqueam asserts that the Tilbury facilities are "located centrally in core Musqueam territory and […] that Musqueam is most affected and most directly interested in the proposed projects". Musqueam has proven Aboriginal rights in the project area that are recognized and affirmed under section 35 of the *Constitution Act, 1982*.[482] The recent agreement between Musqueam and FortisBC Holdings Inc. reflects the spirit of reconciliation and demonstrates the value of meaningful engagement undertaken in close collaboration.

294. The agreement allows for collaboration and partnership between Musqueam and FortisBC Holdings Inc. related to the BCUC-regulated and non-BCUC regulated projects at Tilbury Island. The agreement includes options for Musqueam to acquire equity ownership in the new regulated projects including the TLSE Project, subject to applicable regulatory approvals (which would include BCUC approval) and other conditions.[483]

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479 Exhibit B-44, Rebuttal Evidence to TWN, p. 18.

480 Exhibit B-1-4, Application, p. 204.

481 Exhibit B-1-4, pp. 204-205.

482 Exhibit C8-1.

483 Exhibit B-51, CEC IR3, 119.1

295. This agreement is significant in that it formalizes a close collaboration between Musqueam and FortisBC Holdings Inc. and its affiliates (including FEI) in the furtherance of meaningful dialogue, mutual growth and the sustainable development of energy projects which also respect Musqueam's Section 35 Rights, and the sharing of benefits associated with the development, construction and operation of Tilbury Projects.[484]

296. In the Indigenous Utilities Regulation Inquiry Final Report, the BCUC characterized reconciliation as follows:[485]

297. The concept of reconciliation implies the development of meaningful relationships with Indigenous peoples and the creation of common goals. […] Acknowledging that reconciliation is a process of change through building a lasting relationship, the Panel recognizes that it will take more than merely revising policies or processes. It requires on-going engagement and change to develop, in collaboration with Indigenous representatives, a strategy to go forward.

298. The BCUC's Indigenous Utilities Inquiry Final Report also noted the following interrelationship between UNDRIP and economic participation in utility infrastructure:[486]

Article	Summary of Indigenous Peoples' Rights	Application to This Context
3	Affirms the right to self-determination, which includes the right to freely pursue economic, social and cultural development.	This could include pursuing development of infrastructure, like utilities, to support and expand Indigenous community development.

299. The Report also recommended "that the Province consider mechanisms to encourage the development of further economic partnerships between incumbent utilities and First Nations (Final Recommendation 26)."[487]

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484 Exhibit B-54, BCUC IR4 114.1.

485 Indigenous Utilities Regulation Inquiry Final Report, p. 83. Online: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/item/470256/index.do.

486 Indigenous Utilities Regulation Inquiry Final Report, p. 28.

487 Indigenous Utilities Regulation Inquiry Final Report, p. 74.

300. The fact that these principles are embodied in the relationship between FortisBC and Musqueam is illustrated by the comments of Musqueam Chief Wayne Sparrow, who has described the relationship with FortisBC as follows: "For thousands of years, Musqueam has lived along a trading route and supported trade in the region. Through our relationship with FortisBC, we are building on this strength while being leaders in energy stability and ensuring benefits for future generations."[488]

301. If Musqueam were to exercise its option to acquire an equity ownership interest in the TLSE Project, the ownership structure contemplated would be similar to Mt. Hayes. The model allows for shared ownership of the specific asset, while leaving FEI customers in the same financial position that they would be if FEI still owned the asset.[489] FEI retains effective control over the TLSE facility, and operates it.[490] Musqueam favours the option of acquiring an equity ownership in the TLSE Project over the option of FEI making a annual royalty payment to Musqueam.[491]

302. As with other Indigenous groups, consultation activities with Musqueam remain ongoing. The Agreement contemplates the parties working collaboratively and efficiently to undertake consultation activities throughout the various approval and permitting processes.[492] This will include Musqueam undertaking an Indigenous-led assessment as part of the environmental assessment process.[493]

(c) Consultation with Tsleil-Waututh Nation to Date Has Been Deep and Meaningful

303. In its evidence and responses to IRs, TWN claims that consultation with it regarding the TLSE Project and this CPCN Application has been inadequate.[494] TWN further suggests that it

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488 Exhibit A2-1.

489 Exhibit B-54, BCUC IR4 114.2.1.

490 Exhibit B-54, BCUC IR4 114.2.1.1.

491 Exhibit B-54, BCUC IR4 114.3.

492 Exhibit B-54, BCUC IR4 115.2.

493 Exhibit B-51, CEC IR3, p. 8; and CEC IR3 119.1, Appendix 2 to Attachment 119.1,.

494 Exhibit C7-9, Appendix A, para 1.7.

hasn't been consulted at all with respect to this Application. FEI submits that, in fact, the evidence demonstrates that consultation with TWN at this point has been deep and meaningful. It meets any legal standard, given the nature of the approval sought in this Application and that consultation and engagement with TWN will continue, including throughout the ongoing environmental assessment process. In this section, FEI: (i) outlines the law regarding the duty to consult; (ii) explains that if the duty to consult is triggered by the CPCN decision, the associated duty is at the low end of the spectrum for TWN; and (iii) demonstrates how consultation with TWN has exceeded any obligations of the Crown to consult.

Overview of the Duty to Consult Indigenous Peoples

304. The duty to consult is grounded in the honour of the Crown which is enshrined in section 35 of the *Constitution Act, 1982*. For decisions that may affect Indigenous claims, the Crown is bound by its honour to balance societal and Indigenous interests.[495]

305. The duty to consult is also reciprocal – meaning that Indigenous groups are obliged to "carry their end of the consultation, to make their concerns known, to respond to the government's attempts to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution."[496] In practice, consultation should be undertaken in good faith within the processes available to the Indigenous group.[497] The duty to consult is a right to a process, not a duty to agree or a requirement for consent.[498]

306. The duty arises where the Crown has: (1) real or constructive knowledge of the potential existence of Aboriginal right or title; (2) contemplates conduct; and (3) the contemplated conduct might adversely affect it. This requires that a causal connection between the proposed Crown

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[495] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 45 ("*Haida*") [Book of Authorities, TAB 4].

[496] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, para. 65 [Book of Authorities, TAB 9].

[497] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, para. 161 [Book of Authorities, TAB 5].

[498] *Haida*, para. 42; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, para. 83 [Book of Authorities, TAB 7].

conduct and a potential adverse impact on an Aboriginal claim be demonstrated.[499] The duty is limited to adverse impacts from the specific Crown decision under consideration, here being the issuance of a CPCN by the BCUC. It does not apply to larger adverse impacts of a project beyond the specific Crown conduct.[500]

307. Where a duty to consult exists, the first task is to determine the scope and content of the duty in the particular case. The Crown's obligations will vary with the individual circumstances. There is not one model of consultation.[501]

308. The requirements of consultation increase with the strength of the *prima facie* Aboriginal rights claim and the seriousness of the impact from the particular contemplated Crown conduct on the underlying Aboriginal right.[502] Where the *prima facie* claim to Aboriginal title is weak, the Aboriginal right claimed is limited or the potential for infringement minor, the duty to consult may be limited to notice, the disclosure of information and discussion of issues raised in response to the notice.[503] Where an Indigenous group establishes strong *prima facie* case for its claim and potential infringement is highly significant to the Indigenous group, and there is a high risk of non-compensable damage, deep consultation may be required. Deep consultation may entail the opportunity to make submissions for consideration, participation in the decision-making process, and the provision of written reasons to show the Indigenous concerns were considered.[504]

309. Where a question as to the adequacy of consultation with respect to a CPCN application is raised (as TWN has done in this proceeding), the BCUC is tasked determining whether the duty was triggered, and if so, its scope and content and whether consultation was sufficient. Put

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499 *Haida*, para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani*, 2010 SCC 43, paras. 31 & 51 ("*Carrier Sekani*") [[Book of Authorities, TAB 10].

500 *Carrier Sekani*, para. 53.

501 *Haida,* para. 39.

502 *Carrier Sekani*, para. 36.

503 *Haida* para. 43.

504 *Haida,* para. 44.

simply, the BCUC must determine "whether the consultation efforts up to the point of the decision were adequate", given the nature of the approval sought.[505]

310. Participation in existing regulatory processes created for other purposes may satisfy the duty to consult if that process provides an appropriate level of consultation.[506] As such, information from the environmental assessment process is relevant to the BCUC's assessment of the adequacy of consultation.[507] Further, engagement between the proponent and Indigenous groups may be relied on in fulfilling the duty to consult.[508]

If the Duty to Consult is Triggered for TWN, its Scope and Content Lie at the Low End of the Spectrum

311. FEI submits that if this Application triggers the duty to consult TWN, it would lie at the low end of the spectrum, requiring only notice of the Application.[509] Any impact to TWN's asserted rights associated with the BCUC's decision to grant the CPCN would be minor.

312. First, the impact of the CPCN to TWN's asserted Section 35 Rights is limited in that it is an early authorization in the regulatory process which does not in itself authorize the construction of the TLSE Project. The BC EAA, IAA, the *Oil and Gas Activities Act* and the UCA each mandate discrete processes where independent decision-makers make their own decisions at different stages of a project's development process. However, each decision-maker will take into account "factors relevant to the question on which they are required to form an opinion".[510]

313. The question faced by the BCUC in the context of this Application is whether the TLSE Project is in the public convenience and necessity. The CPCN defines the regulated TLSE Project,

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505 *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* 2009 BCCA 68, para. 70 ("*Kwikwetlem*") [[Book of Authorities, TAB 8].

506 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, para. 40 ("*Taku*") [Book of Authorities, TAB 11].

507 *Kwikwetlem*, para. 56

508 *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management),* 2003 BCSC 1422, paras. 102, 116, & 118 ("*Heiltsuk*") [Book of Authorities, TAB 6].

509 *Haida*, para. 43.

510 *Kwikwetlem*, para. 55.

which will then be assessed as part of the environmental assessment process.[511] That question will be considered contemplating BCUC's central mandate, which the BCUC has accurately described as encompassing rate setting and protecting the supply system in a manner which safeguards the public interest.[512]

314. The BCUC's CPCN Application Guidelines establish that the BCUC will consider information regarding project need, alternatives and justification, Indigenous and public consultation, project information and associated cost estimate, and discussion of BC's energy objectives and policy considerations. Importantly, the consideration of potential effects is only *preliminary* as the CPCN is an early approval in the regulatory scheme.

315. Beyond a CPCN, FEI will require approvals as part of the environmental assessment process and BCOGC permits, as well as other authorizations. It is through these processes that the potential effects of the TLSE Project, including environmental, social and effects to Indigenous groups and Section 35 Rights, are (or will be) thoroughly assessed and mitigations developed. Further, these processes, and the environmental assessment process in particular, include comprehensive and meaningful consultation processes within them, including:

(a) Consensus-seeking throughout the process by the EAO with participating Indigenous nations;

(b) The opportunity for participating Indigenous nations to assess potential effects to such a nation and its Section 35 Rights through an Indigenous-led assessment; and

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511 *Kwikwetlem*, 2009 BCCA 68, para. 56.

512 Decision and Order G-75-20 (City of Coquitlam Application for Reconsideration and Variance of Order G-80-19), p. 12. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/468482/index.do?q=G-75-20. As the BCUC noted, this articulation of the mandate tracks the Supreme Court of Canada's decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 7.

(c) Mandated consideration of participating Indigenous nations' consent (or withhold of consent) for key decisions in the process including the issuance of an environmental assessment certificate. [513]

316. Second, as discussed in Part Eight of this Submission, the TLSE Project footprint is confined to a brownfield site which has been used for over half a century. The EOA identified only two biophysical receptors that presented more than a low risk (prior to the implementation of any mitigation measures): atmospheric bioreceptor and the contaminated soils and groundwater bioreceptor, for which the elevated risk was attributed to needing further assessment.[514] Air quality, soil and groundwater will all be assessed in the environmental assessment.[515] As set out in Part Eight, such potential environmental effects and potential archaeological effects can be mitigated through additional assessments, permitting processes and implementation of best management practices.

317. Further, at this stage, it is premature to make determinations as to the potential effects of the TLSE Project.[516] The concerns raised by TWN in its Written Evidence regarding the potential effects of the Project will be assessed as part of the environmental assessment process.[517] In particular, with respect to TWN's concern regarding 'cultural stress', TWN has elected to undertake its own assessment of the effects to TWN's cultural health within the environmental assessment (which FortisBC has offered to provide capacity funding to support).[518]

318. Third, while TWN has raised its desire to amend the BCUC's process with the BCUC and the Ministry of Energy, Mines and Low Carbon Innovation ("EMLI"),[519] "[t]he duty to consult is

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513 BC EAA, ss. 2, 16, 19, 27, 29; Exhibit B-44, Appendix B.

514 Exhibit B-15, BCUC IR1 49.2; see also Exhibit B-1-4, Application, pp. 173-174; Exhibit B-19, CEC IR1 62.1, 62.2, 62.3.

515 Exhibit B-51, CEC IR3, Attachment 119.1.

516 Exhibit B-44, Rebuttal Evidence to TWN, pp. 23-30.

517 Exhibit C7-9, section 5; BC EAA, s. 25 and IAA, ss. 16(2) & 22(1); Exhibit B-51, CEC IR3, Attachment 119.1.

518 Exhibit B-51, CEC IR3, Attachment 119.1; Exhibit B-44, Rebuttal Evidence to TWN, pp. 17-18.

519 Exhibit C7-9, Appendix L.

rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project."[520]

319. TWN has not identified a specific or tangible interest that will not be (or is not capable of being) resolved within the environmental assessment process. [521] Further, the evidence does not support a conclusion that the CPCN decision itself would have a significant impact to TWN's asserted Section 35 Rights. The decision for the BCUC, which, as noted above, it will consider in light of its core mandate of rate setting and protecting the integrity of the supply system, is whether the TLSE Project is in the public convenience and necessity.

320. Ultimately, because the duty is limited to the adverse impacts from the particular Crown decision, rather than broader impacts of a Project, any duty to consult TWN in the context of this CPCN Application falls at the low end of the spectrum, which would require the provision of notice of the contemplated Crown conduct (being the CPCN proceeding). [522]

Consultation with TWN to Date Has Been Sufficient

321. FEI submits that, any duty to consult owed to TWN at this stage in Project development has been satisfied. Consultation with TWN with respect to the TLSE Project and the Tilbury Phase 2 LNG Expansion Project has gone well beyond the notice required for a duty at the low end of the spectrum. Indeed, the actual consultation which has taken place with TWN to date reflects consultation at the deep end of the spectrum, with several of the hallmarks of deep consultation being present. There can be no doubt that consultation has been sufficient in this case.

322. Consultation activities with TWN with respect to the TLSE Project include those consultation and engagement activities described earlier in this Section, which have been

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520 *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* 2017 SCC 41, para. 2 [Book of Authorities, TAB 2].

521 *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, para. 30 [Book of Authorities, TAB 1].

522 *Carrier Sekani*, para. 53.

undertaken in relation to this Application and the related environmental assessment process for the broader Tilbury Phase 2 LNG Expansion Project.[523]

323. The following summary of consultation specific to TWN, in combination with the earlier description of consultation more generally, demonstrates the sufficiency of consultation to date:[524]

- First, FEI, the EMLI and the BCUC have each provided TWN with notice of the Application and this proceeding;
- In June and July 2020, FEI provided notice to TWN of its intention to file a CPCN application by letter and during telephone calls. Later, in February and March 2021 by email and in meetings, FEI notified TWN of its CPCN Application and provided information regarding the CPCN proceeding and how to participate in the CPCN proceeding;[525]
- In February and March 2021, the BCUC emailed TWN providing information regarding the BCUC process, the role of the BCUC, invited TWN to participate in the CPCN proceeding and obtain funding and offered to meet with TWN. The BCUC also provided TWN with a contact at EMLI to discuss TWN's concerns;[526] and
- In April 2021, a representative of EMLI provided TWN with information regarding how to participate in the CPCN proceeding and obtain funding and about BCUC procedures.[527]

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523 *Kwikwetlem*, para. 56; *Heiltsuk*, paras. 102, 116, & 118; *Taku,* para. 40; Exhibit B-1,Table 8-6 (p. 199-202) and Exhibit B-15 BCUC IR1 56.

524 FEI's record of engagement with TWN are set out in more detail in Exhibit B-44, Rebuttal Evidence to TWN, pp. 16-17, 21, Appendices C, D, J- L.

525 Exhibit B-44, Rebuttal Evidence to TWN, Appendices K and L.

526 Exhibit C7-9, TWN Evidence, Appendix L.

527 Exhibit C7-9, TWN Evidence, Appendix L.

324. Second, the manner in which the BCUC has addressed TWN's request to participate in the proceeding are hallmarks of deep consultation. These hallmarks include: (1) the opportunity to present evidence and to make submissions; (2) formal participation in the decision-making process; (3) the provision of capacity funding; and (4) assurance that the BCUC will provide written reasons.[528] TWN, like other interveners, was provided with the opportunity to pose formal information requests to FEI through four rounds of IRs, to which FEI responded. The BCUC also adjusted the overall regulatory timeline to accommodate TWN's requests. Moreover, the BCUC has significantly adjusted its processes to accommodate requests made by TWN for increased involvement in the proceeding that exceeds the standard involvement of the other interveners. This includes adding a confidential oral hearing component to receive evidence from a TWN knowledge holder. The BCUC also accepted TWN's request to bifurcate their argument to add an oral component, while other parties will be limited to filing written final argument.

325. Third, representatives from EMLI have consulted with TWN. In addition to providing notice of how to participate in the BCUC proceeding, EMLI exchanged emails with TWN, held one virtual meeting to discuss TWN's concerns and had scheduled a second meeting in September 2021 for after FEI had replied to IRs. However, TWN cancelled the meeting with representatives of EMLI scheduled for September 2021. There is no evidence on the record that TWN sought to reschedule the meeting, sought other opportunities to discuss the Project or CPCN or raised any concerns with EMLI regarding the TLSE Project or CPCN Application.[529]

326. Fourth, between December 2021 and February 22, 2022, after FEI learned of TWN's interest in this proceeding, FEI sought feedback from TWN on several occasions and through various forms (i.e., letter, email and bi-weekly meetings) regarding any questions or concerns

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[528] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 47 [Book of Authorities, TAB 3]; Exhibit C7-15 BCUC IR1 1.2; Exhibit A-23.

[529] Exhibit C7-9, TWN Written Evidence, Appendix L.

TWN has regarding the TLSE Project specifically or this CPCN Application. TWN did not identify any such concerns in either regard.[530]

327. Fifth, TWN has also been extensively consulted as part of the environmental assessment process:

- Since 2019, TWN has actively participated in the environmental assessment process, including being a participating Indigenous nation that sits on the technical advisory committee;[531]

- TWN representatives attended two workshops regarding the DPD, five process planning technical workshops regarding aspects of the assessment and other workshops, an Indigenous Knowledge workshop, field study summary calls and site tours.[532] FortisBC has also met with TWN one-on-one over 35 times since 2019;[533]

- TWN has provided comments on FortisBC's draft IPD, DPD (both of which include discussion of project alternatives), Valued Components, and dAIR and FortisBC has provided responses to those comments. FortisBC also sought feedback from TWN regarding draft Technical Data Reports for specific Valued Components and other aspects of the assessment;[534]

- The BC EAO has sought consensus with TWN regarding aspects of the assessment, including the DPD and the Process Order, which encloses the AIR and Assessment

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530 The only concern TWN raised was with respect to the UCA and BCUC's procedure itself: see Exhibit B-44, Appendix L; Exhibit C7-15, BCUC IR1 1.3; Exhibit B-49, TWN IR3 2.1.

531 Exhibit B-44, Rebuttal Evidence to TWN, pp. 1, 16-17 & Appendix K;

532 Exhibit B-44, Rebuttal Evidence to TWN, p. 17.

533 Exhibit B-44, Rebuttal Evidence to TWN, p. 17 and Appendix K.

534 Exhibit B-44, Rebuttal Evidence to TWN, pp. 16-17, 23, Appendix C.

Plan, and addresses the scope, methodology and timing for TWN's Indigenous-led assessment of potential effects to TWN and TWN's Section 35 Rights;[535]

- FEI has provided TWN with sufficient interim capacity funding to allow TWN to actively participate in the environmental assessment process. Moreover, TWN and FEI are negotiating further capacity funding.[536] FortisBC has also offered to provide TWN with capacity funding to support its completion of its Indigenous-led assessment;[537] and

- TWN has been provided with ample time for consultation within the environmental assessment process to date. For example, early engagement activities lasted for nearly two years prior to entering the Readiness Phase. FortisBC has also requested two separate 30-day extensions to the legislated environmental assessment timelines to allow additional time for engagement with Indigenous groups. Other extensions to the process have also been granted, including an over 30-day extension to the Process Planning stage to provide the BC EAO time to work with participating Indigenous nations, including TWN, who have indicated they would be conducting an Indigenous-led assessment.[538]

328. Given the deep consultation described above, FEI submits that consultation on the issues raised by TWN has been sufficient to date and, ultimately, TWN has been afforded a meaningful way to participate in and contribute to the development of the Tilbury Phase 2 LNG Expansion Project, which encompasses the TLSE Project.

329. FEI has given, and continues to give, full and fair consideration to all information provided by TWN, including with respect to TWN's asserted Section 35 Rights, the use of Indigenous

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535 Exhibit B-51, CEC IR3, Attachment 119.1.

536 Exhibit B-49, TWN IR3 2.1; Exhibit B-51, CEC IR3 120.2.

537 Exhibit B-44, Rebuttal Evidence to TWN, pp. 17-18.

538 Exhibit B-44, Rebuttal Evidence to TWN, p. 19.

knowledge and TWN's comments.[539] FEI has provided responses to comments it sought from TWN and may further address or incorporate TWN comments into its environmental assessment application.[540]

330. Finally, as set out in above, FortisBC will continue to engage with TWN throughout the various stages of project development, including the fulfillment of IAAC, BC EAO and BCOGC-related consultation requirements with respect to the TLSE Project. FortisBC will engage with Indigenous groups, the BC EAO and IAAC in the environmental assessment process to consider potential effects to Indigenous rights and interests and seek to develop avoidance or mitigation strategies for potential effects.[541]

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[539] Exhibit B-49, TWN IR3 2.1.

[540] Exhibit B-44, Rebuttal Evidence to TWN, pp. 18, 19 & 20.

[541] Exhibit B-25, TWN IR1 9.1 & 9.2.

PART TEN: APPLICABLE ENERGY OBJECTIVES AND RESOURCE PLAN

A. INTRODUCTION

332. Section 46 (3.1) of the UCA requires that the BCUC consider: "(a) the applicable of British Columbia's energy objectives", and "(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any."[542]

333. The subsections in this Part demonstrate the following points:

- First, the TLSE Project is consistent with applicable British Columbia Energy objectives, including being a direct driver of economic development, while also aligning with the goal of reducing GHG emissions.
- Second, FEI's 2022 Long Term Gas Resource Plan contemplates the continued importance of the existing gas system and, as such, the resiliency benefits will continue to be needed over at least the 20-year planning horizon.

B. THE TLSE PROJECT IS CONSISTENT WITH APPLICABLE ENERGY OBJECTIVES

334. Section 46 (3.1)(a) of the UCA refers to the "the applicable" British Columbia's energy objectives, which recognizes that not all of the objectives are relevant to every project. Section 6 of the BCUC CPCN Application Guidelines adds that, if the nature of the project precludes a direct link to the energy objectives, the application should discuss how the project does not hamper other projects or initiatives undertaken by the applicant or others, from advancing these energy objectives.[543]

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[542] Section 46(3.1) also includes "(c) the extent to which the application for the certificate is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*." These provisions do not apply to FEI.

[543] Appendix A to Order G-20-15, CPCN Guidelines, p. 9.

335. Section 2(k) of the *Clean Energy Act* is directly applicable to the TLSE Project: "to encourage economic development and the creation and retention of jobs". The TLSE Project promotes this objective in the following ways:

- First, the development of the TLSE Project will create additional employment and lead to the procurement of local goods and use of local services. In particular, FEI will be working with Indigenous communities and stakeholders to promote the TLSE Project's positive socio-economic opportunities.[544] This work is already embodied in the agreement reached with the Musqueam, discussed in Part Nine of this Submission.

- Second, as described in Part Three of this Submission, the potential loss or disruption of gas supply would have significant consequences for the Province, impacting many hundreds of thousands of customers who use gas in their homes and businesses, and potentially business closures and the loss of jobs.[545]

336. The TLSE Project is similar to the PGR Project in the sense that it is intended to support uninterrupted service to customers, rather than, for example, promoting load growth. In that case, the BCUC indicated: "The Panel is satisfied that the Project will support the objective of encouraging economic development and the creation and retention of jobs and that this is the only directly applicable of BC's energy objectives."[546]

337. FEI does not expect the TLSE Project to contribute to GHG emissions.[547] Rather, the TLSE Project is a resiliency project that dovetails with FEI's planned transition to a low-carbon energy system.[548] As FEI explains:[549]

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[544] Exhibit B-1-4, Application, pp. 206-207

[545] See Exhibit B-1-4, Application, Appendix B.

[546] Decision p. 47.

[547] Exhibit B-44, Rebuttal Evidence to TWN, p. 24; see also Exhibit B-18, BCSEA IR1 9.1 and Exhibit B-21, MS2S IR1 14.iv.

[548] Exhibit B-31, MS2S IR1 4.3. Exhibit B-30, BCSEA IR2 11.1.

[549] Exhibit B-15, BCUC IR1 63.1.

> …the TLSE Project enables greater resilience of the gas energy delivery system, which as noted the [FortisBC's] Clean Growth Pathway to 2050, is expected to deliver an increasing proportion of renewable and low carbon energy into the future. The need for resilience is even greater as energy supply on both gas and electric systems shifts to incorporate intermittent sources. Accordingly, the TLSE plays a fundamental role in providing resilience to the energy system and supports BC's climate action framework.

338. Guidehouse's *Pathways for British Columbia to Achieve its GHG Reduction Goals* report ("Guidehoues Pathways Report")[550] highlights the critical role that the gas system will have in the Province's decarbonization path. Guidehouse observes that decarbonizing BC's energy system cannot come at the cost of the system's resiliency and its ability to meet BC's energy requirements – particularly during extremely cold weather conditions.[551]

339. While the TLSE Project is not expected to contribute to GHG emissions, the potential impacts of the Tilbury Phase 2 LNG Expansion Project on climate change will nonetheless be studied as part of the environmental assessment process. This includes, in particular, the development of a net zero GHG emissions plan – further advancing British Columbia's energy objectives.[552]

C. FEI'S RESOURCE PLAN ADDRESSES RESILIENCY AND CONTEMPLATES A LONG-TERM ROLE FOR NATURAL GAS INFRASTRUCTURE

340. In May 2022, FEI filed its 2022 LTGRP.[553] The TLSE Project is consistent with the 2022 LTGRP in the sense that it supports the continued role of the gas system through the energy transition.

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[550] Exhibit B-15, Attachment 63.1.

[551] Exhibit B-15, BCUC IR1 63.1; see also Exhibit B-21, MS2S IR1 9iii.

[552] Exhibit B-44, Rebuttal Evidence to TWN, p. 24.

[553] At the time FEI filed this CPCN Application, the "most recent long-term resource plan" was FEI's 2017 LTGRP. As the BCUC Panel IRs canvassed the 2022 LTGRP we have focussed on the 2022 LTGRP.

341. The 2022 LTGRP presents a 20-year view of the demand-side and supply-side resources identified to meet expected future gas demand, reliability requirements and provincial greenhouse gas reduction requirements at the lowest reasonable cost to FEI's customers.

342. As outlined in the 2022 LTGRP, throughout the energy transition over at least the next 20 years, methane (both renewable and conventional natural gas) will continue to play a significant role in providing firm energy service to customers in the Lower Mainland.[554] The TLSE Project will be required to support the resilience of methane-based energy deliveries to customers well into the future, and given its location on-system, also enhances FEI's security of supply, reliability and flexibility to serve loads within FEI's system.

343. Finally, as addressed by FEI in this proceeding, the inclusion of hydrogen in the resource stack in future years is not incompatible with the TLSE Project. While the TLSE Project would not be used if dedicated hydrogen delivery infrastructure were developed (as hydrogen cannot be stored in an LNG tank),[555] FEI expects that methane (whether from conventional or renewable sources) will continue to exceed 80 percent by volume of the gas transported by the Coastal Transmission System pipelines for at least 20 years.[556] As hydrogen can be separated[557] if introduced upstream of the Tilbury facility (i.e., in low concentrations within FEI's existing gas system), FEI does not anticipate impacts on the TLSE Project as a result of increasing hydrogen content in the gas stream.[558] The TLSE Project will still have the capability to inject methane (potentially a combination of natural gas and RNG) to support the Lower Mainland system in the event of a T-South no-flow event.

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554 Exhibit B-39, BCUC Panel IR1 1.1, 1.2.

555 Exhibit B-15, BCUC IR1 21.1; Exhibit B-39, BCUC Panel IR1 1.2.2.

556 Exhibit B-39, BCUC Panel IR1 1.4.1.

557 See Exhibit B-26, BCUC IR2 83.1, 83.3, 83.4, 83.5 for further discussion on the separation of hydrogen from methane and biomethane.

558 Exhibit B-15, BCUC IR1 21.1; Exhibit B-39, BCUC Panel IR1 1.2.2.

PART ELEVEN: CONCLUSION

344. The T-South Incident demonstrated that a no-flow event lasting at least two days is a reality that must factor into FEI's system planning – a reality that the BCUC recognized requesting FEI consider the resiliency of its gas system as part of the ACP compliance process. We know, with certainty, that integrity-related disruptions occur regularly in North America and that the outages frequently last three days, and that non-integrity events (e.g., cyberattacks) have caused multi-day energy infrastructure outages. We know, with certainty, that hundreds of thousands of people in the Lower Mainland will lose gas service on the first day of a no-flow event occurring in winter because Tilbury is much too small to support daily load in a normal winter. We know, with certainty, that an outage will be lengthy. We know, with certainty, that the loss of space and hot water heating for many weeks will represent a hardship for people and businesses, and a health and safety risk to vulnerable populations. FEI submits that these facts make a compelling case for investments to mitigate the known risk. The TLSE Project is the only way to do so effectively.

345. FEI respectfully submits that the TLSE Project should be approved on the terms sought. FEI is also amenable to the reporting discussed in the response to BCOAPO IR2 6.1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: October 24, 2022 ***[original signed by Matthew Ghikas]***
Matthew Ghikas Counsel for FortisBC Energy Inc.

Dated: October 24, 2022 ***[original signed by Dani Bryant]***
Dani Bryan Counsel for FortisBC Energy Inc.

Dated: October 24, 2022 ***[original signed by Niall Rand]***
Niall Rand Counsel for FortisBC Energy Inc.

Dated: October 24, 2022 ***[original signed by Madison Grist]***
Madison Grist Counsel for FortisBC Energy Inc.

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF

THE UTILITIES COMMISSION ACT

RSBC 1996, CHAPTER 473

AND

FORTISBC ENERGY INC.

APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE TILBURY LIQUEFIED NATURAL GAS STORAGE EXPANSION PROJECT

FINAL SUBMISSIONS OF FORTISBC ENERGY INC.

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TAB 1

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

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, 1871[1]. 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.
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> 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.
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> 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.
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> 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 land[2].

[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

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[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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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 claims[3].

[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.
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> 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.
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> 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).
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> 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:
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> > 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.
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> 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 activity[4].

[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 purposes[5]. 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.

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[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 immigration[7]. In the result, if the Crown had any duty to consult with the Treaty One First Nations with respect to the impact of the Pipeline Projects on their unresolved land claims, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice: see *Haida Nation*, above, at para. 37. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more: also see *Ahousaht v. Canada*, 2007 FC 567, [2007] F.C.J. No. 827 at para. 32, aff'd 2008 FCA 212, [2008] F.C.J. No 946 at para. 37.

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

IV. Conclusion

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

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

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

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

JUDGMENT

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

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-225-08, T-921-08 and T-925-08
STYLE OF CAUSE:	Brokenhead Ojibway Nation, et al. v. AGC, et al.
PLACE OF HEARING:	Winnipeg, MB
DATE OF HEARING:	September 2 to 4, 2008 and January 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	May 12, 2009

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TAB 2

Chippewas of the Thames First Nation
Appellant

v.

Enbridge Pipelines Inc.,
National Energy Board and
Attorney General of Canada *Respondents*

and

Attorney General of Ontario,
Attorney General of Saskatchewan,
Nunavut Wildlife Management Board,
Suncor Energy Marketing Inc.,
Mohawk Council of Kahnawà:ke,
Mississaugas of the New Credit First Nation
and Chiefs of Ontario *Interveners*

Chippewas of the Thames First Nation
Appelante

c.

Pipelines Enbridge inc.,
Office national de l'énergie et
procureure générale du Canada *Intimés*

et

Procureur général de l'Ontario,
procureur général de la Saskatchewan,
Conseil de gestion des ressources fauniques
du Nunavut, Suncor Energy Marketing Inc.,
Mohawk Council of Kahnawà:ke,
Mississaugas of the New Credit First Nation
et Chiefs of Ontario *Intervenants*

Indexed as: Chippewas of the Thames First Nation *v.* Enbridge Pipelines Inc.

2017 SCC 41

File No.: 36776.

2016: November 30; 2017: July 26.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Répertorié : Chippewas of the Thames First Nation *c.* Pipelines Enbridge inc.

2017 CSC 41

N° du greffe : 36776.

2016 : 30 novembre; 2017 : 26 juillet.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Aboriginal rights — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact Aboriginal and treaty rights — Pipeline crossing traditional territory of First Nation — National Energy Board approving modification of pipeline — Whether Board's contemplated decision on project's approval amounted to Crown conduct triggering duty to consult — Whether Crown consultation can be conducted through regulatory process — Role of regulatory tribunal when Crown not a party to regulatory process — Scope of duty to consult — Whether there was adequate notice to First Nation that Crown was relying on Board's process to fulfill its duty to consult — Whether Crown's consultation obligation fulfilled — Whether Board's written reasons were sufficient

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Droits ancestraux — Droits issus de traités — Couronne — Obligation de consultation — Décision d'un organisme de réglementation fédéral indépendant qui pourrait avoir une incidence sur des droits ancestraux et issus de traités — Pipeline traversant le territoire traditionnel d'une première nation — Approbation par l'Office national de l'énergie d'une modification du pipeline — La décision envisagée par l'Office relativement à l'approbation du projet peut-elle être considérée comme une mesure de la Couronne ayant donné naissance à l'obligation de consulter? — La consultation incombant à la Couronne peut-elle être menée dans le cadre d'un processus réglementaire? — Rôle d'un tribunal administratif lorsque la Couronne n'est pas partie au processus réglementaire — Étendue

to satisfy Crown's obligation — National Energy Board Act, R.S.C. 1985, c. N-7, s. 58.

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, was the final decision maker on an application by Enbridge Pipelines Inc. for a modification to a pipeline that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. The NEB issued notice to Indigenous groups, including the Chippewas of the Thames First Nation (Chippewas), informing them of the project, the NEB's role, and the NEB's upcoming hearing process. The Chippewas were granted funding to participate in the process, and they filed evidence and delivered oral argument delineating their concerns that the project would increase the risk of pipeline ruptures and spills, which could adversely impact their use of the land. The NEB approved the project, and was satisfied that potentially affected Indigenous groups had received adequate information and had the opportunity to share their views. The NEB also found that potential project impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately mitigated. A majority of the Federal Court of Appeal dismissed the Chippewas' appeal.

Held: The appeal should be dismissed.

When an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work could potentially adversely affect the Chippewas' asserted Aboriginal and treaty rights, the Crown had an obligation to consult.

The Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the

de l'obligation de consulter — La première nation a-t-elle été avisée adéquatement du fait que la Couronne s'en remettait au processus de l'Office pour satisfaire à son obligation de consulter? — La Couronne s'est-elle acquittée de son obligation de consulter? — Les motifs écrits de l'Office étaient-ils suffisants pour satisfaire à l'obligation de la Couronne? — Loi sur l'Office national de l'énergie, L.R.C. 1985, c. N-7, art. 58.

L'Office national de l'énergie (ONÉ), tribunal administratif fédéral et organisme de réglementation, était le décideur ultime concernant une demande présentée par Pipelines Enbridge inc. en vue que soit apportée à une canalisation une modification qui aurait pour effet d'inverser le sens de l'écoulement dans une partie du pipeline, d'accroître sa capacité et de permettre le transport de pétrole brut lourd. L'ONÉ a envoyé un avis à des groupes autochtones, y compris aux Chippewas of the Thames First Nation (Chippewas), afin de les informer du projet, du rôle de l'ONÉ et du processus d'audience à venir. Les Chippewas ont obtenu les fonds nécessaires pour participer au processus, et ils ont déposé des éléments de preuve et présenté des observations orales à l'audience faisant état de leur crainte que le projet n'augmente le risque de ruptures du pipeline et de déversements, ce qui pourrait avoir des effets préjudiciables sur leur utilisation du territoire. L'ONÉ a approuvé le projet, estimant que les groupes autochtones susceptibles d'être touchés avaient été suffisamment renseignés à son sujet et avaient eu l'occasion de faire connaître leurs points de vue. L'ONÉ a également conclu que les effets éventuels du projet sur les droits et les intérêts des groupes autochtones seraient vraisemblablement négligeables et atténués de façon convenable. Les juges majoritaires de la Cour d'appel fédérale ont rejeté l'appel des Chippewas.

Arrêt : Le pourvoi est rejeté.

Lorsqu'un organisme de réglementation indépendant tel l'ONÉ doit rendre une décision susceptible de porter atteinte à des droits ancestraux ou issus de traités, la décision de l'ONÉ constituerait en soi une mesure de la Couronne emportant pour celle-ci une obligation de consulter. En tant qu'organisme d'origine législative investi du pouvoir délégué de rendre une décision susceptible de porter atteinte à des droits ancestraux et issus de traités, l'ONÉ agissait au nom de la Couronne lorsqu'il a approuvé la demande d'Enbridge. Comme les travaux autorisés étaient susceptibles de porter atteinte aux droits ancestraux et issus de traités invoqués par les Chippewas, la Couronne avait une obligation de consulter.

La Couronne peut se fonder sur les mesures prises par un organisme administratif pour satisfaire à son obligation

agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval. Otherwise, a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed.

A regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the hearing process. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights. As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation was adequate if the concern is raised before it. The responsibility to ensure the honour of the Crown is upheld remains with the Crown. However, administrative decision makers have both the obligation to decide necessary questions of law and an obligation to make decisions within the contours of the state's constitutional obligations.

The duty to consult is not the vehicle to address historical grievances. The subject of the consultation is the impact on the claimed rights of the current decision under consideration. Even taking the strength of the Chippewas' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate. Potentially affected Indigenous groups were given early notice of the NEB's hearing and were invited to participate in the process. The Chippewas accepted the invitation and appeared before the NEB. They were aware that the NEB was the final decision maker. Moreover, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. The circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice that it intended to

de consulter, dans la mesure où ce dernier dispose du pouvoir légal de faire ce que l'obligation de consulter impose dans les circonstances, et dans la mesure où il est clairement indiqué au groupe autochtone touché que la Couronne s'en remet à ce processus. Toutefois, si les pouvoirs que la loi confère à l'organisme sont insuffisants dans les circonstances, ou si l'organisme ne prévoit pas des consultations et des accommodements adéquats, la Couronne doit prévoir d'autres avenues de consultation et d'accommodement véritables avant que le projet ne soit approuvé. Autrement, la décision que l'organisme de réglementation aura prise sans consultation adéquate ne respectera pas les normes constitutionnelles et devrait être annulée.

Le pouvoir d'un tribunal administratif d'apprécier l'obligation de consulter de la Couronne n'est pas tributaire de la participation du gouvernement au processus d'audience. L'obligation constitutionnelle de la Couronne ne disparaît pas lorsqu'elle s'engage dans le processus d'approbation d'un projet par l'intermédiaire d'un organisme de réglementation tel l'ONÉ. Il doit être satisfait à cette obligation avant que le gouvernement n'approuve un projet susceptible d'avoir un effet préjudiciable sur des droits ancestraux ou issus de traités. En tant que décideur ultime en ce qui concerne certains projets, l'ONÉ doit, lorsque la question est soulevée devant lui, se demander si les consultations par la Couronne relativement à un projet donné ont été adéquates. La responsabilité de veiller à ce que l'honneur de la Couronne soit préservé continue de reposer sur cette dernière. Toutefois, les décideurs administratifs ont l'obligation de trancher les questions de droit pertinentes soulevées devant eux, ainsi que l'obligation de rendre leurs décisions dans le respect des obligations constitutionnelles de l'État.

L'obligation de consulter n'est pas un moyen approprié de régler des griefs historiques. La consultation s'intéresse à l'effet sur les droits revendiqués de la décision actuellement considérée. Même en considérant de la façon la plus favorable aux Chippewas la solidité de leur revendication et la gravité de l'impact potentiel sur les droits qu'ils invoquent, la consultation menée en l'espèce a manifestement été adéquate. Les groupes autochtones susceptibles d'être touchés ont été avisés à l'avance de la tenue des audiences de l'ONÉ et ont été invités à participer au processus. Les Chippewas ont accepté l'invitation et ils ont comparu devant l'ONÉ. Ils savaient que l'ONÉ était le décideur ultime. De plus, ils comprenaient qu'aucun autre organisme de l'État ne participait au processus pour effectuer des consultations. Les circonstances indiquaient de façon suffisamment claire aux Chippewas que le processus de l'ONÉ constituait le processus de consultation et d'accommodement de la Couronne. Malgré son

rely on the NEB's process to fulfill its duty to consult, its consultation obligation was met.

The NEB's statutory powers under s. 58 of the *National Energy Board Act* were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. Second, the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, in order to mitigate potential risks, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

Finally, where affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights and interests into consideration and accommodated them where appropriate. In this case, the NEB's written reasons are sufficient to satisfy the Crown's obligation. Unlike the NEB's reasons in the companion case *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, the discussion of Aboriginal consultation was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous groups and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address any negative impacts on the asserted rights from the approval and completion of the project.

Cases Cited

Applied: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **referred to:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC

omission de donner avis en temps utile de son intention de s'en remettre au processus de l'ONÉ pour s'acquitter de son obligation de consulter, la Couronne a respecté son obligation de mener des consultations.

Du fait des pouvoirs que l'art. 58 de la *Loi sur l'Office national de l'énergie* confère à l'ONÉ, ce dernier était en mesure de satisfaire aux obligations constitutionnelles de la Couronne dans le présent cas. En outre, le processus mené par l'ONÉ en l'espèce était suffisant pour satisfaire à l'obligation de consulter qui incombait à la Couronne. Premièrement, l'ONÉ a fourni aux Chippewas une possibilité adéquate de participer au processus décisionnel. Deuxièmement, l'ONÉ a suffisamment apprécié les effets potentiels du projet sur les droits des groupes autochtones, ce qui l'a amené à conclure que le risque d'effets préjudiciables était minime et pouvait être atténué. Troisièmement, l'ONÉ a pris des mesures d'accommodement appropriées pour atténuer les risques potentiels du projet sur les droits des groupes autochtones en imposant des conditions à Enbridge.

Enfin, lorsque des groupes autochtones touchés soulèvent directement des préoccupations concernant les consultations incombant à la Couronne, l'ONÉ doit habituellement motiver sa décision par écrit. Ce qu'il faut, c'est que l'ONÉ indique qu'il a pris en considération les droits ancestraux et issus de traités invoqués et qu'il a pris des accommodements à leur égard lorsqu'il convenait de le faire. En l'espèce, les motifs écrits exposés par l'ONÉ sont suffisants et permettent de satisfaire à l'obligation de la Couronne. Contrairement aux motifs de l'ONÉ dans l'affaire connexe *Clyde River (Hameau) c. Petroleum Geo-Services Inc.*, 2017 CSC 40, [2017] 1 R.C.S. 1069, l'analyse de la consultation menée auprès des Autochtones n'était pas intégrée dans une évaluation environnementale. L'ONÉ a examiné les éléments de preuve présentés par écrit et de vive voix par de nombreux groupes autochtones et il a identifié, par écrit, les droits et intérêts en jeu. Il a apprécié les risques que le projet posait à l'égard de ces droits et intérêts et conclu qu'ils étaient minimes. Néanmoins, il a imposé par écrit, sous forme de conditions contraignantes, des mesures d'accommodement en vue de remédier adéquatement à tout effet préjudiciable sur les droits invoqués par suite de l'approbation et de la réalisation du projet.

Jurisprudence

Arrêts appliqués : *Clyde River (Hameau) c. Petroleum Geo-Services Inc.*, 2017 CSC 40, [2017] 1 R.C.S. 1069; *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; **arrêts mentionnés :** *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004

73, [2004] 3 S.C.R. 511; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.
National Energy Board Act, R.S.C. 1985, c. N-7, ss. 3, 22(1), Part III, 30(1), 52, 54(1), 58.
Oil Pipeline Uniform Accounting Regulations, C.R.C., c. 1058.

Authors Cited

Woodward, Jack. *Native Law*, vol. 1. Toronto: Thomson Reuters, 1994 (loose-leaf updated 2017, release 2).

APPEAL from a judgment of the Federal Court of Appeal (Ryer, Webb and Rennie JJ.A.), 2015 FCA 222, [2016] 3 F.C.R. 96, 390 D.L.R. (4th) 735, [2016] 1 C.N.L.R. 18, 479 N.R. 220, [2015] F.C.J. No. 1294 (QL), 2015 CarswellNat 5511 (WL Can.), affirming a decision of the National Energy Board, No. OH-002-2013, March 6, 2014, 2014 LNCNEB 4 (QL). Appeal dismissed.

David C. Nahwegahbow and *Scott Robertson*, for the appellant.

Douglas E. Crowther, *Q.C.*, *Joshua A. Jantzi* and *Aaron Stephenson*, for the respondent Enbridge Pipelines Inc.

Jody Saunders and *Kristen Lozynsky*, for the respondent the National Energy Board.

Peter Southey and *Mark R. Kindrachuk*, *Q.C.*, for the respondent the Attorney General of Canada.

Manizeh Fancy and *Richard Ogden*, for the intervener the Attorney General of Ontario.

CSC 73, [2004] 3 R.C.S. 511; *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781; *Première nation dakota de Standing Buffalo c. Enbridge Pipelines Inc.*, 2009 CAF 308, [2010] 4 R.C.F. 500; *Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *West Moberly First Nations c. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234; *Kainaiwa/Blood Tribe c. Alberta (Energy)*, 2017 ABQB 107; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817.

Lois et règlements cités

Loi constitutionnelle de 1982, art. 35.
Loi sur l'Office national de l'énergie, L.R.C. 1985, c. N-7, art. 3, 22(1), partie III, 30(1), 52, 54(1), 58.
Règlement de normalisation de la comptabilité des oléoducs, C.R.C., c. 1058.

Doctrine et autres documents cités

Woodward, Jack. *Native Law*, vol. 1, Toronto, Thomson Reuters, 1994 (loose-leaf updated 2017, release 2).

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Ryer, Webb et Rennie), 2015 CAF 222, [2016] 3 R.C.F. 96, 390 D.L.R. (4th) 735, [2016] 1 C.N.L.R. 18, 479 N.R. 220, [2015] A.C.F. nº 1294 (QL), 2015 CarswellNat 10332 (WL Can.), qui a confirmé une décision de l'Office national de l'énergie, nº OH-002-2013, datée du 6 mars 2014, 2014 LNCONE 4 (QL). Pourvoi rejeté.

David C. Nahwegahbow et *Scott Robertson*, pour l'appelante.

Douglas E. Crowther, *c.r.*, *Joshua A. Jantzi* et *Aaron Stephenson*, pour l'intimée Pipelines Enbridge inc.

Jody Saunders et *Kristen Lozynsky*, pour l'intimé l'Office national de l'énergie.

Peter Southey et *Mark R. Kindrachuk*, *c.r.*, pour l'intimée la procureure générale du Canada.

Manizeh Fancy et *Richard Ogden*, pour l'intervenant le procureur général de l'Ontario.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

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

Martin Ignasiak, *W. David Rankin* and *Thomas Kehler*, for the intervener Suncor Energy Marketing Inc.

Francis Walsh and *Suzanne Jackson*, for the intervener the Mohawk Council of Kahnawà:ke.

Nuri G. Frame, *Jason T. Madden* and *Jessica Labranche*, for the intervener the Mississaugas of the New Credit First Nation.

Maxime Faille, *Jaimie Lickers* and *Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

Karakatsanis and Brown JJ. —

I. Introduction

[1] In this appeal and in its companion, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, this Court must consider the Crown's duty to consult with Indigenous peoples prior to an independent regulatory agency's approval of a project that could impact their rights. As we explain in the companion case, the Crown may rely on regulatory processes to partially or completely fulfill its duty to consult.

[2] These cases demonstrate that the duty to consult has meaningful content, but that it is limited in scope. The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Marie-France Major et *Thomas Slade*, pour l'intervenant le Conseil de gestion des ressources fauniques du Nunavut.

Martin Ignasiak, *W. David Rankin* et *Thomas Kehler*, pour l'intervenante Suncor Energy Marketing Inc.

Francis Walsh et *Suzanne Jackson*, pour l'intervenant Mohawk Council of Kahnawà:ke.

Nuri G. Frame, *Jason T. Madden* et *Jessica Labranche*, pour l'intervenante Mississaugas of the New Credit First Nation.

Maxime Faille, *Jaimie Lickers* et *Guy Régimbald*, pour l'intervenant Chiefs of Ontario.

Version française du jugement de la Cour rendu par

Les juges Karakatsanis et Brown —

I. Introduction

[1] Dans le présent pourvoi et le pourvoi connexe, *Clyde River (Hameau) c. Petroleum Geo-Services Inc.*, 2017 CSC 40, [2017] 1 R.C.S. 1069, la Cour est appelée à examiner l'obligation qui incombe à la Couronne de consulter les peuples autochtones avant qu'un organisme de réglementation indépendant n'approuve un projet susceptible de porter atteinte à leurs droits. Comme nous l'expliquons dans le pourvoi connexe, la Couronne peut s'en remettre à des processus réglementaires pour satisfaire, en tout ou en partie, à son obligation de consulter.

[2] Il ressort de ces décisions que l'obligation de consulter a un contenu significatif, mais que sa portée est limitée. L'obligation de consulter tire son origine du besoin d'éviter qu'il soit porté à des droits revendiqués ou reconnus une atteinte découlant de la mise en œuvre d'un projet donné; elle n'a pas pour objet de résoudre des revendications plus larges dépassant le cadre du projet en question. Cela dit,

an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.

[3] The Chippewas of the Thames First Nation has historically resided near the Thames River in southwestern Ontario, where its members carry out traditional activities that are central to their identity and way of life. Enbridge Pipelines Inc.'s Line 9 pipeline crosses their traditional territory.

[4] In November 2012, Enbridge applied to the National Energy Board (NEB) for approval of a modification of Line 9 that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. These changes would increase the assessed risk of spills along the pipeline. The Chippewas of the Thames requested Crown consultation before the NEB's approval, but the Crown signalled that it was relying on the NEB's public hearing process to address its duty to consult.

[5] The NEB approved Enbridge's proposed modification. The Chippewas of the Thames then brought an appeal from that decision to the Federal Court of Appeal, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. The majority of the Federal Court of Appeal dismissed the appeal, and the Chippewas of the Thames brought an appeal from that decision to this Court. For the reasons set out below, we would dismiss the appeal. The Crown is entitled to rely on the NEB's process to fulfill the duty to consult. In this case, in light of the scope of the project and the consultation process afforded to the Chippewas of the Thames by the NEB, the Crown's duty to consult and accommodate was fulfilled.

l'obligation de consulter exige une véritable possibilité de dialogue avec les groupes autochtones dont les droits peuvent être touchés.

[3] L'appelante, Chippewas of the Thames First Nation (Chippewas de la Thames), vit depuis longtemps près de la rivière Thames dans le Sud-Ouest de l'Ontario, où ses membres poursuivent des activités traditionnelles qui sont au cœur de leur identité et de leur mode de vie. La canalisation 9 de Pipelines Enbridge inc. traverse son territoire traditionnel.

[4] En novembre 2012, Enbridge a demandé à l'Office national de l'énergie (ONÉ) d'approuver, à l'égard de la canalisation 9, une modification qui aurait pour effet d'inverser le sens de l'écoulement dans une partie du pipeline, d'accroître sa capacité et de permettre le transport de pétrole brut lourd. Ces changements aggraveraient les risques de déversements le long du pipeline qui ont été évalués. Les Chippewas de la Thames ont demandé à la Couronne de les consulter avant que l'ONÉ n'approuve le projet, mais la Couronne a répondu qu'elle s'en remettait au processus d'audience publique de l'ONÉ pour satisfaire à son obligation de consulter.

[5] L'ONÉ a approuvé la modification proposée par Enbridge. Les Chippewas de la Thames ont alors interjeté appel de cette décision à la Cour d'appel fédérale, soutenant que l'ONÉ n'avait pas compétence pour approuver le changement proposé à la canalisation 9 en l'absence de consultations menées par la Couronne. Les juges majoritaires de la Cour d'appel fédérale ont rejeté l'appel et les Chippewas de la Thames ont porté cette décision en appel devant la Cour. Pour les motifs exposés ci-après, nous sommes d'avis de rejeter l'appel. La Couronne est autorisée à s'en remettre au processus de l'ONÉ pour satisfaire à son obligation de consulter. En l'espèce, compte tenu de la portée du projet et du processus de consultation de l'ONÉ dont ont bénéficié les Chippewas de la Thames, la Couronne a satisfait à son obligation de consultation et d'accommodement.

II. Background

A. *The Chippewas of the Thames First Nation*

[6] The Chippewas of the Thames are the descendants of a part of the Anishinaabe Nation that lived along the shore of the Thames River in southwestern Ontario prior to the arrival of European settlers in the area at the beginning of the 18th century. Their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory.

[7] The Chippewas of the Thames assert that they have a treaty right guaranteeing their exclusive use and enjoyment of their reserve lands. They also assert Aboriginal harvesting rights as well as the right to access and preserve sacred sites in their traditional territory. Finally, they claim Aboriginal title to the bed of the Thames River, its airspace, and other lands throughout their traditional territory.

B. *Legislative Scheme*

[8] The NEB is a federal administrative tribunal and regulatory agency established under s. 3 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*), whose functions include the approval and regulation of pipeline projects. The *NEB Act* prohibits the operation of a pipeline unless a certificate of public convenience and necessity has been issued for the project and the proponent has been given leave under Part III to open the pipeline (s. 30(1)).

[9] The NEB occupies an advisory role with respect to the issuance of a certificate of public convenience and necessity. Under ss. 52(1) and 52(2), it can submit a report to the Minister of Natural Resources setting out: (i) its recommendation on whether a certificate should be issued based on its consideration of certain criteria; and (ii) the terms

II. Contexte

A. *Les Chippewas de la Thames*

[6] Les Chippewas de la Thames sont les descendants d'une partie de la Nation Anishinaabe qui vivait au bord de la rivière Thames, dans le Sud-Ouest de l'Ontario, avant que les colons européens ne s'établissent dans cette région au début du 18e siècle. Leurs ancêtres avaient un mode de vie axé sur la chasse, la pêche, le piégeage, la cueillette et la culture du maïs et de la courge; ils célébraient des cérémonies sur des sites sacrés et pouvaient trouver sur leur territoire traditionnel des animaux, des plantes, des minéraux, du sucre d'érable et de l'huile.

[7] Les Chippewas de la Thames soutiennent qu'ils possèdent un droit issu de traités qui leur garantit l'utilisation et la jouissance exclusives de leurs terres de réserve. Ils affirment par ailleurs posséder des droits ancestraux de récolte ainsi que le droit d'accéder à des sites sacrés sur leur territoire traditionnel et de les protéger. Enfin, ils revendiquent le titre ancestral sur le lit de la rivière Thames et sur son espace aérien, ainsi que sur d'autres terres de leur territoire traditionnel.

B. *Régime législatif*

[8] L'ONÉ est un tribunal administratif fédéral et un organisme de réglementation constitué sous le régime de l'art. 3 de la *Loi sur l'Office national de l'énergie*, L.R.C. 1985, c. N-7 (*Loi sur l'ONÉ*). Il a notamment pour fonction d'approuver et d'encadrer les projets de pipeline. La *Loi sur l'ONÉ* interdit l'exploitation d'un pipeline sans qu'un certificat d'utilité publique ait été délivré à l'égard du projet et que le promoteur ait été autorisé aux termes de la partie III à mettre le pipeline en service (par. 30(1)).

[9] L'ONÉ exerce un rôle consultatif pour ce qui est de la délivrance des certificats d'utilité publique. Les paragraphes 52(1) et 52(2) prévoient qu'il peut présenter au ministre des Ressources naturelles un rapport où figurent : (i) sa recommandation motivée à savoir si un certificat devrait être délivré eu égard à certains critères; (ii) les conditions qu'il estime

and conditions that it considers necessary or desirable in the public interest to be attached to the project should the certificate be issued. The Governor in Council may then direct the NEB either to issue the certificate or to dismiss the application (s. 54(1)).

[10] Under s. 58 of the *NEB Act*, however, the NEB may make orders, on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications from various requirements that would otherwise apply under Part III, including the requirement for the issuance of a certificate of public convenience and necessity. Consequently, as in this case, smaller projects and amendments to existing facilities are commonly sought under s. 58. The NEB is the final decision maker on s. 58 exemptions.

C. *The Line 9 Pipeline and the Project*

[11] The Line 9 pipeline, connecting Sarnia to Montreal, opened in 1976 with the purpose of transporting crude oil from western Canada to eastern refineries. Line 9 cuts through the Chippewas of the Thames' traditional territory and crosses the Thames River. It was approved and built without any consultation of the Chippewas of the Thames.

[12] In 1999, following NEB approval, Line 9 was reversed to carry oil westward. In July 2012, the NEB approved an application from Enbridge, the current operator of Line 9, for the re-reversal (back to eastward flow) of the westernmost segment of Line 9, between Sarnia and North Westover, called "Line 9A".

[13] In November 2012, Enbridge filed an application under Part III of the *NEB Act* for a modification to Line 9. The project would involve reversing the flow (to eastward) in the remaining 639-kilometre segment of Line 9, called "Line 9B", between North Westover and Montreal; increasing the annual capacity of Line 9 from 240,000

utiles, dans l'intérêt public, de rattacher au projet dans le cas où le certificat serait délivré. Le gouverneur en conseil peut ensuite donner instruction à l'ONÉ de délivrer le certificat ou de rejeter la demande (par. 54(1)).

[10] En vertu de l'art. 58 de la *Loi sur l'ONÉ*, cependant, l'ONÉ peut, par ordonnance et aux conditions qu'il estime indiquées, soustraire les projets de pipeline de petite envergure ou les modifications apportées à un projet à l'application de diverses exigences autrement applicables sous le régime de la partie III, notamment à l'obligation d'obtenir un certificat d'utilité publique. Par conséquent, comme c'est le cas en l'espèce, les demandes concernant les projets de moindre envergure et les modifications à des installations existantes sont habituellement fondées sur l'art. 58. C'est donc l'ONÉ qui est le décideur ultime en ce qui concerne les exemptions prévues à l'art. 58.

C. *La canalisation 9 et le projet*

[11] La canalisation 9, qui relie Sarnia à Montréal, a été mise en service en 1976 afin de transporter du pétrole brut de l'Ouest du Canada jusqu'aux raffineries de l'Est. La canalisation 9 traverse le territoire traditionnel des Chippewas de la Thames ainsi que la rivière Thames. Elle a été approuvée et construite sans que les Chippewas de la Thames aient été consultés.

[12] En 1999, après approbation de l'ONÉ, le débit de la canalisation 9 a été inversé vers l'ouest. En juillet 2012, l'ONÉ a approuvé une demande d'Enbridge, l'exploitante actuelle de la canalisation 9, visant à ce qu'il soit inversé de nouveau (et s'écoule vers l'est) dans le tronçon le plus à l'ouest, entre Sarnia et North Westover, appelé « canalisation 9A ».

[13] En novembre 2012, Enbridge a présenté une demande de modification à la canalisation 9 fondée sur la partie III de la *Loi sur l'ONÉ*. Le projet consistait à inverser (vers l'est) le sens de l'écoulement pour le tronçon restant de la canalisation 9, appelé « canalisation 9B », d'une longueur de 639 kilomètres entre North Westover et Montréal,

to 300,000 barrels per day; and allowing for the transportation of heavy crude. While the project involved a significant increase of Line 9's throughput, virtually all of the required construction would take place on previously disturbed lands owned by Enbridge and on Enbridge's right of way.

[14] Enbridge also sought exemptions under s. 58 from various filing requirements which would otherwise apply under Part III of the *NEB Act*, the *Oil Pipeline Uniform Accounting Regulations*, C.R.C., c. 1058, and the NEB's Filing Manual. The most significant requested exemption was to dispense with the requirement for a certificate of public convenience and necessity, which as explained above is subject to the Governor in Council's final approval under s. 52 of the *NEB Act*. Without the need for a Governor in Council-approved certificate, the NEB would have the final word on the project's approval.

[15] In December 2012, the NEB, having determined that Enbridge's application was complete enough to proceed to assessment, issued a hearing order, which established the process for the NEB's consideration of the project. This process culminated in a public hearing, the purpose of which was for the NEB to gather and review information that was relevant to the assessment of the project. Persons or organizations interested in the outcome of the project, or in possession of relevant information or expertise, could apply to participate in the hearing. The NEB accepted the participation of 60 interveners and 111 commenters.

D. *Indigenous Consultation on the Project*

[16] In February 2013, after Enbridge filed its application and several months before the hearings, the NEB issued notice to 19 potentially affected Indigenous groups, including the Chippewas of the Thames, informing them of the project, the NEB's role, and the NEB's upcoming hearing process.

à accroître la capacité annuelle de la canalisation 9, qui passerait de 240 000 à 300 000 barils par jour, et à permettre le transport de pétrole brut. Si le projet impliquait une augmentation importante du débit de la canalisation 9, la presque totalité des travaux nécessaires devaient toutefois avoir lieu sur des terres déjà perturbées appartenant à Enbridge et dans les limites de l'emprise d'Enbridge.

[14] Se fondant sur l'art. 58, Enbridge a également demandé d'être soustraite à certaines exigences en matière de dépôt prévues par la partie III de la *Loi sur l'ONÉ*, par le *Règlement de normalisation de la comptabilité des oléoducs*, C.R.C., c. 1058, et par le Guide de dépôt de l'ONÉ. Elle demandait surtout à être exemptée de l'obligation d'obtenir un certificat d'utilité publique qui, comme nous l'avons expliqué, est assujetti à l'approbation finale du gouverneur en conseil en vertu de l'art. 52 de la *Loi sur l'ONÉ*. Sans cette obligation concernant l'obtention d'un certificat approuvé par le gouverneur en conseil, l'ONÉ aurait le dernier mot sur l'approbation du projet.

[15] En décembre 2012, après avoir déterminé que la demande d'Enbridge était assez complète pour qu'il puisse procéder à son évaluation, l'ONÉ a rendu une ordonnance d'audience qui fixait la marche à suivre pour l'examen du projet. Le processus a abouti à une audience publique qui devait permettre à l'ONÉ de recueillir et d'examiner des renseignements pertinents pour l'examen du projet. Les personnes ou organisations intéressées par l'issue du projet, ou possédant des informations ou des compétences pertinentes, pouvaient présenter une demande de participation à l'audience. L'ONÉ a accédé à la demande de 60 intervenants et de 111 auteurs d'une lettre de commentaires.

D. *Consultation des peuples autochtones au sujet du projet*

[16] En février 2013, après le dépôt de la demande d'Enbridge et plusieurs mois avant les audiences, l'ONÉ a envoyé un avis à 19 groupes autochtones susceptibles d'être touchés par le projet, y compris aux Chippewas de la Thames, afin de les informer du projet, du rôle de l'ONÉ et du processus d'audience à

Between April and July 2013, it also held information meetings in three communities upon their request.

[17] In September 2013, prior to the NEB hearing, the Chiefs of the Chippewas of the Thames and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development. The letter described the asserted Aboriginal and treaty rights of both groups and the project's potential impact on them. The Chiefs noted that no Crown consultation with any affected Indigenous groups had taken place with respect to the project's approval, and called on the Ministers to initiate Crown consultation. No response arrived until after the conclusion of the NEB hearing.

[18] In the meantime, the NEB's process unfolded. The Chippewas of the Thames were granted funding to participate as an intervener, and they filed evidence and delivered oral argument at the hearing delineating their concerns that the project would increase the risk of pipeline ruptures and spills along Line 9, which could adversely impact their use of the land and the Thames River for traditional purposes.

[19] In January 2014, after the NEB's hearing process had concluded, the Minister of Natural Resources responded to the September 2013 letter. The response acknowledged the Government of Canada's commitment to fulfilling its duty to consult where it exists, and stated that the "[NEB's] regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate" (A.R., vol. VI, at p. 47). In sum, the Minister indicated that he would be relying solely on the NEB's process to fulfill the Crown's duty to consult Indigenous peoples on the project.

venir. D'avril à juillet 2013, l'ONÉ a également tenu des séances d'information dans trois communautés, à la demande de celles-ci.

[17] En septembre 2013, avant l'audience de l'ONÉ, les chefs des Chippewas de la Thames et de la Aamjiwnaang First Nation ont écrit conjointement au premier ministre, au ministre des Ressources naturelles et au ministre des Affaires autochtones et du Nord. Dans leur lettre, ils décrivaient les droits ancestraux et issus de traités invoqués par les deux groupes et les répercussions potentielles du projet sur ces droits. Les chefs soulignaient le fait que la Couronne n'avait consulté aucun des groupes touchés au sujet de l'approbation du projet et ils ont demandé aux ministres d'amorcer un processus de consultation menée par la Couronne. Ils n'ont reçu une réponse qu'une fois l'audience de l'ONÉ terminée.

[18] Entre-temps, le processus de l'ONÉ a suivi son cours. Les Chippewas de la Thames ont obtenu les fonds nécessaires pour y participer en qualité d'intervenants. Ils ont déposé des éléments de preuve et présenté des observations orales à l'audience. Ils ont dit craindre que le projet n'augmente le risque de ruptures du pipeline et de déversements le long de la canalisation 9, ce qui pourrait avoir des effets préjudiciables sur leur utilisation traditionnelle du territoire et de la rivière.

[19] En janvier 2014, une fois le processus d'audience de l'ONÉ terminé, le ministre des Ressources naturelles a répondu à la lettre qu'il avait reçue en septembre 2013. La réponse faisait état de l'engagement du gouvernement du Canada à s'acquitter de l'obligation de consulter lorsqu'elle existe et précisait que [TRADUCTION] « le processus d'examen réglementaire [de l'ONÉ] est le cadre dans lequel la question de la compétence du gouvernement à l'égard d'un projet de pipeline est examinée. Le gouvernement s'en remet au processus de l'ONÉ pour l'examen des effets potentiels sur les droits ancestraux et issus de traités que peuvent avoir les projets qui relèvent de son mandat » (d.a., vol. VI, p. 47). En somme, le ministre indiquait qu'il s'en remettait exclusivement au processus de l'ONÉ pour satisfaire à l'obligation qui incombe à la Couronne de consulter les peuples autochtones au sujet du projet.

III. The Decisions Below

A. *The NEB's Decision, 2014 LNCNEB 4 (QL)*

[20] The NEB approved the project, finding that it was in the public interest and consistent with the requirements in the *NEB Act*. It explained that the approval "enables Enbridge to react to market forces and provide benefits to Canadians, while at the same time implementing the Project in a safe and environmentally sensitive manner" (para. 20). The NEB imposed conditions on the project related to pipeline integrity, safety, environmental protection, and the impact of the project on Indigenous communities.

[21] In its discussion of Aboriginal Matters (Chapter 7 of the NEB's reasons), the NEB explained that it "interprets its responsibilities, including those outlined in section 58 of the NEB Act, in a manner consistent with the *Constitution Act, 1982*, including section 35" (para. 293). It noted that proponents are required to make reasonable efforts to consult with Indigenous groups, and that the NEB hearing process is part of the consultative process. In deciding whether a project is in the public interest, the NEB "considers all of the benefits and burdens associated with the project, balancing the interests and concerns of Aboriginal groups with other interests and factors" (para. 301).

[22] The NEB noted that, in this case, the scope of the project was limited. It was not an assessment of the current operating Line 9, but rather of the modifications required to increase the capacity of Line 9, transport heavy crude on Line 9, and reverse the flow of Line 9B. Enbridge would not need to acquire any new permanent land rights for the project. Most work would take place within existing Enbridge facilities and its existing right of way. Given the limited scope of the project, the NEB was satisfied that potentially affected Indigenous groups had received adequate information about the project. It was also satisfied that potentially affected Indigenous groups had the opportunity to share their views about the project through the NEB hearing process and through discussions with Enbridge.

III. Les décisions des juridictions inférieures

A. *La décision de l'ONÉ, 2014 LNCONE 4 (QL)*

[20] L'ONÉ a approuvé le projet, estimant qu'il était dans l'intérêt public et qu'il répondait aux exigences de la *Loi sur l'ONÉ*. Il a expliqué que sa décision « donne à Enbridge la possibilité de réagir aux forces du marché et procure des avantages à la population canadienne. Elle permet également la mise en œuvre du projet d'une manière sécuritaire et écologique » (par. 20). L'ONÉ a assorti le projet de conditions relatives à l'intégrité et à la sécurité du pipeline, à la protection de l'environnement et à ses effets sur les communautés autochtones.

[21] Dans son analyse des questions autochtones (chapitre 7 de ses motifs), l'ONÉ explique qu'il « conçoit ses attributions, dont celles conférées par l'article 58 de la Loi, en conformité avec la *Loi constitutionnelle de 1982,* notamment l'article 35 » (par. 293). Il indique que les promoteurs doivent faire des efforts raisonnables pour consulter les groupes autochtones, et que le processus d'audience de l'ONÉ fait partie du processus de consultation global. Pour décider si un projet est d'intérêt public, l'ONÉ « en examine l'ensemble des retombées et des inconvénients et met en balance les intérêts et préoccupations des Autochtones, d'une part, et tous les autres facteurs et intérêts, d'autre part » (p. 301).

[22] L'ONÉ a noté qu'en l'espèce le projet était d'envergure limitée. Ce faisant, il ne se prononçait pas sur la canalisation 9 alors en exploitation, mais sur les modifications requises pour accroître sa capacité, permettre le transport de pétrole brut lourd et inverser le sens d'écoulement de la canalisation 9B. Il ne serait pas nécessaire pour Enbridge d'acquérir de nouveaux droits fonciers permanents pour réaliser le projet. La plupart des travaux se dérouleraient dans les limites de l'emprise et des installations existantes d'Enbridge. Compte tenu de l'envergure limitée du projet, l'ONÉ a estimé que les groupes autochtones susceptibles d'être touchés avaient été suffisamment renseignés à son sujet. Il a ajouté que ceux-ci avaient eu l'occasion de faire connaître leurs points de vue sur le projet à la faveur du processus d'audience de

The NEB expected that Enbridge would continue consultations after the project's approval.

[23] While Enbridge acknowledged that the project would increase the assessed risk for some parts of Line 9, the NEB found that "any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated" (para. 343) given the project's limited scope, the commitments made by Enbridge, and the conditions imposed by the NEB. While the project would occur on lands used by Indigenous groups for traditional purposes, those lands are within Enbridge's existing right of way. The project was therefore unlikely to impact traditional land use. The NEB acknowledged that a spill on Line 9 could impact traditional land use, but it was satisfied that "Enbridge will continue to safely operate Line 9, protect the environment, and maintain comprehensive emergency response plans" (*ibid.*).

[24] The NEB imposed three conditions on the project related to Indigenous communities. Condition 6 required Enbridge to file an Environmental Protection Plan for the project including an Archaeological Resource Contingency plan. Condition 24 required Enbridge to prepare an Ongoing Engagement Report providing details on its discussions with Indigenous groups going forward. Condition 26 "directs Enbridge to include Aboriginal groups in Enbridge's continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response" (*ibid.*).

B. *Appeal to the Federal Court of Appeal, 2015 FCA 222, [2016] 3 F.C.R. 96*

[25] The Chippewas of the Thames brought an appeal from the NEB's decision to the Federal Court of Appeal pursuant to s. 22(1) of the *NEB Act*. They

l'ONÉ et de leurs discussions avec Enbridge. L'ONÉ s'attendait à ce qu'Enbridge poursuive les consultations une fois le projet approuvé.

[23] Bien qu'Enbridge ait reconnu que le projet ferait augmenter le risque évalué à l'égard de certains tronçons de la canalisation 9, l'ONÉ a conclu que « les effets éventuels du projet sur les droits et les intérêts des groupes autochtones seront vraisemblablement négligeables et atténués de façon convenable » (par. 343), compte tenu de la portée limitée du projet, des engagements pris par Enbridge et des conditions imposées par l'ONÉ. Quoique le projet doive être réalisé sur des terres utilisées par les groupes autochtones à des fins traditionnelles, ces terres sont situées dans les limites de l'emprise actuelle d'Enbridge. Le projet n'aurait donc vraisemblablement pas d'effets sur les utilisations traditionnelles des terres. L'ONÉ a reconnu qu'un déversement sur la canalisation 9 pourrait avoir des effets sur les utilisations traditionnelles des terres, mais il était convaincu qu'« Enbridge continuera[it] d'exploiter la canalisation 9 de façon sécuritaire, de veiller à la protection de l'environnement et de s'appuyer sur des plans exhaustifs d'intervention en cas d'urgence » (*ibid.*).

[24] L'ONÉ a imposé à l'égard du projet trois conditions relatives aux communautés autochtones. La condition 6 obligeait Enbridge à présenter un plan de protection de l'environnement incluant un plan d'urgence relatif aux ressources archéologiques. La condition 24 exigeait d'Enbridge qu'elle prépare un rapport d'engagement permanent contenant des détails sur les discussions à venir avec les groupes autochtones. Enfin, la condition 26 « demand[ait] qu'Enbridge inclue les groupes autochtones dans son programme d'éducation permanente (y compris les exercices de sécurité civile), son programme de liaison et ses consultations en matière de protection civile et d'intervention » (*ibid.*).

B. *Appel à la Cour d'appel fédérale, 2015 CAF 222, [2016] 3 R.C.F. 96*

[25] Les Chippewas de la Thames ont interjeté appel de la décision de l'ONÉ à la Cour d'appel fédérale, conformément au par. 22(1) de la *Loi sur*

argued that the decision should be quashed, as the NEB was "without jurisdiction to issue exemptions and authorizations to [Enbridge] prior to the Crown fulfilling its duty to consult and accommodate" (para. 2).

[26] The majority of the Federal Court of Appeal (Ryer and Webb JJ.A.) dismissed the appeal. It concluded that the NEB was not required to determine, as a condition of undertaking its mandate with respect to Enbridge's application, whether the Crown had a duty to consult under *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and, if so, whether the Crown had fulfilled this duty.

[27] The majority also concluded that the NEB did not have a duty to consult the Chippewas of the Thames. It noted that while the NEB is required to carry out its mandate in a manner that respects s. 35(1) of the *Constitution Act, 1982*, the NEB had adhered to this obligation by requiring Enbridge to consult extensively with the Chippewas of the Thames and other First Nations.

[28] Rennie J.A. dissented. He would have allowed the appeal. In his view, the NEB was required to determine whether the duty to consult had been triggered and fulfilled. Given that the NEB is the final decision maker for s. 58 applications, it must have the power and duty to assess whether consultation is adequate, and to refuse a s. 58 application where consultation is inadequate.

IV. Analysis

A. *Crown Conduct Triggering the Duty to Consult*

[29] In the companion case to this appeal, *Clyde River*, we outline the principles which apply when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights. In these circumstances, the NEB's decision would itself be Crown conduct that

l'ONÉ. Ils ont fait valoir que la décision devait être annulée, car « il n'entrait pas dans les pouvoirs de l'Office d'exempter et d'autoriser [Enbridge] avant que la Couronne ne se soit acquittée de son obligation de consulter l'appelante et de trouver des accommodements » (par. 2).

[26] Les juges majoritaires de la Cour d'appel fédérale (les juges Ryer et Webb) ont rejeté l'appel. Ils ont conclu que l'ONÉ n'avait pas à décider, pour remplir son mandat en ce qui concerne la demande d'Enbridge, si la Couronne était tenue à une obligation de consulter au sens de l'arrêt *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, et, le cas échéant, si la Couronne avait satisfait à cette obligation.

[27] Les juges majoritaires ont également conclu que l'ONÉ n'était pas tenu de consulter les Chippewas de la Thames. Ils ont indiqué que, bien qu'il doive s'acquitter de son mandat conformément aux dispositions du par. 35(1) de la *Loi constitutionnelle de 1982*, l'ONÉ avait satisfait à cette obligation en exigeant d'Enbridge qu'elle participe à des consultations approfondies avec les Chippewas de la Thames et d'autres Premières Nations.

[28] Le juge Rennie, dissident, aurait accueilli l'appel. À son avis, l'ONÉ était tenu de déterminer si l'obligation de consulter avait pris naissance et si on y avait satisfait. Puisque l'ONÉ décide en dernier ressort des demandes fondées sur l'art. 58, il doit avoir le pouvoir et l'obligation de décider si une consultation est adéquate et de refuser une demande présentée au titre de l'art. 58 si la consultation est inadéquate.

IV. Analyse

A. *Mesures de la Couronne donnant naissance à l'obligation de consulter*

[29] Dans le pourvoi connexe *Clyde River*, nous exposons les principes applicables lorsqu'un organisme de réglementation indépendant tel que l'ONÉ doit rendre une décision susceptible de porter atteinte à des droits ancestraux ou issus de traités. Dans un tel cas, la décision de l'ONÉ constituerait

implicates the Crown's duty to consult (*Clyde River*, at para. 29). A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 31; *Clyde River*, at para. 25).

[30] We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).

[31] As the respondents conceded before this Court, the NEB's contemplated decision on the project's approval would amount to Crown conduct. When the NEB grants an exemption under s. 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work — the increase in flow capacity and change to heavy crude — could potentially adversely affect the Chippewas of the Thames' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to Enbridge's project application.

B. *Crown Consultation Can Be Conducted Through a Regulatory Process*

[32] The Chippewas of the Thames argue that meaningful Crown consultation cannot be carried out

en soi une mesure de la Couronne emportant pour celle-ci une obligation de consulter (*Clyde River*, par. 29). Une décision d'un tribunal administratif donnerait naissance à l'obligation de la Couronne de consulter lorsque celle-ci a connaissance, concrètement ou par imputation, de l'existence d'un droit ancestral ou issu d'un traité, potentiel ou reconnu, sur lequel la décision pourrait avoir un effet préjudiciable (*Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 31; *Clyde River*, par. 25).

[30] Nous ne partageons pas l'opinion voulant que, parce que la Couronne n'a pas pris part à l'instance devant l'ONÉ par l'entremise d'un représentant du ministère fédéral compétent, il est possible qu'il n'y ait eu aucune de mesure de la Couronne ayant donné naissance à l'obligation de consulter (voir les motifs de la C.A., par. 57 et 69-70).

[31] Comme l'ont concédé les intimés devant la Cour, la décision relative à l'approbation du projet envisagée par l'ONÉ pouvait être considérée comme une mesure de la Couronne. Lorsque l'ONÉ accorde, sous le régime de l'art. 58 de la *Loi sur l'ONÉ*, une exemption quant à l'obligation relative au certificat d'utilité publique dont la délivrance est par ailleurs assujettie à l'approbation du gouverneur en conseil, c'est effectivement à l'ONÉ que revient la décision définitive sur l'ensemble de la demande. En tant qu'organisme d'origine législative investi du pouvoir délégué de rendre une décision susceptible de porter atteinte à des droits ancestraux et issus de traités, l'ONÉ agissait au nom de la Couronne lorsqu'il a approuvé la demande d'Enbridge. Comme les travaux autorisés — une augmentation de la capacité d'écoulement et une modification permettant le transport de pétrole brut lourd — étaient susceptibles de porter atteinte aux droits ancestraux et issus de traités invoqués par les Chippewas de la Thames, la Couronne avait une obligation de consulter relativement à la demande d'Enbridge.

B. *La consultation incombant à la Couronne peut être menée dans le cadre d'un processus réglementaire*

[32] Les Chippewas de la Thames soutiennent qu'une véritable consultation par la Couronne ne

wholly through a regulatory process. We disagree. As we conclude in *Clyde River*, the Crown may rely on steps taken by an administrative body to fulfill its duty to consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Carrier Sekani*, at para. 60; *Clyde River*, at para. 30). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.

[33] The majority of the Federal Court of Appeal in this case expressed concern that a tribunal like the NEB might be charged with both carrying out consultation on behalf of the Crown and then adjudicating on the adequacy of these consultations (para. 66). A similar concern was expressed in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, where, in a pre-*Haida* decision, the Court held that quasi-judicial tribunals like the NEB do not owe Indigenous peoples a heightened degree of procedural fairness. The Court reasoned that imposition of such an obligation would risk compromising the independence of quasi-judicial bodies like the NEB (pp. 183-84).

[34] In our view, these concerns are answered by recalling that while it is the *Crown* that owes a constitutional obligation to consult with potentially affected Indigenous peoples, the NEB is tasked with making legal decisions that comply with the Constitution. When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but

peut être menée entièrement dans le cadre d'un processus réglementaire. Nous ne sommes pas d'accord. Comme nous le concluons dans l'arrêt *Clyde River*, la Couronne peut se fonder sur les mesures prises par un organisme administratif pour satisfaire à son obligation de consulter (par. 30). La Couronne peut ainsi s'en remettre à un organisme de réglementation dans la mesure où ce dernier dispose du pouvoir légal de faire ce que l'obligation de consulter impose dans les circonstances (*Carrier Sekani*, par. 60; *Clyde River*, par. 30). Toutefois, si les pouvoirs que la loi confère à l'organisme sont insuffisants dans les circonstances, ou si l'organisme ne prévoit pas des consultations et des accommodements adéquats, la Couronne doit prévoir d'autres avenues de consultation et d'accommodement véritables qui lui permettront de satisfaire à son obligation avant que le projet ne soit approuvé. Autrement, la décision que l'organisme de réglementation aura prise sans consultation adéquate ne respectera pas les normes constitutionnelles et devrait être annulée à l'issue d'un contrôle judiciaire ou d'un appel.

[33] En l'espèce, les juges majoritaires de la Cour d'appel fédérale ont dit craindre qu'un tribunal tel l'ONÉ soit tenu à la fois de mener des consultations au nom de la Couronne puis de se prononcer sur le caractère adéquat de ces consultations (par. 66). Notre Cour a exprimé une préoccupation semblable dans l'arrêt *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159, lorsqu'elle a conclu, dans une décision antérieure à l'arrêt *Haïda*, que les tribunaux quasi judiciaires tel l'ONÉ n'ont pas à faire preuve d'un degré plus élevé d'équité procédurale à l'égard des peuples autochtones. La Cour a expliqué que le fait d'imposer une telle obligation pourrait porter atteinte à l'indépendance des tribunaux quasi judiciaires comme l'ONÉ (p. 183-184).

[34] À notre avis, il est possible de répondre à ces préoccupations en rappelant que, bien que ce soit à la *Couronne* qu'incombe l'obligation constitutionnelle de consulter les peuples autochtones potentiellement touchés, l'ONÉ est tenu de rendre des décisions juridiques qui sont conformes à la Constitution. Lorsqu'il est appelé à se prononcer sur le caractère adéquat de la consultation incombant à

its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

C. *The Role of a Regulatory Tribunal When the Crown Is Not a Party*

[35] At the Federal Court of Appeal, the majority and dissenting judges disagreed over whether the NEB was empowered to decide whether the Crown's consultation was adequate in the absence of the Crown participating in the NEB process as a party. The disagreement stems from differing interpretations of *Carrier Sekani* and whether it overruled *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500. In *Standing Buffalo*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo* applied here. Because the Crown (meaning, presumably, a relevant federal ministry or department) had not participated in the NEB's hearing process, the majority reasoned that the NEB was under no obligation to consider whether the Crown's duty to consult had been discharged before it approved Enbridge's s. 58 application (para. 59). In dissent, Rennie J.A.

la Couronne, l'ONÉ peut tenir compte des mesures de consultation offertes, mais son obligation de neutralité demeure la même. Un tribunal respecte sa compétence lorsqu'il exerce les fonctions que le législateur lui a attribuées dans une loi, et que ses décisions sont conformes à la loi et à la Constitution. Les organismes de réglementation cumulent bien souvent des fonctions différentes qui se chevauchent sans susciter une crainte raisonnable de partialité. En fait, ce cumul peut être nécessaire en ce qu'il permet aux organismes de remplir efficacement leur rôle (*Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781, par. 41). D'ailleurs, notre Cour a envisagé cette possibilité dans l'arrêt *Carrier Sekani*, lorsqu'elle a expliqué que les tribunaux administratifs peuvent être investis autant du pouvoir de satisfaire à l'obligation de consulter qui incombe à la Couronne que de celui de se prononcer sur le caractère suffisant des consultations (par. 58).

C. *Le rôle d'un tribunal administratif lorsque la Couronne n'est pas une partie*

[35] À la Cour d'appel fédérale, les juges majoritaires et le juge dissident étaient en désaccord sur la question de savoir si l'ONÉ pouvait, même si la Couronne n'était pas partie à la procédure devant lui, décider si les consultations menées par cette dernière étaient adéquates. Le désaccord découle d'interprétations divergentes de l'arrêt *Carrier Sekani* et de la question de savoir si cet arrêt a pour effet d'écarter la décision *Première nation dakota de Standing Buffalo c. Enbridge Pipelines Inc.*, 2009 CAF 308, [2010] 4 R.C.F. 500. Dans *Standing Buffalo*, la Cour d'appel fédérale a conclu que l'ONÉ n'était pas tenu de se demander si la Couronne avait satisfait à son obligation de consulter avant d'approuver une demande fondée sur l'art. 52 sollicitant la délivrance d'un certificat relatif à un pipeline, dans les cas où la Couronne n'a pas officiellement participé au processus d'audience de l'ONÉ. Dans l'affaire qui nous occupe, les juges majoritaires ont conclu que le principe énoncé dans l'arrêt *Standing Buffalo* s'appliquait à l'espèce. Étant donné que la Couronne (c'est-à-dire, présumément, un ministère ou un organisme fédéral compétent) n'avait pas participé au processus d'audience

reasoned that *Standing Buffalo* had been overtaken by this Court's decision in *Carrier Sekani*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving Enbridge's application (para. 112).

de l'ONÉ, les juges majoritaires se sont dits d'avis que l'ONÉ n'avait pas l'obligation d'examiner si la Couronne avait respecté son obligation de consulter avant d'approuver la demande d'Enbridge fondée sur l'art. 58 (par. 59). Dans sa dissidence, le juge Rennie a estimé que l'arrêt *Standing Buffalo* avait été écarté par la décision de notre Cour dans *Carrier Sekani*. Il a conclu que, bien que la Couronne n'ait pas participé à la procédure devant l'ONÉ en tant que partie, l'ONÉ était *tenu* de prendre en compte l'obligation de consulter de la Couronne avant d'approuver la demande d'Enbridge (par. 112).

[36] We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

[36] Nous sommes d'accord avec le juge Rennie pour dire que le pouvoir d'un tribunal administratif d'apprécier l'obligation de consulter de la Couronne n'est pas tributaire de la participation du gouvernement aux audiences de l'ONÉ. Si l'obligation de la Couronne de procéder à une consultation a pris naissance, un décideur ne peut approuver un projet que si cette consultation est adéquate. L'obligation constitutionnelle de la Couronne ne disparaît pas lorsqu'elle s'engage dans le processus d'approbation d'un projet par l'intermédiaire d'un organisme de réglementation tel l'ONÉ. Il doit être satisfait à cette obligation avant que le gouvernement n'approuve un projet susceptible d'avoir un effet préjudiciable sur des droits ancestraux ou issus de traités (*Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257, par. 78).

[37] As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).

[37] En tant que décideur ultime en ce qui concerne certains projets, l'ONÉ doit, lorsque la question est soulevée devant lui, se demander si les consultations par la Couronne relativement à un projet donné ont été adéquates (*Clyde River*, par. 36). La responsabilité de veiller à ce que l'honneur de la Couronne soit préservé continue de reposer sur cette dernière (*Clyde River*, par. 22). Toutefois, les décideurs administratifs ont l'obligation de trancher les questions de droit pertinentes soulevées devant eux, ainsi que l'obligation de rendre leurs décisions dans le respect des obligations constitutionnelles de l'État (*R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 77).

D. *Scope of the Duty to Consult*

[38] The degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (*Haida*, at paras. 39 and 43-45).

[39] Relying on *Carrier Sekani*, the Attorney General of Canada asserts that the duty to consult in this case "is limited to the [p]roject" and "does not arise in relation to claims for past infringement such as the construction of a pipeline under the Thames River in 1976" (R.F., vol. I, at para. 80).

[40] While the Chippewas of the Thames identify new impacts associated with the s. 58 application that trigger the duty to consult and delimit its scope, they also note that "[t]he potential adverse impacts to [the asserted] Aboriginal rights and title resulting from approval of Enbridge's application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill" (A.F., at para. 57). Similarly, the Mississaugas of the New Credit First Nation, an intervener, argued in the hearing that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario.

[41] The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue — not [on] larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration" (*Carrier Sekani*, at para. 53 (emphasis in original)). *Carrier Sekani* also clarified that "[a]n order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may

D. *Étendue de l'obligation de consulter*

[38] L'étendue de la consultation requise dépend de la solidité de la revendication autochtone et de la gravité de l'impact potentiel sur le droit concerné (*Haïda*, par. 39 et 43-45).

[39] S'appuyant sur l'arrêt *Carrier Sekani,* la procureure générale du Canada fait valoir qu'en l'espèce l'obligation de consulter [TRADUCTION] « se limite au [p]rojet » et « ne s'applique pas relativement à des demandes relatives à des manquements passés tels que la construction d'un pipeline sous la rivière Thames en 1976 » (m.i., vol. I, par. 80).

[40] Bien qu'ils fassent état de nouveaux effets liés à la demande fondée sur l'art. 58 qui font naître l'obligation de consulter et en délimitent la portée, les Chippewas de la Thames soulignent aussi que [TRADUCTION] « [l]es éventuels effets préjudiciables aux droits ancestraux et au titre ancestral [invoqués] découlant de l'approbation de la demande d'Enbridge de modifier la canalisation 9 sont graves et cumulatifs, et pourraient même être catastrophiques advenant un déversement » (m.a., par. 57). De même, l'intervenante Mississaugas of the New Credit First Nation a soutenu à l'audience que, parce que l'art. 58 s'applique fréquemment à des projets distincts d'agrandissement et de réaménagement de pipelines, il n'y a pas de discussions ou consultations stratégiques de haut niveau au sujet des effets plus larges du pipeline sur les Premières Nations dans le Sud de l'Ontario.

[41] Des conséquences d'ordre historique ne font pas naître l'obligation de consulter. Il ne s'agit pas d'un moyen approprié de régler des griefs historiques. Dans *Carrier Sekani*, notre Cour a expliqué que la Couronne est tenue de mener des consultations sur les « effets préjudiciables de la mesure précise projetée par la Couronne, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. La consultation s'intéresse à l'effet de la décision *actuellement* considérée sur les droits revendiqués » (*Carrier Sekani*, par. 53 (en italique dans l'original)). La Cour a également précisé dans cet arrêt que « [l]'ordonnance de consulter n'est indiquée

adversely impact on established or claimed rights" (para. 54).

[42] That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, *Native Law* (loose-leaf), vol. 1, at pp. 5-107 to 5-108). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234, at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (*West Moberly*, at para. 119).

[43] Neither the Federal Court of Appeal nor the NEB discussed the degree of consultation required. That said, and as we will explain below, even taking the strength of the Chippewas of the Thames' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate.

E. *Was There Adequate Notice That the Crown Was Relying on the NEB's Process in This Case?*

[44] As indicated in the companion case *Clyde River*, the Crown may rely on a regulatory body such as the NEB to fulfill the duty to consult. However, where the Crown intends to do so, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty (*Clyde River*, at para. 23). The Crown's constitutional obligation requires a meaningful consultation process that is carried out in good faith. Obviously, notice helps ensure the appropriate participation of Indigenous groups, because it makes clear to them that consultation

que lorsque la mesure projetée par la Couronne, qu'elle soit immédiate ou prospective, est susceptible d'avoir un effet préjudiciable sur des droits établis ou revendiqués » (par. 54).

[42] Cela dit, il peut se révéler impossible de bien saisir la gravité des effets d'un projet sur des droits visés à l'art. 35 si on ne tient pas compte du contexte plus large (J. Woodward, *Native Law* (feuilles mobiles), vol. 1, p. 5-107 à 5-108). Les effets cumulatifs d'un projet continu ainsi que le contexte historique peuvent donc être pertinents pour déterminer l'étendue de l'obligation de consulter (*West Moberly First Nations c. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234, par. 117). Il n'est pas question de [TRADUCTION] « tenter de remédier à des manquements passés. Il s'agit plutôt simplement de reconnaître une situation existante et de remédier aux conséquences de ce qui peut résulter » du projet (*West Moberly*, par. 119).

[43] Ni la Cour d'appel fédérale ni l'ONÉ n'ont traité de l'étendue de la consultation requise. Cela étant, et comme nous l'expliquerons ci-après, même en considérant de la façon la plus favorable aux Chippewas de la Thames la solidité de leur revendication et la gravité de l'impact potentiel sur les droits qu'ils invoquent, la consultation menée en l'espèce a manifestement été adéquate.

E. *Le fait que la Couronne s'en remettait au processus de l'ONÉ a-t-il fait l'objet d'un avis suffisant?*

[44] Comme nous l'avons précisé dans l'arrêt connexe *Clyde River*, la Couronne peut s'en remettre à un organisme de réglementation tel l'ONÉ pour satisfaire à son obligation de consulter. Toutefois, lorsque la Couronne entend procéder de cette façon, il doit être clairement indiqué au groupe autochtone touché que la Couronne s'en remet au processus de l'organisme de réglementation pour satisfaire à son obligation (*Clyde River*, par. 23). L'obligation constitutionnelle de la Couronne exige le recours à un processus véritable de consultation, mené de bonne foi. De toute évidence, l'avis contribue à garantir

is being carried out through the regulatory body's processes (*ibid.*).

[45] In this case, the Chippewas of the Thames say they did not receive explicit notice from the Crown that it intended to rely on the NEB's process to satisfy the duty. In September 2013, the Chippewas of the Thames wrote to the Prime Minister, the Minister of Natural Resources and the Minister of Aboriginal Affairs and Northern Development requesting a formal Crown consultation process in relation to the project. It was not until January 2014, after the NEB's hearing process was complete, that the Minister of Natural Resources responded to the Chippewas of the Thames on behalf of the Crown advising them that it relied on the NEB's process. At the hearing before this Court, the Chippewas of the Thames conceded that the Crown may have been entitled to rely on the NEB to carry out the duty had they received the Minister's letter indicating the Crown's reliance prior to the NEB hearing (transcript, at pp. 34-35). However, having not received advance notice of the Crown's intention to do so, the Chippewas of the Thames maintain that consultation could not properly be carried out by the NEB.

[46] In February 2013, the NEB contacted the Chippewas of the Thames and 18 other Indigenous groups to inform them of the project and of the NEB's role in relation to its approval. The Indigenous groups were given early notice of the hearing and were invited to participate in the NEB process. The Chippewas of the Thames accepted the invitation and appeared before the NEB as an intervener. In this role, they were aware that the NEB was the final decision maker under s. 58 of the *NEB Act*. Moreover, as is evidenced from their letter of September 2013, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. In our view, the circumstances of this case made it sufficiently clear to the Chippewas of the Thames that the NEB process was intended to constitute Crown consultation and

une participation appropriée de la part des groupes autochtones, car il leur indique clairement que la consultation s'effectue dans le cadre du processus mené par l'organisme de réglementation (*ibid.*).

[45] En l'espèce, les Chippewas de la Thames disent ne pas avoir reçu de la Couronne un avis explicite indiquant qu'elle entendait satisfaire à son obligation dans le cadre du processus de l'ONÉ. Au mois de septembre 2013, les Chippewas de la Thames ont écrit au premier ministre, au ministre des Ressources naturelles et au ministre des Affaires autochtones et du Développement du Nord pour leur demander la mise sur pied d'un processus formel de consultation mené par la Couronne relativement au projet. Ce n'est qu'au mois de janvier 2014, après la fin des audiences de l'ONÉ, que le ministre des Ressources naturelles a répondu aux Chippewas de la Thames au nom de la Couronne et les a informés que celle-ci s'en remettait au processus de l'ONÉ. À l'audience devant notre Cour, les Chippewas de la Thames ont concédé que la Couronne aurait pu s'en remettre au processus de l'ONÉ pour satisfaire à son obligation s'ils avaient reçu avant la tenue des audiences la lettre du ministre les informant que la Couronne entendait agir ainsi (transcription, p. 34-35). Toutefois, comme ils n'ont pas été avisés à l'avance de l'intention de la Couronne de procéder ainsi, les Chippewas de la Thames soutiennent que la consultation ne pouvait être menée de manière adéquate par l'ONÉ.

[46] En février 2013, l'ONÉ a communiqué avec les Chippewas de la Thames et 18 autres groupes autochtones pour les informer de l'existence du projet et du rôle de l'ONÉ concernant son approbation. Les groupes autochtones ont été avisés à l'avance de la tenue des audiences et ont été invités à participer au processus de l'ONÉ. Les Chippewas de la Thames ont accepté l'invitation et ils ont comparu devant l'ONÉ en tant qu'intervenants. À ce titre, ils savaient que l'ONÉ était le décideur ultime aux termes de l'art. 58 de la *Loi sur l'ONÉ*. De plus, comme il ressort de leur lettre du mois de septembre 2013, ils comprenaient qu'aucun autre organisme de l'État ne participait au processus pour effectuer des consultations. Selon nous, les circonstances indiquaient de façon suffisamment claire aux Chippewas de la Thames que le processus de

accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met.

F. *Was the Crown's Consultation Obligation Fulfilled?*

[47] When deep consultation is required, the duty to consult may be satisfied if there is "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). As well, this Court has recognized that the Crown may wish to "adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers" (*ibid.*). This list is neither exhaustive nor mandatory. As we indicated above, neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case. However, the Attorney General of Canada submitted before this Court that the NEB's statutory powers were capable of satisfying the Crown's constitutional obligations in this case, accepting the rights as asserted by the Chippewas of the Thames and the potential adverse impact of a spill. With this, we agree.

[48] As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. Given the NEB's expertise in the supervision and approval of federally regulated pipeline projects, the NEB is particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad

l'ONÉ constituait le processus de consultation et d'accommodement de la Couronne. Malgré son défaut de donner un avis en temps utile, la Couronne a respecté son obligation de mener des consultations.

F. *La Couronne a-t-elle satisfait à son obligation de consulter?*

[47] Lorsqu'une consultation approfondie est nécessaire, il peut être satisfait à l'obligation de consulter si la consultation comporte « la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision » (*Haïda*, par. 44). De même, la Cour a reconnu que la Couronne « peut décider de recourir à un mécanisme de règlement des différends comme la médiation ou un régime administratif mettant en scène des décideurs impartiaux » (*ibid.*). Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. Comme nous l'avons déjà mentionné, ni l'ONÉ ni la Cour d'appel fédérale n'ont évalué l'ampleur des consultations qui étaient requises en l'espèce. Toutefois, la procureure générale du Canada a fait valoir devant notre Cour que, du fait des pouvoirs que la loi confère à l'ONÉ, ce dernier était en mesure de satisfaire aux obligations constitutionnelles de la Couronne dans le présent cas, en tenant pour avérés les droits invoqués par les Chippewas de la Thames et les possibles effets préjudiciables d'un déversement. Nous sommes de cet avis.

[48] Comme il l'a reconnu dans ses motifs, l'ONÉ doit, en tant que décideur quasi judiciaire, s'acquitter des responsabilités qui lui incombent en vertu de l'art. 58 de la *Loi sur l'ONÉ* en conformité avec l'art. 35 de la *Loi constitutionnelle de 1982*. Selon nous, il doit en conséquence prendre en compte les droits et les intérêts des groupes autochtones avant de rendre une décision définitive qui pourrait avoir une incidence sur ces droits et intérêts. Vu l'expertise qu'il possède en ce qui concerne la surveillance et l'approbation de projets de pipeline réglementés par le fédéral, l'ONÉ est particulièrement bien placé

jurisdiction to impose conditions on proponents to mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions. Therefore, we conclude that the NEB's statutory powers under s. 58 are capable of satisfying the Crown's duty to consult in this case.

[49] However, a finding that the NEB's statutory authority allowed for it to satisfy the duty to consult is not determinative of whether the Crown's constitutional obligations were upheld in this case. The Chippewas of the Thames maintain that the process carried out by the NEB was not an adequate substitute for Crown consultation. In particular, the Chippewas of the Thames argue that the NEB's regulatory process failed to engage affected Indigenous groups in a "meaningful way in order for adverse impacts to be understood and minimized" (A.F., at para. 110). They allege that the NEB's process did not "apprehend or address the seriousness" of the potential infringement of their treaty rights and title, nor did it "afford a genuine opportunity for accommodation by the Crown" (A.F., at para. 113). By minimizing the rights of the affected Indigenous groups and relying upon the proponent to mitigate potential impacts, they allege the process undertaken by the NEB allowed for nothing more than "blowing off steam" (*ibid.*).

[50] Enbridge, on the other hand, argues not only that the NEB was capable of satisfying the Crown's duty to consult but that, in fact, it did so here. In support of its position, Enbridge points to the Chippewas of the Thames' early notice of, and participation in, the NEB's formal hearing process as well as the NEB's provision of written reasons. Moreover, Enbridge submits that far from failing

pour évaluer les risques que posent des projets de cette nature pour les groupes autochtones. De plus, l'ONÉ dispose de vastes pouvoirs l'habilitant à imposer aux promoteurs des conditions en vue d'atténuer de tels risques. En outre, le rôle permanent qu'il joue en tant qu'organisme de réglementation en ce qui concerne l'application de mesures de sécurité lui permet de veiller au respect à long terme de ces conditions. Nous concluons donc que les pouvoirs que la loi confère à l'ONÉ à l'art. 58 lui permettent de satisfaire à l'obligation de consulter de la Couronne en l'espèce.

[49] Toutefois, la conclusion suivant laquelle les pouvoirs conférés par la loi à l'ONÉ lui permettent de satisfaire à l'obligation de consulter n'est pas déterminante pour ce qui est de décider si la Couronne s'est acquittée de ses obligations constitutionnelles dans la présente affaire. Les Chippewas de la Thames soutiennent que le processus mené par l'ONÉ n'a pas constitué un substitut adéquat à des consultations menées par la Couronne. Plus particulièrement, ils plaident que le processus réglementaire de l'ONÉ n'a pas permis aux groupes autochtones de participer [TRADUCTION] « de manière utile pour que les effets préjudiciables soient bien compris et réduits au minimum » (m.a., par. 110). Ils allèguent que le processus de l'ONÉ n'a pas permis de « saisir ou considérer la gravité » des atteintes potentielles à leur titre et à leurs droits issus de traités, ni « constitué une véritable occasion en vue de la prise de mesures d'accommodement par la Couronne » (m.a., par. 113). En n'accordant pas suffisamment d'importance aux droits des groupes autochtones touchés et en s'en remettant au promoteur pour atténuer les effets potentiels du projet, ils affirment que l'ONÉ, dans le cadre de son processus, a tout au plus permis aux intéressés « de se défouler » (*ibid.*).

[50] Enbridge plaide pour sa part que non seulement l'ONÉ était en mesure de satisfaire à l'obligation de consulter de la Couronne, mais qu'il l'a effectivement fait en l'espèce. À l'appui de sa thèse, Enbridge signale que les Chippewas de la Thames ont été rapidement avisés du processus d'audience formel de l'ONÉ, qu'ils y ont participé et que l'ONÉ a exposé des motifs écrits. De plus, Enbridge soutient

to afford a genuine opportunity for accommodation by the Crown, the NEB's process provided "effective accommodation" through the imposition of conditions on Enbridge to mitigate the risk and effect of potential spills arising from the project (R.F., at para. 107).

[51] In our view, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, we find that the NEB provided the Chippewas of the Thames with an adequate opportunity to participate in the decision-making process. Second, we find that the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, we agree with Enbridge that, in order to mitigate potential risks to the rights of Indigenous groups, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

[52] First, unlike the Inuit in the companion case of *Clyde River*, the Chippewas of the Thames were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the Chippewas of the Thames participated as an intervener. The NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses, and to make closing oral submissions to the NEB.

que loin d'avoir fait défaut de constituer une véritable occasion en vue de la prise de mesures d'accommodement par la Couronne, le processus de l'ONÉ s'est traduit par des [TRADUCTION] « mesures d'accommodement effectives » du fait qu'Enbridge s'est vue imposer des conditions destinées à atténuer les risques et les effets d'éventuels déversements découlant du projet (m.i., par. 107).

[51] À notre avis, le processus mené par l'ONÉ en l'espèce était suffisant pour satisfaire à l'obligation de consulter qui incombait à la Couronne. Premièrement, nous concluons que l'ONÉ a fourni aux Chippewas de la Thames une possibilité adéquate de participer au processus décisionnel. Deuxièmement, nous estimons que l'ONÉ a suffisamment apprécié les effets potentiels du projet sur les droits des groupes autochtones, ce qui l'a amené à conclure que le risque d'effets préjudiciables était minime et pouvait être atténué. Troisièmement, nous sommes d'accord avec Enbridge pour dire que l'ONÉ a pris des mesures d'accommodement appropriées pour atténuer les risques potentiels du projet sur les droits des groupes autochtones en imposant des conditions à Enbridge.

[52] Premièrement, contrairement aux Inuits dans l'affaire connexe *Clyde River*, les Chippewas de la Thames se sont vu offrir une possibilité suffisante de présenter des observations à l'ONÉ dans le cadre de son processus décisionnel indépendant (conformément aux prescriptions de l'arrêt *Haïda*, par. 44). En l'espèce, l'ONÉ a tenu une audience. Il a informé au préalable les groupes autochtones du processus et il les a invités à y participer formellement. Comme il a été indiqué précédemment, les Chippewas de la Thames ont participé au processus en tant qu'intervenants. L'ONÉ leur a fourni de l'aide financière qui leur a permis de préparer et de présenter des éléments de preuve, notamment une étude « préliminaire » sur l'utilisation traditionnelle des terres réalisée par des spécialistes (motifs de la C.A., par. 14). De plus, en qualité d'intervenants, les Chippewas de la Thames ont été en mesure de présenter de manière formelle à Enbridge des demandes de renseignements auxquelles cette dernière a répondu par écrit, et de présenter de vive voix à l'ONÉ des observations finales.

[53] Contrary to the submissions of the Chippewas of the Thames, we do not find that the NEB minimized or failed to apprehend the importance of their asserted Aboriginal and treaty rights. Before the NEB, the Chippewas of the Thames asserted rights that had the potential to be impacted by the project: (a) Aboriginal harvesting and hunting rights; (b) the right to access and preserve sacred sites; (c) Aboriginal title to the bed of the Thames River and its related airspace or, in the alternative, an Aboriginal right to use the water, resources and airspace in the bed of the Thames River; and (d) the treaty right to the exclusive use of their reserve lands. In its written reasons, the NEB expressly recognized these rights. Moreover, in light of the rights asserted, the NEB went on to consider whether affected Indigenous groups had received adequate information regarding the project and a proper opportunity to express their concerns to Enbridge. It noted that the project was to occur within Enbridge's existing right of way on previously disturbed land. No additional Crown land was required. Given the scope of the project and its location, the NEB was satisfied that all Indigenous groups had been adequately consulted.

[53] Contrairement à ce qu'ont affirmé les Chippewas de la Thames, nous n'estimons pas que l'ONÉ a accordé trop peu d'importance aux droits ancestraux et issus de traités qu'ils invoquent, ou qu'il n'en a pas saisi l'importance. Devant l'ONÉ, les Chippewas de la Thames ont fait valoir des droits auxquels le projet était susceptible de porter atteinte : a) des droits ancestraux de récolte et de chasse; b) le droit d'accéder à des sites sacrés et de préserver ces sites; c) le titre ancestral sur le lit et l'espace aérien de la rivière Thames ou, subsidiairement, le droit ancestral d'utiliser l'eau, les ressources et l'espace aérien de la rivière Thames; et d) le droit issu de traités d'utiliser de manière exclusive leurs terres de réserve. Dans ses motifs écrits, l'ONÉ a expressément reconnu ces droits. De plus, l'ONÉ s'est demandé si, compte tenu des droits invoqués, les groupes autochtones touchés avaient reçu des renseignements suffisants concernant le projet et s'ils s'étaient vu offrir une possibilité appropriée de faire part de leurs préoccupations à Enbridge. Il a souligné que le projet serait réalisé sur l'emprise existante d'Enbridge dans des secteurs déjà perturbés et qu'aucune terre publique additionnelle n'était requise. Étant donné l'envergure du projet et son emplacement, l'ONÉ s'est dit convaincu que tous les groupes autochtones avaient été consultés adéquatement.

[54] Second, the NEB considered the potential for negative impacts on the rights and interests of the Chippewas of the Thames. It identified potential consequences that could arise from either the construction required for the completion of the project or the increased risk of spill brought about by the continued operation of Line 9.

[54] Deuxièmement, l'ONÉ a examiné la possibilité que le projet ait des effets préjudiciables sur les droits et les intérêts des Chippewas de la Thames. Il a fait état de possibles conséquences susceptibles de résulter des travaux de construction nécessaires pour mener à bien le projet ou du risque accru de déversements créé par l'exploitation continue de la canalisation 9.

[55] The NEB found that any potential negative impacts on the rights and interests of the Chippewas of the Thames from the modification of Line 9 were minimal and could be reasonably mitigated. The NEB found that it was unlikely that the completion of the project would have any impact on the traditional land use rights of Indigenous groups. Given the location of the project and its limited scope, as well as the conditions that the NEB imposed on Enbridge, the NEB was satisfied that the risk of

[55] L'ONÉ a conclu que tout effet préjudiciable que pourrait avoir le projet sur les droits et les intérêts des Chippewas de la Thames en raison de la modification de la canalisation 9 était minime et pouvait raisonnablement être atténué. L'ONÉ a estimé qu'il était peu probable que la réalisation du projet ait quelque effet sur les droits des groupes autochtones relatifs à l'utilisation traditionnelle des terres. Vu l'emplacement du projet et son envergure limitée, ainsi que les conditions qu'il a imposées à Enbridge,

negative impact through the completion of the project was negligible.

[56] Similarly, the NEB assessed the increased risk of a spill or leak from Line 9 as a result of the project. It recognized the potential negative impacts that a spill could have on traditional land use, but found that the risk was low and could be adequately mitigated. Given Enbridge's commitment to safety and the conditions imposed upon it by the NEB, the NEB was confident that Line 9 would be operated in a safe manner throughout the term of the project. The risk to the rights asserted by the Chippewas of the Thames resulting from a potential spill or leak was therefore minimal.

[57] Third, we do not agree with the Chippewas of the Thames that the NEB's process failed to provide an opportunity for adequate accommodation. Having enumerated the rights asserted by the Chippewas of the Thames and other Indigenous groups, the adequacy of information provided to the Indigenous groups from Enbridge in light of those rights, and the risks to those rights posed by the construction and ongoing operation of Line 9, the NEB imposed a number of accommodation measures that were designed to minimize risks and respond directly to the concerns posed by affected Indigenous groups. To facilitate ongoing communication between Enbridge and affected Indigenous groups regarding the project, the NEB imposed Condition 24. This accommodation measure required Enbridge to continue to consult with Indigenous groups and produce Ongoing Engagement Reports which were to be provided to the NEB. Similarly, Condition 29 required Enbridge to file a plan for continued engagement with persons and groups during the operation of Line 9. Therefore, we find that the NEB carried out a meaningful process of consultation including the imposition of appropriate accommodation measures where necessary.

l'ONÉ s'est dit convaincu que le risque d'effets préjudiciables attribuable à l'achèvement du projet était négligeable.

[56] De même, l'ONÉ a évalué le risque accru de déversements ou de fuites de la canalisation 9 en raison du projet. Il a reconnu les effets néfastes qu'une fuite pourrait avoir sur l'utilisation traditionnelle des terres, mais il a conclu que ce risque était faible et qu'il pouvait être adéquatement atténué. Compte tenu de l'engagement d'Enbridge quant à la sécurité ainsi que des conditions imposées à cette dernière, l'ONÉ s'est dit confiant que la canalisation 9 serait exploitée de manière sécuritaire pendant toute la durée du projet. Le risque de préjudice aux droits invoqués par les Chippewas de la Thames en raison d'une fuite ou d'un déversement était en conséquence minime.

[57] Troisièmement, nous ne pouvons souscrire à la thèse des Chippewas de la Thames voulant qu'ils n'aient pas eu la possibilité d'obtenir des mesures d'accommodement adéquates dans le cadre du processus de l'ONÉ. Après avoir fait état des droits invoqués par les Chippewas de la Thames et d'autres groupes autochtones, du caractère adéquat des renseignements fournis aux groupes autochtones par Enbridge eu égard à ces droits, ainsi que des risques que posaient la construction et l'exploitation de la canalisation 9, l'ONÉ a imposé plusieurs mesures d'accommodement visant à réduire les risques au minimum et à répondre directement aux préoccupations des groupes autochtones touchés par le projet. Pour faciliter les communications entre Enbridge et les groupes autochtones touchés concernant le projet, l'ONÉ a imposé à Enbridge la condition 24. Cette mesure d'accommodement exigeait qu'Enbridge continue de consulter les groupes autochtones et dépose auprès de l'ONÉ des rapports d'engagement permanent. De même, la condition 29 exigeait qu'Enbridge dépose un plan de consultation continue des personnes et des groupes tout au long de l'exploitation de la canalisation 9. Par conséquent, nous concluons que l'ONÉ a mené un véritable processus de consultation, notamment en imposant au besoin des mesures d'accommodement appropriées.

[58] Nonetheless, the Chippewas of the Thames argue that any putative consultation that occurred in this case was inadequate as the NEB "focused on balancing multiple interests" which resulted in the Chippewas of the Thames' "Aboriginal and treaty rights [being] weighed by the Board against a number of economic and public interest factors" (A.F., at paras. 95 and 104). This, the Chippewas of the Thames assert, is an inadequate means by which to assess Aboriginal and treaty rights that are constitutionally guaranteed by s. 35 of the *Constitution Act, 1982*.

[59] In *Carrier Sekani*, this Court recognized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest" which surpasses economic concerns (para. 70). A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met (*Clyde River*, at para. 40; *Carrier Sekani*, at para. 70). Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida*, at para. 50).

[60] Here, the NEB recognized that the impact of the project on the rights and interests of the Chippewas of the Thames was likely to be minimal. Nonetheless, it imposed conditions on Enbridge to accommodate the interests of the Chippewas of the Thames and to ensure ongoing consultation between the proponent and Indigenous groups. The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process (*Haida*, at para. 50).

[58] Quoi qu'il en soit, les Chippewas de la Thames plaident que toute soi-disant consultation ayant eu lieu en l'espèce était inadéquate étant donné que l'ONÉ [TRADUCTION] « s'est employé à soupeser des intérêts multiples », de sorte que « l'Office a soupesé les droits ancestraux et issus de traités [des Chippewas de la Thames] au regard de nombreux facteurs économiques et d'intérêt public » (m.a., par. 95 et 104). Cette façon de faire, de prétendre les Chippewas de la Thames, ne constitue pas une méthode adéquate pour évaluer des droits ancestraux et issus de traités garantis par l'art. 35 de la *Loi constitutionnelle de 1982*.

[59] Dans *Carrier Sekani*, la Cour a reconnu que « [l]'aspect constitutionnel de l'obligation de consulter fait naître un intérêt public spécial » qui l'emporte sur des préoccupations d'ordre économique (par. 70). Une décision autorisant un projet ne saurait servir l'intérêt public s'il n'a pas été satisfait à l'obligation de consulter de la Couronne (*Clyde River*, par. 40; *Carrier Sekani*, par. 70). Toutefois, cela ne signifie pas que les intérêts des groupes autochtones ne peuvent être soupesés avec d'autres intérêts à l'étape des accommodements. C'est d'ailleurs pour cette raison que l'obligation de consulter n'a pas pour effet de créer en faveur des groupes autochtones un droit de « veto » sur les décisions finales de la Couronne (*Haïda*, par. 48). Des accommodements convenables reposent plutôt « sur la nécessité d'établir un équilibre entre des intérêts sociétaux opposés et les droits ancestraux et issus de traités des Autochtones » (*Haïda*, par. 50).

[60] En l'espèce, l'ONÉ a reconnu que les effets du projet sur les droits et les intérêts des Chippewas de la Thames seraient vraisemblablement minimes. Il a néanmoins imposé des conditions à Enbridge pour accommoder les intérêts des Chippewas de la Thames et pour faire en sorte que les consultations se poursuivent entre le promoteur et les groupes autochtones. Les Chippewas de la Thames n'ont pas droit à un processus unilatéral, mais plutôt à un processus coopératif visant à favoriser la réconciliation. La mise en équilibre et le compromis font partie intégrante de ce processus (*Haïda*, par. 50).

G. *Were the NEB's Reasons Sufficient?*

[61] Finally, in the hearing before us, the Chippewas of the Thames raised the issue of the adequacy of the NEB's reasons regarding consultation with Indigenous groups. The Chippewas of the Thames asserted that the NEB's process could not have constituted consultation in part because of the NEB's failure to engage in a *Haida*-style analysis. In particular, the NEB did not identify the strength of the asserted Aboriginal and treaty rights, nor did it identify the depth of consultation required in relation to each Indigenous group. As a consequence, the Chippewas of the Thames submit that the NEB could not have fulfilled the Crown's duty to consult.

[62] In *Haida*, this Court found that where deep consultation is required, written reasons will often be necessary to permit Indigenous groups to determine whether their concerns were adequately considered and addressed (para. 44). In *Clyde River*, we note that written reasons foster reconciliation (para. 41). Where Aboriginal and treaty rights are asserted, the provision of reasons denotes respect (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)) and encourages proper decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

[63] We agree with the Chippewas of the Thames that this case required the NEB to provide written reasons. Additionally, as we recognized in the companion case *Clyde River*, where affected Indigenous peoples have squarely raised concerns about Crown consultation with the NEB, the NEB must usually provide written reasons (*Clyde River*, at para. 41). However, this requirement does not necessitate a formulaic "*Haida* analysis" in all circumstances (para. 42). Instead, where deep consultation is required and the issue of Crown consultation is raised with the NEB, the NEB will be obliged to "explain how it considered and addressed" Indigenous concerns (*ibid.*). What is necessary is an indication that

G. *Les motifs exposés par l'ONÉ sont-ils suffisants?*

[61] Enfin, à l'audience devant nous, les Chippewas de la Thames ont soulevé la question du caractère suffisant des motifs exposés par l'ONÉ sur les consultations avec les groupes autochtones, affirmant que le processus de l'ONÉ ne pouvait avoir constitué une consultation, notamment parce que l'ONÉ n'a pas procédé à une analyse de type *Haïda*. Plus particulièrement, l'ONÉ n'a pas déterminé la solidité des droits ancestraux et issus de traités invoqués ni l'ampleur des consultations nécessaires auprès de chacun des groupes autochtones. En conséquence, les Chippewas de la Thames soutiennent que l'ONÉ ne peut avoir satisfait à l'obligation de consulter incombant à la Couronne.

[62] Dans l'arrêt *Haïda*, notre Cour a conclu que, dans les cas où des consultations approfondies sont requises, des motifs écrits sont souvent nécessaires pour permettre aux groupes autochtones de constater si on a adéquatement considéré leurs préoccupations et répondu à celles-ci (par. 44). Dans *Clyde River*, nous faisons remarquer que des motifs écrits favorisent la réconciliation (par. 41). Lorsque des droits ancestraux ou issus de traités sont invoqués, la rédaction de motifs écrits dénote le respect (*Kainaiwa/Blood Tribe c. Alberta (Energy)*, 2017 ABQB 107, par. 117 (CanLII)) et favorise une meilleure prise de décision (*Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 39).

[63] À l'instar des Chippewas de la Thames, nous sommes d'avis que la présente affaire requérait que l'ONÉ expose des motifs écrits. De plus, comme nous le reconnaissons dans le pourvoi connexe *Clyde River*, lorsque des groupes autochtones touchés soulèvent directement devant l'ONÉ des préoccupations concernant les consultations incombant à la Couronne, l'ONÉ doit habituellement motiver sa décision par écrit (*Clyde River*, par. 41). Toutefois, cette exigence n'oblige pas dans tous les cas à procéder mécaniquement à l'« analyse requise par l'arrêt *Haïda* » (par. 42). Lorsqu'une consultation approfondie est requise et que la question de la consultation menée par la Couronne est soulevée devant l'ONÉ,

the NEB took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.

[64] In our view, the NEB's written reasons are sufficient to satisfy the Crown's obligation. It is notable that, unlike the NEB's reasons in the companion case *Clyde River*, the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

[65] For these reasons, we reject the Chippewas of the Thames' assertion that the NEB's reasons were insufficient to satisfy the Crown's duty to consult.

V. Conclusion

[66] We are of the view that the Crown's duty to consult was met. Accordingly, we would dismiss this appeal with costs to Enbridge.

Appeal dismissed with costs to Enbridge Pipelines Inc.

Solicitors for the appellant: Nahwegahbow, Corbiere, Rama, Ontario.

Solicitors for the respondent Enbridge Pipelines Inc.: Dentons Canada, Calgary; Enbridge Law Department, Calgary.

ce dernier devra « expliquer de quelle manière il a considéré » les préoccupations autochtones « et il en a tenu compte » (*ibid.*). Ce qu'il faut, c'est que l'ONÉ indique qu'il a pris en considération les droits ancestraux et issus de traités invoqués et qu'il a pris des accommodements à leur égard lorsqu'il convenait de le faire.

[64] À notre avis, les motifs écrits exposés par l'ONÉ sont suffisants et permettent de satisfaire à l'obligation de la Couronne. Il convient de souligner que, contrairement aux motifs de l'ONÉ dans l'affaire connexe *Clyde River*, l'analyse de la consultation menée auprès des Autochtones dans le présent cas n'était pas intégrée dans une évaluation environnementale. En l'espèce, l'ONÉ a examiné les éléments de preuve présentés par écrit et de vive voix par de nombreux intervenants autochtones et il a identifié, par écrit, les droits et intérêts en jeu. Il a apprécié les risques que le projet posait à l'égard de ces droits et intérêts et conclu qu'ils étaient minimes. Néanmoins, il a imposé par écrit, sous forme de conditions contraignantes, des mesures d'accommodement en vue de remédier adéquatement à la possibilité d'effets préjudiciables sur les droits invoqués par suite de l'approbation et de la réalisation du projet.

[65] Pour ces raisons, nous rejetons l'argument des Chippewas de la Thames selon lequel les motifs exposés par l'ONÉ sont insuffisants pour satisfaire à l'obligation de consulter incombant à la Couronne.

V. Conclusion

[66] Nous sommes d'avis qu'il a été satisfait à l'obligation de consulter incombant à la Couronne. En conséquence, nous rejetterions le pourvoi, avec dépens en faveur d'Enbridge.

Pourvoi rejeté avec dépens en faveur de Pipelines Enbridge inc.

Procureurs de l'appelante : Nahwegahbow, Corbiere, Rama, Ontario.

Procureurs de l'intimée Pipelines Enbridge inc. : Dentons Canada, Calgary; Enbridge Law Department, Calgary.

Solicitor for the respondent the National Energy Board: National Energy Board, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener Suncor Energy Marketing Inc.: Osler, Hoskin & Harcourt, Calgary; Suncor Law Department, Calgary.

Solicitor for the intervener the Mohawk Council of Kahnawà:ke: Mohawk Council of Kahnawake Legal Services, Mohawk Territory of Kahnawà:ke, Quebec.

Solicitors for the intervener the Mississaugas of the New Credit First Nation: Pape Salter Teillet, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

Procureur de l'intimé l'Office national de l'énergie : Office national de l'énergie, Calgary.

Procureure de l'intimée la procureure générale du Canada : Procureure générale du Canada, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureurs de l'intervenant le Conseil de gestion des ressources fauniques du Nunavut : Supreme Advocacy, Ottawa.

Procureurs de l'intervenante Suncor Energy Marketing Inc. : Osler, Hoskin & Harcourt, Calgary; Suncor Law Department, Calgary.

Procureur de l'intervenant Mohawk Council of Kahnawà:ke : Mohawk Council of Kahnawake Legal Services, Mohawk Territory of Kahnawà:ke, Québec.

Procureurs de l'intervenante Mississaugas of the New Credit First Nation : Pape Salter Teillet, Toronto.

Procureurs de l'intervenant Chiefs of Ontario : Gowling WLG (Canada), Ottawa.

TAB 3

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River and Jerry Natanine *Appellants*

v.

Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) and Attorney General of Canada *Respondents*

and

Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario *Interveners*

Hameau de Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River et Jerry Natanine *Appelants*

c.

Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) et procureure générale du Canada *Intimées*

et

Procureur général de l'Ontario, procureur général de la Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Conseil de gestion des ressources fauniques du Nunavut, Inuvialuit Regional Corporation et Chiefs of Ontario *Intervenants*

Indexed as: Clyde River (Hamlet) *v.* Petroleum Geo-Services Inc.

2017 SCC 40

File No.: 36692.

2016: November 30; 2017: July 26.*

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Répertorié : Clyde River (Hameau) *c.* Petroleum Geo-Services Inc.

2017 CSC 40

N° du greffe : 36692.

2016 : 30 novembre; 2017 : 26 juillet*.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Inuit — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact upon treaty rights — Offshore seismic testing for oil and gas resources potentially affecting Inuit treaty rights — National Energy Board authorizing project — Whether Board's approval process triggered Crown's duty to consult — Whether

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Inuits — Droits issus de traités — Couronne — Obligation de consultation — Décision d'un organisme de réglementation fédéral indépendant qui pourrait avoir une incidence sur des droits issus de traités — Essais sismiques extracôtiers liés aux ressources pétrolières et gazières et susceptibles d'avoir une incidence sur des droits issus de traités des Inuits —

* This judgment was amended on October 30, 2017, by adding the footnotes that now appear at paras. 31 and 47 of the English and French versions of the reasons.

* Ce jugement a été modifié le 30 octobre 2017, par adjonction des notes en bas de page qui figurent maintenant aux par. 31 et 47 des versions anglaise et française des motifs.

Crown can rely on Board's process to fulfill its duty — Role of Board in considering Crown consultation before approval of project — Whether consultation was adequate in this case — Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5(1)(b).

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, is the final decision maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. The proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.

Held: The appeal should be allowed and the NEB's authorization quashed.

The NEB's approval process, in this case, triggered the duty to consult. Crown conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult.

Projet autorisé par l'Office national de l'énergie — Le processus d'approbation de l'Office a-t-il donné naissance à l'obligation de consulter de la Couronne? — La Couronne peut-elle s'en remettre au processus de l'Office pour satisfaire à son obligation? — Rôle de l'Office dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet — La consultation a-t-elle été adéquate en l'espèce? — Loi sur les opérations pétrolières au Canada, L.R.C. 1985, c. O-7, art. 5(1)b).

L'Office national de l'énergie (ONÉ), tribunal administratif fédéral et organisme de réglementation, prend en dernier ressort la décision d'autoriser ou non des activités telles la recherche et l'exploitation des ressources pétrolières et gazières dans certains endroits désignés. Les promoteurs ont demandé à l'ONÉ l'autorisation de mener des essais sismiques extracôtiers liés aux ressources pétrolières et gazières au Nunavut. Les essais proposés pourraient avoir des incidences négatives sur les droits issus de traités des Inuits de Clyde River, qui se sont opposés aux essais sismiques, affirmant qu'il n'avait pas été satisfait à l'obligation de consultation en ce qui a trait à ces essais. L'ONÉ a accordé l'autorisation demandée. Il a conclu que les promoteurs avaient déployé suffisamment d'efforts pour consulter les groupes autochtones et que ces groupes avaient eu une possibilité adéquate de participer au processus d'évaluation environnementale de l'ONÉ. L'ONÉ a également conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants. Clyde River a demandé le contrôle judiciaire de la décision de l'ONÉ. La Cour d'appel fédérale a jugé que l'obligation de consulter avait pris naissance, mais que la Couronne pouvait s'en remettre à l'ONÉ pour que celui-ci procède à la consultation, et que le processus de l'ONÉ avait permis de satisfaire à l'obligation de consulter de la Couronne en l'espèce.

Arrêt : Le pourvoi est accueilli et l'autorisation de l'ONÉ est annulée.

Dans la présente affaire, le processus d'approbation de l'ONÉ a donné naissance à l'obligation de consulter. Les mesures de la Couronne susceptibles de donner naissance à l'obligation de consulter ne se limitent pas à l'exercice, par la Couronne ou en son nom, de la prérogative royale ou de pouvoirs conférés par la loi, et ne se limitent pas non plus aux décisions qui ont une incidence immédiate sur les terres et les ressources. L'ONÉ n'est pas, à proprement parler, « la Couronne » ou un mandataire de la Couronne. Cependant, il agit pour le compte de la Couronne lorsqu'il prend une décision définitive à l'égard d'une demande de projet. Dans ce contexte, l'ONÉ est le moyen par lequel la Couronne agit. Par conséquent, il importe

The substance of the duty does not change when a regulatory agency holds final decision-making authority.

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to s. 35(1) the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and the duty to consult do not operate in conflict here. The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project

peu que le décideur ultime soit le Cabinet ou l'ONÉ. Dans les deux cas, la décision constitue une mesure de la Couronne qui peut donner naissance à l'obligation de consulter. La substance de cette obligation ne change pas lorsqu'un organisme de réglementation détient le pouvoir de prendre la décision définitive.

Il est loisible aux législateurs d'habiliter des organismes de réglementation à contribuer à la réalisation de l'obligation de consulter de la Couronne. Bien que ce soit toujours à la Couronne qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation, elle peut s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à son obligation de consulter. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. De plus, lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. L'ONÉ dispose des pouvoirs procéduraux nécessaires pour mener des consultations, ainsi que des pouvoirs de réparation lui permettant de prendre, au besoin, des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La Couronne peut donc s'en remettre au processus de l'ONÉ pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe.

L'ONÉ dispose de vastes pouvoirs l'autorisant à entendre et à trancher toute question pertinente de droit et de fait, et ses décisions doivent respecter le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, l'ONÉ peut décider s'il a été satisfait à l'obligation de consulter de la Couronne. L'intérêt public et l'obligation de consulter ne sont pas incompatibles en l'espèce. En tant qu'impératif constitutionnel, l'obligation de consulter fait naître un intérêt public spécial, qui l'emporte sur les autres préoccupations dont tiennent habituellement compte les tribunaux administratifs appelés à évaluer l'intérêt public. Lorsque l'autorisation accordée à l'égard d'un projet viole les droits constitutionnels des peuples autochtones, cette autorisation ne saurait servir l'intérêt public. Lorsque les groupes autochtones touchés soulèvent directement auprès de l'ONÉ des préoccupations concernant la consultation qui a été menée par la Couronne, l'ONÉ doit habituellement traiter de ces préoccupations dans des motifs. L'étendue de l'analyse qui conviendra variera selon les circonstances propres à chaque cas. Par-dessus tout, toute décision touchant des droits ancestraux ou issus

approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

Cases Cited

Applied: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **distinguished:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; **referred to:** *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R.*

de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter. Lorsque la Couronne n'a pas satisfait à son obligation de consulter, l'ONÉ doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait être annulée à l'issue d'un contrôle judiciaire.

Bien que la Couronne puisse s'en remettre au processus mené par l'ONÉ pour satisfaire à son obligation de consulter, les efforts de consultation et d'accommodement déployés dans le présent cas ont été inadéquats et lacunaires à plusieurs égards. Premièrement, la consultation était mal orientée. Le processus consultatif ne vise pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le droit lui-même. Dans son évaluation environnementale, l'ONÉ n'a pas pris en considération la source des droits issus de traités des Inuits, ni l'incidence des essais proposés sur ces droits. Deuxièmement, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'ONÉ pour satisfaire à son obligation de consulter. Enfin, élément le plus important, le processus de l'ONÉ n'a pas permis de satisfaire à l'obligation de la Couronne de mener la consultation approfondie qui était requise dans la présente affaire. Très peu de possibilités de participation et de consultation ont étés offertes. Il n'y a pas eu d'audiences en l'espèce ni d'aide financière à l'intention des participants. Bien que ces garanties procédurales ne soient pas toujours nécessaires, leur absence dans la présente instance a réduit de façon importante la qualité de la consultation. De plus, les promoteurs ont finalement répondu aux questions soulevées durant le processus d'évaluation environnementale, mais au moyen d'un document pratiquement inaccessible, et ce, des mois après que les questions aient été posées. Il n'existait aucune compréhension mutuelle sur les points fondamentaux — à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements. En outre, les changements apportés au projet par suite de la consultation ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En conséquence, la Couronne a manqué à son obligation de consulter en ce qui concerne les essais proposés.

Jurisprudence

Arrêt appliqué : *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; **distinction d'avec l'arrêt :** *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550; **arrêts mentionnés :** *Chippewas of the Thames First Nation c. Pipelines Enbridge inc.*, 2017 CSC 41, [2017] 1 R.C.S. 1099; *Nation haïda c. Colombie-Britannique (Ministre des*

v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

Statutes and Regulations Cited

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

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

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

Constitution Act, 1982, s. 35.

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

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

Treaties and Agreements

Nunavut Land Claims Agreement (1993).

Authors Cited

Freedman, Robert, and Sarah Hansen. "Aboriginal Rights vs. The Public Interest" prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online: http://www.millerthomson.com/assets/files/article_attachments/Aboriginal_Rights_vs_The_Public_Interest.pdf; archived version: http://www.scc-csc.ca/cso-dce/2017SCC-CSC40_1_eng.pdf).

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

Forêts), 2004 CSC 73, [2004] 3 R.C.S. 511; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *Ross River Dena Council c. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103; *Première Nation des Chippewas de la Thames c. Pipelines Enbridge Inc.*, 2015 CAF 222, [2016] 3 R.C.F. 96; *McAteer c. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. c. Department of the Environment*, [1978] A.C. 359; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159; *Première nation dakota de Standing Buffalo c. Enbridge Pipelines Inc.*, 2009 CAF 308, [2010] 4 R.C.F. 500; *Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257; *Kainaiwa/Blood Tribe c. Alberta (Energy)*, 2017 ABQB 107; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Qikiqtani Inuit Assn. c. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

Lois et règlements cités

Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37.

Loi canadienne sur l'évaluation environnementale (2012), L.C. 2012, c. 19, art. 52.

Loi constitutionnelle de 1982, art. 35.

Loi sur l'Office national de l'énergie, L.R.C. 1985, c. N-7, art. 12(2), 16.3, 24.

Loi sur l'Office national de l'énergie, S.C. 1959, c. 46.

Loi sur les opérations pétrolières au Canada, L.R.C. 1985, c. O-7, art. 2.1, 3, 5(1)a), 5(1)b), 5(4), 5(5), 5.002 [aj. 2015, c. 4, art. 7], 5.2(2), 5.31, 5.32, 5.331 [*idem*, art. 13], 5.36.

Traités et ententes

Accord sur les revendications territoriales du Nunavut (1993).

Doctrine et autres documents cités

Freedman, Robert, and Sarah Hansen. « Aboriginal Rights vs. The Public Interest » prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (en ligne : http://www.millerthomson.com/assets/files/article_attachments/Aboriginal_Rights_vs_The_Public_Interest.pdf; version archivée : http://www.scc-csc.ca/cso-dce/2017SCC-CSC40_1_eng.pdf).

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

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

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

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Dawson and Boivin JJ.A.), 2015 FCA 179, [2016] 3 F.C.R. 167, 474 N.R. 96, 94 C.E.L.R. (3d) 1, [2015] F.C.J. No. 991 (QL), 2015 CarswellNat 3750 (WL Can.), affirming a decision of the National Energy Board, No. 5554587, June 26, 2014. Appeal allowed.

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

Sandy Carpenter and *Ian Breneman*, for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS).

Mark R. Kindrachuk, *Q.C.*, and *Peter Southey*, for the respondent the Attorney General of Canada.

Manizeh Fancy and *Richard Ogden*, for the intervener the Attorney General of Ontario.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

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

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

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

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

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

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

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Nadon, Dawson et Boivin), 2015 CAF 179, [2016] 3 R.C.F. 167, 474 N.R. 96, 94 C.E.L.R. (3d) 1, [2015] A.C.F. nº 991 (QL), 2015 CarswellNat 12196 (WL Can.), qui a confirmé une décision de l'Office national de l'énergie, nº 5554587, datée du 26 juin 2014. Pourvoi accueilli.

Nader R. Hasan, *Justin Safayeni* et *Pam Hrick*, pour les appelants.

Sandy Carpenter et *Ian Breneman*, pour les intimées Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) et TGS-NOPEC Geophysical Company ASA (TGS).

Mark R. Kindrachuk, *c.r.*, et *Peter Southey*, pour l'intimée la procureure générale du Canada.

Manizeh Fancy et *Richard Ogden*, pour l'intervenant le procureur général de l'Ontario.

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Dominique Nouvet, *Marie Belleau* et *Sonya Morgan*, pour l'intervenante Nunavut Tunngavik Incorporated.

Argumentation écrite seulement par *David Schulze* et *Nicholas Dodd*, pour l'intervenante Makivik Corporation.

Marie-France Major et *Thomas Slade*, pour l'intervenant le Conseil de gestion des ressources fauniques du Nunavut.

Kate Darling, *Lorraine Land*, *Matt McPherson* et *Krista Nerland*, pour l'intervenante Inuvialuit Regional Corporation.

Maxime Faille, *Jaimie Lickers* and *Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

[2] The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

Maxime Faille, *Jaimie Lickers* et *Guy Régimbald*, pour l'intervenant Chiefs of Ontario.

Version française du jugement de la Cour rendu par

LES JUGES KARAKATSANIS ET BROWN —

I. Introduction

[1] À plusieurs reprises, la Cour a confirmé la place que tient l'obligation de consultation de la Couronne lorsqu'il s'agit de favoriser la réconciliation entre les peuples autochtones du Canada et la Couronne. Dans le présent pourvoi, ainsi que dans le pourvoi connexe *Chippewas of the Thames First Nation c. Pipelines Enbridge inc.*, 2017 SCC 41, [2017] 1 R.C.S. 1099, nous examinons l'obligation de la Couronne de consulter les peuples autochtones avant qu'un organisme de réglementation indépendant n'autorise un projet susceptible d'avoir des incidences sur leurs droits. Selon la jurisprudence de notre Cour, la substance de cette obligation ne change pas lorsqu'un organisme de réglementation détient le pouvoir de prendre la décision définitive à l'égard d'un projet. Bien que la Couronne soit toujours tenue de consulter, elle peut satisfaire partiellement ou totalement à cette obligation dans le cadre du processus de réglementation.

[2] Le hameau de Clyde River est situé sur la côte nord-est de l'île de Baffin, au Nunavut. La communauté se trouve dans une plaine inondable entre la Baie Patricia et la cordillère arctique. La plupart des résidents sont des Inuits et ils comptent sur les mammifères marins pour se nourrir et assurer leur bien-être économique, culturel et spirituel. Ils récoltent les mammifères marins depuis des générations. Ils accordent une importance particulière à la baleine boréale, au narval, au phoque annelé, au phoque barbu, au phoque du Groenland et à l'ours polaire. Aux termes de l'*Accord sur les revendications territoriales du Nunavut* (1993), les Inuits de Clyde River ont cédé l'ensemble de leurs revendications, droits, titres et intérêts ancestraux dans la région du Nunavut, qui comprend Clyde River, contre des droits définis par traité, notamment le droit de récolter des mammifères marins.

[3] In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

[4] While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

II. Background

A. *Legislative Framework*

[5] The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

[6] The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to

[3] En 2011, les intimées TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As et Petroleum Geo-Services Inc. (les promoteurs) ont demandé à l'Office national de l'énergie (ONÉ) l'autorisation de mener des essais sismiques extracôtiers liés aux ressources pétrolières et gazières. Nul ne conteste que ces essais pourraient avoir des incidences négatives sur les droits de récolte des Inuits de Clyde River. Après une période de consultation entre les promoteurs du projet, l'ONÉ et les communautés inuites touchées, l'ONÉ a accordé l'autorisation demandée.

[4] Bien que la Couronne puisse s'en remettre au processus mené par l'ONÉ pour satisfaire à son obligation de consulter, vu l'importance des droits issus de traités reconnus en jeu et l'incidence que les essais sismiques pourraient avoir sur ces droits, à l'instar des appelants nous estimons que les efforts de consultation et d'accommodement en l'espèce ont été inadéquats. Pour les motifs qui suivent, nous sommes donc d'avis d'accueillir le pourvoi et d'annuler l'autorisation de l'ONÉ.

II. Contexte

A. *Cadre législatif*

[5] La *Loi sur les opérations pétrolières au Canada*, L.R.C. 1985, c. O-7 (*LOPC*), vise en partie à promouvoir la recherche et l'exploitation responsables des ressources pétrolières et gazières (art. 2.1). Elle s'applique à la recherche, notamment par forage, à la production, à la rationalisation de l'exploitation, à la transformation et au transport du pétrole et du gaz dans certains endroits désignés, notamment au Nunavut (art. 3). Il est interdit de se livrer à de telles activités sans avoir obtenu le permis de travaux prévu à l'al. 5(1)a) ou l'autorisation prévue à l'al. 5(1)b).

[6] L'ONÉ est un tribunal administratif fédéral et un organisme de réglementation établi par la *Loi sur l'Office national de l'énergie*, L.R.C. 1985, c. N-7 (*Loi sur l'ONÉ*). En l'espèce, c'est lui qui prend en dernier ressort la décision d'accorder ou non l'autorisation prévue à l'al. 5(1)b) de la *LOPC*. L'ONÉ est investi d'un large pouvoir discrétionnaire

provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. *The Seismic Testing Authorization*

[7] In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

[8] The NEB launched an environmental assessment of the project.[1]

[9] Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

[10] In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in

[1] This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

qui l'habilite à assortir de conditions, en vertu du par. 5(4), les autorisations qu'il délivre, et il peut demander aux parties tout renseignement qu'il juge nécessaire pour s'acquitter du mandat que lui confère la loi (art. 5.31).

B. *L'autorisation relative aux essais sismiques*

[7] En mai 2011, les promoteurs ont demandé à l'ONÉ, aux termes de l'al. 5(1)b) de la *LOPC*, l'autorisation d'effectuer des essais sismiques dans la baie de Baffin et le détroit de Davis, lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins. Les essais proposés prévoyaient que des canons à air seraient remorqués par navire à travers une région visée par le projet. Ces canons produisent des ondes sonores sous-marines qui permettent de trouver et de mesurer les ressources géologiques sous-marines tel le pétrole. Les essais devaient avoir lieu de juillet à novembre, pendant cinq années consécutives.

[8] L'ONÉ a procédé à une évaluation environnementale du projet[1].

[9] Clyde River s'est opposé aux essais sismiques et a présenté à l'ONÉ une pétition à l'encontre de ces essais en mai 2011. En 2012, les promoteurs ont répondu à des demandes de renseignements supplémentaires de l'ONÉ. Ils ont tenu des assemblées dans des communautés qui seraient touchées par les essais, notamment à Clyde River.

[10] En avril et en mai 2013, l'ONÉ a tenu des assemblées dans les hameaux de Pond Inlet, Clyde River, Qikiqtarjuaq et Iqaluit afin de recueillir les commentaires des membres du public concernant le projet. Des représentants des promoteurs ont assisté à ces assemblées. Les membres des communautés ont posé des questions de base au sujet de l'effet des essais sur les mammifères marins de la région, mais

[1] Cette évaluation était initialement exigée par la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, c. 37. Depuis l'abrogation de cette loi et son remplacement par la *Loi canadienne sur l'évaluation environnementale (2012)*, L.C. 2012, c. 19, art. 52, l'ONÉ continue de mener des évaluations environnementales relativement aux projets proposés, considérant qu'il possède toujours le pouvoir de le faire en vertu de la *LOPC*.

Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: "That's a very difficult question to answer because we're not the core experts" (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

> . . . a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.

(A.R., vol. III, at p. 651)

[11] These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

[12] Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

les promoteurs n'ont pas été en mesure de répondre à bon nombre de celles-ci. Par exemple, à Pond Inlet, un membre de la communauté a demandé aux promoteurs quels mammifères marins seraient touchés par les essais. Ceux-ci ont donné la réponse suivante : [TRADUCTION] « Il est très difficile de répondre à cette question parce que nous ne sommes pas des experts à ce sujet » (d.a., vol. III, p. 541). De même, à Clyde River, un membre de la communauté voulait savoir quel serait l'effet des essais sur les mammifères marins. Les promoteurs ont répondu ce qui suit :

> [TRADUCTION] . . . il y a eu beaucoup de travaux en matière d'essais sismiques à d'autres endroits, et une grande partie de cette information est utilisée dans la réalisation de l'évaluation environnementale, le document qui a été soumis à l'Office national de l'énergie par les entreprises pour les besoins du processus d'approbation. Il comporte une section sur, vous savez, les mammifères marins et les effets sur ceux-ci.

(d.a., vol. III, p. 651)

[11] Ce ne sont là que deux exemples des nombreux cas où les promoteurs n'ont pas su donner de réponses concrètes à des questions de base au sujet des répercussions des essais sismiques proposés. C'est ce qui a amené l'ONÉ à suspendre son évaluation en mai 2013. En août 2013, les promoteurs ont déposé auprès de l'ONÉ un document de 3 926 pages censé répondre à ces questions. Ce document a été affiché sur le site Web de l'ONÉ et envoyé aux bureaux des hameaux. La majeure partie de ce document n'a pas été traduite en inuktitut. Aucun effort additionnel n'a été déployé pour vérifier si les communautés avaient accès à ce document, et si elles avaient obtenu des réponses à leurs questions. Après le dépôt du document, l'ONÉ a repris son évaluation.

[12] Tout au long du processus d'évaluation environnementale, Clyde River et diverses organisations inuites ont déposé auprès de l'ONÉ des lettres de commentaires dans lesquelles ils affirmaient que la consultation était inadéquate et ils exprimaient leurs inquiétudes au sujet des essais.

[13] In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment[2] before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

[14] In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

[15] In its environmental assessment report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised" and that

[13] En avril 2014, des organisations représentant les appelants et des Inuits d'autres communautés ont écrit au ministre des Affaires autochtones et du Nord et à l'ONÉ, affirmant qu'à leur avis il n'avait pas été satisfait à l'obligation de consultation en ce qui a trait aux essais. Selon ces organisations, il était possible de remédier à cette situation en réalisant une évaluation environnementale stratégique[2] avant que des essais sismiques ne soient autorisés. En mai, le Conseil du milieu marin du Nunavut a lui aussi écrit à l'ONÉ, avec copie au ministre, et demandé que toute décision réglementaire touchant le milieu marin de la région du Nunavut soit reportée jusqu'à ce que l'évaluation environnementale stratégique soit terminée. De l'avis du Conseil, cette évaluation était nécessaire pour que l'on comprenne les conditions de référence du milieu marin et pour veiller à ce que les essais sismiques soient adéquatement réglementés.

[14] En juin 2014, le ministre a répondu à ces deux lettres, exprimant son [TRADUCTION] « désaccord avec l'idée de suspendre l'exploration sismique de la région jusqu'à ce que l'évaluation environnementale stratégique soit terminée » (d.a., vol. IV, p. 967). Peu de temps après, une lettre émanant de l'ONÉ qui accordait l'autorisation de mener des travaux géophysiques a suivi, indiquant que le rapport d'évaluation environnementale était terminé et que l'autorisation avait été accordée.

[15] Dans son rapport d'évaluation environnementale, l'ONÉ a traité de la consultation et de la participation des groupes autochtones dans le cadre de son processus. Il a conclu que les promoteurs [TRADUCTION] « ont déployé suffisamment d'efforts pour consulter les groupes autochtones susceptibles

[2] At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment — specifically, the "Eastern Arctic Strategic Environmental Assessment" — for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

[2] À cette époque, le ministère des Affaires indiennes et du Nord canadien préparait une évaluation environnementale stratégique — plus précisément l'[TRADUCTION] « Évaluation environnementale stratégique dans l'Arctique de l'Est » — pour la baie de Baffin et le détroit de Davis, qui visait l'examen de « tous les aspects de l'exploitation pétrolière et gazière future ». Une fois terminée, cette évaluation « guiderait les décisions de politique générale concernant l'opportunité d'inviter les sociétés pétrolières et gazières à soumissionner à l'égard de parcelles de terre afin d'y obtenir des droits d'exploration par forage dans la baie de Baffin et le détroit de Davis, ainsi que le moment où cela pourrait se faire et les endroits qui seraient visés » (lettre de l'honorable Bernard Valcourt à Cathy Towtongie et autres, d.a., vol. IV, p. 966-967).

"Aboriginal groups had an adequate opportunity to participate in the NEB's [environmental assessment] process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. *The Judicial Review Proceedings*

[16] Clyde River applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of *COGOA* (2015 FCA 179, [2016] 3 F.C.R. 167). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

[17] The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development

d'être touchés et pour répondre aux préoccupations qu'ils ont soulevées », et que « les groupes autochtones ont eu une possibilité adéquate de participer au processus d'évaluation environnementale de l'ONÉ » (d.a., vol. I, p. 24). L'ONÉ a également conclu que les essais pouvaient modifier les routes migratoires des mammifères marins et augmenter le risque de mortalité chez ces animaux, situation qui influerait sur la récolte traditionnelle des mammifères marins, notamment les baleines boréales et les narvals, deux espèces qualifiées d'« espèces préoccupantes » par le Comité sur la situation des espèces en péril au Canada (COSEPAC). L'ONÉ a toutefois conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants compte tenu des mesures d'atténuation que les promoteurs mettraient en œuvre.

C. *La demande de contrôle judiciaire*

[16] Clyde River a demandé à la Cour d'appel fédérale le contrôle judiciaire de la décision de l'ONÉ accordant l'autorisation. La juge Dawson (avec l'appui des juges Nadon et Boivin) a conclu que l'obligation de consulter avait pris naissance, parce que l'ONÉ ne pouvait pas accorder l'autorisation tant que le ministre n'aurait pas approuvé (ou renoncer à l'obligation d'approuver) un plan de retombées économiques relativement au projet, conformément au par. 5.2(2) de la *LOPC* (2015 CAF 179, [2016] 3 R.C.F. 167). La Cour d'appel fédérale a considéré que les circonstances requéraient une consultation approfondie, suivant le sens donné à cette notion dans l'arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 44, et elle a jugé que la Couronne pouvait s'en remettre à l'ONÉ pour que celui-ci procède à la consultation.

[17] La Cour d'appel a également conclu que, du fait de la nature et de l'étendue des processus de l'ONÉ, il avait été satisfait à l'obligation de consulter incombant à la Couronne. Les conditions auxquelles l'ONÉ avait accordé son autorisation montraient qu'il avait suffisamment pris en compte les intérêts des Inuits et qu'il était permis de s'attendre à ce que de nouvelles consultations soient

activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

[18] The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?

2. Can the Crown rely on the NEB's process to fulfill the duty to consult?

3. What is the NEB's role in considering Crown consultation before approval?

4. Was the consultation adequate in this case?

A. *The Duty to Consult — General Principles*

[19] The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

menées si les essais proposés étaient suivis d'autres activités de mise en valeur. Dans les circonstances, un rapport d'évaluation environnementale stratégique n'était pas nécessaire.

III. Analyse

[18] Le présent pourvoi soulève les questions suivantes :

1. Un processus d'approbation de l'ONÉ peut-il donner naissance à l'obligation de consulter?

2. La Couronne peut-elle s'en remettre au processus de l'ONÉ pour satisfaire à l'obligation de consulter?

3. Quel est le rôle de l'ONÉ dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet?

4. La consultation a-t-elle été adéquate en l'espèce?

A. *L'obligation de consulter — principes généraux*

[19] L'obligation de consulter vise la protection des droits ancestraux et issus de traités tout en favorisant la réconciliation entre les peuples autochtones et la Couronne (*Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 34). Elle revêt à la fois une dimension constitutionnelle et une dimension légale (*R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6; *Carrier Sekani*, par. 34). Sa dimension constitutionnelle découle du principe de l'honneur de la Couronne (*Kapp*, par. 6). Ce principe est lui-même consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits existants ancestraux et issus de traités (*Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550, par. 24). Et, en tant qu'obligation légale, elle découle de la proclamation de la souveraineté de la Couronne sur des terres et ressources autrefois détenues par les peuples autochtones (*Haïda*, par. 53).

[20] The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

[21] This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani*, at para. 56; *Haida*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

[22] In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties

[20] Une fois que l'obligation a pris naissance, son contenu se situe sur un continuum qui va de la consultation limitée à la consultation approfondie, selon la solidité de la revendication autochtone et la gravité de l'impact potentiel sur le droit concerné. Il faut procéder au cas par cas et faire preuve de souplesse, car le caractère approfondi de la consultation nécessaire peut varier au fur et à mesure que se déroule le processus et que sont mis au jour de nouveaux renseignements (*Haïda*, par. 39 et 43-45).

[21] Notre Cour a affirmé qu'il est loisible aux législateurs d'habiliter des organismes de réglementation à contribuer à la réalisation de l'obligation de consulter de la Couronne (*Carrier Sekani*, par. 56; *Haïda*, par. 51). Les appelants plaident qu'un processus réglementaire ne peut à lui seul assurer le respect de l'obligation de consulter, parce qu'il faut au moins un certain dialogue direct entre « la Couronne » et la communauté autochtone touchée.

[22] À notre avis, bien que la Couronne puisse s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire, en tout ou en partie, à son obligation de consulter et, lorsque cela se justifie, à son obligation d'accommoder, c'est toujours à elle qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation. Sur le plan pratique, cela ne signifie pas qu'un ministre doive dans chaque cas se demander explicitement s'il a été satisfait à l'obligation de consulter, ou qu'il doive participer directement au processus de consultation. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. Elle pourrait devoir combler les lacunes soit au cas par cas, soit de manière plus systématique au moyen de modifications législatives ou réglementaires (voir, par ex., *Ross River Dena Council c. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Elle pourrait également exiger la présentation d'observations à l'organisme de réglementation, demander le réexamen de la décision ou solliciter le report de l'audience afin de mener d'autres consultations dans le cadre d'un processus distinct avant que la décision ne soit rendue. Par ailleurs, si un groupe autochtone

are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12).

[23] Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

[24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal

touché est (comme les Inuits du Nunavut) partie à un traité moderne et juge que le processus est déficient, il devrait, comme ce fut le cas en l'espèce, demander une intervention directe de la Couronne en temps opportun (puisque les parties aux traités sont tenues d'agir de façon diligente pour faire valoir leurs intérêts respectifs) (*Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103, par. 12).

[23] De plus, étant donné que l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation (*Haïda*, par. 41), lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. Les peuples autochtones doivent être avisés de la forme que prendra le processus de consultation, afin de savoir comment les consultations se dérouleront, de pouvoir y participer activement et, au besoin, d'être en mesure de soulever en temps opportun leurs préoccupations au sujet de la forme des consultations proposées.

[24] Par-dessus tout, et peu importe le processus de consultation entrepris, toute décision touchant des droits ancestraux ou issus de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter, laquelle est un impératif constitutionnel. En cas de contestation, la décision devrait être annulée à l'issue d'un contrôle judiciaire. Cela dit, le contrôle judiciaire ne saurait remplacer une consultation adéquate. On ne parvient que rarement, voire jamais, à une véritable réconciliation dans une salle d'audience. Un recours judiciaire peut tendre à corriger des atteintes passées à des droits ancestraux ou issus de traités, mais une consultation adéquate par la Couronne *avant* que le projet ne soit approuvé est toujours préférable à des remontrances judiciaires formulées après le fait, au terme d'une procédure contradictoire. Après tout, la consultation [TRADUCTION] « s'attache au maintien de relations constantes » (*Carrier Sekani*, par. 38, citant D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009),

interests" (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

B. *Can an NEB Approval Process Trigger the Duty to Consult?*

[25] The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida*, at para. 35; *Carrier Sekani*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46).

[26] In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in *COGOA*'s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment

p. 21). Comme notre Cour l'a souligné dans *Haïda*, « [m]ême si les revendications autochtones sont et peuvent être réglées dans le cadre de litiges, il est préférable de recourir à la négociation pour concilier les intérêts de la Couronne et ceux des Autochtones » (par. 14). Il n'est à l'avantage de personne — promoteurs du projet, peuples autochtones ou membres non autochtones des communautés touchées — qu'un projet soit approuvé prématurément mais fasse ensuite l'objet d'un litige.

B. *Un processus d'approbation de l'ONÉ peut-il donner naissance à l'obligation de consulter?*

[25] L'obligation de consulter prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle d'une revendication autochtone ou de droits ancestraux ou issus de traités susceptibles de subir des effets préjudiciables en raison d'une mesure prise par la Couronne (*Haïda*, par. 35; *Carrier Sekani*, par. 31). Les mesures de la Couronne susceptibles de donner naissance à l'obligation de consulter ne se limitent pas à l'exercice, par la Couronne ou en son nom, de la prérogative royale ou de pouvoirs conférés par la loi, et ne se limitent pas non plus aux décisions qui ont une incidence immédiate sur les terres et les ressources. Il faut se demander si la mesure a des effets préjudiciables, quelle qu'en soit la cause, sur des droits ancestraux ou issus de traités. D'ailleurs, un des objectifs de la consultation consiste à cerner les effets préjudiciables, à les réduire au minimum et à y remédier si possible (*Carrier Sekani*, par. 45-46).

[26] Dans le présent pourvoi, toutes les parties ont reconnu que l'obligation de consulter de la Couronne avait pris naissance, mais elles ont été incapables de s'accorder sur la *nature exacte* de la mesure de la Couronne qui a donné naissance à cette obligation. La Cour d'appel fédérale a considéré que l'élément ayant fait naître l'obligation est l'exigence prévue par la *LOPC* qui requiert que le ministre approuve (ou renonce à l'obligation d'approuver) un plan de retombées économiques pour les essais. Dans l'affaire connexe *Chippewas of the Thames*, les juges majoritaires de la Cour d'appel fédérale ont conclu qu'il n'était pas nécessaire de

of the *NEB Act*[3] (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

[27] Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

[28] It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:

décider si l'obligation de consulter s'appliquait, puisque la Couronne n'était pas partie à l'instance devant l'ONÉ, mais ils ont évoqué l'idée que la seule mesure de la Couronne en cause pourrait être l'adoption en 1959 de la *Loi sur l'ONÉ*[3] (*Première Nation des Chippewas de la Thames c. Pipelines Enbridge Inc.*, 2015 CAF 222, [2016] 3 R.C.F. 96). Bref, dans les deux affaires la Cour d'appel fédérale était d'avis que seule une mesure prise par un ministre ou un ministère du gouvernement, ou une société d'État, peut constituer une mesure de la Couronne donnant naissance à l'obligation de consulter. Et devant notre Cour, dans le pourvoi *Chippewas of the Thames*, la procureure générale du Canada a plaidé que c'est l'approbation du projet de pipeline par l'ONÉ qui a donné naissance à l'obligation, puisqu'il s'agissait d'une mesure de l'État susceptible d'avoir une incidence sur des droits ancestraux ou issus de traités.

[27] Contrairement aux conclusions de la Cour d'appel fédérale sur ce point, nous sommes d'avis qu'en l'espèce, tout comme dans *Chippewas of the Thames*, c'est le processus d'approbation de l'ONÉ qui a donné naissance à l'obligation de consulter.

[28] Il importe de répéter que l'obligation de consulter incombe à la Couronne. En un sens, la « Couronne » s'entend de la personnification de Sa Majesté de l'État canadien dans l'exercice des prérogatives et des privilèges qui lui sont réservés. Cependant, la Couronne désigne aussi la souveraine dans l'exercice de son rôle législatif officiel (lorsqu'elle sanctionne les projets de loi, qu'elle refuse de les sanctionner ou qu'elle réserve sa décision), et en tant que chef du pouvoir exécutif (*McAteer c. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, par. 51; P. W. Hogg, P. J. Monahan et W. K. Wright, *Liability of the Crown* (4e éd. 2011), p. 11-12; mais voir *Carrier Sekani*, par. 44). Pour cette raison, le mot « Couronne » est couramment employé comme symbole du pouvoir exécutif et pour désigner ce pouvoir. C'est ce que lord Simon of Glaisdale a décrit dans *Town Investments Ltd. c. Department of the Environment*, [1978] A.C. 359 (H.L.), p. 397 :

[3] *National Energy Board Act*, S.C. 1959, c. 46.

[3] *Loi sur l'Office national de l'énergie*, S.C. 1959, c. 46.

The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

[29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final

[TRADUCTION] La couronne, en tant qu'objet, est une coiffure ornée de bijoux conservée sous garde à la tour de Londres. Mais elle symbolise les pouvoirs du gouvernement qui étaient auparavant exercés par la personne portant la couronne; c'est ainsi qu'au 13e siècle, les crimes étaient commis non seulement contre la paix du roi, mais aussi contre « sa couronne et sa dignité » : *Pollock and Maitland, History of English Law*, 2e éd. (1898), vol. I, p. 525. Par conséquent, on utilise l'expression « la Couronne » en droit constitutionnel pour désigner l'ensemble des pouvoirs de cette nature qui subsistent (la prérogative royale), ainsi que les autres pouvoirs que la loi confère expressément à « la Couronne ».

[29] Selon cette interprétation, l'ONÉ n'est pas, à proprement parler, « la Couronne ». Il n'est pas non plus, à proprement parler, un mandataire de la Couronne, étant donné que — comme l'ONÉ exerce ses activités de manière indépendante des ministres de la Couronne — il n'existe entre eux aucun lien de dépendance (Hogg, Monahan et Wright, p. 465). Cependant, en tant qu'organisme créé par la loi à qui incombe la responsabilité visée à l'al. 5(1)b) de la *LOPC*, l'ONÉ agit pour le compte de la Couronne lorsqu'il prend une décision définitive à l'égard d'une demande de projet. En termes simples, dès lors que l'on accepte qu'un organisme de réglementation existe pour exercer le pouvoir de nature exécutive que le législateur concerné l'autorise à exercer, toute distinction entre les mesures de cet organisme et celles de la Couronne disparaît rapidement. Dans ce contexte, l'ONÉ est le moyen par lequel la Couronne agit, d'où l'emploi interchangeable dans *Carrier Sekani* des expressions « mesure gouvernementale » et « mesure [. . .] de la Couronne » (par. 42-44). Par conséquent, il importe peu que le décideur ultime dans un projet soit le Cabinet ou l'ONÉ. Dans les deux cas, la décision constitue une mesure de la Couronne qui peut donner naissance à l'obligation de consulter. Comme l'a affirmé en dissidence le juge Rennie de la Cour d'appel fédérale dans *Chippewas of the Thames*, « [l]'obligation,

decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. *Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?*

[30] As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

[31] We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, 5.31(1) and 5.32). It can also require

comme l'honneur de la Couronne, ne s'envole pas en fumée simplement parce qu'une décision sans appel a été rendue par un tribunal établi par le Parlement, plutôt que par le Cabinet » (par. 105). La mesure qu'a prise l'ONÉ dans l'exercice du pouvoir qu'il possède, en vertu de l'al. 5(1)b) de la *LOPC*, de prendre la décision ultime concernant des essais tels ceux proposés en l'espèce, constitue manifestement une mesure de la Couronne.

C. *La Couronne peut-elle s'en remettre au processus de l'ONÉ pour satisfaire à l'obligation de consulter?*

[30] Comme nous l'avons déjà dit, bien que la Couronne demeure ultimement responsable de veiller au caractère adéquat de la consultation, celle-ci peut s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à l'obligation de consulter. Cependant, la question de savoir si la Couronne est en mesure de le faire, en tout ou en partie, dépend de la réponse à la question de savoir si les attributions que la loi confère à l'organisme habilitent ce dernier à faire ce que l'obligation exige dans les circonstances particulières (*Carrier Sekani*, par. 55 et 60). En conséquence, dans le cas de l'ONÉ, la question consiste à décider si celui-ci peut, dans la mesure où la Couronne s'en remet à lui, assurer un niveau de consultation adéquat et, au besoin, accorder aux Inuits de Clyde River des mesures d'accommodement à l'égard des essais proposés.

[31] Nous constatons que tant l'ONÉ que la *LOPC* sont antérieurs à la reconnaissance judiciaire de l'obligation de consulter. Toutefois, compte tenu du caractère souple de cette obligation, la Couronne peut s'en remettre à un processus qui a été initialement conçu pour une autre fin, tant que ce processus rend possible un niveau approprié de consultation du groupe autochtone touché (*Beckman*, par. 39; *Taku River*, par. 22). En vertu de la *LOPC*, l'ONÉ dispose d'un large éventail de pouvoirs qui permettent une consultation étendue. Il peut tenir des audiences, en plus de posséder un vaste pouvoir discrétionnaire l'habilitant à rendre des ordonnances ou obtenir

studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).[4]

[32] *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), 5(5) and 5.36(2)).

[33] The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

[34] In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill

[4] While s. 5.002 (participant funding) and s. 5.331 (public hearings) of *COGOA* were not in force at the time the NEB considered and authorized the project at issue here, they were added later (see S.C. 2015, c. 4, ss. 7 and 13).

des renseignements pour l'application de la *LOPC* et dans l'intérêt public (art. 5.331, par. 5.31(1), art. 5.32). Il peut également exiger que des études soient entreprises et imposer des conditions préalables à l'approbation (par. 5(4)). Dans le cas de projets désignés, il peut aussi (comme c'est le cas en l'espèce) réaliser des évaluations environnementales et créer un programme d'aide financière pour faciliter la participation du public (art. 5.002)[4].

[32] La *LOPC* confère aussi à l'ONÉ de vastes pouvoirs d'accommodement afin de répondre, au besoin, aux préoccupations des groupes autochtones. L'ONÉ peut assortir l'autorisation qu'il accorde en vertu de l'al. 5(1)b) de toute condition qu'il juge appropriée, et peut faire dépendre la prise d'effet de cette autorisation de l'exécution de ces conditions (par. 5(4) et 5.36(1)). Plus important encore, l'ONÉ peut exiger que des accommodements soient apportés soit en exerçant son pouvoir discrétionnaire de refuser une autorisation, soit en réservant sa décision pendant le règlement d'autres questions (al. 5(1)b), et par. 5(5) et 5.36(2)).

[33] L'ONÉ a également acquis une importante expertise institutionnelle, tant en effectuant des consultations qu'en évaluant les effets environnementaux des projets proposés. Lorsque les effets d'un projet proposé sur un droit ancestral ou issu d'un traité chevauchent considérablement les répercussions environnementales potentielles du projet, l'ONÉ est bien placé pour superviser les consultations visant l'examen de ces effets, et pour utiliser son expertise technique afin d'évaluer les formes d'accommodement possibles.

[34] En somme, l'ONÉ dispose (1) des pouvoirs procéduraux nécessaires pour mener des consultations et (2) des pouvoirs de réparation lui permettant de prendre, au besoin, des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La

[4] Même si les art. 5.002 (aide financière) et 5.331 (audiences publiques) de la *LOPC* n'étaient pas en vigueur lorsque l'ONÉ a examiné et autorisé le projet litigieux en l'espèce, ils ont été ajoutés à la loi par la suite (voir L.C. 2015, c. 4, art. 7 et 13).

the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

D. *What Is the NEB's Role in Considering Crown Consultation Before Approval?*

[35] The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

[36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72).

Couronne peut donc s'en remettre au processus de l'ONÉ pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe. Nous allons examiner ci-après si le processus de l'ONÉ a permis de satisfaire à cette obligation en l'espèce.

D. *Quel est le rôle de l'ONÉ dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet?*

[35] Les appelants soutiennent que, en tant que tribunal administratif habilité à trancher des questions de droit, l'ONÉ *doit* exercer son pouvoir décisionnel en conformité avec le par. 35(1) de la *Loi constitutionnelle de 1982*, et ce, en évaluant le caractère adéquat de la consultation avant d'accorder une autorisation pour des essais sismiques. À l'inverse, les promoteurs plaident que rien dans la jurisprudence de notre Cour ne permet d'imposer cette obligation à l'ONÉ. Bien que la procureure générale du Canada soit d'accord avec les appelants pour dire que l'ONÉ possède la capacité juridique de trancher des questions constitutionnelles lorsque cela est nécessaire dans l'exercice de ses pouvoirs décisionnels, elle soutient que, dans sa décision relative à l'évaluation environnementale en l'espèce, l'ONÉ a examiné de manière appropriée le caractère adéquat des efforts de consultation déployés par les promoteurs.

[36] En général, un tribunal administratif habilité à examiner des questions de droit doit décider si une consultation de ce genre était suffisante sur le plan constitutionnel dans le cas où cette question est régulièrement soulevée devant lui. Le pouvoir d'un tribunal administratif « de statuer en droit emporte celui de trancher une question constitutionnelle dont il est régulièrement saisi, sauf lorsqu'il est clairement établi que le législateur a voulu le priver d'un tel pouvoir » (*Carrier Sekani*, par. 69). Les organismes de réglementation investis du pouvoir de trancher des questions de droit ont le devoir et le pouvoir d'appliquer la Constitution, sauf si le pouvoir de statuer sur la question constitutionnelle a clairement été écarté (*R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 77). Il s'ensuit qu'ils doivent s'assurer que leurs décisions sont conformes à l'art. 35 de la *Loi constitutionnelle de 1982* (*Carrier Sekani*, par. 72).

[37] The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

[38] We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames* considered that this issue was not properly before the NEB. It distinguished *Carrier Sekani* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames*, while the Crown (in the form of BC Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

[39] The difficulty with this view, however, is that — as we have explained — action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been

[37] L'ONÉ dispose, tant en vertu de la *Loi sur l'ONÉ* que de la *LOPC*, de vastes pouvoirs l'autorisant à entendre et à trancher toute question pertinente de droit et de fait (*Loi sur l'ONÉ*, par. 12(2); *LOPC*, par. 5.31(2)). Aucune disposition de l'une ou l'autre de ces lois ne tend à indiquer que le législateur entendait priver l'ONÉ du pouvoir de statuer sur le caractère adéquat de la consultation. De plus, dans *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159, notre Cour a conclu que les décisions de l'ONÉ doivent respecter le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, l'ONÉ peut décider s'il a été satisfait à l'obligation de consulter de la Couronne.

[38] Nous constatons que, dans l'affaire *Chippewas of the Thames*, les juges majoritaires de la Cour d'appel fédérale ont considéré que l'ONÉ n'avait pas été régulièrement saisi de cette question. Ils ont distingué cette affaire de l'arrêt *Carrier Sekani* sur la base que, dans *Chippewas of the Thames*, la Couronne n'était pas partie à l'audience devant l'ONÉ, tandis que dans *Carrier Sekani* la Couronne (par l'entremise de BC Hydro, une société d'État) était partie à l'instance devant la commission des services d'utilité publique. Se fondant sur l'arrêt *Première nation dakota de Standing Buffalo c. Enbridge Pipelines Inc.*, 2009 CAF 308, [2010] 4 R.C.F. 500, les juges majoritaires de la Cour d'appel fédérale dans *Chippewas of the Thames* ont estimé que l'ONÉ n'est pas tenu de se demander si l'obligation de consulter incombant à la Couronne a pris naissance (ou s'il a été satisfait à cette obligation) avant d'autoriser un projet lié aux ressources, sauf dans le cas où la Couronne est une partie à l'instance devant l'ONÉ.

[39] Toutefois, la difficulté que soulève cette opinion est que — comme nous l'avons expliqué — les mesures prises par l'ONÉ en application de son pouvoir de rendre des décisions définitives en vertu de l'al. 5(1)b) de la *LOPC* sont *elles-mêmes* des mesures prises par la Couronne qui donnent naissance à l'obligation de consulter. Nous ne pouvons pas non plus, soit dit en tout respect, souscrire à l'opinion des juges majoritaires de la Cour d'appel fédérale dans l'affaire connexe *Chippewas of the Thames* selon laquelle une décision de l'ONÉ respecte le par. 35(1) de la *Loi constitutionnelle de 1982* dans

triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

[40] Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

[41] This leaves the question of what a regulatory agency must do where the adequacy of Crown

la mesure où l'ONÉ s'assure que les promoteurs participent à des « discussions » avec les groupes autochtones susceptibles d'être touchés (par. 62). Si l'obligation de la Couronne de consulter a pris naissance, un décideur ne peut approuver un projet que si la consultation incombant à la Couronne est adéquate. Même si dans bien des cas la Couronne peut s'en remettre aux processus de l'ONÉ pour satisfaire à son obligation de consulter, étant donné que c'est l'ONÉ qui prend la décision définitive, la question fondamentale consiste à décider s'il a été satisfait à l'obligation avant l'approbation du projet (*Haïda*, par. 67). En conséquence, lorsque la Couronne n'a pas satisfait à son obligation de consulter les groupes autochtones touchés par un projet visé par la *LOPC*, l'ONÉ doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait (comme nous l'avons dit précédemment) être annulée à l'issue d'un contrôle judiciaire, puisque l'obligation de consulter doit être respectée avant la prise de mesures susceptibles d'avoir des effets préjudiciables sur le droit en question (*Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257, par. 78).

[40] Certains auteurs affirment que, comme l'ONÉ a pour mission de trancher des questions dans l'intérêt public, il ne peut, de manière effective, tenir compte des droits ancestraux et issus de traités et apprécier l'obligation de consulter de la Couronne (voir R. Freedman et S. Hansen, « Aboriginal Rights vs. The Public Interest », préparé pour une conférence du Pacific Business & Law Institute, Vancouver, C.-B. (26-27 février 2009) (en ligne), p. 4 et 14). À notre avis, cependant, l'intérêt public et l'obligation de consulter ne sont pas incompatibles. Comme l'a expliqué la Cour dans *Carrier Sekani*, en tant qu'impératif constitutionnel, l'obligation de consulter fait naître un intérêt public spécial, qui l'emporte sur les autres préoccupations dont tiennent habituellement compte les tribunaux administratifs appelés à évaluer l'intérêt public (par. 70). Lorsque l'autorisation accordée à l'égard d'un projet viole les droits constitutionnels des peuples autochtones, cette autorisation ne saurait servir l'intérêt public (*ibid.*).

[41] Il reste à déterminer ce qu'un organisme de réglementation doit faire dans les cas où se soulève

consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

devant lui la question du caractère adéquat de la consultation incombant à la Couronne. Lorsque les groupes autochtones touchés soulèvent directement auprès de l'ONÉ des préoccupations concernant la consultation qui a été menée par la Couronne, l'ONÉ doit habituellement traiter de ces préoccupations dans des motifs, plus particulièrement s'il s'agit d'une demande d'approbation de projet requérant une consultation approfondie. Le fait que l'honneur de la Couronne soit en jeu ne permet pas de préjuger d'un résultat donné, mais favorise la réconciliation en imposant des obligations quant à l'approche et à la façon de faire du gouvernement (*Haïda*, par. 49 et 63). L'existence de motifs écrits favorise la réconciliation, parce que ces motifs montrent aux peuples autochtones touchés que leurs droits ont été considérés et comment on en a tenu compte (*Haïda*, par. 44). Des motifs constituent [TRADUCTION] « une marque de respect [qui] démontre la courtoisie dont doit faire preuve la Couronne en tant que souverain envers une nation qui occupait le territoire avant elle » (*Kainaiwa/Blood Tribe c. Alberta (Energy)*, 2017 ABQB 107, par. 117 (CanLII)). Les motifs écrits favorisent également une meilleure prise de décision (*Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 39).

[42] This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

[42] Cependant, cela ne signifie pas, contrairement à ce qu'affirment les appelants, que l'ONÉ est toujours tenu d'examiner le caractère adéquat de la consultation qui a été menée en appliquant mécaniquement l'« analyse requise par l'arrêt *Haïda* ». Des motifs explicites ne sont pas non plus requis dans tous les cas. L'étendue de l'analyse qui conviendra variera selon les circonstances propres à chaque cas. Mais dans les cas où une consultation approfondie est nécessaire et que les peuples autochtones touchés ont fait connaître leurs préoccupations, l'honneur de la Couronne obligera généralement l'ONÉ, lorsque son processus d'approbation donne naissance à l'obligation de consulter, à expliquer de quelle manière il a considéré ces préoccupations et il en a tenu compte.

E. *Was the Consultation Adequate in This Case?*

E. *La consultation a-t-elle été adéquate en l'espèce?*

[43] The Crown acknowledges that deep consultation was required in this case, and we agree. As

[43] La Couronne reconnaît qu'une consultation approfondie était requise dans le cas qui nous

this Court explained in *Haida*, deep consultation is required "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

> The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than . . . just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.
>
> (*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25)

occupe, et nous en convenons. Comme notre Cour l'a expliqué dans l'arrêt *Haïda*, une consultation approfondie est requise dans « les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé » (par. 44). En l'espèce, les appelants possèdent des *droits issus de traités établis* leur permettant de chasser et de récolter des mammifères marins. La Cour d'appel fédérale a reconnu que ces droits étaient extrêmement importants pour le bien-être économique, culturel et spirituel des appelants (par. 2). Jerry Natanine, l'ancien maire de Clyde River, a fourni les explications qui suivent à ce sujet : [TRADUCTION] « [la chasse aux mammifères marins] nous fournit des aliments nutritifs, en plus de nous permettre d'exercer des pratiques observées depuis des générations et d'entretenir d'étroites relations les uns avec les autres grâce au partage de ce que nous appelons les "aliments traditionnels" » (d.a., vol. II, p. 197). Récemment, la Cour de justice du Nunavut a également reconnu l'importance de ces droits :

> [TRADUCTION] Le droit inuit qui nous intéresse en l'espèce est le droit de récolter les mammifères marins. Le régime alimentaire de nombreux Inuits au Nunavut se compose en grande partie d'aliments traditionnels. Le coût des aliments est très élevé, et plusieurs habitants seraient dans l'incapacité d'acheter des aliments pour remplacer les aliments traditionnels si ceux-ci n'étaient plus disponibles. Il est reconnu que les aliments traditionnels ont une valeur nutritive plus élevée que les aliments achetés. Cependant, l'incapacité de récolter des mammifères marins n'aurait pas uniquement des répercussions sur le régime alimentaire des Inuits. La tradition culturelle qu'ont les Inuits de partager les aliments traditionnels entre eux dans la communauté serait perdue. La fabrication de vêtements traditionnels serait aussi touchée. Les Inuits perdraient la possibilité de participer à la chasse, une activité qui constitue un aspect fondamental de l'identité inuite. Le droit des Inuits qui est en jeu est d'une grande importance, d'où la nécessité d'une consultation approfondie et de mesures d'accommodement substantielles.
>
> (*Qikiqtani Inuit Assn. c. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, par. 25)

[44] The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

[45] Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

[46] Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

[47] Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). Despite the NEB's broad powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants.

[44] Les essais proposés comportent également des risques importants pour ces droits issus de traités. Selon l'évaluation environnementale de l'ONÉ, ce projet est susceptible d'accroître le risque de mortalité chez les mammifères marins, de causer des dommages permanents à leur ouïe et de modifier leurs routes migratoires, situation qui a en conséquence une incidence sur l'utilisation des ressources traditionnelles. En raison de l'importance du droit en jeu, de la portée des effets potentiels et du risque de préjudice non indemnisable, l'obligation qui s'impose dans la présente affaire se situe à l'extrémité supérieure du continuum.

[45] Dans cette optique, la consultation qui a eu lieu en l'espèce a été lacunaire à plusieurs égards. Premièrement, la consultation était mal orientée. Bien que l'ONÉ ait conclu que les essais proposés n'étaient pas susceptibles d'avoir des effets environnementaux négatifs importants, et que tout effet sur l'utilisation des ressources traditionnelles pourrait faire l'objet de mesures d'atténuation, le processus consultatif ne vise pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le *droit*. Dans son évaluation environnementale, l'ONÉ n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins, ni l'incidence des essais proposés sur ces droits.

[46] Deuxièmement, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'ONÉ pour satisfaire à son obligation de consulter. L'importance du processus ne leur a pas été expliquée adéquatement.

[47] Enfin, élément le plus important, le processus de l'ONÉ n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie. Une telle consultation « pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision » (*Haïda*, par. 44). Malgré les vastes pouvoirs que la *LOPC* confère à l'ONÉ pour offrir de telles mesures avantageuses, les appelants n'ont bénéficié

Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument.[5] While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani*, at para. 38).

[48] The consultation in this case also stands in contrast to *Taku River* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

[49] While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including

[5] The NEB process in *Chippewas of the Thames* was undertaken pursuant to the *NEB Act*, not *COGOA*. Under the *NEB Act*, the NEB had at the relevant time, and still has today, explicit statutory powers to conduct public hearings (s. 24) and provide participant funding for such hearings (s. 16.3). As noted above, Parliament conferred similar powers upon the NEB under *COGOA* in 2015.

que de très peu de possibilités de participation et de consultation. Contrairement à de nombreuses autres instances de l'ONÉ, y compris celle dans l'affaire *Chippewas of the Thames*, il n'y a pas eu d'audiences en l'espèce. Bien que les appelants aient soumis des éléments de preuve scientifique à l'ONÉ, ils l'ont fait sans recevoir d'aide financière à l'intention des participants. Une autre situation qui contraste avec l'affaire *Chippewas of the Thames*, où le processus de consultation a été beaucoup plus robuste. Dans cette affaire, l'ONÉ a tenu des audiences, les appelants ont reçu des fonds pour y participer et ils ont eu l'occasion de présenter des éléments de preuve et des observations finales[5]. Quoique ces garanties procédurales constituent des caractéristiques d'un processus contradictoire, elles peuvent être nécessaires pour qu'une véritable consultation ait lieu (*Haïda*, par. 41) et elles ne transforment pas l'objectif sous-jacent de cette consultation, soit encourager la réconciliation tout en favorisant le maintien de relations constantes (*Carrier Sekani*, par. 38).

[48] La consultation qui s'est déroulée en l'espèce contraste également avec celle tenue dans l'affaire *Taku River* où, même si elle avait droit uniquement à un niveau de consultation se trouvant à mi-chemin du continuum (par. 32), la Première Nation Tlingit de Taku River a obtenu de l'aide financière (par. 37) et a participé pleinement au processus d'évaluation en tant que membre du comité responsable du projet, comité qui était le « principal moteur du processus d'évaluation » (par. 3, 8 et 40).

[49] Bien que ces garanties procédurales ne soient pas toujours nécessaires, leur absence en l'espèce a réduit de façon importante la qualité de la consultation. Même si les appelants ont eu la possibilité d'interroger les promoteurs au sujet du projet lors des rencontres organisées par l'ONÉ au printemps 2013, ces derniers ont été incapables de répondre à

[5] Le processus suivi par l'ONÉ dans l'affaire *Chippewas of the Thames* s'est déroulé conformément à la *Loi sur l'ONÉ*, et non à la *LOPC*. En vertu de la *Loi sur l'ONÉ*, l'ONÉ possédait au moment pertinent, et possède encore aujourd'hui, le pouvoir explicite de tenir des audiences publiques (art. 24) et de verser de l'aide financière en vue de faciliter la participation à de telles audiences (art. 16.3). Comme il a été indiqué précédemment, le Parlement a conféré à l'ONÉ des pouvoirs similaires dans la *LOPC* en 2015.

basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.

[50] The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

de nombreuses questions, y compris des questions de base sur les effets des essais proposés sur les mammifères marins. Les promoteurs ont finalement répondu à ces questions; cependant, ils l'ont fait dans un document de 3 926 pages, qu'ils ont soumis à l'ONÉ. Ce document a été affiché sur le site Web de l'ONÉ et remis aux bureaux des hameaux de Pond Inlet, Clyde River, Qikiqtajuak et Iqualuit. Toutefois, l'Internet est lent au Nunavut, et la bande passante est coûteuse. L'ancien maire de Clyde River a déclaré avoir été incapable de télécharger le document, puisque celui-ci était trop volumineux. De plus, une fraction seulement de cet énorme document a été traduite en inuktitut. Le moins que l'on puisse dire, c'est que le fait de répondre à des questions qui touchent à l'essence des droits issus de traités en cause au moyen d'un amas documentaire pratiquement inaccessible, et ce, des mois après que les questions aient été posées en personne ne constitue pas une véritable consultation. Selon des auteurs, le mot [TRADUCTION] « "consultation", dans son sens le moins technique, s'entend de l'action de se parler dans le but de se comprendre les uns les autres » (T. Isaac et A. Knox, « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49, p. 61). Aucune compréhension mutuelle sur les points fondamentaux — à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements — n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire.

[50] Les fruits de la participation limitée des Inuits au processus d'évaluation en l'espèce ressortent clairement de l'examen des mesures d'accommodement consignées dans le rapport d'évaluation environnementale de l'ONÉ. Il y est fait état des changements apportés au projet par suite de la consultation, par exemple un engagement à poursuivre les consultations, l'affectation d'agents de liaison auprès de la communauté dans les communautés touchées et un projet d'étude sur les Inuit Qaujimajatuqangit (connaissances traditionnelles inuites). Les promoteurs se sont aussi engagés à doter le navire devant être utilisé pour les essais proposés d'appareils de surveillance acoustique passive afin d'éviter les collisions avec des mammifères marins.

[51] These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

[52] The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

[53] For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

Appeal allowed with costs.

[51] Cependant, ces changements ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En outre, la surveillance acoustique passive ne constituait aucunement une concession, puisqu'elle est exigée par l'Énoncé des pratiques canadiennes d'atténuation des ondes sismiques en milieu marin, lequel énonce des « normes minimales, qui s'appliquent dans toutes les eaux marines du Canada libres de glace » (d.a., vol. I, p. 40), et qui figureraient virtuellement dans tous les projets d'essais sismiques. Aucune de ces soi-disant concessions, ni les motifs eux-mêmes exposés par l'ONÉ, n'ont donné aux Inuits une assurance raisonnable que leurs droits issus de traités protégés par la Constitution avaient été considérés en tant que *droits*, plutôt que comme un aspect accessoire de l'évaluation des préoccupations environnementales.

[52] Compte tenu des droits issus de traités établis que possèdent les Inuits et des risques que posent pour ces droits les essais proposés, le processus de consultation qui s'est déroulé en l'espèce a comporté d'importantes lacunes. Si les appelants avaient disposé des ressources nécessaires pour présenter leur propre preuve scientifique, et s'ils avaient eu l'occasion de vérifier la validité de la preuve des promoteurs, le résultat de l'évaluation environnementale aurait pu être bien différent. Les Inuits n'ont pas non plus reçu de réponses concrètes à leurs questions au sujet de l'effet des essais sur la vie marine. Bien que l'ONÉ ait examiné les répercussions potentielles du projet sur les mammifères marins et sur l'utilisation traditionnelle des ressources par les Inuits, son rapport ne reconnaît pas, ni même ne mentionne, l'existence des droits issus de traités des Inuits de récolter des ressources fauniques au Nunavut ou le fait qu'une consultation approfondie était nécessaire.

IV. Conclusion

[53] Pour ces motifs, nous concluons que la Couronne a manqué à son obligation de consulter les appelants au sujet des essais proposés. Nous sommes d'avis d'accueillir le pourvoi, avec dépens en faveur des appelants, et d'annuler l'autorisation de l'ONÉ.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Stockwoods, Toronto.

Solicitors for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS): Blake, Cassels & Graydon, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the intervener Nunavut Tunngavik Incorporated: Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Solicitors for the intervener the Makivik Corporation: Dionne Schulze, Montréal.

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener the Inuvialuit Regional Corporation: Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

Procureurs des appelants : Stockwoods, Toronto.

Procureurs des intimées Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) et TGS-NOPEC Geophysical Company ASA (TGS) : Blake, Cassels & Graydon, Calgary.

Procureure de l'intimée la procureure générale du Canada : Procureure générale du Canada, Saskatoon.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureurs de l'intervenante Nunavut Tunngavik Incorporated : Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Procureurs de l'intervenante Makivik Corporation : Dionne Schulze, Montréal.

Procureurs de l'intervenant le Conseil de gestion des ressources fauniques du Nunavut : Supreme Advocacy, Ottawa.

Procureurs de l'intervenante Inuvialuit Regional Corporation : Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Procureurs de l'intervenant Chiefs of Ontario : Gowling WLG (Canada), Ottawa.

TAB 4

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,

Ministre des Forêts et procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Appelants*

c.

Conseil de la Nation haïda et Guujaaw, en leur propre nom et au nom des membres de la Nation haïda *Intimés*

et entre

Weyerhaeuser Company Limited *Appelante*

c.

Conseil de la Nation haïda et Guujaaw, en leur propre nom et au nom des membres de la Nation haïda *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Nouvelle-Écosse, procureur général de la Saskatchewan, procureur général de l'Alberta, Bande indienne de Squamish et Bande indienne des Lax-kw'alaams, Nation haisla, Sommet des Premières nations, Première nation Dene Tha', Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan, 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

British Columbia Cattlemen's Association and Village of Port Clements *Interveners*

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

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

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

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which

Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association et Village de Port Clements *Intervenants*

Répertorié : Nation haïda *c.* Colombie-Britannique (Ministre des Forêts)

Référence neutre : 2004 CSC 73.

N° du greffe : 29419.

2004 : 24 mars; 2004 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

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

Couronne — Honneur de la Couronne — Obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations — La Couronne a-t-elle envers les peuples autochtones une obligation de consultation et d'accommodement avant de prendre une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et titres ancestraux non encore prouvées? — L'obligation vise-t-elle aussi les tiers?

Depuis plus de 100 ans, les Haïda revendiquent un titre sur les terres des îles Haïda Gwaii et les eaux les entourant; ce titre n'a pas encore été juridiquement reconnu. En 1961, la province de la Colombie-Britannique a délivré à une grosse compagnie forestière une « concession de ferme forestière » (CFF 39) l'autorisant à récolter des arbres dans la région des îles Haïda Gwaii connue sous le nom de Bloc 6. En 1981, en 1995 et en l'an 2000, le ministre a remplacé la CFF 39 et en 1999 il a autorisé la cession de la CFF 39 à Weyerhaeuser Co. Les Haïda ont contesté devant les tribunaux ces remplacements et cette cession, qui ont été effectués sans leur consentement et, depuis 1994 au moins, en dépit de leurs objections. Ils demandent leur annulation. Le juge en son cabinet a rejeté la demande, mais a conclu que le gouvernement a l'obligation morale, mais non légale, de négocier avec les Haïda. La Cour d'appel a infirmé cette décision, déclarant que le gouvernement et Weyerhaeuser Co. ont tous deux l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations.

Arrêt : Le pourvoi de la Couronne est rejeté. Le pourvoi de Weyerhaeuser Co. est accueilli.

Il est loisible aux Haïda de demander une injonction interlocutoire, mais ce n'est pas leur seul recours. Par

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

ailleurs, il est possible que l'injonction interlocutoire ne tienne pas suffisamment compte de leurs intérêts avant qu'une décision définitive soit rendue au sujet de ceux-ci. S'ils sont en mesure d'établir l'existence d'une obligation particulière donnant naissance à l'obligation de consulter ou d'accommoder, ils sont libres de demander l'application de ces mesures.

L'obligation du gouvernement de consulter les peuples autochtones et de trouver des accommodements à leurs intérêts découle du principe de l'honneur de la Couronne, auquel il faut donner une interprétation généreuse. Bien que les droits et titre ancestraux revendiqués, mais non encore définis ou prouvés, ne soient pas suffisamment précis pour que l'honneur de la Couronne oblige celle-ci à agir comme fiduciaire, cette dernière, si elle entend agir honorablement, ne peut traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité. L'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà de la reconnaissance formelle des revendications. L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci. La prise de mesures de consultation et d'accommodement avant le règlement définitif d'une revendication permet de protéger les intérêts autochtones et constitue même un aspect essentiel du processus honorable de conciliation imposé par l'art. 35 de la *Loi constitutionnelle de 1982*.

L'étendue de l'obligation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre. La Couronne n'a pas l'obligation de parvenir à une entente mais plutôt de mener de bonne foi de véritables consultations. Le contenu de l'obligation varie selon les circonstances et il faut procéder au cas par cas. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. Des consultations menées de bonne foi peuvent faire naître l'obligation d'accommodement. Lorsque des mesures d'accommodement sont nécessaires lors de la prise d'une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et de titre ancestraux non encore prouvées, la Couronne doit établir un équilibre

with the potential impact of the decision on the asserted right or title and with other societal interests.

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

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

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

Cases Cited

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; **referred to:** *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996]

raisonnable entre les préoccupations des Autochtones, d'une part, et l'incidence potentielle de la décision sur le droit ou titre revendiqué et les autres intérêts sociétaux, d'autre part.

Les tiers ne peuvent être jugés responsables de ne pas avoir rempli l'obligation de consultation et d'accommodement qui incombe à la Couronne. Le respect du principe de l'honneur de la Couronne ne peut être délégué, et la responsabilité juridique en ce qui a trait à la consultation et à l'accommodement incombe à la Couronne. Toutefois, cela ne signifie pas que des tiers ne peuvent jamais être tenus responsables envers des peuples autochtones.

Enfin, l'obligation de consultation et d'accommodement s'applique au gouvernement provincial. Les intérêts acquis par la province sur les terres lors de l'Union sont subordonnés à tous intérêts autres que ceux que peut y avoir la province. Comme l'obligation de consulter et d'accommoder qui est en litige dans la présente affaire est fondée sur l'affirmation par la province, avant l'Union, de sa souveraineté sur le territoire visé, la province a acquis les terres sous réserve de cette obligation.

En l'espèce, la Couronne avait l'obligation de consulter les Haïda au sujet du remplacement de la CFF 39. Les revendications par les Haïda du titre et du droit ancestral de récolter du cèdre rouge étaient étayées par une preuve à première vue valable, et la province savait que les droits et titre ancestraux potentiels visaient le Bloc 6 et qu'ils pouvaient être touchés par la décision de remplacer la CFF 39. Les décisions rendues à l'égard des CFF reflètent la planification stratégique touchant l'utilisation de la ressource en cause et risquent d'avoir des conséquences graves sur les droits ou titres ancestraux. Pour que les consultations soient utiles, elles doivent avoir lieu à l'étape de l'octroi ou du renouvellement de la CFF. De plus, la solidité de la preuve étayant l'existence d'un titre haïda et d'un droit haïda autorisant la récolte du cèdre rouge, conjuguée aux répercussions sérieuses sur ces intérêts des décisions stratégiques successives, indique que l'honneur de la Couronne pourrait bien commander des mesures d'accommodement substantielles pour protéger les intérêts des Haïda en attendant que leurs revendications soient réglées.

Jurisprudence

Arrêt appliqué : *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; **arrêts mentionnés :** *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Marshall*, [1999] 3 R.C.S. 456; *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1

2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *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.

Statutes and Regulations Cited

Constitution Act, 1867, s. 109.
Constitution Act, 1982, s. 35.
Forest Act, R.S.B.C. 1996, c. 157.
Forestry Revitalization Act, S.B.C. 2003, c. 17.

Authors Cited

Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "accommodate", "accommodation".

Hunter, John J. L. "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction". Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.

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

Lawrence, Sonia, and Patrick Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252.

New Zealand. Ministry of Justice. *A Guide for Consultation with Mäori*. Wellington: The Ministry, 1997.

APPEALS from a judgment of the British Columbia Court of Appeal, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147,

R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *TransCanada Pipelines Ltd. c. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell c. M.R.N.*, [2001] 1 R.C.S. 911, 2001 CSC 33; *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, conf. par [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council c. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. c. Marshall*, [1999] 3 R.C.S. 533; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Adams*, [1996] 3 R.C.S. 101; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 App. Cas. 46; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

Lois et règlements cités

Forest Act, R.S.B.C. 1996, ch. 157.
Forestry Revitalization Act, S.B.C. 2003, ch. 17.
Loi constitutionnelle de 1867, art. 109.
Loi constitutionnelle de 1982, art. 35.

Doctrine citée

Hunter, John J. L. « Advancing Aboriginal Title Claims after *Delgamuukw* : The Role of the Injunction ». Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.

Imbs, Paul, dir. *Trésor de la langue française, dictionnaire de la langue du XIX^e^ et du XX^e^ siècle (1789-1960)*, t. 1. Paris : Centre national de la recherche scientifique, 1971, « accommodement », « accommoder ».

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

Lawrence, Sonia, and Patrick Macklem. « From Consultation to Reconciliation : Aboriginal Rights and the Crown's Duty to Consult » (2000), 79 *R. du B. can.* 252.

Nouvelle-Zélande. Ministry of Justice. *A Guide for Consultation with Mäori*. Wellington : The Ministry, 1997.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147, avec motifs

with supplementary reasons (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, reversing a decision of the British Columbia Supreme Court (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

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

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

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

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

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

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

Written submissions only by *Alexander MacBain Cameron*, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, *Q.C.*, and *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

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

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

Allan Donovan, for the intervener the Haisla Nation.

supplémentaires (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, qui a infirmé une décision de la Cour suprême de la Colombie-Britannique (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Pourvoi de la Couronne rejeté. Pourvoi de Weyerhaeuser Co. accueilli.

Paul J. Pearlman, *c.r.*, et *Kathryn L. Kickbush*, pour les appelants le ministre des Forêts et le procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

John J. L. Hunter, *c.r.*, et *K. Michael Stephens*, pour l'appelante Weyerhaeuser Company Limited.

Louise Mandell, *c.r.*, *Michael Jackson*, *c.r.*, *Terri-Lynn Williams-Davidson*, *Gidfahl Gudsllaay* et *Cheryl Y. Sharvit*, pour les intimés.

Mitchell R. Taylor et *Brian McLaughlin*, pour l'intervenant le procureur général du Canada.

E. Ria Tzimas et *Mark Crow*, pour l'intervenant le procureur général de l'Ontario.

Pierre-Christian Labeau, pour l'intervenant le procureur général du Québec.

Argumentation écrite seulement par *Alexander MacBain Cameron*, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Graeme G. Mitchell, *c.r.*, et *P. Mitch McAdam*, pour l'intervenant le procureur général de la Saskatchewan.

Stanley H. Rutwind et *Kurt Sandstrom*, pour l'intervenant le procureur général de l'Alberta.

Gregory J. McDade, *c.r.*, et *John R. Rich*, pour les intervenantes la Bande indienne de Squamish et la Bande indienne des Lax-kw'alaams.

Allan Donovan, pour l'intervenante la Nation haisla.

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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.

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

Hugh M. G. Braker, *c.r.*, *Anja Brown*, *Arthur C. Pape* et *Jean Teillet*, pour l'intervenant le Sommet des Premières nations.

Robert C. Freedman, pour l'intervenante la Première nation Dene Tha'.

Robert J. M. Janes et *Dominique Nouvet*, pour l'intervenant Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan.

Charles F. Willms et *Kevin O'Callaghan*, pour les intervenants 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 et Mining Association of British Columbia.

Thomas F. Isaac, pour l'intervenante British Columbia Cattlemen's Association.

Stuart A. Rush, *c.r.*, pour l'intervenant le village de Port Clements.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

1 À l'ouest de la partie continentale de la Colombie-Britannique s'étendent les îles de la Reine-Charlotte, patrie traditionnelle des Haïda. Les îles Haïda Gwaii, comme leurs habitants les appellent, se composent de deux grandes îles et de plusieurs petites îles. Depuis plus de 100 ans, les Haïda revendiquent un titre sur les terres des îles Haïda Gwaii et les eaux les entourant. Ce titre en est toujours à l'étape de la revendication et n'a pas encore été juridiquement reconnu.

2 Les îles Haïda Gwaii sont densément boisées. L'épinette, la pruche et le cèdre y foisonnent. Le plus important de ces arbres est le cèdre, qui, depuis des temps immémoriaux, joue un rôle central dans l'économie et la culture des Haïda. C'est à partir du cèdre qu'ils fabriquaient leurs canots maritimes, leurs vêtements, leurs ustensiles et les totems qui

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

protégeaient leurs habitations. La forêt de cèdres demeure essentielle à leur vie et à la conception qu'ils se font d'eux-mêmes.

Les forêts des îles Haïda Gwaii étaient déjà exploitées avant la Première Guerre mondiale. Certaines parties du territoire ont été coupées à blanc. D'autres sont occupées par une forêt secondaire. Dans certaines régions, on peut encore trouver de vieilles forêts.

La province de la Colombie-Britannique continue de délivrer à des compagnies forestières des permis de coupe autorisant l'abattage d'arbres sur les îles Haïda Gwaii. Ce sont ces permis, maintenant appelés [TRADUCTION] « concessions de ferme forestière » (« CFF »), qui sont au cœur du présent litige. En 1961, MacMillan Bloedel Limited, une grosse compagnie forestière, a obtenu la CFF 39, qui lui permettait de récolter des arbres dans la région connue sous le nom de « Bloc 6 ». En 1981, en 1995 et en l'an 2000, le ministre a remplacé la CFF 39 conformément à la procédure prévue par la *Forest Act*, R.S.B.C. 1996, ch. 157. En 1999, il a autorisé la cession de la CFF 39 à Weyerhaeuser Company Limited (« Weyerhaeuser »). Les Haïda ont contesté ces remplacements et cette cession, qui ont été effectués sans leur consentement et, depuis 1994 au moins, en dépit de leurs objections. La CFF 39 est cependant restée en vigueur.

En janvier 2000, les Haïda ont engagé une procédure par laquelle ils s'opposent aux trois remplacements et à la cession de la CFF 39 à Weyerhaeuser, et demandent leur annulation. Invoquant l'existence d'un titre ancestral, ils ont plaidé grèvement en common law, grèvement en equity et manquement à l'obligation de fiduciaire.

Cela nous amène à la question dont la Cour est saisie. Le gouvernement détient le titre en common law sur les terres en question. Dans l'exercice des pouvoirs que lui confère ce titre, il a accordé à Weyerhaeuser le droit d'exploiter les forêts du Bloc 6. Mais les Haïda prétendent également détenir un titre sur ces terres — titre dont ils tentent actuellement d'établir l'existence — et s'opposent à l'exploitation des forêts du Bloc 6 prévue par la

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?

CFF 39. Dans ces circonstances, le gouvernement est-il tenu à une obligation envers les Haïda et, si oui, laquelle? De façon plus concrète, a-t-il l'obligation de consulter les Haïda avant de prendre des décisions concernant l'exploitation des forêts et de trouver des accommodements à leurs préoccupations quant à la question de savoir si les forêts du Bloc 6 peuvent être exploitées — et, dans l'affirmative, lesquelles — avant qu'ils aient pu établir l'existence de leur titre sur les terres et leurs droits ancestraux?

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.

7 Les enjeux sont énormes. Les Haïda font valoir que, si on ne procède pas à ces consultation et accommodement, ils obtiendront leur titre mais se retrouveront privés de forêts qui sont vitales à leur économie et à leur culture. Il faut des générations aux forêts pour parvenir à maturité, soulignent-ils, et les vieilles forêts sont irremplaçables. Comme a conclu le juge en son cabinet, leur revendication du titre sur les îles Haïda Gwaii s'appuie sur des arguments solides. Mais elle est également complexe, et il faudra de nombreuses années pour l'établir. Les Haïda affirment qu'entre-temps ils auront été irrémédiablement dépouillés de leur héritage.

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.

8 Le gouvernement, pour sa part, soutient qu'il a le droit et le devoir d'aménager les ressources forestières dans l'intérêt de tous les habitants de la Colombie-Britannique et que, tant que les Haïda n'auront pas formellement établi le bien-fondé de leur revendication, ils n'ont aucun droit à des consultations ou à des accommodements à leurs besoins et intérêts.

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.

9 Le juge en son cabinet a décidé que le gouvernement a l'obligation morale, mais non légale, de négocier avec les Haïda : [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. La Cour d'appel de la Colombie-Britannique a infirmé cette décision, déclarant que le gouvernement et Weyerhaeuser ont tous deux l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations en ce qui concerne la récolte de bois sur le bloc 6 : (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, avec motifs supplémentaires (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

Je conclus que le gouvernement est légalement tenu de consulter les Haïda au sujet de la récolte de bois sur le bloc 6, y compris en ce qui concerne la cession ou le remplacement des CFF. Une consultation menée de bonne foi pourrait à son tour entraîner l'obligation de trouver des accommodements aux préoccupations des Haïda à propos de la récolte de bois, mais il est impossible pour le moment de préciser le genre d'accommodement qui s'impose, à supposer qu'une telle mesure soit requise. Il faut une véritable consultation. Les intéressés n'ont aucune obligation de parvenir à une entente. Le gouvernement ne peut se décharger des obligations de consultation et d'accommodement en les déléguant à Weyerhaeuser. De son côté, cette dernière n'a pas d'obligation indépendante de consulter les Haïda ou de trouver des accommodements à leurs préoccupations, bien qu'il demeure possible qu'elle soit tenue responsable à l'égard d'obligations qu'elle aurait assumées. Je suis donc d'avis de rejeter l'appel de la Couronne et d'accueillir l'appel de Weyerhaeuser.

Il s'agit de la première affaire du genre à être soumise à la Cour. Notre tâche se limite modestement à établir le cadre général d'application, dans les cas indiqués, de l'obligation de consultation et d'accommodement avant que les revendications de titre et droits ancestraux soient tranchées. Au fur et à mesure de l'application de ce cadre, les tribunaux seront appelés, conformément à la méthode traditionnelle de la common law, à préciser l'obligation de consultation et d'accommodement.

II. Analyse

A. *Le droit en matière d'injonction s'applique-t-il en l'espèce?*

On fait valoir que le recours approprié pour les Haïda consiste à demander une injonction interlocutoire contre le gouvernement et contre Weyerhaeuser et qu'il est en conséquence inutile d'examiner la question de l'existence de l'obligation de consulter ou d'accommoder. Dans *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, les critères à respecter pour obtenir une injonction interlocutoire ont été examinés. Le demandeur

suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

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.

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

doit établir les éléments suivants : (1) il existe une question sérieuse à juger; (2) le refus de l'injonction causera un préjudice irréparable; (3) la prépondérance des inconvénients favorise l'octroi de l'injonction.

13 Il est loisible à des demandeurs comme les Haïda de demander une injonction interlocutoire. Cependant, cela ne signifie pas qu'il s'agit là de leur seul recours. Si des demandeurs sont en mesure d'établir l'existence d'une obligation particulière donnant naissance à l'obligation de consulter ou d'accommoder, ils sont libres de demander l'application de ces mesures. Ici, les Haïda invoquent l'obligation découlant du principe que la Couronne doit agir honorablement envers les peuples autochtones.

14 L'injonction interlocutoire n'offre parfois qu'une réparation partielle et imparfaite. Premièrement, comme nous l'avons déjà mentionné, elle peut ne pas faire apparaître toute l'obligation du gouvernement, qui, selon les Haïda, incombe au gouvernement. Deuxièmement, elle représente généralement la solution du tout ou rien. Ou le projet se poursuit, ou il s'arrête. Par contre, l'obligation de consulter et d'accommoder invoquée en l'espèce nécessite, de par sa nature même, une mise en balance des intérêts autochtones et des intérêts non autochtones et se rapproche donc de l'objectif de conciliation qui est au cœur des rapports entre la Couronne et les Autochtones et qui a été énoncé dans les arrêts *R. c. Van der Peet*, [1996] 2 R.C.S. 507, par. 31, et *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 186. Troisièmement, le critère de la balance des inconvénients fait pencher la balance du côté de la protection des emplois et des recettes de l'État, de sorte que les intérêts autochtones tendent à « être écartés » totalement jusqu'à ce que la question en litige ait été tranchée de façon définitive, au lieu d'être convenablement mis en balance avec les préoccupations opposées : J. J. L. Hunter, « Advancing Aboriginal Title Claims after *Delgamuukw* : The Role of the Injunction » (juin 2000). Quatrièmement, l'injonction interlocutoire est considérée comme une mesure corrective provisoire jusqu'à ce que le tribunal ait statué sur la question litigieuse fondamentale. Les affaires portant sur des revendications autochtones peuvent

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

être extrêmement complexes et prendre des années, voire des décennies, avant d'être tranchées par les tribunaux. L'application d'une injonction interlocutoire pendant une si longue période pourrait causer des préjudices inutiles et pourrait inciter la partie en bénéficiant à faire moins de compromis. Même si les revendications autochtones sont et peuvent être réglées dans le cadre de litiges, il est préférable de recourir à la négociation pour concilier les intérêts de la Couronne et ceux des Autochtones. Pour toutes ces raisons, il est possible qu'une injonction interlocutoire ne tienne pas suffisamment compte des intérêts autochtones avant qu'une décision définitive soit rendue au sujet de ceux-ci.

J'estime que le recours en injonction interlocutoire ne fait pas obstacle à la revendication des Haïda. Nous devons aller plus loin et décider si les rapports particuliers avec la Couronne qu'invoquent les Haïda font naître une obligation de consulter et, s'il y a lieu, d'accommoder. Je vais maintenant analyser la source de l'obligation, le moment où elle prend naissance, sa portée et son contenu, la question de savoir si elle vise aussi les tiers et si elle s'applique au gouvernement provincial, et non exclusivement au gouvernement fédéral. J'appliquerai ensuite les conclusions de cette analyse aux faits de l'espèce.

B. *La source de l'obligation de consulter et d'accommoder*

L'obligation du gouvernement de consulter les peuples autochtones et de prendre en compte leurs intérêts découle du principe de l'honneur de la Couronne. L'honneur de la Couronne est toujours en jeu lorsque cette dernière transige avec les peuples autochtones : voir par exemple *R. c. Badger*, [1996] 1 R.C.S. 771, par. 41; *R. c. Marshall*, [1999] 3 R.C.S. 456. Il ne s'agit pas simplement d'une belle formule, mais d'un précepte fondamental qui peut s'appliquer dans des situations concrètes.

Les origines historiques du principe de l'honneur de la Couronne tendent à indiquer que ce dernier doit recevoir une interprétation généreuse afin de refléter les réalités sous-jacentes dont il découle. Dans tous ses rapports avec les peuples autochtones, qu'il s'agisse de l'affirmation de sa souveraineté, du règlement de revendications ou de la mise en œuvre

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.

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.

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

de traités, la Couronne doit agir honorablement. Il s'agit là du minimum requis pour parvenir à « concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté » : *Delgamuukw*, précité, par. 186, citant *Van der Peet*, précité, par. 31.

18 L'honneur de la Couronne fait naître différentes obligations selon les circonstances. Lorsque la Couronne assume des pouvoirs discrétionnaires à l'égard d'intérêts autochtones particuliers, le principe de l'honneur de la Couronne donne naissance à une obligation de fiduciaire : *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79, par. 79. Le contenu de l'obligation de fiduciaire peut varier en fonction des autres obligations, plus larges, de la Couronne. Cependant, pour s'acquitter de son obligation de fiduciaire, la Couronne doit agir dans le meilleur intérêt du groupe autochtone lorsqu'elle exerce des pouvoirs discrétionnaires à l'égard des intérêts autochtones en jeu. Comme il est expliqué dans *Wewaykum*, par. 81, l'expression « obligation de fiduciaire » ne dénote pas un rapport fiduciaire universel englobant tous les aspects des rapports entre la Couronne et les peuples autochtones :

> . . . [considérer l'] « obligation de fiduciaire » [. . .] comme si elle imposait à la Couronne une responsabilité totale à l'égard de tous les aspects des rapports entre la Couronne et les bandes indiennes[, c'est] aller trop loin. L'obligation de fiduciaire incombant à la Couronne n'a pas un caractère général, mais existe plutôt à l'égard de droits particuliers des Indiens.

En l'espèce, des droits et un titre ancestraux ont été revendiqués, mais n'ont pas été définis ou prouvés. L'intérêt autochtone en question n'est pas suffisamment précis pour que l'honneur de la Couronne oblige celle-ci à agir, comme fiduciaire, dans le meilleur intérêt du groupe autochtone lorsqu'elle exerce des pouvoirs discrétionnaires à l'égard de l'objet du droit ou du titre.

19 L'honneur de la Couronne imprègne également les processus de négociation et d'interprétation des traités. Lorsqu'elle conclut et applique un traité, la Couronne doit agir avec honneur et intégrité, et éviter la moindre apparence de « manœuvres malhonnêtes » (*Badger*, par. 41). Ainsi, dans *Marshall*, précité, par. 4, les juges majoritaires de la Cour ont

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).

justifié leur interprétation du traité en déclarant que « rien de moins ne saurait protéger l'honneur et l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié . . . ».

Tant qu'un traité n'a pas été conclu, l'honneur de la Couronne exige la tenue de négociations menant à un règlement équitable des revendications autochtones : *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1105-1106. Les traités permettent de concilier la souveraineté autochtone préexistante et la souveraineté proclamée de la Couronne, et ils servent à définir les droits ancestraux garantis par l'art. 35 de la *Loi constitutionnelle de 1982*. L'article 35 promet la reconnaissance de droits, et « [i]l faut toujours présumer que [la Couronne] entend respecter ses promesses » (*Badger*, précité, par. 41). Un processus de négociation honnête permet de concrétiser cette promesse et de concilier les revendications de souveraineté respectives. L'article 35 a pour corollaire que la Couronne doit agir honorablement lorsqu'il s'agit de définir les droits garantis par celui-ci et de les concilier avec d'autres droits et intérêts. Cette obligation emporte à son tour celle de consulter et, s'il y a lieu, d'accommoder.

Cette obligation de consulter a été reconnue et analysée dans la jurisprudence. Dans *Sparrow*, précité, p. 1119, la Cour a confirmé l'existence de l'obligation de consulter les Salish de la côte ouest qui revendiquaient un droit de pêche non encore reconnu. Le juge en chef Dickson et le juge La Forest ont écrit que, pour déterminer si les restrictions imposées au droit sont justifiées, il faut notamment se demander « si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre ».

Quelques années plus tard, la Cour a confirmé l'existence de l'obligation de consultation à l'égard des ressources visées par une revendication autochtone dans *R. c. Nikal*, [1996] 1 R.C.S. 1013, où le juge Cory a écrit que « [d]ans la mesure où tous les efforts raisonnables ont été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier » (par. 110).

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).

Dans l'arrêt connexe *R. c. Gladstone*, [1996] 2 R.C.S. 723, le juge en chef Lamer a fait état de la nécessité « [des] consultations et [de] l'indemnisation », et de la nécessité d'examiner « la manière dont l'État a concilié les différents droits ancestraux visant une pêche donnée [. . .], l'importance de la pêche pour le bien-être économique et matériel de la bande en question, ainsi que les critères appliqués par l'État, par exemple, dans la répartition des permis de pêche commerciale entre les divers usagers » (par. 64). 23

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.

Au paragraphe 168 de l'arrêt de principe *Delgamuukw*, précité, prononcé dans le contexte d'une revendication de titre sur des terres et des ressources, la Cour a confirmé l'existence de l'obligation de consulter et a précisé cette obligation, affirmant que son contenu variait selon les circonstances : de la simple « obligation de discuter des décisions importantes » « lorsque le manquement est moins grave ou relativement mineur », en passant par l'obligation nécessitant « beaucoup plus qu'une simple consultation » qui s'impose « [d]ans la plupart des cas », jusqu'à la nécessité d'obtenir le « consentement [de la] nation autochtone » sur les questions très importantes. Ces remarques s'appliquent autant aux revendications non réglées qu'aux revendications déjà réglées et auxquelles il est porté atteinte. 24

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.

En bref, les Autochtones du Canada étaient déjà ici à l'arrivée des Européens; ils n'ont jamais été conquis. De nombreuses bandes ont concilié leurs revendications avec la souveraineté de la Couronne en négociant des traités. D'autres, notamment en Colombie-Britannique, ne l'ont pas encore fait. Les droits potentiels visés par ces revendications sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*. L'honneur de la Couronne commande que ces droits soient déterminés, reconnus et respectés. Pour ce faire, la Couronne doit agir honorablement et négocier. Au cours des négociations, l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et, s'il y a lieu, à trouver des accommodements à leurs intérêts. 25

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

C. *Le moment où l'obligation de consulter et d'accommoder prend naissance*

L'obligation de négocier honorablement emporte celle de consulter les demandeurs autochtones et de parvenir à une entente honorable, qui tienne compte de leurs droits inhérents. Mais prouver l'existence de droits peut prendre du temps, parfois même beaucoup de temps. Comment faut-il traiter les intérêts en jeu dans l'intervalle? Pour répondre à cette question, il faut tenir compte de la nécessité de concilier l'occupation antérieure des terres par les peuples autochtones et la réalité de la souveraineté de la Couronne. Celle-ci peut-elle, en vertu de la souveraineté qu'elle a proclamée, exploiter les ressources en question comme bon lui semble en attendant que la revendication autochtone soit établie et réglée? Ou doit-elle plutôt adapter son comportement de manière à tenir compte des droits, non encore reconnus, visés par cette revendication?

La réponse à cette question découle, encore une fois, de l'honneur de la Couronne. Si cette dernière entend agir honorablement, elle ne peut traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité. Elle doit respecter ces intérêts potentiels mais non encore reconnus. La Couronne n'est pas paralysée pour autant. Elle peut continuer à gérer les ressources en question en attendant le règlement des revendications. Toutefois, selon les circonstances, question examinée de façon plus approfondie plus loin, le principe de l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et à prendre raisonnablement en compte leurs intérêts jusqu'au règlement de la revendication. Le fait d'exploiter unilatéralement une ressource faisant l'objet d'une revendication au cours du processus visant à établir et à régler cette revendication peut revenir à dépouiller les demandeurs autochtones d'une partie ou de l'ensemble des avantages liés à cette ressource. Agir ainsi n'est pas une attitude honorable.

Le gouvernement prétend qu'il n'a aucune obligation de consulter et d'accommoder tant qu'une décision définitive n'a pas été rendue quant à la portée et au contenu du droit. Avant que le droit ne soit

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.

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).

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

établi, affirme-t-on, il n'existe qu'une « obligation d'équité » générale en common law, fondée sur la règle générale selon laquelle une décision administrative qui touche « les droits, privilèges ou biens d'une personne » entraîne l'application de cette obligation d'équité : *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 20. Le gouvernement affirme que, en dehors des obligations générales découlant du droit administratif, l'obligation de consulter et d'accommoder n'existe que dans le cas où le gouvernement s'est engagé à protéger un intérêt autochtone particulier ou cherche à restreindre un intérêt autochtone reconnu. Le gouvernement soutient donc qu'il n'existe, à ce stade-ci, aucune obligation légale de consulter les Haïda et de prendre en compte leurs intérêts, bien qu'il admette qu'il puisse exister de [TRADUCTION] « bonnes raisons sur le plan pratique et politique » de le faire.

29 Le gouvernement invoque des précédents et des considérations d'intérêt général à l'appui de sa thèse. Il cite *Sparrow*, précité, p. 1110-1113 et 1119, où l'étendue et le contenu du droit avaient été déterminés et l'atteinte avait été établie, avant que soit examinée la question de savoir si l'atteinte était justifiée. Le gouvernement prétend que sa position est également étayée par le point de vue exprimé dans *TransCanada Pipelines Ltd. c. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, où la Cour d'appel de l'Ontario a jugé que [TRADUCTION] « ce qui déclenche l'examen de l'obligation de la Couronne de consulter, c'est la démonstration par la Première nation qu'il y a eu violation d'un droit existant, ancestral ou issu de traité, reconnu et confirmé par le par. 35(1) » (par. 120).

30 Du point de vue des considérations d'intérêt général, le gouvernement invoque les difficultés que pose sur le plan pratique l'application de l'obligation de consulter ou d'accommoder dans les cas de revendications non établies. Si, selon les circonstances, l'obligation de consulter peut aller de la « simple » obligation d'informer et d'écouter, à une extrémité de la gamme, à l'obligation d'obtenir le consentement des Autochtones, à l'autre extrémité, comment, demande le gouvernement, les parties peuvent-elles

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

s'entendre sur le degré de consultation lorsque des revendications et des droits sont contestés? Et si elles n'arrivent pas à s'entendre, comment les tribunaux judiciaires ou administratifs sont-ils censés trancher la question? Le gouvernement affirme également qu'il est irréaliste et injuste d'imposer une consultation avant que les revendications soient réglées de façon définitive, car cela revient à accorder réparation avant que la question de l'atteinte et celle de la justification aient été tranchées.

Les arguments du gouvernement ne résistent pas à un examen minutieux. Ni les précédents ni les considérations d'ordre pratique n'appuient la thèse selon laquelle l'obligation de consulter et, s'il y a lieu, d'accommoder ne prend naissance que lorsqu'une décision définitive a été rendue quant à la portée et au contenu du droit.

La jurisprudence de la Cour étaye le point de vue selon lequel l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*. Ce processus de conciliation découle de l'obligation de la Couronne de se conduire honorablement envers les peuples autochtones, obligation qui, à son tour, tire son origine de l'affirmation par la Couronne de sa souveraineté sur un peuple autochtone et par l'exercice de fait de son autorité sur des terres et ressources qui étaient jusque-là sous l'autorité de ce peuple. Comme il est mentionné dans *Mitchell c. M.R.N.*, [2001] 1 R.C.S. 911, 2001 CSC 33, par. 9, « [c]ette affirmation de souveraineté a fait naître l'obligation de traiter les peuples autochtones de façon équitable et honorable, et de les protéger contre l'exploitation » (je souligne).

Limiter l'application du processus de conciliation aux revendications prouvées comporte le risque que la conciliation soit considérée comme un objectif formaliste éloigné et se voie dénuée du « sens utile » qu'elle doit avoir par suite de l'« engagement

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.

solennel » pris par la Couronne lorsqu'elle a reconnu et confirmé les droits et titres ancestraux : *Sparrow*, précité, p. 1108. Une telle attitude risque également d'avoir des conséquences fâcheuses. En effet, il est possible que, lorsque les Autochtones parviennent finalement à établir le bien-fondé de leur revendication, ils trouvent leurs terres changées et leurs ressources épuisées. Ce n'est pas de la conciliation, ni un comportement honorable.

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.

34 L'existence d'une obligation légale de consulter le groupe intéressé avant qu'il ait apporté la preuve de sa revendication est nécessaire pour comprendre le langage employé dans des affaires comme *Sparrow*, *Nikal* et *Gladstone*, précitées, où la confirmation du droit et la justification de l'atteinte reprochée ont été débattues en même temps. Dans *Sparrow*, par exemple, la référence au comportement de la Couronne au cours de l'examen de la justification des atteintes s'entend du comportement avant l'établissement du droit, ce qui réfute l'argument que ce soit la preuve de l'existence du droit revendiqué qui déclenche l'obligation légale de consulter et, s'il y a lieu, d'accommoder, même dans le contexte de la justification.

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.

35 Mais à quel moment, précisément, l'obligation de consulter prend-elle naissance? L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci : voir *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (C.S.C.-B.), p. 71, le juge Dorgan.

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

36 Il reste l'argument d'ordre pratique. On affirme que, tant qu'une revendication n'est pas réglée, la Couronne ne peut pas savoir si les droits revendiqués existent ou non et que, de ce fait, elle ne peut être tenue à une obligation de consulter ou d'accommoder. Cette difficulté ne saurait être niée ou minimisée. Comme je l'ai déclaré (dans mes motifs dissidents) dans *Marshall*, précité, par. 112, on ne peut « analyser utilement la question de la prise en

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.

compte d'un droit ou de la justification de ses limites sans avoir une idée de l'essence de ce droit et de sa portée actuelle ». Cependant, il est souvent possible de se faire, à l'égard des droits revendiqués et de leur solidité, une idée suffisamment précise pour que l'obligation de consulter et d'accommoder s'applique, même si ces droits n'ont pas fait l'objet d'un règlement définitif ou d'une décision judiciaire finale. Pour faciliter cette détermination, les demandeurs devraient exposer clairement leurs revendications, en insistant sur la portée et la nature des droits ancestraux qu'ils revendiquent ainsi que sur les violations qu'ils allèguent. C'est ce qui s'est produit en l'espèce, lorsque le juge en son cabinet a procédé à une évaluation préliminaire, fondée sur la preuve, de la solidité des revendications des Haïda à l'égard des terres et des ressources des îles Haïda Gwaii, en particulier du Bloc 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.

Il y a une différence entre une connaissance suffisante pour entraîner l'application de l'obligation de consulter et, s'il y a lieu, d'accommoder, et le contenu ou l'étendue de cette obligation dans une affaire donnée. La connaissance d'une revendication crédible mais non encore établie suffit à faire naître l'obligation de consulter et d'accommoder. Toutefois, le contenu de l'obligation varie selon les circonstances, comme nous le verrons de façon plus approfondie plus loin. Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes. Il est possible en droit de différencier les revendications reposant sur une preuve ténue des revendications reposant sur une preuve à première vue solide et de celles déjà établies. Les parties peuvent examiner la question et, si elles ne réussissent pas à s'entendre, les tribunaux administratifs et judiciaires peuvent leur venir en aide. Il faut régler les problèmes liés à l'absence de preuve et de définition des revendications en délimitant l'obligation de façon appropriée et non en niant son existence.

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

J'estime que, bien que le respect des obligations de consultation et d'accommodement avant le règlement définitif d'une revendication ne soit pas sans poser de problèmes, de telles mesures ne sont toutefois pas impossibles et constituent même un aspect

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*

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

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

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

essentiel du processus honorable de conciliation imposé par l'art. 35. Elles protègent les intérêts autochtones jusqu'au règlement des revendications et favorisent le développement entre les parties d'une relation propice à la négociation, processus à privilégier pour parvenir finalement à la conciliation : voir S. Lawrence et P. Macklem, « From Consultation to Reconciliation : Aboriginal Rights and the Crown's Duty to Consult » (2000), 79 *R. du B. can.* 252, p. 262. Les mesures précises que doit prendre le gouvernement peuvent varier selon la solidité de la revendication et les circonstances, mais elles doivent à tout le moins être compatibles avec l'honneur de la Couronne.

D. *L'étendue et le contenu de l'obligation de consulter et d'accommoder*

39 Le contenu de l'obligation de consulter et d'accommoder varie selon les circonstances. La nature précise des obligations qui naissent dans différentes situations sera définie à mesure que les tribunaux se prononceront sur cette nouvelle question. En termes généraux, il est néanmoins possible d'affirmer que l'étendue de l'obligation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre.

40 Dans *Delgamuukw*, précité, par. 168, la Cour a examiné l'obligation de consulter et d'accommoder dans le contexte de revendications dont le bien-fondé a été établi. Le juge en chef Lamer a écrit :

> La nature et l'étendue de l'obligation de consultation dépendront des circonstances. Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones.

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

La transposition de ce passage dans le contexte des revendications non encore établies permet d'avancer ce qui suit. Bien qu'il ne soit pas utile de classer les situations dans des compartiments étanches, il est possible d'identifier différentes situations appelant des solutions différentes. Dans tous les cas, le principe de l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation, qui soit appropriée eu égard aux circonstances. Lorsque vient le temps de s'acquitter de cette obligation, les garanties procédurales de justice naturelle exigées par le droit administratif peuvent servir de guide.

À toutes les étapes, les deux parties sont tenues de faire montre de bonne foi. Le fil conducteur du côté de la Couronne doit être « l'intention de tenir compte réellement des préoccupations [des Autochtones] » à mesure qu'elles sont exprimées (*Delgamuukw*, précité, par. 168), dans le cadre d'un véritable processus de consultation. Les manœuvres malhonnêtes sont interdites. Cependant, il n'y a pas obligation de parvenir à une entente mais plutôt de procéder à de véritables consultations. Quant aux demandeurs autochtones, ils ne doivent pas contrecarrer les efforts déployés de bonne foi par la Couronne et ne devraient pas non plus défendre des positions déraisonnables pour empêcher le gouvernement de prendre des décisions ou d'agir dans les cas où, malgré une véritable consultation, on ne parvient pas à s'entendre : voir *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (C.A.C.-B.), p. 44; *Heiltsuk Tribal Council c. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (C.S.C.-B.). Toutefois, le seul fait de négocier de façon serrée ne porte pas atteinte au droit des Autochtones d'être consultés.

Sur cette toile de fond, je vais maintenant examiner le type d'obligations qui peuvent découler de différentes situations. À cet égard, l'utilisation de la notion de continuum peut se révéler utile, non pas pour créer des compartiments juridiques étanches, mais plutôt pour préciser ce que le principe de l'honneur de la Couronne est susceptible d'exiger dans des circonstances particulières. À une extrémité du continuum se trouvent les cas où la revendication

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.

de titre est peu solide, le droit ancestral limité ou le risque d'atteinte faible. Dans ces cas, les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis. La [TRADUCTION] « "consultation", dans son sens le moins technique, s'entend de l'action de se parler dans le but de se comprendre les uns les autres » : T. Isaac et A. Knox, « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49, 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.

44 À l'autre extrémité du continuum on trouve les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé. Dans de tels cas, il peut s'avérer nécessaire de tenir une consultation approfondie en vue de trouver une solution provisoire acceptable. Quoique les exigences précises puissent varier selon les circonstances, la consultation requise à cette étape pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision. Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. Dans les affaires complexes ou difficiles, le gouvernement peut décider de recourir à un mécanisme de règlement des différends comme la médiation ou un régime administratif mettant en scène des décideurs impartiaux.

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

45 Entre les deux extrémités du continuum décrit précédemment, on rencontrera d'autres situations. Il faut procéder au cas par cas. Il faut également faire preuve de souplesse, car le degré de consultation nécessaire peut varier à mesure que se déroule le processus et que de nouveaux renseignements sont mis au jour. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. Tant que la question n'est pas réglée, le principe de l'honneur de la Couronne commande que celle-ci mette en balance les

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 Mäori* (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 Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori 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,

intérêts de la société et ceux des peuples autochtones lorsqu'elle prend des décisions susceptibles d'entraîner des répercussions sur les revendications autochtones. Elle peut être appelée à prendre des décisions en cas de désaccord quant au caractère suffisant des mesures qu'elle adopte en réponse aux préoccupations exprimées par les Autochtones. Une attitude de pondération et de compromis s'impose alors.

À la suite de consultations véritables, la Couronne pourrait être amenée à modifier la mesure envisagée en fonction des renseignements obtenus lors des consultations. Le *Guide for Consultation with Mäori* (1997) du ministère de la Justice de la Nouvelle-Zélande fournit des indications sur la question (aux p. 21 et 31):

> [TRADUCTION] La consultation n'est pas seulement un simple mécanisme d'échange de renseignements. Elle comporte également des mises à l'épreuve et la modification éventuelle des énoncés de politique compte tenu des renseignements obtenus ainsi que la rétroaction. Elle devient donc un processus grâce auquel les deux parties sont mieux informées . . .
>
> . . .
>
> . . . de véritables consultations s'entendent d'un processus qui consiste . . . :
>
> - à recueillir des renseignements pour mettre à l'épreuve les énoncés de politique;
> - à proposer des énoncés qui ne sont pas encore arrêtés définitivement;
> - à chercher à obtenir l'opinion des Mäoris sur ces énoncés;
> - à informer les Mäoris de tous les renseignements pertinents sur lesquels reposent ces énoncés;
> - à écouter avec un esprit ouvert ce que les Mäoris ont à dire sans avoir à en faire la promotion;
> - à être prêt à modifier l'énoncé original;
> - à fournir une rétroaction tant au cours de la consultation qu'après la prise de décision.

S'il ressort des consultations que des modifications à la politique de la Couronne s'imposent, il faut alors passer à l'étape de l'accommodement. Des consultations menées de bonne foi peuvent donc faire naître l'obligation d'accommoder. Lorsque la

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".

revendication repose sur une preuve à première vue solide et que la décision que le gouvernement entend prendre risque de porter atteinte de manière appréciable aux droits visés par la revendication, l'obligation d'accommodement pourrait exiger l'adoption de mesures pour éviter un préjudice irréparable ou pour réduire au minimum les conséquences de l'atteinte jusqu'au règlement définitif de la revendication sous-jacente. L'accommodement est le fruit des consultations, comme la Cour l'a reconnu dans *R. c. Marshall*, [1999] 3 R.C.S. 533, par. 22 : « . . . il est préférable de réaliser la prise en compte du droit issu du traité par des consultations et par la négociation ».

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.

48 Ce processus ne donne pas aux groupes autochtones un droit de veto sur les mesures susceptibles d'être prises à l'égard des terres en cause en attendant que la revendication soit établie de façon définitive. Le « consentement » dont il est question dans *Delgamuukw* n'est nécessaire que lorsque les droits invoqués ont été établis, et même là pas dans tous les cas. Ce qu'il faut au contraire, c'est plutôt un processus de mise en balance des intérêts, de concessions mutuelles.

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.

49 Cette conclusion découle du sens des termes « accommoder » et « accommodement », définis respectivement ainsi : « **Accommoder qqc. à.** L'adapter à, la mettre en correspondance avec quelque chose . . . » et « Action, résultat de l'action d'accommoder (ou de s'accommoder); moyen employé en vue de cette action. [. . .] Action de (se) mettre ou fait d'être en accord avec quelqu'un; règlement à l'amiable, transaction » (*Trésor de la langue française*, t. 1, 1971, p. 391 et 388). L'accommodement susceptible de résulter de consultations menées avant l'établissement du bien-fondé de la revendication correspond exactement à cela : la recherche d'un compromis dans le but d'harmoniser des intérêts opposés et de continuer dans la voie de la réconciliation. L'engagement à suivre le processus n'emporte pas l'obligation de se mettre d'accord, mais exige de chaque partie qu'elle s'efforce de bonne foi à comprendre les préoccupations de l'autre et à y répondre.

The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised

50 La jurisprudence de la Cour confirme cette conception d'accommodement. Dans *Sparrow*, la Cour

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.

a évoqué cette notion, insistant sur la nécessité d'établir un équilibre entre des intérêts sociétaux opposés et les droits ancestraux et issus de traités des Autochtones. Dans *R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1072, la Cour a affirmé qu'il incombe à la Couronne de prouver que son occupation des terres « ne peut s'accommoder de l'exercice raisonnable des droits des Hurons ». Et, dans *R. c. Côté*, [1996] 3 R.C.S. 139, par. 81, la Cour s'est demandé si les restrictions imposées aux droits ancestraux « [étaient] conciliable[s] avec les rapports spéciaux de fiduciaire de l'État à l'égard des premières nations ». La mise en équilibre et le compromis font partie intégrante de la notion de conciliation. Lorsque l'accommodement est nécessaire à l'occasion d'une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et de titre ancestraux non encore prouvées, la Couronne doit établir un équilibre raisonnable entre les préoccupations des Autochtones, d'une part, et l'incidence potentielle de la décision sur le droit ou titre revendiqué et les autres intérêts sociétaux, d'autre part.

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.

Il est loisible aux gouvernements de mettre en place des régimes de réglementation fixant les exigences procédurales applicables aux différents problèmes survenant à différentes étapes, et ainsi de renforcer le processus de conciliation et réduire le recours aux tribunaux. Comme il a été mentionné dans *R. c. Adams*, [1996] 3 R.C.S. 101, par. 54, le gouvernement « ne peut pas se contenter d'établir un régime administratif fondé sur l'exercice d'un pouvoir discrétionnaire non structuré et qui, en l'absence d'indications explicites, risque de porter atteinte aux droits ancestraux dans un nombre considérable de cas ». Il convient de souligner que, depuis octobre 2002, la Colombie-Britannique dispose d'une politique provinciale de consultation des Premières nations établissant les modalités d'application des lignes directrices opérationnelles des ministères et organismes provinciaux. Même si elle ne constitue pas un régime de réglementation, une telle politique peut néanmoins prévenir l'exercice d'un pouvoir discrétionnaire non structuré et servir de guide aux décideurs.

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

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.

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.

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.

E. *Les tiers ont-ils l'obligation de consulter et d'accommoder?*

52 La Cour d'appel a conclu que Weyerhaeuser, l'entreprise forestière détenant la CFF 39, avait l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations. En toute déférence, je ne puis souscrire à cette conclusion.

53 Il a été dit (le juge Lambert de la Cour d'appel) qu'un tiers peut être tenu de consulter les Autochtones concernés du fait qu'il a la faculté, en cas de violation des droits de ces derniers, de plaider en défense que l'atteinte est justifiée. Comme nous l'avons vu, cependant, l'obligation de consulter et d'accommoder découle de la proclamation de la souveraineté de la Couronne sur des terres et ressources autrefois détenues par le groupe autochtone concerné. Cette théorie ne permet pas de conclure que les tiers ont l'obligation de consulter ou d'accommoder. La Couronne demeure seule légalement responsable des conséquences de ses actes et de ses rapports avec des tiers qui ont une incidence sur des intérêts autochtones. Elle peut déléguer certains aspects procéduraux de la consultation à des acteurs industriels qui proposent des activités d'exploitation; cela n'est pas rare en matière d'évaluations environnementales. Ainsi, la CFF 39 obligeait Weyerhaeuser à préciser les mesures qu'elle entendait prendre pour identifier et consulter les [TRADUCTION] « Autochtones qui revendiquaient un intérêt ancestral dans la région » (CFF 39, CFF haïda, paragraphe 2.09g)(ii)). Cependant, la responsabilité juridique en ce qui a trait à la consultation et à l'accommodement incombe en dernier ressort à la Couronne. Le respect du principe de l'honneur de la Couronne ne peut être délégué.

54 Il a également été avancé (le juge Lambert de la Cour d'appel) que les tiers pourraient être assujettis à l'obligation de consulter et d'accommoder par l'effet de la doctrine du droit des fiducies appelée « réception en connaissance de cause ». Cependant, comme nous l'avons vu, même si les obligations de fiduciaire de la Couronne et son obligation de consulter et d'accommoder découlent toutes du principe que l'honneur de la Couronne est en jeu dans ses rapports avec les peuples autochtones, l'obligation de

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

consulter est différente de l'obligation de fiduciaire qui existe à l'égard de certains intérêts autochtones reconnus. Comme il a été indiqué plus tôt, la Cour a souligné, dans *Wewaykum*, qu'il fallait se garder de supposer l'existence d'une obligation générale de fiduciaire régissant tous les aspects des rapports entre la Couronne et les peuples autochtones. En outre, dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, la Cour a clairement dit que la relation « semblable à une fiducie » qui existe entre la Couronne et les peuples autochtones n'est pas une vraie « fiducie », faisant observer que « [l]e droit des fiducies constitue un domaine juridique très perfectionné et spécialisé » (p. 386). Il n'y a aucune raison d'introduire la doctrine de la réception en connaissance de cause dans la relation spéciale qui existe entre la Couronne et les peuples autochtones. Il n'est pas certain non plus qu'une entreprise en vertu d'une concession de la Couronne puisse être assimilée à une personne qui, en toute connaissance de cause, divertit à son profit des fonds en fiducie.

Enfin, il a été affirmé (le juge Finch, juge en chef de la C.-B.) que, pour qu'il soit possible d'accorder une réparation efficace, il faudrait considérer que les tiers sont tenus à l'obligation. La première difficulté que comporte cette affirmation réside dans le fait que la réparation ne détermine pas la responsabilité. Ce n'est qu'une fois la question de la responsabilité tranchée que se soulève la question de la réparation. Il ne faut pas mettre la charrue (la réparation) devant les bœufs (la responsabilité). Nous ne pouvons poursuivre une personne riche simplement parce qu'elle a de l'argent plein les poches ou que cela permet d'obtenir le résultat souhaité. La seconde difficulté est qu'il n'est pas certain que le gouvernement ne dispose pas de mécanismes suffisants pour procéder à des mesures de consultation et d'accommodement utiles. En l'espèce, la partie 10 de la CFF 39 prévoit que le ministre des Forêts peut modifier toute concession accordée à Weyerhaeuser pour la rendre conforme aux décisions des tribunaux relativement aux droits ou titres ancestraux. Le gouvernement peut également exiger de Weyerhaeuser qu'elle modifie son plan d'aménagement si le chef des services forestiers le considère inadéquat du fait qu'il porte atteinte à un droit ancestral (paragraphe 2.38d)). Enfin, le

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".

gouvernement peut exercer son autorité sur la question par voie législative, comme il l'a fait en édictant la *Forestry Revitalization Act*, S.B.C. 2003, ch. 17, qui permet de récupérer 20 pour 100 du droit de coupe des titulaires de concession, en partie pour mettre des terres à la disposition des peuples autochtones. De par son pouvoir de légiférer sur les ressources naturelles de la province, le gouvernement provincial dispose d'un outil puissant pour s'acquitter de ses obligations légales, situation qui met en doute l'affirmation du juge en chef Finch de la C.-B. qu'il [TRADUCTION] « ne peut allouer une partie de ce bois d'œuvre aux Haïda sans le consentement ou la collaboration de Weyerhaeuser » ((2002), 5 B.C.L.R. (4th) 33, par. 119). Le fait de ne pas imposer à Weyerhaeuser l'obligation de consulter et d'accommoder ne rend pas la réparation [TRADUCTION] « futile ou illusoire ».

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.

56 Le fait que les tiers n'aient aucune obligation de consulter les peuples autochtones ou de trouver des accommodements à leurs préoccupations ne signifie pas qu'ils ne peuvent jamais être tenus responsables envers ceux-ci. S'ils font preuve de négligence dans des circonstances où ils ont une obligation de diligence envers les peuples autochtones, ou s'ils ne respectent pas les contrats conclus avec les Autochtones ou traitent avec eux d'une manière malhonnête, ils peuvent être tenus légalement responsables. Cependant, les tiers ne peuvent être jugés responsables de ne pas avoir rempli l'obligation de consulter et d'accommoder qui incombe à la Couronne.

F. *The Province's Duty*

F. *L'obligation de la province*

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

57 La province de la Colombie-Britannique soutient que l'obligation de consulter ou d'accommoder, si elle existe, incombe uniquement au gouvernement fédéral. Je ne peux accepter cet argument.

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

58 L'argument de la province repose sur l'art. 109 de la *Loi constitutionnelle de 1867*, qui dispose que « [t]outes les terres, mines, minéraux et réserves royales appartenant aux différentes provinces du Canada [. . .] lors de l'union [. . .] appartiendront aux différentes provinces. » Selon la province, cette disposition lui confère des droits exclusifs sur les terres en question. Ce droit, affirme-t-elle, ne peut être limité par la protection accordée aux

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

droits ancestraux par l'art. 35 de la *Loi constitutionnelle de 1982*. La province affirme qu'agir ainsi reviendrait à [TRADUCTION] « rompre l'équilibre du fédéralisme » (mémoire de la Couronne, par. 96).

La réponse à cet argument est que les intérêts que détenait la province sur les terres sont subordonnés à « tous intérêts autres que ceux que peut y avoir la province » (art. 109). L'obligation de consulter et d'accommoder en litige dans la présente affaire est fondée sur l'affirmation de la souveraineté de la Couronne qui a précédé l'Union. Il s'ensuit que la province a acquis les terres sous réserve de cette obligation. Elle ne peut donc pas prétendre que l'art. 35 la prive de pouvoirs dont elle aurait joui autrement. Comme il est précisé dans *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 App. Cas. 46 (C.P.), les terres situées dans la province [TRADUCTION] « peuvent constituer une source de revenus [pour la province] dans tous les cas où les biens de la Couronne ne sont plus grevés du titre indien » (p. 59). L'argument de la Couronne sur ce point a été examiné de façon approfondie par la Cour dans *Delgamuukw*, précité, par. 175, où le juge en chef Lamer a réitéré les conclusions tirées dans *St. Catherine's Milling*, précité. Cet argument n'est en conséquence pas fondé.

G. *L'examen administratif*

Lorsque la conduite du gouvernement est contestée au motif qu'il ne se serait pas acquitté de son obligation de consulter et d'accommoder en attendant le règlement des revendications, la question peut être soumise aux tribunaux pour examen. La province n'a pas encore établi de mécanisme à cette fin. En l'absence d'un tel mécanisme, il est impossible de déterminer quelle norme de contrôle devrait appliquer le tribunal appelé à statuer sur le caractère suffisant des efforts déployés par le gouvernement. Les principes généraux du droit administratif permettent toutefois de dégager les notions suivantes.

Quant aux questions de droit, le décideur doit, en règle générale, rendre une décision correcte : voir, par exemple, *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S.

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.

585, 2003 CSC 55. Par contre, en ce qui a trait aux questions de fait et aux questions mixtes de fait et de droit, l'organisme de révision peut devoir faire preuve de déférence à l'égard du décideur. L'existence et l'étendue de l'obligation de consulter ou d'accommoder sont des questions de droit en ce sens qu'elles définissent une obligation légale. Cependant, la réponse à ces questions repose habituellement sur l'appréciation des faits. Il se peut donc qu'il convienne de faire preuve de déférence à l'égard des conclusions de fait du premier décideur. La question de savoir s'il y a lieu de faire montre de déférence et, si oui, le degré de déférence requis dépendent de la nature de la question dont était saisi le tribunal administratif et de la mesure dans laquelle les faits relevaient de son expertise : *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Paul*, précité. En l'absence d'erreur sur des questions de droit, il est possible que le tribunal administratif soit mieux placé que le tribunal de révision pour étudier la question, auquel cas une certaine déférence peut s'imposer. Dans ce cas, la norme de contrôle applicable est vraisemblablement la norme de la décision raisonnable. Dans la mesure où la question est une question de droit pur et peut être isolée des questions de fait, la norme applicable est celle de la décision correcte. Toutefois, lorsque les deux types de questions sont inextricablement liées entre elles, la norme de contrôle applicable est vraisemblablement celle de la décision raisonnable : *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

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

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Le processus lui-même devrait vraisemblablement être examiné selon la norme de la décision raisonnable. La perfection n'est pas requise; il s'agit de se demander si, « considéré dans son ensemble, le régime de réglementation [ou la mesure gouvernementale] respecte le droit ancestral collectif en question » : *Gladstone*, précité, par. 170. Ce qui est requis, ce n'est pas une mesure parfaite mais une mesure raisonnable. Comme il est précisé dans *Nikal*, précité, par. 110, « [l]e concept du caractère raisonnable doit [. . .] entrer en jeu pour ce qui [. . .] concern[e] l'information et la consultation. [. . .] Dans la mesure où tous les efforts raisonnables ont

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).

été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier. » Le gouvernement doit déployer des efforts raisonnables pour informer et consulter. Cela suffit pour satisfaire à l'obligation.

Si le gouvernement n'a pas bien saisi l'importance de la revendication ou la gravité de l'atteinte, il s'agit d'une question de droit qui devra vraisemblablement être jugée selon la norme de la décision correcte. Si le gouvernement a raison sur ces points et agit conformément à la norme applicable, la décision ne sera annulée que si le processus qu'il a suivi était déraisonnable. Comme il a été expliqué précédemment, l'élément central n'est pas le résultat, mais le processus de consultation et d'accommodement.

H. *L'application aux faits*

(1) L'existence de l'obligation

Il s'agit de savoir si la province connaissait, concrètement ou par imputation, l'existence potentielle d'un droit ou titre ancestral et envisageait des mesures susceptibles d'avoir un effet préjudiciable sur ce droit ou titre. Compte tenu de la preuve présentée à la Cour en l'espèce, il ne fait aucun doute qu'il faut répondre « oui » à cette question.

Les Haïda revendiquent depuis au moins 100 ans le titre sur l'ensemble des îles Haida Gwaii. Le juge de première instance a conclu que les Haïda se plaignaient depuis plusieurs années auprès de la province du rythme d'exploitation des vieilles forêts, des méthodes d'exploitation et des répercussions de l'exploitation forestière sur l'environnement. De plus, la province savait, depuis au moins 1994, que les Haïda s'opposaient à ce qu'on remplace la CFF 39 sans leur consentement et sans que leurs revendications aient fait l'objet de mesures d'accommodement. Comme l'a constaté le juge en son cabinet, la province disposait, [TRADUCTION] « [d]epuis 1994, et peut-être bien avant », d'éléments de preuve établissant que les Haïda utilisaient et occupaient à titre exclusif certaines régions du Bloc 6. Depuis au moins 1846 (affirmation de la souveraineté britannique), elle possède des preuves témoignant de l'importance du cèdre rouge dans la culture haïda.

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.

66 La province se dit inquiète de l'ampleur des revendications des Haïda, faisant observer que, [TRADUCTION] « [d]ans une action distincte, les Haïda revendiquent un titre ancestral sur l'ensemble des îles de la Reine-Charlotte, sur les eaux les entourant et sur l'espace aérien. [. . .] La revendication des Haïda vise le droit à l'utilisation, à l'occupation et au bénéfice exclusifs des terres, des eaux intérieures, du fond marin, des eaux pélagiques et de l'espace aérien » (mémoire de la Couronne, par. 35). Cependant, se demander si l'obligation de consulter et d'accommoder s'applique avant que la preuve de l'existence d'un droit n'ait été apportée n'équivaut pas à préjuger de l'affaire sur le fond. D'ailleurs, il convient de souligner que, avant que le juge en son cabinet ait rendu sa décision en l'espèce, la province avait obtenu que la question de l'existence du titre et des droits des Haïda et de l'atteinte portée à ceux-ci soit examinée séparément des questions se rapportant à l'obligation de consulter et d'accommoder. Les questions ont été clairement séparées dans l'instance, à l'instigation de la province.

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.

67 Le juge en son cabinet a estimé que la province savait que les droits et titre ancestraux potentiels en question visaient le Bloc 6 et qu'ils pouvaient être touchés par la décision de remplacer la CFF 39. Pour ce motif, l'honneur de la Couronne commandait que celle-ci procède à une consultation avant de prendre une décision susceptible d'avoir un effet préjudiciable sur les droits et titre ancestraux revendiqués.

(2) Scope of the Duty

(2) L'étendue de l'obligation

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.

68 Comme il a été expliqué plus tôt, l'ampleur de la consultation requise dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre, ainsi que de la gravité de l'effet préjudiciable potentiel sur le droit ou titre revendiqué.

(i) *Strength of the Case*

(i) *Solidité de la preuve*

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

69 Après avoir examiné une preuve qu'il a qualifiée d'[TRADUCTION] « abondante », le juge en son cabinet a, au par. 25 de sa décision, tiré un certain nombre de conclusions [TRADUCTION] « incontournables » relativement aux revendications des Haïda. Il a conclu que les Haïda habitaient les îles Haïda Gwaii depuis au moins 1774, qu'ils n'avaient jamais

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.

été conquis, qu'ils n'avaient jamais cédé leurs droits dans un traité et qu'aucune loi fédérale n'avait éteint leurs droits. Depuis au moins 1846, l'utilisation du cèdre rouge provenant des vieilles forêts des régions côtières et intérieures de la zone maintenant connue comme étant le Bloc 6 de la CFF 39 fait partie de leur culture.

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.

Le juge en son cabinet a rigoureusement évalué la preuve et établi une distinction entre les différentes revendications des Haïda visant le Bloc 6. Au terme d'un examen approfondi de la preuve, il a tiré les conclusions suivantes au par. 47 :

> (1) il existe une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à établir l'existence d'un titre sur [TRADUCTION] « au moins quelques parties » des régions côtières et intérieures des îles Haïda Gwaii, notamment les régions côtières du Bloc 6; il semble exister une [TRADUCTION] « possibilité raisonnable » que ces régions comprennent les régions intérieures du Bloc 6;
>
> (2) il existe une [TRADUCTION] « forte probabilité » que les Haïda réussissent à établir l'existence d'un droit ancestral de récolter le cèdre rouge provenant des vieilles forêts des régions côtières et intérieures du Bloc 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).

Le juge en son cabinet a reconnu qu'un règlement définitif nécessiterait beaucoup plus d'éléments de preuve, mais, selon lui, [TRADUCTION] « il est juste de dire que la revendication des Haïda est beaucoup plus qu'une simple "affirmation" de titre ancestral » (par. 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.

La Cour d'appel s'est fondée sur les constatations du juge en son cabinet pour conclure que les revendications par les Haïda du titre et de droits ancestraux étaient [TRADUCTION] « étayées par une preuve à première vue valable » (par. 49). La solidité de la preuve influe sur l'étendue de l'obligation que doit satisfaire la province. En l'espèce, le dossier permet clairement de conclure, en attendant le règlement définitif, qu'il existe une preuve *prima facie* de l'existence d'un titre ancestral et une solide preuve *prima facie* de l'existence d'un droit ancestral de récolter le cèdre rouge.

(ii) *Seriousness of the Potential Impact*

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.

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.

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.

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

(ii) *Gravité des conséquences potentielles*

72 La preuve présentée au juge en son cabinet indiquait que l'utilisation du cèdre rouge fait depuis longtemps partie intégrante de la culture haïda. Le juge a considéré qu'il existait une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à démontrer une atteinte à un droit ancestral de récolter le cèdre rouge [TRADUCTION] « en prouvant que le cèdre des vieilles forêts a été et continuera d'être exploité dans le Bloc 6, et que cette ressource est limitée » (par. 48). La perspective de l'exploitation continue d'une ressource par ailleurs limitée laisse entrevoir les répercussions que la décision de remplacer la CFF 39 pourrait avoir sur un droit ancestral.

73 Les CFF ont un caractère exclusif et sont accordées pour de longues périodes. La CFF 39 confère à Weyerhaeuser le droit exclusif de récolter le bois dans une région qui représente près du quart de la superficie totale des îles Haïda Gwaii. Le juge en son cabinet a fait observer qu'[TRADUCTION] « il [est] manifeste que de vastes étendues du Bloc 6 ont été coupées à blanc » (par. 59). Ce fait illustre les conséquences potentielles que la décision de remplacer la CFF 39 a sur les droits ancestraux.

74 Il faut reconnaître à la province d'avoir imposé à Weyerhaeuser, dans la CFF 39, des conditions à l'égard des peuples autochtones. Mais la province devait faire davantage. Lorsque le gouvernement sait qu'un droit ou un titre ancestral est revendiqué, il doit consulter les Autochtones sur la façon dont les terres visées devraient être exploitées.

75 Il faut maintenant se demander à quel moment prend naissance l'obligation de consulter. Est-ce à l'étape de l'octroi d'une CFF, ou seulement à l'étape de la délivrance des permis de coupe? Le remplacement d'une CFF n'autorise pas en soi la récolte de bois, qui ne peut se faire qu'en vertu des permis de coupe. Les CFF sont périodiquement remplacées, et la décision de remplacer une CFF en particulier n'a pas nécessairement pour effet de détruire l'essence même du droit revendiqué. La province fait valoir que, bien qu'elle ne les ait pas consultés avant de remplacer la CFF, elle [TRADUCTION]

prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

« a consulté et continue de consulter les Haïda avant d'autoriser les permis de coupe ou autres plans d'aménagement » (mémoire de la Couronne, par. 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.

J'estime que, lorsqu'elle prend des décisions concernant les CFF, la province est tenue à une obligation de consultation, et peut-être à une obligation d'accommodement. La décision rendue à l'égard d'une CFF reflète la planification stratégique touchant l'utilisation de la ressource en cause. Les décisions prises durant la planification stratégique risquent d'avoir des conséquences graves sur un droit ou titre ancestral. Tous les cinq ans, le titulaire de la CFF 39 doit présenter au chef des services forestiers un plan d'aménagement comprenant l'inventaire des ressources du secteur visé par la concession, une analyse des approvisionnements en bois d'œuvre et un « plan de 20 ans » présentant une séquence hypothétique de blocs de coupe. C'est à partir de l'inventaire et de l'analyse des approvisionnements en bois d'œuvre qu'est fixée la possibilité annuelle de coupe (« PAC ») pour la concession. Ainsi, le titulaire de la concession établit les renseignements techniques servant à calculer la PAC. La tenue de consultations au niveau de l'exploitation a donc peu d'incidence sur le volume fixé dans la PAC, qui, à son tour, détermine les modalités du permis de coupe. Pour que les consultations soient utiles, elles doivent avoir lieu à l'étape de l'octroi ou du renouvellement de la CFF.

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.

Il s'agit enfin de décider si la Couronne avait l'obligation non seulement de consulter les Haïda au sujet des décisions relatives aux CFF mais aussi de trouver des accommodements à leurs préoccupations. Les faits de l'espèce ne permettent pas de dire si la consultation aurait entraîné la nécessité de telles mesures. Cependant, la solidité de la preuve étayant l'existence et d'un titre haïda et d'un droit haïda autorisant la récolte du cèdre rouge, conjuguée aux répercussions sérieuses sur ces intérêts des décisions stratégiques successives, indique que l'honneur de la Couronne pourrait bien commander des mesures d'accommodement substantielles pour protéger les intérêts des Haïda en attendant que leurs revendications soient réglées.

(3) Did the Crown Fulfill its Duty?

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.

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

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.

(3) La Couronne s'est-elle acquittée de son obligation?

78 La province n'a pas consulté les Haïda au sujet du remplacement de la CFF 39. Le juge en son cabinet a tiré la conclusion suivante (par. 42) :

> [TRADUCTION] [S]elon la preuve présentée, il est manifeste que le ministre a refusé de consulter les Haïda au sujet du remplacement de la CFF 39 en 1995 et en l'an 2000, au motif que la loi ne l'obligeait pas à le faire et qu'une telle consultation ne pouvait avoir d'incidence sur son obligation, prévue par la loi, de remplacer la CFF 39.

La province a attiré l'attention de la Cour et des tribunaux d'instance inférieure sur les nombreuses mesures et politiques qu'elle a adoptées pour tenir compte des intérêts autochtones. Devant la Cour, elle a affirmé que [TRADUCTION] « [l]es Haïda ont été et sont consultés au sujet des plans d'aménagement forestier et des permis de coupe. [. . .] À la suite de consultations antérieures auprès des Haïda, la province a pris plusieurs mesures pour atténuer les effets de l'exploitation forestière [. . .] » (mémoire de la Couronne, par. 75). Cependant, ces mesures et politiques n'équivalent pas à une consultation au sujet de la décision de remplacer la CFF 39 et de l'établissement de ses modalités, et ne peuvent la remplacer.

79 Par conséquent, la province ne s'est pas acquittée de son obligation de procéder à davantage qu'une simple consultation. Elle n'a procédé à absolument aucune consultation utile.

III. Conclusion

80 Le pourvoi de la Couronne est rejeté et celui de Weyerhaeuser est accueilli. L'ordonnance de la Cour d'appel de la Colombie-Britannique est modifiée de manière que l'obligation de consultation de la Couronne ne s'étende pas à Weyerhaeuser. La Couronne a accepté de payer les dépens des intimés pour la demande d'autorisation de pourvoi et pour le pourvoi. Weyerhaeuser est dispensée de toute obligation de payer les dépens des Haïda devant les instances inférieures. Il n'est pas nécessaire de répondre à la question constitutionnelle dans le présent pourvoi.

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

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

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

Solicitors for the respondents: EAGLE, Surrey.

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

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Department of Justice, Edmonton.

Solicitors for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

Pourvoi de la Couronne rejeté. Pourvoi de Weyerhaeuser Co. accueilli.

Procureurs de l'appelant le ministre des Forêts : Fuller Pearlman & McNeil, Victoria.

Procureur de l'appelant le procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'appelante Weyerhaeuser Company Limited : Hunter Voith, Vancouver.

Procureurs des intimés : EAGLE, Surrey.

Procureur de l'intervenant le procureur général du Canada : Ministère de la Justice, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse : Ministère de la Justice, Halifax.

Procureur de l'intervenant le procureur général de la Saskatchewan : Sous-procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Ministère de la Justice, Edmonton.

Procureurs des intervenantes la Bande indienne de Squamish et la Bande indienne des Lax-kw'alaams : Ratcliff & Company, North Vancouver.

Procureurs de l'intervenante la Nation haisla : Donovan & Company, Vancouver.

Procureurs de l'intervenant le Sommet des Premières nations : Braker & Company, West Vancouver.

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors 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: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

Procureurs de l'intervenante la Première nation Dene Tha' : Cook Roberts, Victoria.

Procureurs de l'intervenant Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan : Cook Roberts, Victoria.

Procureurs des intervenants 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 et Mining Association of British Columbia : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante British Columbia Cattlemen's Association : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenant le village de Port Clements : Rush Crane Guenther & Adams, Vancouver.

TAB 5

Citation: Halfway River First Nation v. B.C. Date: 19990812
1999 BCCA 470 Docket: CA023526, CA023539
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CHIEF BERNIE METECHEAH, on his own behalf and on behalf of all other members of the HALFWAY RIVER FIRST NATION, and the HALFWAY RIVER FIRST NATION

PETITIONERS
(RESPONDENTS)

AND:

DAVID LAWSON, DISTRICT MANAGER, FORT ST. JOHN FOREST DISTRICT and THE MINISTRY OF FORESTS

RESPONDENTS
(APPELLANTS)

AND:

CANADIAN FOREST PRODUCTS LTD.

RESPONDENTS
(APPELLANTS)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Finch
The Honourable Madam Justice Huddart

M. W. W. Frey and H. M. Groberman, Q.C.	Counsel for the Appellant, District Manager and Ministry of Forests
S. B. Armstrong and J. M. Marks	Counsel for the Appellant, Canadian Forest Products Ltd.
C. Allan Donovan	Counsel for the Respondents, Chief Bernie Metecheah and Halfway River First Nation
Place and Date of Hearing	Vancouver, British Columbia 19, 20, 21 and 22 January, 1999
Place and Date of Judgment	Vancouver, British Columbia 12 August, 1999

Written Reasons by: (with Index)

The Honourable Mr. Justice Finch

Concurred in by:

The Honourable Madam Justice Huddart (P. 80, para. 170)

Dissenting Reasons by:

The Honourable Madam Justice Southin (P. 93, para. 194)

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Reasons for Judgment of the Honourable Mr. Justice Finch:

I

Introduction

[1] The Ministry of Forests ("the Ministry"), its District Manager at Fort St. John, David Lawson, ("the District Manager") and Canadian Forest Products Limited ("Canfor") appeal the order of the Supreme Court of British Columbia pronounced 24 June, 1997, which quashed the decision of the District Manager on 13 September, 1996, approving Canfor's application for Cutting Permit 212. Canfor holds the timber harvesting licence for the wilderness area in which C.P.212 would permit logging. It is Crown land, adjacent to the reserve land granted to the Halfway River First Nation. The Halfway Nation are descendants of the Beaver People who were signatories to Treaty 8 in 1900.

[2] The part of Treaty 8 that preserved the signatories right to hunt says:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and **saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes**.
>
> (my emphasis)

[3] The petitioners claimed under the Treaty the traditional right to hunt on the Crown land adjacent to their reserve, which they refer to as the "Tusdzuh" area, including the areas covered by C.P.212. In addition, they have an outstanding Treaty Land Entitlement Claim (T.L.E.C.) against the federal Crown, and they say lands recoverable in that claim may be located in the Tusdzuh.

[4] Among many other arguments advanced the petitioners said that issuance of the permit, and the logging it will allow, infringes their hunting rights under the Treaty, and that such infringement cannot be justified by the Crown. The petitioners also claimed that C.P.212 was granted by the District Manager in breach of his administrative law duty of fairness, in that he fettered his discretion by applying government policy, prejudged Canfor's right to have the permit issued, failed to give adequate notice of his intention to decide the question, and failed to provide an adequate opportunity for them to be heard. The petitioners also said the District Manager reached a patently unreasonable decision in deciding factual issues on an incomplete evidentiary base.

[5] The learned chambers judge accepted all these submissions and held therefore that C.P.212 should be quashed. Other

submissions were rejected.

[6] On this appeal, the appellants say the learned chambers judge erred on all counts. They say that, properly construed, the plaintiffs' right under Treaty 8 to hunt is subject to the Crown's right to "require", or "take up" lands from time to time for, among other purposes, "lumbering"; and that the issuance of C.P.212 therefore did not breach or infringe the petitioners' treaty rights to hunt. Alternatively, the petitioners say that if the treaty right to hunt was breached, that breach was justified within the test laid down in ***R. v. Sparrow***,[1990] 1 S.C.R. 1075, 3 C.N.L.R. 160, 4 W.W.R. 410.

[7] As to the administrative law issues, the appellants say the learned chambers judge erred in finding that the District Manager had fettered his discretion, that his decision gave rise to a reasonable apprehension of bias, and that he failed to give adequate notice or opportunity to be heard. They also say the learned chambers judge erred in holding the District Manager's decision to be patently unreasonable.

[8] For the reasons that follow, I have concluded that the only lack of procedural fairness in the decision-making process of the District Manager was the failure to provide to the petitioners an opportunity to be heard. In my respectful view,

the learned chambers judge erred in holding that there was a lack of procedural fairness on the other three grounds that were raised. I have also concluded that the issuance of the cutting permit infringed the petitioners' treaty right to hunt, that the Crown has failed to show that infringement was justified, and that the learned chambers judge did not err in quashing the District Manager's approval of Canfor's permit application.

II

Background

[9] Treaty 8 is one of 11 numbered treaties made between the federal government and various Indian bands between 1871 and 1923. B.C. joined confederation in 1871, but the provincial government was not represented in these treaty negotiations. Treaty 8 was negotiated in 1899, and was adhered to in that year by a number of bands who lived in what are now Alberta, Saskatchewan and the Northwest Territories. The first adherents, a band of Cree Indians, signed the treaty at Lesser Slave Lake in June, 1899. The Hudson Hope Beaver people, from whom the petitioners are descended, adhered to the treaty at Fort St. John in 1900. At that time there were 46 Beaver people living in the vicinity of Fort St. John. The Hudson Hope people are now spread between the Halfway River Nation and the West Moberley Band.

[10] On this appeal, counsel for the Ministry of Forests told the Court that the British Columbia government acknowledged that it was bound by the provisions of Treaty 8 concerning the petitioners' rights to hunt and fish, but made no similar concession in respect of the petitioners' right to lands under the treaty.

[11] The full provisions of the treaty are set out in the reasons of my colleague, Madam Justice Southin. The Indians could neither read nor write English, and the terms of the treaty were interpreted to them orally. There is a question in this case as to what extrinsic evidence, if any, is admissible in interpreting the treaty. The commissioners who acted on behalf of the federal government made a report concerning their discussions and negotiations with the original adherents to the treaty in 1899. There is no similar record of what was said to the Beaver people of Fort St. John in 1900. The appellant Minister says the extrinsic evidence of what occurred in 1899, and which was admitted and considered in ***R. v. Badger***, [1996] 1 S.C.R. 771, is not admissible for the purposes of construing the treaty adhered to by the petitioners' ancestors in 1900.

[12] In 1900 title to Crown land was vested in the provincial Crown by virtue of the terms of union between British Columbia

and Canada in 1871. Treaty 8 provides for reserve lands to be set aside for the Indians, to the extent of one square mile for each family of five, or 160 acres per individual. The "selection" of such reserves was to be made in the manner provided for in the treaty.

[13] On 15 May, 1907 the provincial government transferred administration and control of lands in the Peace River block to the federal government by Executive Order-in-Council. The transfer covered about 3.5 million acres of land, selected as agreed in 1884. By virtue of s.91(24) of the ***Constitution Act, 1867***, the federal government already had all jurisdiction to deal with "Indians and land reserved for Indians".

[14] The reserve lands of the Halfway River Nation were not finally surveyed and located until 1914. The reserve is located on the north bank of the Halfway River, about 100 miles west of the city of Fort St. John. The reserve comprises about 9,880 acres.

[15] The lands to the south and west of the Halfway River reserve were, in 1900 and 1914, unsettled and undeveloped wilderness. The Halfway River Nation referred to this area as the Tusdzuh. 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 Tusdzuh are vast areas in which, until fairly recent times, there has been limited industrial use or development. There has been some mining since the early 1900s and, more recently, some oil and gas exploration. A network of seismic lines was cut for that purpose. The evidence does not disclose when the first timber harvesting licence was granted. Canfor obtained one part of its current timber harvesting licence in 1983, and a second part in 1989. These licences were amalgamated into Forest Licence No. A181154.

[22] In 1991, Canfor first identified the areas covered by C.P.212 in its five year Forest Development Plan for 1991-96. Chief Metecheah wrote to the Minister of Forests on 20 January, 1992 requesting a meeting to discuss the development of lands

in the 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 Metecheah 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 Metecheah dated August 29, 1996 Lawson states:
>
> > "I must inform you that if the application is in order and abides by all ministry regulations and the ***Forest Practices Code*** I

> have no compelling reasons not to approve their application."

This statement strongly suggests that Lawson had already concluded that there was no infringement of Treaty or Aboriginal Rights. His only remaining concerns about the application were with respect to compliance with MOF and ***Code*** requirements. He requests information on Aboriginal and Treaty Rights with respect to future Canfor activities but makes no reference to such rights vis-a-vis CP212. The only conclusion to be drawn from this letter is that Lawson had already decided that there was no infringement of Halfway's rights.

[49] As well, it should be noted that at paragraph 18 of the affidavit of David Menzies, he states:

> Approval to proceed with harvesting in Blocks 1, 2, 4, 5, 17 and 19 was granted by the District Manager on September 13, 1996 (attached as Exhibit 8). The formal application letter was only sent after the Ministry of Forests confirmed that the application would be granted, consistent with the approval already granted for the Development Plan.
>
> [emphasis added]

This evidence indicates that once the Development Plan was approved, all applications for cutting permits within it will likely be approved as well and is evidence which supports a finding of a reasonable apprehension of bias.

[42] She held that the petitioners had not waived their right to rely on the allegation of apprehended bias.

C. The District Manager's "Errors of Fact"

[43] The learned chambers judge held that it was patently

unreasonable for the District Manager to conclude that there was no infringement of the petitioner's hunting rights under Treaty 8. In reaching this conclusion, she said in part at paras. 63, 66 and 68:

> [63] In the present case, it cannot be said that there was no evidence supporting Lawson's finding that Aboriginal and Treaty Rights would not be infringed. Lawson had the CHOA report and information provided by BCE staff regarding the impact of harvesting on the traditional activities of hunting, trapping and fishing.
>
> . . .
>
> [66] Given the limited evidence available to Lawson, the factual conclusions which he reached as to infringement of Treaty 8 or Aboriginal Rights is unreasonable. There was some evidence supporting his findings, however, Lawson had no information from Halfway. How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question? This problem was recognized in the CHOA report, which stated, at 33-34:
>
> > In summary, the Cultural Heritage (Ethnographic) Overview presented here provides a useful starting point for assessing the extent of the Halfway River First Nation's use of the Tusdzah 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 Tusdzah study area are required before this issue can be adequately addressed.
> >
> > . . .

> However, as discussed above, there are numerous shortcomings with a study of this nature, from both a cultural and ecological perspective. In fact, I suggest that until more detailed information is obtained in both these areas, studies such as this will fail to adequately address the concerns and management needs of forest managers and First Nations.
>
> . . .
>
> [68] Given the importance attached to Treaty and Aboriginal Rights, in the absence of significant information and in the face of assertions by Halfway as to their uses of CP212, it was patently unreasonable for Lawson to conclude that there was no infringement.

D. Notice

[44] The learned chambers judge held that the highest standard of fairness should apply in the circumstances of this case, and although the petitioners had some notice of Canfor's application for C.P.212, that notice was inadequate because the petitioners did not see Canfor's application in final form until after the Cutting Permit had been approved by the District Manager, and the petitioners had no specific notice that the District Manager would make his decision on 13 September, 1996 or on any other date. The history of the notice given to the petitioners is set out in para.73 of her reasons.

E. Infringement of Treaty 8 Right to Hunt

[45] The learned chambers judge held that there was a *prima facie* infringement of the petitioners Treaty 8 right to hunt, as recognized and affirmed by s.35(1) of the ***Constitution Act, 1982*** which provides:

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

[46] She held that infringement was to be determined in accordance with the test laid down in ***R. v. Sparrow***, *supra*. She said in part at paras.91-93:

> [91] Pursuant to Treaty 8 the Beaver First Nation (of which Halfway is a member) agreed to surrender "all their rights, titles and privileges whatsoever" to the Tusdzuh area. Treaty 8 appears to have extinguished any non-Treaty Aboriginal Rights Halfway may have had prior to entering into the Treaty.
>
> > See for example ***Ontario (Attorney General) v. Bear Island Foundation***, [1991] 2 S.C.R. 570 at 575; 83 D.L.R. (4th) 381.
>
> [92] In return for the surrender of land, the government agreed that the Natives would have the "right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered." In ***R. v. Noel***, [1995] 4 C.N.L.R. 78 at 88 (N.W.T. Terr. Ct.), Halifax J. stated:
>
> > There is no doubt that Treaty No. 8 provided a right to fish, hunt and trap to persons covered under that Treaty.
>
> [93] According to the Treaty, these rights were subject to "such regulations as may from time to time

> be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[47] She held, citing ***R. v. Badger***, *supra* (at para.101):

> ... that any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights.

[48] She considered the availability to Canfor of other areas in which to log at para.108:

> [108] While the onus is on the petitioners to establish infringement, it is worth noting that there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of CP212 to avoid interfering with aboriginal rights.

She said at para.114:

> [114] The MOF and Canfor argue that Halfway has the rest of the Tusdzuh 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 Tusdzuh 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 Tusdzuh 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 prejudgment 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 <u>any interference</u> with the petitioners' right

to hunt was a breach of Treaty 8, and say further that she erred in basing her decision on the petitioners' "holistic perspective" and in holding that they had the right to exercise their "preferred means" of hunting in an "unspoiled wilderness". The Minister says such conclusions are embarrassing as they do not reflect the historical realities of what had occurred in the Tusdzuh (mining and oil and gas exploration) before the granting of C.P.212.

[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. <u>What Extrinsic Evidence is Admissible</u>

[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 Tusdzuh 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 contra-distinction 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 <u>any</u> 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"

TAB 6

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

Counsel for Petitioners	E.P. Murphy and A. McCue
Counsel for Respondent, Minister of Sustainable Resource Management and Land and Water British Columbia Inc.	K.E. Gillese and E.K. Christie
Counsel for Respondent, Omega Salmon Group Ltd.	C.F. Willms and K.G. O'Callaghan
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 Tinglit, that the Tinglits 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 Tinglit's aboriginal way of life and their ability to sustain it. The Tinglit'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 ***Gitxsan 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 diminuation 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

TAB 7

Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation *Appellants*

v.

Minister of Forests, Lands and Natural Resource Operations and Glacier Resorts Ltd. *Respondents*

and

Attorney General of Canada, Attorney General of Saskatchewan, Canadian Muslim Lawyers Association, South Asian Legal Clinic of Ontario, Kootenay Presbytery (United Church of Canada), Evangelical Fellowship of Canada, Christian Legal Fellowship, Alberta Muslim Public Affairs Council, Amnesty International Canada, Te'mexw Treaty Association, Central Coast Indigenous Resource Alliance, Shibogama First Nations Council, Canadian Chamber of Commerce, British Columbia Civil Liberties Association, Council of the Passamaquoddy Nation at Schoodic, Katzie First Nation, West Moberly First Nations and Prophet River First Nation *Interveners*

Ktunaxa Nation Council et Kathryn Teneese, en leur propre nom et au nom de tous les citoyens de la Ktunaxa Nation *Appelants*

c.

Minister of Forests, Lands and Natural Resource Operations et Glacier Resorts Ltd. *Intimés*

et

Procureur général du Canada, procureur général de la Saskatchewan, Association canadienne des avocats musulmans, South Asian Legal Clinic of Ontario, Kootenay Presbytery (United Church of Canada), Alliance évangélique du Canada, Alliance des chrétiens en droit, Alberta Muslim Public Affairs Council, Amnistie internationale (Canada), Te'mexw Treaty Association, Central Coast Indigenous Resource Alliance, Shibogama First Nations Council, Chambre de commerce du Canada, British Columbia Civil Liberties Association, Council of the Passamaquoddy Nation at Schoodic, Katzie First Nation, West Moberly First Nations et Prophet River First Nation *Intervenants*

INDEXED AS: KTUNAXA NATION *v.* BRITISH COLUMBIA (FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS)

2017 SCC 54

File No.: 36664.

2016: December 1; 2017: November 2.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

RÉPERTORIÉ : KTUNAXA NATION *c.* COLOMBIE-BRITANNIQUE (FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS)

2017 CSC 54

N° du greffe : 36664.

2016 : 1er décembre; 2017 : 2 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

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

Constitutional law — Charter of Rights — Freedom of religion — First Nation alleging that ski resort project would drive spirit central to their religious beliefs from their traditional territory — Provincial government approving ski resort despite claim by First Nation that development would breach right to freedom of religion — Whether Minister's decision violates s. 2(a) of Canadian Charter of Rights and Freedoms.

Constitutional law — Aboriginal rights — Crown — Duty to consult — Provincial government approving ski resort despite claim by First Nation that development would breach constitutional right to protection of Aboriginal interests — Whether Minister's decision that Crown had met duty to consult and accommodate was reasonable — Constitution Act, 1982, s. 35.

The Ktunaxa are a First Nation whose traditional territories include an area in British Columbia that they call Qat'muk. Qat'muk is a place of spiritual significance for them because it is home to Grizzly Bear Spirit, a principal spirit within Ktunaxa religious beliefs and cosmology. Glacier Resorts sought government approval to build a year-round ski resort in Qat'muk. The Ktunaxa were consulted and raised concerns about the impact of the project, and as a result, the resort plan was changed to add new protections for Ktunaxa interests. The Ktunaxa remained unsatisfied, but committed themselves to further consultation. Late in the process, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices. After efforts to continue consultation failed, the respondent Minister declared that reasonable consultation had occurred and approved the project. The Ktunaxa brought a petition for judicial review of the approval decision on the grounds that the project would violate their constitutional right to freedom of religion, and that the Minister's decision breached the Crown's duty of consultation and accommodation. The chambers judge dismissed the petition, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

Droit constitutionnel — Charte des droits — Liberté de religion — Allégation d'une première nation selon laquelle un projet de station de ski chasserait de son territoire traditionnel un esprit qui est au cœur de ses croyances religieuses — Approbation par le gouvernement provincial de l'aménagement d'une station de ski malgré la prétention d'une première nation selon laquelle l'aménagement porterait atteinte à son droit à la liberté de religion — La décision du Ministre viole-t-elle l'art. 2a) de la Charte canadienne des droits et libertés?

Droit constitutionnel — Droits ancestraux — Couronne — Obligation de consulter — Approbation par le gouvernement provincial de l'aménagement d'une station de ski malgré la prétention d'une première nation selon laquelle l'aménagement porterait atteinte à son droit constitutionnel à la protection des intérêts autochtones — La décision du Ministre que la Couronne s'est acquittée de son obligation de consulter et d'accommoder était-elle raisonnable? — Loi constitutionnelle de 1982, art. 35.

Les Ktunaxa forment une première nation dont le territoire traditionnel comprend un secteur de la Colombie-Britannique qu'ils appellent le Qat'muk. Le Qat'muk est un lieu d'importance spirituelle pour eux car il abrite l'Esprit de l'Ours Grizzly, un esprit principal des croyances religieuses et de la cosmologie des Ktunaxa. Glacier Resorts a demandé au gouvernement l'autorisation de construire une station de ski ouverte à longueur d'année dans le Qat'muk. Les Ktunaxa ont été consultés et ils ont fait part de leurs préoccupations quant aux répercussions du projet. À la suite de ces consultations, le projet a été modifié par l'ajout de nouvelles protections à l'égard des intérêts des Ktunaxa. Les Ktunaxa sont demeurés insatisfaits, mais ils se sont engagés à participer à de nouvelles consultations. Vers la fin du processus, les Ktunaxa ont estimé qu'il était impossible d'arriver à un compromis parce que le projet chasserait l'Esprit de l'Ours Grizzly du Qat'muk et porterait par le fait même irrémédiablement atteinte à leurs croyances et pratiques religieuses. Après qu'on eut essayé en vain de poursuivre les consultations, le Ministre intimé a déclaré qu'il y avait eu une consultation raisonnable et a approuvé le projet. Les Ktunaxa ont présenté une requête en contrôle judiciaire de l'approbation au motif que le projet violerait leur droit constitutionnel à la liberté de religion et que la décision du Ministre manquait à l'obligation de consultation et d'accommodement qui incombe à la Couronne. Le juge en chambre a rejeté la requête et la Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Per McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The Minister's decision does not violate the Ktunaxa's s. 2(*a*) *Charter* right to freedom of religion. In this case, the Ktunaxa's claim does not fall within the scope of s. 2(*a*) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. In this case, the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place.

The second part of the test, however, is not met. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. Yet the Ktunaxa are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect the presence of Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. This is a novel claim that would extend s. 2(*a*) beyond its scope and would put deeply held personal beliefs under judicial scrutiny. The state's duty under s. 2(*a*) is not to protect the object of beliefs or the spiritual focal point of worship, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination.

In addition, the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* was reasonable. The Minister's decision is entitled to deference. A court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* raised in isolation on a standard of correctness, and therefore does not decide the issue for itself. Rather, it must ask whether the decision maker's finding on the issue was reasonable.

La juge en chef McLachlin et les juges Abella, Karakatsanis, Wagner, Gascon, Brown et Rowe : La décision du Ministre ne viole pas le droit à la liberté de religion garanti aux Ktunaxa par l'al. 2*a*) de la *Charte*. En l'espèce, la revendication des Ktunaxa ne relève pas de cette disposition car la décision du Ministre d'approuver le projet ne porte atteinte ni à la liberté des Ktunaxa d'avoir leurs croyances ni à leur liberté de manifester ces croyances.

Pour démontrer qu'il y a atteinte au droit à la liberté de religion, le demandeur doit établir (1) qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion, et (2) que la conduite qu'il reproche à l'État nuit d'une manière plus que négligeable ou insignifiante à sa capacité de se conformer à cette pratique ou croyance. Dans la présente affaire, les Ktunaxa croient sincèrement en l'existence et l'importance de l'Esprit de l'Ours Grizzly. Ils croient aussi qu'un aménagement permanent à l'intérieur du Qat'muk en chassera cet esprit.

Il n'est toutefois pas satisfait au second volet du critère. Les Ktunaxa doivent démontrer que la décision du Ministre d'approuver l'aménagement porte atteinte soit à leur liberté de croire en l'Esprit de l'Ours Grizzly, soit à leur liberté de manifester cette croyance. Pourtant, les Ktunaxa ne réclament pas la protection de la liberté de croire en l'Esprit de l'Ours Grizzly ou de s'adonner à des pratiques connexes. Ils sollicitent plutôt la protection de la présence de l'Esprit de l'Ours Grizzly lui-même et du sens spirituel subjectif qu'ils en dégagent. Cette allégation inédite étendrait l'al. 2*a*) au-delà de ses limites et exposerait les croyances intimes profondes au contrôle des tribunaux. L'obligation imposée à l'État par l'al. 2*a*) ne consiste pas à protéger l'objet des croyances ou le point de mire spirituel du culte, comme l'Esprit de l'Ours Grizzly. Il incombe plutôt à l'État de protéger la liberté de toute personne d'avoir pareilles croyances et de les manifester par le culte et la pratique ou par l'enseignement et la diffusion.

En outre, il était raisonnable de la part du Ministre de décider que la Couronne s'était acquittée de l'obligation de consultation et d'accommodement que lui impose l'art. 35 de la *Loi constitutionnelle de 1982*. Il convient de faire preuve de déférence à l'égard de cette décision. La cour qui contrôle une décision administrative au titre de l'art. 35 ne tranche pas la question constitutionnelle *de novo* soulevée de façon isolée selon la norme de la décision correcte. Elle ne tranche donc pas la question de façon indépendante. Elle doit plutôt se demander si la conclusion du décideur sur cette question était raisonnable.

The constitutional guarantee of s. 35 is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

In this case, the Ktunaxa's petition asked the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Nor can administrative decision makers themselves pronounce upon the existence or scope of Aboriginal rights without specifically delegated authority. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. In the interim, while claims are resolved, consultation and accommodation are the best available legal tools for achieving reconciliation.

The record here supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that

La garantie constitutionnelle de l'art. 35 ne vise pas uniquement les droits issus de traités ou les revendications prouvées ou réglées de droits ancestraux et de titre ancestral. L'article 35 protège aussi les droits éventuels inhérents aux revendications autochtones qui n'ont pas encore été formellement établies et il peut obliger la Couronne à consulter les Autochtones et à prendre en compte leurs intérêts en attendant qu'il soit statué sur ces revendications par la négociation ou une autre procédure. Cette obligation découle de l'honneur de la Couronne et est constitutionnalisée à l'art. 35.

En l'espèce, les Ktunaxa demandent aux tribunaux dans leur requête, sous le couvert d'une demande de contrôle judiciaire d'une décision administrative, de se prononcer sur la validité de leur revendication à l'égard d'un lieu sacré et des pratiques spirituelles connexes. Ce jugement déclaratoire ne peut être rendu par une cour siégeant en contrôle d'une décision administrative. Dans une instance judiciaire, pareil jugement déclaratoire ne peut être rendu qu'après l'instruction de la question quand le tribunal bénéficie des actes de procédure, des interrogatoires préalables, des éléments de preuve et des arguments. Sans un pouvoir expressément délégué, les décideurs administratifs ne peuvent pas non plus se prononcer eux-mêmes sur l'existence ou la portée de droits ancestraux. Les droits ancestraux doivent être prouvés au moyen d'éléments mis à l'épreuve; ils ne peuvent être établis accessoirement dans le cadre d'une procédure administrative dont le point de mire est le caractère adéquat des consultations et des mesures d'accommodement. Permettre une telle chose causerait de l'incertitude et découragerait le règlement définitif des droits allégués par la procédure appropriée. Dans l'intervalle, alors que les revendications sont en voie de règlement, la consultation et l'accommodement sont les meilleurs outils juridiques dont on dispose pour parvenir à une réconciliation.

Le dossier de l'espèce étaye le caractère raisonnable de la conclusion du Ministre selon laquelle l'obligation de consultation et d'accommodement visée à l'art. 35 a été respectée. Les revendications de nature spirituelle des Ktunaxa à l'égard du Qat'muk ont été reconnues dès le départ. Des négociations se sont échelonnées sur deux décennies et il y a eu des consultations approfondies. De nombreux changements ont été apportés au projet pour tenir compte des revendications de nature spirituelle des Ktunaxa. Alors que tous les différends importants semblaient réglés, les Ktunaxa ont adopté une nouvelle position absolue selon laquelle aucun accommodement n'était possible parce que des installations permanentes

there was no point in further consultation. The process protected by s. 35 was at an end.

The record does not suggest, conversely, that the Minister mischaracterized the right as a claim to preclude development, instead of a claim to a spiritual right. The Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in Qat'muk, which the Ktunaxa believed would be driven out by the development. Spiritual practices and interests were raised at the beginning of the process and continued to be discussed throughout. Nor did the Minister misunderstand the Ktunaxa's secrecy imperative, which had contributed to the late disclosure of the true nature of the claim: an absolute claim to a sacred site, which must be preserved and protected from permanent human habitation. The Minister understood and accepted that spiritual beliefs did not permit details of beliefs to be shared with outsiders. Nothing in the record suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred. In addition, the Minister did not treat the broader spiritual right as weak. The Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the new, absolute claim that no accommodation was possible because the project would drive Grizzly Bear Spirit from Qat'muk. The record also does not demonstrate that the Minister failed to properly assess the adverse impact of the development on the spiritual interests of the Ktunaxa.

Ultimately, the consultation was not inadequate. The Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge and the Court of Appeal. Moreover, the record does not establish that no accommodation was made with respect to the spiritual right. While the Minister did not offer the ultimate accommodation demanded by the Ktunaxa — complete rejection of the ski resort project — the Crown met its obligation to consult and accommodate. Section 35 guarantees a process, not a particular result. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. Section 35 does not give unsatisfied claimants a veto. Where adequate consultation has occurred, a development may proceed without consent.

chasseraient l'Esprit de l'Ours Grizzly du Qat'muk. Le Ministre a cherché à consulter les Ktunaxa pour discuter de la revendication nouvellement formulée, mais on lui a répondu qu'il était inutile de le faire. Le processus protégé par l'art. 35 a alors pris fin.

À l'inverse, le dossier n'indique pas que le Ministre a mal décrit le droit comme une revendication visant à empêcher tout aménagement plutôt que la revendication d'un droit spirituel. Le Ministre comprenait que ce droit supposait des pratiques qui dépendaient de la présence continue de l'Esprit de l'Ours Grizzly dans le Qat'muk, alors que l'aménagement chasserait cet esprit selon les croyances des Ktunaxa. Les pratiques et intérêts spirituels ont été évoqués au début du processus et les parties ont continué de discuter de ces questions tout au long du processus. Le Ministre n'a pas non plus mal compris l'impératif du secret des Ktunaxa qui a contribué à la divulgation tardive de la véritable nature de la revendication : une revendication absolue à l'égard d'un lieu sacré qui devait être préservé et protégé de l'habitation humaine permanente. Le Ministre a compris et accepté le fait que les croyances spirituelles ne permettaient pas que certains détails des croyances soient communiqués à des gens de l'extérieur. Rien dans le dossier ne porte à croire que le Ministre a oublié cet élément fondamental quand il a décidé qu'il y avait eu une consultation adéquate. De plus, le Ministre n'a pas qualifié de faible le droit spirituel général. Le Ministre a jugé solide la revendication globale de nature spirituelle, mais il avait des doutes quant à la solidité de la nouvelle prétention absolue selon laquelle aucun accommodement n'était possible parce que le projet chasserait l'Esprit de l'Ours Grizzly du Qat'muk. En outre, le dossier ne démontre pas que le Ministre a mal évalué l'effet préjudiciable du projet sur les intérêts spirituels des Ktunaxa.

En dernière analyse, la consultation n'était pas insuffisante. Le Ministre s'est livré à des consultations approfondies sur la revendication de nature spirituelle. L'ampleur de ces consultations a été confirmée à la fois par le juge en chambre et par la Cour d'appel. Qui plus est, le dossier n'établit pas qu'on n'a pas tenu compte du droit spirituel. Bien que le Ministre n'ait pas offert la mesure d'accommodement ultime exigée par les Ktunaxa, soit le rejet complet du projet de station de ski, la Couronne s'est acquittée de son obligation de consulter et d'accommoder. L'article 35 garantit un processus, et non un résultat précis. Rien ne garantit qu'en fin de compte il sera justifié ou possible d'obtenir l'accommodement précis demandé. L'article 35 ne confère pas aux demandeurs insatisfaits un droit de veto. S'il y a eu consultation adéquate, le projet peut aller de l'avant sans consentement.

Per Moldaver and Côté JJ.: The Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 of the *Constitution Act, 1982* was met; however, the Minister's decision to approve the ski resort infringed the Ktunaxa's s. 2(*a*) *Charter* right to religious freedom.

The first part of the s. 2(*a*) test is not at issue in this case. The second part focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. Where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her religious beliefs, constituting an infringement of s. 2(*a*).

This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. To ensure that all religions are afforded the same level of protection, courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices. In many Indigenous religions, land is not only the site of spiritual practices; land itself can be sacred. As such, state action that impacts land can sever the connection to the divine, rendering beliefs and practices devoid of spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with the ability to act in accordance with religious beliefs and practices.

In this case, the Ktunaxa sincerely believe that Grizzly Bear Spirit inhabits Qat'muk, a body of sacred land in their religion, and that the Minister's decision to approve the ski resort would sever their connection to Qat'muk and to Grizzly Bear Spirit. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. Their religious beliefs in Grizzly Bear Spirit would become entirely devoid of religious significance, and accordingly, their prayers, ceremonies, and rituals associated with Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. Moreover, without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, the Ktunaxa would be unable to pass on their beliefs and practices to future generations. Therefore, the Minister's decision approving the proposed development interferes with the Ktunaxa's

Les juges Moldaver et Côté : Le Ministre a raisonnablement conclu à l'acquittement de l'obligation de consulter et d'accommoder les Ktunaxa prévue à l'art. 35 de la *Loi constitutionnelle de 1982*; en revanche, la décision du Ministre d'approuver la station de ski a porté atteinte au droit à la liberté de religion garanti aux Ktunaxa par l'al. 2*a*) de la *Charte*.

Le premier volet du critère relatif à l'al. 2*a*) n'est pas en litige dans la présente affaire. Le second volet s'attache au point de savoir si une mesure étatique a nui à la capacité d'une personne de se conformer à ses croyances ou pratiques religieuses. La conduite de l'État qui prive de toute signification religieuse les croyances religieuses sincères d'une personne porte atteinte à son droit à la liberté de religion. Les croyances religieuses revêtent une signification spirituelle pour le croyant. Lorsque cette signification est supprimée par l'État, la personne ne peut plus se conformer à ses croyances religieuses, ce qui constitue une contravention à l'al. 2*a*).

Ce type d'ingérence de l'État est une réalité lorsque les citoyens s'épanouissent spirituellement par le lien qui les unit au monde concret. Pour veiller à ce que l'al. 2*a*) accorde la même protection à toutes les religions, les tribunaux doivent être conscients des caractéristiques propres à chacune d'elles et des différentes manières dont l'État peut nuire aux croyances ou pratiques de chaque religion. Dans de nombreuses religions autochtones, la terre est non seulement le lieu où s'exercent des pratiques spirituelles; la terre peut elle-même être sacrée. Une mesure étatique qui touche la terre peut donc rompre le lien avec l'être divin, ce qui priverait les croyances et pratiques de leur signification spirituelle. La mesure étatique qui a cet effet sur une religion autochtone nuit à la capacité de se conformer à des croyances et pratiques religieuses.

En l'espèce, les Ktunaxa croient sincèrement que l'Esprit de l'Ours Grizzly habite le Qat'muk, un lieu sacré dans leur religion, et que la décision du Ministre d'approuver la station de ski romprait leur lien avec le Qat'muk et l'Esprit de l'Ours Grizzly. Les Ktunaxa seraient ainsi privés des conseils et de l'assistance spirituels de cet esprit. Leurs croyances religieuses en l'Esprit de l'Ours Grizzly perdraient toute signification religieuse et, par conséquent, leurs prières, cérémonies et rites associés à cet esprit ne seraient plus que de vaines paroles et des gestes vides de sens. En outre, sans leur lien spirituel avec le Qat'muk et l'Esprit de l'Ours Grizzly, les Ktunaxa ne seraient pas en mesure de transmettre leurs croyances et pratiques aux générations futures. La décision du Ministre d'approuver l'aménagement proposé nuit donc d'une manière plus que négligeable ou insignifiante à la

ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial.

The Minister's decision is reasonable, however, because it reflects a proportionate balancing between the Ktunaxa's s. 2(*a*) *Charter* right and the Minister's statutory objectives: to administer Crown land and dispose of it in the public interest. A proportionate balancing is one that gives effect as fully as possible to the *Charter* protections at stake given the particular statutory mandate. When the Minister balances the *Charter* protections with these objectives, he must ensure that the *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives.

In this case, the Minister did not refer to s. 2(*a*) explicitly in his reasons for decision; however, it is clear from his reasons that he was alive to the substance of the Ktunaxa's s. 2(*a*) right. He recognized that the development put at stake the Ktunaxa's spiritual connection to Qat'muk.

In addition, it is implicit from the Minister's reasons that he proportionately balanced the Ktunaxa's s. 2(*a*) right with his statutory objectives. The Minister tried to limit the impact of the development on the substance of the Ktunaxa's s. 2(*a*) right as much as reasonably possible given these objectives. He provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. Ultimately, however, the Minister had two options before him: approve the development or permit the Ktunaxa to veto the development on the basis of their freedom of religion. Granting the Ktunaxa a power to veto development over the land would effectively give them a significant property interest in Qat'muk — namely, a power to exclude others from constructing permanent structures on public land. This right of exclusion would not be a minimal or negligible restraint on public ownership. It can be implied from the Minister's reasons that permitting the Ktunaxa to dictate the use of a large tract of land according to their religious belief was not consistent with his statutory mandate. Rather, it would significantly undermine, if not completely compromise, this mandate. In view of the options open to the Minister, his decision was reasonable, and amounted to a proportionate balancing.

capacité des Ktunaxa de se conformer à leurs croyances ou pratiques religieuses.

La décision du Ministre est toutefois raisonnable parce qu'elle est le fruit d'une mise en balance proportionnée du droit reconnu aux Ktunaxa par l'al. 2*a*) de la *Charte* et des objectifs confiés par la loi au Ministre : administrer les terres de la Couronne et les aliéner dans l'intérêt public. Une mise en balance proportionnée en est une qui donne effet autant que possible aux protections en cause conférées par la *Charte* compte tenu du mandat législatif particulier. Quand le Ministre met en balance les protections conférées par la *Charte* et les objectifs en question, il doit s'assurer que ces protections sont restreintes aussi peu que cela est raisonnablement possible eu égard aux objectifs particuliers de l'État.

En l'espèce, le Ministre n'a pas mentionné explicitement l'al. 2*a*) dans ses motifs de décision; il ressort toutefois de ses motifs qu'il a bien saisi la substance du droit garanti aux Ktunaxa par l'al. 2*a*). Il a reconnu que l'aménagement mettait en jeu le lien spirituel des Ktunaxa avec le Qat'muk.

De plus, il ressort implicitement des motifs du Ministre qu'il a mis en balance de façon proportionnée le droit reconnu aux Ktunaxa par l'al. 2*a*) et les objectifs que lui confie la loi. Le Ministre a essayé de limiter autant qu'il était raisonnablement possible de le faire l'impact de l'aménagement sur la substance du droit garanti aux Ktunaxa par l'al. 2*a*) compte tenu de ces objectifs. Il a consenti des mesures d'accommodement importantes qui touchaient précisément le lien spirituel des Ktunaxa avec la terre. En dernière analyse, toutefois, le Ministre avait deux choix : approuver l'aménagement ou permettre aux Ktunaxa d'opposer leur veto à l'aménagement en raison de leur liberté de religion. Conférer aux Ktunaxa le pouvoir d'opposer leur veto à l'aménagement du territoire en question leur donnerait dans les faits un intérêt propriétal d'envergure sur le Qat'muk, à savoir le pouvoir d'interdire à autrui de construire des installations permanentes sur des terres publiques. Ce droit d'interdiction ne serait pas une restriction minimale ou négligeable de la propriété publique. On peut déduire des motifs du Ministre que permettre aux Ktunaxa de dicter l'usage d'une grande étendue de terrain selon leur croyance religieuse n'était pas compatible avec son mandat légal. L'octroi de ce pouvoir compromettrait plutôt substantiellement la réalisation de ce mandat, voire lui porterait un coup fatal. Vu les choix qui s'offraient au Ministre, sa décision était raisonnable et était le fruit d'une mise en balance proportionnée.

Cases Cited

By McLachlin C.J. and Rowe J.

Applied: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, rev'd *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

By Moldaver J.

Applied: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; **referred to:** *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235; *Mouvement laïque québécois v.*

Jurisprudence

Citée par la juge en chef McLachlin et le juge Rowe

Arrêts appliqués : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; **arrêts mentionnés :** *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551; *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467; *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256; *R. c. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, inf. par *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391; *Divito c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 47, [2013] 3 R.C.S. 157; *Inde c. Badesha*, 2017 CSC 44, [2017] 2 R.C.S. 127; *S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Village)*, 2004 CSC 48, [2004] 2 R.C.S. 650; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Mitchell c. M.R.N.*, 2001 CSC 33, [2001] 1 R.C.S. 911; *Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257; *Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103.

Citée par le juge Moldaver

Arrêt appliqué : *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395; **arrêts mentionnés :** *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613; *Figueroa c. Canada (Procureur général)*, 2003 CSC 37, [2003] 1 R.C.S. 912; *Renvoi : Circ. électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551; *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567; *S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235;

Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(*a*).
Constitution Act, 1982, s. 35.
Environmental Assessment Act, S.B.C. 1994, c. 35.
Environmental Assessment Act, S.B.C. 2002, c. 43.
Land Act, R.S.B.C. 1996, c. 245, ss. 4, 11(1).
Ministry of Lands, Parks and Housing Act, R.S.B.C. 1996, c. 307, s. 5(b).

Treaties and Other International Instruments

American Convention on Human Rights, 1144 U.N.T.S. 123, art. 12(1), (3).
Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [*European Convention on Human Rights*], art. 9(1).
International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 18(1).
Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 18.

Authors Cited

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.
Ross, Michael L. *First Nations Sacred Sites in Canada's Courts*. Vancouver: UBC Press, 2005.
Ziff, Bruce. *Principles of Property Law*, 6th ed. Toronto: Carswell, 2014.

APPEAL from a judgment of the British Columbia Court of Appeal (Lowry, Bennett and Goepel JJ.A.), 2015 BCCA 352, 387 D.L.R. (4th) 10, 78 B.C.L.R. (5th) 297, 376 B.C.A.C. 105, 646 W.A.C. 105, 89 Admin. L.R. (5th) 63, 93 C.E.L.R. (3d) 1, [2015] 4 C.N.L.R. 199, 339 C.R.R. (2d) 183, [2016] 3 W.W.R. 423, [2015] B.C.J. No. 1682 (QL), 2015 CarswellBC 2215 (WL Can.), affirming a decision of Savage J., 2014 BCSC 568, 306 C.R.R. (2d) 211, 82 Admin. L.R. (5th) 117, 86 C.E.L.R. (3d) 202, [2014] 4 C.N.L.R. 143, [2014] B.C.J. No. 584 (QL), 2014 CarswellBC 901 (WL Can.), dismissing an application

Mouvement laïque québécois c. Saguenay (Ville), 2015 CSC 16, [2015] 2 R.C.S. 3; *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708; *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559; *R. c. Van der Peet*, [1996] 2 R.C.S. 507.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2*a*).
Environmental Assessment Act, S.B.C. 1994, c. 35.
Environmental Assessment Act, S.B.C. 2002, c. 43.
Land Act, R.S.B.C. 1996, c. 245, art. 4, 11(1).
Loi constitutionnelle de 1982, art. 35.
Ministry of Lands, Parks and Housing Act, R.S.B.C. 1996, c. 307, art. 5(b).

Traités et autres documents internationaux

Convention américaine relative aux droits de l'homme, 1144 R.T.N.U. 123, art. 12(1), (3).
Convention de sauvegarde des droits de l'homme et des libertés fondamentales, 213 R.T.N.U. 221 [*Convention européenne des droits de l'homme*], art. 9(1).
Déclaration universelle des droits de l'homme, A.G. Rés. 217 A (III), Doc. N.U. A/810, p. 71 (1948), art. 18.
Pacte international relatif aux droits civils et politiques, R.T. Can. 1976 nº 47, art. 18(1).

Doctrine et autres documents cités

Dyzenhaus, David. « The Politics of Deference : Judicial Review and Democracy », in Michael Taggart, ed., *The Province of Administrative Law*, Oxford, Hart, 1997, 279.
Ross, Michael L. *First Nations Sacred Sites in Canada's Courts*, Vancouver, UBC Press, 2005.
Ziff, Bruce. *Principles of Property Law*, 6th ed., Toronto, Carswell, 2014.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Lowry, Bennett et Goepel), 2015 BCCA 352, 387 D.L.R. (4th) 10, 78 B.C.L.R. (5th) 297, 376 B.C.A.C. 105, 646 W.A.C. 105, 89 Admin. L.R. (5th) 63, 93 C.E.L.R. (3d) 1, [2015] 4 C.N.L.R. 199, 339 C.R.R. (2d) 183, [2016] 3 W.W.R. 423, [2015] B.C.J. No. 1682 (QL), 2015 CarswellBC 2215 (WL Can.), qui a confirmé une décision du juge Savage, 2014 BCSC 568, 306 C.R.R. (2d) 211, 82 Admin. L.R. (5th) 117, 86 C.E.L.R. (3d) 202, [2014] 4 C.N.L.R. 143, [2014] B.C.J. No. 584 (QL), 2014 CarswellBC 901 (WL Can.), qui a rejeté

for judicial review of a decision of the Minister to approve a ski resort. Appeal dismissed.

Peter Grant, *Jeff Huberman*, *Karenna Williams* and *Diane Soroka*, for the appellants.

Jonathan G. Penner and *Erin Christie*, for the respondent the Minister of Forests, Lands and Natural Resource Operations.

Gregory J. Tucker, *Q.C.*, and *Pamela E. Sheppard*, for the respondent Glacier Resorts Ltd.

Mitchell R. Taylor, *Q.C.*, and *Sharlene Telles-Langdon*, for the intervener the Attorney General of Canada.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Justin Safayeni and *Khalid Elgazzar*, for the interveners the Canadian Muslim Lawyers Association, the South Asian Legal Clinic of Ontario and the Kootenay Presbytery (United Church of Canada).

Albertos Polizogopoulos and *Derek Ross*, for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship.

Written submissions only by *Avnish Nanda*, for the intervener the Alberta Muslim Public Affairs Council.

Joshua Ginsberg and *Randy Christensen*, for the intervener Amnesty International Canada.

Robert J. M. Janes, *Q.C.*, and *Claire Truesdale*, for the intervener the Te'mexw Treaty Association.

Written submissions only by *Lisa C. Fong*, for the intervener the Central Coast Indigenous Resource Alliance.

Senwung Luk and *Krista Nerland*, for the intervener the Shibogama First Nations Council.

une demande de contrôle judiciaire de la décision du Ministre d'approuver une station de ski. Pourvoi rejeté.

Peter Grant, *Jeff Huberman*, *Karenna Williams* et *Diane Soroka*, pour les appelants.

Jonathan G. Penner et *Erin Christie*, pour l'intimé Minister of Forests, Lands and Natural Resource Operations.

Gregory J. Tucker, *c.r.*, et *Pamela E. Sheppard*, pour l'intimée Glacier Resorts Ltd.

Mitchell R. Taylor, *c.r.*, et *Sharlene Telles-Langdon*, pour l'intervenant le procureur général du Canada.

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Justin Safayeni et *Khalid Elgazzar*, pour les intervenants l'Association canadienne des avocats musulmans, South Asian Legal Clinic of Ontario et Kootenay Presbytery (United Church of Canada).

Albertos Polizogopoulos et *Derek Ross*, pour les intervenantes l'Alliance évangélique du Canada et l'Alliance des chrétiens en droit.

Argumentation écrite seulement par *Avnish Nanda*, pour l'intervenant Alberta Muslim Public Affairs Council.

Joshua Ginsberg et *Randy Christensen*, pour l'intervenante Amnistie internationale (Canada).

Robert J. M. Janes, *c.r.*, et *Claire Truesdale*, pour l'intervenante Te'mexw Treaty Association.

Argumentation écrite seulement par *Lisa C. Fong*, pour l'intervenante Central Coast Indigenous Resource Alliance.

Senwung Luk et *Krista Nerland*, pour l'intervenant Shibogama First Nations Council.

Neil Finkelstein, *Brandon Kain* and *Bryn Gray*, for the intervener the Canadian Chamber of Commerce.

Jessica Orkin and *Adriel Weaver*, for the intervener the British Columbia Civil Liberties Association.

Paul Williams, for the intervener the Council of the Passamaquoddy Nation at Schoodic.

Written submissions only by *John Burns* and *Amy Jo Scherman*, for the intervener the Katzie First Nation.

Written submissions only by *John W. Gailus* and *Christopher G. Devlin*, for the interveners the West Moberly First Nations and the Prophet River First Nation.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE AND ROWE J. —

I. Introduction

[1] The issue in this case is whether the British Columbia Minister of Forests, Lands and Natural Resource Operations ("Minister") erred in approving a ski resort development, despite claims by the Ktunaxa that the development would breach their constitutional right to freedom of religion and to protection of Aboriginal interests under s. 35 of the *Constitution Act, 1982*.

[2] The appellants represent the Ktunaxa people. The Ktunaxa's traditional territories are said to consist of land that straddles the international boundary between Canada and the United States, comprised of northeastern Washington, northern Idaho, northwestern Montana, southwestern Alberta and southeastern British Columbia.

Neil Finkelstein, *Brandon Kain* et *Bryn Gray*, pour l'intervenante la Chambre de commerce du Canada.

Jessica Orkin et *Adriel Weaver*, pour l'intervenante British Columbia Civil Liberties Association.

Paul Williams, pour l'intervenant Council of the Passamaquoddy Nation at Schoodic.

Argumentation écrite seulement par *John Burns* et *Amy Jo Scherman*, pour l'intervenante Katzie First Nation.

Argumentation écrite seulement par *John W. Gailus* et *Christopher G. Devlin*, pour les intervenantes West Moberly First Nations et Prophet River First Nation.

Version française du jugement de la juge en chef McLachlin et des juges Abella, Karakatsanis, Wagner, Gascon, Brown et Rowe rendu par

LA JUGE EN CHEF ET LE JUGE ROWE —

I. Introduction

[1] Dans le présent pourvoi, il s'agit de décider si l'intimé, Minister of Forests, Lands and Natural Resource Operations de la Colombie-Britannique (« Ministre »), a commis une erreur en approuvant l'aménagement d'une station de ski malgré les revendications des Ktunaxa, qui soutenaient que l'aménagement porterait atteinte à leur droit constitutionnel à la liberté de religion et à leurs droits ancestraux dont l'art. 35 de la *Loi constitutionnelle de 1982* commande la protection.

[2] Les appelants représentent le peuple des Ktunaxa dont le territoire traditionnel regrouperait des terres qui s'étendent de part et d'autre de la frontière internationale entre le Canada et les États-Unis et englobent le nord-est de l'État de Washington, le nord de l'Idaho, le nord-ouest du Montana, le sud-ouest de l'Alberta et le sud-est de la Colombie-Britannique.

[3] This case concerns a proposed development in an area the Ktunaxa call Qat'muk. This area is located in a Canadian valley in the northwestern part of the larger Ktunaxa territory, the Jumbo Valley, about 55 kilometres west of the town of Invermere, B.C.

[4] The respondent Glacier Resorts Ltd. ("Glacier Resorts") wishes to build a year-round ski resort in Qat'muk with lifts to glacier runs and overnight accommodation for guests and staff. For more than two decades, Glacier Resorts has been negotiating with the B.C. government and stakeholders, including the Aboriginal peoples who inhabit the valley, the Ktunaxa and the Shuswap, on the terms and conditions of the development.

[5] Early on in the process, the Ktunaxa and Shuswap peoples raised concerns about the impact of the resort project. The Ktunaxa asserted that Qat'muk was a place of spiritual significance for them. Notably, it is home to an important population of grizzly bears and to Grizzly Bear Spirit, or Kławła Tukłułak?is, "a principal spirit within Ktunaxa religious beliefs and cosmology": A.F., at para. 18.

[6] Consultation ensued, leading to significant changes to the original proposal. The Shuswap declared themselves satisfied with the changes and indicated their support for the proposal given the benefits it would bring to their people and the region. The Ktunaxa were not satisfied, but committed themselves to further consultation to remove the remaining obstacles and find mutually satisfactory accommodation. Lengthy discussions ensued, and it seemed agreement would be achieved. Then, late in the process, the Ktunaxa adopted an uncompromising position — that accommodation was impossible because a ski resort with lifts to glacier runs and permanent structures would drive Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices. After fruitless efforts to revive the consultation process and reach agreement, the

[3] La présente affaire concerne une proposition d'aménagement dans un secteur que les Ktunaxa appellent le Qat'muk. Ce secteur est situé dans une vallée canadienne, dans la partie nord-ouest du vaste territoire des Ktunaxa, la vallée Jumbo, à environ 55 kilomètres à l'ouest de la ville d'Invermere, en Colombie-Britannique.

[4] L'intimée Glacier Resorts Ltd. (« Glacier Resorts ») souhaite construire dans le Qat'muk une station de ski ouverte à longueur d'année et munie de remonte-pentes par lesquels on pourrait accéder aux pistes de glacier et qui offrirait un hébergement pour la nuit aux visiteurs et au personnel. Glacier Resorts a négocié pendant plus de 20 ans les conditions de l'aménagement avec le gouvernement de la Colombie-Britannique et différents intéressés, notamment les peuples autochtones qui habitent la vallée, les Ktunaxa et les Shuswap.

[5] Au début du processus, les peuples des Ktunaxa et des Shuswap ont fait part de leurs préoccupations quant aux répercussions du projet. Les Ktunaxa ont affirmé que le Qat'muk était un lieu d'importance spirituelle pour eux. Fait à noter, il abrite une population importante de grizzlys et l'Esprit de l'Ours Grizzly, ou Kławła Tukłułak?is, [TRADUCTION] « un esprit principal des croyances religieuses et de la cosmologie des Ktunaxa » : m.a., par. 18.

[6] Des consultations ont débouché sur des modifications importantes à la proposition initiale. Les Shuswap se sont dits satisfaits des changements et ont donné leur appui à la proposition compte tenu des avantages qu'elle présenterait pour leur peuple et la région. Les Ktunaxa se sont quant à eux dits insatisfaits, mais ils se sont engagés à participer à de nouvelles consultations en vue d'éliminer les derniers obstacles et d'arriver à un compromis satisfaisant pour tous. De longs pourparlers s'ensuivirent et les parties semblaient sur le point de parvenir à un accord. Puis, vers la fin du processus, les Ktunaxa ont adopté une position inflexible, estimant désormais qu'il était impossible d'arriver à un compromis parce qu'une station de ski munie de remonte-pentes vers les pistes de glacier et d'installations permanentes chasserait l'Esprit de l'Ours Grizzly du

government declared that reasonable consultation had occurred and approved the project.

[7] The appellants, the Ktunaxa Nation Council and the Chair of the Council, Kathryn Teneese, brought proceedings in judicial review before the British Columbia Supreme Court to overturn the approval by the Minister of the ski resort on two independent grounds: first, that the project would violate the Ktunaxa's freedom of religion under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*; and second, that the government breached the duty of consultation and accommodation imposed on the Crown by s. 35 of the *Constitution Act, 1982*. The chambers judge dismissed the petition for judicial review, and the Court of Appeal affirmed his decision. The Ktunaxa now appeal to this Court.

[8] We would dismiss the appeal. We conclude that the claim does not engage the right to freedom of conscience and religion under s. 2(*a*) of the *Charter*. Section 2(*a*) protects the freedom of individuals and groups to hold and manifest religious beliefs: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336. The Ktunaxa's claim does not fall within the scope of s. 2(*a*) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

[9] We also conclude that the Minister, while bound by s. 35 of the *Constitution Act, 1982* to consult with the Ktunaxa in an effort to find a way to accommodate their concerns, did not act unreasonably in concluding that the requirements of s. 35 had been met and approving the project.

[10] We arrive at these conclusions cognizant of the importance of protecting Indigenous religious beliefs and practices, and the place of such

Qat'muk et porterait irrémédiablement atteinte à leurs croyances et pratiques religieuses. Après avoir tenté sans succès de relancer le processus de consultation et de parvenir à un accord, le gouvernement a déclaré qu'il y avait eu une consultation raisonnable et a approuvé le projet.

[7] Les appelants, Ktunaxa Nation Council et Kathryn Teneese, la présidente de ce conseil, ont intenté une procédure de contrôle judiciaire devant la Cour suprême de la Colombie-Britannique pour faire annuler l'approbation, par le Ministre, du projet de station de ski. Ils invoquaient deux moyens indépendants : premièrement, le projet porterait atteinte à la liberté de religion garantie aux Ktunaxa par l'al. 2*a*) de la *Charte canadienne des droits et libertés*; deuxièmement, le gouvernement a manqué à l'obligation de consultation et d'accommodement qu'impose à la Couronne l'art. 35 de la *Loi constitutionnelle de 1982*. Le juge en chambre a rejeté la requête en contrôle judiciaire, et la Cour d'appel a confirmé sa décision. Les Ktunaxa se pourvoient maintenant devant notre Cour.

[8] Nous sommes d'avis de rejeter le pourvoi. Nous concluons que la revendication ne fait pas intervenir le droit à la liberté de conscience et de religion garanti à l'al. 2*a*) de la *Charte*. L'alinéa 2*a*) protège la liberté des individus et des groupes d'avoir et de manifester des croyances religieuses : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 336. La revendication des Ktunaxa ne relève pas de cette disposition car la décision du Ministre d'approuver le projet ne porte atteinte ni à la liberté des Ktunaxa d'avoir leurs croyances ni à leur liberté de manifester ces croyances.

[9] Nous jugeons aussi que le Ministre, quoique tenu par l'art. 35 de la *Loi constitutionnelle de 1982* de consulter les Ktunaxa pour essayer de répondre à leurs préoccupations, n'a pas agi déraisonnablement en concluant que les exigences de l'art. 35 avaient été respectées et en approuvant le projet.

[10] Nous arrivons à ces conclusions en étant conscients de l'importance de protéger les croyances et pratiques religieuses des Autochtones et du rôle

protection in achieving reconciliation between Indigenous peoples and non-Indigenous communities.

II. Facts

[11] The Jumbo Valley and Qat'muk are located in the traditional territory of the Ktunaxa. The Ktunaxa believe that Grizzly Bear Spirit inhabits Qat'muk. It is undisputed that Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices.

[12] The Jumbo Valley has long been used for heli-skiing, which involves flying skiers to the top of runs by helicopter, whence they ski to the valley floor. In the 1980s, Glacier Resorts became interested in building a permanent ski resort on a site near the north end of the valley and sought government approval of the project.

[13] The regulatory process for approval of the ski resort was a protracted matter, involving a number of cascading processes: (1) the Commercial Alpine Ski Policy ("CASP") process to determine sole proponent status; (2) the Commission on Resources and the Environment ("CORE") process to determine best uses of the land; (3) an environmental assessment process to resolve issues related to environmental, wildlife and cultural impact and culminating in an Environmental Assessment Certificate ("EAC"); and (4) submission of a Master Plan which, if approved, would lead to a Master Development Agreement ("MDA") between the developer and the government. These processes involved public consultation, and the Ktunaxa participated at every stage. In the course of the various reviews, many changes were made to the original plan. The entire process, until the Minister determined consultation was adequate, took place from 1991 to 2011 — over 20 years.

[14] Until 2005, the Ktunaxa participated in the regulatory processes jointly with the Shuswap as part

que joue une telle protection dans l'atteinte d'une réconciliation entre les peuples autochtones et les communautés non autochtones.

II. Faits

[11] La vallée Jumbo et le Qat'muk se situent dans le territoire traditionnel des Ktunaxa. Ces derniers croient que l'Esprit de l'Ours Grizzly habite le Qat'muk. Personne ne conteste que cet esprit est au cœur des croyances et pratiques religieuses des Ktunaxa.

[12] La vallée Jumbo a longtemps été utilisée pour l'héliski, pratique qui consiste à amener par hélicoptère des skieurs au sommet de pistes, d'où ils descendent jusqu'au fond de la vallée. Dans les années 1980, Glacier Resorts s'est mise à caresser un projet de construction d'une station de ski permanente près de l'extrémité nord de la vallée, pour lequel elle a sollicité l'approbation du gouvernement.

[13] Le processus d'approbation réglementaire de la station de ski s'est révélé une entreprise de longue haleine en raison de ses étapes consécutives : (1) l'étape relative à la politique sur les centres de ski alpin à vocation commerciale (« PCSAVC »), qui vise à déterminer la qualité de seul promoteur; (2) l'étape relative à la Commission sur les ressources et l'environnement (« CORE »), qui vise à déterminer les meilleures utilisations du terrain; (3) l'étape relative à l'évaluation environnementale, qui cherche à résoudre les questions liées aux répercussions sur l'environnement, la faune et la culture, et se termine par la délivrance d'un certificat d'évaluation environnementale (« CÉE »); (4) la présentation d'un plan directeur qui, s'il est approuvé, mènerait à un accord-cadre d'aménagement (« ACA ») entre le promoteur et le gouvernement. Le processus global comportait une consultation publique à laquelle les Ktunaxa ont participé à chacune des étapes. Au cours des divers examens, de nombreux changements ont été apportés au plan initial. L'ensemble du processus, au terme duquel le Ministre a jugé la consultation adéquate, a duré de 1991 à 2011, soit plus de 20 ans.

[14] Jusqu'en 2005, les Ktunaxa ont participé aux étapes réglementaires conjointement avec les

of the Ktunaxa/Kinbasket Tribal Council ("KKTC"). However, in 2005, the Shuswap parted company with the Ktunaxa over the proposed ski resort and left the KKTC. The Shuswap support the project, believing their interests have been reasonably accommodated and that the project will be good for their community. The Ktunaxa, by contrast, say their interests cannot be accommodated and demand the project's rejection.

[15] Adequacy of consultation is a central issue in this appeal. It is therefore necessary to set out in some detail what occurred at each step of the regulatory process.

A. *Stage One: The CASP Process*

[16] In 1991, Glacier Resorts filed a formal proposal to build a year-round ski resort in the upper Jumbo Valley. The government conducted public hearings on the project under the CASP, the first phase in the regulatory approval process. The predecessor of the appellants, the KKTC, participated in public hearings in the fall of 1991. After a call for proposals, Glacier Resorts was granted sole proponent status and moved up to the next step on the regulatory ladder.

B. *Stage Two: The Land Use or CORE Process*

[17] In 1993 and 1994, the second phase of the regulatory process began. The government conducted a site utilization review under the CORE process, with the goal of producing a new land use plan for the region focusing specifically on construction of the ski resort. The CORE process involved public hearings, which the KKTC attended as an observer. In 1994, the CORE process concluded with a report that assigned very high recreational and tourism values to the area of the proposed ski resort and recommended that the approval process for the resort include a statutory environmental assessment.

Shuswap par l'entremise du Ktunaxa/Kinbasket Tribal Council (« KKTC »). Toutefois, en 2005, les Shuswap se sont dissociés des Ktunaxa au sujet de la station de ski proposée et ont quitté le KKTC. Les Shuswap soutiennent le projet, estimant qu'on a raisonnablement tenu compte de leurs intérêts et que le projet sera bénéfique pour leur communauté, alors que les Ktunaxa disent que leurs intérêts ne peuvent être pris en compte et exigent le rejet du projet.

[15] La question du caractère adéquat de la consultation est au centre du présent pourvoi. Il est par conséquent nécessaire de relater de manière assez détaillée ce qui s'est produit à chaque étape du processus réglementaire.

A. *Première étape : PCSAVC*

[16] En 1991, Glacier Resorts a déposé une proposition officielle pour la construction d'une station de ski ouverte à l'année dans la partie supérieure de la vallée Jumbo. Le gouvernement a mené des audiences publiques sur le projet conformément à la PCSAVC, première étape du processus d'approbation réglementaire. Le prédécesseur des appelants, le KKTC, a participé aux audiences publiques tenues à l'automne 1991. À la suite d'un appel de propositions, Glacier Resorts s'est vu reconnaître la qualité de seul promoteur et a pu passer à l'étape suivante du processus réglementaire.

B. *Deuxième étape : utilisation du terrain ou CORE*

[17] En 1993 et 1994, la deuxième étape du processus réglementaire s'est amorcée. Le gouvernement a examiné l'utilisation du site conformément au processus de la CORE dans le but de produire un nouveau plan d'utilisation du terrain pour la région prévoyant expressément la construction de la station de ski. Le processus de la CORE comportait des audiences publiques auxquelles le KKTC a assisté comme observateur. En 1994, le processus s'est conclu par le dépôt d'un rapport accordant une très grande valeur au chapitre du loisir et du tourisme à la région choisie pour la station de ski proposée et recommandait que le processus d'approbation comprenne une évaluation environnementale prévue par la loi.

[18] In March 1995, the government released a summary of the CORE East Kootenay Land Use Plan and West Kootenay-Boundary Land Use Plan, identifying a ski resort development as an acceptable land use of the upper Jumbo Creek Valley. In July 1995, the government and Glacier Resorts entered into an interim agreement pursuant to the CASP, and the third step on the regulatory ladder, review under the *Environmental Assessment Act*, S.B.C. 1994, c. 35, began.

C. *Stage Three: The Environmental Assessment Process*

[19] The environmental assessment process lasted almost a decade, from 1995 to 2004. The KKTC, representing both the Ktunaxa and the Shuswap peoples, and supported by government funding, was extensively involved in the environmental assessment process for the ski resort. It was invited to participate in the technical review committee and to comment on the project report. It raised the issue of "sacred values" in the valley, which were discussed in the "First Nations Socio-Economic Assessment: Jumbo Glacier Resort Project, A Genuine Wealth Analysis", a 2003 report of consultants retained by the B.C. government's Environmental Assessment Office ("EAO").

[20] In parallel, Glacier Resorts submitted the information required to complete the environmental review under the new *Environmental Assessment Act*, S.B.C. 2002, c. 43, in a comprehensive "Project Report" in December 2003 that was accepted by the EAO in the following months.

[21] In response to this report, the KKTC submitted a document to the EAO entitled "Jumbo Glacier Resort Project: Final Comments on Measures Proposed to Address Issues Identified by the Ktunaxa Nation" stating that the Jumbo Valley area is invested with sacred values, and Glacier Resorts should be required to negotiate an Impact Management and

[18] En mars 1995, le gouvernement a publié un résumé des plans d'utilisation du terrain d'East Kootenay et de West Kootenay-Boundary préparés par la CORE, lequel indique que l'aménagement d'une station de ski constitue une utilisation acceptable du terrain de la partie supérieure de la vallée Jumbo Creek. En juillet 1995, le gouvernement et Glacier Resorts ont conclu une entente intérimaire conformément à la PCSAVC, ce qui a constitué le coup d'envoi de la troisième étape prévue par la réglementation : un examen en application de l'*Environmental Assessment Act*, S.B.C. 1994, c. 35.

C. *Troisième étape : processus d'évaluation environnementale*

[19] Le processus d'évaluation environnementale a duré presque une décennie, soit de 1995 à 2004. Le KKTC, qui représentait tant le peuple des Ktunaxa que celui des Shuswap et recevait l'aide financière du gouvernement, a participé activement au processus d'évaluation environnementale de la station de ski. Il a été invité à se joindre au comité d'examen technique et à commenter le rapport sur le projet. Il a ainsi soulevé la question des [TRADUCTION] « valeurs sacrées » associées à la vallée, lesquelles ont été examinées dans un rapport de 2003 qui a pour titre « First Nations Socio-Economic Assessment : Jumbo Glacier Resort Project, A Genuine Wealth Analysis », rédigé par des consultants auxquels a fait appel l'Environmental Assessment Office (« Bureau ») de la Colombie-Britannique.

[20] Parallèlement, Glacier Resorts a fourni en décembre 2003, dans son exhaustif [TRADUCTION] « rapport sur le projet », les renseignements nécessaires à l'évaluation environnementale prévue par la nouvelle *Environmental Assessment Act*, S.B.C. 2002, c. 43. Le Bureau a accepté ce rapport dans les mois qui ont suivi.

[21] En réponse à ce rapport, le KKTC a présenté au Bureau un document intitulé « Jumbo Glacier Resort Project : Final Comments on Measures Proposed to Address Issues Identified by the Ktunaxa Nation », qui expliquait que des valeurs sacrées étaient associées à la région de la vallée Jumbo et que Glacier Resorts devrait avoir l'obligation de

Benefits Agreement ("IMBA") to mitigate the potential impact of the ski resort. The KKTC submitted detailed comments, under protest, on the measures proposed by the EAO to address the concerns of the valley's Indigenous inhabitants.

[22] On October 4, 2004, an EAC was issued, approving the development subject to numerous conditions. Among them was a requirement that Glacier Resorts negotiate with the KKTC and attempt to conclude an IMBA before the next stage of the regulatory process. The KKTC did not seek judicial review of the conditional EAC. At this point, from the government's perspective, the consultation was proceeding smoothly toward mutually acceptable accommodation.

D. *Stage Four: Development of a Resort Master Plan*

[23] The regulatory process moved to the fourth stage — the development of a Master Plan and an MDA for the ski resort.

[24] Glacier Resorts submitted a revised draft Master Plan in 2005. The process of reviewing this plan took place from December 2005 to July 2007.

[25] At the outset of the review process, the government offered to enter into additional consultations with the Ktunaxa Nation Council, which was formed following the withdrawal of the Shuswap from the KKTC. In June 2006, a consultant retained by the Ktunaxa and funded by the government prepared a "Gap Analysis" to identify what the Ktunaxa considered to be the outstanding issues for discussion. The Gap Analysis highlighted the need for further information to facilitate discussion on: (1) contemporary land and resource use by the Ktunaxa of the Jumbo Valley; (2) the effectiveness of proposed mitigation measures to reduce disturbance, displacement and mortality impacts to key wildlife populations from road traffic on the access road; and (3) project-induced socio-economic effects to the regional economy, including land use and cost of living that might affect Ktunaxa well-being. One of the

négocier une entente sur la gestion des répercussions et les avantages (« EGRA ») pour atténuer les éventuelles répercussions de la station de ski. Le KKTC a présenté sous toutes réserves des commentaires détaillés au sujet des mesures proposées par le Bureau pour répondre aux préoccupations des habitants autochtones de la vallée.

[22] Le 4 octobre 2004, un CÉE approuvant l'aménagement a été délivré sous réserve de nombreuses conditions, dont celle que Glacier Resorts négocie avec le KKTC et tente de conclure une EGRA avant la prochaine étape du processus réglementaire. Le KKTC n'a pas sollicité le contrôle judiciaire de ce CÉE conditionnel. Le gouvernement avait alors l'impression que la consultation se dirigeait sans heurts vers un compromis acceptable pour tous.

D. *Quatrième étape : élaboration d'un plan directeur pour la station de ski*

[23] Le projet est passé ainsi à la quatrième étape du processus réglementaire : l'élaboration d'un plan directeur et d'un ACA pour la station de ski.

[24] Glacier Resorts a présenté une ébauche révisée du plan directeur en 2005. La révision de ce plan s'est déroulée de décembre 2005 à juillet 2007.

[25] Au début de la révision, le gouvernement a offert de poursuivre les consultations avec le Ktunaxa Nation Council, qui avait été constitué après que les Shuswap se soient retirés du KKTC. En juin 2006, un consultant retenu par les Ktunaxa mais payé par le gouvernement a préparé une [TRADUCTION] « analyse de l'écart » pour faire ressortir ce que les Ktunaxa considéraient être les questions non réglées devant faire l'objet de discussions. Cette analyse mettait en lumière le besoin d'obtenir des renseignements additionnels pour faciliter les discussions sur les enjeux suivants : (1) l'utilisation actuelle du terrain et des ressources par les Ktunaxa de la vallée Jumbo; (2) l'efficacité des mesures d'atténuation proposées pour réduire les perturbations, les déplacements et la mortalité des principales espèces d'animaux sauvages causés par le trafic sur la route d'accès; (3) les effets socio-économiques du projet sur l'économie

34 issues identified in the Gap Analysis was that the Jumbo Valley is an "area of cultural significance and has sacred values": chambers judge's reasons, 2014 BCSC 568, 306 C.R.R. (2d) 211, at para. 69. In this regard, the analysis stated that the "cultural impacts remain unassessed" (*ibid.*).

[26] The Ktunaxa met with the Minister and they agreed on further consultation built around the Gap Analysis. As part of this process, the cultural significance/sacred values issue was discussed at the "Land Issues" workshop held on October 12 and 13, 2006 in Cranbrook, B.C. Following the workshop, the Ktunaxa consultant circulated a document entitled "Working Outline: Ktunaxa-British Columbia Accommodation", which identified the cultural and sacred significance of the valley as an issue to be addressed, and suggested a conceptual framework for accommodating the Ktunaxa land use concerns through: (a) a fee simple land transfer to the Ktunaxa; (b) the establishment of a land reserve; and (c) the establishment of a conservancy area in proximity to the ski-run site. The land use issues workshop was followed by workshops in November and December 2006 and January 2007. These addressed grizzly bear, other wildlife, and residual issues.

[27] In November 2006, prospects for agreement on accommodation looked bright. The Minister received a copy of a letter where the Ktunaxa informed Glacier Resorts that they had made "considerable progress in setting up a process for the negotiation of an [IMBA]": chambers judge's reasons, at para. 76. Only two issues appeared to stand in the way of final agreement — "funding" and "the outstanding issue of unpaid monies" (*ibid.*). In April 2007, Glacier Resorts wrote the Minister that it believed it had reached an "agreement in principle" with the Ktunaxa (*ibid.*). On July 12, the Minister approved a Master Plan, which outlined the nature,

régionale, notamment en ce qui a trait à l'utilisation du terrain et au coût de la vie, qui pourraient avoir une incidence sur le bien-être des Ktunaxa. L'une des 34 questions soulevées dans l'analyse concernait le fait que la vallée Jumbo est une [TRADUCTION] « région d'importance culturelle et porteuse de valeurs sacrées » : motifs du juge en chambre, 2014 BCSC 568, 306 C.R.R. (2d) 211, par. 69. À cet égard, l'analyse mentionnait que les « conséquences culturelles ne sont toujours pas évaluées » (*ibid.*).

[26] Les Ktunaxa ont rencontré le Ministre et accepté de continuer de participer à des consultations additionnelles sur le fondement de l'analyse de l'écart. Dans le cadre du processus, les parties ont discuté de la question de l'importance culturelle et de la valeur sacrée des lieux en cause dans l'atelier [TRADUCTION] « Enjeux fonciers » tenu les 12 et 13 octobre 2006 à Cranbrook, en Colombie-Britannique. Après l'atelier, le consultant des Ktunaxa a fait circuler un document intitulé « Working Outline : Ktunaxa-British Columbia Accommodation », qui indiquait que la question de l'importance culturelle et sacrée de la vallée devait être examinée et proposait, pour répondre aux préoccupations des Ktunaxa quant à l'utilisation du terrain, un cadre conceptuel consistant en a) un transfert de terres en fief simple aux Ktunaxa, b) l'établissement d'une réserve foncière et c) la création d'une aire de conservation à proximité des pistes de ski. L'atelier sur les enjeux fonciers a été suivi d'autres ateliers en novembre et décembre 2006 et en janvier 2007. Il a alors été question des grizzlys, d'autres animaux sauvages et d'enjeux résiduels.

[27] En novembre 2006, les perspectives d'accord sur un accommodement semblaient bonnes. Le Ministre a reçu une copie d'une lettre dans laquelle les Ktunaxa informaient Glacier Resorts qu'ils estimaient avoir réalisé [TRADUCTION] « des progrès considérables dans l'établissement d'une marche à suivre pour la négociation d'une [EGRA] » : motifs du juge en chambre, par. 76. Il ne semblait rester que deux questions à régler pour parvenir à un accord définitif : « le financement » et « la question non réglée des sommes d'argent non versées » (*ibid.*). En avril 2007, Glacier Resorts a écrit au Ministre qu'elle estimait être parvenue à un « accord de principe »

scope and pace of the proposed development, identified land tenure requirements, and incorporated recommendations arising from consultation with Glacier Resorts, the public and First Nations and from the environmental review process.

[28] The Minister advised the Ktunaxa that Master Plan approval did not preclude additional mitigation measures based on ongoing consultation. In the months following the approval, the discussion turned to economic issues. The Minister made an accommodation proposal to the Ktunaxa in December 2007, which included $650,000 in economic benefits to be taken in cash or Crown land, plus nine non-financial accommodations. In February 2008, the Ktunaxa rejected the proposed accommodation on the basis that (1) the financial component was "grossly insufficient" and (2) it was inappropriate for the Minister to provide identical financial accommodation to the Shuswap, given the Ktunaxa's "far greater history in the Jumbo area": chambers judge's reasons, at para. 82. The rejection letter did not mention the sacred nature of the Jumbo Valley or Grizzly Bear Spirit.

[29] The Minister came back in September 2008 with a second offer of accommodation to the Ktunaxa, in the form of revenue sharing in an Economic and Community Development Agreement. The Ktunaxa rejected this proposal in December. While the negotiations suggested that an agreement could be reached regarding the construction of the ski resort project, the Ktunaxa rejected this proposal on the basis that the Jumbo Valley is a "place unique and sacred" to them: chambers judge's reasons, at para. 83. Again, there was no special mention of Grizzly Bear Spirit.

[30] Discussions continued. In February 2009, the Ktunaxa gave formal notice to the Minister that they wished to enter into a process to negotiate an

avec les Ktunaxa (*ibid.*). Le 12 juillet, le Ministre a approuvé un plan directeur, qui décrivait la nature, l'étendue et le rythme de réalisation de l'aménagement proposé, énonçait les exigences relatives au mode de tenure et formulait des recommandations découlant du processus d'évaluation environnementale et des consultations menées auprès de Glacier Resorts, du public et des Premières Nations.

[28] Le Ministre a avisé les Ktunaxa que l'approbation du plan directeur n'empêchait pas la prise de mesures d'atténuation additionnelles découlant de la poursuite de la consultation. Dans les mois qui ont suivi l'approbation, la discussion s'est orientée sur des enjeux économiques. Le Ministre a proposé en décembre 2007 aux Ktunaxa un accommodement qui comprenait des avantages économiques de 650 000 dollars en argent ou terres publiques ainsi que neuf mesures d'accommodement non pécuniaires. En février 2008, les Ktunaxa ont rejeté la proposition d'accommodement au motif (1) que le volet financier était [TRADUCTION] « nettement insuffisant » et (2) qu'il était inapproprié de la part du Ministre de fournir les mêmes mesures d'accommodement financières aux Shuswap et aux Ktunaxa étant donné que « les liens historiques [de ces derniers] avec la région Jumbo étaient nettement plus forts » : motifs du juge en chambre, par. 82. La lettre de rejet ne mentionnait ni la nature sacrée de la vallée Jumbo ni l'Esprit de l'Ours Grizzly.

[29] En septembre 2008, le Ministre a fait une seconde offre d'accommodement aux Ktunaxa, à savoir un partage de revenus dans le cadre d'une entente de développement économique et communautaire. Les Ktunaxa l'ont rejetée en décembre. Bien que les négociations donnaient à penser qu'un accord sur le projet de construction de la station de ski pourrait être conclu, les Ktunaxa ont rejeté la proposition au motif que la vallée Jumbo était un [TRADUCTION] « lieu unique et sacré » pour eux : motifs du juge en chambre, par. 83. Encore une fois, ils n'ont pas expressément mentionné l'Esprit de l'Ours Grizzly.

[30] Les discussions se sont donc poursuivies. En février 2009, les Ktunaxa ont formellement avisé le Ministre qu'ils souhaitaient amorcer la négociation

accommodation and benefits agreement. In April, the Minister accepted and offered additional capacity funding for the process. In May, the Ktunaxa provided the Minister with a list of outstanding issues and possible accommodation measures to be discussed, including land transfers, land reserves, a wildlife conservancy, development-free buffer zones beside the access road, access rights in the controlled recreation area, a stewardship framework for economic compensation, revenue sharing, ongoing supervision of environmental commitments, and other measures. The Ktunaxa did not place the sacred nature of the Jumbo Valley on the list of outstanding issues.

[31] On June 3, 2009, the Minister advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were "primarily interest-based rather than legally driven by asserted Aboriginal rights and title claims": chambers judge's reasons, at para. 86. Accordingly, he was of the view that approval for the resort could be given. The Minister expressed the intention to continue negotiating a benefits agreement with the Ktunaxa.

[32] At this point, the big issues appeared to have been resolved. In deference to the Ktunaxa claim, the MDA changed the scope of the proposed development and added new protections for Ktunaxa interests. The size of the controlled recreational area was reduced by approximately 60% and the total resort area was reduced to approximately 104 hectares. Protections for Ktunaxa access and activities were put in place, and environmental protections were established.

[33] To accommodate the Ktunaxa's spiritual concerns, changes had been proposed to provide special protection of grizzly bear habitat:

- The lower Jumbo Creek area was removed from the recreation area because it was perceived as having greater visitation potential from grizzly bears;

d'une entente sur des mesures d'accommodement et des avantages. En avril, le Ministre a accepté leur demande et leur a alloué de nouveaux fonds pour la négociation. Le mois suivant, les Ktunaxa ont remis au Ministre une liste de questions non réglées et de mesures d'accommodement possibles dont ils souhaitaient discuter : transferts de terres, réserves foncières, conservation de la faune, zones tampons non aménagées à côté de la route d'accès, droits d'accès à la zone de loisir contrôlée, cadre de gestion pour l'indemnisation pécuniaire, partage des revenus, supervision continue des engagements environnementaux, etc. Les Ktunaxa n'ont pas inscrit la nature sacrée de la vallée Jumbo dans leur liste des questions non réglées.

[31] Le 3 juin 2009, le Ministre a avisé les Ktunaxa qu'à son avis, il y avait eu un processus de consultation raisonnable et que la plupart des questions non réglées avaient [TRADUCTION] « essentiellement trait à des intérêts plutôt qu'à des revendications de droits et de titre ancestraux » : motifs du juge en chambre, par. 86. Par conséquent, il estimait possible de donner l'aval au projet, mais a exprimé l'intention de continuer à négocier avec les Ktunaxa une entente sur les avantages.

[32] À ce stade, les grandes questions semblaient avoir été réglées. Pour respecter la demande des Ktunaxa, l'ACA a modifié l'étendue de l'aménagement proposé et ajouté de nouvelles protections à l'égard des intérêts des Ktunaxa. La taille de la zone de loisir contrôlée a été réduite d'environ 60 p. 100 et l'aire totale de la station de ski, à environ 104 hectares. Par ailleurs, des mesures ont été prévues pour protéger l'accès et les activités des Ktunaxa ainsi que l'environnement.

[33] Pour répondre aux préoccupations de nature spirituelle des Ktunaxa, on a proposé des changements pour que l'habitat du grizzly bénéficie d'une protection spéciale :

- Le secteur inférieur de Jumbo Creek a été retiré de la zone de loisir parce qu'il était perçu comme davantage susceptible d'être fréquenté par les grizzlys.

- Ski lifts were removed on the west side of the valley, where impact to grizzly bear habitat was expected to be greatest; and

- The province committed to pursuing a Wildlife Management Area to address potential impacts in relation to grizzly bears and Aboriginal claims relating to the spiritual value of the valley.

[34] On June 8, 2009, five days after the Minister had concluded that all major issues had been resolved, the Ktunaxa responded with a table of outstanding concerns. They did not list the sacred nature of the area or a threat to the grizzly bear population among their concerns.

[35] At meetings on June 9 and 10, however, the Ktunaxa took a very different and uncompromising position regarding the spiritual value of Qat'muk. They asserted that the consultation process was deficient, not because interest-based issues like money and land reserves had not been concluded, but because the process had not properly considered information that the Jumbo Valley was a sacred site. They advised the Minister that only certain members of the community, knowledge keepers, possessed information about these values. Elder Chris Luke Sr. was better placed to speak to the issue. The Minister agreed to meet Mr. Luke on June 22, 2009 but the meeting did not proceed on that date. The Minister agreed to extend the consultation process with the Ktunaxa until at least December 2009 to specifically address the issue of the sacred nature of the Jumbo Valley.

[36] After ongoing efforts to arrange a meeting about sacred values, the Minister was finally able to meet with the Ktunaxa and Mr. Luke on September 19, 2009 in Cranbrook Mr. Luke, through translators, advised the Minister that Qat'muk was "a life and death matter", that "Jumbo is one of the major spiritual places", and that to say the sacredness of the area for the Ktunaxa was important would be

- On a retiré les remonte-pentes du côté ouest de la vallée, car on pensait que les répercussions sur l'habitat du grizzly y seraient plus importantes.

- La province s'est engagée à mettre sur pied une aire de gestion de la faune pour contrer les répercussions possibles du projet sur les grizzlys et les revendications autochtones touchant la valeur spirituelle de la vallée.

[34] Le 8 juin 2009, soit cinq jours après que le Ministre eut conclu que toutes les questions importantes avaient été réglées, les Ktunaxa lui ont présenté un tableau des questions non résolues, dans lequel ils n'ont pas mentionné la nature sacrée de la région ni les menaces pour la population de grizzlys.

[35] Aux rencontres tenues les 9 et 10 juin, les Ktunaxa ont toutefois adopté une position très différente et inflexible concernant la valeur spirituelle du Qat'muk. Ils ont affirmé que le processus de consultation était déficient, non pas en raison de questions ayant trait à des intérêts, comme l'indemnisation pécuniaire et les réserves foncières, mais parce qu'on n'avait pas adéquatement tenu compte dans le processus de renseignements selon lesquels la vallée Jumbo est un lieu sacré. Ils ont expliqué au Ministre que seuls certains membres de la collectivité, les gardiens du savoir, détenaient de l'information sur ces valeurs. L'aîné Chris Luke père était le mieux placé pour parler de cet enjeu. Le Ministre a accepté de le rencontrer le 22 juin 2009, mais la réunion n'a pas eu lieu ce jour-là. Le Ministre a accepté de prolonger la consultation auprès des Ktunaxa jusqu'au moins décembre 2009 pour traiter tout particulièrement de l'enjeu de la nature sacrée de la vallée Jumbo.

[36] Après avoir déployé des efforts constants en vue d'organiser une rencontre pour discuter des valeurs sacrées, le Ministre a finalement réussi à rencontrer les Ktunaxa et M. Luke le 19 septembre 2009 à Cranbrook. S'exprimant par l'entremise d'interprètes, M. Luke a informé le Ministre que la question du Qat'muk en était une [TRADUCTION] « de vie et de mort », que « Jumbo [était] l'un des

an understatement: chambers judge's reasons, at para. 94. He stated that any movement of earth and the construction of permanent structures would desecrate the area and destroy the valley's spiritual value. The Ktunaxa at the meeting told the Minister that there was no middle ground regarding the proposed resort. Simply put, no accommodation was possible. The Ktunaxa confirmed this position in a second meeting in Creston, B.C., on December 7, 2009. It emerged that the revelation that led to the position that permanent structures would desecrate and irrevocably devalue the sacred site came to Mr. Luke in 2004, but that health problems and secrecy concerns had prevented him from disclosing the revelation to others until 2009.

[37] The Minister persisted. After further study of the Ktunaxa's spiritual claims, on June 11, 2010 he sent the Ktunaxa a 71-page draft "Consultation/Accommodation Summary" that included seven pages devoted to describing the consultation and accommodation specifically related to the Ktunaxa's assertions regarding the sacred nature of the Jumbo Valley and invited the Ktunaxa's comments. He met with the Ktunaxa on July 8, 2010 and revisions were made to the document.

[38] The Ktunaxa responded with a 40-page document that devoted the first page and a half to sacred values. A few months later, in November 2010, the Ktunaxa issued the "Qat'muk Declaration" (Schedule "E" of 2014 BCSC 568, at pp. 115-16 (CanLII)) — a unilateral declaration of rights based on "pre-existing sovereignty". The Qat'muk Declaration mapped an area in which the Ktunaxa would not permit development. No disturbance or alteration of the ground would be permitted within an area identified as the "refuge area". Construction of buildings with permanent foundations or permanent human habitation was forbidden within the refuge area and

principaux lieux spirituels » de leur nation, et que dire que la nature sacrée du lieu est importante pour les Ktunaxa serait un euphémisme : motifs du juge en chambre, par. 94. Il a déclaré que tout déplacement de la terre ou toute construction d'installations permanentes enlèverait à la région son caractère sacré et détruirait la valeur spirituelle de la vallée. À la réunion, les Ktunaxa ont dit au Ministre qu'il n'y avait aucune solution intermédiaire au regard du projet. En termes simples, aucun accommodement n'était possible. Les Ktunaxa ont confirmé cette position lors d'une seconde rencontre le 7 décembre 2009 à Creston, en Colombie-Britannique. Il en est ressorti que M. Luke avait eu en 2004 la révélation qui a mené à la position que des installations permanentes enlèveraient au site son caractère sacré et le dévalueraient de façon irrévocable, mais que des problèmes de santé et des préoccupations liées au caractère secret de cette révélation l'avaient empêché d'en faire part à autrui avant 2009.

[37] Le Ministre a persisté. Après examen plus approfondi des revendications à caractère spirituel des Ktunaxa, il a envoyé à ces derniers, le 11 juin 2010, un document préliminaire de 71 pages, « Consultation/Accommodation Summary » (Résumé des consultations et des mesures d'accommodement). Sept pages étaient consacrées à la description des consultations et des mesures d'accommodement qui avaient directement trait aux affirmations des Ktunaxa quant à la nature sacrée de la vallée Jumbo. On invitait par ailleurs les Ktunaxa à présenter leurs observations. Il a rencontré les Ktunaxa le 8 juillet 2010 et des modifications ont été apportées au document.

[38] La réponse des Ktunaxa est contenue dans un document de 40 pages dont la première page et demie portait sur les valeurs sacrées. Quelques mois plus tard, en novembre 2010, les Ktunaxa ont publié une déclaration de droits unilatérale sur le Qat'muk, la « Qat'muk Declaration » (déclaration sur le Qat'muk) (annexe « E » de la décision 2014 BCSC 568, p. 115-116 (CanLII)), fondée sur leur [TRADUCTION] « souveraineté préexistante ». Ce document dressait la carte d'une région où les Ktunaxa empêcheraient tout aménagement. Aucune perturbation ou altération ne serait permise dans la région identifiée sous le nom d'« aire de refuge ». Il était

the access road and buffer area. This amounted to saying that the resort could not proceed, as the proposed resort was partially within the refuge area and its access road ran through the buffer area.

[39] Consistent with the Qat'muk Declaration, the Ktunaxa now took the position that negotiations were over. The only point of further discussion was to make decision makers understand why the proposed resort could not proceed. The Minister continued to explore potential mitigation and accommodation measures through additional consultations, without success. Negotiations were at an end.

[40] On March 20, 2012, the Minister signed the MDA with Glacier Resorts. The MDA contained a number of measures responding to concerns raised by the Ktunaxa during the consultations: chambers judge's reasons, at paras. 236-39.

[41] In summary, the Ktunaxa played an active part in all phases of the lengthy regulatory process leading to the approval of the resort project. As a result of the consultation that occurred during the regulation process, the resort plan was significantly reduced in scope; safeguards for the grizzly bear population and the spiritual interests of the Ktunaxa were put in place; and economic and interest-based issues, including compensation, were discussed. Areas of significant frequentation by grizzly bears were removed from the project. Progress was made and agreement seemed imminent.

[42] This trajectory toward accommodation ended in 2010, with the issuance of the Qat'muk Declaration. The Ktunaxa said at the September 2009 meeting that their spiritual concerns could not be accommodated. The 2010 Qat'muk Declaration unequivocally changed the process from a search for

interdit de construire des immeubles avec des fondations permanentes ou des habitations permanentes pour les humains dans l'aire de refuge ainsi qu'à l'intérieur de la zone tampon et sur la route d'accès, ce qui revenait à dire que le projet de station de ski ne pouvait pas aller de l'avant puisqu'il était partiellement situé dans l'aire de refuge et que sa route d'accès traversait la zone tampon.

[39] Dans la même veine que la déclaration sur le Qat'muk, les Ktunaxa ont désormais soutenu que les négociations étaient terminées. Les discussions pouvaient uniquement se poursuivre pour faire comprendre aux décideurs la raison pour laquelle le projet de station de ski ne pouvait pas aller de l'avant. Le Ministre a continué à tenter de trouver des mesures d'atténuation et d'accommodement en procédant à des consultations additionnelles, mais sans succès. Les négociations étaient terminées.

[40] Le 20 mars 2012, le Ministre a signé l'ACA avec Glacier Resorts. Le document prévoyait un certain nombre de mesures pour répondre aux préoccupations soulevées par les Ktunaxa lors des consultations : motifs du juge en chambre, par. 236-239.

[41] En résumé, les Ktunaxa ont joué un rôle actif à toutes les phases du long processus réglementaire qui a mené à l'approbation du projet de station de ski. Par suite de la consultation qui a eu lieu au cours du processus réglementaire, l'étendue du projet a été grandement réduite, des mesures ont été prises pour protéger les grizzlys et les intérêts spirituels des Ktunaxa, et des discussions ont été engagées sur des enjeux économiques et autres intérêts, notamment en matière d'indemnisation. Les zones fréquentées abondamment par les grizzlys ont été retirées du projet. Enfin, des progrès ont été réalisés et la conclusion d'un accord semblait imminente.

[42] En 2010, la déclaration sur le Qat'muk a mis fin à cette perspective d'entente sur d'éventuels accommodements. Les Ktunaxa ont dit à la réunion de septembre 2009 qu'il n'était pas possible de répondre à leurs préoccupations d'ordre spirituel. La déclaration sur le Qat'muk de 2010 a changé sans

accommodation to rejection of the entire project; from a search for protection of spiritual values inhering in the valley and the grizzly bear population, to the position that any permanent structures on the proposed resort site would drive out Grizzly Bear Spirit and destroy the foundation of Ktunaxa spiritual practice.

[43] The stance taken by the Ktunaxa in September 2009 and again in late 2010 with the issuance of the Qat'muk Declaration amounted, in effect, to a different and uncompromising claim regarding suitable accommodation. The claim now was not a claim to generalized spiritual values that could be accommodated by measures like land reserves, economic payments and environmental protections. Instead, it was an absolute claim to a sacred site, which must be preserved and protected from permanent human habitation. To identify this claim — which first arose in September 2009 and was affirmed in December 2009 and again by the Qat'muk Declaration — we refer to it below as the "Late-2009 Claim". There was no way the proposed resort could be reconciled with this claim. The Minister made efforts to continue consultation, but, not surprisingly, they failed. In 2011, the Minister concluded that sufficient consultation had occurred and approved the resort development.

III. Decisional History

A. *The Minister's Rationale*

[44] On March 20, 2012, the Minister approved the resort MDA and issued the Rationale for his decision: Schedule "F" of 2014 BCSC 568, at pp. 117-24 (CanLII) ("Rationale"). The Rationale in turn referenced the detailed Consultation/Accommodation Summary, which was finalized in March 2011: see R.R. (Minister), at pp. 66-154.

équivoque le processus : d'une recherche d'accommodements acceptables, on est passé à un rejet de l'ensemble du projet, et d'une recherche de protection des valeurs spirituelles inhérentes à la vallée et de la population de grizzlys, on en est venu à la position que toute installation permanente sur l'emplacement proposé de la station de ski chasserait l'Esprit de l'Ours Grizzly et détruirait le fondement de la pratique spirituelle des Ktunaxa.

[43] La position adoptée par les Ktunaxa en septembre 2009 et de nouveau à la fin de 2010 avec la publication de la déclaration sur le Qat'muk équivalait en fait à une revendication différente et inflexible au sujet d'un accommodement convenable. La revendication ne portait alors plus sur les valeurs spirituelles répandues auxquelles il serait possible de satisfaire par la prise de mesures comme la création de réserves foncières, le versement de sommes d'argent et la protection de l'environnement. Il s'agissait désormais plutôt d'une revendication absolue à l'égard d'un lieu sacré qui devait être préservé et protégé de l'habitation humaine permanente. Nous l'appelons ci-dessous « revendication de la fin de 2009 », laquelle a été formulée la première fois en septembre 2009 puis de nouveau en décembre 2009 ainsi que dans la déclaration sur le Qat'muk. Il n'y avait aucun moyen de concilier cette revendication avec le projet de station de ski. Le Ministre a essayé de poursuivre les consultations mais, sans surprise, celles-ci ont échoué. En 2011, le Ministre a conclu qu'il y avait eu des consultations suffisantes et a approuvé l'aménagement de la station de ski.

III. Historique des décisions

A. *Les motifs du Ministre*

[44] Le 20 mars 2012, le Ministre a approuvé l'ACA et rendu les motifs de sa décision (annexe « F » de la décision 2014 BCSC 568, p. 117-124 (CanLII) (« Motifs »)), lesquels renvoyaient au détaillé Résumé des consultations et des mesures d'accommodement, qui a été achevé en mars 2011 (voir le d.i. (Ministre), p. 66-154).

[45] The Minister stated that while the Aboriginal claims to the area remained to be proven, he was required to give them due respect and recognition, and consult with the groups with a view to accommodating their interests. The Shuswap had concluded that sufficient consultation had occurred, but the Ktunaxa had not.

[46] The Minister stated that he recognized the genuinely sacred values at stake for the Ktunaxa leadership and knowledge keepers. He stated that it was not clear whether the Ktunaxa spiritual claims would be found to be a constitutionally protected right or whether the claimed right could be reconciled with other claimed Aboriginal rights and Ktunaxa access to the valley for a variety of traditional and modern uses, including hunting, gathering and fishing. He viewed the claim as weak, due to lack of indication that the claimed right was part of an Aboriginal tradition, practice or activity integral to the Ktunaxa culture, and the fact that details of the spiritual interest were not shared with or known to the general Ktunaxa population. (The latter point must refer to the Late-2009 Claim, since the more general spiritual claims that had been advanced from the start of the process were broadly known and shared.)

[47] The Minister reviewed the extensive record of consultation with the Ktunaxa over the past two decades, and noted the many accommodations and adjustments that had been made in an effort to accommodate their interests. These included a 60% reduction in the resort development area, on-site environmental monitors, continued use of the area for traditional practices, and measures designed to reduce the impact of the development on grizzly bears. The lower Jumbo Creek area and a ski lift on the west side of the valley had been removed from the development because of perceived greater visitation by grizzly bears in these areas. A wildlife management area had been established to address potential impacts in relation to grizzly bears and the

[45] Le Ministre a déclaré que le bien-fondé des revendications des Autochtones à l'égard de la région devait encore être prouvé, mais qu'il devait malgré tout faire preuve de respect à l'égard de ces revendications et reconnaître leur existence et qu'il devait consulter les groupes dans le but de tenir compte de leurs intérêts. Les Shuswap avaient conclu au caractère suffisant de la consultation, mais non les Ktunaxa.

[46] Le Ministre a déclaré qu'il reconnaissait les valeurs véritablement sacrées en jeu pour les dirigeants des Ktunaxa et les gardiens du savoir. Il a ajouté qu'on ne savait pas si les revendications de nature spirituelle des Ktunaxa seraient considérées comme un droit protégé par la Constitution ou si le droit revendiqué pourrait être concilié avec d'autres droits revendiqués par les Autochtones et l'accès des Ktunaxa à la vallée pour diverses activités traditionnelles et modernes, notamment la chasse, la cueillette et la pêche. À son avis, la revendication était faible car, d'une part, peu d'indices laissaient croire que le droit revendiqué faisait partie d'une tradition, pratique ou activité ancestrale essentielle à la culture des Ktunaxa et, d'autre part, en raison du fait que les détails de l'intérêt en question n'étaient ni communiqués à la population générale des Ktunaxa ni connus de cette dernière. (Le dernier point renvoie à la revendication de la fin de 2009, étant donné que les revendications plus générales de nature spirituelle invoquées depuis le début du processus étaient notoires.)

[47] Le Ministre, qui a examiné le volumineux dossier des consultations menées auprès des Ktunaxa au cours des deux dernières décennies, a indiqué qu'un grand nombre de mesures d'accommodement et d'ajustements avaient été consentis pour tenter de répondre aux intérêts de cette nation. On avait par exemple réduit de 60 p. 100 la zone d'aménagement réservée à la station de ski, dépêché sur place des inspecteurs de l'environnement, assuré l'utilisation continue de la zone pour des pratiques traditionnelles et pris des mesures pour atténuer les répercussions de l'aménagement sur les grizzlys. On avait retiré du projet le secteur inférieur de Jumbo Creek et un remonte-pente du côté ouest de la vallée parce qu'on avait l'impression que le grizzly fréquentait

spiritual value of the valley. And the province committed to continue to proactively manage the grizzly bear population through existing legislation and policies. The Minister stated in his Rationale:

> For these reasons I have concluded that, on balance, the commitments and strategies in place are reasonable and minimize the potential impact to the environment and specifically, to Grizzly bear habitat. [p. 124]

[48] The Minister concluded that overall, consultation had been at the "deep end of the consultation spectrum" (p. 123). This, combined with the accommodation measures put in place, was adequate "in respect of those rights for which the strength of claim is strong, and for which potential impacts of the project could be significant" (*ibid.*). The extensive accommodation measures relating to the continued ability of the Ktunaxa to continue to exercise their Aboriginal rights, balanced against the societal benefits of the project ($900 million in capital investment and 750 to 800 permanent, direct jobs), were reasonable.

[49] Noting once again the extensive consultation and assessment processes that had taken place, the Minister stated that he had decided to approve the MDA for the Jumbo Glacier Resort.

B. *The Chambers Judge's Reasons*

[50] The Ktunaxa sought judicial review of the Minister's decision. They filed a petition, claiming the decision violated their freedom of religion guaranteed by s. 2(*a*) of the *Charter*, and breached the Crown's duty to consult and accommodate their Aboriginal rights under s. 35 of the *Constitution Act, 1982*.

davantage ces secteurs. Une aire de gestion de la faune avait été établie pour atténuer les éventuelles répercussions du projet sur les grizzlys et la valeur spirituelle de la vallée. Par ailleurs, la province s'était engagée à poursuivre la gestion proactive de la population de grizzlys grâce à la législation et aux politiques existantes. Le Ministre a déclaré ce qui suit dans ses Motifs :

> [TRADUCTION] Tout bien considéré, j'ai conclu pour ces raisons que les engagements et stratégies en place sont raisonnables et minimisent les éventuelles répercussions sur l'environnement et, en particulier, sur l'habitat du grizzly. [p. 124]

[48] Le Ministre a conclu que, dans l'ensemble, la consultation s'était rendue [TRADUCTION] « à l'extrémité supérieure du continuum de consultation » (p. 123). Si l'on tient compte en outre des mesures d'accommodement prises, la consultation était adéquate « à l'égard des droits pour lesquels il existait une revendication solide, et pour lesquels les conséquences du projet pourraient être importantes » (*ibid.*). Il a jugé raisonnables les mesures importantes d'accommodement prises pour permettre aux Ktunaxa de continuer à exercer leurs droits ancestraux, par rapport aux avantages du projet pour la collectivité (investissements de 900 millions de dollars et entre 750 et 800 emplois directs et permanents).

[49] Rappelant les vastes consultations et processus d'évaluation qui avaient eu lieu, le Ministre a affirmé avoir décidé d'approuver l'ACA pour la station de ski Jumbo Glacier.

B. *Les motifs du juge en chambre*

[50] Les Ktunaxa ont sollicité le contrôle judiciaire de la décision du Ministre. Ils ont déposé une requête dans laquelle ils faisaient valoir que la décision portait atteinte à leur liberté de religion garantie par l'al. 2*a*) de la *Charte* et ne respectait pas l'obligation de la Couronne de les consulter et de tenir compte des droits ancestraux qui leur sont reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*.

[51] The chambers judge, Savage J. (as he then was), dismissed the petition. On the *Charter* claim, he held that s. 2(*a*) protects against state coercion or constraint on individual conduct, but does not encompass "subjective loss of meaning" to a religion, without associated coercion or constraint on conduct (para. 299). He therefore rejected the claim that the state had a duty under s. 2(*a*) to stop the development because the Ktunaxa believe it would undermine their religious beliefs and practices.

[52] The chambers judge went on to say that if he were wrong in this conclusion about the scope of s. 2(*a*), the Minister's actions and accommodations represented a reasonable balancing of the s. 2(*a*) value and the statutory objectives, and thus did not unreasonably trench on freedom of religion.

[53] On the issue of consultation, the chambers judge found that the consultation process undertaken by the Minister was reasonable and appropriate, and that the Minister's proposed accommodations fell within a range of reasonable responses which upheld the honour of the Crown and satisfied the Crown's duty to consult and accommodate under s. 35 of the *Constitution Act, 1982*.

C. *The Court of Appeal*

[54] The Court of Appeal dismissed the appeal: 2015 BCCA 352, 387 D.L.R. (4th) 10.

[55] The Court of Appeal held that the Minister's decision did not violate the Ktunaxa's right to freedom of religion under s. 2(*a*) of the *Charter*. The chambers judge's view that s. 2(*a*) protected only against state coercion or constraint on individual conduct was too narrow; s. 2(*a*) freedom implies the vitality of a religious community as a whole. The proper test was whether "the subjective loss of meaning more than trivially or substantially interfere[d] with the *communal dimension* of the s. 2(a) right

[51] Le juge en chambre, le juge Savage (maintenant juge à la Cour d'appel de la Colombie-Britannique), a rejeté la requête. Pour ce qui est de la revendication fondée sur la *Charte*, il a jugé que l'al. 2*a*) protège l'individu contre la coercition ou contrainte exercée par l'État, mais ne vise pas une [TRADUCTION] « perte subjective de sens » d'une religion, en l'absence de la coercition ou contrainte associée à la conduite (par. 299). Il a par conséquent rejeté l'argument des Ktunaxa selon lequel l'État était tenu par l'al. 2*a*) de mettre un terme au projet parce qu'ils croyaient qu'il nuirait à leurs croyances et pratiques religieuses.

[52] Le juge en chambre a ajouté que si sa conclusion au sujet de la portée de l'al. 2*a*) était erronée, il y avait un équilibre raisonnable entre, d'une part, les actes du Ministre et les mesures d'accommodement qu'il a prises et, d'autre part, les valeurs sous-jacentes à l'al. 2*a*) et les objectifs de cette disposition, et qu'il n'était par conséquent pas porté atteinte de façon déraisonnable à la liberté de religion.

[53] Sur la question de la consultation, le juge en chambre a conclu que le processus de consultation suivi par le Ministre était raisonnable et approprié et que les mesures d'accommodement proposées par ce dernier faisaient partie des réponses raisonnables de nature à préserver l'honneur de la Couronne et respectaient l'obligation de la Couronne en matière de consultation et d'accommodement découlant de l'art. 35 de la *Loi constitutionnelle de 1982*.

C. *La Cour d'appel*

[54] La Cour d'appel a rejeté l'appel : 2015 BCCA 352, 387 D.L.R. (4th) 10.

[55] Selon la Cour d'appel, la décision du Ministre ne portait pas atteinte au droit à la liberté de religion garanti aux Ktunaxa par l'al. 2*a*) de la *Charte*. Elle a par ailleurs trouvé trop restrictive l'opinion du juge en chambre selon laquelle l'al. 2*a*) n'accordait une protection qu'à l'égard de la coercition ou contrainte exercée par l'État à l'égard d'une conduite individuelle, estimant que la liberté protégée à l'al. 2*a*) implique la vitalité d'une communauté religieuse dans son ensemble. Le bon test

by diminishing the vitality of the Ktunaxa religious community through a disruption of the 'deep linkages' between the asserted religious belief and its manifestation through communal Ktunaxa institutions": para. 67 (emphasis in original). However, protection of the communal dimension of freedom of religion does not extend to "restraining and restricting the behaviour of others who do not share that belief in the name of preserving subjective religious meaning" (para. 73). The court found that the Ktunaxa cannot, in the name of their own religious freedom, require others who do not share that belief to modify their behaviour. As stated in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 62, "[c]onduct which would potentially cause harm to or interference with the rights of others [may not] be protected."

[56] On s. 35, the Court of Appeal agreed with the chambers judge's conclusion that "the process of consultation and the accommodation offered meets the reasonableness standard" (para. 93). It concluded that the chambers judge did not err in law by finding reasonable the Minister's characterization of the potential Aboriginal right as a right to "preclude permanent development" rather than a right to "exercise spiritual practices which rely on a sacred site and require its protection" (para. 81). Nor did the chambers judge understate the scale of the alleged infringement to the Ktunaxa and apply too light a standard of consultation; in fact, deep consultation consistent with an important impact took place. Finally, the chambers judge did not err in finding that the Ktunaxa first asserted the permanent nature of the proposed project would infringe their s. 35 Aboriginal rights in 2009. In fact, the chambers judge found that what was first asserted in 2009 was the position that "no accommodation" was possible — a finding supported by the record.

consistait à déterminer si [TRADUCTION] « la perte de sens subjective [entravait] d'une manière plus que négligeable ou insignifiante la *dimension collective* du droit reconnu à l'al. 2a) en diminuant la vitalité de la communauté religieuse des Ktunaxa par la perturbation des "liens profonds" entre la croyance religieuse invoquée et sa manifestation au sein des institutions collectives des Ktunaxa » : par. 67 (en italique dans l'original). Toutefois, la protection de la dimension collective de la liberté de religion ne va pas jusqu'à « restreindre et limiter, au nom de la préservation d'un sens religieux subjectif, la conduite d'autres personnes qui ne partagent pas cette croyance » (par. 73). La Cour d'appel a conclu que les Ktunaxa ne peuvent pas, au nom de leur propre liberté de religion, exiger d'autres personnes ne partageant pas cette croyance qu'elles modifient leur comportement. Comme l'indique l'arrêt *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 62, « [u]ne conduite susceptible de causer préjudice aux droits d'autrui ou d'entraver l'exercice de ces droits [ne peut être] protégée. »

[56] Sur l'art. 35, la Cour d'appel a souscrit à la conclusion du juge en chambre selon laquelle [TRADUCTION] « le processus de consultation et l'accommodement offert satisfont à la norme du caractère raisonnable » (par. 93). D'après la Cour d'appel, le juge en chambre n'a pas commis d'erreur de droit en estimant raisonnable le fait que le Ministre a décrit l'éventuel droit ancestral comme un droit « d'empêcher tout aménagement permanent » plutôt qu'un droit de « se livrer à des pratiques spirituelles qui reposent sur un lieu sacré dont la protection est requise » (par. 81). Le juge en chambre n'a pas non plus minimisé l'étendue du préjudice dont seraient victimes les Ktunaxa ni appliqué une norme de consultation trop basse; il y a eu en effet des consultations approfondies en accord avec l'étendue du préjudice. Enfin, le juge en chambre n'a pas commis d'erreur en concluant que les Ktunaxa avaient fait valoir la première fois en 2009 que la nature permanente du projet porterait atteinte à leurs droits ancestraux reconnus à l'art. 35. En fait, il a conclu que ce qui a été exprimé la première fois en 2009, c'est la position qu'« aucun accommodement » n'était possible — conclusion étayée par le dossier.

IV. Issues

[57] A. Did the Minister's decision violate the Ktunaxa's freedom of conscience and religion?

B. Was the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* reasonable?

V. Analysis

A. *Did the Minister's Decision Violate the Ktunaxa's Freedom of Conscience and Religion?*

(1) The Claim

[58] The Ktunaxa contend that the Minister's decision to allow the Glacier Resorts project to proceed violates their right to freedom of conscience and religion protected by s. 2(*a*) of the *Charter*. This claim is asserted independently from the Ktunaxa's s. 35 claim. Even if the Minister undertook adequate consultation under s. 35 of the *Constitution Act, 1982*, his decision could be impeached on the ground that it violated the Ktunaxa's *Charter* guarantee of freedom of religion. We note that with respect to the s. 2(*a*) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants.

[59] The Ktunaxa assert that the project, and in particular permanent overnight accommodation, will drive Grizzly Bear Spirit from Qat'muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure, they say, would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk.

[60] The Ktunaxa fault the Minister for not having considered their right to freedom of religion in

IV. Questions en litige

[57] A. La décision du Ministre a-t-elle violé la liberté de conscience et de religion des Ktunaxa?

B. Était-il raisonnable de la part du Ministre de décider que la Couronne s'était acquittée de l'obligation de consultation et d'accommodement que lui impose l'art. 35 de la *Loi constitutionnelle de 1982*?

V. Analyse

A. *La décision du Ministre a-t-elle violé la liberté de conscience et de religion des Ktunaxa?*

(1) La prétention

[58] Les Ktunaxa soutiennent que la décision du Ministre d'autoriser la poursuite du projet de Glacier Resorts viole leur droit à la liberté de conscience et de religion protégé par l'al. 2*a*) de la *Charte*. Cette prétention est présentée indépendamment de la revendication des Ktunaxa fondée sur l'art. 35. Même si le Ministre a procédé à une consultation adéquate au titre de l'art. 35 de la *Loi constitutionnelle de 1982*, sa décision pourrait être attaquée au motif qu'elle a porté atteinte à la liberté de religion des Ktunaxa garantie par la *Charte*. Nous tenons à souligner qu'en ce qui concerne la revendication fondée sur l'al. 2*a*), la situation des Ktunaxa est la même que celle des plaideurs non autochtones.

[59] Les Ktunaxa affirment que le projet, et en particulier les installations permanentes d'hébergement pour la nuit, chassera l'Esprit de l'Ours Grizzly du Qat'muk. Comme cet esprit est au cœur de leurs croyances et pratiques religieuses, ils disent que son départ aurait pour effet d'éliminer le fondement de leurs croyances et de rendre inutiles leurs pratiques. Les Ktunaxa plaident que la vitalité de leur communauté religieuse dépend du maintien de la présence de l'Esprit de l'Ours Grizzly dans le Qat'muk.

[60] Les Ktunaxa reprochent au Ministre de ne pas avoir tenu compte dans sa décision de leur droit

the course of his decision. The Ktunaxa raised the potential breach of s. 2(*a*) before the Minister. Nevertheless, the Minister's Rationale for approving the Jumbo Glacier Resort did not analyze the s. 2(*a*) claim. The Minister should have discussed the s. 2(*a*) claim. However, his failure to conduct an analysis of the Ktunaxa's right to freedom of religion is immaterial because the claim falls outside the scope of s. 2(*a*). This was the finding of both the chambers judge and the Court of Appeal and we agree, though for somewhat different reasons.

(2) The Scope of Freedom of Religion

[61] The first step where a claim is made that a law or governmental act violates freedom of religion is to determine whether the claim falls within the scope of s. 2(*a*). If not, there is no need to consider whether the decision represents a proportionate balance between freedom of religion and other considerations: *Amselem*, at para. 181.

[62] The seminal case on the scope of the *Charter* guarantee of freedom of religion is this Court's decision in *Big M Drug Mart*. The majority of the Court, per Justice Dickson (as he then was), defined s. 2(*a*) as protecting "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (p. 336).

[63] So defined, s. 2(*a*) has two aspects — the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been adopted in subsequent cases: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 58; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 68; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 159; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 32; *Amselem*, at para. 40.

à la liberté de religion. Ils ont soutenu devant lui qu'il pourrait y avoir contravention à l'al. 2*a*). Malgré cela, les motifs pour lesquels le Ministre a approuvé le projet Jumbo Glacier ne contenaient pas d'analyse de la revendication fondée sur l'al. 2*a*). Le Ministre aurait dû analyser cette revendication. L'omission du Ministre d'examiner le droit à la liberté de religion des Ktunaxa est toutefois sans importance parce que la revendication ne relève pas de l'al. 2*a*). C'est la conclusion à laquelle sont arrivés le juge en chambre et la Cour d'appel et nous partageons leur avis, quoique pour des raisons quelque peu différentes.

(2) La portée de la liberté de religion

[61] Lorsqu'un intéressé fait valoir qu'une mesure législative ou une action de l'État viole sa liberté de religion, la première étape consiste à juger si l'allégation relève de l'al. 2*a*). Dans la négative, il n'est pas nécessaire de chercher à savoir si la décision est le fruit d'une mise en balance proportionnée de la liberté de religion et d'autres facteurs : *Amselem*, par. 181.

[62] L'arrêt de principe sur l'étendue de la liberté de religion garantie par la *Charte* est *Big M Drug Mart*. Au nom des juges majoritaires de la Cour, le juge Dickson (plus tard Juge en chef) a décrit l'al. 2*a*) comme protégeant « le droit de croire ce que l'on veut en matière religieuse, le droit de professer ouvertement des croyances religieuses sans crainte d'empêchement ou de représailles, et le droit de manifester ses croyances religieuses par leur mise en pratique et par le culte ou par leur enseignement et leur propagation » (p. 336).

[63] Ainsi défini, l'al. 2*a*) comporte deux volets : la liberté d'avoir des croyances religieuses et celle de manifester ces croyances. Cette définition a été reprise dans des arrêts ultérieurs : *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613, par. 58; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 68; *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, par. 159; *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, par. 32; *Amselem*, par. 40.

[64] These two aspects of the right to freedom of religion — the freedom to hold a religious belief and the freedom to manifest it — are reflected in international human rights law. Article 18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) ("UDHR"), first defined the right in international law in these terms: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

[65] Similarly, art. 18(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), defined the right to freedom of religion as consisting of "freedom to have or to adopt a religion or belief of [one's] choice" and "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching". The relevance of art. 18(1) of the ICCPR to s. 2(*a*) of the *Charter* was considered by a noted human rights jurist, Tarnopolsky J.A., in *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395 (C.A.). He observed that art. 18(1) defined freedom of religion "as including not only the right to have or adopt a religion or belief of one's choice, but also to be able to 'manifest' the religion or belief" (p. 421 (emphasis deleted)), and added that s. 2(*a*) of the *Charter* — then a new and judicially unconsidered feature of Canada's Constitution — should be "interpreted in conformity with our international obligations" (p. 420). On further appeal to this Court, Dickson C.J. approved Tarnopolsky J.A.'s approach to s. 2(*a*), noting that his definition of freedom of religion "to include the freedom to manifest and practice one's religious beliefs . . . anticipated conclusions which were reached by this Court in the *Big M Drug Mart Ltd.* case": *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 735. Later, in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349, Dickson C.J. proposed, as Tarnopolsky J.A. had done, that the *Charter* be presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations. The Court has since

[64] Ces deux volets du droit à la liberté de religion — la liberté d'avoir une croyance religieuse et la liberté de la manifester — trouvent leur expression dans le droit international en matière de droits de la personne. L'article 18 de la *Déclaration universelle des droits de l'homme*, A.G. Rés. 217 A (III), Doc. N.U. A/810, p. 71 (1948) (« DUDH »), a défini ainsi pour la première fois ce droit en droit international : « Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction ainsi que la liberté de manifester sa religion ou sa conviction, seule ou en commun, tant en public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites. »

[65] De même, le par. 18(1) du *Pacte international relatif aux droits civils et politiques*, R.T. Can. 1976 nº 47 (« PIDCP »), a défini le droit à la liberté de religion comme « la liberté d'avoir ou d'adopter une religion ou une conviction de son choix » et « la liberté de manifester sa religion ou sa conviction, individuellement ou en commun, tant en public qu'en privé, par le culte et l'accomplissement des rites, les pratiques et l'enseignement ». La pertinence du par. 18(1) du PIDCP pour l'al. 2*a*) de la *Charte* a été examinée par un éminent juriste des droits de la personne, le juge Tarnopolsky, dans *R. c. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395 (C.A.). Il a fait observer que, selon le par. 18(1), la liberté de religion [TRADUCTION] « comprend non seulement le droit d'avoir ou d'adopter une religion ou une conviction de son choix, mais aussi la faculté de "manifester" la religion ou conviction » (p. 421 (soulignement omis)), et ajouté que l'al. 2*a*) de la *Charte* — alors un nouvel aspect de la Constitution canadienne sur lequel les tribunaux ne s'étaient pas encore penchés — doit être « interprété conformément à nos obligations internationales » (p. 420). À la suite du pourvoi formé devant notre Cour, le juge en chef Dickson a souscrit à la manière dont le juge Tarnopolsky a abordé l'al. 2*a*) et signalé qu'en définissant la liberté de religion « comme incluant la liberté de manifester et de mettre en pratique ses croyances religieuses [. . .] le juge Tarnopolsky a devancé les conclusions tirées par notre Cour dans l'arrêt *Big M Drug Mart Ltd.* » : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 735. Puis, dans le *Renvoi relatif à la Public Service*

adopted this interpretive presumption: *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at paras. 22-23 and 25; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38.

[66] The two aspects of freedom of religion enunciated in the UDHR and ICCPR are also found in international human rights instruments to which Canada is not a party. Article 9(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221, recognizes everyone's right to "freedom of thought, conscience and religion" including "freedom . . . to manifest [one's] religion or belief, in worship, teaching, practice and observance". The *American Convention on Human Rights*, 1144 U.N.T.S. 123, provides, at art. 12(1), that "[e]veryone has the right to freedom of conscience and of religion" including "freedom to profess or disseminate one's religion or beliefs", while art. 12(3) indicates that the "[f]reedom to manifest one's religion and beliefs" may be subject only to lawful limitations. While these instruments are not binding on Canada and therefore do not attract the presumption of conformity, they are nevertheless important illustrations of how freedom of religion is conceived around the world.

[67] The scope of freedom of religion in these instruments is expressed in terms of the right's two aspects: the freedom to believe and the freedom to manifest belief. This Court's definition from *Big M Drug Mart*, consistently applied in later cases, is in keeping with this conception of the right's scope. The question, then, is whether the Ktunaxa's claim falls within that scope.

Employee Relations Act (Alb.), [1987] 1 R.C.S. 313, p. 349, le juge en chef Dickson a proposé, à l'instar du juge Tarnopolsky, de présumer que la *Charte* accorde une protection au moins aussi grande que les obligations internationales du Canada relatives aux droits de la personne. La Cour a depuis fait sienne cette présomption d'interprétation : *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, par. 70; *Divito c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 47, [2013] 3 R.C.S. 157, par. 22-23 et 25; *Inde c. Badesha*, 2017 CSC 44, [2017] 2 R.C.S. 127, par. 38.

[66] Les deux volets de la liberté de religion énoncés dans la DUDH et le PIDCP figurent aussi dans les instruments internationaux sur les droits de l'homme auxquels le Canada n'est pas partie. Le paragraphe 9(1) de la *Convention européenne des droits de l'homme*, 213 R.T.N.U. 221, reconnaît à toute personne le droit à « la liberté de pensée, de conscience et de religion », notamment « la liberté [. . .] de manifester sa religion ou sa conviction [. . .] par le culte, l'enseignement, les pratiques et l'accomplissement des rites ». La *Convention américaine relative aux droits de l'homme*, 1144 R.T.N.U. 123, dispose, en son par. 12(1), que « [t]oute personne a droit à la liberté de conscience et de religion », y compris « la liberté de professer et de répandre sa foi ou ses croyances », tandis que le par. 12(3) indique que « [l]a liberté de manifester sa religion ou ses croyances » ne peut être assortie que de restrictions prévues par la loi. Bien que ces instruments ne lient pas le Canada et ne font donc pas intervenir la présomption de conformité, ils constituent des illustrations importantes de la manière dont on conçoit la liberté de religion partout dans le monde.

[67] La portée de la liberté de religion est exprimée dans ces instruments sous l'angle des deux volets du droit : la liberté de croire et la liberté de manifester une croyance. La définition donnée par notre Cour dans *Big M Drug Mart* et systématiquement appliquée par la suite concorde avec cette conception de la portée du droit. Il s'agit alors de savoir si la revendication des Ktunaxa s'inscrit dans cette portée.

(3) Application to This Case

[68] To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief: see *Multani*, at para. 34.

[69] In this case, it is undisputed that the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place. The chambers judge indicated that Mr. Luke came to this belief in 2004 but whether this belief is ancient or recent plays no part in our s. 2(*a*) analysis. The *Charter* protects all sincere religious beliefs and practices, old or new.

[70] The second part of the test, however, is not met in this case. This stage of the analysis requires an objective analysis of the interference caused by the impugned state action: *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 24. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. But the Minister's decision does neither of those things. This case is not concerned with either the freedom to hold a religious belief or to manifest that belief. The claim is rather that s. 2(*a*) of the *Charter* protects the presence of Grizzly Bear Spirit in Qat'muk. This is a novel claim and invites this Court to extend s. 2(*a*) beyond the scope recognized in our law.

[71] We would decline this invitation. The state's duty under s. 2(*a*) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does

(3) Application en l'espèce

[68] Pour démontrer qu'il y a atteinte au droit à la liberté de religion, le demandeur doit établir (1) qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion, et (2) que la conduite qu'il reproche à l'État nuit d'une manière plus que négligeable ou insignifiante à sa capacité de se conformer à cette pratique ou croyance : voir *Multani*, par. 34.

[69] Dans la présente affaire, nul ne conteste que les Ktunaxa croient sincèrement en l'existence et l'importance de l'Esprit de l'Ours Grizzly. Ils croient aussi qu'un aménagement permanent à l'intérieur du Qat'muk en chassera cet esprit. Selon le juge en chambre, M. Luke est parvenu à cette croyance en 2004, mais le caractère ancien ou récent de cette croyance ne joue aucun rôle dans notre analyse fondée sur l'al. 2*a*). La *Charte* protège toutes les croyances et pratiques religieuses sincères, qu'elles soient anciennes ou récentes.

[70] Il n'est toutefois pas satisfait au second volet du critère en l'espèce. À ce stade de l'analyse, il faut examiner objectivement l'atteinte causée par l'acte reproché à l'État : *S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235, par. 24. Les Ktunaxa doivent démontrer que la décision du Ministre d'approuver l'aménagement porte atteinte soit à leur liberté de croire en l'Esprit de l'Ours Grizzly, soit à leur liberté de manifester cette croyance. Or, la décision ne porte atteinte à aucune de ces libertés. La présente affaire ne porte ni sur la liberté d'avoir une croyance religieuse ni sur celle de manifester cette croyance, mais plutôt sur l'allégation que l'al. 2*a*) de la *Charte* assure la présence de l'Esprit de l'Ours Grizzly dans le Qat'muk. Par cette allégation inédite, on invite la Cour à étendre l'al. 2*a*) au-delà de ce que reconnaît le droit canadien.

[71] Nous sommes d'avis de décliner cette invitation. L'obligation imposée à l'État par l'al. 2*a*) ne consiste pas à protéger l'objet des croyances, comme l'Esprit de l'Ours Grizzly. Il incombe plutôt à l'État de protéger la liberté de toute personne d'avoir pareilles croyances et de les manifester par le culte et la pratique ou par l'enseignement et la propagation.

not protect the spiritual focal point of worship. We have been directed to no authority that supports the proposition that s. 2(*a*) protects the latter, rather than individuals' liberty to hold a belief and to manifest that belief. Section 2(*a*) protects the freedom to pursue practices, like the wearing of a kirpan in *Multani* or refusing to be photographed in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567. And s. 2(*a*) protects the right to freely hold the religious beliefs that motivate such practices. In this case, however, the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(*a*).

Bref, la *Charte* protège la liberté de culte, mais non le point de mire spirituel du culte. On ne nous a présenté aucune source qui étaye la proposition selon laquelle l'al. 2*a*) protège cette composante plutôt que la liberté des individus d'avoir une croyance et de la manifester. L'alinéa 2*a*) protège la liberté de se livrer à des pratiques, comme le port d'un kirpan (dans *Multani*) ou le refus d'être photographié (dans *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567). L'alinéa 2*a*) protège en outre le droit à la liberté d'avoir des croyances religieuses qui motivent de telles pratiques. Or, en l'espèce, les appelants ne réclament pas la protection de la liberté de croire en l'Esprit de l'Ours Grizzly ou de s'adonner à des pratiques connexes. Ils sollicitent plutôt la protection de l'Esprit de l'Ours Grizzly lui-même et du sens spirituel subjectif qu'ils en dégagent. Cette revendication déborde le cadre de l'al. 2*a*).

[72] The extension of s. 2(*a*) proposed by the Ktunaxa would put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs. In *Amselem*, this Court chose to protect *any* sincerely held belief rather than examining the specific merits of religious beliefs:

> In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

(para. 50, per Iacobucci J.)

[72] L'élargissement de l'al. 2*a*) proposé par les Ktunaxa exposerait les croyances intimes profondes au contrôle des tribunaux. Statuer sur la protection exacte dont doit bénéficier un esprit reviendrait à obliger l'État et ses tribunaux à juger de la teneur et du bien-fondé de croyances religieuses. Dans *Amselem*, notre Cour a choisi de protéger *toute* croyance sincère au lieu d'examiner le bien-fondé précis de croyances religieuses :

> À mon avis, l'État n'est pas en mesure d'agir comme arbitre des dogmes religieux, et il ne devrait pas le devenir. Les tribunaux devraient donc éviter d'interpréter — et ce faisant de déterminer —, explicitement ou implicitement, le contenu d'une conception subjective de quelque exigence, « obligation », précepte, « commandement », coutume ou rituel d'ordre religieux. Statuer sur des différends théologiques ou religieux ou sur des questions litigieuses touchant la doctrine religieuse amènerait les tribunaux à s'empêtrer sans justification dans le domaine de la religion.

(par. 50, le juge Iacobucci)

The Court in *Amselem* concluded that such an inquiry into profoundly personal beliefs would be inconsistent with the principles underlying freedom of religion (para. 49).

Dans *Amselem*, la Cour a conclu que pareil examen des croyances intimes profondes est incompatible avec les principes de base de la liberté de religion (par. 49).

[73] The Ktunaxa argue that the *Big M Drug Mart* definition of the s. 2(*a*) guarantee has been subsequently enriched by an understanding that freedom of religion has a communal aspect, and that the state cannot act in a way that constrains or destroys the communal dimension of a religion. Grizzly Bear Spirit's continued occupation of Qat'muk is essential to the communal aspect of Ktunaxa religious beliefs and practices, they assert. State action that drives Grizzly Bear Spirit from Qat'muk will, the Ktunaxa say, "constrain" or "interfere" with — indeed destroy — the communal aspect of s. 2(*a*) protection.

[74] The difficulty with this argument is that the communal aspect of the claim is also confined to the scope of freedom of religion under s. 2(*a*). It is true that freedom of religion under s. 2(*a*) has a communal aspect: *Loyola*; *Hutterian Brethren*, at para. 89; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650. But the communal aspects of freedom of religion do not, and should not, extend s. 2(*a*)'s protection beyond the freedom to have beliefs and the freedom to manifest them.

[75] We conclude that s. 2(*a*) protects the freedom to have and manifest religious beliefs, and that the Ktunaxa's claim does not fall within these parameters. It is therefore unnecessary to consider whether the Minister's decision represents a reasonable balance between freedom of religion and other considerations.

B. *Was the Minister's Decision That the Crown Had Met Its Duty to Consult and Accommodate Under Section 35 of the Constitution Act, 1982 Reasonable?*

[76] The Ktunaxa say that the Minister's decision that consultation and accommodation had been sufficient to satisfy s. 35 was unreasonable, which in turn rendered his decision to approve the resort unreasonable and invalid.

[73] Les Ktunaxa soutiennent que la définition de la garantie de l'al. 2*a*) formulée dans *Big M Drug Mart* a été ultérieurement enrichie par la compréhension du fait que la liberté de religion comporte un volet collectif et que l'État ne peut agir d'une façon qui restreint ou détruit la dimension collective d'une religion. Selon eux, le maintien de la présence de l'Esprit de l'Ours Grizzly au Qat'muk est essentiel au volet collectif des croyances et pratiques religieuses des Ktunaxa. Aux dires des Ktunaxa, l'action de l'État qui a pour effet de chasser l'Esprit de l'Ours Grizzly du Qat'muk [TRADUCTION] « restreindrait » ou « entraverait » — voire détruirait — le volet collectif de la protection offerte par l'al. 2*a*).

[74] Le problème que pose cet argument est que le volet collectif de la revendication doit lui aussi s'inscrire dans les limites de la liberté de religion reconnue à l'al. 2*a*). Il est vrai que cette liberté de religion comporte un volet collectif : *Loyola*; *Hutterian Brethren*, par. 89; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Village)*, 2004 CSC 48, [2004] 2 R.C.S. 650. Toutefois, la dimension collective de la liberté de religion n'étend pas, et ne doit pas étendre, la protection accordée par l'al. 2*a*) au-delà de la liberté d'avoir des croyances et de la liberté de les manifester.

[75] Nous concluons que l'al. 2*a*) protège la liberté d'avoir des croyances religieuses et de les manifester et que la revendication des Ktunaxa ne relève pas de ces paramètres. Il n'est donc pas nécessaire de se demander si la décision du Ministre représente une mise en balance raisonnable de la liberté de religion et d'autres facteurs.

B. *Était-il raisonnable pour le Ministre de décider que la Couronne s'était acquittée de l'obligation de consultation et d'accommodement que lui impose l'art. 35 de la Loi constitutionnelle de 1982?*

[76] Les Ktunaxa affirment qu'il était déraisonnable de la part du Ministre de décider que les consultations menées et les mesures d'accommodement prises étaient suffisantes pour respecter l'art. 35, et que cela rendait par ricochet déraisonnable et invalide sa décision d'approuver la station de ski.

[77] The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.

(1) The Legal Requirements of the Section 35 Consultation and Accommodation Process

[78] The constitutional guarantee of s. 35 of the *Constitution Act, 1982* is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests: *Haida Nation*, at paras. 25 and 27. Where, as here, a permit is sought to use or develop lands subject to an unproven Aboriginal claim, the government is required to consult with the affected Aboriginal group and, where appropriate, accommodate the group's claim pending its final resolution. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

[79] The extent of the Crown's duty to consult and accommodate in the case of an unproven Aboriginal claim varies with the *prima facie* strength of the claim and the effect the proposed development or use will have on the claimed Aboriginal right: *Haida Nation*, at paras. 43-44. A strong *prima facie* claim and significant impact may require deep consultation. A weak claim or transient impact may

[77] Il convient de faire preuve de déférence à l'égard de la décision du Ministre selon laquelle les consultations menées et les mesures d'accommodement prises étaient adéquates : *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 62. Le juge en chambre devait décider s'il était raisonnable de la part du Ministre de conclure que la Couronne s'était acquittée de son obligation de consulter et d'accommoder. Un juge qui siège en révision ne tranche pas les questions constitutionnelles soulevées de façon isolée selon la norme de la décision correcte, mais se demande plutôt si la décision du Ministre, prise dans son ensemble, était raisonnable.

(1) Les exigences juridiques du processus de consultation et d'accommodement établi à l'art. 35

[78] La garantie constitutionnelle de l'art. 35 de la *Loi constitutionnelle de 1982* ne vise pas uniquement les droits issus de traités ou les revendications prouvées ou réglées de droits ancestraux et de titre ancestral. L'article 35 protège aussi les droits éventuels inhérents aux revendications autochtones qui n'ont pas encore été formellement établies et il peut obliger la Couronne à consulter les Autochtones et à prendre en compte leurs intérêts en attendant qu'il soit statué sur ces revendications par la négociation ou une autre procédure : *Nation haïda*, par. 25 et 27. Lorsque, comme en l'espèce, on demande un permis pour utiliser ou aménager des terres qui font l'objet d'une revendication autochtone dont le bien-fondé n'a pas été démontré, le gouvernement est tenu de consulter le groupe autochtone touché et, s'il y a lieu, de tenir compte de la revendication du groupe en attendant son règlement définitif. Cette obligation découle de l'honneur de la Couronne et est constitutionnalisée à l'art. 35.

[79] L'étendue de l'obligation de la Couronne de consulter les Autochtones et de tenir compte d'une revendication autochtone non encore établie varie selon la solidité de la revendication à première vue et l'effet du projet d'aménagement ou d'utilisation des terres sur le droit ancestral revendiqué : *Nation haïda*, par. 43-44. Une revendication solide à première vue et des conséquences importantes peuvent

attract a lighter duty of consultation. The duty is to consult and, where warranted, accommodate. Section 35 guarantees a process, not a particular result. The Aboriginal group is called on to facilitate the process of consultation and accommodation by setting out its claims clearly (*Haida Nation*, at para. 36) and as early as possible. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. The ultimate obligation is that the Crown act honourably.

[80] The holdings of *Haida Nation*, as they pertain to this case, may be summarized as follows:

- The duty to consult and, if appropriate, accommodate pending the resolution of claims is grounded in the honour of the Crown, and must be understood generously to achieve reconciliation (paras. 16-17).

- 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"; it must consult and, if appropriate, accommodate the Aboriginal interest (para. 27).

- The duty to consult is triggered by the Crown having "[k]nowledge of a credible but unproven claim" (para. 37).

- The content of the duty to consult and accommodate varies with the strength of the claim and the significance of the potential adverse effect on the Aboriginal interest (para. 39). Cases with a weak claim, a limited Aboriginal right, or a minor intrusion may require only notice, information, and response to queries. At the other end of the spectrum, a strong *prima facie* case with significant intrusion on an important right may require the Crown to engage in "deep consultation" and to accommodate the interest

nécessiter une consultation approfondie. Une revendication faible ou des conséquences temporaires peuvent commander une consultation moins vaste. L'obligation en est une de consultation et, s'il y a lieu, d'accommodement. L'article 35 garantit un processus, et non un résultat précis. Le groupe autochtone est appelé à faciliter le processus de consultation et d'accommodement en énonçant ses revendications clairement (*Nation haïda*, par. 36) et le plus tôt possible. Rien ne garantit qu'en fin de compte il sera justifié ou possible d'obtenir l'accommodement précis demandé. L'obligation incontournable est que la Couronne agisse honorablement.

[80] Les conclusions de *Nation haïda* applicables en l'espèce peuvent être résumées comme suit :

- L'obligation de consulter et, s'il y a lieu, d'accommoder en attendant le règlement des revendications découle du principe de l'honneur de la Couronne et doit recevoir une interprétation généreuse pour que l'on parvienne à une réconciliation (par. 16-17).

- La Couronne, qui agit honorablement, ne peut « traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité »; elle doit consulter et, s'il y a lieu, prendre en compte l'intérêt des Autochtones (par. 27).

- L'obligation de consulter découle de la « connaissance [par la Couronne] d'une revendication crédible mais non encore établie » (par. 37).

- Le contenu de l'obligation de consulter et d'accommoder varie selon la solidité de la revendication et l'importance de l'effet préjudiciable potentiel sur l'intérêt autochtone (par. 39). Les cas où la revendication est peu solide, le droit ancestral, limité ou le risque d'atteinte, faible peuvent nécessiter uniquement un avis, une communication de renseignements et de réponses aux questions. À l'autre extrémité du continuum, les cas où la revendication repose sur une preuve solide à première vue et où le

by altering its plans. Between these extremes lie other cases (paras. 43-45).

- When the consultation process suggests amendment of Crown policy, a duty to reasonably accommodate the Aboriginal interest may arise (para. 47).

- The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. The obligations on the Crown are to provide notice and information on the project, and to consult with the Aboriginal group about its concerns. The obligations on the Aboriginal group include: defining the elements of the claim with clarity (para. 36); not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (para. 42).

- The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto over developments pending proof of their claims. Consent is required only for *proven* claims, and even then only in certain cases. What is required is a balancing of interests, a process of give and take (paras. 45 and 48-50).

[81] The steps in a consultation process may be summarized as follows:

1. Initiation of the consultation process, triggered when the Crown has knowledge, whether real

droit et l'atteinte potentielle sont d'une haute importance peuvent obliger la Couronne à tenir une « consultation approfondie » et à prendre en compte les intérêts en modifiant ses projets. D'autres situations se situent entre ces deux extrémités (par. 43-45).

- S'il ressort des consultations que des modifications à la politique de la Couronne s'imposent, une obligation de tenir raisonnablement compte de l'intérêt autochtone peut prendre naissance (par. 47).

- L'obligation de consulter et, le cas échéant, de tenir compte de l'intérêt ancestral implique une réciprocité. Les obligations de la Couronne consistent à donner un avis et des renseignements sur le projet et à consulter le groupe autochtone au sujet de ses préoccupations. Quant au groupe autochtone, il doit notamment définir clairement les éléments de ses revendications (par. 36), ne pas contrecarrer les efforts déployés de bonne foi par la Couronne et ne pas défendre des positions déraisonnables pour empêcher la Couronne de prendre des décisions ou d'agir dans les cas où, malgré une véritable consultation, on ne parvient pas à s'entendre (par. 42).

- L'obligation de consulter et, le cas échéant, de tenir compte des intérêts autochtones peut nécessiter la modification d'un projet. Elle ne confère toutefois pas aux groupes autochtones un droit de veto à l'égard des projets en attendant que leurs revendications soient établies. Le consentement n'est requis que dans les cas des revendications *établies* et, même en pareille éventualité, seules certaines de ces revendications requièrent un consentement. Ce qu'il faut faire, c'est de mettre en balance les intérêts, un processus de concessions mutuelles (par. 45 et 48-50).

[81] Les étapes du processus de consultation peuvent être résumées ainsi :

1. Initiation du processus de consultation dès que la Couronne a connaissance, réellement ou par

or constructive, of the potential existence of an Aboriginal right or treaty right and contemplates conduct that might adversely affect it;

2. Determination of the level of consultation required, by reference to the strength of the *prima facie* claim and the significance of the potential adverse impact on the Aboriginal interest;

3. Consultation at the appropriate level; and

4. If the consultation shows it is appropriate, accommodation of the Aboriginal interest, pending final resolution of the underlying claim.

This summary of the steps in a consultation process is offered as guidance to assist parties in ensuring that adequate consultation takes place, not as a rigid test or a perfunctory formula. In the end there is only one question — whether in fact the consultation that took place was adequate.

(2) Was the Minister's Conclusion That the Consultation Process Satisfied Section 35 Reasonable?

[82] After an extensive regulatory process and negotiations with the Ktunaxa spanning two decades, the Minister concluded that the s. 35 duty of consultation and accommodation had been satisfied, and authorized the Glacier Resorts ski project. As noted, a court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* for itself. Rather, it must ask whether the administrative decision maker's finding on the issue was reasonable. The question before us is whether the Minister's conclusion, that consultation and accommodation sufficient to satisfy s. 35 had occurred, was reasonable.

[83] The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The question is

interprétation, de l'existence possible d'un droit ancestral ou issu d'un traité et envisage d'accomplir un acte susceptible de lui porter préjudice;

2. Détermination du niveau de consultation requis en fonction de la solidité à première vue de la revendication et de l'importance de l'effet préjudiciable potentiel sur l'intérêt autochtone;

3. Consultation au degré approprié;

4. S'il ressort de la consultation que cela est indiqué, prise en compte de l'intérêt autochtone jusqu'au règlement définitif de la revendication sous-jacente.

Le résumé ci-dessus des étapes du processus de consultation sert de guide pour aider les parties à garantir une consultation adéquate; il ne se veut pas un critère rigoureux ou une formule superficielle. Au bout du compte, il n'y a qu'une seule question à se poser : la consultation qui a eu lieu était-elle réellement adéquate?

(2) La conclusion du Ministre selon laquelle le processus de consultation respecte l'art. 35 était-elle raisonnable?

[82] Au terme d'un long processus réglementaire et de négociations avec les Ktunaxa qui se sont échelonnés sur deux décennies, le Ministre a conclu qu'il avait été satisfait à l'obligation de consultation et d'accommodement visée à l'art. 35 et il a autorisé le projet de station de ski de Glacier Resorts. Comme nous l'avons signalé, la cour qui contrôle une décision administrative au titre de l'art. 35 ne tranche pas la question constitutionnelle *de novo*, de façon indépendante. Elle doit plutôt se demander si la conclusion du décideur administratif sur cette question était raisonnable. La question dont nous sommes saisis consiste à savoir s'il était raisonnable de la part du Ministre de conclure que la consultation et les mesures d'accommodement étaient suffisantes pour respecter l'art. 35.

[83] L'obligation de consultation et d'accommodement visée à l'art. 35 pour ce qui est des revendications non établies est un droit à un processus,

not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.

et non à un résultat en particulier. Il ne s'agit pas de savoir si les Ktunaxa ont obtenu le résultat qu'ils recherchaient, mais si le processus était conforme au principe de l'honneur de la Couronne. S'il est vrai qu'on espère toujours que les consultations menées au titre de l'art. 35 déboucheront sur une entente et une conciliation des intérêts des Autochtones et de ceux des non-Autochtones, *Nation haïda* indique clairement que, dans les situations où cela ne se produit pas, l'art. 35 ne confère pas aux demandeurs insatisfaits un droit de veto sur les projets. S'il y a eu consultation adéquate, le projet peut aller de l'avant sans le consentement du groupe autochtone concerné.

[84] The Ktunaxa's petition asked the chambers judge to issue a declaration that Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site. In effect, they ask the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision to approve a development. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. Aboriginal rights claims require that proper evidence be marshalled to meet specific legal tests in the context of a trial: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 109 and 143; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 26; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 26.

[84] Dans leur requête, les Ktunaxa demandent au juge en chambre de rendre un jugement déclaratoire portant que le Qat'muk est sacré pour eux et qu'il est interdit d'ériger des installations permanentes en ce lieu. En fait, ils demandent aux tribunaux, sous le couvert d'une demande de contrôle judiciaire d'une décision administrative, de se prononcer sur la validité de leur revendication à l'égard d'un lieu sacré et des pratiques spirituelles connexes. Ce jugement déclaratoire ne peut être rendu par une cour siégeant en contrôle d'une décision administrative d'approuver un aménagement. Dans une instance judiciaire, pareil jugement déclaratoire ne peut être rendu qu'après l'instruction de la question quand le tribunal bénéficie des actes de procédure, des interrogatoires préalables, des éléments de preuve et des arguments. Les droits ancestraux doivent être prouvés au moyen d'éléments mis à l'épreuve; ils ne peuvent être établis accessoirement dans le cadre d'une procédure administrative dont le point de mire est le caractère adéquat des consultations et des mesures d'accommodement. Permettre une telle chose causerait de l'incertitude et décourage rait le règlement définitif des droits allégués par la procédure appropriée. Les revendications de droits ancestraux nécessitent que l'on rassemble des preuves adéquates pour répondre à des critères juridiques précis dans le cadre d'un procès : *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 109 et 143; *Mitchell c. M.R.N.*, 2001 CSC 33, [2001] 1 R.C.S. 911, par. 26; *Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257, par. 26.

[85] Without specifically delegated authority, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal rights, although they may be called upon to assess the *prima facie* strength of unproven Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required. Indeed, in this case, the duty to consult arises regarding rights that remain unproven: *Haida Nation*, at para. 37.

[86] The Ktunaxa reply that they must have relief now, for if development proceeds Grizzly Bear Spirit will flee Qat'muk long before they are able to prove their claim or establish it under the B.C. treaty process. We are not insensible to this point. But the solution is not for courts to make far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims. Injunctive relief to delay the project may be available. Otherwise, the best that can be achieved in the uncertain interim while claims are resolved is to follow a fair and respectful process and work in good faith toward reconciliation. Claims should be identified early in the process and defined as clearly as possible. In most cases, this will lead to agreement and reconciliation. Where it does not, mitigating potential adverse impacts on the asserted right ultimately requires resolving questions about the existence and scope of unsettled claims as expeditiously as possible. For the Ktunaxa, this may seem unsatisfactory, indeed tragic. But in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.

[85] Sans un pouvoir expressément délégué, les décideurs administratifs ne peuvent pas se prononcer eux-mêmes sur l'existence ou la portée de droits ancestraux, mais ils peuvent être appelés à évaluer la solidité à première vue de revendications autochtones non établies et l'effet préjudiciable de mesures gouvernementales proposées sur ces revendications afin de déterminer l'ampleur des consultations nécessaires. En effet, dans la présente affaire, l'obligation de consulter prend naissance à l'égard de droits qui ne sont toujours pas établis : *Nation haïda*, par. 37.

[86] Les Ktunaxa répliquent qu'ils doivent obtenir réparation maintenant parce que, si le projet va de l'avant, l'Esprit de l'Ours Grizzly fuira le Qat'muk bien avant qu'ils parviennent à établir le bien-fondé de leur revendication ou à le faire dans le cadre du processus des traités de la Colombie-Britannique. Nous ne sommes pas insensibles à ce point. Toutefois, la solution ne consiste pas pour les tribunaux à faire des déclarations constitutionnelles d'une portée considérable lors d'une procédure de contrôle judiciaire accessoire à des droits ancestraux et à des revendications de titre et mal conçue pour les trancher. Il est possible d'obtenir une injonction pour retarder l'exécution du projet. Sinon, le mieux que l'on puisse faire pendant la période d'incertitude temporaire où les revendications sont en voie de règlement, c'est de suivre un processus équitable et respectueux et de s'employer de bonne foi à parvenir à une réconciliation. Les revendications devraient être mentionnées tôt dans le processus et définies aussi clairement que possible. Dans la plupart des cas, une telle démarche mènera à un accord et à une conciliation. Dans les autres cas, pour atténuer les éventuels effets préjudiciables sur le droit revendiqué, il faudra, en dernière analyse, régler le plus rapidement possible les questions de l'existence et de la portée des revendications non encore établies. Pour les Ktunaxa, cette solution peut sembler insatisfaisante, voire tragique. Toutefois, lors de la difficile période allant de la présentation de la revendication à son règlement, la consultation et l'accommodement, aussi imparfaits soient-ils, demeurent les meilleurs outils juridiques dont ils disposent pour parvenir à une réconciliation.

[87] On the face of the matter, the Minister's decision that consultation sufficient to satisfy s. 35 had taken place does not appear to be unreasonable. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa, in the form of the Late-2009 Claim, adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that there was no point in further consultation given the new Ktunaxa position that no accommodation was possible and that only total rejection of the project would satisfy them. The process protected by s. 35 was at an end.

[88] We conclude that on its face, the record supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. However, it is necessary to consider the arguments advanced by the Ktunaxa in support of their position that this conclusion was unreasonable.

[89] The Ktunaxa in their factum say that the consultation process was inadequate to satisfy s. 35 because: (1) the government failed to properly characterize the right; (2) the government failed to comprehend the role of knowledge keepers, which contributed to the late disclosure of the true nature of the claim; (3) the government erroneously treated the spiritual right as weak; (4) the government failed to properly address the adverse impact of the project on the Ktunaxa's rights; (5) consultation was inadequate; and (6) no accommodation was made with respect to the spiritual right. The Ktunaxa point to errors and omissions in the Minister's Rationale, which they say show the unreasonableness of his conclusion that adequate s. 35 consultation occurred.

[87] Au vu du dossier, la conclusion du Ministre qu'il y avait eu consultation suffisante pour respecter l'art. 35 ne semble pas déraisonnable. Les revendications de nature spirituelle des Ktunaxa à l'égard du Qat'muk ont été reconnues dès le départ. Des négociations se sont échelonnées sur deux décennies et il y a eu des consultations approfondies. De nombreux changements ont été apportés au projet pour tenir compte des revendications de nature spirituelle des Ktunaxa. Alors que tous les différends importants semblaient réglés, les Ktunaxa, dans leur revendication de la fin de 2009, ont adopté une nouvelle position absolue selon laquelle aucun accommodement n'était possible parce que des installations permanentes chasseraient l'Esprit de l'Ours Grizzly du Qat'muk. Le Ministre a cherché à consulter les Ktunaxa pour discuter de la revendication nouvellement formulée, mais on lui a répondu qu'il était inutile de le faire vu la nouvelle position des Ktunaxa : aucun accommodement n'était possible et seul le rejet du projet dans son intégralité leur donnerait satisfaction. Le processus protégé par l'art. 35 a alors pris fin.

[88] Nous concluons que, de prime abord, le dossier étaye le caractère raisonnable de la conclusion du Ministre selon laquelle l'obligation de consultation et d'accommodement visée à l'art. 35 a été respectée. Il est toutefois nécessaire d'examiner les arguments présentés par les Ktunaxa au soutien de leur thèse selon laquelle cette conclusion était déraisonnable.

[89] Dans leur mémoire, les Ktunaxa affirment que le processus de consultation était insuffisant pour respecter l'art. 35 car : (1) le gouvernement n'a pas décrit correctement le droit; (2) le gouvernement n'a pas compris le rôle des gardiens du savoir, qui a contribué à la divulgation tardive de la véritable nature de la revendication; (3) le gouvernement a qualifié à tort le droit spirituel de faible; (4) le gouvernement a mal évalué l'effet préjudiciable du projet sur les droits des Ktunaxa; (5) la consultation était inadéquate; (6) le gouvernement ne s'est pas adapté au droit spirituel. Les Ktunaxa relèvent des erreurs et omissions dans les Motifs de la décision du Ministre qui, selon eux, témoignent du caractère déraisonnable de sa conclusion selon laquelle il y avait eu

Overall, the Ktunaxa say the process of consultation was flawed and did not fulfill the honour of the Crown or meet the goal of reconciliation. We will consider each of these submissions in turn. In this analysis we employ the term "spiritual" rather than "religious" only because this term was used by the parties in their submissions. As the chambers judge rightly noted (at para. 275), there is no issue here that the Ktunaxa's system of spiritual beliefs constitutes a religion.

(a) *Failure to Properly Characterize the Right*

[90] The Ktunaxa say that while the right claimed was the right "to exercise spiritual practices which rely on a sacred site and require its protection" (A.F., at para. 112), the Minister erroneously characterized it as a right "to preclude permanent development" (*ibid.*, at para. 116). This mischaracterization, the Ktunaxa say, precluded proper consultation and accommodation. In short, the Ktunaxa say, the Minister viewed the Ktunaxa as making a claim to preclude development, instead of a making a claim to a spiritual right.

[91] The record does not support the contention that the Minister mischaracterized the right in this way. Spiritual practices and interests were raised at the beginning of the regulatory process and continued to be discussed throughout, leading to a number of accommodations. The Minister's Rationale states:

> With respect to the Ktunaxa Nation's asserted spiritual interests in the area . . . the Consultation/Accommodation Summary notes how the Crown has endeavored to honourably give consideration to those interests, while at the same time applying the tests for determination of aboriginal rights as set out in relevant case law. [p. 122]

[92] The Consultation/Accommodation Summary states:

consultation adéquate au titre de l'art. 35. Somme toute, les Ktunaxa soutiennent que le processus de consultation était déficient, qu'il ne respectait pas le principe de l'honneur de la Couronne et qu'il ne permettait pas de réaliser l'objectif de réconciliation. Nous examinerons chacune de ces prétentions à tour de rôle. Dans cette analyse, nous employons l'adjectif « spirituel » au lieu de « religieux » uniquement parce qu'il s'agit du mot utilisé par les parties dans leur argumentation. Comme l'a signalé à juste titre le juge en chambre (au par. 275), il est acquis aux débats en l'espèce que le système de croyances spirituelles des Ktunaxa constitue une religion.

a) *Description erronée du droit*

[90] Les Ktunaxa disent que le droit revendiqué était celui [TRADUCTION] « de se livrer à des pratiques spirituelles qui reposent sur un lieu sacré dont la protection est requise » (m.a., par. 112), mais que le Ministre a erronément décrit ce droit comme « un droit d'empêcher tout aménagement permanent » (*ibid.*, par. 116). Selon les Ktunaxa, cette description erronée faisait obstacle à une consultation et à des mesures d'accommodement appropriées. En résumé, ils soutiennent que le Ministre a considéré qu'ils formulaient une revendication pour empêcher tout aménagement plutôt que la revendication d'un droit spirituel.

[91] Le dossier n'étaye pas la prétention selon laquelle le Ministre a mal décrit ainsi le droit revendiqué. Les Ktunaxa ont évoqué des pratiques et intérêts spirituels au début du processus réglementaire et les parties ont continué de discuter de ces questions tout au long du processus, ce qui a mené à un certain nombre de mesures d'accommodement. Dans ses Motifs, le Ministre écrit :

> [TRADUCTION] En ce qui concerne les intérêts spirituels revendiqués par la Ktunaxa Nation à l'égard de la région [. . .] le Résumé des consultations et des mesures d'accommodement précise que la Couronne s'est efforcée de tenir compte honorablement de ces intérêts, tout en appliquant les critères énoncés dans la jurisprudence pertinente pour déterminer les droits ancestraux. [p. 122]

[92] Le Résumé des consultations et des mesures d'accommodement indique :

With respect to an aboriginal rights claim, the Ministry has had to take the grizzly and spiritual values information presented and characterize it in terms of an aboriginal tradition, practice or activity that is integral to the culture of the Ktunaxa. In addition to the hunting, gathering and fishing rights claims discussed above, the Ministry has assessed the spiritual and cultural related information not as a rights claim to carry out a specific activity but more as a non-exclusive aboriginal right to ensure protection of Jumbo valley from permanent forms of development for the purposes of preserving a place for the spirit of the Grizzly bear which embodies a core spirit of the Ktunaxa people. The claim seems to amount to a right to preclude certain kinds of permanent development (excluding logging and other resource extraction which is more ephemeral) so that the grizzly and its spirit, together with the spirit of the Ktunaxa, can be maintained. [Emphasis added.]

(R.R. (Minister), at p. 115)

[93] It is clear from this and from many other statements throughout the process that the Minister understood that the Ktunaxa were claiming a broad spiritual right, not just a right to block development. It is also clear that the Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in the valley, which the Ktunaxa believed would be driven out by the development.

[94] Moreover, the Late-2009 Claim did not change the nature of the spiritual interests in play. Rather, it attempted to include a specific *accommodation* — no permanent construction — as part of the asserted right. The characterization of an asserted right should not include any specific qualification of that right: *Mitchell*, at para. 23. These potential limitations are better examined in the consideration of adverse effects and the reasonableness of the accommodation, and are addressed below.

(b) *Failure to Understand the Role of Knowledge Keepers*

[95] The Ktunaxa say the Minister erred by failing to comprehend the role of the knowledge keepers.

[TRADUCTION] Pour ce qui est de la revendication de droits ancestraux, le Ministère a dû examiner les renseignements sur les grizzlys et les valeurs spirituelles présentés et les décrire au regard d'une tradition, pratique ou activité ancestrale qui fait partie intégrante de la culture des Ktunaxa. En plus des droits revendiqués de chasse, de cueillette et de pêche déjà examinés, le Ministère a considéré les renseignements liés à la spiritualité et à la culture non pas comme une revendication de droits d'exercer une activité particulière, mais plutôt comme une revendication de droits ancestraux non exclusifs pour protéger la vallée Jumbo contre toute forme d'aménagement permanent en vue de préserver un lieu pour l'Esprit de l'Ours Grizzly, qui incarne un esprit fondamental du peuple des Ktunaxa. La revendication semble équivaloir à un droit d'empêcher certains types d'aménagement permanent (mais exclut des activités plus éphémères comme l'exploitation forestière et l'extraction de ressources) pour permettre de préserver le grizzly et son esprit ainsi que l'esprit des Ktunaxa. [Nous soulignons.]

(d.i. (Ministre), p. 115)

[93] Il ressort de ces documents et de beaucoup d'autres déclarations faites tout au long du processus que le Ministre comprenait que les Ktunaxa revendiquaient un large droit spirituel, et pas uniquement un droit d'empêcher tout aménagement. De même, le Ministre comprenait que ce droit supposait des pratiques qui dépendaient de la présence continue de l'Esprit de l'Ours Grizzly dans la vallée, alors que l'aménagement proposé chasserait cet esprit selon les croyances des Ktunaxa.

[94] Qui plus est, la revendication de la fin de 2009 n'a pas modifié la nature des intérêts spirituels en jeu. Elle visait plutôt à intégrer au droit revendiqué un *accommodement* précis, l'absence d'installation permanente. La définition d'un droit revendiqué ne devrait pas assortir celui-ci de restrictions précises : *Mitchell*, par. 23. Il vaut mieux examiner ces limites potentielles dans l'analyse des effets préjudiciables et du caractère raisonnable de l'accommodement et elles sont abordées ci-après.

b) *Incompréhension du rôle des gardiens du savoir*

[95] Les Ktunaxa soutiennent que le Ministre a commis une erreur en ne saisissant pas le rôle des

This criticism is based on a statement in the Rationale that "details of the spiritual interest in the valley have not been shared with or known by the general Ktunaxa population" (p. 122). This led the Minister to question "whether any of these values can take the shape of a constitutionally protected aboriginal right", they contend (*ibid.*).

[96] The Minister's query does not establish that the Minister misunderstood the secrecy imperative. The Rationale makes it clear that the Minister understood the special role of knowledge keepers, and accepted that spiritual beliefs did not permit details of beliefs to be shared with the population or outsiders. The Minister refers to "spiritual information" which has been imparted to him "in a trusting way": Rationale, at p. 122. The need for knowledge keepers to keep details of spiritual beliefs secret was made plain to the Minister during the regulatory process, and in particular at his meeting in Cranbrook with knowledge keeper Mr. Luke and other Ktunaxa members in September 2009. The record is clear that the Ktunaxa at this meeting advised the Minister that only certain members of the community, knowledge keepers, possessed information about spiritual values, and that only Mr. Luke could speak to these matters. Nothing in the Rationale suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred.

(c) *Treating the Constitutional Right as Weak*

[97] The Ktunaxa argue that the Minister treated their claimed spiritual interest in Qat'muk as weak. If the Crown significantly undervalues the Aboriginal right at stake, this may render a decision adverse to that interest reviewable: *Haida Nation*, at para. 63.

[98] The Minister took account of numerous asserted Aboriginal rights including the right to gather, the right to hunt and fish, and the right to Aboriginal title: Rationale, at p. 122. The Minister's assessment

gardiens du savoir. Cette critique repose sur une affirmation faite dans les Motifs : [TRADUCTION] « . . . des détails de l'intérêt spirituel de la vallée n'ont pas été communiqués à la population générale des Ktunaxa ou n'étaient pas connus d'elle » (p. 122), ce qui avait amené, aux dires des Ktunaxa, le Ministre à se demander « si l'une ou l'autre de ces valeurs peut prendre la forme d'un droit ancestral garanti par la Constitution » (*ibid.*).

[96] L'interrogation du Ministre ne prouve pas qu'il a mal compris l'impératif du secret. Les Motifs indiquent clairement que le Ministre a compris le rôle particulier des gardiens du savoir et a accepté que les croyances spirituelles ne permettaient pas que certains détails des croyances soient communiqués à la population ou aux gens de l'extérieur. Le Ministre renvoie aux [TRADUCTION] « renseignements spirituels » qui lui ont été fournis « sous le sceau de la confiance » : Motifs, p. 122. On a clairement expliqué au Ministre que les gardiens du savoir devaient garder secrets certains détails des croyances spirituelles lors du processus réglementaire, et notamment lors de sa réunion à Cranbrook avec le gardien du savoir M. Luke et d'autres membres des Ktunaxa en septembre 2009. Le dossier indique clairement qu'à cette réunion, les Ktunaxa ont informé le Ministre que seuls certains membres de la communauté, les gardiens du savoir, possédaient des renseignements sur les valeurs spirituelles, et que seul M. Luke pouvait en parler. Rien dans les Motifs ne porte à croire que le Ministre a oublié cet élément fondamental quand il a décidé qu'il y avait eu une consultation adéquate.

c) *Qualifier le droit constitutionnel de faible*

[97] Les Ktunaxa soutiennent que le Ministre a qualifié de faible l'intérêt spirituel qu'ils revendiquent à l'égard du Qat'muk. Si la Couronne sous-estime grandement le droit ancestral en jeu, cela peut rendre susceptible de contrôle une décision défavorable à ce droit : *Nation haïda*, par. 63.

[98] Le Ministre a tenu compte de nombreux droits ancestraux revendiqués, y compris ceux de cueillette, de chasse et de pêche ainsi que le droit au titre ancestral : Motifs, p. 122. L'appréciation par le Ministre

of the strength of these asserted rights and the consultation and accommodation flowing from them are not in dispute in this case. The main issue of contention is, rather, the Minister's appreciation and weighing of the spiritual significance of Qat'muk, particularly following the Ktunaxa's advancement of the Late-2009 Claim.

[99] The Minister at one point in his Rationale did indeed refer to the spiritual claim as "weak", stating that it had not been shown to be part of a pre-contact practice integral to the Ktunaxa culture, and that it had not been shared with and was not known to the general Ktunaxa population (p. 122). This comment may seem at odds with the Minister's statement later in the Rationale that "[o]verall, the consultation applied in this case is at the deep end of the consultation spectrum" (p. 123). The explanation for this apparent tension lies in the fact that when the Minister described the claim as "weak" early in the Rationale he had in mind the Late-2009 Claim that the resort development could not proceed because this would drive out Grizzly Bear Spirit and irrevocably impair the foundation of the Ktunaxa spiritual practices. The Minister was not here referring to the broader claim to spiritual values in Qat'muk. This is apparent from the Minister's statement that the claim he characterized as "weak" had not been shared with and was not known to the Ktunaxa population generally. It is also supported by the Minister's reference to deep consultation being adequate "in respect of those rights for which the strength of the claim is strong" (p. 123). We view the Rationale as indicating that the Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the Late-2009 Claim.

[100] Even if the Minister had accepted the Ktunaxa's characterization of the Late-2009 Claim as a right to "exercise spiritual practices which rely on a sacred site and require its protection", it still

de la solidité de ces droits revendiqués ainsi que de la consultation et des accommodements qui en découlent ne sont pas en litige dans la présente affaire. Le nœud principal du débat est plutôt l'évaluation et la pondération qu'a faites le Ministre de l'importance spirituelle du Qat'muk, surtout après que les Ktunaxa eurent fait valoir la revendication de la fin de 2009.

[99] Dans ses Motifs, le Ministre a bel et bien qualifié de [TRADUCTION] « faible » la revendication de nature spirituelle, expliquant qu'on n'avait pas démontré que la pratique faisait partie intégrante de la culture des Ktunaxa avant leur contact avec les Européens et que la population générale des Ktunaxa n'avait pas été informée de son existence et ne la connaissait pas (p. 122). Cette remarque paraît peut-être contraire à la déclaration ultérieure du Ministre selon laquelle « [d]ans l'ensemble, la consultation effectuée en l'espèce se situe à l'extrémité supérieure du continuum de consultation » (p. 123). Cette contradiction apparente peut s'expliquer par le fait que, lorsque le Ministre a qualifié la revendication de « faible » au début de ses Motifs, il avait à l'esprit la revendication de la fin de 2009 selon laquelle l'aménagement de la station de ski ne pouvait aller de l'avant parce qu'il chasserait l'Esprit de l'Ours Grizzly et porterait atteinte irrémédiablement au fondement des pratiques spirituelles des Ktunaxa. Le Ministre ne parlait pas ici de la revendication générale visant les valeurs spirituelles associées au Qat'muk. C'est ce qui ressort de la déclaration du Ministre selon laquelle la revendication qu'il a qualifiée de « faible » n'avait pas été communiquée à la population générale des Ktunaxa et celle-ci n'était pas au courant de son existence. Le point de vue du Ministre est aussi étayé par sa remarque selon laquelle des consultations approfondies étaient adéquates « à l'égard de ces droits qui reposent sur une preuve solide » (p. 123). D'après nous, les Motifs indiquent que le Ministre a jugé solide la revendication générale de nature spirituelle, mais qu'il avait des doutes quant à la solidité de la revendication de la fin de 2009.

[100] Même si le Ministre avait partagé l'avis des Ktunaxa selon lequel la revendication de la fin de 2009 visait le droit d'[TRADUCTION] « exercer des pratiques spirituelles qui reposent sur un lieu sacré

would have been reasonable to find this aspect of the Ktunaxa's overall claim weak: C.A. reasons, at para. 81. As the Minister noted, in the negotiations the Ktunaxa did not advise the Crown of "specific spiritual practices": R.R. (Minister), at p. 113; see also chambers judge's reasons, at para. 212. As such, the Minister did not have evidence that the Ktunaxa were asserting a particular practice that took place in Qat'muk prior to contact. The Late-2009 Claim seemed designed to require a particular accommodation rather than to assert and support a particular pre-contact practice, custom, or tradition that took place on the territory in question.

dont la protection est requise », il aurait néanmoins été raisonnable de juger faible cet aspect de la revendication générale des Ktunaxa : motifs de la C.A., par. 81. Comme l'a fait remarquer le Ministre, les Ktunaxa n'ont pas informé la Couronne de l'existence de [TRADUCTION] « pratiques spirituelles en particulier » lors des négociations : d.i. (Ministre), p. 113; voir aussi les motifs du juge en chambre, par. 212. En conséquence, le Ministre ne disposait pas de preuve que les Ktunaxa faisaient valoir une pratique exercée dans le Qat'muk avant le contact avec les Européens. La revendication de la fin de 2009 semblait avoir pour objet d'exiger un accommodement donné plutôt que de faire valoir et d'appuyer une pratique, coutume ou tradition précontact sur le territoire en question.

(d) *Failure to Properly Assess the Adverse Impact of the Development on the Spiritual Right*

[101] The Ktunaxa assert that because the Minister mischaracterized the asserted right, he "could not have properly assessed the ski resort's adverse impact on the right": A.F., at para. 123. The Ktunaxa do not point to anything said by the Minister, but reference para. 83 of the Court of Appeal reasons.

[102] The record supports the view that, after June 2009, the Minister understood the Ktunaxa position that any construction of permanent accommodation on the resort site would drive Grizzly Bear Spirit from Qat'muk and undermine the basis of their spiritual beliefs and practices. The Court of Appeal in the criticized passage summarized the adverse impact issue as follows, using the description provided by the Ktunaxa themselves in the Qat'muk Declaration, and concluded that the Minister understood the adverse impact from the Ktunaxa perspective:

> In this case, the "adverse impacts flowing from the specific Crown proposal at issue" concerns the spiritual consequences that follow from permitting development of the Proposed Resort in the Qat'muk area. In the Qat'muk declaration, this is the adverse impact that the Ktunaxa describe:

d) *Mauvaise évaluation de l'effet préjudiciable du projet sur le droit spirituel*

[101] Les Ktunaxa affirment que le Ministre [TRADUCTION] « ne pouvait pas avoir correctement évalué l'effet préjudiciable de la station de ski sur le droit revendiqué » (m.a., par. 123) puisqu'il a mal décrit ce droit. Ils ne renvoient à aucune observation du Ministre, mais plutôt au par. 83 des motifs de la Cour d'appel.

[102] Le dossier permet de dire qu'après juin 2009, le Ministre a compris la position des Ktunaxa selon laquelle toute installation d'hébergement permanente construite sur le site de la station de ski chasserait l'Esprit de l'Ours Grizzly du Qat'muk et minerait le fondement de leurs croyances et pratiques spirituelles. La Cour d'appel a résumé ainsi la question de l'effet préjudiciable, en renvoyant à la description fournie par les Ktunaxa eux-mêmes dans la déclaration sur le Qat'muk, et a conclu que le Ministre a saisi l'effet préjudiciable du point de vue des Ktunaxa :

> [TRADUCTION] Dans la présente affaire, les « effets préjudiciables découlant de la proposition précise de la Couronne » concernent les conséquences spirituelles qui découlent de l'autorisation de l'aménagement de la station de ski proposée dans la région du Qat'muk. Dans la déclaration sur le Qat'muk, voici l'effet préjudiciable que décrivent les Ktunaxa :

> The refuge and buffer areas will not be shared with those who engage in activities that harm or appropriate the spiritual nature of the area. These activities include, but are not limited to:
>
> - The construction of buildings or structures with permanent foundations;
>
> - Permanent occupation of residences.
>
> To further safeguard spiritual values, no disturbances or alteration of the ground will be permitted within the refuge area.

In my view, the Minister reasonably characterized the above adverse impact on the s. 35 right as concerning the impact of development of the Proposed Resort on the Ktunaxa and, in particular, as a claim that development in the Qat'muk area was fundamentally inimical to their belief. [paras. 83-84]

[103] We agree with the Court of Appeal on this point. The record does not support the view that the Minister failed to properly assess the adverse impact of the development on the spiritual claim.

(e) *Inadequate Consultation on the Asserted Right*

[104] The overall contention of the Ktunaxa is that the Crown did not offer sufficient consultation on their asserted right. It is possible for a decision maker to mischaracterize a right and still fulfill the duty to consult: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paras. 38-39. Thus, even in the face of any alleged mischaracterization or undervaluing, the key question is the level of consultation regarding the asserted right.

[105] We are satisfied that the Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge (at para. 233) and the Court of Appeal (at para. 86) and we would not disturb that finding.

> Les aires de refuge et les zones tampons ne seront pas partagées avec ceux qui se livrent à des activités nuisant à la nature spirituelle du secteur ou la faisant disparaître. Ces activités comprennent :
>
> - la construction d'immeubles ou d'installations comportant des fondations permanentes;
>
> - l'occupation permanente de résidences.
>
> Pour mieux sauvegarder les valeurs spirituelles, aucune perturbation ou modification du sol ne sera permise dans l'aire de refuge.

À mon avis, le Ministre a raisonnablement décrit l'effet préjudiciable susmentionné sur le droit reconnu à l'art. 35 comme concernant les répercussions de l'aménagement de la station de ski proposée sur les Ktunaxa et, en particulier, comme visant l'aménagement dans la région du Qat'muk, lequel allait fondamentalement à l'encontre de leur croyance. [par. 83-84]

[103] Nous partageons l'avis de la Cour d'appel sur ce point. Le dossier n'étaye pas l'opinion selon laquelle le Ministre a mal évalué l'effet préjudiciable du projet sur la revendication de nature spirituelle.

e) *Consultation inadéquate à propos du droit revendiqué*

[104] De façon générale, les Ktunaxa font valoir que les consultations offertes par la Couronne au sujet du droit qu'ils revendiquent n'étaient pas suffisantes. Il se peut qu'un décideur décrive mal un droit et s'acquitte néanmoins de l'obligation de consulter : *Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103, par. 38-39. Donc, même en présence d'une prétendue mauvaise description ou sous-évaluation, la question clé est l'ampleur de la consultation au sujet du droit revendiqué.

[105] Nous sommes convaincus que le Ministre s'est livré à des consultations approfondies sur la revendication de nature spirituelle. L'ampleur de ces consultations a été confirmée à la fois par le juge en chambre (par. 233) et par la Cour d'appel (par. 86) et nous ne sommes pas d'avis de modifier cette conclusion.

[106] Regarding the Late-2009 Claim that no permanent construction be built, the Ktunaxa argue that the Minister wrongly ended the consultation on June 3, 2009. There is a contradiction, it is argued, between the Minister's June 3, 2009 letter expressing the view that the s. 35 consultation process had been completed, and the chambers judge's conclusion that when post-2009 consultations were considered in the context of the extensive prior consultation, "the Minister's consultation in respect of the Ktunaxa's asserted spiritual claims was reasonable and appropriate": A.F., at para. 128, citing chambers judge's reasons, at para. 232; see also A.F., at para. 129.

[106] En ce qui concerne la revendication de la fin de 2009 qu'aucune installation permanente ne soit érigée, les Ktunaxa soutiennent que le Ministre a mis fin à tort aux consultations le 3 juin 2009. D'après eux, il existe une contradiction entre la lettre du Ministre datée du 3 juin 2009 dans laquelle il se dit d'avis que le processus de consultation au titre de l'art. 35 était terminé, et la conclusion du juge en chambre selon laquelle, si l'on examinait les consultations postérieures à 2009 eu égard à la poursuite de la consultation antérieure approfondie, [TRADUCTION] « les consultations du Ministre au sujet des revendications de nature spirituelle des Ktunaxa étaient raisonnables et appropriées » : m.a., par. 128, citant les motifs du juge en chambre, par. 232; voir aussi le m.a., par. 129.

[107] This argument takes the Minister's letter stating that he considered sufficient consultation had taken place by June 3, 2009 out of context and fails to take account of what the Minister actually said. The letter was written at a time when the sacred value of Jumbo Valley was no longer listed as an outstanding issue for the Ktunaxa's agreement, and before the Late-2009 Claim. Negotiations with the Ktunaxa had been going well, and the Minister reasonably believed that the only outstanding matters were unrelated to the Ktunaxa rights claims. The Minister's letter therefore advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were interest-based.

[107] Cet argument sort de son contexte la lettre dans laquelle le Ministre a jugé suffisantes les consultations menées jusqu'au 3 juin 2009 et ne tient pas compte de ce qu'il a réellement dit. La lettre avait été écrite à l'époque où la valeur sacrée de la vallée Jumbo ne figurait plus parmi les questions non réglées en vue de l'assentiment des Ktunaxa et avant la revendication de la fin de 2009. Les négociations avec les Ktunaxa allaient bon train, et le Ministre croyait raisonnablement que les seules questions non réglées étaient étrangères aux revendications de droits des Ktunaxa. Le Ministre a par conséquent informé dans sa lettre les Ktunaxa qu'à son avis il y avait eu un processus de consultation raisonnable et que la plupart des questions non réglées portaient principalement sur des intérêts.

[108] Five days later, on June 8, 2009, the Ktunaxa responded to this letter with a list of concerns, not including the sacred nature of the area. At meetings the next day, however, the Ktunaxa refocused on the sacred nature of the site and asked for more consultation on this issue. The Minister agreed to this, and lengthy in-depth consultations on this new spiritual claim took place, including the meeting between the Minister himself and knowledge keeper Mr. Luke, in Cranbrook in September. The Minister sent the Ktunaxa a "Consultation/Accommodation Summary" that included a description of the consultation and accommodation efforts specifically

[108] Cinq jours plus tard, le 8 juin 2009, les Ktunaxa ont répondu à cette lettre en énumérant des sujets de préoccupation, mais non la nature sacrée de la région. Aux réunions tenues le lendemain, les Ktunaxa ont toutefois mis à nouveau l'accent sur la nature sacrée du lieu et demandé des consultations supplémentaires à ce sujet, ce que le Ministre a accepté de faire. De longues consultations approfondies sur cette nouvelle revendication d'ordre spirituel ont eu lieu, y compris une réunion en septembre, à Cranbrook, entre le Ministre lui-même et M. Luke, le gardien du savoir. Le Ministre a envoyé aux Ktunaxa un « Résumé des consultations et des

related to the Late-2009 Claim and invited them to comment on it. He then met with them and revisions were made to the document. Consultation continued until the Ktunaxa issued the Qat'muk Declaration in November 2010 declaring that no accommodation was possible and that the only point of further discussions was to make decision makers understand why the proposed resort could not proceed. Even after this, the Minister sought further consultation, without success.

mesures d'accommodement » qui comportait une description des consultations et des mesures d'accommodement se rapportant expressément à la revendication de la fin de 2009 et les invitait à commenter le résumé. Il les a ensuite rencontrés et des modifications ont été apportées au document. Les consultations se sont poursuivies jusqu'à la déclaration sur le Qat'muk des Ktunaxa en novembre 2010 portant qu'aucun accommodement n'était possible et que la seule raison pour laquelle il serait justifié de poursuivre les discussions serait de faire comprendre aux décideurs pourquoi le projet de station de ski ne pouvait pas aller de l'avant. Même après ce revirement, le Ministre a cherché à poursuivre les consultations, mais en vain.

[109] There is no contradiction between the Minister's letter on June 3, 2009 and the chambers judge's conclusion that negotiations from 2009 onwards indicated deep consultation on the Late-2009 Claim. On June 3, that claim was not in play. Six days later, with the Ktunaxa change of position, it assumed central importance, and renewed consultation focused on this issue ensued.

[109] Il n'y a aucune contradiction entre la lettre écrite le 3 juin 2009 par le Ministre et la conclusion du juge en chambre selon laquelle les négociations menées à partir de 2009 avaient comporté des consultations approfondies sur la revendication de la fin de 2009. Le 3 juin, cette revendication n'était pas en jeu. Six jours plus tard, étant donné le changement de position des Ktunaxa, elle revêtait une importance capitale, et de nouvelles consultations axées sur cet enjeu ont suivi.

[110] The Ktunaxa also contend that the courts below relied too much on the length of the consultation process. We agree that adequacy of consultation is not determined by the length of the process, although this may be a factor to be considered. While the Minister's Rationale mentions two decades of consulting, there is no evidence that he made his decision simply because he felt the process had gone on too long. Rather, it was clear to all by the spring of 2012 that given the position of the Ktunaxa, more consultation would be fruitless.

[110] Les Ktunaxa soutiennent également que les cours d'instance inférieure se sont appuyées trop fortement sur la longueur du processus de consultation. Nous convenons que ce n'est pas la longueur du processus qui détermine le caractère adéquat de la consultation, même s'il peut s'agir d'un facteur à prendre en considération. Bien que le Ministre mentionne dans ses Motifs les deux décennies de consultations, rien ne prouve qu'il a rendu sa décision simplement parce qu'il estimait que le processus avait trop duré. Au contraire, il était clair pour tous au printemps 2012 que la poursuite des consultations serait vaine étant donné la position des Ktunaxa.

[111] Finally, the Ktunaxa assert that although the Minister may have undertaken deep consultation on other issues, he did not engage in deep consultation with respect to the Late-2009 Claim. We cannot agree. Even after the Ktunaxa said further

[111] Enfin, les Ktunaxa affirment que, bien que le Ministre se soit peut-être livré à des consultations approfondies sur d'autres enjeux, il ne l'a pas fait à l'égard de la revendication de la fin de 2009. Nous ne pouvons souscrire à cette affirmation. En

consultation was pointless, the Minister persisted in attempts to consult.

(f) *Failure to Accommodate the Asserted Right*

[112] As a consequence of the lengthy regulatory process, many accommodations were made with respect to Ktunaxa spiritual concerns. These included specific changes to protect the grizzly population in Qat'muk — the west chair lift was removed because of the grizzly bear population in that area and the resort was confined to the upper half of the valley — as well as extensive environmental reserves and monitoring. The findings of the chambers judge on this point (at para. 236) have not been impugned.

[113] The Ktunaxa say these changes were inadequate: "Changes to the ski resort were measures required by economic, environmental and wildlife protection concerns and, while they do set out some limited protection for grizzly bears, there was no accommodation to address the ability of the Ktunaxa to carry on their spiritual practices dependent upon Grizzly Bear Spirit": A.F., at para. 133; see generally paras. 133-38.

[114] In point of fact, there was no evidence before the Minister of "specific spiritual practices". It is true, of course, that the Minister did not offer the ultimate accommodation demanded by the Ktunaxa — complete rejection of the ski resort project. It does not follow, however, that the Crown failed to meet its obligation to consult and accommodate. The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: *Haida Nation*. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of "give and take", and outcomes are not guaranteed.

effet, même après que les Ktunaxa eurent dit qu'il ne servait à rien de poursuivre les consultations, le Ministre a continué de tenter de les consulter.

f) *Omission de s'adapter au droit revendiqué*

[112] Le long processus réglementaire s'est soldé par la prise de nombreuses mesures d'accommodement à l'égard des préoccupations de nature spirituelle des Ktunaxa. Entre autres, on a apporté des changements précis pour protéger la population de grizzlys dans le Qat'muk, le remonte-pente ouest a été retiré en raison de la présence de grizzlys dans le secteur et la station de ski a été confinée à la moitié supérieure de la vallée, sans compter la création et la surveillance de réserves environnementales d'envergure. Les conclusions du juge en chambre sur ce point (par. 236) n'ont pas été contestées.

[113] Selon les Ktunaxa, ces modifications étaient inadéquates : [TRADUCTION] « Les modifications apportées à la station de ski étaient des mesures nécessaires en raison de préoccupations économiques, environnementales et de protection de la faune et, s'il est vrai qu'elles prévoient effectivement une protection limitée des grizzlys, elles ne proposent rien au sujet de la capacité des Ktunaxa à poursuivre leurs pratiques spirituelles tributaires de la présence de l'Esprit de l'Ours Grizzly » : m.a., par. 133; voir de façon générale les par. 133-138.

[114] Dans les faits, le Ministre n'avait aucune preuve de l'existence de [TRADUCTION] « pratiques spirituelles en particulier ». Il est vrai, bien sûr, que le Ministre n'a pas offert la mesure d'accommodement ultime exigée par les Ktunaxa, soit le rejet complet du projet de station de ski. Il ne s'ensuit toutefois pas que la Couronne a failli à son obligation de consulter et d'accommoder. Le droit de consultation et d'accommodement reconnu à l'art. 35 est un droit à un processus, et non un droit à un résultat précis : *Nation haïda*. Bien que l'objectif du processus soit la conciliation des intérêts des Autochtones et de ceux de l'État, il n'est pas toujours possible d'y parvenir. Le processus en est un de « concessions mutuelles », et les résultats ne sont pas garantis.

VI. Conclusion

[115] The Minister's decision did not violate the Ktunaxa's freedom of religion as their claim does not fall within the scope of s. 2(*a*) of the *Charter*. The Minister's conclusion that consultation sufficient to satisfy s. 35 of the *Constitution Act, 1982* had occurred has not been shown to be unreasonable. For these reasons, we would dismiss the appeal.

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J. —

I. Overview

[116] The Ktunaxa are an Aboriginal people who inhabit parts of southeastern British Columbia. They claim that the decision by the provincial Minister of Forests, Lands and Natural Resource Operations ("Minister") to approve a ski resort development infringes their right to religious freedom under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* and constitutes a breach of the Crown's duty to consult pursuant to s. 35 of the *Constitution Act, 1982*.

[117] I agree with the Chief Justice and Rowe J. that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 was met. Respectfully, however, I disagree with my colleagues' s. 2(*a*) analysis. In my view, the Ktunaxa's right to religious freedom was infringed by the Minister's decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. The Ktunaxa hold as sacred several sites within their traditional lands, and they revere multiple spirits in their religion. The Ktunaxa believe that a very important spirit in their religious tradition, Grizzly Bear Spirit, inhabits Qat'muk, a body of sacred land that lies at the heart of the proposed ski resort. The development of the ski resort would desecrate Qat'muk and cause Grizzly Bear Spirit to leave, thus severing the Ktunaxa's connection to the

VI. Conclusion

[115] La décision du Ministre n'a pas violé la liberté de religion des Ktunaxa car leur revendication ne relève pas de l'al. 2*a*) de la *Charte*. On n'a pas démontré le caractère déraisonnable de la conclusion du Ministre qu'il y avait eu une consultation suffisante pour respecter l'art. 35 de la *Loi constitutionnelle de 1982*. Pour ces motifs, nous sommes d'avis de rejeter le pourvoi.

Version française des motifs des juges Moldaver et Côté rendus par

LE JUGE MOLDAVER —

I. Vue d'ensemble

[116] Les Ktunaxa forment un peuple autochtone qui habite certains secteurs du sud-est de la Colombie-Britannique. Selon eux, la décision de l'intimé, Minister of Forests, Lands and Natural Resource Operations de la Colombie-Britannique (« Ministre »), d'approuver l'aménagement d'une station de ski porte atteinte au droit à la liberté de religion que leur garantit l'al. 2*a*) de la *Charte canadienne des droits et libertés* et constitue un manquement à l'obligation de consultation imposée à la Couronne par l'art. 35 de la *Loi constitutionnelle de 1982*.

[117] Je conviens avec la Juge en chef et le juge Rowe que le Ministre a raisonnablement conclu à l'acquittement de l'obligation de consulter et d'accommoder les Ktunaxa prévue à l'art. 35. En revanche, je ne peux malheureusement faire mienne leur analyse fondée sur l'al. 2*a*). À mon avis, la décision du Ministre d'approuver l'aménagement de la station de ski proposée par l'intimée Glacier Resorts Ltd. a porté atteinte au droit des Ktunaxa à la liberté de religion. Les Ktunaxa tiennent pour sacrés plusieurs secteurs de leur territoire traditionnel et la vénération de nombreux esprits fait partie de leur religion. Ils croient qu'un esprit fort important dans leur tradition religieuse, l'Esprit de l'Ours Grizzly, habite le Qat'muk, un lieu sacré qui se situe au cœur de la station de ski proposée. L'aménagement de la station de ski profanerait le Qat'muk et ferait fuir

land. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. All songs, rituals and ceremonies associated with Grizzly Bear Spirit would become meaningless.

[118] In my respectful view, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her *religious* beliefs, constituting an infringement of s. 2(*a*). That is exactly what happened in this case. The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s. 2(*a*) breach.

[119] That being said, I am of the view that the Minister proportionately balanced the Ktunaxa's s. 2(*a*) right with the relevant statutory objectives: to administer Crown land and dispose of it in the public interest. The Minister was faced with two options: approve the development of the ski resort or grant the Ktunaxa a right to exclude others from constructing permanent structures on over 50 square kilometres of Crown land. This placed the Minister in a difficult, if not impossible, position. If he granted this right of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives. In the end, it is apparent that he determined that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa the veto right that they were seeking.

[120] In view of the options open to the Minister, I am satisfied that his decision was reasonable.

l'Esprit de l'Ours Grizzly, rompant par le fait même le lien entre les Ktunaxa et la terre. Ces derniers seraient ainsi privés de ses conseils et de son assistance spirituels. L'ensemble des chansons, rites et cérémonies associés à l'Esprit de l'Ours Grizzly perdraient tout leur sens.

[118] À mon humble avis, la conduite de l'État qui prive de toute signification religieuse les croyances religieuses sincères d'une personne porte atteinte à son droit à la liberté de religion. Les croyances religieuses revêtent une signification spirituelle pour le croyant. Lorsque cette signification est supprimée par l'État, la personne ne peut plus se conformer à ses croyances *religieuses*, ce qui constitue une contravention à l'al. 2*a*). C'est exactement ce qui s'est produit en l'espèce. La décision du Ministre d'approuver la station de ski privera de toute signification spirituelle l'ensemble des croyances religieuses des Ktunaxa touchant l'Esprit de l'Ours Grizzly. Par conséquent, les Ktunaxa ne pourront pas interpréter des chansons, se livrer à des rituels ou tenir des cérémonies en l'honneur de l'Esprit de l'Ours Grizzly d'une manière qui a une signification religieuse à leurs yeux. À mon avis, il s'agit là d'une violation de l'al. 2*a*).

[119] Cela dit, j'estime que le Ministre a mis en balance de façon proportionnée le droit reconnu aux Ktunaxa par l'al. 2*a*) et les objectifs pertinents de la loi : administrer les terres de la Couronne et les aliéner dans l'intérêt public. Deux choix se présentaient au Ministre : approuver l'aménagement de la station de ski ou conférer aux Ktunaxa le droit d'interdire à autrui de construire des installations permanentes sur plus de 50 kilomètres carrés de terres de la Couronne. Le Ministre se retrouvait donc dans une situation difficile, voire impossible. S'il conférait ce droit d'interdiction aux Ktunaxa, cela le gênerait considérablement dans l'atteinte des objectifs que lui confie la loi, voire l'empêcherait d'atteindre ces objectifs. Au bout du compte, il a manifestement décidé que la réalisation de son mandat législatif l'empêchait d'accorder aux Ktunaxa le droit de veto qu'ils réclamaient.

[120] Vu les choix qui s'offraient au Ministre, je suis convaincu que sa décision était raisonnable. Elle

It limited the Ktunaxa's right "as little as reasonably possible" given these statutory objectives (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 40), and amounted to a proportionate balancing. I would therefore dismiss the appeal.

II. Analysis

A. *Section 2(a) of the Charter*

(1) The Scope of Section 2(*a*)

[121] All *Charter* rights — including freedom of religion under s. 2(*a*) — must be interpreted in a broad and purposive manner (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 20; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 179, per McLachlin J. (as she then was)). As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, the interpretation of freedom of religion must be a "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (emphasis added). The interpretation of s. 2(*a*) must therefore be guided by its purpose, which is to "ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759).

[122] In light of this purpose, this Court has articulated a two-part test for determining whether s. 2(*a*) has been infringed. The claimant must show: (1) that he or she sincerely believes in a belief or practice that has a nexus with religion; and (2) that the impugned conduct interferes with the claimant's ability to act in accordance with that belief or practice "in a manner that is more than trivial or insubstantial" (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 59 (emphasis deleted); *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 34; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32).

a restreint le droit des Ktunaxa « aussi peu que cela [était] raisonnablement possible » compte tenu de ces objectifs visés par la loi (*École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613, par. 40), et était le fruit d'une mise en balance proportionnée. Je suis donc d'avis de rejeter le pourvoi.

II. Analyse

A. *Alinéa 2a) de la Charte*

(1) La portée de l'al. 2*a*)

[121] Tous les droits garantis par la *Charte* — notamment la liberté de religion reconnue à l'al. 2*a*) — doivent recevoir une interprétation libérale et téléologique (*Figueroa c. Canada (Procureur général)*, 2003 CSC 37, [2003] 1 R.C.S. 912, par. 20; *Renvoi : Circ. électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, p. 179, la juge McLachlin (maintenant Juge en chef)). Comme l'a dit la Cour dans *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344, l'interprétation de la liberté de religion doit être « libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte* » (je souligne). L'interprétation de l'al. 2*a*) doit donc tenir compte de son objet, qui est d'« assurer que la société ne s'ingérera pas dans les croyances intimes profondes qui régissent la perception qu'on a de soi, de l'humanité, de la nature et, dans certains cas, d'un être supérieur ou différent » (*R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 759).

[122] À la lumière de cet objet, la Cour a formulé un critère à deux volets permettant de décider s'il y a eu contravention à l'al. 2*a*). Le demandeur doit démontrer : (1) qu'il croit sincèrement à une croyance ou à une pratique ayant un lien avec la religion et (2) que la conduite reprochée nuit « d'une manière plus que négligeable ou insignifiante » à sa capacité de se conformer à cette croyance ou pratique (*Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 59 (soulignement omis); *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, par. 34; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 32).

[123] The first part of the test is not at issue in this case. None of the parties dispute that the Ktunaxa sincerely believe that Grizzly Bear Spirit lives in Qat'muk, and that any permanent development would drive Grizzly Bear Spirit out, desecrate the land and sever the Ktunaxa's spiritual connection to it. The central issue raised by this appeal concerns the second part of the test. The Chief Justice and Rowe J. maintain that the Minister's decision does not interfere with the Ktunaxa's ability to act in accordance with their religious beliefs or practices. With respect, I disagree. As I will explain, in my view, the Minister's decision interferes with the Ktunaxa's ability to act in accordance with their religious beliefs and practices in a manner that is more than trivial or insubstantial, and the Ktunaxa's claim therefore falls within the scope of s. 2(*a*).

(2) The Ability to Act in Accordance With a Religious Belief or Practice

[124] As indicated, the s. 2(*a*) inquiry focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. This Court has recognized that religious beliefs are "deeply held personal convictions . . . integrally linked to one's self-definition and spiritual fulfilment", while religious practices are those that "allow individuals to foster a connection with the divine" (*Amselem*, at para. 39). In my view, where a person's religious belief no longer provides spiritual fulfillment, or where the person's religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her *religious* beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her.

[125] The same holds true of a person's ability to pass on beliefs and practices to future generations. This Court has recognized that the ability of a religious community's members to pass on their beliefs to their children is an essential aspect of religious

[123] Le premier volet du critère n'est pas en litige dans la présente affaire. Aucune des parties ne conteste le fait que les Ktunaxa croient sincèrement que l'Esprit de l'Ours Grizzly vit dans le Qat'muk et que tout aménagement permanent en chasserait cet esprit, profanerait le terrain et romprait le lien spirituel qui l'unit aux Ktunaxa. La question principale soulevée par le présent pourvoi touche le second volet du critère. La Juge en chef et le juge Rowe affirment que la décision du Ministre ne nuit pas à la capacité des Ktunaxa de se conformer à leurs croyances ou pratiques religieuses. Soit dit en tout respect, je ne partage pas leur avis. Comme je l'expliquerai, la décision du Ministre me semble nuire d'une manière plus que négligeable ou insignifiante à la capacité des Ktunaxa de se conformer à leurs croyances et pratiques religieuses, et la revendication des Ktunaxa relève donc de l'al. 2*a*).

(2) La capacité de se conformer à une croyance ou pratique religieuse

[124] Rappelons que l'analyse fondée sur l'al. 2*a*) s'attache au point de savoir si une mesure étatique a nui à la capacité d'une personne de se conformer à ses croyances ou pratiques religieuses. La Cour a reconnu que les croyances religieuses sont « de profondes [. . .] convictions volontaires, [. . .] qui sont intégralement liées à la façon dont [l'individu] se définit et s'épanouit spirituellement », tandis que les pratiques religieuses « permettent à l'individu de communiquer avec l'être divin » (*Amselem*, par. 39). À mon avis, si la croyance religieuse d'une personne ne lui offre plus d'épanouissement spirituel, ou si sa pratique religieuse ne lui permet plus de communiquer avec l'être divin, cette personne ne peut se conformer à ses croyances ou pratiques *religieuses*, car elles ont perdu toute signification religieuse. Bien qu'une personne puisse toujours professer une croyance en particulier ou s'adonner à un rite donné, cette croyance ou ce rite n'aurait aucune signification religieuse pour elle.

[125] Il en va de même de la capacité d'une personne de transmettre des croyances et des pratiques aux générations futures. La Cour a reconnu que la capacité des membres d'une communauté religieuse de transmettre leurs croyances à leurs enfants est un

freedom protected under s. 2(*a*) (*Loyola*, at paras. 64 and 67). Where state action has rendered a certain belief or practice devoid of spiritual significance, this interferes with one's ability to pass on that tradition to future generations, as there would be no reason to continue a tradition that lacks spiritual significance.

[126] Therefore, where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual's ability to act in accordance with his or her religious beliefs or practices — whether by professing a belief, engaging in a ritual, or passing traditions on to future generations.

[127] This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. The connection to the physical world, specifically to land, is a central feature of Indigenous religions. Indeed, as M. L. Ross explains, "First Nations spirituality and religion are rooted in the land" (*First Nations Sacred Sites in Canada's Courts* (2005), at p. 3 (emphasis added)). In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself. Unlike in Judeo-Christian faiths, for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world. For Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with a believer's ability to act in accordance with his or her religious beliefs and practices.

[128] Taking this feature of Indigenous religions into account is therefore critical in assessing whether there has been a s. 2(*a*) infringement. The principle of state neutrality requires that the state not favour or

aspect essentiel de la liberté de religion protégé par l'al. 2*a*) (*Loyola*, par. 64 et 67). Lorsqu'une mesure étatique prive de toute signification spirituelle une certaine croyance ou pratique, cela nuit à la capacité d'une personne de transmettre cette tradition aux générations futures, car il ne servirait à rien de poursuivre une tradition dénuée de signification spirituelle.

[126] Ainsi, lorsqu'une mesure étatique enlève à des croyances ou pratiques leur signification spirituelle, cela nuit à la capacité d'une personne de se conformer à ses croyances ou pratiques religieuses, que ce soit en professant une croyance, en se livrant à un rite ou en transmettant des traditions aux générations futures.

[127] Ce type d'ingérence de l'État est une réalité lorsque les citoyens s'épanouissent spirituellement par le lien qui les unit au monde concret. Le lien au monde concret, particulièrement à la terre, est un élément primordial des religions autochtones. En effet, comme l'explique M. L. Ross, [TRADUCTION] « la spiritualité et la religion des Premières Nations sont ancrées dans la terre » (*First Nations Sacred Sites in Canada's Courts* (2005), p. 3 (je souligne)). Dans de nombreuses religions autochtones, la terre est non seulement le lieu où s'exercent des pratiques spirituelles au même titre que peut l'être une église, une mosquée ou un lieu saint; la terre peut *elle-même* être sacrée, en ce sens que c'est là que l'être divin se manifeste. Contrairement aux fois judéo-chrétiennes, par exemple, où l'être divin est perçu comme étant surnaturel, dans les fois autochtones, le domaine spirituel est inextricablement lié au monde concret. Du point de vue des religions autochtones, une mesure étatique qui touche la terre peut donc rompre le lien avec l'être divin, ce qui priverait les croyances et pratiques de leur signification spirituelle. La mesure étatique qui a cet effet sur une religion autochtone nuit à la capacité d'un croyant de se conformer à ses croyances et pratiques religieuses.

[128] Il est crucial de prendre en compte cet élément des religions autochtones pour juger s'il y a eu contravention à l'al. 2*a*). Le principe de la neutralité de l'État exige que l'État ne favorise ni ne

hinder one religion over the other (see *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 32; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 72). To ensure that all religions are afforded the same level of protection under s. 2(*a*), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices.

(3) The Chief Justice and Rowe J.'s Position on the Scope of Section 2(*a*)

[129] The Chief Justice and Rowe J. take a different approach. They maintain that the *Charter* protects the "freedom to worship", but not what they call the "spiritual focal point of worship" (para. 71). If I understand my colleagues' approach correctly, s. 2(*a*) of the *Charter* protects *only* the freedom to hold beliefs and manifest them through worship and practice (para. 71). In their view, even where the effect of state action is to render beliefs and practices devoid of all spiritual significance, claimants still have the freedom to hold beliefs and manifest those beliefs through practices, and there is therefore no interference with their ability to act in accordance with their beliefs. Thus, under my colleagues' approach, as long as a Sikh student can carry a kirpan into a school (*Multani*), Orthodox Jews can erect a personal succah (*Amselem*), or the Ktunaxa have the ability to conduct ceremonies and rituals, there is no infringement of s. 2(*a*), even where the effect of state action is to reduce these acts to empty gestures.

[130] I cannot accept such a restrictive reading of s. 2(*a*). As I have indicated, where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice. The scope of s. 2(*a*) is therefore not limited to the freedom to hold a belief and manifest that belief through religious practices. Rather, as this Court noted in *Amselem*, "[i]t is the religious or spiritual essence of an action" that attracts protection under s. 2(*a*) (para. 47). In my view, the

défavorise une religion aux dépens de l'autre (voir *S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235, par. 32; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 72). Pour veiller à ce que l'al. 2*a*) accorde la même protection à toutes les religions, les tribunaux doivent être conscients des caractéristiques propres à chacune d'elles et des différentes manières dont l'État peut nuire aux croyances ou pratiques de chaque religion.

(3) La position de la Juge en chef et du juge Rowe sur la portée de l'al. 2*a*)

[129] La Juge en chef et le juge Rowe voient les choses autrement. Selon eux, la *Charte* protège la « liberté de culte », mais non ce qu'ils appellent le « point de mire spirituel du culte » (par. 71). Si je comprends bien la thèse de mes collègues, l'al. 2*a*) de la *Charte* protège *uniquement* la liberté d'avoir des croyances et de les manifester par le culte et la pratique (par. 71). À leur avis, même si une mesure étatique a pour effet de priver des croyances et des pratiques de toute signification spirituelle, les demandeurs conservent néanmoins la liberté d'avoir des croyances et de les manifester en se livrant à des pratiques, et il n'y a donc pas atteinte à leur capacité de se conformer à leurs croyances. Par conséquent, selon la thèse de mes collègues, tant qu'un élève de religion sikhe peut porter un kirpan à l'école (*Multani*), que des Juifs orthodoxes peuvent ériger une souccah individuelle (*Amselem*), ou que les Ktunaxa peuvent tenir des cérémonies et des rituels, il n'y a pas contravention à l'al. 2*a*) même si la mesure étatique a pour effet de vider ces gestes de tout sens.

[130] Je ne peux souscrire à une interprétation aussi restrictive de l'al. 2*a*). Comme je l'ai mentionné, lorsqu'une croyance ou pratique est dénuée de signification spirituelle, il y a manifestement atteinte à la capacité de se conformer à cette croyance ou pratique *religieuse*. L'alinéa 2*a*) ne protège donc pas seulement la liberté d'avoir une croyance et de la manifester en se livrant à des pratiques religieuses. D'ailleurs, comme l'a souligné la Cour dans *Amselem*, « [c]'est le caractère religieux ou spirituel d'un acte » qui entraîne la protection de l'al. 2*a*)

approach adopted by my colleagues does not engage with this crucial point. It does not take into account that if a belief or practice becomes devoid of spiritual significance, it is highly unlikely that a person would continue to hold those beliefs or engage in those practices. Indeed, that person would have no reason to do so. With respect, my colleagues' approach amounts to protecting empty gestures and hollow rituals, rather than guarding against state conduct that interferes with "profoundly personal beliefs", the true purpose of s. 2(*a*)'s protection (*Edwards Books*, at p. 759).

[131] This approach also risks excluding Indigenous religious freedom claims involving land from the scope of s. 2(*a*)'s protection. As indicated, there is an inextricable link between spirituality and land in Indigenous religious traditions. In this context, state action that impacts land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance. My colleagues have not taken this unique and central feature of Indigenous religion into account. Their approach therefore risks foreclosing the protections of s. 2(*a*) of the *Charter* to substantial elements of Indigenous religious traditions.

(4) The Minister's Decision Infringes the Ktunaxa's Freedom of Religion Under Section 2(*a*) of the *Charter*

[132] I turn now to the facts of this case. The Ktunaxa's religion encompasses multiple spirits and several places of spiritual significance (see, e.g., A.R., vol. II, at pp. 119 and 197). The Ktunaxa sincerely believe that Qat'muk is a highly sacred site, home to a very important spirit — Grizzly Bear Spirit. The Ktunaxa assert that Grizzly Bear Spirit provides them with spiritual guidance and assistance. They claim that the proposed development would drive Grizzly Bear Spirit out, sever their spiritual connection with Qat'muk, and render their beliefs in Grizzly Bear Spirit devoid of spiritual significance.

(par. 47). J'estime que l'approche adoptée par mes collègues fait abstraction de ce point capital. Elle ne tient pas compte du fait que, si une croyance ou pratique perd sa signification spirituelle, il est fort peu probable qu'une personne conserve cette croyance ou se livre toujours à cette pratique. En effet, cette personne n'aurait aucune raison de le faire. Soit dit en tout respect, l'approche de mes collègues revient à protéger des gestes vains et des rites vides de sens plutôt qu'à se prémunir contre la conduite de l'État qui nuit à des « croyances intimes profondes », le véritable objet de la protection accordée par l'al. 2*a*) (*Edwards Books*, p. 759).

[131] Cette approche risque aussi d'exclure des revendications territoriales autochtones fondées sur la liberté de religion de la protection accordée par l'al. 2*a*). Comme je l'ai mentionné, un lien inextricable unit la spiritualité et la terre dans les traditions religieuses autochtones. Dans ces conditions, une mesure étatique qui touche la terre peut rompre le lien spirituel avec l'être divin et priver ainsi les croyances et pratiques autochtones de leur signification spirituelle. Mes collègues n'ont pas tenu compte de cette caractéristique unique et centrale de la religion autochtone. Leur approche risque donc d'exclure des éléments importants de traditions religieuses autochtones de la protection accordée par l'al. 2*a*) de la *Charte*.

(4) La décision du Ministre porte atteinte à la liberté de religion garantie aux Ktunaxa par l'al. 2*a*) de la *Charte*

[132] Je passe maintenant aux faits de l'espèce. La religion des Ktunaxa englobe de multiples esprits et plusieurs lieux d'importance spirituelle (voir, p. ex., d.a., vol. II, p. 119 et 197). Les Ktunaxa croient sincèrement que le Qat'muk est un lieu très sacré, le foyer d'un esprit fort important, celui de l'Ours Grizzly. Selon eux, cet esprit leur donne des conseils et de l'assistance spirituels. Ils prétendent que l'aménagement proposé chasserait l'Esprit de l'Ours Grizzly, romprait leur lien spirituel avec le Qat'muk et priverait leurs croyances en cet esprit de toute signification spirituelle.

[133] The Chief Justice and Rowe J. frame the Ktunaxa's religious freedom claim as one that seeks to protect the "spiritual focal point of worship" — that is, Grizzly Bear Spirit (para. 71). I disagree. The Ktunaxa are seeking protection of their ability to act in accordance with their religious beliefs and practices, which falls squarely within the scope of s. 2(*a*). If the Ktunaxa's religious beliefs in Grizzly Bear Spirit become entirely devoid of religious significance, their prayers, ceremonies and rituals in recognition of Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. There would be no reason for them to continue engaging in these acts, as they would be devoid of any spiritual significance. Members of the Ktunaxa assert that without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, they would be unable to pass on their beliefs and practices to future generations in any meaningful way, as illustrated in the following excerpt from an affidavit quoted in the appellants' factum:

> If the proposed resort were to go ahead in the heart of Qat'muk, I do not see how I can meaningfully speak to my grandchildren about Grizzly Bear Spirit. How can I teach them his songs, what to ask from him, if he no longer has a place recognizable to us and respected as his within our world? [para. 28]

[134] Viewed this way, I am satisfied that the Minister's decision approving the proposed development interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial. The decision therefore amounts to an infringement of the Ktunaxa's freedom of religion under s. 2(*a*).

B. *The Minister's Decision Was Reasonable*

(1) The *Doré* Framework

[135] Having resolved the preliminary issue that the Minister's decision to approve the development infringes the Ktunaxa's s. 2(*a*) right, I turn now to

[133] La Juge en chef et le juge Rowe disent que la revendication des Ktunaxa fondée sur la liberté de religion vise à protéger le « point de mire spirituel du culte », en l'occurrence l'Esprit de l'Ours Grizzly (par. 71). Je ne suis pas de cet avis. Les Ktunaxa réclament la protection de leur capacité de se conformer à leurs croyances et pratiques religieuses, qui relèvent nettement de l'al. 2*a*). Si les croyances religieuses des Ktunaxa en l'Esprit de l'Ours Grizzly perdent toute signification religieuse, leurs prières, cérémonies et rites en l'honneur de cet esprit ne seraient plus que de vaines paroles et des gestes vides de sens. Les Ktunaxa n'auraient aucune raison de continuer de se livrer à ces actes, car ceux-ci seraient dépourvus de toute signification spirituelle. Des membres des Ktunaxa mentionnent que, sans leur lien spirituel avec le Qat'muk et l'Esprit de l'Ours Grizzly, ils ne seraient pas en mesure de transmettre de façon significative leurs croyances et pratiques aux générations futures, comme le montre l'extrait suivant d'un affidavit cité dans le mémoire des appelants :

> [TRADUCTION] Si la construction de la station de ski proposée devait aller de l'avant dans le cœur du Qat'muk, je ne vois pas comment je pourrais parler de façon significative de l'Esprit de l'Ours Grizzly à mes petits-enfants. Comment pourrais-je leur enseigner ses chansons, ce que nous pouvons lui demander, s'il n'occupe plus une place que nous reconnaissons et qui est tenue pour la sienne dans notre monde? [par. 28]

[134] Dans cette optique, je suis convaincu que la décision du Ministre d'approuver l'aménagement proposé nuit d'une manière plus que négligeable ou insignifiante à la capacité des Ktunaxa de se conformer à leurs croyances ou pratiques religieuses. La décision porte donc atteinte à la liberté de religion garantie aux Ktunaxa par l'al. 2*a*).

B. *La décision du Ministre était raisonnable*

(1) Le cadre d'analyse établi dans *Doré*

[135] Ayant réglé la question préliminaire en statuant que la décision du Ministre d'approuver l'aménagement porte atteinte au droit garanti aux Ktunaxa

the question of whether the Minister's decision was reasonable.

[136] This Court's decision in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister reasonably exercised his statutory discretion in accordance with the Ktunaxa's *Charter* protections (*Loyola*, at para. 3). On judicial review, the task of the reviewing court applying the *Doré* framework "is to assess whether the decision is reasonable because it reflects a proportionate balance" between the *Charter* protections — both rights and values — at stake and the relevant statutory objectives (*Loyola*, at para. 37, citing *Doré*, at para. 57). As this Court explained in *Loyola*, a proportionate balancing is one "that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (para. 39). That is, when the Minister balances the *Charter* protections with the relevant statutory objectives, he or she must ensure that the *Charter* protections are "affected as little as reasonably possible" in light of the state's particular objectives (*Loyola*, at para. 40). This approach respects the expertise that decision makers like the Minister bring to balancing *Charter* protections and statutory objectives in the context of the particular facts before them (*Loyola*, at para. 42, citing *Doré*, at para. 47).

(2) A Reviewing Court May Consider an Administrative Decision Maker's Implicit Reasons

[137] The Ktunaxa submit that the Minister did not consider their s. 2(*a*) claim at all when he made his decision and that his decision was therefore unreasonable. Although the Ktunaxa advised the Minister that their s. 2(*a*) right was implicated by his decision regarding the development (A.F., at para. 17), the Minister did not refer to s. 2(*a*) explicitly in his reasons for his decision.

par l'al. 2*a*), j'aborde maintenant le point de savoir si cette décision était raisonnable.

[136] Dans l'arrêt *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, la Cour établit le cadre d'analyse applicable pour décider si le Ministre a raisonnablement exercé le pouvoir discrétionnaire que lui accorde la loi en conformité avec les protections conférées par la *Charte* aux Ktunaxa (*Loyola*, par. 3). Lors d'un contrôle judiciaire, le rôle de la cour appelée à appliquer le cadre d'analyse établi dans *Doré* « consiste à se demander si la décision en cause est raisonnable parce qu'elle est le fruit d'une mise en balance proportionnée » des protections de la *Charte* — tant les droits que les valeurs — en jeu et des objectifs pertinents visés par la loi (*Loyola*, par. 37, citant *Doré*, par. 57). Comme l'a expliqué la Cour dans *Loyola*, une mise en balance proportionnée en est une « qui donne effet autant que possible aux protections en cause conférées par la *Charte* compte tenu du mandat législatif particulier en cause » (par. 39). Autrement dit, quand le Ministre met en balance les protections conférées par la *Charte* et les objectifs pertinents de la loi, il doit s'assurer que ces protections sont « restrei[ntes] [. . .] aussi peu que cela est raisonnablement possible » eu égard aux objectifs particuliers de l'État (*Loyola*, par. 40). Cette approche respecte l'expertise que les décideurs comme le Ministre apportent à la mise en balance des protections conférées par la *Charte* et des objectifs de la loi dans le contexte des faits particuliers dont ils sont saisis (*Loyola*, par. 42, citant *Doré*, par. 47).

(2) Une cour de révision peut examiner les motifs implicites d'un décideur administratif

[137] Les Ktunaxa soutiennent que le Ministre n'a pas du tout pris en compte leur revendication fondée sur l'al. 2*a*) au moment de prendre sa décision et que celle-ci était donc déraisonnable. Bien que les Ktunaxa aient informé le Ministre que sa décision concernant l'aménagement mettait en jeu le droit que leur reconnaissait l'al. 2*a*) (m.a., par. 17), il n'a pas mentionné explicitement cet alinéa dans ses motifs de décision.

[138] The chambers judge, Savage J., held that the Minister did not need to specifically refer to the s. 2(*a*) claim made by the Ktunaxa, because the Minister addressed the "substance" of the asserted *Charter* right in his reasons: the Ktunaxa's spiritual connection to Qat'muk, and the impact the development would have on this connection (2014 BCSC 568, 306 C.R.R. (2d) 211, at paras. 270 and 273). Although Savage J. found that the Minister's decision did not infringe the Ktunaxa's s. 2(*a*) right, he stated that if he was wrong in this regard, the Minister's decision amounted to a proportionate balancing of the *Charter* protections with the statutory objectives (para. 301).

[139] As I will explain, I agree with Savage J. in two respects: (1) that the Minister addressed the "substance" of the Ktunaxa's s. 2(*a*) right; and (2) that it is implicit from the Minister's reasons that he proportionately balanced the *Charter* protections at stake for the Ktunaxa with the relevant statutory objectives. In this case, it is important to recall that reviewing courts may consider an administrative decision maker's implicit reasoning for reaching a decision. As Abella J. held in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the reasons given by an administrative decision maker are not required to explicitly address every argument raised by the claimant:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion . . . . [para. 16]

[140] Rather, the ultimate question for the reviewing court is whether "the reasons allow the reviewing court to understand why the [administrative decision maker] made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*ibid.*). Even if the reasons

[138] Le juge en chambre, le juge Savage, a conclu que le Ministre n'avait pas à mentionner expressément la revendication faite par les Ktunaxa sur la base de l'al. 2*a*) parce qu'il a traité de la « substance » du droit invoqué au titre de la *Charte* dans ses motifs : le lien spirituel des Ktunaxa avec le Qat'muk et l'impact qu'aurait l'aménagement sur ce lien (2014 BCSC 568, 306 C.R.R. (2d) 211, par. 270 et 273). Bien que le juge Savage ait estimé que la décision du Ministre ne portait pas atteinte au droit reconnu aux Ktunaxa par l'al. 2*a*), il a dit que, même s'il se trompait sur ce point, la décision du Ministre était le fruit d'une mise en balance proportionnée des protections conférées par la *Charte* et des objectifs de la loi (par. 301).

[139] Comme je l'expliquerai, je partage l'avis du juge Savage à deux égards : (1) le Ministre a traité de la « substance » du droit garanti aux Ktunaxa par l'al. 2*a*) et (2) il ressort implicitement des motifs du Ministre qu'il a mis en balance de façon proportionnée les protections de la *Charte* en jeu pour les Ktunaxa et les objectifs pertinents de la loi. En l'espèce, il importe de rappeler que la cour de révision peut tenir compte du raisonnement adopté implicitement par le décideur administratif pour parvenir à une décision. Comme l'a déclaré la juge Abella dans *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, il n'est pas nécessaire que les motifs du décideur administratif abordent explicitement chaque argument soulevé par le demandeur :

> Il se peut que les motifs ne fassent pas référence à tous les arguments, dispositions législatives, précédents ou autres détails que le juge siégeant en révision aurait voulu y lire, mais cela ne met pas en doute leur validité ni celle du résultat au terme de l'analyse du caractère raisonnable de la décision. Le décideur n'est pas tenu de tirer une conclusion explicite sur chaque élément constitutif du raisonnement, si subordonné soit-il, qui a mené à sa conclusion finale . . . [par. 16]

[140] La question que la cour de révision doit trancher au bout du compte est plutôt de savoir si « [les motifs] permettent à la cour de révision de comprendre le fondement de la décision du [décideur administratif] et de déterminer si la conclusion fait partie des issues possibles acceptables » (*ibid.*).

do not seem wholly adequate to justify the outcome, a reviewing court should seek to first supplement the reasons of the decision maker before substituting its own decision (*ibid*., at para. 12). Reasonableness review thus entails "a respectful attention to the reasons offered or which could be offered in support of a decision" (*ibid.*, at para. 12, citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286; see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 58). For example, in *Newfoundland Nurses*, although the chambers judge and a dissenting judge at the Court of Appeal found that the administrative decision maker's reasons disclosed no line of reasoning which could lead to his conclusion, this Court held that the decision maker was "alive to the question at issue and came to a result well within the range of reasonable outcomes" (para. 26). His decision was therefore reasonable.

(3) The Minister Was Alive to the Substance of the Ktunaxa's Section 2(*a*) Right

[141] In my view, it is clear from the Minister's reasons that he was alive to the "substance" of the Ktunaxa's asserted *Charter* right: the Ktunaxa's spiritual connection to Qat'muk, and the fact that any permanent development in Qat'muk would sever their spiritual connection to the land. The Minister did note that the Ktunaxa's *prima facie* claim to an Aboriginal right under s. 35 based on their spiritual connection to the land was "weak" (see Minister's Rationale, at Schedule "F" of 2014 BCSC 568, pp. 117-24 ("Rationale"), at p. 122 (CanLII)). However, as I will explain, this assessment of the s. 35 claim was based on factors which are irrelevant to the s. 2(*a*) inquiry and thus had no bearing on the Minister's consideration of the Ktunaxa's s. 2(*a*) right.

[142] In assessing the *prima facie* claim to an Aboriginal right as "weak", the Minister specifically referred to elements of the test under s. 35 for evaluating an Aboriginal right (see *R. v. Van der Peet*,

Même si les motifs ne semblent pas tout à fait convenables pour justifier l'issue, la cour de révision doit d'abord chercher à les compléter avant de leur substituer sa propre décision (*ibid*., par. 12). Le contrôle selon la norme de la décision raisonnable commande donc [TRADUCTION] « une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision » (*ibid.*, par. 12, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286; voir aussi *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559, par. 58). Par exemple, dans *Newfoundland Nurses*, bien que le juge siégeant en cabinet et une juge dissidente de la Cour d'appel aient conclu que les motifs du décideur administratif ne faisaient ressortir aucun raisonnement susceptible de mener à la conclusion à laquelle il était parvenu, notre Cour a jugé que le décideur avait « bien saisi la question en litige et qu'il [était] parvenu à un résultat faisant sans aucun doute partie des issues possibles raisonnables » (par. 26). Sa décision était donc raisonnable.

(3) Le Ministre a bien saisi la substance du droit garanti aux Ktunaxa par l'al. 2*a*)

[141] À mon avis, il ressort des motifs du Ministre qu'il a bien saisi la « substance » du droit revendiqué par les Ktunaxa en vertu de la *Charte* : leur lien spirituel avec le Qat'muk et le fait que toute installation permanente dans ce secteur romprait le lien en question. Le Ministre a effectivement qualifié de [TRADUCTION] « faible » la revendication à première vue, par les Ktunaxa, d'un droit ancestral reconnu à l'art. 35 du fait de leur lien spirituel avec la terre (voir les motifs du Ministre à l'annexe « F » de la décision 2014 BCSC 568, p. 117-124 (« Motifs »), p. 122 (CanLII)). Toutefois, comme je l'expliquerai, cette évaluation de la revendication fondée sur l'art. 35 reposait sur des facteurs étrangers à l'analyse concernant l'al. 2*a*) et ne se rapportait donc pas à la décision du Ministre sur le droit garanti aux Ktunaxa par l'al. 2*a*).

[142] Pour juger « faible » la revendication à première vue d'un droit ancestral, le Ministre a explicitement mentionné des éléments du test à utiliser en application de l'art. 35 pour évaluer ce droit (voir

[1996] 2 S.C.R. 507, at paras. 46, 55 and 60). These elements include whether the tradition or practice was engaged in prior to contact with Europeans and whether it was integral to the distinctive culture of the Aboriginal group. The Minister noted that there was no indication that Jumbo Valley was under threat from "permanent forms of development at the time of contact such that the right claimed would have been one that was exercised or an aboriginal tradition, practice or activity integral to the culture of [the] Ktunaxa", and that the "details of the spiritual interest in the valley" were not shared with or known by the general Ktunaxa population (Rationale, at p. 122).

[143] These elements of the test for identifying an Aboriginal right under s. 35 are not part of the s. 2(*a*) inquiry. As indicated, in order to determine that there is an infringement of a s. 2(*a*) right, there are two requirements: (1) that the religious belief or practice is sincerely held; and (2) that state conduct has interfered with the ability to act in accordance with the belief or practice in a non-trivial way. It follows that the Minister's comment that the *prima facie* claim concerning the Ktunaxa's spiritual connection to the land was "weak" goes only to the strength of the s. 35 claim and has no bearing on the assessment of the Ktunaxa's s. 2(*a*) right.

[144] In fact, in his Rationale, the Minister explicitly recognized that the proposed development put at stake the Ktunaxa's spiritual connection to Qat'muk — the substance of their s. 2(*a*) right. Although the Minister assessed the strength of the s. 35 claim to an Aboriginal right as "weak", he stated that he "sincerely recognize[d] the genuinely sacred values at stake for Ktunaxa leadership and the Knowledge Keepers in particular" (p. 122). In his Consultation/Accommodation Summary (reproduced in R.R. (Minister), at pp. 66-154), which the Minister refers to in his Rationale, he noted that Jumbo Valley is an area of cultural significance with sacred values, and that "the Land of the Grizzly Spirit" is a highly important spiritual site in the Ktunaxa's traditional

R. c. Van der Peet, [1996] 2 R.C.S. 507, par. 46, 55 et 60). Au nombre de ces éléments figurent les points de savoir si la tradition ou pratique précède le contact avec les Européens et si elle faisait partie intégrante de la culture distinctive du groupe autochtone. D'après le Ministre, rien n'indique que la vallée Jumbo était menacée par des [TRADUCTION] « aménagements permanents au moment du contact qui auraient entraîné l'exercice du droit revendiqué ou fait en sorte que celui-ci constitue une tradition, pratique ou activité ancestrale au cœur de la culture des Ktunaxa », et les « détails de l'intérêt spirituel dans la vallée » n'étaient ni communiqués à la population générale des Ktunaxa ni connus de cette dernière (Motifs, p. 122).

[143] Ces éléments du test servant à identifier un droit ancestral reconnu à l'art. 35 ne font pas partie de l'analyse fondée sur l'al. 2*a*). Comme je l'ai indiqué, pour décider qu'il y a atteinte à un droit garanti à l'al. 2*a*), deux conditions doivent être réunies : (1) il s'agit d'une croyance ou pratique religieuse sincère et (2) la conduite étatique a nui à la capacité de se conformer à la croyance ou pratique de manière non négligeable. Par conséquent, la remarque du Ministre selon laquelle la revendication à première vue concernant le lien spirituel des Ktunaxa avec la terre était « faible » se rapporte uniquement à la solidité de la revendication fondée sur l'art. 35 et n'a rien à voir avec l'évaluation du droit garanti aux Ktunaxa par l'al. 2*a*).

[144] En fait, dans ses Motifs, le Ministre a expressément reconnu que l'aménagement proposé mettait en jeu le lien spirituel des Ktunaxa avec le Qat'muk, la substance du droit que leur garantit l'al. 2*a*). Bien que le Ministre ait jugé « faible » la revendication d'un droit ancestral fondée sur l'art. 35, il a dit avoir [TRADUCTION] « reconn[u] sincèrement les valeurs réellement sacrées en jeu pour les dirigeants des Ktunaxa et les gardiens du savoir en particulier » (p. 122). Dans son Résumé des consultations et des mesures d'accommodement (reproduit dans le d.i. (Ministre), p. 66-154), auquel renvoie le Ministre dans ses Motifs, il a signalé que la vallée Jumbo est un secteur d'importance culturelle auquel sont associées des valeurs sacrées et que [TRADUCTION] « la

lands (p. 111). In my view, the Minister was thus alive to the substance of the Ktunaxa's s. 2(*a*) right.

(4) The Minister Engaged in Proportionate Balancing

(a) *Statutory Objectives*

[145] Before turning to the question of whether the Minister engaged in proportionate balancing of the substance of the Ktunaxa's s. 2(*a*) right and his statutory mandate, I begin with the relevant statutory objectives in this case. The Minister referred to several of his statutory obligations under the *Land Act*, R.S.B.C. 1996, c. 245, and the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307, that were relevant to his decision. At page 119 of his Rationale, the Minister noted that under those Acts, he is "responsible for the administration of Crown land" (see *Land Act*, s. 4), "responsible to dispose of Crown land where [he] considers advisable in the public interest" (see *Land Act*, s. 11(1)), and "responsible for encouraging outdoor recreation" (see *Ministry of Lands, Parks and Housing Act*, s. 5(b)). When the reasons of the Minister are read fairly as a whole, it is apparent that he took these objectives into account in arriving at his decision.

(b) *The Minister's Efforts to Accommodate the Ktunaxa's Section 2(a) Claim*

[146] As I will explain, it is apparent from the Minister's reasons that he tried to limit the impact of the proposed development on the substance of the Ktunaxa's s. 2(*a*) right as much as reasonably possible given these statutory objectives. The Minister in fact provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. As Savage J. noted, these accommodations were "clearly intended to reduce the footprint of the Proposed Resort within Qat'muk and lessen the effect of the Proposed Resort on Grizzly bears, within which the Ktunaxa say

terre de l'Esprit de l'Ours Grizzly » est une partie fort importante sur le plan spirituel du territoire traditionnel des Ktunaxa (p. 111). J'estime donc que le Ministre a bien saisi la substance du droit garanti aux Ktunaxa par l'al. 2*a*).

(4) Le Ministre s'est livré à une mise en balance proportionnée

a) *Objectifs visés par la loi*

[145] Avant de passer à la question de savoir si le Ministre a mis en balance de façon proportionnée la substance du droit garanti aux Ktunaxa par l'al. 2*a*) et le mandat que lui confie la loi, j'aborde les objectifs législatifs pertinents en l'espèce. Le Ministre a fait état de plusieurs de ses obligations découlant de la *Land Act*, R.S.B.C. 1996, c. 245, et de la *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307, qui ont joué dans sa décision. À la p. 119 de ses Motifs, il fait remarquer qu'aux termes de ces lois, il est [TRADUCTION] « responsable de l'administration des terres de la Couronne » (voir la *Land Act*, art. 4), « chargé d'aliéner les terres de la Couronne lorsqu['il] l'estime indiqué dans l'intérêt public » (voir la *Land Act*, par. 11(1)) et « chargé d'encourager les activités de plein air » (voir la *Ministry of Lands, Parks and Housing Act*, al. 5(b)). Lorsqu'on interprète impartialement les motifs du Ministre dans leur ensemble, il est clair qu'il a tenu compte de ces objectifs pour parvenir à sa décision.

b) *Les efforts déployés par le Ministre pour satisfaire à la revendication des Ktunaxa fondée sur l'al. 2a)*

[146] Comme je l'expliquerai, il ressort des motifs du Ministre qu'il a essayé de limiter autant qu'il était raisonnablement possible de le faire l'impact de l'aménagement proposé sur la substance du droit garanti aux Ktunaxa par l'al. 2*a*) compte tenu de ces objectifs visés par la loi. Le Ministre a en fait consenti des mesures d'accommodement importantes qui touchaient précisément le lien spirituel des Ktunaxa avec la terre. Comme l'a souligné le juge Savage, ces mesures d'accommodement [TRADUCTION] « visaient clairement à réduire l'empreinte de la station de ski proposée dans le Qat'muk et à

the Grizzly Bear Spirit manifests itself" (para. 313). These measures included the following (Rationale, at p. 123):

- The area of the "controlled recreation area" was reduced by 60% and reductions were also made to the "total resort development area".
- An area was removed "from the controlled recreation area of the lower Jumbo Creek area that has been perceived as having greater visitation potential from Grizzly bears".
- The "controlled recreation area" was also "amended to remove ski lifts on the West side of the valley, where impact to Grizzly bear habitat was expected to be greatest".
- The Province of B.C. would "pursue the establishment of a Wildlife Management Area (WMA)" in order "to address potential impacts in relation to Grizzly bears and aboriginal claims relating to spiritual value of the valley". The Ktunaxa were invited to engage with the Province in the development and implementation of the WMA objectives.

[147] It is true that these accommodation measures were provided in the context of the Minister's duty to consult and accommodate under s. 35. The Minister provided these measures, as well as other accommodations, as part of a consultative process that occurred "at the deep end of the consultation spectrum" (Rationale, at p. 123). But, as indicated, the Minister provided the accommodation listed above to specifically address the Ktunaxa's spiritual interest in the land, even though the Minister assessed the strength of the Ktunaxa's *prima facie* s. 35 claim based on this interest as "weak". In my opinion, it does not make sense that the Minister would provide significant accommodation for a "weak" s. 35 claim, which suggests that the Minister took into account the Ktunaxa's broader spiritual

atténuer les répercussions de cette station sur les grizzlys dans lesquels, aux dires des Ktunaxa, se manifeste l'Esprit de l'Ours Grizzly » (par. 313). Ces mesures comprenaient les suivantes (Motifs, p. 123) :

- La taille de la [TRADUCTION] « zone de loisir contrôlée » a été réduite de 60 p. 100 et on a également amputé « l'aire totale d'aménagement de la station ».
- On a retranché « de la zone de loisir contrôlée du secteur inférieur de la vallée Jumbo une région perçue comme davantage susceptible d'être fréquentée par les grizzlys ».
- La « zone de loisir contrôlée » a aussi été « modifiée par le retrait des remonte-pentes sur le côté ouest de la vallée car on pensait que l'impact sur l'habitat du grizzly y serait plus important ».
- La province de la Colombie-Britannique « irait de l'avant avec la mise sur pied d'une aire de gestion de la faune (AGF) » afin « de contrer les répercussions possibles du projet sur les grizzlys et les revendications autochtones touchant la valeur spirituelle de la vallée ». On a invité les Ktunaxa à discuter avec la province de l'élaboration et de la mise en œuvre des objectifs de l'AGF.

[147] Certes, ces mesures d'accommodement ont été consenties eu égard à l'obligation du Ministre de consulter et d'accommoder découlant de l'art. 35. Le Ministre a offert ces mesures et d'autres accommodements dans le cadre d'un processus de consultation qui s'était rendu [TRADUCTION] « à l'extrémité supérieure du continuum de consultation » (Motifs, p. 123). Mais, tel qu'il est indiqué précédemment, le Ministre a offert les accommodements énumérés ci-dessus pour répondre précisément à l'intérêt spirituel des Ktunaxa sur la terre même s'il a jugé « faible » la revendication à première vue des Ktunaxa fondée sur l'art. 35. Il me semble illogique que le Ministre consente des accommodements importants pour une « faible » revendication fondée sur l'art. 35, ce qui donne à penser que le

interest in the land, distinct from the context of their s. 35 claim.

[148] The Chief Justice and Rowe J. take a different approach. They explain this apparent tension by asserting that the Minister assessed as "weak" only the Ktunaxa's s. 35 claim that their spiritual connection to the land would be severed by any permanent development. For them, the Minister determined that the Ktunaxa's "broader claim to spiritual values in Qat'muk" under s. 35 was strong, and he accordingly engaged in deep consultation (para. 99).[1] In my view, even if my colleagues are right that the Minister engaged in deep consultation to address the Ktunaxa's "overall spiritual claim" (para. 99) under s. 35, it follows that the Minister provided the accommodation above to reduce the impact of the development on the Ktunaxa's spiritual connection to Qat'muk. These measures indicate that the Minister made efforts to mitigate the impact on the substance of their s. 2(*a*) right as much as reasonably possible given his statutory mandate.

[149] Nonetheless, I acknowledge that these accommodation measures only reduce the footprint of the development in Qat'muk, a very important spiritual site in the Ktunaxa's religion. They do not prevent the loss of the Ktunaxa's spiritual connection to the land once the development is built and Grizzly Bear Spirit leaves Qat'muk. The Ktunaxa's position is that there is no "middle ground" available regarding the development: no accommodation is possible, as no permanent structures can be built on the land or Qat'muk will lose its sacred nature. The Minister therefore had two options before him: approve the development or permit the Ktunaxa to

[1] To be clear, as I have indicated above, it is plain from the Minister's reasons that he assessed the Ktunaxa's s. 35 claim based on their spiritual connection to the land as "weak". However, I am satisfied that the duty to consult and accommodate under s. 35 with respect to this claim was met by the deep consultation engaged in by the Minister.

Ministre a tenu compte de l'intérêt spirituel général des Ktunaxa sur le terrain indépendamment de leur revendication fondée sur l'art. 35.

[148] La Juge en chef et le juge Rowe adoptent une perspective différente. Ils expliquent cette contradiction apparente en affirmant que le Ministre a qualifié de « faible » uniquement la prétention des Ktunaxa fondée sur l'art. 35 selon laquelle leur lien spirituel avec la terre serait rompu par tout aménagement permanent. D'après eux, le Ministre a décidé que leur « revendication générale visant les valeurs spirituelles associées au Qat'muk » au titre de l'art. 35 était solide et il a donc procédé à des consultations approfondies (par. 99)[1]. À mon avis, même si mes collègues ont raison de dire que le Ministre a procédé à des consultations approfondies pour répondre à la « revendication générale de nature spirituelle » (par. 99) des Ktunaxa en conformité avec l'art. 35, il s'ensuit que le Ministre a offert les accommodements susmentionnés pour réduire l'incidence de l'aménagement sur le lien spirituel des Ktunaxa avec le Qat'muk. Ces mesures indiquent que le Ministre s'est efforcé d'atténuer autant qu'il était raisonnablement possible de le faire l'impact sur la substance du droit que leur garantit l'al. 2*a*) compte tenu de son mandat législatif.

[149] Néanmoins, je reconnais que ces mesures d'accommodement ne font que réduire l'empreinte de l'aménagement sur le Qat'muk, un lieu spirituel qui revêt une grande importance dans la religion des Ktunaxa. Elles n'empêchent pas les Ktunaxa de perdre leur lien spirituel avec la terre après que la station de ski soit construite et que l'Esprit de l'Ours Grizzly quitte le Qat'muk. Les Ktunaxa estiment qu'il n'y pas de « moyen terme » à l'égard de l'aménagement : aucun accommodement n'est possible, car aucune installation permanente ne peut être érigée sur la terre, sinon le Qat'muk perdra son caractère sacré. Le Ministre avait donc deux

[1] Précisons que, comme je l'ai mentionné précédemment, il ressort des motifs du Ministre qu'il a jugé « faible » la revendication faite par les Ktunaxa au titre de l'art. 35 sur la base de leur lien spirituel avec la terre. Or, je suis convaincu que le Ministre s'est acquitté de l'obligation de consulter et d'accommoder que lui impose cet article en procédant aux consultations approfondies.

veto the development on the basis of their freedom of religion. As I will explain, it can be implied from the Minister's decision that permitting the Ktunaxa to veto the development was not consistent with his statutory mandate. Indeed, it would significantly undermine, if not completely compromise, this mandate.

(c) *The Right to Exclude*

[150] Granting the Ktunaxa a power to veto development over the land would effectively give the Ktunaxa a significant property interest in Qat'muk — namely, a power to exclude others from constructing permanent structures on over 50 square kilometres of public land. This right of exclusion is not a minimal or negligible restraint on public ownership. It gives the Ktunaxa the power to exclude others from developing land that the public in fact owns. The public in this case includes an Aboriginal group, the Shuswap Indian Band, that supports the development — a fact which the Minister explicitly took into consideration in his reasons. The Shuswap Indian Band is supportive of the development in part because of "the potential economic development opportunities it may provide" (R.R. (Minister), at p. 68).

[151] The power of exclusion is an essential right in property ownership, because it gives an owner the exclusive right to determine the use of his or her property and to ensure that others do not interfere with that use (see B. Ziff, *Principles of Property Law* (6th ed. 2014), at p. 6). Without the power of exclusion, the owner is unable to dictate how his or her property will be used. Even a person who has a limited power of exclusion — for example, the power to prevent development of the land — will be able to exercise control over the property and dictate its use to a significant extent.

[152] In granting a limited power of exclusion to the Ktunaxa, the Minister would effectively transfer the public's control of the use of over 50 square kilometres of land to the Ktunaxa. This power would permit the Ktunaxa to dictate the use of the land —

choix : approuver l'aménagement ou permettre aux Ktunaxa d'opposer leur veto à l'aménagement en raison de leur liberté de religion. Comme je l'expliquerai, on peut déduire de la décision du Ministre que le deuxième choix n'était pas compatible avec son mandat législatif. En effet, cela minerait considérablement la réalisation de ce mandat, voire lui porterait un coup fatal.

c) *Le droit d'interdiction*

[150] Conférer aux Ktunaxa le pouvoir d'opposer leur veto à l'aménagement du territoire en question leur donnerait dans les faits un intérêt propriétal d'envergure sur le Qat'muk, à savoir le pouvoir d'interdire à autrui de construire des installations permanentes sur plus de 50 kilomètres carrés de terres publiques. Ce droit d'interdiction n'est pas une restriction minimale ou négligeable de la propriété publique. Il donne aux Ktunaxa le pouvoir d'interdire à autrui d'aménager un territoire qui appartient effectivement à la population. Cette dernière comprend un groupe autochtone, la Shuswap Indian Band, qui est en faveur de l'aménagement, un fait dont a expressément tenu compte le Ministre dans ses motifs. La Shuswap Indian Band est favorable à l'aménagement notamment en raison [TRADUCTION] « des possibilités de développement économique qu'il peut offrir » (d.i. (Ministre), p. 68).

[151] Le pouvoir d'interdiction est un droit essentiel à la propriété d'un bien car il accorde au propriétaire le droit exclusif de décider de l'usage de son bien et d'éviter que d'autres personnes ne nuisent à cet usage (voir B. Ziff, *Principles of Property Law* (6e éd. 2014), p. 6). Sans le pouvoir d'interdiction, le propriétaire ne peut dicter l'usage qui sera fait de son bien. Même le titulaire d'un pouvoir limité d'interdiction — comme celui de prévenir l'aménagement du territoire — pourra exercer un contrôle sur le bien et en dicter l'usage dans une large mesure.

[152] S'il accordait aux Ktunaxa un pouvoir limité d'interdiction, le Ministre leur céderait dans les faits le contrôle que détient le public sur l'utilisation de plus de 50 kilomètres carrés de terres. Ce pouvoir permettrait aux Ktunaxa de dicter l'usage

namely, preventing any permanent structures from being constructed — so that it does not conflict with their religious belief in the sacred nature of Qat'muk. A religious group would therefore be able to regulate the use of a vast expanse of public land so that it conforms to its religious belief. It seems implicit from the Minister's reasons that permitting a religious group to dictate the use of a large tract of land according to its religious belief — and excluding the public from using the land in a way contrary to this belief — would undermine the objectives of administering Crown land and disposing of it in the public interest. It can be inferred that the Minister found that granting the Ktunaxa such a power of exclusion would not fulfill his statutory mandate. Rather, it would significantly compromise — if not negate — those objectives.

du territoire — soit empêcher la construction de toute installation permanente — pour éviter qu'elle n'entre en conflit avec leur croyance religieuse dans le caractère sacré du Qat'muk. Un groupe religieux serait donc en mesure de réglementer l'utilisation d'une vaste étendue de terre publique pour qu'elle se conforme à sa croyance religieuse. Il semble se dégager implicitement des motifs du Ministre que permettre à un groupe religieux de dicter l'utilisation d'une grande étendue de terrain selon sa croyance religieuse — et d'interdire à la population d'utiliser le terrain contrairement à cette croyance — entraverait la réalisation des objectifs d'administrer les terres de la Couronne et de les aliéner dans l'intérêt public. On peut en déduire que, selon le Ministre, conférer aux Ktunaxa pareil pouvoir d'interdiction ne lui permettrait pas de remplir son mandat législatif. L'octroi de ce pouvoir compromettrait plutôt substantiellement l'atteinte de ces objectifs, voire lui porterait un coup fatal.

[153] As indicated, the Ktunaxa's s. 2(*a*) claim left the Minister with two options: either to approve the development, or to grant the Ktunaxa a right to exclude others from constructing any permanent development on over 50 square kilometres of public land. This is distinct from a situation where some reasonable accommodation — a "middle ground" — is possible. For example, where a claimant seeks limited access to an area of land, or seeks to restrict a certain activity on an area of land during certain limited time periods, granting an accommodation may not have the effect of undermining the Minister's statutory objectives of administering Crown land and disposing of it in the public interest. As proportionate balancing under *Doré* requires limiting *Charter* protections "no more than is necessary given the applicable statutory objectives" (*Loyola*, at para. 4), in such cases, it may be unreasonable for the Minister not to provide these accommodations.

[153] Comme je l'ai indiqué, la revendication des Ktunaxa fondée sur l'al. 2*a*) laissait deux choix au Ministre : soit approuver l'aménagement, soit accorder aux Ktunaxa le droit d'interdire à autrui de construire toute installation permanente sur plus de 50 kilomètres carrés de terres publiques. Ce cas se distingue d'une situation où il est possible de parvenir à un compromis raisonnable, un « moyen terme ». Par exemple, lorsqu'un demandeur réclame l'accès limité à un secteur ou cherche à restreindre une activité donnée dans un secteur pendant certaines périodes limitées, le fait d'offrir un accommodement n'aura peut-être pas pour effet d'entraver la réalisation des objectifs confiés par la loi au Ministre d'administrer les terres de la Couronne et de les aliéner dans l'intérêt public. Puisque la mise en balance proportionnée établie dans *Doré* exige qu'on ne limite pas les protections énumérées dans la *Charte* « plus qu'il n'est nécessaire compte tenu des objectifs applicables visés par la loi » (*Loyola*, par. 4), en pareil cas, il peut être déraisonnable pour le Ministre de ne pas offrir ces accommodements.

[154] But here, an accommodation that would not compromise the Minister's statutory mandate was unavailable. As indicated, the Minister did make an

[154] Mais dans l'affaire qui nous occupe, il était impossible d'offrir un accommodement qui ne compromettrait pas la réalisation du mandat confié au

effort to provide the Ktunaxa with accommodation to limit the impact on their religious freedom, but the Ktunaxa took the position that no permanent development in the area could be allowed. This placed the Minister in a difficult, if not impossible, position. He determined that if he granted the power of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives: to administer Crown land and to dispose of it in the public interest. In the end, he found that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa a veto right over the construction of permanent structures on over 50 square kilometres of public land.

[155] In view of the options open to the Minister, I am satisfied that this decision was reasonable in the circumstances. It limited the Ktunaxa's right "as little as reasonably possible" given the statutory objectives (*Loyola*, at para. 40) and amounted to a proportionate balancing.

III. Conclusion

[156] For these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Peter Grant & Associates, Vancouver; Diane Soroka Avocate Inc., Westmount, Quebec.

Solicitor for the respondent the Minister of Forests, Lands and Natural Resource Operations: Attorney General of British Columbia, Victoria.

Solicitors for the respondent Glacier Resorts Ltd.: Owen Bird Law Corporation, Vancouver.

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

Ministre par la loi. Je le rappelle, le Ministre s'est efforcé de fournir aux Ktunaxa un accommodement pour limiter l'impact du projet sur leur liberté de religion, mais les Ktunaxa ont soutenu qu'on ne pouvait autoriser aucun aménagement permanent dans le secteur. Cela a mis le Ministre dans une situation difficile, voire impossible. Selon lui, s'il accordait le pouvoir d'interdiction aux Ktunaxa, cela le gênerait considérablement dans la réalisation de ses objectifs légaux, voire l'empêcherait de les réaliser : administrer les terres de la Couronne et les aliéner dans l'intérêt public. En fin de compte, il a jugé que la réalisation du mandat que lui attribue la loi l'empêchait de donner aux Ktunaxa un droit de veto sur la construction d'installations permanentes sur plus de 50 kilomètres carrés de terres publiques.

[155] Vu les choix qui s'offraient au Ministre, je suis convaincu que cette décision était raisonnable dans les circonstances. Elle a restreint le droit des Ktunaxa « aussi peu que cela [était] raisonnablement possible » compte tenu des objectifs visés par la loi (*Loyola*, par. 40) et était le fruit d'une mise en balance proportionnée.

III. Conclusion

[156] Pour ces motifs, je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté.

Procureurs des appelants : Peter Grant & Associates, Vancouver; Diane Soroka Avocate Inc., Westmount, Québec.

Procureur de l'intimé Minister of Forests, Lands and Natural Resource Operations : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intimée Glacier Resorts Ltd. : Owen Bird Law Corporation, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Vancouver.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the interveners the Canadian Muslim Lawyers Association, the South Asian Legal Clinic of Ontario and the Kootenay Presbytery (United Church of Canada): Stockwoods, Toronto; Khalid Elgazzar, Ottawa.

Solicitors for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship: Vincent Dagenais Gibson, Ottawa; Christian Legal Fellowship, London, Ontario.

Solicitors for the intervener the Alberta Muslim Public Affairs Council: Nanda & Company, Edmonton.

Solicitor for the intervener Amnesty International Canada: Ecojustice Canada, Toronto.

Solicitors for the intervener the Te'mexw Treaty Association: JFK Law Corporation, Victoria.

Solicitors for the intervener the Central Coast Indigenous Resource Alliance: Ng Ariss Fong, Vancouver.

Solicitors for the intervener the Shibogama First Nations Council: Olthuis, Kleer, Townshend, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: McCarthy Tétrault, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Goldblatt Partners, Toronto.

Solicitor for the intervener the Council of the Passamaquoddy Nation at Schoodic: Paul Williams, Ohsweken, Ontario.

Solicitors for the intervener the Katzie First Nation: Donovan & Company, Vancouver.

Solicitors for the interveners the West Moberly First Nations and the Prophet River First Nation: Devlin Gailus Westaway, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureurs des intervenants l'Association canadienne des avocats musulmans, South Asian Legal Clinic of Ontario et Kootenay Presbytery (United Church of Canada) : Stockwoods, Toronto; Khalid Elgazzar, Ottawa.

Procureurs des intervenantes l'Alliance évangélique du Canada et l'Alliance des chrétiens en droit : Vincent Dagenais Gibson, Ottawa; Alliance des chrétiens en droit, London, Ontario.

Procureurs de l'intervenant Alberta Muslim Public Affairs Council : Nanda & Company, Edmonton.

Procureur de l'intervenante Amnistie internationale (Canada) : Ecojustice Canada, Toronto.

Procureurs de l'intervenante Te'mexw Treaty Association : JFK Law Corporation, Victoria.

Procureurs de l'intervenante Central Coast Indigenous Resource Alliance : Ng Ariss Fong, Vancouver.

Procureurs de l'intervenant Shibogama First Nations Council : Olthuis, Kleer, Townshend, Toronto.

Procureurs de l'intervenante la Chambre de commerce du Canada : McCarthy Tétrault, Toronto.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Goldblatt Partners, Toronto.

Procureur de l'intervenant Council of the Passamaquoddy Nation at Schoodic : Paul Williams, Ohsweken, Ontario.

Procureurs de l'intervenante Katzie First Nation : Donovan & Company, Vancouver.

Procureurs des intervenantes West Moberly First Nations et Prophet River First Nation : Devlin Gailus Westaway, Victoria.

TAB 8

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Kwikwetlem First Nation v. British Columbia (Utilities Commission),*** 2009 BCCA 68

Date: 20090218
Docket: CA035864; CA035928

Docket: CA035864

In the Matter of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473
and the Application by the British Columbia Transmission Corporation
for a Certificate of Public Convenience and Necessity for the
Interior to Lower Mainland Project

Between:

The Kwikwetlem First Nation

Appellant
(Applicant/Intervenor)

And

**British Columbia Transmission Corporation,
British Columbia Hydro and Power Authority, and
British Columbia Utilities Commission**

Respondents

- and -

Docket: CA035928

In the Matter of the *Utilities Commission Act,* R.S.B.C. 1996, c. 473,
and the Application by the British Columbia Transmission Corporation
for a Certificate of Public Convenience and Necessity for the
Interior To Lower Mainland Project

Between:

**Nlaka'pamux Nation Tribal Council,
Okanagan Nation Alliance and Upper Nicola Indian Band**

Appellants
(Applicants/Intervenors)

And

**British Columbia Utilities Commission,
British Columbia Transmission Corporation, and
British Columbia Hydro and Power Authority**

Respondents

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, The Kwikwetlem First Nation
T. Howard B. C. Stadfeld	Counsel for the Appellants, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band
K. B. Bergner A. Bespflug	Counsel for the Respondent, British Columbia Hydro and Power Authority
A. W. Carpenter	Counsel for the Respondent, British Columbia Transmission Corporation
Place and Date of Hearing:	Vancouver, British Columbia November 26 and 27, 2008
Place and Date of Judgment:	Vancouver, British Columbia February 18, 2009

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

[2] The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

[3] The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title,

requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

[4] The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

[5] The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

[6] The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C Letter Decision No. L-6-08, 5 March 2008 (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

[7] The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("*VITR*") and *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07 ("*Revelstoke*"). It is the reasoning in *VITR***,** amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

[8] As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and

capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

[9] The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)

[10] BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for

operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

[11] It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

[12] In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208. It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

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

[13] The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

[14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the

EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

[15] I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

> 45. (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
>
> …
>
> (3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
>
> …

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

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

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

(9) In giving its approval, the commission

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

(b) may impose conditions about

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

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46. (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

…

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

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

> (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.
>
> (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
>
> …
>
> 99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.
>
> …
>
> 101. (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
>
> …
>
> (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

[16] The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

> The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.
>
> CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project

> justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

> 2. Project Description:
>
> …
>
> (iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;
>
> …
>
> 3. Project Justification
>
> …
>
> (ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;
>
> (iii) a statement identifying any significant risks to successful completion of the project;
>
> …
>
> 4. Public Consultation
>
> (i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.
>
> …

6. Other Applications and Approvals

(i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and

(ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

Environmental Assessment Act

8. (1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project,

…

unless

(c) the person first obtains an environmental assessment certificate for the project, or

…

9. (1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project,

…

unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

…

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10. (1) The executive director by order

…

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

…

11. (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

…

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

…

16. (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

…

17. (1) On completion of an assessment of a reviewable project … the executive director … must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director ...,

(b) the recommendations, if any, of the executive director, …, and

(c) reasons for the recommendations, if any, of the executive director, ….

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

…

> 30. (1) At any time during the assessment of a reviewable project under this Act , and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate …, the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that
>
> > (a) is being or will be conducted by any of the following or any combination of the following:
> >
> > > (i) the government of British Columbia, including any agency, board or commission of British Columbia;
> > >
> > > (ii) the government of Canada;
> > >
> > > (iii) a municipality or regional district in British Columbia;
> > >
> > > (iv) a jurisdiction bordering on British Columbia;
> > >
> > > (v) another organization, and
> >
> > (b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.
>
> (2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

[17] The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office (“EAO”) outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18,

> "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

[18] The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

[19] The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

[20] The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

[21] This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

[22] BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

[23] Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

[24] In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

[25] In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

> 4.1 The scope of assessment for the Project will include consideration of the potential for:
>
> > 4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,
> >
> > 4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

[26] In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

[27] The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

[28] The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In

para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

[29] On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

> In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

[30] In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the

EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

[31] On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

[32] At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

[33] Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

[34] On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of

consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

The Scoping Decision

[35] The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

[36] The Commission Secretary explained (at p. 2-3):

> In both the VITR Decision and the Revelstoke Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the VITR Decision:
>
> > The government has legislated regulatory approvals that must be obtained before VITR proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for VITR. Given the Section 11 Procedural Order and the Terms of Reference for VITR, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of VITR, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).
>
> In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

> The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order … and the draft Terms of Reference … the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

[37] In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 51 (also quoted at p. 47 of the *VITR* decision):

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

[38] To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and

therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

> The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. … [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

[39] The Commission summarized its analysis (at p. 5):

> … The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

[40] The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis

and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

[41] After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *In the Matter of British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, B.C.U.C. Decision, 5 August 2008, Commission Order No. C-4-08 (the "CPCN decision"). At page 96 of those reasons, it concluded:

> The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

[42] The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

> … although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

[43] From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

[44] On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

Discussion

[45] The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation

efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

[46] The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *VITR, In the Matter of BC Gas Utility Ltd. Southern Crossing Pipeline Project Application for a Certificate of Public Convenience and Necessity*, B.C.U.C. Decision, 21 May 1999, Commission Order No. G-51-99). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

[47] At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking,

BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

[48] BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

[49] On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified

project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

[50] The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

[51] Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

[52] BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

[53] The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC,

and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process**.** Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

[54] It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers

before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[56] Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

[57] The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects

on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act.*

[58] Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

[59] By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

[60] In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified

BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

[61] This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

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

[63] The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade

an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

[64] If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

[65] Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

Summary

[66] BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro

acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

[67] When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices – accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

[68] Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing

interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida,* at paras. 46-47.

[69] The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

[70] If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

[71] For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Bauman"

TAB 9

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*

Première nation crie Mikisew *Appelante*

c.

Sheila Copps, ministre du Patrimoine canadien, et Thebacha Road Society *Intimées*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Nation crie de Big Island Lake, Lesser Slave Lake Indian Regional Council, Premières nations de l'Alberta signataires du Traité nº 8, Treaty 8 Tribal Association, Premières nations de Blueberry River et Assemblée des Premières Nations *Intervenants*

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.

Répertorié : Première nation crie Mikisew *c.* Canada (Ministre du Patrimoine canadien)

Référence neutre : 2005 CSC 69.

Nº du greffe : 30246.

2005 : 14 mars; 2005 : 24 novembre.

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

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.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Droits issus de traités — Obligation de consultation de la Couronne — Exercice par la Couronne du droit issu du traité et « prise » de terres cédées afin de construire une route d'hiver pour répondre aux besoins régionaux en matière de transport — Route proposée réduisant le territoire sur lequel la Première nation crie Mikisew aurait le droit d'exercer ses droits de chasse, de pêche et de piégeage issus du traité — La Couronne avait-elle l'obligation de consulter les Mikisew? — Dans l'affirmative, la Couronne s'est-elle acquittée de cette obligation? — Traité nº 8.

Couronne — Honneur de la Couronne — Obligation de consulter et d'accommoder les peuples autochtones.

Appel — Rôle de l'intervenant — Nouvel 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".

Aux termes du Traité n^{o} 8 signé en 1899, les premières nations qui vivaient dans la région ont cédé à la Couronne 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest, une superficie de très loin supérieure à celle de la France, qui excède celle du Manitoba, de la Saskatchewan ou de l'Alberta et qui équivaut presque à celle de la Colombie-Britannique. En contrepartie de cette cession, on a promis aux premières nations des réserves et certains autres avantages, les plus importants pour eux étant les droits de chasse, de pêche et de piégeage sur tout le territoire cédé à la Couronne à l'exception de « tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ».

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

La réserve des Mikisew se trouve sur le territoire visé par le Traité n^{o} 8 dans ce qui est maintenant le parc national Wood Buffalo. En 2000, le gouvernement fédéral a approuvé la construction d'une route d'hiver, qui devait traverser la réserve des Mikisew, sans consulter ceux-ci. À la suite des protestations des Mikisew, le tracé de la route a été modifié (mais sans consultation) de manière à ce qu'il longe la limite de la réserve. La superficie totale du corridor de la route est d'environ 23 kilomètres carrés. L'objection des Mikisew à la construction de la route va au-delà de l'effet direct qu'aurait l'interdiction de chasser et de piéger dans le secteur visé par la route d'hiver et porte sur le préjudice causé au mode de vie traditionnel qui est essentiel à leur culture. La Section de première instance de la Cour fédérale a annulé l'approbation de la ministre en se fondant sur la violation de l'obligation de fiduciaire de la Couronne de consulter adéquatement les Mikisew et a accordé une injonction interlocutoire interdisant la construction de la route d'hiver. La cour a conclu que les avis publics types et la tenue de séances portes ouvertes n'étaient pas suffisants et que les Mikisew avaient droit à un processus de consultation distinct. La Cour d'appel fédérale a annulé cette décision et a conclu, en s'appuyant sur un argument présenté par un intervenant, que la route d'hiver constituait plus justement une « prise » de terres cédées effectuée conformément au traité plutôt qu'une violation de celui-ci. Cette décision a été rendue avant que notre Cour se prononce dans les affaires *Nation Haïda* et *Première nation Tlingit de Taku River.*

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

Arrêt : Le pourvoi est accueilli. L'obligation de consultation qui découle du principe de l'honneur de la Couronne n'a pas été respectée.

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

La démarche adoptée par le gouvernement a nui au processus de réconciliation entre la Couronne et les premières nations signataires du Traité n^{o} 8 plutôt que de le faire progresser. [4]

Lorsque la Couronne exerce son droit issu du Traité n^{o} 8 de « prendre » des terres, son obligation d'agir honorablement dicte le contenu du processus. La question dans chaque cas consiste à déterminer la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur les droits de chasse, de pêche et de piégeage des Autochtones de manière à rendre applicable l'obligation de consulter. Par conséquent, dans les cas où la Cour est en présence d'une « prise » projetée, il n'est pas indiqué de passer directement à une analyse de la justification fondée sur l'arrêt *Sparrow* même si on a conclu que la mesure envisagée, si elle était mise en œuvre, porterait atteinte à un droit issu du traité de la première nation. La Cour doit d'abord examiner le processus et se demander s'il est compatible avec l'honneur de la Couronne. [33-34] [59]

Même si le traité lui accorde un droit de « prendre » des terres cédées, la Couronne a néanmoins l'obligation de s'informer de l'effet qu'aura son projet sur l'exercice, par les Mikisew, de leurs droits de chasse, de pêche et de piégeage et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter avec les Mikisew de bonne foi et dans l'intention de tenir compte réellement de leurs préoccupations. L'obligation de consultation est vite déclenchée, mais l'effet préjudiciable et l'étendue du contenu de l'obligation de la Couronne sont des questions de degré. En vertu du Traité n^{o} 8, les droits de chasse, de pêche et de piégeage issus du traité de la première nation sont par conséquent restreints non seulement par des limites géographiques et des mesures spécifiques de réglementation gouvernementale, mais aussi le droit pour la Couronne de prendre des terres aux termes du traité, sous réserve de son obligation de tenir des consultations et, s'il y a lieu, de trouver des accommodements aux intérêts de la première nation. [55-56]

En l'espèce, l'obligation de consultation est déclenchée. Les effets de la route proposée étaient clairs, démontrés et manifestement préjudiciables à l'exercice ininterrompu des droits de chasse et de piégeage des Mikisew sur les terres en question. Contrairement à ce qu'elle prétend, la Couronne ne s'est pas acquittée de l'obligation de consultation en 1899 lors des négociations qui ont précédé le traité. [54-55]

Cependant, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres cédées où les droits issus du

"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*

traité des Mikisew sont expressément assujettis à la restriction de la « prise », le contenu de l'obligation de consultation de la Couronne se situe plutôt au bas du continuum. La Couronne doit aviser les Mikisew et nouer un dialogue directement avec eux. Ce dialogue devrait comporter la communication de renseignements au sujet du projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne doit aussi demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits issus du traité des Mikisew. [64]

La Couronne n'a pas respecté ses obligations lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Elle n'a pas réussi à démontrer qu'elle avait l'intention de tenir compte réellement des préoccupations des Autochtones dans le cadre d'un véritable processus de consultation. [64-67]

Le procureur général de l'Alberta n'a pas outrepassé le rôle d'un intervenant lorsqu'il a soulevé devant la Cour d'appel fédérale un nouvel argument pertinent à la question qui était au cœur du litige, à savoir si l'approbation de la route d'hiver par la ministre violait le Traité nº 8. Un intervenant peut toujours présenter un argument juridique à l'appui de ce qu'il prétend être la bonne conclusion juridique à l'égard d'une question dont la cour est régulièrement saisie pourvu que son argument juridique ne fasse pas appel à des faits additionnels qui n'ont pas été prouvés au procès, ou qu'il ne soulève pas un argument qui est par ailleurs injuste pour l'une des parties. [40]

Jurisprudence

Arrêts examinés : *R. c. Badger*, [1996] 1 R.C.S. 771; *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, [2004] 3 R.C.S. 550, 2004 CSC 74; **distinction d'avec l'arrêt :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés :** *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43; *Halfway River First Nation c. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. c. Morgentaler*, [1993] 1 R.C.S. 462; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19; *Province of*

Canada (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.
Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.
Wood Buffalo National Park Game Regulations, SOR/78-830, s. 36(5).

Treaties and Proclamations

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.
Treaty No. 8 (1899).

Authors Cited

Mair, Charles. *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908.
Report of Commissioners for Treaty No. 8, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.*, reprinted from 1899 edition. Ottawa: Queen's Printer, 1966.

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), [2004] 3 F.C.R. 436, 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.

Ontario c. Dominion of Canada (1895), 25 R.C.S. 434; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *R. c. Smith*, [1935] 2 W.W.R. 433.

Lois et règlements cités

Convention sur le transfert des ressources naturelles de 1930 (Alberta) (annexe de la *Loi constitutionnelle de 1930*, L.R.C. 1985, app. II, nº 26), par. 10.
Loi constitutionnelle de 1982, art. 35.
Règlement sur le gibier du parc de Wood-Buffalo, DORS/78-830, art. 36(5).

Traités et proclamations

Proclamation royale (1763), L.R.C. 1985, app. II, nº 1.
Traité nº 8 (1899).

Doctrine citée

Mair, Charles. *Through the Mackenzie Basin : A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto : William Briggs, 1908.
Rapport des commissaires sur le Traité nº 8, dans *Traité nº 8 conclu le 21 juin 1899 et adhésions, rapports et autres documents annexés*. Ottawa : Ministre des Approvisionnements et Services Canada, 1981.

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Rothstein, Sexton et Sharlow), [2004] 3 R.C.F. 436, 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] A.C.F. nº 277 (QL), 2004 CAF 66, qui a infirmé un jugement de la juge Hansen (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169, [2001] A.C.F. nº 1877 (QL), 2001 CFPI 1426. Pourvoi accueilli.

Jeffrey R. W. Rath et *Allisun Taylor Rana*, pour l'appelante.

Cheryl J. Tobias et *Mark R. Kindrachuk*, *c.r.*, pour l'intimée Sheila Copps, ministre du Patrimoine canadien.

Personne n'a comparu pour l'intimée Thebacha Road Society.

P. Mitch McAdam, pour l'intervenant le procureur général de la Saskatchewan.

Robert J. Normey et *Angela J. Brown*, pour l'intervenant le procureur général de l'Alberta.

James D. Jodouin and *Gary L. Bainbridge*, for the intervener the Big Island Lake Cree Nation.

Allan Donovan and *Bram Rogachevsky*, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and *Dominique Nouvet*, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and *Jay Nelson*, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, *Q.C.*, and *Gary A. Nelson*, for the intervener the Blueberry River First Nations.

Jack R. London, *Q.C.*, and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

BINNIE J. — 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.

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),

James D. Jodouin et *Gary L. Bainbridge*, pour l'intervenante la Nation crie de Big Island Lake.

Allan Donovan et *Bram Rogachevsky*, pour l'intervenant Lesser Slave Lake Indian Regional Council.

Robert C. Freedman et *Dominique Nouvet*, pour l'intervenante les Premières nations de l'Alberta signataires du Traité nº 8.

E. Jack Woodward et *Jay Nelson*, pour l'intervenante Treaty 8 Tribal Association.

Thomas R. Berger, *c.r.*, et *Gary A. Nelson*, pour l'intervenante Premières nations de Blueberry River.

Jack R. London, *c.r.*, et *Bryan P. Schwartz*, pour l'intervenante l'Assemblée des Premières Nations.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'objectif fondamental du droit moderne relatif aux droits ancestraux et issus de traités est la réconciliation entre les peuples autochtones et non autochtones et la conciliation de leurs revendications, intérêts et ambitions respectifs. La gestion de ces rapports s'exerce dans l'ombre d'une longue histoire parsemée de griefs et d'incompréhension. La multitude de griefs de moindre importance engendrés par l'indifférence de certains représentants du gouvernement à l'égard des préoccupations des peuples autochtones, et le manque de respect inhérent à cette indifférence, ont causé autant de tort au processus de réconciliation que certaines des controverses les plus importantes et les plus vives. Et c'est le cas en l'espèce. 1

Le Traité nº 8 est l'un des plus importants traités conclus après la Confédération. Les premières nations qui l'ont signé en 1899 ont cédé à la Couronne une superficie de 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest. Pour donner une idée de l'étendue du territoire cédé, sa superficie est 2

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 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. [Emphasis added.]

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

de très loin supérieure à celle de la France (543 998 kilomètres carrés), elle excède celle du Manitoba (650 087 kilomètres carrés), de la Saskatchewan (651 900 kilomètres carrés) et de l'Alberta (661 185 kilomètres carrés), et elle équivaut presque à celle de la Colombie-Britannique (948 596 kilomètres carrés). En contrepartie de cette cession, on a promis aux premières nations des réserves et certains autres avantages, y compris, ce qui leur importait le plus, les droits de chasse, de piégeage et de pêche suivants :

> [TRADUCTION] Et Sa Majesté la Reine convient par les présentes avec les dits sauvages qu'ils auront le droit de se livrer à leurs occupations ordinaires de la chasse au fusil, de la chasse au piège et de la pêche dans l'étendue de pays cédée telle que ci-dessus décrite, subordonnées à tels règlements qui pourront être faits de temps à autre par le gouvernement du pays agissant au nom de Sa Majesté et sauf et excepté tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets. [Je souligne.]

En fait, pour diverses raisons (y compris un manque d'intérêt de la part des Autochtones), on n'a pas mis de côté suffisamment de terres aux fins d'établissement de réserves pour la Première nation crie Mikisew (les « Mikisew ») avant l'adoption du Treaty Land Entitlement Agreement de 1986, soit 87 ans après la signature du Traité nº 8. Moins de 15 ans plus tard, le gouvernement fédéral a approuvé la construction d'une route d'hiver de 118 kilomètres qui, selon le plan original, traversait la nouvelle réserve de la Première nation Mikisew à Peace Point. Le gouvernement n'a pas jugé nécessaire de consulter directement les Mikisew avant de prendre cette décision. À la suite des protestations de ces derniers, le tracé de la route d'hiver a été modifié de manière à longer la limite de la réserve de Peace Point plutôt que de la traverser, toujours sans que les Mikisew aient été consultés. Le tracé modifié de la route traversait les lignes de piégeage d'environ 14 familles Mikisew vivant dans le secteur voisin de la route projetée, et ceux d'autres personnes pouvant installer des pièges dans ce secteur sans y vivre, ainsi que les territoires de chasse d'une centaine de Mikisew dont les activités de chasse (principalement à

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.

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

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.

l'orignal) risquaient, selon les Mikisew, d'être perturbées. Le fait que la route d'hiver projetée ne nuise directement qu'à environ 14 trappeurs Mikisew et quelque 100 chasseurs peut ne pas sembler très dramatique (sauf si vous êtes vous-même un des trappeurs ou des chasseurs en question), mais dans le contexte d'une collectivité éloignée du nord composée d'un nombre relativement restreint de familles, ce fait a de l'importance. Au-delà de tout cela, le principe de tenir des consultations avant de porter atteinte à des droits issus de traités existants constitue néanmoins une question qui revêt une importance générale en ce qui concerne les rapports entre les peuples autochtones et non autochtones. Ce principe touche au cœur de ces rapports et concerne non seulement les Mikisew, mais aussi d'autres premières nations et les gouvernements non autochtones.

4 En l'espèce, les rapports n'ont pas été bien gérés. Aucune consultation adéquate n'a été tenue avant l'approbation de la ministre. La démarche adoptée par le gouvernement a nui au processus de réconciliation plutôt que de le faire progresser. L'obligation de consultation qui découle du principe de l'honneur de la Couronne, ainsi que l'obligation de celle-ci de respecter les droits issus de traités existants des peuples autochtones (maintenant reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*) ont été violées. Je suis d'avis d'accueillir le pourvoi des Mikisew, d'annuler l'approbation de la ministre et de lui renvoyer le dossier pour qu'elle tienne des consultations et qu'elle en poursuive l'examen.

I. Faits

5 Environ 5 p. 100 du territoire cédé en vertu du Traité nº 8 a été réservé en 1922 pour la création du parc national Wood Buffalo. Le parc a été créé principalement pour protéger les derniers troupeaux de bisons des bois du nord du Canada et il occupe une superficie de 44 807 kilomètres carrés de part et d'autre de la frontière entre le nord de l'Alberta et la partie du sud des Territoires du Nord-Ouest. Il a été désigné site du patrimoine mondial par l'UNESCO. Le parc est lui-même plus grand que la Suisse.

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

Il abrite actuellement le plus grand troupeau de bisons en liberté et à reproduction autonome du monde, et on y trouve la dernière aire de nidification naturelle des grues blanches, une espèce menacée, ainsi que de vastes forêts boréales naturelles intactes. Point plus pertinent encore, des Autochtones y habitent depuis plus de 8 000 ans et certains d'entre eux tirent encore leur subsistance de la chasse, de la pêche et du piégeage commercial pratiqués dans les limites du parc. Les terres ancestrales des Mikisew se trouvent dans le parc. Par l'effet du Treaty Land Entitlement Agreement, la réserve de Peace Point a été formellement exclue du parc en 1988, mais évidemment celui-ci entoure la réserve.

Les membres de la Première nation crie Mikisew sont des descendants des Cris de Fort Chipewyan qui ont signé le Traité n^{o} 8 le 21 juin 1899. Il est établi que ses membres ont droit aux avantages conférés par le Traité n^{o} 8.

A. *Le projet de route d'hiver*

La promotrice de la route d'hiver est l'intimée Thebacha Road Society, dont les membres comprennent la ville de Fort Smith (située dans les Territoires du Nord-Ouest, à la limite nord-est du parc national Wood Buffalo, où se trouve le centre administratif du parc), le Conseil des Métis de Fort Smith, la Première nation de Salt River et la Première nation crie de Little Red River. Pour ces gens, la route d'hiver présente l'avantage d'offrir un accès hivernal direct à un certain nombre de collectivités nordiques isolées et au réseau routier de l'Alberta au sud. La juge de première instance a reconnu que l'objectif du gouvernement était de répondre à des « besoins régionaux en matière de transport » : [2001] A.C.F. n^{o} 1877 (QL), 2001 CFPI 1426, par. 115.

B. *Le processus de consultation*

Selon la juge de première instance, pour démontrer qu'une consultation appropriée avait été tenue, la ministre s'est appuyée sur le fait que la plupart des communications avec les Mikisew consistaient à leur fournir les mêmes renseignements généraux concernant le projet de route que ceux distribués à l'ensemble des parties intéressées, et ce, tant sur

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".

le plan de la forme que du contenu. Le 19 janvier 2000, Parcs Canada a ainsi remis aux Mikisew, pour le compte de la ministre, le cadre de référence pour l'évaluation environnementale. Les Mikisew ont été informés que des séances portes ouvertes seraient tenues au cours de l'été 2000. La ministre affirme n'avoir reçu aucune réponse officielle des Mikisew avant le 10 octobre 2000, soit environ deux mois après l'expiration du délai qu'elle avait fixé pour la présentation des commentaires « publics ». Le chef Poitras a déclaré que les Mikisew n'avaient pas participé officiellement aux séances portes ouvertes parce que [TRADUCTION] « les séances portes ouvertes ne sont pas un moyen adéquat de nous consulter ».

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".

10 Apparemment, Parcs Canada n'a pas mis la promotrice Thebacha Road Society dans le coup non plus. À la fin de janvier 2001, cette dernière a informé le chef Poitras qu'elle venait tout juste d'apprendre que les Mikisew n'appuyaient pas le projet de route. Jusque-là, on avait donné à entendre à Thebacha Road Society que les Mikisew ne s'opposaient pas à ce que la route traverse la réserve. Le 29 janvier 2001, le chef Poitras a écrit une autre lettre à la ministre et a reçu du cabinet de la ministre une réponse type disant [TRADUCTION] qu'« il sera[it] donné suite à la lettre avec toute l'attention requise ».

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.

11 Finalement, le 30 avril 2001, après plusieurs autres malentendus, Parcs Canada a écrit au chef Poitras une lettre où on pouvait lire notamment ce qui suit : [TRADUCTION] « Je vous fais, à vous et à votre peuple, mes excuses pour la façon dont s'est déroulé le processus de consultation relatif au projet de route d'hiver et pour toute perception publique négative de la [Première nation crie Mikisew]. » En fait, la décision d'approuver une route au tracé modifié avait déjà été prise à ce moment-là.

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".

12 Le 25 mai 2001, la ministre a annoncé sur le site Web de Parcs Canada que Thebacha Road Society était autorisée à construire une route d'hiver d'une largeur de 10 mètres dont les vitesses limites affichées seraient de 10 à 40 kilomètres à l'heure. Selon cette annonce, l'autorisation était conforme [TRADUCTION] « aux plans et politiques de Parcs

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).

Canada » et à « d'autres lois et règlements fédéraux ». Il n'était aucunement fait mention d'une quelconque obligation envers les Mikisew.

La ministre affirme maintenant que les Mikisew sont mal venus de se plaindre du processus de consultation puisqu'ils ont refusé de participer au processus public qui a été mis en place. La consultation, affirme-t-elle, doit se faire dans les deux sens. Il n'en tenait qu'à eux de profiter de ce qu'on leur offrait. Ils ne l'ont pas fait. À son avis, elle s'est acquittée de son obligation.

La route d'hiver projetée est suffisamment large pour permettre le passage de deux véhicules. Par application du par. 36(5) du *Règlement sur le gibier du parc de Wood-Buffalo*, DORS/78-830, l'aménagement de la route aurait pour effet de créer un corridor de 200 mètres de large à l'intérieur duquel il serait interdit d'utiliser des armes à feu. Ce corridor aurait une superficie totale d'environ 23 kilomètres carrés.

L'objection des Mikisew va bien au-delà de l'effet direct qu'aurait l'interdiction de chasser et de piéger dans le secteur visé par la route d'hiver. Selon la conclusion de la juge de première instance, le secteur environnant subirait un effet préjudiciable. Le maintien d'un mode de vie traditionnel, lequel est, au dire des Mikisew, essentiel à leur culture, dépend de la conservation des terres entourant la réserve de Peace Point dans leur état naturel, ce qui, soutiennent-ils, est nécessaire pour leur permettre de transmettre leur culture et leur savoir à la prochaine génération. L'effet préjudiciable de la route sur la chasse et le piégeage, affirment-ils, pourrait s'avérer constituer, pour leurs jeunes, une incitation de plus à abandonner leur mode de vie traditionnel pour se tourner vers d'autres modes de vie du sud.

Les Mikisew ont demandé à la Cour fédérale d'annuler l'approbation de la ministre en se fondant sur leur conception de l'obligation de fiduciaire de la Couronne, faisant valoir que la ministre est tenue à [TRADUCTION] « une obligation fiduciaire et [constitutionnelle] de consulter [adéquatement] la Première nation crie Mikisew au sujet de la construction de la route » (la juge de première instance, par. 26).

An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

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)

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.

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

Le 27 août 2001, la Section de première instance de la Cour fédérale a accordé une injonction interlocutoire interdisant la construction de la route d'hiver. 17

II. Dispositions pertinentes

Loi constitutionnelle de 1982 18

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

III. Historique judiciaire

A. *Section de première instance de la Cour fédérale* ([2001] A.C.F. nº 1877 (QL), 2001 CFPI 1426)

La juge Hansen a conclu que les terres comprises dans le parc national de Wood Buffalo n'avaient pas été « prises » par la Couronne au sens du Traité nº 8 puisque l'utilisation de ces terres comme parc national ne constituait pas une « utilisation visible » non compatible avec le droit de chasser et de piéger existant (*R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Sioui*, [1990] 1 R.C.S. 1025). La route d'hiver projetée et son corridor de 200 mètres « [sans] armes à feu » aurait un effet préjudiciable sur les droits issus du traité des Mikisew. Ces droits ont reçu une protection constitutionnelle en 1982, et toute atteinte à ces droits doit être justifiée conformément au critère énoncé dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075. Selon la juge Hansen, la décision de la ministre d'approuver la route portait atteinte aux droits issus du Traité nº 8 des Mikisew et ne pouvait être justifiée suivant le critère énoncé dans l'arrêt *Sparrow.* 19

Plus particulièrement, la juge de première instance a conclu que les avis publics types et la tenue de séances portes ouvertes n'étaient pas suffisants. Les Mikisew avaient droit à un processus de consultation distinct. Elle a affirmé ce qui suit (par. 170-171) : 20

La demanderesse critique les mesures d'atténuation accompagnant la décision de la Ministre parce qu'elles n'ont pas été élaborées en consultation avec les Mikisews et qu'elles n'étaient pas conçues pour minimiser les

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)*,

empiétements sur leurs droits. Je partage ce point de vue. Même la bifurcation du tracé, apparemment adoptée par suite des objections élevées par les Mikisews, n'a pas été faite en consultation avec la Première nation. La preuve n'établit pas qu'on ait pris le moindrement en considération la question de savoir si la nouvelle route porterait le moins possible atteinte aux droits issus de traité des Mikisews. La déposition du chef Poitras met en évidence l'atmosphère de secret qui entourait le tracé de la bifurcation, alors que ce processus aurait dû comporter l'examen, en toute transparence, des préoccupations des Mikisews.

Parcs Canada a reconnu qu'il n'avait pas consulté les Mikisews au sujet du tracé de la bifurcation et qu'il n'avait pas non plus pris en considération les incidences du nouveau tracé sur les droits des trappeurs mikisews.

La juge de première instance a donc accueilli la demande de contrôle judiciaire et annulé l'approbation de la ministre.

B. *Cour d'appel fédérale* ([2004] 3 R.C.F. 436, 2004 CAF 66)

Le juge Rothstein, avec l'accord du juge Sexton, a accueilli l'appel et rétabli l'approbation de la ministre. Il s'est appuyé sur un argument présenté par le procureur général de l'Alberta, intervenant dans l'appel. Selon cet argument, le Traité nº 8 prévoyait expressément la « prise » de terres cédées pour différentes fins, y compris la construction de routes. Il était plus juste de considérer la route d'hiver comme une « prise » effectuée en application du traité plutôt que comme une violation de celui-ci. Selon la conclusion du juge Rothstein :

> Lorsqu'une limitation expressément prévue par un traité s'applique, le traité n'est pas violé et l'article 35 n'est donc pas non plus violé. Il faut faire la distinction avec le cas où les limitations prévues par le traité ne s'appliquent pas, mais où le gouvernement cherche néanmoins à limiter le droit issu du traité. En pareil cas, il faut satisfaire au critère énoncé dans l'arrêt *Sparrow* pour que l'atteinte soit permise sur le plan constitutionnel. [par. 21]

Le juge Rothstein a également conclu que la ministre n'était tenue à aucune obligation de consulter les Mikisew au sujet de la route, bien qu'il soit de « bonne pratique » de le faire (par. 24). (Cette décision a été rendue avant que notre Cour se prononce dans les affaires *Nation Haïda c.*

[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.)

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

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

Colombie-Britannique (Ministre des Forêts), [2004] 3 R.C.S. 511, 2004 CSC 73, et *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, [2004] 3 R.C.S. 550, 2004 CSC 74.)

23 En dissidence, la juge Sharlow a souscrit à l'opinion de la juge de première instance selon laquelle l'approbation de la route d'hiver constituait une atteinte *prima facie* aux droits issus du Traité nº 8 et que l'atteinte n'avait pas été justifiée selon le critère énoncé dans l'arrêt *Sparrow*. L'obligation de fiduciaire de la Couronne doit être prise en compte. L'omission du personnel de la ministre travaillant pour Parcs Canada de procéder à une réelle consultation a été fatale à la tentative de justification de la Couronne. Elle a écrit ce qui suit :

> Dans ce cas-ci, rien ne montre que la ministre ait de bonne foi fait des efforts pour comprendre ou examiner les préoccupations que la Première nation crie Mikisew entretenait au sujet de l'effet possible de la route sur l'exercice du droit de chasse et de piégeage qui lui était reconnu par le Traité nº 8. À mon avis, il importe de noter que l'on a informé la Première nation crie Mikisew du nouveau tracé du corridor routier destiné à éviter la réserve de Peace Point qu'une fois qu'il a été conclu que ce nouveau tracé était réalisable et raisonnable, en ce qui concerne les répercussions sur l'environnement, et que la route a été approuvée. On peut en inférer que les représentants responsables de la Couronne croyaient que, dans la mesure où la route d'hiver ne traversait pas la réserve de Peace Point, il était possible de ne faire aucun cas des autres objections soulevées par la Première nation crie Mikisew. Cela est bien loin d'indiquer une consultation réelle, mais indique plutôt que l'on a fait aucun cas des préoccupations qu'entretenait la Première nation crie Mikisew au sujet de l'atteinte aux droits qui lui étaient reconnus par le Traité nº 8. [par. 152]

La juge Sharlow aurait rejeté l'appel.

IV. Analyse

24 Les traités numérotés conclus après la Confédération visaient à permettre la colonisation et le développement de l'Ouest et du Nord-Ouest canadiens. Le Traité nº 8 lui-même précise que [TRADUCTION] « les dits sauvages ont été notifiés et informés par les dits commissaires de Sa Majesté que c'est le désir de Sa Majesté d'ouvrir à

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".

la colonisation, à l'immigration, au commerce, aux voyages, aux opérations minières et forestières et à telles autres fins que Sa Majesté pourra trouver convenables ». Cet énoncé de l'objet se reflète dans une limitation corrélative aux droits de chasse, de pêche et de piégeage issus du Traité nº 8 visant à exclure tels [TRADUCTION] « terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ». Les « autres objets » seraient au moins aussi généraux que les fins mentionnées dans le préambule susmentionné, y compris les « voyages ».

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:

On a donc pu observer, dès le départ, qu'il existait une tension entre l'exigence essentielle posée par les premières nations voulant qu'elles demeurent libres de vivre de la terre autant après qu'avant la signature du traité et le désir de la Couronne d'augmenter le nombre de non autochtones s'établissant dans le territoire cédé. Comme les commissaires l'ont reconnu au début des négociations du Traité nº 8 au Petit lac des Esclaves en juin 1899, ces rapports sont apparus d'entrée de jeu comme des rapports permanents qu'il serait difficile de gérer :

> 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)

> [TRADUCTION] L'homme blanc viendra peupler cette partie du pays et nous venons avant lui pour vous expliquer comment les choses doivent se passer entre vous et pour éviter tout problème.
>
> (C. Mair, *Through the Mackenzie Basin : A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, 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."

Comme le juge Cory l'a expliqué dans l'arrêt *Badger*, par. 57, « [l]es Indiens comprenaient que des terres seraient prises pour y établir des exploitations agricoles ou pour y faire de la prospection et de l'exploitation minières, et qu'ils ne seraient pas autorisés à y chasser ou à tirer sur les animaux de ferme et les bâtiments des colons. »

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations peoples. 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:

Les droits de chasse, de pêche et de piégeage ne servaient pas que les intérêts des peuples des premières nations. Comme l'ont reconnu les commissaires eux-mêmes dans leur rapport sur le Traité nº 8 en date du 22 septembre 1899, la Couronne avait intérêt à laisser les peuples autochtones vivre de la terre :

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.

[TRADUCTION] Nous leur fîmes comprendre que le gouvernement ne pouvait entreprendre de faire vivre les sauvages dans l'oisiveté, qu'ils auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie, et qu'on espérait que les sauvages s'en serviraient.

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).

27 Aucune des parties signataires ne s'attendait donc en 1899 que le Traité nº 8 constitue un plan définitif d'utilisation des terres. Ce traité marquait l'aube d'une période de transition. Il fallait, comme l'ont souligné les commissaires, [TRADUCTION] « expliquer comment les choses [devaient] se passer » à l'avenir [TRADUCTION] « pour éviter tout problème » (Mair, p. 61).

A. *Interpretation of the Treaty*

A. *Interprétation du traité*

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:

L'interprétation du traité « doit être réaliste et refléter l'intention des deux parties et non seulement celle [de la première nation] » (*Sioui*, p. 1069). Comme une majorité de notre Cour l'a affirmé dans l'arrêt *R. c. Marshall*, [1999] 3 R.C.S. 456, par. 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 British Crown. [Emphasis in original; citations omitted.]

Les parties indiennes n'ont à toutes fins pratiques pas eu la possibilité de créer leurs propres compte-rendus écrits des négociations. Certaines présomptions sont donc appliquées relativement à l'approche suivie par la Couronne dans la conclusion des traités (conduite honorable), présomptions dont notre Cour tient compte dans son approche en matière d'interprétation des traités (souplesse) pour statuer sur l'existence d'un traité [. . .] le caractère exhaustif de tout écrit [. . .] et l'interprétation des conditions du traité, une fois qu'il a été conclu à leur existence. En bout de ligne, la Cour a l'obligation « de choisir, parmi les interprétations de l'intention *commune* [au moment de la conclusion du traité] qui s'offrent à [elle], celle qui concilie le mieux » les intérêts [de la première nation] et ceux de la Couronne britannique. [Souligné dans l'original; références omises.]

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.

Voir également *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43, la juge en chef McLachlin, par. 22-24, et le juge LeBel, par. 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

La ministre a donc raison d'insister sur le fait que la disposition régissant la chasse, la pêche et le piégeage ne peut être dissociée du traité dans son ensemble, mais doit être interprétée en fonction de son objectif sous-jacent, visé tant par la Couronne

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".

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*

que par les peuples des premières nations. Comme l'a fait remarquer le juge Cory dans l'arrêt *Badger*, dans ce contexte

> le texte d'un traité ne doit pas être interprété suivant son sens strictement formaliste, ni se voir appliquer les règles rigides d'interprétation modernes. Il faut plutôt lui donner le sens que lui auraient naturellement donné les Indiens à l'époque de sa signature. [par. 52]

Dans le cas du Traité nº 8, toutes les parties signataires envisageaient que « de temps à autre » des terres cédées seraient « prises » de l'ensemble des terres sur lesquelles les premières nations avaient des droits de chasse, de pêche et de piégeage issus du traité et seraient transférées à l'ensemble des terres sur lesquelles elles n'avaient pas un tel droit. Les terres visées par le Traité nº 8 se trouvent dans le nord du Canada et ne se prêtent pas, pour la plupart, à l'agriculture. Les commissaires qui ont négocié le Traité nº 8 pouvaient donc, comme je l'ai déjà mentionné, assurer aux premières nations qu'elles [TRADUCTION] « auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie ».

Je suis d'accord avec le juge Rothstein pour dire que les « prises » effectuées subséquemment par la Couronne ne constituaient pas toutes une atteinte au Traité nº 8 devant être justifiée conformément au critère énoncé dans l'arrêt *Sparrow*. Dans cet arrêt, on s'en souviendra, la réglementation sur les pêches du gouvernement fédéral portait atteinte au droit de pêche autochtone et devait être strictement justifiée. La situation n'est pas la même en l'espèce où les droits autochtones ont été cédés et sont éteints, et où les droits issus du Traité nº 8 se limitent expressément aux terrains qui n'ont pas [TRADUCTION] « de temps à autre [. . .] [été] requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets » (je souligne). Le libellé du traité ne peut annoncer plus clairement des changements à venir. Néanmoins, la Couronne était et est encore censée gérer le changement de façon honorable.

Il s'ensuit que je ne peux souscrire à la démarche axée sur le critère énoncé dans *Sparrow* retenue en l'espèce par la juge de première instance, qui s'est

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.

fondée à cet égard sur l'arrêt *Halfway River First Nation c. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. Dans cette affaire, les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont conclu que le droit du gouvernement de prendre des terres était [TRADUCTION] « limité de par sa nature même » (par. 138) et [TRADUCTION] « que *toute* entrave au droit de chasse constitu[ait] une atteinte *prima facie* au droit issu d'un traité des Indiens protégé par l'art. 35 de la *Loi constitutionnelle de 1982* » (par. 144 (en italique dans l'original)) qui devait être justifiée selon le critère énoncé dans l'arrêt *Sparrow*. Les Mikisew appuient fortement le critère appliqué dans l'arrêt *Halfway River First Nation*, mais en toute déférence, je ne puis accepter leur interprétation dans la mesure où ils affirment que cet arrêt a fixé en 1899 les limites géographiques du droit de chasse prévu au Traité nº 8, et que tout empiètement sur ces limites géographiques après 1899 exige une justification comme celle requise par l'arrêt *Sparrow*. L'argument des Mikisew suppose que l'on promettait, au Traité nº 8, le maintien des modes d'utilisation des terres établis au XIX^e^ siècle. Tel n'est pas le cas, comme l'indiquent clairement tant le contexte historique dans lequel le Traité nº 8 a été conclu que la période de transition qu'il annonçait.

B. *The Process of Treaty Implementation*

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

B. *Le processus de mise en œuvre du traité*

33

Tant le contexte historique que les inévitables tensions sous-jacentes à la mise en œuvre du Traité nº 8 commandent un *processus* par lequel des terres peuvent être transférées d'une catégorie (celle des terres sur lesquelles les premières nations conservent des droits de chasse, de pêche et de piégeage) à l'autre (celle des terres sur lesquelles elles n'ont pas ces droits). Le contenu du processus est dicté par l'obligation de la Couronne d'agir honorablement. Même si aucun traité n'était en cause dans l'affaire *Nation Haïda*, la juge en chef McLachlin a souligné ce qui suit aux par. 19 et 35 :

> L'honneur de la Couronne imprègne également les processus de négociation et d'interprétation des traités. Lorsqu'elle conclut et applique un traité, la Couronne doit agir avec honneur et intégrité, et éviter

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

la moindre apparence de « manœuvres malhonnêtes » (*Badger*, par. 41). Ainsi, dans *Marshall*, précité, par. 4, les juges majoritaires de la Cour ont justifié leur interprétation du traité en déclarant que « rien de moins ne saurait protéger l'honneur et l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié . . . ».

. . .

Mais à quel moment, précisément, l'obligation de consulter prend-elle naissance? L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci.

Dans le cas d'un traité, la Couronne, en tant que partie, a toujours connaissance de son contenu. La question dans chaque cas consiste donc à déterminer la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur ces droits de manière à rendre applicable l'obligation de consulter. Le critère retenu dans les arrêts *Nation Haïda* et *Taku River* est peu rigoureux. La souplesse ne réside pas tant dans le fait que l'obligation devient applicable (on envisage des mesures « susceptibles d'avoir un effet préjudiciable » sur un droit) que dans le contenu variable de l'obligation une fois que celle-ci s'applique. Au minimum, « les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis » (*Nation Haïda*, par. 43). Les Mikisew affirment que l'on n'a pas respecté même le contenu minimum de l'obligation en l'espèce.

C. *L'argument juridique des Mikisew*

Les appelants, les Mikisew, ont essentiellement rappelé à la Cour ce qu'elle a dit dans les arrêts *Nation Haïda* et *Taku River*. La preuve en l'espèce, affirment-ils, est plus solide. Dans ces affaires, contrairement au présent pourvoi, l'intérêt autochtone sur les terres était revendiqué mais n'était pas encore prouvé. En l'espèce, les intérêts des

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).

Autochtones sont protégés par le Traité nº 8. Ces intérêts constituent un fait juridique établi. Comme dans l'affaire *Nation Haïda*, la juge de première instance a estimé que le droit des Autochtones était menacé par le développement projeté. Si on a conclu à l'existence d'une obligation de consultation dans les affaires *Nation Haïda* et *Taku River*, les Mikisew soutiennent qu'à plus forte raison, cette obligation doit exister en l'espèce, et que les juges majoritaires de la Cour d'appel fédérale ont eu bien tort de considérer la consultation entre les gouvernements et les peuples autochtones comme rien de plus qu'une « bonne pratique » (par. 24).

D. *The Minister's Response*

D. *La réponse de la ministre*

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.

36 La ministre intimée tente d'établir une distinction entre la présente affaire et les affaires *Nation Haïda* et *Taku River*. Pour justifier l'approbation qu'elle a donnée au projet de route d'hiver, son avocat avance trois propositions générales.

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.

1. En « prenant » les 23 kilomètres carrés à des fins de construction de la route d'hiver, la Couronne ne faisait que ce que le Traité nº 8 l'autorisait à faire. La Couronne, comme les premières nations, a des droits en vertu du Traité nº 8. L'exercice par la Couronne de *son* droit issu du traité de « prendre » des terres ne constitue pas une violation du traité, mais une exécution de celui-ci.

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.

2. La Couronne a procédé à de vastes consultations auprès des premières nations au moment de la négociation du Traité nº 8 en 1899. Quelle que soit la nature de l'obligation d'accommodement envers les premières nations, elle s'est acquittée de cette obligation à ce moment-là. Les modalités du traité n'exigent pas que l'on procède à de nouvelles consultations chaque fois qu'une « prise » est effectuée.

3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

3. S'il fallait tenir d'autres consultations, le processus suivi en l'espèce par la ministre, par l'intermédiaire de Parcs Canada, était suffisant.

37 For the reasons that follow, I believe that each of these propositions must be rejected.

Pour les motifs qui suivent, j'estime que chacune de ces propositions doit être rejetée.

(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. 18).

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

(1) En « prenant » des terres pour construire la route d'hiver, la Couronne ne faisait que ce que le traité l'autorisait à faire

La Cour d'appel fédérale a conclu à la majorité qu'« [à] l'exception des cas dans lesquels la Couronne a pris des terres de mauvaise foi ou a pris tant de terres qu'il ne reste aucun droit réel de chasse, la prise de terres dans un but expressément prévu dans le traité lui-même ou dans un but nécessairement implicite ne peut pas être considérée comme une atteinte au droit de chasse issu du traité » (par. 18).

L'argument fondé sur les « droits de la Couronne » a été présenté pour la première fois devant la Cour d'appel fédérale par le procureur général de l'Alberta qui agissait à titre d'intervenant. La ministre intimée a informé la Cour d'appel fédérale que, même si elle ne contestait pas cet argument, « [elle] ne se fondait tout simplement pas sur cette question » (par. 3). Soulevant une objection préliminaire, les Mikisew affirment qu'il n'est pas permis à un intervenant « d'élargir la portée des questions en litige ou d'y ajouter quoi que ce soit » : *R. c. Morgentaler*, [1993] 1 R.C.S. 462, p. 463. Il n'était donc pas loisible à la Cour d'appel fédérale (ou à notre Cour) de trancher l'affaire en se fondant sur cet argument.

a) *Objection préliminaire : le procureur général de l'Alberta a-t-il outrepassé le rôle d'un intervenant?*

En toute déférence, ce volet de l'argument des Mikisew est mal fondé. Dans leur demande de contrôle judiciaire, les Mikisew ont fait valoir que l'approbation ministérielle de la route d'hiver violait le Traité n^{o} 8. La question de la violation est au cœur de l'instance. Un intervenant peut toujours présenter un argument juridique à l'appui de ce qu'il prétend être la bonne conclusion juridique à l'égard d'une question dont la Cour est régulièrement saisie pourvu que son argument juridique ne fasse pas appel à des faits additionnels qui n'ont pas été prouvés au procès, ou qu'il ne soulève pas un argument qui est par ailleurs injuste pour l'une des parties. L'intervenant n'est pas plus mal placé

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.

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".

qu'une partie qui se rend tardivement compte qu'elle aurait dû soulever un argument juridique plus tôt dans l'instance mais qui ne l'a pas fait, comme ce fut le cas dans *Lamb c. Kincaid* (1907), 38 R.C.S. 516, où le juge Duff a affirmé ce qui suit, à la p. 539 :

> [TRADUCTION] Selon moi, un tribunal d'appel ne devrait pas recevoir un tel argument soulevé pour la première fois en appel, à moins qu'il ne soit clair que, même si la question avait été soulevée en temps opportun, elle n'aurait pas été éclaircie davantage.

Voir également *Athey c. Leonati*, [1996] 3 R.C.S. 458, par. 51-52.

41 Même en admettant que les Mikisew puissent à juste titre affirmer que le procureur général de l'Alberta formule l'argument de l'absence de violation d'une manière différente de celle employée par la ministre fédérale en première instance, il reste que les Mikisew n'ont établi aucun préjudice. Si l'argument avait été formulé de la même manière au procès, en quoi aurait-il pu être « éclairci davantage » par des éléments de preuve additionnels? Le dossier historique a été étudié à fond au procès. À ce stade-ci, la question relève des règles d'interprétation des traités, non des règles de preuve. Elle est donc visée par la règle énoncée dans l'arrêt *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19, selon laquelle « [i]l est loisible à la Cour, dans le cadre d'un pourvoi, d'examiner une nouvelle question de droit dans les cas où elle peut le faire sans qu'il en résulte de préjudice d'ordre procédural pour la partie adverse et où son refus de le faire risquerait d'entraîner une injustice » (par. 33). En l'espèce, le procureur général de l'Alberta a pris le dossier factuel dans l'état où il se trouvait. La question de la violation du traité est au cœur du litige depuis le début. L'argument juridique de l'Alberta n'est pas de nature à prendre les Mikisew par surprise. Dans ces circonstances, on ne saurait tolérer que les tribunaux soient empêchés de donner effet à une analyse juridique correcte simplement parce qu'elle a été présentée un peu tard et par un intervenant plutôt que par une partie. Fermer les yeux sur l'argument « risquerait d'entraîner une 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, 1930* is not at issue in this case as the Mikisew reserve is vested in Her

b) *Le contenu du Traité n^o^ 8*

La disposition du Traité n^o^ 8 qui traite de « la chasse au fusil, de la chasse au piège et de la pêche » a été examinée en profondeur par notre Cour dans *Badger*. Dans cette affaire, le juge Cory a signalé que « même suivant les termes du Traité n^o^ 8, le droit des Indiens de chasser pour se nourrir était circonscrit par des limites géographiques et des mesures spécifiques de réglementation gouvernementale » (par. 37). Les membres de la première nation, a-t-il ajouté, « comprenaient que des terres étaient "requises ou prises" si elles étaient utilisées à des fins [visibles] incompatibles avec l'exercice du droit de chasse » (par. 53).

> [I]l ressort des promesses verbales faites par les représentants de la Couronne et de l'histoire orale des Indiens que ceux-ci comprenaient que des terres seraient prises et occupées d'une manière qui les empêcherait d'y chasser, lorsqu'elles feraient l'objet d'une utilisation visible et incompatible avec la pratique de la chasse. Pour ce qui est de la jurisprudence, il est évident que les tribunaux ont souscrit à cette interprétation et conclu que la question de savoir si une terre est oui ou non prise ou occupée est une question de fait, qui doit être tranchée au cas par cas. [par. 58]

Bien qu'il soit fait état, dans l'arrêt *Badger*, des « limites géographiques » circonscrivant les droits de chasse, de pêche et de piégeage, on n'y a pas traité (puisque cela n'était pas nécessaire) du processus par lequel « de temps à autre » des terres seraient « prises » et donc soustraites à l'exercice de ces droits. Selon la conclusion précisément tirée dans l'arrêt *Badger*, le régime de délivrance de permis de l'Alberta que l'on cherchait à imposer à tous les chasseurs autochtones se trouvant sur les terres de l'Alberta visées par le Traité n^o^ 8 violait ce traité, même si le droit issu du traité était expressément subordonné à [TRADUCTION] « tels règlements qui pourront être faits de temps à autre par le gouvernement ». Le régime de délivrance de permis de l'Alberta privait les « personnes qui sont titulaires de droits issus de traité modifiés par la *Convention* [*sur le transfert des ressources naturelles de 1930*] des moyens mêmes d'exercer ces droits » (par. 94). On avait ainsi tenté d'exercer un pouvoir de réglementation qui allait au-delà de ce qu'avaient

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".)

raisonnablement prévu les signataires du traité en 1899. (Je signale en passant que la *Convention sur le transfert des ressources naturelles de 1930* n'est pas en cause en l'espèce puisque la réserve Mikisew appartient à la Couronne du chef du Canada. Le paragraphe 10 de la Convention prévoit que les réserves créées ultérieurement « seront dans la suite administrées par le Canada de la même manière à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes ».)

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

44

La Cour d'appel fédérale entendait suivre l'arrêt *Badger* en concluant qu'il n'est porté atteinte aux droits de chasse, de pêche et de piégeage que dans les « cas dans lesquels la Couronne a pris des terres de mauvaise foi ou a pris tant de terres qu'il ne reste aucun droit réel de chasse » (par. 18). En toute déférence, je ne peux souscrire à ce rejet implicite des droits de nature procédurale des Mikisew. À ce stade-ci, la route d'hiver n'est rien de plus qu'un projet de changement d'utilisation. L'utilisation proposée, si elle est mise en œuvre, réduirait le territoire sur lequel les Mikisew peuvent exercer leurs droits issus du Traité n^{o} 8. Essentiellement, il n'y aurait plus du tout de chasse dans le corridor routier de 200 mètres. De façon plus générale, comme l'a conclu la juge de première instance, la route nuirait à l'exercice de ces droits dans la forêt environnante. Comme l'a reconnu Josie Weninger, témoin de Parcs Canada, en contre-interrogatoire :

[TRADUCTION]

Q : Mais dans les faits, les routes modifient les habitudes des orignaux et des autres animaux sauvages dans le parc, et c'est ce que Parcs Canada a constaté auparavant dans le cas d'autres routes, n'est-ce pas?

R : On a constaté que les routes ont des répercussions. Il serait absurde de prétendre le contraire.

Dans la version préliminaire du rapport d'évaluation environnementale, on a reconnu que la route pourrait entraîner une diminution quantitative des récoltes fauniques des Mikisew du fait qu'il y aurait moins d'animaux à fourrure (notamment le pékan, le rat musqué, la martre, le carcajou et le lynx) dans leurs pièges. Deuxièmement, sur le plan qualitatif, la population des espèces d'animaux à fourrure les

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 minimis* 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

plus précieuses ou les plus rares pourrait décliner. Les autres répercussions possibles comprennent la fragmentation des habitats fauniques, la perturbation des habitudes migratoires, le dépérissement de la végétation, l'augmentation du braconnage parce que le territoire est plus accessible par véhicule et l'augmentation du nombre d'animaux tués par suite de collisions. Alors que l'affaire *Nation Haïda* a été tranchée après le prononcé de la décision de la Cour d'appel fédérale en l'espèce, il est manifeste que le projet de route aura un effet préjudiciable sur les droits de chasse et de piégeage existants des Mikisew et que, par conséquent, l'obligation de consultation définie dans *Nation Haïda* devient « applicable ».

La ministre cherche à étendre la portée de la remarque faite par le juge Rothstein en affirmant, au par. 96 de son mémoire, que le critère doit consister à [TRADUCTION] « se demander si, après la prise, il demeure encore raisonnablement possible pour les Indiens de pratiquer, dans l'ensemble de la province, la chasse, la pêche et le piégeage de subsistance autant qu'ils veulent le faire » (je souligne). Cela ne saurait être exact. Cette affirmation donne à penser qu'une interdiction de chasser à Peace Point serait acceptable dès lors qu'une chasse décente peut encore être pratiquée dans le secteur du Traité n^{o} 8 qui se trouve au nord de Jasper, soit à l'autre extrémité de la province à environ 800 kilomètres de distance, ce qui équivaut à se déplacer de Toronto à Québec (809 kilomètres) ou d'Edmonton à Regina (785 kilomètres). Autant demander aux cueilleurs de truffes du sud de la France de tenter leur chance dans les Alpes autrichiennes, ce déplacement couvrant environ la même distance que la traversée de l'Alberta que la ministre considère comme une façon acceptable de tenir les promesses faites dans le Traité n^{o} 8.

Au paragraphe 49 de son mémoire, le procureur général de l'Alberta propose un argument légèrement différent, ajoutant un élément *de minimis* à l'approche fondée sur l'ensemble des terres visées par le traité :

> [TRADUCTION] En l'espèce, les terres qui doivent être prises pour construire la route d'hiver représentent 23 kilomètres carrés des 44 807 kilomètres carrés

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.

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:

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". This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

qu'occupe le parc national Wood Buffalo et des 840 000 kilomètres carrés visés par le Traité nº 8. Comme l'a dit le juge Rothstein, il ne s'agit pas d'un cas où il ne reste aucun droit réel de chasse.

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Les arguments du gouvernement fédéral et de l'Alberta ne tiennent tout simplement pas compte de l'importance et des aspects pratiques du territoire traditionnel des premières nations. L'argument de l'Alberta concernant les 23 kilomètres carrés est contraire à l'existence d'un effet préjudiciable sur les terres environnantes à laquelle a conclu la juge de première instance. Qui plus est, pour les peuples autochtones, comme pour les peuples non autochtones, le lieu importe. Une superficie de seulement 23 kilomètres carrés est importante si elle comprend le territoire de chasse ou les lignes de piégeage des demandeurs. Si le Traité nº 8 confère aux Mikisew les droits de chasse, de pêche et de piégeage dans tout le territoire visé par le traité, il n'est pas logique d'un point de vue pratique de dire aux chasseurs et trappeurs Mikisew que, bien que leurs propres territoires de chasse et lignes de piégeage soient maintenant mis en péril, il leur est permis d'envahir les territoires traditionnels d'autres premières nations loin de leur propre terrain (une suggestion qui aurait été encore plus irréalisable en 1899). Comme l'ont fait observer les commissaires du Traité nº 8 dans leur rapport, les négociateurs chipewyans étaient, en 1899, des gens très pratiques :

[TRADUCTION] Les Chipewyans se confinent à poser des questions et à les discuter brièvement. Ils paraissent plus portés à contre-interroger qu'à faire des discours, et le chef au Fort Chipewyan a fait preuve d'une vive intelligence et de beaucoup de sens pratique en présentant les prétentions de sa bande.

Dans *Badger*, on a noté qu'un élément important des négociations du Traité nº 8 tenait aux assurances de *continuité* des modes traditionnels d'activité économique. La continuité respecte les modes d'activité et d'occupation traditionnels. La Couronne a promis aux Indiens que leurs droits de chasse, de pêche et de piégeage leur apporteraient [TRADUCTION] « après le traité les mêmes moyens qu'auparavant » de gagner leur vie. Ce n'est pas honorer cette promesse que d'expédier les Mikisew dans des territoires éloignés de leurs territoires de chasse et de leurs lignes de piégeage traditionnels.

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.

Le juge Rothstein a en fait affirmé ceci au par. 18 :

> À l'exception des cas dans lesquels la Couronne a pris des terres de mauvaise foi ou a pris tant de terres qu'il ne reste aucun droit réel de chasse, la prise de terres dans un but expressément prévu dans le traité lui-même ou dans un but nécessairement implicite ne peut pas être considérée comme une atteinte au droit de chasse issu du traité. [Je souligne.]

Le « droit réel de chasse » n'est pas établi en fonction de toutes les terres visées par le traité (la totalité des 840 000 kilomètres carrés) mais par rapport aux territoires sur lesquels les premières nations avaient l'habitude de chasser, de pêcher et de piéger, et sur lesquels elles le font encore aujourd'hui. S'il advenait que pour une première nation signataire du Traité nº 8 en particulier, il ne reste « aucun droit réel de chasse » sur *ses* territoires traditionnels, l'importance de la promesse verbale qu'ils [TRADUCTION] « auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie » serait clairement remise en question, et la première nation aurait raison de répondre par une action en violation du traité comportant une demande de justification selon le critère énoncé dans l'arrêt *Sparrow*.

(c) *Unilateral Crown Action*

c) *Action unilatérale de la Couronne*

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."

L'argument de la ministre renferme un ardent plaidoyer en faveur de l'action unilatérale de la Couronne (une approche du genre « il s'agit de terres cédées et nous pouvons en faire ce que nous voulons ») qui non seulement fait fi des promesses réciproques, tant verbales qu'écrites, faites lors de la signature du traité, mais qui constitue également l'antithèse de la réconciliation et du respect mutuel. Cela est d'autant plus surprenant que la ministre a reconnu, au par. 41 de son mémoire, que [TRADUCTION] « [d]ans la plupart, voire la totalité, des cas, le gouvernement n'est pas en mesure d'apprécier l'effet qu'aura une prise projetée sur l'exercice, par les Indiens, de leurs droits de chasse, de pêche et de piégeage sans procéder à une consultation. »

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

Le procureur général de l'Alberta nie qu'il soit possible d'inférer une obligation de consultation des modalités du Traité nº 8. Selon lui :

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*

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.

[TRADUCTION] Étant donné qu'une obligation de consultation exigerait de la Couronne qu'elle procède à une consultation réelle de tous les Indiens touchés, c'est-à-dire de tous les nomades dispersés sur un vaste territoire, chaque fois qu'elle entend utiliser une parcelle de terrain ou en modifier l'utilisation, une telle exigence ne s'inscrirait pas dans la gamme des possibilités prévues selon l'intention commune des parties.

Les parties *ont* effectivement prévu une période de transition difficile, et ont tenté d'en atténuer le plus possible les effets, et toute défense fondée sur les inconvénients administratifs découlant de la gestion du processus a été rejetée dans les arrêts *Nation Haïda* et *Taku River*. Nul n'est besoin de répéter en l'espèce ce qui a été dit dans ces arrêts au sujet de l'objectif primordial de réconciliation plutôt que de confrontation.

d) *Honneur de la Couronne*

51

L'obligation de consultation repose sur l'honneur de la Couronne, et il n'est pas nécessaire pour les besoins de l'espèce d'invoquer les obligations de fiduciaire. L'honneur de la Couronne est elle-même une notion fondamentale en matière d'interprétation et d'application des traités que le juge Gwynne de notre Cour avait déjà qualifiée d'*obligation découlant d'un traité* en 1895, soit quatre ans avant la conclusion du Traité nº 8 : *Province of Ontario c. Dominion of Canada* (1895), 25 R.C.S. 434, p. 511-512, le juge Gwynne (dissident). Même si son opinion, voulant que l'obligation découlant d'un traité de verser des rentes aux Indiens crée une fiducie à l'égard des terres provinciales, était minoritaire, les juges majoritaires n'ont rien dit dans cette affaire qui permette de douter que l'honneur de la Couronne garantissait l'exécution de ses obligations envers les Indiens. La Couronne en avait fait sa politique au moins depuis la *Proclamation royale* de 1763, et cette notion ressort clairement des promesses consignées dans le rapport des commissaires. L'honneur de la Couronne existe également en tant que source d'obligation indépendante des traités, bien entendu. Dans les arrêts *Sparrow*, *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, *Nation Haïda* et *Taku River*, l'« honneur de la Couronne » a été invoqué à titre de principe central du règlement des demandes de consultation des Autochtones, et ce, même en l'absence d'un traité.

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

Ce n'est pas comme si les premières nations signataires du Traité nº 8 n'avaient pas payé chèrement leur droit à un comportement honorable de la part de la Couronne; la cession des intérêts autochtones sur un territoire plus grand que la France constitue un prix d'achat très élevé.

(2) La tenue de vastes consultations auprès des premières nations au moment de la négociation du Traité nº 8 en 1899 a-t-elle libéré la Couronne de son obligation de consultation et d'accommodement?

La deuxième réponse générale de la Couronne à la revendication des Mikisew est que ce qui devait être fait a été fait en 1899. La ministre soutient ce qui suit :

> [TRADUCTION] Bien que le gouvernement doive tenir compte des incidences sur le droit issu du traité, il n'existe aucune obligation d'accommodement dans ce contexte. Le traité lui-même constitue l'accommodement aux intérêts autochtones; la prise de terres, telle qu'elle est définie ci-dessus, ne touche aucunement à la capacité fondamentale des Indiens de continuer à chasser, à pêcher et à piéger. Dans la mesure où cette promesse est honorée, le traité n'est pas violé, et aucune obligation d'accommodement distincte ne prend naissance. [Je souligne.]

Cet argument n'est pas fondé. La consultation qui exclurait dès le départ toute forme d'accommodement serait vide de sens. Le processus envisagé ne consiste pas simplement à donner aux Mikisew l'occasion de se défouler avant que la ministre fasse ce qu'elle avait l'intention de faire depuis le début. La conclusion de traités est une étape importante du long processus de réconciliation, mais ce n'est qu'une étape. Ce qui s'est passé à Fort Chipewyan en 1899 ne constituait pas un accomplissement parfait de l'obligation découlant de l'honneur de la Couronne, mais une réitération de celui-ci.

Le traité accorde à la Couronne un droit de « prendre » des terres cédées à des fins de transport régional, mais elle n'en est pas moins tenue de s'informer de l'effet qu'aura son projet sur l'exercice par les Mikisew de leurs droits de chasse et de piégeage, et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter

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.

avec les Mikisew « de bonne foi, dans l'intention de tenir compte réellement » de leurs préoccupations (*Delgamuukw*, par. 168). Cela ne signifie pas que le gouvernement doit consulter toutes les premières nations signataires du Traité nº 8 chaque fois qu'il se propose de faire quelque chose sur les terres cédées visées par ce traité, même si l'effet est peu probable ou peu important. L'obligation de consultation, comme il est précisé dans l'arrêt *Nation Haïda*, est vite déclenchée, mais l'effet préjudiciable, comme l'étendue de l'obligation de la Couronne, est une question de degré. En l'espèce, les effets étaient clairs, démontrés et manifestement préjudiciables à l'exercice ininterrompu des droits de chasse et de piégeage des Mikisew sur les terres en question.

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.

56 En résumé, les négociations menées en 1899 constituaient la première étape d'un long voyage qui n'est pas à la veille de se terminer. À la lumière des faits de la présente affaire, nous devons ajouter aux deux restrictions inhérentes aux droits de chasse, de pêche et de piégeage que le Traité nº 8 accorde aux Indiens qui ont été dégagées dans l'arrêt *Badger* (limites géographiques et mesures spécifiques de réglementation gouvernementale), une troisième restriction, soit le droit pour la Couronne de prendre des terres aux termes du traité, un droit qui est lui-même assujetti à l'obligation de tenir des consultations et, s'il y a lieu, de trouver des accommodements aux intérêts des premières nations avant de réduire le territoire sur lequel leurs membres peuvent continuer à exercer leurs droits de chasse, de pêche et de piégeage. Comme nous l'avons vu, cette troisième restriction (qui n'était pas en cause dans *Badger*) est tout à fait justifiée par l'historique des négociations qui ont mené à la signature du Traité nº 8 ainsi que par l'honneur de la Couronne.

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

57 Comme je l'ai affirmé au début, l'honneur de la Couronne imprègne chaque traité et l'exécution de chaque obligation prévue au traité. En conséquence, le Traité nº 8 est à l'origine des droits de nature procédurale des Mikisew (p. ex. la consultation) ainsi que de leurs droits substantiels (p. ex. les droits de chasse, de pêche et de piégeage). Si la Couronne avait foncé pour mettre en œuvre le projet de route

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

d'hiver sans consultation adéquate, elle aurait violé ses obligations *procédurales*, outre le fait que les Mikisew auraient peut-être pu établir que la route d'hiver violait en plus les obligations *substantielles* que le traité impose à la Couronne.

Selon l'arrêt *Sparrow*, non seulement les droits protégés par l'art. 35 de la *Loi constitutionnelle de 1982* ne sont pas absolus, mais leur violation peut être justifiée par la Couronne dans certaines circonstances précises. Les droits que le Traité nº 8 confère aux Mikisew sont protégés par l'art. 35. La Couronne ne cherche pas à justifier au sens de l'arrêt *Sparrow* les lacunes de sa consultation en l'espèce. Il reste donc à répondre à la question de savoir si, dans les mesures qu'elle a prises, la Couronne a respecté son obligation de consulter honorablement la Première nation Mikisew.

(3) Le processus suivi en l'espèce par la ministre, par l'intermédiaire de Parcs Canada, était-il suffisant?

Dans les cas où, comme en l'espèce, la Cour est en présence d'une « prise » *projetée*, il n'est pas indiqué (même si on a conclu que la mesure envisagée, *si elle était mise en œuvre*, porterait atteinte aux droits de chasse et de piégeage issus du traité) de passer directement à une analyse fondée sur l'arrêt *Sparrow*. La Cour doit d'abord examiner le *processus* selon lequel la « prise » doit se faire, et se demander si ce processus est compatible avec l'honneur de la Couronne. Dans la négative, la première nation peut obtenir l'annulation de l'ordonnance de la ministre en se fondant sur le motif relatif au processus, peu importe que les faits de l'affaire justifient par ailleurs une conclusion que les droits de chasse, de pêche et de piégeage ont été violés.

Je précise d'entrée de jeu que la construction de la route d'hiver proposée par la ministre est une fin qui lui permettait de « prendre » des terres aux termes du Traité nº 8. Il est évident que les fins [TRADUCTION] « d'établissements, de mine, d'opérations forestières » et de [TRADUCTION] « commerce » nécessitent toutes un transport convenable. Le traité ne définit pas les [TRADUCTION] « autres

(Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

objets » qui permettent de prendre des terres, mais cette expression ne doit pas recevoir une interprétation restrictive : *R. c. Smith*, [1935] 2 W.W.R. 433 (C.A. Sask.), p. 440-441. Quoi qu'il en soit, comme je l'ai déjà mentionné, on parle de « voyages » dans le préambule du Traité nº 8.

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):

61 La question est de savoir si la ministre et son personnel ont tenté de parvenir à la fin autorisée que constituent les besoins en matière de transport régional en respectant l'obligation de consultation de la Couronne. La réponse dépend du contenu de cette obligation, lequel est tributaire des circonstances de l'espèce. Dans l'arrêt *Delgamuukw*, la Cour a examiné l'obligation de consultation et d'accommodement dans le contexte d'une atteinte au titre aborigène (par. 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.]

Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones. [Je souligne.]

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):

62 Dans l'arrêt *Nation Haïda*, la Cour a examiné les types d'obligations qui peuvent découler de différentes situations dans le contexte de revendications non encore prouvées, et la juge en chef McLachlin a utilisé la notion de continuum comme fondement de son analyse (par. 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. . . .

À une extrémité du continuum se trouvent les cas où la revendication de titre est peu solide, le droit ancestral limité ou le risque d'atteinte faible. Dans ces cas, les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis. . .

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

À l'autre extrémité du continuum on trouve les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une

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 Nation* 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 Nation* 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

haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé. Dans de tels cas, il peut s'avérer nécessaire de tenir une consultation approfondie en vue de trouver une solution provisoire acceptable. Quoique les exigences précises puissent varier selon les circonstances, la consultation requise à cette étape pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision. Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. . .

Entre les deux extrémités du continuum décrit précédemment, on rencontrera d'autres situations. Il faut procéder au cas par cas. Il faut également faire preuve de souplesse, car le degré de consultation nécessaire peut varier à mesure que se déroule le processus et que de nouveaux renseignements sont mis au jour. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. . . [Je souligne.]

Comme l'indique l'arrêt *Nation Haïda*, la détermination du contenu de l'obligation de consultation sera fonction du contexte. La spécificité des promesses faites sera une des variables prises en compte. Si, par exemple, un traité exige la fourniture de biens ou le paiement de sommes d'argent par la Couronne, ou si une entente récente sur les revendications territoriales impose aux Autochtones des obligations spécifiques relativement à des ressources données, l'importance de la consultation peut être assez limitée. Si les obligations respectives sont claires, les parties devraient les exécuter. Un autre facteur contextuel sera la gravité de l'incidence qu'auront sur le peuple autochtone les mesures que propose la Couronne. Plus la mesure aura d'incidence, plus la consultation prendra de l'importance. S'il n'y a pas de traité, la solidité de la revendication autochtone sera un autre facteur, comme le signale l'arrêt *Nation Haïda*. L'historique des relations entre la Couronne et une première nation peut aussi être un facteur important. En l'espèce, le facteur contextuel le plus important est le fait que le Traité n^{o} 8 offre un cadre permettant de gérer les changements constants à l'utilisation des terres déjà prévus en 1899 et qui, on le sait

overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

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.]

maintenant, vont se poursuivre encore longtemps. Dans ce contexte, la consultation est un facteur clé pour parvenir à la réconciliation, l'objectif global du droit moderne des traités et des droits autochtones.

64

L'obligation en l'espèce comporte des éléments informationnels et des éléments de solution. Dans cette affaire, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres *cédées* où les droits de chasse, de pêche et de piégeage des Mikisew sont expressément assujettis à la restriction de la « prise », j'estime que l'obligation de la Couronne se situe plutôt au bas du continuum. La Couronne devait aviser les Mikisew et nouer un dialogue directement avec eux (et non, comme cela semble avoir été le cas en l'espèce, après coup lorsqu'une consultation publique générale a été tenue auprès des utilisateurs du parc). Ce dialogue aurait dû comporter la communication de renseignements sur le projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne devait demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits de chasse, de pêche et de piégeage des Mikisew. Elle n'a pas respecté cette obligation lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Sur ce point, je souscris à l'opinion exprimée par le juge Finch (maintenant Juge en chef de la C.-B.) dans *Halfway River First Nation*, par. 159-160 :

[TRADUCTION] Ce n'est pas parce qu'on a donné un avis suffisant d'une décision envisagée qu'on a aussi respecté l'exigence de la consultation suffisante.

L'obligation de consultation de la Couronne lui impose le devoir concret de veiller raisonnablement à ce que les Autochtones disposent en temps utile de toute l'information nécessaire pour avoir la possibilité d'exprimer leurs intérêts et leurs préoccupations, et de faire en sorte que leurs observations sont prises en considération avec sérieux et, lorsque c'est possible, sont intégrées d'une façon qui puisse se démontrer dans le plan d'action proposé. [Je souligne.]

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

Il est vrai, comme le prétend la ministre, que les Mikisew ont l'obligation réciproque de faire leur part en matière de consultation, de faire connaître leurs préoccupations, de supporter les efforts du gouvernement en vue de tenir compte de leurs préoccupations et suggestions, et de tenter de trouver une solution mutuellement satisfaisante. En l'espèce, cependant, la consultation n'a jamais atteint ce stade. Elle n'a jamais pris son essor.

Le processus de consultation, s'il avait suivi son cours, n'aurait pas conféré aux Mikisew un droit de veto sur le tracé de la route. Comme on le souligne dans l'arrêt *Nation Haïda*, la consultation n'entraîne pas toujours un accommodement, et l'accommodement ne se traduit pas toujours par une entente. On aurait toutefois peut-être pu apporter au tracé ou à la construction de la route des modifications qui permettraient de répondre, dans une large mesure, aux objections des Mikisew. Nous ne savons pas ce que pourraient être ces modifications et, en l'absence de consultation, la ministre ne peut pas le savoir non plus.

Il ressort clairement des conclusions de fait de la juge de première instance que la Couronne n'a pas réussi à démontrer qu'elle avait « "l'intention de tenir compte réellement des préoccupations (des Autochtones)" [. . .] dans le cadre d'un véritable processus de consultation » (*Nation Haïda*, par. 42). Au contraire, la juge de première instance a estimé que,

> [e]n l'espèce, il aurait donc au moins fallu répondre à la lettre des Mikisews du 10 octobre 2000 et rencontrer ceux-ci pour prendre leurs préoccupations en considération au début de la planification du projet. Lorsque des rencontres ont finalement eu lieu entre Parcs Canada et les Mikisews, la décision était pour ainsi dire prise, et elles ne pouvaient donc se tenir dans l'intention véritable de permettre la prise en compte de leurs préoccupations. [par. 154]

La juge de première instance a également écrit ceci :

> . . . l'honneur de la Couronne, en sa qualité de fiduciaire, ne saurait permettre qu'une décision portant atteinte à

First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

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).

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

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, Vancouver.

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 & Company, Saskatoon.

des droits issus de traité et jouissant d'une protection constitutionnelle soit prise sans que la Première nation concernée soit consultée. [par. 157]

68 Comme la juge Sharlow, dissidente en Cour d'appel fédérale, je suis de cet avis. Cette dernière a affirmé que les mesures d'atténuation avaient été élaborées par suite d'un processus qui était « fondamentalement vicié » (par. 153).

69 En définitive, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance d'approbation de la ministre et de lui renvoyer le dossier du projet de route d'hiver pour qu'elle prenne une décision conforme aux présents motifs.

V. Conclusion

70 Les Mikisew ont demandé les dépens sur une base avocat-client, mais aucune circonstance exceptionnelle ne justifie cette demande. En conséquence, le pourvoi est accueilli et la décision de la Cour d'appel fédérale est annulée, le tout avec dépens entre parties contre la ministre intimée dans notre Cour et dans la Cour d'appel fédérale. L'ordonnance relative aux dépens rendue par la juge en Section de première instance est maintenue.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Rath & Co., Priddis, Alberta.

Procureur de l'intimée Sheila Copps, ministre du Patrimoine canadien : Procureur général du Canada, Vancouver.

Procureurs de l'intimée Thebacha Road Society : Ackroyd Piasta Roth & Day, Edmonton.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante la Nation crie de Big Island Lake : Woloshyn & Company, 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.

Solicitor for the intervener the Blueberry River First Nations: Thomas R. Berger, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

Procureurs de l'intervenant Lesser Slave Lake Indian Regional Council : Donovan & Co., Vancouver.

Procureurs de l'intervenante les Premières nations de l'Alberta signataires du Traité n^{o} 8 : Cook Roberts, Victoria.

Procureurs de l'intervenante Treaty 8 Tribal Association : Woodward & Co., Victoria.

Procureur de l'intervenante les Premières nations de Blueberry River : Thomas R. Berger, Vancouver.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Pitblado, Winnipeg.

TAB 10

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority *Appellants*

v.

Carrier Sekani Tribal Council *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, British Columbia Utilities Commission, Mikisew Cree First Nation, Moosomin First Nation, Nunavut Tunngavik Inc., Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band, Lakes Division of the Secwepemc Nation, Assembly of First Nations, Standing Buffalo Dakota First Nation, First Nations Summit, Duncan's First Nation, Horse Lake First Nation, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. and TransCanada Keystone Pipeline GP Ltd. *Interveners*

Rio Tinto Alcan Inc. et British Columbia Hydro and Power Authority *Appelantes*

c.

Conseil tribal Carrier Sekani *Intimé*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, British Columbia Utilities Commission, Première nation crie Mikisew, Première nation de Moosomin, Nunavut Tunngavik Inc., Conseil tribal de la nation Nlaka'pamux, Alliance des nations de l'Okanagan, Bande indienne d'Upper Nicola, Division des Grands lacs de la nation Secwepemc, Assemblée des Premières Nations, Première nation Standing Buffalo Dakota, Sommet des Premières nations, Première nation Duncan's, Première nation de Horse Lake, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. et TransCanada Keystone Pipeline GP Ltd. *Intervenants*

INDEXED AS: RIO TINTO ALCAN INC. *v.* CARRIER SEKANI TRIBAL COUNCIL

2010 SCC 43

File No.: 33132.

2010: May 21; 2010: October 28.

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

RÉPERTORIÉ : RIO TINTO ALCAN INC. *c.* CONSEIL TRIBAL CARRIER SEKANI

2010 CSC 43

N° du greffe : 33132.

2010 : 21 mai; 2010 : 28 octobre.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Honour of the Crown — Aboriginal peoples — Aboriginal rights — Right to consultation — British Columbia authorized project altering timing and flow of water in area claimed by First Nations

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

Droit constitutionnel — Honneur de la Couronne — Peuples autochtones — Droits ancestraux — Droit à la consultation — La Colombie-Britannique a autorisé la construction d'un ouvrage modifiant le débit d'un cours

without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Duty to consult arises when Crown knows of potential Aboriginal claim or right and contemplates conduct that may adversely affect it — Whether Commission reasonably declined to consider adequacy of consultation in context of assessing whether agreement is in public interest — Whether duty to consult arose — What constitutes "adverse effect" — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Administrative law — Boards and tribunals — Jurisdiction — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Commission empowered to decide questions of law and to determine whether agreement is in public interest — Whether Commission had jurisdiction to discharge Crown's constitutional obligation to consult — Whether Commission had jurisdiction to consider adequacy of consultation — If so, whether it was required to consider adequacy of consultation in determining whether agreement is in public interest — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

In the 1950s, the government of British Columbia authorized the building of a dam and reservoir which altered the amount and timing of water flows in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project.

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements ("EPAs") which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the

d'eau dans un territoire revendiqué par des Autochtones sans consulter au préalable les Premières nations touchées — La société d'État provinciale d'hydroélectricité a ensuite demandé à la British Columbia Utilities Commission d'approuver un contrat d'achat intervenu avec un producteur d'électricité privé — L'obligation de consulter naît lorsque la Couronne a connaissance de l'existence éventuelle d'une revendication autochtone ou d'un droit ancestral et qu'elle envisage une mesure susceptible d'avoir un effet défavorable sur cette revendication ou ce droit — La Commission a-t-elle agi raisonnablement en refusant de se pencher sur le caractère adéquat de la consultation alors qu'elle était appelée à déterminer si le contrat servait l'intérêt public? — L'obligation de consulter a-t-elle pris naissance? — Que faut-il entendre par « effet défavorable »? — Loi constitutionnelle de 1982, art. 35 — Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 71.

Droit administratif — Organismes et tribunaux administratifs — Compétence — La Colombie-Britannique a autorisé la construction d'un ouvrage modifiant le débit d'un cours d'eau dans un territoire revendiqué par des Autochtones sans consulter au préalable les Premières nations touchées — La société d'État provinciale d'hydroélectricité a ensuite demandé à la British Columbia Utilities Commission d'approuver un contrat d'achat intervenu avec un producteur d'électricité privé — La Commission avait le pouvoir de trancher des questions de droit et de décider si un contrat était dans l'intérêt public — Avait-elle compétence pour s'acquitter de l'obligation de la Couronne de consulter? — Avait-elle le pouvoir de se pencher sur le caractère adéquat de la consultation? — Dans l'affirmative, lui incombait-il de se pencher sur le caractère adéquat de la consultation pour décider si le contrat servait l'intérêt public? — Loi constitutionnelle de 1982, art. 35 — Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 71.

Dans les années 1950, le gouvernement de la Colombie-Britannique a autorisé la construction d'un barrage et d'un réservoir qui ont modifié les débits d'eau dans la rivière Nechako. Les Premières nations prétendent que la vallée de la Nechako fait partie de leurs terres ancestrales et elles revendiquent le droit de pêcher dans la rivière Nechako, mais comme ce n'était pas l'usage à l'époque, elles n'ont pas été consultées relativement au barrage projeté.

Depuis 1961, Alcan vend les surplus d'électricité du barrage à BC Hydro au moyen de contrats d'achat d'électricité (« CAÉ ») dans lesquels elle s'engage à vendre l'électricité excédentaire, et BC Hydro à l'acheter. Le gouvernement de la Colombie-Britannique a demandé

Commission's approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met. Alcan and BC Hydro appealed.

Held: The appeal should be allowed and the decision of the British Columbia Utilities Commission approving the 2007 EPA should be confirmed.

The Commission did not act unreasonably in approving the 2007 EPA. Governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. The duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation. The duty has both a legal and a constitutional character, and is prospective, fastening on rights yet to be proven. The nature of the duty and the remedy for its breach vary with the situation.

The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This test can be broken down into three elements. First, the Crown must have real or constructive knowledge of a potential Aboriginal claim or right. While the existence of a potential claim is essential, proof that the claim will succeed is not. Second, there must be Crown conduct or a Crown decision. In accordance with the generous, purposive approach that must be brought to the duty to consult, the required decision or conduct is not confined to government exercise of statutory powers or to decisions or conduct which have an immediate impact

à la Commission d'approuver le CAÉ de 2007. Les Premières nations ont fait valoir que ce dernier devait faire l'objet d'une consultation suivant l'art. 35 de la *Loi constitutionnelle de 1982*.

La Commission a reconnu avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones, mais elle a conclu que la question de la consultation ne pouvait se poser étant donné que le CAÉ de 2007 n'allait pas avoir d'effet préjudiciable sur quelque intérêt autochtone. La Cour d'appel de la Colombie-Britannique a annulé ses ordonnances et lui a renvoyé l'affaire pour qu'elle entende preuve et arguments sur la question de savoir s'il existait ou non une obligation de consulter les Premières nations et, dans l'affirmative, si elle avait été respectée. Alcan et BC Hydro ont interjeté appel.

Arrêt : Le pourvoi est accueilli, et la décision de la British Columbia Utilities Commission approuvant le CAÉ de 2007 est confirmée.

La Commission n'a pas agi de manière déraisonnable en approuvant le CAÉ de 2007. Un gouvernement a l'obligation de consulter les peuples autochtones avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur les terres et les ressources revendiquées par eux. L'obligation de consulter s'origine de l'honneur de la Couronne et c'est un corollaire de celle d'arriver à un règlement équitable des revendications autochtones au terme du processus de négociation de traités. Lorsque ce processus est en cours, la Couronne a l'obligation tacite de consulter les demandeurs autochtones sur ce qui est susceptible d'avoir un effet préjudiciable sur leurs droits issus de traités et leurs droits ancestraux, et de trouver des mesures d'accommodement dans un esprit de conciliation. L'obligation revêt un caractère à la fois juridique et constitutionnel. Elle est de nature prospective et prend appui sur des droits dont l'existence reste à prouver. La nature de l'obligation et le recours pour manquement à celle-ci varient en fonction de la situation.

L'obligation de consulter prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et qu'elle envisage une mesure susceptible d'avoir un effet préjudiciable sur celui-ci. Cette condition comporte trois éléments. Premièrement, la Couronne doit avoir connaissance, concrètement ou par imputation, de l'existence possible d'une revendication autochtone ou d'un droit ancestral. L'existence possible d'une revendication est essentielle, mais il n'est pas nécessaire de prouver que la revendication connaîtra une issue favorable. Deuxièmement, il doit y avoir une mesure ou une décision de la Couronne. Conformément à l'approche généreuse et téléologique que commande l'obligation de

on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights. Third, there must be a possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice. Moreover, the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.

Tribunals are confined to the powers conferred on them by their constituent legislation, and the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on them. The legislature may choose to delegate the duty to consult to a tribunal, and it may empower the tribunal to determine whether adequate consultation has taken place.

The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct, often complex, constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation must be expressly or impliedly empowered to do so and its enabling statute must give it the necessary remedial powers.

The duty to consult is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts. These remedies have proven time-consuming and expensive, are often ineffective, and serve the interest of no one.

consulter, cette mesure ou cette décision ne s'entend pas uniquement de l'exercice d'un pouvoir conféré par la loi ni seulement d'une décision ou d'un acte qui a un effet immédiat sur des terres et des ressources. L'obligation de consulter naît aussi d'une « décision stratégique prise en haut lieu » qui est susceptible d'avoir un effet sur des revendications autochtones et des droits ancestraux. Troisièmement, il doit être possible que la mesure de la Couronne ait un effet sur une revendication autochtone ou un droit ancestral. Le demandeur doit établir un lien de causalité entre la mesure ou la décision envisagée par le gouvernement et un effet préjudiciable éventuel sur une revendication autochtone ou un droit ancestral. Un acte fautif antérieur, une simple répercussion hypothétique et un effet préjudiciable sur la position de négociation ultérieure d'une Première nation ne suffisent pas. Aussi, l'obligation de consulter ne vise que les effets préjudiciables de la mesure ou de la décision actuelle du gouvernement, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. Lorsque la ressource est transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle, il n'y a pas lieu de consulter, mais de négocier une indemnisation.

Un tribunal administratif doit s'en tenir à l'exercice des pouvoirs que lui confère sa loi habilitante, et son rôle en ce qui a trait à la consultation tient à ses obligations et à ses attributions légales. Le législateur peut décider de déléguer à un tribunal administratif l'obligation de la Couronne de consulter, et il peut lui conférer le pouvoir de décider si une consultation adéquate a eu lieu.

Le pouvoir de consulter, qui est distinct du pouvoir de déterminer s'il existe une obligation de consulter, ne peut être inféré du simple pouvoir d'examiner des questions de droit. La consultation comme telle n'est pas une question de droit. Il s'agit d'un processus constitutionnel distinct, souvent complexe, et dans certaines circonstances, d'un droit mettant en jeu faits, droit, politique et compromis. Le tribunal administratif désireux d'entreprendre une consultation doit y être expressément ou tacitement autorisé, et sa loi habilitante doit lui conférer la pouvoir de réparation nécessaire.

L'obligation de consulter est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne. Elle doit être respectée. Si le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent alors s'adresser à une cour de justice pour obtenir la réparation voulue. L'expérience enseigne que la voie judiciaire est longue, coûteuse et souvent vaine et qu'elle ne sert l'intérêt de personne.

In this case, the Commission had the power to consider whether adequate consultation had taken place. The *Utilities Commission Act* empowered it to decide questions of law in the course of determining whether an EPA is in the public interest, which implied a power to decide constitutional issues properly before it. At the time, it also required the Commission to consider "any other factor that the commission considers relevant to the public interest", including the adequacy of consultation. This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over any "constitutional question", since the application for reconsideration does not fall within the narrow statutory definition of that term.

The Legislature did not delegate the Crown's duty to consult to the Commission. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to engage in consultation because consultation is a distinct constitutional process, not a question of law.

The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, and reasonably concluded that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. In this case, the Crown had knowledge of a potential Aboriginal claim or right and BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. However, the 2007 EPA would have neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the First Nations. The failure to consult on the initial project was an underlying infringement, and was not sufficient to trigger a duty to consult. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives will nevertheless be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them.

Cases Cited

Followed: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC

En l'espèce, la Commission avait le pouvoir de déterminer si une consultation adéquate avait eu lieu. La *Utilities Commission Act* l'investissait du pouvoir de trancher des questions de droit aux fins de déterminer si un CAÉ servait l'intérêt public, ce qui emportait celui de trancher une question constitutionnelle dont elle était régulièrement saisie. Au moment considéré, elle exigeait également de la Commission qu'elle tienne compte de « tout autre élément jugé pertinent eu égard à l'intérêt public », dont le caractère adéquat de la consultation. L'*Administrative Tribunals Act* ne modifie pas cette conclusion même si elle prévoit qu'un tribunal administratif n'a pas compétence à l'égard d'une « question constitutionnelle », car la demande de révision échappe à la définition restrictive de ce terme.

Le législateur n'a pas délégué à la Commission l'obligation de la Couronne de consulter. Le pouvoir de la Commission d'examiner les questions de droit et tout élément pertinent pour ce qui concerne l'intérêt public ne l'autorise pas à entreprendre la consultation, car celle-ci est un processus constitutionnel distinct, et non une question de droit.

La Commission a reconnu à juste titre avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones et elle a raisonnablement conclu que la question de la consultation ne pouvait se poser étant donné que le CAÉ de 2007 n'allait pas avoir d'effet préjudiciable sur quelque intérêt autochtone. Dans la présente affaire, la Couronne avait connaissance de l'existence possible d'une revendication autochtone ou d'un droit ancestral, et le projet de BC Hydro de conclure avec Alcan un contrat d'achat d'électricité constituait clairement une mesure projetée par la Couronne. Cependant, le CAÉ de 2007 n'allait pas avoir d'impact physique sur la rivière Nechako ou sur le poisson, ni entraîner de changements organisationnels, politiques ou de gestion susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations. L'omission de consulter relativement au projet initial constituait une atteinte sous-jacente et ne suffisait pas pour faire naître l'obligation de consulter. Vu leur obligation d'agir conformément à l'honneur de la Couronne, les représentants de BC Hydro devront néanmoins tenir compte des groupes autochtones touchés et les consulter au besoin lorsqu'une décision ultérieure sera susceptible d'avoir un effet préjudiciable sur eux.

Jurisprudence

Arrêt suivi : *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; **arrêts mentionnés :** *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation*

74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1; *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203; *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 1, 44(1), 58.
Constitution Act, 1867, s. 91(12).
Constitution Act, 1982, ss. 24, 35, 52.
Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 8.
Utilities Commission Act, R.S.B.C. 1996, c. 473, ss. 2(4), 71, 79, 101(1), 105.

Authors Cited

Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, 2009.
Slattery, Brian. "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433.
Woodward, Jack. *Native Law*, vol. 1. Toronto: Carswell, 1994 (loose-leaf updated 2010, release 4).

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Huddart and Bauman JJ.A.), 2009 BCCA 67, 89 B.C.L.R. (4th) 298, 266 B.C.A.C. 228, 449 W.A.C. 228, [2009] 2 C.N.L.R. 58, [2009] 4 W.W.R. 381, 76 R.P.R. (4th) 159, [2009] B.C.J. No. 259 (QL), 2009 CarswellBC 340, allowing an appeal from a decision of the British Columbia Utilities Commission, 2008 CarswellBC 1232, and remitting the consultation issue to the Commission. Appeal allowed; decision

de projet), 2004 CSC 74, [2004] 3 R.C.S. 550; *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; *Huu-Ay-Aht First Nation c. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx c. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation c. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Première nation Dene Tha' c. Canada (Ministre de l'Environnement)*, 2006 CF 1354 (CanLII), conf. par 2008 CAF 20 (CanLII); *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. c. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203; *R. c. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190.

Lois et règlements cités

Administrative Tribunals Act, S.B.C. 2004, ch. 45, art. 1, 44(1), 58.
Constitutional Question Act, R.S.B.C. 1996, ch. 68, art. 8.
Loi constitutionnelle de 1867, art. 91(12).
Loi constitutionnelle de 1982, art. 24, 35, 52.
Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 2(4), 71, 79, 101(1), 105.

Doctrine citée

Newman, Dwight G. *The Duty to Consult : New Relationships with Aboriginal Peoples*. Saskatoon : Purich Publishing, 2009.
Slattery, Brian. « Aboriginal Rights and the Honour of the Crown » (2005), 29 *S.C.L.R.* (2d) 433.
Woodward, Jack. *Native Law*, vol. 1. Toronto : Carswell, 1994 (loose-leaf updated 2010, release 4).

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Donald, Huddart et Bauman), 2009 BCCA 67, 89 B.C.L.R. (4th) 298, 266 B.C.A.C. 228, 449 W.A.C. 228, [2009] 2 C.N.L.R. 58, [2009] 4 W.W.R. 381, 76 R.P.R. (4th) 159, [2009] B.C.J. No. 259 (QL), 2009 CarswellBC 340, accueillant l'appel d'une décision de la British Columbia Utilities Commission, 2008 CarswellBC 1232, et renvoyant à la Commission la question de la consultation. Pourvoi accueilli; décision de la

of the British Columbia Utilities Commission approving 2007 EPA confirmed.

Daniel A. Webster, *Q.C.*, *David W. Bursey* and *Ryan D. W. Dalziel*, for the appellant Rio Tinto Alcan Inc.

Chris W. Sanderson, *Q.C.*, *Keith B. Bergner* and *Laura Bevan*, for the appellant the British Columbia Hydro and Power Authority.

Gregory J. McDade, *Q.C.*, and *Maegen M. Giltrow*, for the respondent.

Mitchell R. Taylor, *Q.C.*, for the intervener the Attorney General of Canada.

Malliha Wilson and *Tamara D. Barclay*, for the intervener the Attorney General of Ontario.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

Stephanie C. Latimer, for the intervener the Attorney General of Alberta.

Written submissions only by *Gordon A. Fulton*, *Q.C.*, for the intervener the British Columbia Utilities Commission.

Written submissions only by *Robert C. Freedman* and *Rosanne M. Kyle*, for the intervener the Mikisew Cree First Nation.

Written submissions only by *Jeffrey R. W. Rath* and *Nathalie Whyte*, for the intervener the Moosomin First Nation.

Richard Spaulding, for the intervener Nunavut Tunngavik Inc.

Written submissions only by *Timothy Howard* and *Bruce Stadfeld*, for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band.

Robert J. M. Janes, for the intervener the Lakes Division of the Secwepemc Nation.

British Columbia Utilities Commission approuvant le CAÉ de 2007 confirmée.

Daniel A. Webster, *c.r.*, *David W. Bursey* et *Ryan D. W. Dalziel*, pour l'appelante Rio Tinto Alcan Inc.

Chris W. Sanderson, *c.r.*, *Keith B. Bergner* et *Laura Bevan*, pour l'appelante British Columbia Hydro and Power Authority.

Gregory J. McDade, *c.r.*, et *Maegen M. Giltrow*, pour l'intimé.

Mitchell R. Taylor, *c.r.*, pour l'intervenant le procureur général du Canada.

Malliha Wilson et *Tamara D. Barclay*, pour l'intervenant le procureur général de l'Ontario.

Paul E. Yearwood, pour l'intervenant le procureur général de la Colombie-Britannique.

Stephanie C. Latimer, pour l'intervenant le procureur général de l'Alberta.

Argumentation écrite seulement par *Gordon A. Fulton*, *c.r.*, pour l'intervenante British Columbia Utilities Commission.

Argumentation écrite seulement par *Robert C. Freedman* et *Rosanne M. Kyle*, pour l'intervenante la Première nation crie Mikisew.

Argumentation écrite seulement par *Jeffrey R. W. Rath* et *Nathalie Whyte*, pour l'intervenante la Première nation de Moosomin.

Richard Spaulding, pour l'intervenante Nunavut Tunngavik Inc.

Argumentation écrite seulement par *Timothy Howard* et *Bruce Stadfeld*, pour les intervenants le Conseil tribal de la nation Nlaka'pamux, l'Alliance des nations de l'Okanagan et la Bande indienne d'Upper Nicola.

Robert J. M. Janes, pour l'intervenante la Division des Grands lacs de la nation Secwepemc.

Peter W. Hutchins and *David Kalmakoff*, for the intervener the Assembly of First Nations.

Written submissions only by *Mervin C. Phillips*, for the intervener the Standing Buffalo Dakota First Nation.

Arthur C. Pape and *Richard B. Salter*, for the intervener the First Nations Summit.

Jay Nelson, for the interveners the Duncan's First Nation and the Horse Lake First Nation.

Roy W. Millen, for the intervener the Independent Power Producers Association of British Columbia.

Written submissions only by *Harry C. G. Underwood*, for the intervener Enbridge Pipelines Inc.

Written submissions only by *C. Kemm Yates*, *Q.C.*, for the intervener the TransCanada Keystone Pipeline GP Ltd.

The judgment of the Court was delivered by

[1] The Chief Justice — In the 1950s, the government of British Columbia authorized the building of the Kenney Dam in Northwest British Columbia for the production of hydro power for the smelting of aluminum. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations have since time immemorial used for fishing and sustenance. This was done without consulting with the CSTC First Nations. Now, the government of British Columbia seeks approval of a contract for the sale of excess power from the dam to British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. The question is whether the British Columbia Utilities Commission (the "Commission") is required to consider the issue of consultation with the CSTC First Nations in determining whether the sale is in the public interest.

Peter W. Hutchins et *David Kalmakoff*, pour l'intervenante l'Assemblée des Premières Nations.

Argumentation écrite seulement par *Mervin C. Phillips*, pour l'intervenante la Première nation Standing Buffalo Dakota.

Arthur C. Pape et *Richard B. Salter*, pour l'intervenant le Sommet des Premières nations.

Jay Nelson, pour les intervenantes la Première nation Duncan's et la Première nation de Horse Lake.

Roy W. Millen, pour l'intervenante Independent Power Producers Association of British Columbia.

Argumentation écrite seulement par *Harry C. G. Underwood*, pour l'intervenante Enbridge Pipelines Inc.

Argumentation écrite seulement par *C. Kemm Yates*, *c.r.*, pour l'intervenante TransCanada Keystone Pipeline GP Ltd.

Version française du jugement de la Cour rendu par

[1] La Juge en chef — Dans les années 1950, le gouvernement de la Colombie-Britannique a autorisé la construction du barrage Kenney dans le nord-ouest de la province en vue de la production d'électricité destinée à l'alimentation d'une aluminerie. Le barrage et le réservoir ont modifié les débits d'eau dans la rivière Nechako, dont les Premières nations du Conseil tribal Carrier Sekani (« CTCS ») tirent leur subsistance (notamment grâce à la pêche) depuis des temps immémoriaux. Ces Premières nations n'ont pas été consultées avant la construction du complexe. Le gouvernement de la Colombie-Britannique demande aujourd'hui l'approbation d'un contrat de vente des surplus d'électricité produits par le barrage à une société d'État, British Columbia Hydro and Power Authority (« BC Hydro »). La Cour doit déterminer si la British Columbia Utilities Commission (la « Commission ») est tenue de se pencher sur la question de la consultation des Premières nations du CTCS pour déterminer si la vente sert l'intérêt public.

[2] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, this Court affirmed that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. In the intervening years, government-Aboriginal consultation has become an important part of the resource development process in British Columbia especially; much of the land and resources there are subject to land claims negotiations. This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation. I would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights.

I. Background

A. *The Facts*

[3] In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

[4] Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in

[2] Dans l'arrêt *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, la Cour affirme qu'un gouvernement a l'obligation de consulter les peuples autochtones avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur les terres et les ressources revendiquées par eux. Depuis lors, la consultation des Autochtones par le gouvernement constitue un volet important du processus d'exploitation des ressources, spécialement en Colombie-Britannique où beaucoup de terres et de ressources font l'objet de revendications territoriales. Le pourvoi soulève les questions suivantes : d'où naît l'obligation de consulter et quel rôle joue un tribunal administratif dans la consultation et le contrôle de celle-ci? Je suis d'avis d'accueillir le pourvoi, tout en confirmant l'obligation de BC Hydro de consulter les Premières nations du CTCS sur les activités d'exploitation ultérieures susceptibles d'avoir un effet préjudiciable sur leurs revendications et leurs droits.

I. Contexte

A. *Les faits*

[3] Dans les années 1950, Alcan (aujourd'hui Rio Tinto Alcan) a construit un barrage sur la rivière Nechako dans le nord-ouest de la Colombie-Britannique afin de produire de l'électricité destinée à la fabrication d'aluminium. Il s'agissait de travaux colossaux. L'eau de la rivière Nechako a été détournée dans le réservoir du même nom, où une centrale a été construite pour y produire de l'électricité. Après être passée dans les turbines de la centrale, l'eau se déversait ensuite dans la rivière Kemano, puis dans l'océan Pacifique à l'ouest. Le barrage a eu une incidence sur le débit de la rivière Nechako à l'est, ce qui a eu des répercussions sur les stocks de poissons dans les terres aujourd'hui revendiquées par les Premières nations du CTCS. Alcan a effectué ces dérivations d'eau conformément au permis d'exploitation hydraulique permanent nº 102324, qui lui accorde un droit perpétuel d'utilisation de l'eau.

[4] En 1987, Alcan, la province de la Colombie-Britannique et le Canada ont convenu de lâchers

1987 on the release of waters in order to protect fish stocks. Canada was involved because fisheries, whether seacoast-based or inland, fall within federal jurisdiction under s. 91(12) of the *Constitution Act, 1867*. The 1987 agreement directs the release of additional flows in July and August to protect migrating salmon. In addition, a protocol has been entered into between the Haisla Nation and Alcan which regulates water flows to protect eulachon spawning grounds.

[5] The electricity generated by the project has been used over the years primarily for aluminum smelting. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, for use in the local area and later for transmission to neighbouring communities. The Energy Purchase Agreement ("EPA") entered into in 2007, which is the subject of this appeal is the latest in a series of power sales from Alcan to BC Hydro. It commits Alcan to supplying and BC Hydro to purchasing excess electricity from the Kemano site until 2034. The 2007 EPA establishes a Joint Operating Committee to advise the parties on the administration of the EPA and the operation of the reservoir.

[6] The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the diversion of the river effected by the 1950s dam project. They assert, however, that the 2007 EPA for the power generated by the project should be subject to consultation. This, they say, is their constitutional right under s. 35 of the *Constitution Act, 1982*, as defined in *Haida Nation*.

B. *The Commission Proceedings*

[7] The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission*

d'eau pour protéger les stocks de poissons. Le Canada était partie à l'accord, car les pêches, des côtes de la mer ou de l'intérieur, relèvent de la compétence fédérale suivant le par. 91(12) de la *Loi constitutionnelle de 1867*. L'accord de 1987 prévoit des lâchers supplémentaires en juillet et en août afin de protéger le saumon anadrome. De plus, un protocole est intervenu entre la nation Haisla et Alcan pour régulariser les débits d'eau et protéger les frayères d'eulachons.

[5] Au fil des ans, l'électricité générée par la centrale a principalement servi à alimenter une aluminerie. Toutefois, depuis 1961, Alcan vend ses surplus d'électricité à une société d'État, BC Hydro. Ces surplus ont d'abord été consommés localement, puis acheminés vers des collectivités avoisinantes. Le contrat d'achat d'électricité (le « CAÉ ») conclu en 2007, qui fait l'objet du pourvoi, est le plus récent intervenu entre Alcan et BC Hydro. Alcan s'y engage à vendre l'électricité excédentaire produite par la centrale de Kemano, et BC Hydro à l'acheter, jusqu'en 2034. Le CAÉ de 2007 crée un comité conjoint d'exploitation appelé à conseiller les parties sur l'administration du contrat et l'exploitation du réservoir.

[6] Les Premières nations du CTCS prétendent que la vallée de la Nechako fait partie de leurs terres ancestrales et elles revendiquent le droit de pêcher dans la rivière Nechako. Comme ce n'était pas l'usage à l'époque, elles n'ont pas été consultées au sujet du détournement de la rivière occasionné par la construction du barrage dans les années 1950. Elles font toutefois valoir que le CAÉ de 2007 conclu relativement à l'énergie produite par ce barrage devrait faire l'objet d'une consultation. Selon elles, il s'agit d'un droit constitutionnel découlant de l'art. 35 de la *Loi constitutionnelle de 1982*, au sens où l'entend la Cour dans l'arrêt *Nation Haïda*.

B. *Les procédures de la Commission*

[7] Le CAÉ de 2007 a été soumis à l'examen de la Commission, laquelle devait, en application de l'art. 71 de la *Utilities Commission Act*, R.S.B.C. 1996, ch. 473, déterminer si la vente d'électricité

Act, R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

[8] The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "ha[d] failed to act on their legal obligation" to them, but refrained from asking the Commission "to assess the adequacy [of consultation] and accommodation afforded . . . on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, October 10, 2007 (the "Scoping Order"), unreported. The Commission's Scoping Order therefore addressed the consultation issue as follows:

> Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

[9] On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision

était dans l'intérêt public. La Commission avait le pouvoir de déclarer inapplicable le contrat de vente d'électricité qui, selon elle, n'était pas dans l'intérêt public compte tenu de la quantité d'énergie fournie, de la disponibilité de l'approvisionnement, du prix et de la disponibilité de toute autre forme d'énergie, du prix de l'énergie fournie à une entreprise de services publics et de [TRADUCTION] « tout autre élément jugé pertinent eu égard à l'intérêt public ».

[8] La Commission a entrepris ses travaux par la tenue de deux conférences de nature procédurale pour déterminer notamment le « cadre » de l'audience. Le « cadrage » est le processus par lequel la Commission détermine [TRADUCTION] « les données qu'elle estime nécessaires pour décider si le contrat est ou non dans l'intérêt public » en application de l'al. 71(1)b) de la *Utilities Commission Act*. C'est à cette étape qu'a été soulevée la question de la participation des Premières nations à l'audience. Le CTCS n'était pas partie à la procédure, contrairement à la Nation Haisla, qui soutenait que la province et BC Hydro [TRADUCTION] « avaient manqué à leur obligation légale envers elle », mais qui ne demandait pas à la Commission « de se prononcer sur le caractère adéquat [de la consultation] et des mesures d'accommodement prises [. . .] relativement au CAÉ de 2007 » : *Re : British Columbia Hydro & Power Authority Filing of Electricity Power Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, 10 octobre 2007 (l'« ordonnance sur le cadre de l'audience »), inédite. Dans son ordonnance, la Commission se prononce donc comme suit sur la question de la consultation :

> [TRADUCTION] Les éléments de preuve se rapportant à la consultation des Premières nations peuvent être pertinents, et ce, pour les mêmes raisons que la Commission examine souvent la preuve de la consultation d'autres intéressés. De manière générale, une preuve de consultation insuffisante, notamment des Premières nations, n'est pas déterminante eu égard aux questions dont est saisie la Commission.

[9] Le 29 octobre 2007, le CTCS a tardivement demandé d'être constitué partie intervenante sur la question de la consultation au motif que la décision

might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

[10] The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

[11] On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

[12] As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement]

de la Commission risquait d'avoir un effet préjudiciable sur les droits ancestraux et le titre aborigène qu'il revendiquait alors. Le 19 novembre 2007, au début de l'audience, le CTCS a demandé la révision de l'ordonnance qui en définissait le cadre et, dans son argumentation écrite du 20 novembre 2007, il a demandé qu'à l'audience, la Commission examine en outre les questions de savoir si l'obligation de consultation avait été respectée et si la vente d'électricité projetée dans le CAÉ de 2007 pouvait en soi être préjudiciable aux droits ancestraux et au titre aborigène, ainsi que la question connexe des répercussions environnementales du CAÉ de 2007 sur les droits des Premières nations du CTCS.

[10] La Commission a établi un processus comportant deux étapes pour statuer sur la demande de révision. Elle devait d'abord déterminer si un fondement probatoire raisonnable justifiait la révision de l'ordonnance, puis entendre les arguments des parties sur la question de savoir s'il y avait lieu d'accueillir la demande de recadrage. À la première étape, le CTCS a produit des éléments de preuve, présenté des témoins et contre-interrogé ceux de BC Hydro et d'Alcan. La Commission s'en est tenue à la question de savoir si, en raison de la modification du débit de la rivière Nechako ou du niveau du réservoir Nechako qui en résulterait, le CAÉ de 2007 aurait un effet préjudiciable sur les droits éventuels des Premières nations du CTCS.

[11] Le 29 novembre 2007, la Commission a rendu à la première étape une décision préliminaire intitulée [TRADUCTION] « Impact sur le débit d'eau ». Elle y conclut que [TRADUCTION] « suivant le CAÉ de 2007, l'exploitation du réservoir Nechako continue d'incomber à Alcan » et que le contrat ne changera rien aux niveaux de la rivière Nechako, affirmant que [TRADUCTION] « le CAÉ de 2007 accorde la priorité à la production d'électricité, et non à l'eau ». Avec ou sans le CAÉ de 2007, [TRADUCTION] « Alcan exploite le réservoir Nechako dans le but d'optimiser la production d'électricité ».

[12] Au chapitre de la pêche, la Commission a estimé que [TRADUCTION] « les lâchers d'eau effectués à partir du réservoir Nechako [conformément

is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

[13] The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application — specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

[14] On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the 2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "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 [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional

à l'accord de 1987] visent en priorité le passage des poissons, puis la production d'électricité ». Bien que le calendrier des lâchers d'eau destinés à la production d'électricité puisse changer en raison du CAÉ de 2007, à son avis, cela [TRADUCTION] « n'aura aucun impact sur les apports dans le réseau hydrographique de la Nechako », car ces lâchers d'eau ne sont pas effectués dans la rivière Nechako à l'est — objet de la préoccupation des Premières nations du CTCS —, mais dans la rivière Kemano à l'ouest. La Commission a aussi conclu que le CAÉ de 2007 ne modifiera ni la gestion des débits et des niveaux d'eau, ni la structure de gestion du réservoir.

[13] À la deuxième étape, la Commission a invité les parties à présenter des observations écrites sur la demande de révision — plus précisément, sur la question de savoir si le refus de recadrer l'audience pour que les questions liées à la consultation y soient aussi abordées constituerait une erreur de compétence à la lumière de ces faits. Les parties ont répondu à l'invitation.

[14] Le 17 décembre 2007, la Commission a rejeté la demande du CTCS au motif que le CAÉ de 2007 ne créerait pas de nouveaux effets défavorables sur les intérêts des Premières nations en cause : *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (la « décision sur la demande de révision »). Pour statuer, elle a tenu pour avérés l'atteinte historique aux droits ancestraux et au titre aborigène et le manquement du gouvernement à son obligation de consulter. S'appuyant sur l'arrêt *Nation Haïda*, elle a conclu qu'il fallait [TRADUCTION] « davantage qu'une atteinte sous-jacente ». Le CTCS devait démontrer que le CAÉ de 2007 aurait un « effet préjudiciable » sur les droits ancestraux des Premières nations qui en faisaient partie. Après avoir appliqué ce critère à ses conclusions de fait, elle a statué que l'[TRADUCTION] « examen visé à l'article 71 n'a pas pour effet d'approuver ou de transférer une licence ou une autorisation ou d'en modifier le titulaire, de sorte qu'en l'absence de nouveaux impacts physiques, faire droit [sans consultation] à une demande présentée sous le régime de l'article 71 ne constituerait pas une erreur de compétence ». La Commission a donc estimé que sa décision

error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

[15] The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

> In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

[16] In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. *The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (Donald, Huddart and Bauman JJ.A.)*

[17] The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

concernant le CAÉ de 2007 n'aurait pas d'effet préjudiciable sur les intérêts des Premières nations du CTCS. L'obligation de consulter n'avait donc pas pris naissance, et la Commission n'a pas commis d'erreur de compétence en refusant d'inclure dans le cadre de l'audience la consultation des Premières nations, en sus de la consultation générale de tous les intéressés.

[15] La Commission a ensuite conclu que le CAÉ de 2007 était dans l'intérêt public et devait être approuvé :

> [TRADUCTION] Dans les circonstances du présent examen, on peut raisonnablement tenir pour inutile la preuve relative à la consultation sur l'atteinte historique et continue pour les mêmes raisons qu'il n'y a pas d'erreur de compétence, soit la portée limitée de l'examen visé à l'article 71 et l'absence de nouveaux impacts physiques.

[16] Essentiellement, la Commission a opiné que le CAÉ de 2007 n'aurait pas d'impact physique sur les niveaux d'eau existants de la rivière Nechako, de sorte qu'il ne modifierait pas la gestion des stocks de poissons. Elle a aussi estimé que sa décision ne nécessiterait ni cession ni modification des licences ou des activités d'exploitation. Elle est donc arrivée à la conclusion que sa décision n'aurait aucun effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS, de sorte qu'il n'était pas nécessaire de recadrer l'audience pour permettre que soit débattue plus avant la question de l'obligation de consulter.

C. *Le jugement de la Cour d'appel, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (les juges Donald, Huddart et Bauman)*

[17] Le CTCS a contesté devant la Cour d'appel de la Colombie-Britannique la décision sur la demande de révision et l'approbation du CAÉ de 2007. Au nom de la Cour d'appel, le juge Donald a annulé les ordonnances et renvoyé l'affaire à la Commission pour qu'elle entende [TRADUCTION] « preuve et arguments sur la question de savoir s'il existe ou non une obligation de consulter [les Premières nations du CTCS] et, au besoin, d'arriver à un accord avec elles et, dans l'affirmative, sur la question de savoir si l'obligation a été respectée relativement au dépôt du CAÉ de 2007 » (par. 69).

[18] The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

[19] The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

> . . . 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 [CSTC] would win the point as a precondition for a hearing into the very same point.
>
> 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. [paras. 61-62]

[20] The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

[21] The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional

[18] La Cour d'appel conclut que la Commission avait compétence pour se pencher sur la question de la consultation. La Commission pouvait trancher des questions de droit et, par conséquent, toute question constitutionnelle liée à l'obligation de consulter.

[19] La Cour d'appel opine ensuite que la Commission a prématurément rejeté la demande de révision. Le juge Donald dit ce qui suit au nom de la juridiction d'appel :

> [TRADUCTION] . . . la Commission a tranché une question tenue erronément pour préliminaire alors qu'il s'agissait d'une question de fond. La faille logique a consisté à présumer l'inutilité de la consultation. Autrement dit, la Commission a exigé comme condition préalable à l'examen des prétentions que [le CTCS] en démontre d'abord la justesse.
>
> Je ne dis pas que la Commission serait tenue de conclure à l'existence d'une obligation de consulter en l'espèce. L'erreur de la Commission est de ne pas avoir considéré la question de la consultation dans le cadre d'une audience en bonne et due forme alors que les circonstances exigeaient un examen. [par. 61-62]

[20] La Cour d'appel conclut que l'honneur de la Couronne obligeait la Commission à trancher la question de la consultation et que [TRADUCTION] « le tribunal administratif doté du pouvoir d'approuver le projet doit accepter l'obligation de se prononcer sur le caractère adéquat de la consultation » (par. 53). Contrairement à la Commission, la Cour d'appel ne se demande pas si le CAÉ de 2007 était susceptible d'avoir un effet préjudiciable sur quelque revendication ou droit des Premières nations du CTCS. Elle ne reproche pas à la Commission sa conclusion sur l'effet préjudiciable. Elle semble plutôt estimer que, malgré cette conclusion, la Commission était tenue de déterminer si la consultation pouvait être « utile ». En statuant que la Commission aurait dû examiner la question de la consultation, la Cour d'appel paraît interpréter plus largement que la Commission les conditions auxquelles il y a obligation de consulter.

[21] La Cour d'appel laisse entendre que l'omission de considérer la question de la consultation risquait d'entraîner l'approbation d'un contrat

duty. Donald J.A. asked, "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" (para. 42).

[22] Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

[23] The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to rescope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. *Legislation Regarding the Public Interest Determination*

[24] The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest":

au mépris de l'obligation constitutionnelle de la Couronne. Le juge Donald pose la question suivante : [TRADUCTION] « Comment un contrat conclu par un mandataire de la Couronne dans le non-respect d'une obligation constitutionnelle peut-il être dans l'intérêt public? L'existence d'une telle obligation et l'allégation de non-respect doivent faire partie intégrante de l'examen relatif à l'intérêt public » (par. 42).

[22] Alcan et BC Hydro interjettent appel devant notre Cour. Elles soutiennent que la Cour d'appel a interprété trop largement l'obligation de la Couronne de consulter et le pouvoir du tribunal administratif de trancher les questions touchant à la consultation. Vu le mandat incombant à la Commission suivant sa loi constitutive et la preuve dont elle disposait, Alcan et BC Hydro prétendent que la Commission a conclu à juste titre qu'elle n'était pas tenue d'examiner la question de la consultation soulevée par le CTCS, car peu importe l'importance du droit de participation reconnu, il était impossible de conclure à l'existence d'une obligation de consulter relativement au CAÉ de 2007.

[23] Le CTCS avance que la Cour d'appel a eu raison de conclure que la Commission avait refusé à tort de redéfinir le cadre de l'audience de manière à permettre la présentation d'observations sur la question de la consultation. Il ne fait plus valoir les arguments procéduraux invoqués devant les tribunaux inférieurs.

II. Le cadre législatif

A. *Dispositions législatives régissant la décision relative à l'intérêt public*

[24] L'article 71 de la *Utilities Commission Act* prévoyait que la Commission devait examiner le CAÉ de 2007 pour déterminer si son approbation était dans l'intérêt public. Avant le mois de mai 2008, la décision devait tenir compte de la quantité d'énergie fournie, de la disponibilité de l'approvisionnement, du prix et de la disponibilité de toute autre forme d'énergie, du prix de l'énergie fournie à une entreprise de services publics et de [TRADUCTION] « tout autre élément jugé pertinent

Utilities Commission Act, s. 71(2)(a) to (e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a) and (b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. *Legislation on the Commission's Remedial Powers*

[25] Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2) and (3).

C. *Legislation on the Commission's Jurisdiction and Appeals*

[26] Section 79 of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

[27] Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or

eu égard à l'intérêt public » : al. 71(2)a) à e) de la *Utilities Commission Act*. À compter de mai 2008, se sont ajoutées les considérations suivantes : les [TRADUCTION] « objectifs énergétiques du gouvernement » et son plan à long terme en matière de ressources : al. 71(2.1)a) et b). Or, la disposition portant sur l'intérêt public a vu sa portée ramenée à la prise en compte des intérêts des clients éventuels d'une entreprise de services publics de la Colombie-Britannique : al. 71(2.1)d).

B. *Dispositions législatives régissant le pouvoir de réparation de la Commission*

[25] Au vu des considérations susmentionnées, la Commission peut, si elle juge qu'il est dans l'intérêt public de le faire, rendre une ordonnance approuvant le contrat projeté en application du par. 71(2.4) de la *Utilities Commission Act*. Si elle arrive à la conclusion contraire concernant l'intérêt public, elle peut, par voie d'ordonnance, déclarer le contrat inapplicable, en totalité ou en partie, ou [TRADUCTION] « rendre toute autre ordonnance qu'elle juge indiquée dans les circonstances » : par. 71(2) et (3).

C. *Dispositions législatives régissant la compétence de la Commission et le droit d'appel*

[26] L'article 79 de la *Utilities Commission Act* dispose que les conclusions de fait tirées par la Commission dans les limites de sa compétence sont [TRADUCTION] « opposables et définitives ». L'article 105 confère en outre à la Commission le [TRADUCTION] « pouvoir exclusif de statuer dans toute affaire et sur toute question relevant de sa compétence suivant la présente loi ou un autre texte législatif ». Ses décisions et ordonnances peuvent cependant être contestées devant la Cour d'appel, sur autorisation : par. 101(1).

[27] Ensemble, les art. 79 et 105 de la *Utilities Commission Act* constituent une [TRADUCTION] « disposition d'inattaquabilité » au sens de l'article premier de l'*Administrative Tribunals Act* de la Colombie-Britannique, S.B.C. 2004, ch. 45. Suivant l'art. 58 de l'*Administrative Tribunals Act*, cette disposition d'inattaquabilité assujettit à la norme de

an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all [other] matters".

[28] The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(2) says:

> **8.** . . .
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. *Section 35 of the Constitution Act, 1982*

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

contrôle de la décision « manifestement déraisonnable » [TRADUCTION] « la conclusion de fait ou de droit ou l'exercice du pouvoir discrétionnaire relatifs à une question sur laquelle le tribunal a compétence exclusive du fait de l'existence d'une disposition d'inattaquabilité ». La norme de contrôle de la décision correcte vaut pour [TRADUCTION] « toute [autre] question ».

[28] On peut aussi soutenir que le par. 44(1) de l'*Administrative Tribunals Act* a une incidence sur la compétence de la Commission en ce qu'il s'applique à celle-ci suivant le par. 2(4) de la *Utilities Commission Act*. Le paragraphe 44(1) de l'*Administrative Tribunals Act* dispose qu'[TRADUCTION] « [u]n tribunal administratif n'a pas compétence pour trancher une question constitutionnelle ». L'article premier de l'*Administrative Tribunals Act* délimite cette matière par renvoi à l'art. 8 de la *Constitutional Question Act*, R.S.B.C. 1996, ch. 68. Voici le texte du par. 8(2) de cette loi :

[TRADUCTION]

> **8.** . . .
>
> (2) Lorsque dans une instance, y compris un dossier ou une affaire,
>
> a) la validité ou l'applicabilité constitutionnelle d'une loi est contestée ou
>
> b) une réparation constitutionnelle est demandée,
>
> la loi ne doit pas être tenue pour invalide ou inapplicable, et la réparation ne doit pas être accordée sans qu'un avis de la contestation ou de la demande n'ait été signifié au procureur général du Canada et au procureur général de la Colombie-Britannique.

La [TRADUCTION] « réparation constitutionnelle » est définie comme étant « la réparation visée au par. 24(1) de la *Loi constitutionnelle de 1982*, hormis celle consistant à écarter un élément de preuve ou découlant d'une telle mesure » : *Constitutional Question Act*, par. 8(1).

D. *L'article 35 de la Loi constitutionnelle de 1982*

[29] Voici le libellé de l'art. 35 de la *Loi constitutionnelle de 1982* :

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

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

(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.

III. The Issues

[30] The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;
2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. *When Does the Duty to Consult Arise?*

[31] The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuits et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

III. Les questions en litige

[30] Les principales questions à trancher sont les suivantes : (1) la Commission avait-elle compétence pour se prononcer sur la consultation et (2), dans l'affirmative, le refus de la Commission de redéfinir le cadre de l'audience pour que la question de la consultation soit abordée devrait-il être annulé? Il faut dès lors déterminer les conditions auxquelles il y a obligation de consulter et examiner le rôle du tribunal administratif à l'égard de cette obligation. J'examinerai donc successivement ce qui suit :

1. les conditions auxquelles il y a obligation de consulter;
2. le rôle du tribunal administratif à l'égard de la consultation;
3. le pouvoir de la Commission de se prononcer sur la consultation;
4. la décision de la Commission sur la demande de révision;
5. la conclusion de la Commission portant que l'approbation du CAÉ de 2007 servait l'intérêt public.

IV. Analyse

A. *À quelles conditions y a-t-il obligation de consulter?*

[31] Dans l'arrêt *Nation Haïda*, notre Cour établit que l'obligation de consulter prend naissance

the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

[32] The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:

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

[33] The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a

« lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci » (par. 35). Ce critère comporte trois volets : (1) la connaissance par la Couronne, réelle ou imputée, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, (2) la mesure envisagée de la Couronne et (3) la possibilité que cette mesure ait un effet préjudiciable sur une revendication autochtone ou un droit ancestral. J'examinerai chacun de ces volets plus en détail. D'abord, quelques remarques générales sont de mise concernant la source et la nature de l'obligation de consulter.

[32] L'obligation de consulter s'origine de l'honneur de la Couronne. Elle est un corollaire de celle d'arriver à un règlement équitable des revendications autochtones au terme du processus de négociation de traités. Lorsque les négociations sont en cours, la Couronne a l'obligation tacite de consulter les demandeurs autochtones sur ce qui est susceptible d'avoir un effet préjudiciable sur leurs droits issus de traités et leurs droits ancestraux, et de trouver des mesures d'accommodement dans un esprit de conciliation : *Nation Haïda*, par. 20. Comme le dit la Cour au par. 25 de cet arrêt :

> En bref, les Autochtones du Canada étaient déjà ici à l'arrivée des Européens; ils n'ont jamais été conquis. De nombreuses bandes ont concilié leurs revendications avec la souveraineté de la Couronne en négociant des traités. D'autres, notamment en Colombie-Britannique, ne l'ont pas encore fait. Les droits potentiels visés par ces revendications sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*. L'honneur de la Couronne commande que ces droits soient déterminés, reconnus et respectés. Pour ce faire, la Couronne doit agir honorablement et négocier. Au cours des négociations, l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et, s'il y a lieu, à trouver des accommodements à leurs intérêts.

[33] L'obligation de consulter dont il est fait état dans l'arrêt *Nation Haïda* découle de la nécessité de protéger les intérêts autochtones lorsque des terres ou des ressources font l'objet de revendications ou que la mesure projetée peut empiéter sur un droit ancestral. Sans le respect de cette

final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

[34] Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

[35] *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.

[36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment*

obligation, un groupe autochtone désireux de protéger ses intérêts jusqu'au règlement d'une revendication devrait s'adresser au tribunal pour obtenir une injonction interlocutoire ordonnant la cessation de l'activité préjudiciable. L'expérience enseigne qu'il s'agit d'une démarche longue, coûteuse et souvent vaine. De plus, sauf quelques exceptions, les groupes autochtones réussissent rarement à obtenir une injonction pour mettre fin à la mise en valeur des terres ou aux activités qui y sont exercées et ainsi protéger des droits ancestraux ou issus de traités qui sont contestés.

[34] Fondée sur l'honneur de la Couronne, l'obligation revêt un caractère à la fois juridique et constitutionnel : *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6. Elle vise la protection des droits ancestraux et issus de traités, ainsi que la réalisation de l'objectif de conciliation des intérêts des Autochtones et de ceux de la Couronne. Elle reconnaît que les deux parties doivent collaborer pour concilier leurs intérêts au lieu de s'opposer dans un litige. Elle tient aussi compte du fait que les peuples autochtones participent souvent à l'exploitation des ressources. Empêcher la mise en valeur par voie d'injonction risque de ne servir l'intérêt de personne. L'honneur de la Couronne est donc davantage compatible avec une obligation de consulter axée sur la conciliation des intérêts respectifs des parties.

[35] L'arrêt *Nation Haïda* jette les bases du dialogue préalable au règlement définitif des revendications en obligeant la Couronne à tenir compte des droits ancestraux contestés ou établis *avant* de prendre une décision susceptible d'avoir un effet préjudiciable sur ces droits : J. Woodward, *Native Law*, vol. 1 (feuilles mobiles), p. 5-35. Il s'agit d'une obligation de nature *prospective* prenant appui sur des droits dont l'existence reste à prouver.

[36] La nature de l'obligation varie en fonction de la situation. La consultation exigée est plus approfondie lorsque la revendication autochtone paraît de prime abord fondée et que l'effet sur le droit ancestral ou issu de traité sous-jacent est grave : *Nation Haïda*, par. 43-45, et *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur*

Director), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

[37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

[38] The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at para. 32:

> . . . the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

[39] Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) Knowledge by the Crown of a Potential Claim or Right

[40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a

d'évaluation de projet), 2004 CSC 74, [2004] 3 R.C.S. 550, par. 32.

[37] Le recours pour manquement à l'obligation de consulter varie également en fonction de la situation. L'omission de la Couronne de consulter les intéressés peut donner lieu à un certain nombre de mesures allant de l'injonction visant l'activité préjudiciable, à l'indemnisation, voire à l'ordonnance enjoignant au gouvernement de consulter avant d'aller de l'avant avec son projet : *Nation Haïda*, par. 13-14.

[38] L'obligation de consulter s'inscrit dans ce que Brian Slattery qualifie d'ordre constitutionnel [TRADUCTION] « génératif » où « l'article 35 a une fonction dynamique et non purement statique » (« Aboriginal Rights and the Honour of the Crown » (2005), 29 *S.C.L.R.* (2d) 433, p. 440). Ce dynamisme a été formulé comme suit dans l'arrêt *Nation Haïda* (par. 32) :

> . . . l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Comme le confirme la jurisprudence postérieure à cet arrêt, la consultation [TRADUCTION] « s'attache au maintien de relations constantes » et à l'établissement d'un processus permanent de conciliation en ce qu'elle privilégie les mesures « qui favorisent la continuité des négociations » : D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009), p. 21.

[39] Sur cette toile de fond, j'examine maintenant les trois éléments qui font naître l'obligation de consulter.

(1) Connaissance par la Couronne de l'existence possible d'une revendication ou d'un droit

[40] Pour qu'elle ait l'obligation de consulter, la Couronne doit avoir connaissance, concrètement

claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

[41] The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

(2) Crown Conduct or Decision

[42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that

ou par imputation, d'une revendication visant la ressource ou la terre qui s'y rattache : *Nation Haïda*, par. 35. La norme de preuve applicable, eu égard à la nécessité de préserver l'honneur de la Couronne, n'est pas stricte. Il y a connaissance réelle lorsqu'une revendication a été formulée dans une instance judiciaire ou lors de négociations, ou lorsqu'un droit issu de traité peut être touché : *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388, par. 34. Il y a connaissance par imputation lorsque l'on sait ou que l'on soupçonne raisonnablement que les terres ont été traditionnellement occupées par une collectivité autochtone ou que l'on peut raisonnablement prévoir qu'il y aura une incidence sur des droits. L'existence possible d'une revendication est essentielle, mais il n'est pas nécessaire de prouver que la revendication connaîtra une issue favorable. La revendication doit seulement être crédible. La revendication à l'assise fragile, dont le fondement ne paraît pas plausible à première vue, peut ne faire naître qu'une obligation d'informer. Comme l'affirme notre Cour dans l'arrêt *Nation Haïda* (par. 37) :

La connaissance d'une revendication crédible mais non encore établie suffit à faire naître l'obligation de consulter et d'accommoder. Toutefois, le contenu de l'obligation varie selon les circonstances, comme nous le verrons de façon plus approfondie plus loin. Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes. Il est possible en droit de différencier les revendications reposant sur une preuve ténue des revendications reposant sur une preuve à première vue solide et de celles déjà établies.

[41] Il faut que la revendication ou le droit existe réellement et risque d'être compromis par la mesure gouvernementale, car l'objectif de la consultation est de protéger un droit, établi ou non, d'un préjudice irréparable, pendant les négociations en vue d'un règlement : Newman, p. 30, citant *Nation Haïda*, par. 27 et 33.

(2) Mesure ou décision de la Couronne

[42] Deuxièmement, pour que naisse l'obligation de consulter, la mesure ou la décision de la

engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

[44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

Couronne doit mettre en jeu un droit ancestral éventuel. La mesure doit être susceptible d'avoir un effet préjudiciable sur la revendication ou le droit en question.

[43] Dès lors, la question qui se pose est celle de savoir quelle mesure oblige le gouvernement à consulter. Il a été établi que cette mesure ne s'entend pas uniquement de l'exercice d'un pouvoir conféré par la loi : *Huu-Ay-Aht First Nation c. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, par. 94 et 104; *Wii'litswx c. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, par. 11-15. Cette conclusion s'inscrit dans l'approche généreuse et téléologique que commande l'obligation de consulter.

[44] En outre, une mesure gouvernementale ne s'entend pas uniquement d'une décision ou d'un acte qui a un effet immédiat sur des terres et des ressources. Un simple risque d'effet préjudiciable suffit. Ainsi, l'obligation de consulter naît aussi d'une [TRADUCTION] « décision stratégique prise en haut lieu » qui est susceptible d'avoir un effet sur des revendications autochtones et des droits ancestraux (Woodward, p. 5-41 (italiques omis)). Mentionnons quelques exemples : la cession de concessions de ferme forestière qui auraient permis l'abattage d'arbres dans de vieilles forêts (*Nation Haïda*), l'approbation d'un plan pluriannuel de gestion forestière visant un vaste secteur géographique (*Khaloose First Nation c. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110), la création d'un processus d'examen relativement à un gazoduc important (*Première nation Dene Tha' c. Canada (Ministre de l'Environnement)*, 2006 CF 1354 (CanLII), conf. par 2008 CAF 20 (CanLII)), et l'examen approfondi des besoins d'infrastructure et de capacité de transport d'électricité d'une province (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). La question de savoir si une mesure gouvernementale s'entend aussi d'une mesure législative devra être tranchée dans une affaire ultérieure : voir *R. c. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, par. 37-40.

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example,

(3) Effet préjudiciable de la mesure projetée par la Couronne sur une revendication autochtone ou un droit ancestral

[45] Le troisième élément requis pour qu'il y ait obligation de consulter est la possibilité que la mesure de la Couronne ait un effet sur une revendication autochtone ou un droit ancestral. Le demandeur doit établir un lien de causalité entre la mesure ou la décision envisagée par le gouvernement et un effet préjudiciable éventuel sur une revendication autochtone ou un droit ancestral. Un acte fautif commis dans le passé, telle l'omission de consulter, ne suffit pas.

[46] Une approche généreuse et téléologique est aussi de mise à l'égard de ce troisième élément puisque, comme le dit Newman, l'objectif poursuivi est [TRADUCTION] « de reconnaître que les actes touchant un titre aborigène ou un droit ancestral non encore établi, ou des droits issus de traités, peuvent avoir des répercussions irréversibles qui sont incompatibles avec l'honneur de la Couronne » (p. 30, citant l'arrêt *Nation Haïda*, par. 27 et 33). Cependant, de simples répercussions hypothétiques ne suffisent pas. Comme il appert de l'arrêt *R. c. Douglas*, [2007] BCCA 265, 278 D.L.R. (4th) 653, au par. 44, il doit y avoir un [TRADUCTION] « effet préjudiciable important sur la possibilité qu'une Première nation puisse exercer son droit ancestral ». Le préjudice doit toucher l'exercice futur du droit lui-même, et non seulement la position de négociation ultérieure de la Première nation.

[47] L'effet préjudiciable comprend toute répercussion risquant de compromettre une revendication autochtone ou un droit ancestral. Il est souvent de nature physique. Cependant, comme on l'a vu relativement à ce qui constitue une mesure de la Couronne, la décision prise en haut lieu ou la modification structurelle apportée à la gestion de la ressource risque aussi d'avoir un effet préjudiciable sur une revendication autochtone ou un droit ancestral, et ce, même si elle n'a pas d'[TRADUCTION] « effet immédiat sur les terres et les ressources » : Woodward, p. 5-41. La raison en est qu'une telle modification structurelle de la

a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

[49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated

gestion de la ressource peut ouvrir la voie à d'autres décisions ayant un effet préjudiciable *direct* sur les terres et les ressources. Par exemple, le contrat par lequel la Couronne cède à une partie privée la maîtrise d'une ressource risque de supprimer ou de réduire le pouvoir de la Couronne de faire en sorte que la ressource soit exploitée dans le respect des intérêts autochtones, conformément à l'honneur de la Couronne. Les Autochtones seraient alors dépouillés en tout ou en partie de leur droit constitutionnel de voir leurs intérêts pris en considération dans les décisions de mise en valeur, ce qui constitue un effet préjudiciable : voir l'arrêt *Nation Haïda*, par. 72-73.

[48] Une atteinte sous-jacente ou continue, même si elle ouvre droit à d'autres recours, ne constitue pas un effet préjudiciable lorsqu'il s'agit de déterminer si une décision gouvernementale particulière emporte l'obligation de consulter. La raison d'être de cette obligation est d'empêcher que les revendications autochtones et les droits ancestraux ne soient compromis pendant les négociations auxquelles ils donnent lieu : *Nation Haïda*, par. 33. L'obligation naît lorsque la Couronne a *connaissance*, concrètement ou par imputation, de l'existence potentielle ou réelle du droit ou titre ancestral revendiqué et qu'elle « envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci » : *Nation Haïda*, par. 35 (je souligne). Ce critère est repris par notre Cour relativement à des droits issus de traités dans l'arrêt *Première nation crie Mikisew*, par. 33-34.

[49] Il faut déterminer si une revendication ou un droit est susceptible d'être compromis par la mesure ou la décision *actuelle* du gouvernement. L'atteinte antérieure et continue, y compris l'omission de consulter, ne fait naître l'obligation de consulter que si la décision actuelle risque d'avoir un nouvel effet défavorable sur une revendication actuelle ou un droit existant. Il peut néanmoins y avoir recours pour une atteinte antérieure et continue, y compris l'omission de consulter. Comme le signale la Cour dans l'arrêt *Nation Haïda*, le nonrespect de l'obligation de consulter peut donner droit à diverses réparations, dont l'indemnisation. Pour que naisse une nouvelle obligation de

Crown action must put current claims and rights in jeopardy.

[50] Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

[51] As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

[52] The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries

consulter — ce dont il est question en l'espèce —, une mesure envisagée par la Couronne doit mettre en péril une revendication actuelle ou un droit existant.

[50] L'effet préjudiciable ne s'entend pas non plus d'une répercussion négative sur la position de négociation d'un groupe autochtone. L'obligation de consulter, que justifie la nécessité de protéger les droits ancestraux et de préserver l'utilisation ultérieure des ressources revendiquées par les peuples autochtones, compte tenu des intérêts opposés de la Couronne, peut assurément retarder au final la mise en valeur entreprise. Elle peut donc servir non seulement à régler provisoirement une question relative aux ressources, mais aussi, accessoirement, à atteindre un objectif d'indemnisation à long terme. Vue sous cet angle, l'obligation de consulter peut être considérée comme un maillon essentiel du dispositif global permettant à la Couronne de s'acquitter de ses obligations constitutionnelles envers les Premières nations du Canada. Toutefois, dissociée de sa raison d'être qu'est la nécessité de préserver les intérêts autochtones, l'obligation de consulter viserait seulement à favoriser une partie par rapport à une autre dans le processus de négociation.

(4) Interprétation nouvelle de l'obligation de consulter

[51] Rappelons que l'obligation de consulter prend naissance lorsque (1) la Couronne a connaissance, concrètement ou par imputation, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, (2) qu'elle envisage une mesure ou une décision et (3) que cette mesure ou cette décision est susceptible d'avoir un effet préjudiciable sur la revendication autochtone ou le droit ancestral. Il faut donc établir un lien de causalité entre la mesure projetée par la Couronne et l'effet préjudiciable possible sur une revendication autochtone ou un droit ancestral.

[52] L'intimé fonde ses prétentions sur une interprétation plus large de l'obligation de consulter. Il prétend que même si le CAÉ de 2007 n'aura aucun impact sur les niveaux d'eau de la rivière

or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

[53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

[54] The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree — an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

Nechako, ses stocks de poissons ou la gestion de la ressource visée par le litige, il peut y avoir obligation de consulter, car le CAÉ de 2007 fait partie d'un projet hydroélectrique qui continue d'avoir des répercussions sur ses droits. Dès lors, si la Couronne projette quelque mesure — aussi modeste soit-elle — se rapportant à un projet qui touche une revendication autochtone ou un droit ancestral, une nouvelle obligation de consulter voit le jour. La mesure ou la décision gouvernementale en cause, qu'elle ait peu de conséquences, voire aucune, devient le fondement de l'obligation constitutionnelle de consulter relativement à la totalité de la ressource.

[53] Je ne peux adhérer à cette interprétation de l'obligation de consulter. L'arrêt *Nation Haïda* écarte une interprétation aussi large. La Cour y fait reposer l'obligation de consulter sur la nécessité de préserver les droits ancestraux allégués jusqu'au règlement des revendications. L'objet de la consultation se limite donc aux seuls effets préjudiciables de la mesure précise projetée par la Couronne, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. La consultation s'intéresse à l'effet de la décision *actuellement* considérée sur les droits revendiqués.

[54] La thèse d'une obligation de consulter plus étendue s'appuie sur un principe en matière de preuve — celui du fruit de l'arbre empoisonné — selon lequel la Couronne ne saurait aujourd'hui tirer avantage de ses fautes d'hier. L'intimé prétend donc que l'omission de consulter les Premières nations du CTCS au sujet du projet initial de barrage et de dérivation d'eau empêche toute poursuite de l'exploitation de cette ressource tant qu'il n'y a pas eu consultation sur l'ensemble de la ressource et de sa gestion. Or, comme le fait observer la Cour dans l'arrêt *Nation Haïda*, l'absence de consultation ouvre droit à diverses réparations, y compris l'indemnisation. L'ordonnance de consulter n'est indiquée que lorsque la mesure projetée par la Couronne, qu'elle soit immédiate ou prospective, est susceptible d'avoir un effet préjudiciable sur des droits établis ou revendiqués. Sinon, d'autres réparations peuvent être plus indiquées.

B. *The Role of Tribunals in Consultation*

[55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

[56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

[57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

[58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

[59] The decisions below and the arguments before us at times appear to merge the different

B. *Le rôle du tribunal administratif dans la consultation*

[55] L'obligation du tribunal administratif de se pencher sur la consultation et sur la portée de celle-ci dépend de la mission que lui confie sa loi constitutive. Un tribunal administratif doit s'en tenir à l'exercice des pouvoirs que lui confère sa loi habilitante : *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765. Il s'ensuit que le rôle d'un tribunal administratif en ce qui a trait à la consultation tient à ses obligations et à ses attributions légales.

[56] Le législateur peut décider de lui déléguer l'obligation de la Couronne de consulter. Comme le signale la Cour dans l'arrêt *Nation Haïda*, il est loisible aux gouvernements de mettre en place des régimes de réglementation fixant les exigences procédurales de la consultation aux différentes étapes du processus décisionnel relatif à une ressource.

[57] Sinon, il peut lui confier le seul pouvoir de décider si une consultation adéquate a eu lieu, l'exercice de ce pouvoir faisant dès lors partie de son processus décisionnel. En pareil cas, le tribunal administratif ne participe pas à la consultation. Il s'assure plutôt que la Couronne s'est acquittée de son obligation de consulter une Première nation en particulier sur un éventuel effet préjudiciable de la décision en cause sur ses droits ancestraux.

[58] Le tribunal administratif appelé à examiner une question ayant trait à une ressource et ayant une incidence sur des intérêts autochtones peut n'avoir ni l'une ni l'autre de ces obligations, n'avoir que l'une d'elles ou avoir les deux, selon les attributions que lui confère le législateur. Tant son pouvoir légal d'examiner une question de droit que celui d'accorder réparation sont pertinents pour circonscrire sa compétence : *Conway*. Ils sont donc aussi pertinents pour déterminer si un tribunal administratif particulier est tenu d'effectuer une consultation ou de se pencher sur la consultation, ou s'il n'a aucune obligation en la matière.

[59] Les décisions des tribunaux inférieurs et les prétentions formulées devant notre Cour paraissent

duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

[60] This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

[61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by

parfois amalgamer les différentes obligations en ce qui concerne la consultation et le contrôle de leur exécution. On prétend plus particulièrement que tout tribunal administratif compétent pour examiner une question de droit a l'obligation constitutionnelle de s'assurer qu'il y a eu consultation adéquate et, s'il n'y en a pas eu, de consulter lui-même les intéressés, que sa loi constitutive le prévoie ou non. Le raisonnement veut que ce pouvoir découle automatiquement du pouvoir du tribunal administratif d'examiner des questions de droit et, par conséquent, des questions constitutionnelles. L'absence de consultation équivaudrait à un vice constitutionnel qui annulerait la compétence du tribunal administratif et qui, en l'espèce, la rendrait contraire à l'intérêt public. Pour s'acquitter de son obligation, le tribunal administratif devrait remédier au vice en effectuant lui-même la consultation.

[60] À mon avis, on ne peut faire droit à cette thèse. Un tribunal administratif n'a que les pouvoirs qui lui sont expressément ou implicitement conférés par la loi. Pour qu'il puisse consulter une Première nation au sujet d'une ressource avant le règlement définitif de revendications, il doit y être expressément ou implicitement autorisé. Le pouvoir de consulter, qui est distinct du pouvoir de déterminer s'il existe une obligation de consulter, ne peut être inféré du simple pouvoir d'examiner une question de droit. La consultation comme telle n'est pas une question de droit. Il s'agit d'un processus constitutionnel distinct, souvent complexe, et dans certaines circonstances, d'un droit mettant en jeu faits, droit, politique et compromis. Par conséquent, le tribunal administratif désireux d'effectuer lui-même la consultation doit avoir le pouvoir de réparation nécessaire pour faire ce à quoi on l'exhorte relativement à la consultation. Le pouvoir de réparation d'un tribunal administratif tient à sa loi habilitante et à l'intention du législateur : *Conway*, par. 82.

[61] Le tribunal administratif doté du pouvoir de se prononcer sur le caractère adéquat de la consultation, mais non du pouvoir d'effectuer celle-ci, doit accorder la réparation qu'il juge indiquée dans les circonstances, conformément aux pouvoirs de réparation qui lui sont expressément ou implicitement

statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

[62] The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

[63] As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

[64] Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. . . . Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of

conférés par sa loi habilitante. L'objectif est de protéger les droits et les intérêts des Autochtones et de favoriser la conciliation d'intérêts que préconise notre Cour dans l'arrêt *Nation Haïda*.

[62] Qu'un tribunal administratif doive s'en tenir à l'exercice de ses pouvoirs légaux et ne faire porter son analyse et ses décisions que sur les questions particulières dont il est saisi comporte certes le risque qu'un gouvernement se soustraie de fait à l'obligation de consulter en limitant le mandat d'un tribunal administratif. On peut craindre en effet qu'en privant un tribunal administratif du pouvoir d'examiner les questions relatives à la consultation ou en répartissant le pouvoir de statuer en la matière entre plusieurs tribunaux administratifs de manière qu'aucun d'eux ne puisse se pencher sur l'obligation de consulter que font naître certaines mesures gouvernementales, le gouvernement se soustraie de fait à cette obligation.

[63] Comme le conclut à juste titre la Cour d'appel, l'obligation de consulter les peuples autochtones, qui naît lorsque le gouvernement prend une décision susceptible d'avoir un effet préjudiciable sur leurs intérêts, est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne et qui doit être respectée. Si le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent alors s'adresser à une cour de justice pour obtenir la réparation voulue : *Nation Haïda*, par. 51.

[64] Avant de passer au volet suivant de l'analyse, il me paraît indiqué de préciser quelle norme de contrôle s'applique à la décision du tribunal administratif. Prenons comme point de départ le par. 61 de l'arrêt *Nation Haïda* :

> L'existence et l'étendue de l'obligation de consulter ou d'accommoder sont des questions de droit en ce sens qu'elles définissent une obligation légale. Cependant, la réponse à ces questions repose habituellement sur l'appréciation des faits. Il se peut donc qu'il convienne de faire preuve de déférence à l'égard des conclusions de fait du premier décideur. [. . .] En l'absence d'erreur sur des questions de droit, il est possible que le tribunal

deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness . . . .

[65] It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. *The Commission's Jurisdiction to Consider Consultation*

[66] Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

[67] The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

[68] As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to

administratif soit mieux placé que le tribunal de révision pour étudier la question, auquel cas une certaine déférence peut s'imposer. Dans ce cas, la norme de contrôle applicable est vraisemblablement la norme de la décision raisonnable. Dans la mesure où la question est une question de droit pur et peut être isolée des questions de fait, la norme applicable est celle de la décision correcte. Toutefois, lorsque les deux types de questions sont inextricablement liées entre elles, la norme de contrôle applicable est vraisemblablement celle de la décision raisonnable . . .

[65] Il est donc clair qu'une certaine déférence s'impose à l'égard d'une décision sur une question mixte de fait et de droit, d'où l'application de la norme de la raisonnabilité. Ce qui n'écarte évidemment pas la nécessité de tenir compte de l'intention expresse du législateur pour déterminer la norme de contrôle qu'il convient d'appliquer dans un cas donné : *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339. Il faut donc, en l'espèce, considérer les dispositions de l'*Administrative Tribunals Act* et de la *Utilities Commission Act* pour arrêter la bonne norme de contrôle, ce dont il est question plus en détail ci-après.

C. *Le pouvoir de la Commission de se pencher sur la consultation*

[66] Après examen du droit régissant l'existence de l'obligation de consulter et le rôle du tribunal administratif relativement à celle-ci, je reviens sur les questions en litige dans le pourvoi.

[67] D'abord, l'examen de l'obligation de consulter relevait-elle du mandat de la Commission? S'agissant d'une question de compétence, la norme de contrôle est, en common law, celle de la décision correcte. Les lois applicables considérées précédemment n'écartent pas cette norme. Je conviens donc avec la Cour d'appel que la Commission n'a pas eu tort de conclure qu'elle avait le pouvoir de se pencher sur la question de la consultation.

[68] Rappelons que la consultation des peuples autochtones par la Couronne découle de l'art. 35 de la *Loi constitutionnelle de 1982*, de sorte qu'elle revêt une dimension constitutionnelle. Il faut déterminer si la Commission avait le pouvoir d'en faire

consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

[69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

[70] Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).

[71] This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over

un objet de son examen. Je le répète, un tribunal administratif doit s'en tenir à l'exercice des pouvoirs conférés par le législateur : arrêt *Conway*. Nous devons donc nous demander si la *Utilities Commission Act* reconnaissait à la Commission le pouvoir d'examiner la question de la consultation du fait de l'assise constitutionnelle de celle-ci.

[69] Il est reconnu que la *Utilities Commission Act* investit la Commission du pouvoir de trancher des questions de droit aux fins de déterminer si le CAÉ de 2007 sert l'intérêt public. Le pouvoir d'un tribunal administratif de statuer en droit emporte celui de trancher une question constitutionnelle dont il est régulièrement saisi, sauf lorsqu'il est clairement établi que le législateur a voulu le priver d'un tel pouvoir (*Conway*, par. 81; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585, par. 39). « [U]n tribunal spécialisé jouissant à la fois de l'expertise et du pouvoir requis pour trancher une question de droit est le mieux placé pour trancher une question constitutionnelle se rapportant à son mandat légal » : *Conway*, par. 6.

[70] Outre les questions de droit qu'elle a le pouvoir général d'examiner, les éléments dont la Commission doit tenir compte suivant l'art. 71 de la *Utilities Commission Act*, bien qu'ils soient surtout axés sur l'économie, sont suffisamment généraux pour englober la consultation des Autochtones par la Couronne. L'alinéa 71(2)e) exigeait aussi de la Commission qu'elle tienne compte de [TRADUCTION] « tout autre élément jugé pertinent eu égard à l'intérêt public ». L'aspect constitutionnel de l'obligation de consulter fait naître un intérêt public spécial qui écarte la prédominance de l'angle économique dans la consultation prévue par la *Utilities Commission Act*. Comme le demande le juge Donald de la Cour d'appel, [TRADUCTION] « Comment un contrat conclu par un mandataire de la Couronne dans le non-respect d'une obligation constitutionnelle peut-il être dans l'intérêt public? » (par. 42).

[71] L'*Administrative Tribunals Act* de la Colombie-Britannique ne modifie pas cette conclusion même si elle prévoit qu'un tribunal administratif

constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions." However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

[72] The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

[73] For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

[74] While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place,

n'a pas compétence en matière constitutionnelle. Le paragraphe 2(4) de la *Utilities Commission Act* assujettit la Commission à certaines dispositions de l'*Administrative Tribunals Act*, dont le par. 44(1), qui dispose qu'[TRADUCTION] « [u]n tribunal administratif n'a pas compétence pour trancher une question constitutionnelle. » Or, le terme [TRADUCTION] « question constitutionnelle » est défini de manière stricte à l'article premier comme s'entendant de « toute question exigeant qu'un avis soit donnée en application de l'article 8 de la *Constitutional Question Act* ». L'avis n'est requis que lorsque la validité ou l'applicabilité constitutionnelle d'une loi est contestée ou qu'une réparation constitutionnelle est demandée.

[72] L'objet de la demande présentée à la Commission par le CTCS pour que le cadre de l'audience soit redéfini de manière à englober la question de la consultation ne correspond pas à cette définition. Il n'y avait ni contestation de la validité ou de l'applicabilité constitutionnelle d'une loi, ni demande de réparation fondée sur l'art. 24 de la *Charte* ou l'art. 52 de la *Loi constitutionnelle de 1982*. De manière générale, la consultation visée à l'art. 35 de la *Loi constitutionnelle de 1982* correspond à une question constitutionnelle : *Paul*, par. 38. Toutefois, l'intention du législateur de soustraire à la compétence de la Commission la question de savoir si la Couronne s'est acquittée de son obligation de consulter les titulaires des droits ancestraux en cause ne ressort ni de l'*Administrative Tribunals Act* ni de la *Constitutional Question Act*. Dès lors, suivant le critère dégagé dans les arrêts *Paul* et *Conway*, la Commission a compétence constitutionnelle pour se pencher sur le caractère adéquat de la consultation effectuée par la Couronne relativement aux questions dont elle est régulièrement saisie.

[73] C'est pourquoi j'estime que la Commission avait le pouvoir de déterminer si les peuples autochtones touchés avaient été convenablement consultés.

[74] Même si la *Utilities Commission Act* confère à la Commission le pouvoir de déterminer si une consultation adéquate a eu lieu, elle ne va pas jusqu'à

its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

[75] As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. *The Commission's Reconsideration Decision*

[76] The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

[77] As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue

l'autoriser à entreprendre elle-même la consultation et à s'acquitter de l'obligation constitutionnelle de la Couronne. Je rappelle que le législateur peut déléguer à un tribunal administratif l'obligation de la Couronne de consulter. Toutefois, en l'espèce, il ne l'a pas fait vis-à-vis de la Commission. La consultation ne constitue pas comme telle une question de droit, mais une démarche constitutionnelle distincte exigeant le pouvoir de transiger et d'accomplir tout ce qui est nécessaire pour concilier les intérêts divergents de la Couronne et des Autochtones. Le pouvoir de la Commission d'examiner les questions de droit et tout élément pertinent pour ce qui concerne l'intérêt public ne l'autorise pas à entreprendre elle-même la consultation des groupes autochtones.

[75] Comme le conclut à juste titre la Cour d'appel, l'obligation de consulter les peuples autochtones, qui naît lorsque le gouvernement prend une décision susceptible d'avoir un effet préjudiciable sur leurs intérêts, est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne et qui doit être respectée. Lorsque le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent s'adresser à une cour de justice pour obtenir la réparation voulue : *Nation Haïda*, par. 51.

D. *La décision de la Commission sur la demande de révision*

[76] La Commission a reconnu à juste titre avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones. Elle a décidé de ne pas se pencher sur la question non pas parce qu'elle n'en avait pas le pouvoir, mais parce qu'elle estimait que la question ne pouvait se poser étant donné sa conclusion que le CAÉ de 2007 n'aurait pas d'effet préjudiciable sur quelque intérêt autochtone.

[77] Comme nous l'avons vu, la Commission a tenu une audience sur la question de savoir s'il fallait recadrer l'audience principale de manière à permettre l'examen de la question de la consultation. La preuve alors produite portait sur l'effet

of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorization", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

préjudiciable éventuel de l'approbation du CAÉ de 2007 sur les intérêts des Premières nations du CTCS. La Commission a examiné l'effet du CAÉ de 2007 tant sur les niveaux d'eau (impact physique) que sur la gestion de la ressource et sa maîtrise. Elle a conclu que le CAÉ de 2007 n'aurait aucun impact physique négatif sur la rivière Nechako et ses ressources halieutiques. Elle a aussi estimé que le CAÉ de 2007 n'entraînerait [TRADUCTION] « ni transfert ni modification des licences ou des autorisations », écartant du coup tout effet préjudiciable causé par une modification touchant à la gestion ou à la maîtrise. Selon elle, une atteinte sous-jacente (soit l'omission de consulter relativement au projet initial) ne suffisait pas pour faire naître une obligation de consulter. Elle a donc rejeté la demande de révision et refusé de recadrer l'audience de manière que celle-ci porte aussi sur la consultation.

[78] The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act*. Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[78] La décision selon laquelle le recadrage n'était pas nécessaire parce que le CAÉ de 2007 ne pouvait avoir d'incidence sur des intérêts autochtones porte sur une question mixte de fait et de droit. Suivant l'arrêt *Nation Haïda*, la norme de contrôle applicable à ce genre de décision est habituellement celle de la raisonnabilité (au sens où toute conclusion fondée sur un principe de droit erroné n'est pas raisonnable). Cependant, il faut tenir compte des dispositions des lois applicables examinées précédemment. La *Utilities Commission Act* prévoit que les conclusions de fait de la Commission sont [TRADUCTION] « opposables et définitives », ce qui appelle la norme de la décision manifestement déraisonnable suivant l'*Administrative Tribunals Act*. La décision portant sur une question de droit doit être correcte. Or, la question dont nous sommes saisis est une question mixte de fait et de droit. Elle appelle une norme se situant entre celles établies par la loi, à savoir la norme de la raisonnabilité, issue de la common law et consacrée par les arrêts *Nation Haïda* et *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190.

[79] A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may

[79] Rappelons que l'obligation de consulter prend naissance lorsque les éléments suivants sont réunis : a) connaissance par la Couronne, réelle ou imputée, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, b) mesure

adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

[80] The first element of the duty to consult — Crown knowledge of a potential Aboriginal claim or right — need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

[81] Nor need the second element — proposed Crown conduct or decision — detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

[82] The third element — adverse impact on an Aboriginal claim or right caused by the Crown conduct — presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

[83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized

projetée par la Couronne et c) risque que celle-ci ait un effet préjudiciable sur la revendication ou le droit. Si, au regard du critère établi dans l'arrêt *Nation Haïda*, on peut soutenir qu'une obligation de consulter pouvait exister, la Commission a eu tort de rejeter la demande de recadrage de l'audience.

[80] Il n'y a pas lieu de s'arrêter au premier élément — la connaissance par la Couronne de l'existence possible d'une revendication autochtone ou d'un droit ancestral. Les revendications des Premières nations du CTCS étaient bien connues de la Couronne et avaient en fait été formulées dans le cadre du processus formel mis sur pied par la province pour le règlement des revendications autochtones.

[81] Il n'y a pas lieu non plus de s'attarder au deuxième élément — la mesure ou la décision projetée par la Couronne. Le projet de BC Hydro de conclure avec Alcan un contrat d'achat d'électricité constitue clairement une mesure projetée par la Couronne. BC Hydro est une société d'État qui agit au nom de la Couronne. Nul ne prétend sérieusement que le CAÉ de 2007 n'équivaut pas à une mesure projetée par la province de la Colombie-Britannique.

[82] Le troisième élément — l'effet préjudiciable de la mesure de la Couronne sur une revendication autochtone ou un droit ancestral — présente une plus grande difficulté. S'appuyant sur l'arrêt *Nation Haïda*, la Commission a estimé que pour satisfaire à l'exigence de l'effet préjudiciable, il fallait [TRADUCTION] « davantage qu'une atteinte sous-jacente ». En d'autres termes, il fallait démontrer que le CAÉ de 2007 était susceptible d'avoir un « effet préjudiciable » sur un intérêt autochtone actuel. La Cour d'appel rejette le point de vue de la Commission sur ce point, ou c'est du moins ce qu'il faut retenir de sa décision.

[83] À mon sens, la Commission a eu raison de conclure qu'une atteinte sous-jacente ne constitue pas comme telle un effet préjudiciable faisant naître une obligation de consulter. Nous l'avons vu, il appert de l'arrêt *Nation Haïda* que le fondement constitutionnel de la consultation réside dans le risque qu'un projet autorisé par l'État ait

developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

[84] It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

[85] What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.

[86] The Commission considered two types of potential impacts. The first type of impact was the

un effet préjudiciable sur des intérêts autochtones. La consultation porte principalement sur la façon dont la ressource doit être exploitée pour qu'un préjudice irréparable ne soit pas infligé aux intérêts autochtones existants. Les deux parties doivent se rencontrer de bonne foi, dans un climat de mesure compatible avec l'honneur de la Couronne, pour discuter de mise en valeur dans une optique de conciliation des intérêts divergents. Or, un tel échange est impossible lorsque la ressource est transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle. Il ne s'agit plus dès lors de consulter sur l'exploitation ultérieure de la ressource, mais plutôt de négocier une indemnisation pour sa transformation intervenue sans consultation adéquate préalable. La Commission a appliqué le bon critère juridique.

[84] Le CTCS fait valoir que la Couronne a porté atteinte à ses droits lorsque, dans les années 1950, elle a autorisé la construction du barrage Kenney et de la centrale électrique, qui a eu des répercussions sur la rivière Nechako, et que cette atteinte est continue et que rien ne permet de croire qu'elle cessera dans un avenir prévisible. Cependant, la question que devait trancher la Commission était celle de savoir si une nouvelle obligation de consulter pouvait prendre naissance *à l'égard de la décision de la Couronne dont était saisie la Commission*. Il lui fallait déterminer si le CAÉ de 2007 pouvait avoir un effet *préjudiciable* sur les droits revendiqués par les Premières nations du CTCS dans le cadre du processus de règlement en cours. Étant donné les limites de son mandat, la Commission n'était pas saisie de la question de l'atteinte continue et se poursuivant toujours, en sorte que notre Cour ne l'est pas non plus.

[85] Quel est donc l'impact possible du CAÉ de 2007 sur les revendications des Premières nations du CTCS? La Commission a conclu qu'il ne pouvait y en avoir. La question est donc celle de savoir si la conclusion était raisonnable au vu de la preuve offerte à l'appui de la demande de recadrage.

[86] La Commission a considéré deux types d'effet possible. Le premier était l'impact physique du

physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

[87] The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

CAÉ de 2007 sur la rivière Nechako et, par conséquent, sur le poisson. La Commission a examiné minutieusement les éléments de preuve sur les effets que le CAÉ de 2007 pouvait avoir sur les niveaux d'eau de la rivière et elle a conclu qu'il n'y en aurait pas. En fait, les niveaux d'eau de la rivière relevaient entièrement du permis d'exploitation hydraulique et de l'accord de 1987 intervenu entre la province, le Canada et Alcan. La Commission a rejeté l'argument voulant que l'omission d'approuver le CAÉ de 2007 puisse entraîner une augmentation des niveaux d'eau de la rivière Nechako, et favoriser ainsi la pêche, eu égard à la preuve non contredite selon laquelle si Alcan ne pouvait vendre ses surplus d'électricité à BC Hydro, elle trouverait un autre preneur. Elle a conclu qu'avec ou sans le CAÉ de 2007, [TRADUCTION] « Alcan exploite le réservoir Nechako dans le but d'optimiser la production d'énergie ». Enfin, la Commission a conclu que la modification du calendrier des lâchers d'eau destinés à la production d'électricité n'avait aucun impact sur les niveaux d'eau de la rivière Nechako puisque l'eau était déversée dans la rivière Kemano à l'ouest, et non dans la Nechako à l'est.

[87] La Commission s'est aussi penchée sur la question de savoir si le CAÉ de 2007 pouvait entraîner des changements organisationnels, politiques ou de gestion susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS. Je le répète, il peut y avoir obligation de consulter à l'égard non seulement d'impacts physiques particuliers, mais aussi de décisions de gestion ou politiques qui sont prises en haut lieu et qui peuvent avoir une incidence sur l'exploitation future de la ressource au détriment des demandeurs autochtones. La Commission fait remarquer que l'[TRADUCTION] « examen visé à l'art. 71 n'a pas pour effet d'approuver ou de transférer une licence ou une autorisation ou d'en modifier le titulaire ». L'approbation du CAÉ de 2007 n'allait pas entraîner de changements de gestion, ce qui écartait tout effet préjudiciable concomitant. Ces éléments, joints à l'absence d'impact physique, ont amené la Commission à conclure que le CAÉ de 2007 ne risquait pas d'avoir un effet préjudiciable sur des intérêts autochtones.

[88] It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to both Parties, acting reasonably" (s. 4.17).

[89] The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

[90] Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their

[88] Il est toutefois nécessaire de pousser quelque peu l'analyse. Le CAÉ de 2007 prévoit la création d'un comité conjoint d'exploitation formé de représentants d'Alcan et de BC Hydro (clause 4.13). Le comité a pour fonction de conseiller les parties sur l'administration du CAÉ de 2007 et d'accomplir d'autres tâches qui sont précisées ou que lui assignent les parties (clause 4.14). Le CAÉ de 2007 prévoit aussi que, conjointement, les parties élaborent, appliquent et actualisent un modèle d'exploitation du réservoir inspiré de celui d'Alcan et [TRADUCTION] « utilisant des données jugées acceptables par les deux parties, qui sont tenues de se montrer raisonnables » (clause 4.17).

[89] La question est celle de savoir si ces clauses équivalent à autoriser des modifications d'ordre organisationnel qui sont susceptibles d'avoir un effet préjudiciable sur des intérêts autochtones. La Commission ne le croit manifestement pas. Or, il nous faut examiner cette conclusion et nous demander si elle est raisonnable eu égard à l'approche généreuse qui s'impose relativement à l'obligation de consulter, laquelle a pour assise l'honneur de la Couronne.

[90] À supposer que la création du comité conjoint et du modèle d'exploitation du réservoir existant puissent être considérés comme des modifications d'ordre organisationnel apportées par le CAÉ de 2007, la question est celle de savoir si ces dernières sont susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS. Lorsqu'il est établi que l'effet préjudiciable faisant naître l'obligation de consulter résulte d'une modification de l'organisation, notamment celle du pouvoir, c'est généralement parce que la décision opérationnelle en cause risque dès lors d'empêcher la Couronne d'agir honorablement à l'égard des intérêts autochtones. Ainsi, dans l'affaire *Nation Haïda*, la Couronne projetait la conclusion avec Weyerhaeuser d'un contrat à long terme de vente de bois d'œuvre. En concluant le contrat, la Couronne réduisait sa maîtrise de l'exploitation forestière, notamment dans certaines vieilles forêts, et, partant, sa faculté d'exercer son pouvoir décisionnel en la matière de façon conforme à l'honneur de la Couronne. La ressource aurait été

constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

[91] By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

[92] This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the resevoir management team, must in the future consult with the CSTC First Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights

exploitée sans que la Couronne ne se soit acquittée au préalable de l'obligation de consulter que commande l'honneur de la Couronne. Le peuple Haïda aurait été dépouillé de son droit constitutionnel. Difficile de concevoir un effet préjudiciable plus manifeste sur un intérêt autochtone.

[91] En l'espèce, par contre, la Couronne demeure un membre du comité conjoint d'exploitation et un participant en ce qui concerne le modèle d'exploitation du réservoir. Comme ils ont l'obligation d'agir conformément à l'honneur de la Couronne, les représentants de BC Hydro devront tenir compte des groupes autochtones touchés et les consulter au besoin lorsqu'une décision ultérieure sera susceptible d'avoir un effet préjudiciable sur eux. Le droit des Premières nations du CTCS d'être consultées sur toute décision susceptible de compromettre leurs revendications ou leurs droits est préservé. J'ajoute que l'honneur de la Couronne oblige BC Hydro à les informer de toute décision prise en application du CAÉ de 2007 qui est susceptible d'avoir un effet préjudiciable sur leurs revendications ou leurs droits.

[92] Ce droit permanent qu'ont les Premières nations du CTCS d'être consultées pour toute modification ultérieure susceptible d'avoir un effet préjudiciable sur leurs droits ancestraux ne remet pas en cause le bien-fondé de la décision rendue par la Commission relativement à la seule question dont elle était saisie : l'approbation du CAÉ de 2007 pouvait-elle avoir un effet préjudiciable sur leurs revendications ou leurs droits? La Commission a eu raison de répondre par la négative. La preuve non contredite établissait qu'Alcan continuerait de produire la même quantité d'électricité, *que le CAÉ de 2007 soit approuvé ou non*, et qu'elle trouverait un autre acheteur si BC Hydro déclinait l'offre, comme l'y autorisaient le permis d'exploitation hydraulique permanent nº 102324 et l'accord de 1987 sur les niveaux d'eau. De plus, bien que la Commission n'en fasse pas mention, BC Hydro, en tant que membre du comité conjoint d'exploitation et de l'équipe de gestion du réservoir, doit dorénavant consulter les Premières nations du CTCS sur toute décision susceptible d'avoir un effet préjudiciable sur leurs revendications ou leurs droits. À la

currently under negotiation of the CSTC First Nations.

[93] I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. *The Commission's Decision That Approval of the 2007 EPA Was in the Public Interest*

[94] The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

[95] I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed; British Columbia Utilities Commission's approval of 2007 Energy Purchase Agreement confirmed.

lumière de cette preuve, il n'est pas déraisonnable que la Commission conclue que le CAÉ de 2007 n'aura pas d'effet préjudiciable sur les revendications et les droits de ces Premières nations qui faisaient alors l'objet de négociations.

[93] J'arrive à la conclusion que la Commission a bien interprété le droit en ce qui concerne l'obligation de consulter et, par conséquent, la question qu'elle était appelée à trancher pour statuer sur la demande de révision. Elle a bien cerné la question principale dont elle était saisie, à savoir si le CAÉ de 2007 pouvait avoir un effet préjudiciable sur les revendications et les droits des Premières nations du CTCS. Elle a ensuite examiné la preuve pertinente. Elle a considéré les répercussions organisationnelles du CAÉ de 2007 et les changements physiques qui pouvaient en résulter. Elle a conclu que ces modifications ne risquaient pas de compromettre les revendications ou les droits en cause. Il n'a pas été établi qu'elle a agi de manière déraisonnable en tirant ces conclusions.

E. *La décision de la Commission portant que l'approbation du CAÉ de 2007 était dans l'intérêt public*

[94] Le seul motif de contestation de la décision d'approuver le CAÉ de 2007 était l'omission de la Commission d'examiner la question du caractère adéquat de la consultation portant sur les intérêts en cause des Premières nations du CTCS. La conclusion que la Commission n'a pas eu tort de rejeter la demande d'examen de cette question écarte ce motif de contestation. Ainsi, la thèse selon laquelle la Commission a agi de manière déraisonnable en approuvant le CAÉ de 2007 ne saurait être retenue.

V. Dispositif

[95] Je suis d'avis d'accueillir le pourvoi et de confirmer la décision de la Commission approuvant le CAÉ de 2007. Chacune des parties paie ses propres frais de justice.

Pourvoi accueilli; décision de la British Columbia Utilities Commission approuvant le contrat d'achat d'électricité de 2007 confirmée.

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Procureur de l'intervenante Nunavut Tunngavik Inc. : Richard Spaulding, Ottawa.

Procureurs des intervenants le Conseil tribal de la nation Nlaka'pamux, l'Alliance des nations de l'Okanagan et la Bande indienne d'Upper Nicola : Mandell Pinder, Vancouver.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Hutchins Légal inc., Montréal.

Solicitors for the intervener the Standing Buffalo Dakota First Nation: Phillips & Co., Regina.

Solicitors for the intervener the First Nations Summit: Pape Salter Teillet, Vancouver.

Solicitors for the interveners the Duncan's First Nation and the Horse Lake First Nation: Woodward & Company, Victoria.

Solicitors for the intervener the Independent Power Producers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener Enbridge Pipelines Inc.: McCarthy Tétrault, Toronto.

Solicitors for the intervener the TransCanada Keystone Pipeline GP Ltd.: Blake, Cassels & Graydon, Calgary.

Procureurs de l'intervenante la Première nation Standing Buffalo Dakota : Phillips & Co., Regina.

Procureurs de l'intervenant le Sommet des Premières nations : Pape Salter Teillet, Vancouver.

Procureurs des intervenantes la Première nation Duncan's et la Première nation de Horse Lake : Woodward & Company, Victoria.

Procureurs de l'intervenante Independent Power Producers Association of British Columbia : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante Enbridge Pipelines Inc. : McCarthy Tétrault, Toronto.

Procureurs de l'intervenante TransCanada Keystone Pipeline GP Ltd. : Blake, Cassels & Graydon, Calgary.

TAB 11

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)

Norm Ringstad, en sa qualité de directeur d'évaluation de projet pour le Projet de la mine Tulsequah Chief, Sheila Wynn, en sa qualité de directrice administrative, Bureau des évaluations environnementales, le ministre de l'Environnement, des Terres et des Parcs, et le ministre de l'Énergie et des Mines et ministre responsable du Développement du Nord *Appelants*

c.

Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River, Redfern Resources Ltd., et Redcorp Ventures Ltd. auparavant connue sous le nom de Redfern Resources Ltd. *Intimés*

et

Procureur général du Canada, procureur général du Québec, procureur général de l'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, Première nation de Doig River, Sommet des Premières nations et Union of British Columbia Indian Chiefs *Intervenants*

Répertorié : Première nation Tlingit de Taku River *c.* Colombie-Britannique (Directeur d'évaluation de projet)

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

Référence neutre : 2004 CSC 74.

N^{o} du greffe : 29146.

2004 : 24 mars; 2004 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

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

Couronne — Honneur de la Couronne — Obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations — La Couronne a-t-elle l'obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations avant de prendre une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et titres ancestraux non encore prouvées? — Dans l'affirmative, les mesures de consultation et d'accommodement adoptées par la province avant de délivrer le certificat d'approbation de projet étaient-elles suffisantes pour préserver l'honneur de la Couronne?

Depuis 1994, une entreprise d'exploitation minière demande au gouvernement de la Colombie-Britannique l'autorisation de rouvrir une vieille mine. La Première nation Tlingit de Taku River (« PNTTR »), qui a participé à l'évaluation environnementale effectuée par la province conformément à l'*Environmental Assessment Act*, s'est opposée au projet de l'entreprise de construire une route sur une partie de son territoire traditionnel. La province a octroyé le certificat d'approbation de projet en 1998. Invoquant des moyens fondés sur le droit administratif et sur son titre et ses droits ancestraux, la PNTTR a présenté une demande visant à faire annuler la décision. La juge en son cabinet a conclu que les décideurs n'avaient fait preuve de suffisamment de prudence durant les derniers mois de l'évaluation afin de s'assurer qu'ils avaient bien répondu à l'essentiel des préoccupations de la PNTTR. Elle a annulé la décision et a ordonné le réexamen de la demande. La majorité de la Cour d'appel a confirmé la décision, concluant que la province ne s'était pas acquittée de son obligation de consulter la PNTTR et de trouver des accommodements aux préoccupations de cette dernière.

Arrêt : Le pourvoi est accueilli.

L'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements à leurs préoccupations, même avant que l'existence des droits et titre ancestraux revendiqués n'ait été établie, repose sur le principe de l'honneur de la Couronne, qui découle de l'affirmation de la souveraineté de la

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

Couronne face à l'occupation antérieure des terres par les peuples autochtones. Le principe de l'honneur de la Couronne ne peut recevoir une interprétation étroite ou formaliste. Au contraire, il convient de lui donner plein effet afin de promouvoir le processus de conciliation prescrit par le par. 35(1) de la *Loi constitutionnelle de 1982*. L'obligation de consulter varie selon les circonstances. Elle naît lorsqu'un représentant de la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle d'un droit ou titre ancestral et envisage des mesures susceptibles d'avoir un effet préjudiciable sur ce droit ou ce titre. Cette obligation peut, à son tour, donner lieu à l'obligation de trouver des accommodements aux préoccupations des Autochtones. La volonté de répondre aux préoccupations est un élément clé tant à l'étape de la consultation qu'à celle de l'accommodement. L'étendue de l'obligation de consultation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou titre.

En l'espèce, la Couronne avait l'obligation de consulter la PNTTR. La province était au courant des revendications de titre et de droits de la PNTTR et elle savait que la décision de rouvrir la mine pouvait avoir un effet préjudiciable sur le fond de ses revendications. Les revendications de la PNTTR sont relativement solides et à première vue fondées, comme le démontre le fait qu'elles ont été acceptées en vue de la négociation d'un traité. La route proposée n'occupe qu'une petite partie du territoire sur lequel la PNTTR revendique un titre; toutefois, le risque de conséquences négatives sur les revendications est élevé. En ce qui concerne le niveau de consultation que requiert le principe de l'honneur de la Couronne, la PNTTR avait droit à davantage que le minimum prescrit dans les circonstances et elle avait le droit de s'attendre à une volonté de répondre à ses préoccupations qui puisse être qualifiée d'accommodement. Il est cependant impossible de déterminer à l'avance le niveau de consultation requis.

En l'espèce, la province s'est acquittée de son obligation de consultation et d'accommodement en engageant le processus prévu à l'*Environmental Assessment Act*. La PNTTR faisait partie du comité d'examen du projet et elle a participé à part entière à l'examen environnemental. Ses vues ont été exposées aux décideurs et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La province n'avait pas l'obligation de se mettre d'accord avec la PNTTR et le fait qu'elle n'y soit pas parvenue ne constitue pas un manquement à son obligation d'agir de bonne foi avec la PNTTR. Enfin, on s'attend à ce que, à chacune des étapes (permis, licences et

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.

autres autorisations) ainsi que lors de l'élaboration d'une stratégie d'utilisation des terres, la Couronne continue de s'acquitter honorablement de son obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de cette dernière.

Jurisprudence

Arrêt appliqué : *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; **arrêts mentionnés :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010.

Lois et règlements cités

Environmental Assessment Act, R.S.B.C. 1996, ch. 119 [abr. 2002, ch. 43, art. 58], art. 2, 7, 9, 10, 14 à 18, 19(1), 21, 22, 23, 29, 30(1).
Judicial Review Procedure Act, R.S.B.C. 1996, ch. 241.
Loi constitutionnelle de 1982, art. 35(1).
Mine Development Assessment Act, S.B.C. 1990, ch. 55.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (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, qui a confirmé une décision de la Cour suprême de la Colombie-Britannique (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. Pourvoi accueilli.

Paul J. Pearlman, *c.r.*, et *Kathryn L. Kickbush*, pour les appelants.

Arthur C. Pape, *Jean Teillet* et *Richard B. Salter*, pour les intimés la Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River.

Randy J. Kaardal et *Lisa Hynes*, pour les intimées Redfern Resources Ltd. et Redcorp Ventures Ltd., auparavant connue sous le nom de Redfern Resources Ltd.

Mitchell Taylor et *Brian McLaughlin*, pour l'intervenant le procureur général du Canada.

Pierre-Christian Labeau, pour l'intervenant le procureur général du Québec.

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 require-

Kurt J. W. Sandstrom et *Stan Rutwind*, pour l'intervenant le procureur général de l'Alberta.

Charles F. Willms et *Kevin G. O'Callaghan*, pour les intervenants 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 et Aggregate Producers Association of British Columbia.

Jeffrey R. W. Rath et *Allisun Rana*, pour l'intervenante la Première nation de Doig River.

Hugh M. G. Braker, *c.r.*, et *Anja Brown*, pour l'intervenant le Sommet des Premières nations.

Robert J. M. Janes et *Dominique Nouvet*, pour l'intervenante Union of British Columbia Indian Chiefs.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

Le présent pourvoi soulève la question des limites de l'obligation de la Couronne de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur des revendications de droits et de titres ancestraux dont le bien-fondé n'a pas encore été établi. La Première nation Tlingit de Taku River (« PNTTR ») a participé à une évaluation environnementale de trois ans et demi menée par suite des démarches entreprises par Redfern Resources Ltd. (« Redfern ») pour rouvrir une vieille mine. Finalement, ni l'évaluation ni son résultat n'ont su satisfaire la PNTTR.

Je conclus que, dans le processus décisionnel relatif à la demande d'approbation de projet de Redfern, la province avait l'obligation de consulter véritablement la PNTTR. Cependant, cette dernière a joué dans l'évaluation environnementale un rôle suffisant pour qu'il soit possible de conclure que la

ments 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.

province s'est comportée honorablement et qu'elle s'est acquittée de son obligation. Lorsqu'une véritable consultation a eu lieu, il n'est pas essentiel que les parties parviennent à une entente. L'obligation d'accommodement exige plutôt que les préoccupations des Autochtones soient raisonnablement mises en balance avec l'incidence potentielle de la décision sur ces préoccupations et avec les intérêts sociétaux opposés. L'idée de compromis fait partie intégrante du processus de conciliation. En l'espèce, la province a pris des mesures d'accommodement à l'égard des préoccupations de la PNTTR en adaptant la procédure d'évaluation environnementale et les conditions imposées à Redfern pour que son projet soit approuvé. Par conséquent, j'estime que la province s'est acquittée de son obligation envers la PNTTR.

II. Facts and Decisions Below

II. Faits et décisions des juridictions inférieures

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").

3 La mine Tulsequah Chief, qui était exploitée dans les années 50 par Cominco Ltd., se trouve dans une région vierge et éloignée du nord-ouest de la Colombie-Britannique, au confluent des rivières Taku et Tulsequah. Depuis 1994, Redfern demande au gouvernement de la Colombie-Britannique l'autorisation de rouvrir la mine. Elle a présenté sa demande d'abord en vertu de la *Mine Development Assessment Act*, S.B.C. 1990, ch. 55, puis en vertu de l'*Environmental Assessment Act*, R.S.B.C. 1996, ch. 119, après la promulgation de celle-ci en 1995. Au cours de l'évaluation environnementale, la question de l'accès à la mine s'est révélée être un point de discorde. La PNTTR, dont des représentants ont participé à l'évaluation en tant que membres du comité responsable du projet, s'est opposée au projet de Redfern de construire, sur une partie de son territoire traditionnel, une route de 160 kilomètres reliant la mine à la ville d'Atlin. Au terme d'un long processus, le ministre de l'Environnement, des Terres et des Parcs et le ministre de l'Énergie et des Mines (« ministres ») ont donné leur aval au projet le 19 mars 1998.

The Redfern proposal was assessed in accordance with British Columbia's *Environmental Assessment Act*. The environmental assessment process is

4 La proposition de Redfern a été évaluée conformément à la loi intitulée *Environmental Assessment Act* (« Loi ») de la Colombie-Britannique.

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.

L'évaluation environnementale est un processus distinct de l'aménagement du territoire et de la négociation des traités, bien que ces deux processus puissent évidemment avoir des répercussions sur l'évaluation des différentes propositions. Les dispositions suivantes de la Loi sont pertinentes en l'espèce.

5 Section 2 sets out the purposes of the Act, which are:

Les objets de la Loi sont définis ainsi à l'art. 2 :

[TRADUCTION]

(a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,

a) favoriser la durabilité en protégeant l'environnement et en encourageant une économie saine et le bien-être collectif;

(b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,

b) fournir en temps utile une évaluation complète et intégrée des conséquences que les projets assujettis à la procédure d'examen peuvent avoir sur l'environnement, l'économie, la société, la culture, le patrimoine et la santé;

(c) to prevent or mitigate adverse effects of reviewable projects,

c) prévenir ou atténuer les effets négatifs des projets assujettis à la procédure d'examen;

(d) to provide an open, accountable and neutrally administered process for the assessment

(i) of reviewable projects, and

d) fournir un processus ouvert et neutre assorti de mécanismes d'imputabilité pour l'évaluation :

(i) des projets assujettis à la procédure d'examen;

. . .

. . .

(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.

e) permettre, lors des évaluations effectuées en vertu de la présente loi, la participation du public, des promoteurs, des Premières nations, des municipalités et districts régionaux, du gouvernement et de ses organismes, du gouvernement du Canada et de ses organismes et des ressorts voisins de la Colombie-Britannique.

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

En vertu de l'art. 7 de la Loi, [TRADUCTION] « [l]e promoteur d'un projet assujetti à la procédure d'examen peut présenter une demande de certificat d'approbation de projet » en fournissant, « à l'égard du projet, un aperçu préliminaire indiquant notamment » ses effets possibles et les mesures d'atténuation envisagées. Si le projet est accepté pour examen, [TRADUCTION] « le directeur administratif forme un comité chargé d'examiner le projet » (par. 9(1)). À cette fin, il invite à participer à la nomination des membres du comité

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".

un certain nombre de groupes, notamment « toute Première nation dont le territoire traditionnel abrite le chantier ou se trouve à proximité de celui-ci » (al. 9(2)d)). Aux termes du par. 9(6), le comité d'examen du projet peut [TRADUCTION] « établir des règles régissant sa procédure et la conduite de ses réunions ».

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.

7

La proposition de Redfern a été acceptée pour examen en vertu de l'ancienne loi intitulée *Mine Development Assessment Act*, et un comité d'examen du projet a été créé en novembre 1994. Ont été invités à faire partie de ce comité la PNTTR, les gouvernements de la Colombie-Britannique, du Canada, du Yukon, des États-Unis et de l'Alaska, ainsi que la commission consultative d'aménagement du territoire d'Atlin. Lorsque l'*Environmental Assessment Act* est entrée en vigueur, le comité d'examen du projet a été officiellement constitué conformément à l'art. 9. Divers groupes de travail et sous-comités techniques ont été formés, notamment un groupe chargé d'examiner les préoccupations des Autochtones et un autre d'étudier les options en matière de transport. La PNTTR a participé à ces deux groupes. Plusieurs études ont été commandées et remises au comité d'examen du projet au cours de l'évaluation.

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:

8

Le comité d'examen du projet devient le principal moteur du processus d'évaluation. Il doit s'acquitter de son mandat, qui est défini ainsi à l'art. 10 :

(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.

[TRADUCTION]

a) fournir au directeur administratif, au ministre et au ministre responsable expertise, conseils, analyses et recommandations;

b) conseiller, après analyse, le directeur administratif, le ministre et le ministre responsable à propos :

(i) des commentaires reçus en réponse à l'invitation de donner des commentaires en vertu de la présente loi,

(ii) des conseils et recommandations du comité consultatif public établi pour l'examen de ce projet, le cas échéant,

(iii) des effets possibles du projet,

(iv) de la prévention ou de l'atténuation des effets négatifs.

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)).

Le promoteur du projet a l'obligation de mener des consultations publiques relativement à la proposition et de diffuser de l'information à cet égard (art. 14-18). À l'expiration de la période de réception des commentaires, le directeur administratif [TRADUCTION] « renvoie la demande [aux ministres] [. . .] pour décision [. . .] ou il ordonne la préparation d'un rapport de projet [. . .] et la poursuite de l'examen du projet » (par. 19(1)). Dans le cas où un rapport de projet s'impose, le directeur administratif établit les spécifications du rapport de projet en indiquant, selon les recommandations du comité d'examen du projet, les renseignements, analyses, plans ou autres éléments requis pour l'évaluation (al. 21a)). Les articles 22 et 23 dressent une liste non exhaustive des points qui peuvent être inclus dans ce rapport de projet. Les spécifications sont communiquées au promoteur (al. 21b)).

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.

En l'espèce, Redfern devait produire un rapport de projet, et elle a reçu la liste des spécifications requises pour la préparation de ce rapport. Le délai a été prorogé afin que la directrice administrative et le comité responsable aient plus de temps pour établir les spécifications.

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.

Lorsque le promoteur soumet un rapport de projet, le comité recommande au directeur administratif d'accepter le rapport pour examen ou de le refuser s'il ne respecte pas les spécifications. En novembre 1996, Redfern a remis un rapport de projet de plusieurs volumes. Le délai d'examen du rapport a été prorogé pour permettre au comité de terminer son travail. En janvier 1997, le comité d'examen du projet a conclu que le rapport comportait des lacunes et il a été enjoint à Redfern d'y remédier.

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

Les inquiétudes de la PNTTR au sujet de la route proposée sont ressorties clairement au cours de l'évaluation environnementale. La PNTTR s'inquiétait particulièrement des effets possibles sur la faune et l'utilisation traditionnelle des terres, ainsi que de l'absence de données de base permettant de mesurer les effets ultérieurs du projet. La PNTTR estimait que la construction de la route ne devait pas être approuvée sans une stratégie

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.

d'utilisation du territoire et en dehors du cadre de la négociation des traités. Ces préoccupations plus larges n'ont pu être examinées directement dans l'évaluation environnementale, mais le directeur de l'évaluation du projet a mis la PNTTR en contact avec d'autres organismes et décideurs provinciaux. Par exemple, selon le désir de la PNTTR, la province a approuvé le financement de programmes de surveillance de la faune (évaluation des effets cumulatifs à long terme sur les grizzlis et programme de surveillance des ongulés). La PNTTR a aussi manifesté son intérêt à l'égard des aspects suivants : pouvoir d'approuver les permis pour le projet, partage des recettes et contrôle de l'utilisation de la route d'accès par des tiers. Elle a été informée que ces questions ne relevaient pas du processus de délivrance des certificats et ne pourraient être examinées que lors de négociations ultérieures avec le gouvernement.

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.

13 Pendant que Redfern s'attachait à remédier à d'autres lacunes, le directeur de l'évaluation du projet, Bureau des évaluations environnementales, a engagé un consultant jugé acceptable par la PNTTR, M. Lindsay Staples, pour effectuer des études sur l'utilisation traditionnelle des terres et examiner les questions soulevées par la PNTTR. En juillet 1997, Redfern a remis son rapport corrigé, mais on lui a demandé d'attendre le rapport Staples. Celui-ci, préparé en août 1997, a été annexé au rapport de projet, lequel a été distribué pour examen en septembre 1997. Le public disposait de 60 jours pour faire part de ses observations. Cependant, après examen du rapport Staples, la PNTTR a exprimé d'autres inquiétudes et le Bureau des évaluations environnementales a demandé à M. Staples de préparer un addenda à son rapport. L'addenda a été terminé en décembre 1997 et figure en annexe du rapport de projet depuis cette date.

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

14 Suivant la Loi, après avoir accepté un rapport de projet, le directeur administratif peut renvoyer la demande de certificat d'approbation de projet aux ministres pour décision (art. 29). [TRADUCTION] « Dans un tel cas [. . .] le directeur administratif doit prendre en considération la demande, le

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.

rapport de projet et les commentaires reçus à leur sujet » (par. 29(1)). [TRADUCTION] « Le comité d'examen du projet peut joindre des recommandations à la demande déférée aux ministres » (par. 29(4)), mais il n'est pas tenu par la Loi de rédiger un rapport faisant état de ses recommandations.

En l'espèce, le personnel du Bureau des évaluations environnementales a préparé un tel rapport, dont la majeure partie a été remise aux membres du comité pour examen au début de janvier 1998. Les 18 dernières pages ont été remises avec le rapport provisoire complet le 3 mars 1998. La majorité des membres du comité ont convenu de renvoyer la demande aux ministres et de recommander l'approbation du projet, sous réserve de certaines recommandations et conditions. La PNTTR a exprimé son désaccord au sujet du rapport faisant état des recommandations et a préparé son propre rapport minoritaire énonçant ses préoccupations à l'égard du processus et de la proposition.

Lorsqu'une demande leur est déférée en vertu de l'art. 29, [TRADUCTION] « les ministres doivent examiner la demande et les recommandations du comité d'examen du projet » (al. 30(1)a)) et soit « délivrer un certificat d'approbation de projet », soit « refuser la délivrance du certificat . . . », ou encore « renvoyer la demande à la Commission d'évaluation environnementale pour la tenue [d'une] audience publique » (al. 30(1)b)). Leur décision doit être motivée (al. 30(1)c)).

Le 12 mars 1998, la directrice administrative a renvoyé la demande de Redfern aux ministres. La demande était accompagnée du rapport faisant état des recommandations du comité d'examen du projet, de la version du certificat d'approbation qui a finalement été signée, et du rapport de la PNTTR (d.a., vol. V, p. 858). De plus, dans le rapport faisant état des recommandations on mentionne explicitement à plusieurs endroits les préoccupations et les points de désaccord de la PNTTR, ainsi que les mesures d'atténuation proposées. Les ministres ont délivré le certificat d'approbation du projet le 19 mars 1998, avalisant ainsi la proposition sous réserve de conditions détaillées.

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.

18 Délivrer un certificat d'approbation de projet ne revient pas à donner « le feu vert » pour tous les aspects du projet. Chaque aspect de la construction fait au préalable l'objet d'un long processus d'« autorisation » et peut nécessiter la fourniture par le promoteur de renseignements plus détaillés et plus substantiels. À la partie 6 du rapport faisant état des recommandations, le comité d'examen du projet a résumé les exigences en matière de licences, de permis et d'autorisations qui s'appliqueraient après l'approbation du projet en l'espèce. De plus, ce rapport formulait des recommandations prospectives quant à ce qui devrait se produire à l'étape du certificat, comme condition de sa délivrance. Il prévoyait que Redfern devrait, toujours avec le concours de la PNTTR, préparer à cette étape des analyses et des données de base plus détaillées, lesquelles pourraient donner lieu à une correction du tracé de la route. La majorité des membres a aussi recommandé la création d'une zone de gestion des ressources le long du corridor d'accès et son maintien jusqu'à l'achèvement d'un futur plan d'aménagement du territoire, l'établissement de règlements régissant l'utilisation de la route et la création d'un comité conjoint de gestion de la route avec la PNTTR. Le rapport recommandait que la future demande de Redfern en vue d'obtenir un permis spécial d'utilisation de la route soit présentée au comité conjoint de gestion proposé.

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,

19 Invoquant des moyens fondés sur le droit administratif et sur son titre et ses droits ancestraux, la PNTTR a présenté, en février 1999, en vertu de la *Judicial Review Procedure Act*, R.S.B.C. 1996, ch. 241, une demande visant à faire annuler la décision des ministres de délivrer le certificat d'approbation du projet. À la demande de la province, la demande de détermination des droits et du titre a été dissociée de la procédure de contrôle judiciaire et a été inscrite pour instruction. La juge Kirkpatrick, en son cabinet, a entendu la demande de contrôle judiciaire et conclu que les ministres auraient dû être conscients de la possibilité que leur décision porte atteinte à des droits ancestraux et qu'ils auraient dû faire preuve de plus de prudence durant les derniers mois de l'évaluation afin de s'assurer qu'ils avaient bien répondu à l'essentiel des

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.

préoccupations de la PNTTR ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001). La juge a également donné raison à la PNTTR en ce qui concerne les moyens fondés sur le droit administratif. Elle a annulé la décision accordant le certificat d'approbation du projet et elle a ordonné le réexamen de la demande de permis, réexamen à l'égard duquel elle a plus tard donné des directives.

La majorité de la Cour d'appel de la Colombie-Britannique (sous la plume de la juge Rowles) a rejeté l'appel de la province, concluant que celle-ci ne s'était pas acquittée de son obligation de consulter la PNTTR et de trouver des accommodements aux préoccupations de celle-ci ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Dissidente, la juge Southin était d'avis que la consultation avait été adéquate au vu des faits. Tant les juges majoritaires que la juge dissidente semblent conclure que la décision était conforme aux principes du droit administratif. La province s'est pourvue devant la Cour, faisant valoir que, sauf application des principes du droit administratif prévus par la common law, il n'existe pas d'obligation de consultation, tant qu'une revendication de droits ancestraux n'a pas été établie. Elle ajoute que, si une telle obligation existe, les faits démontrent qu'elle a été respectée en l'espèce.

III. Analyse

Dans l'affaire *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73, entendue en même temps que le présent pourvoi, la Cour a confirmé l'existence de l'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements aux préoccupations de ceux-ci même avant que n'ait été tranchée une revendication de droits ou de titre. En l'espèce, la Couronne avait l'obligation de consulter la PNTTR. La province était au courant des revendications en raison de la participation de la PNTTR au processus de négociation de traités, et elle savait que la décision de rouvrir la mine Tulsequah Chief pouvait avoir un effet préjudiciable sur le fond des revendications de la PNTTR.

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?*

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.

The Province's submissions present an impoverished vision of the honour of the Crown and all

Selon les principes analysés dans *Haïda*, il ressort de ces faits que l'honneur de la Couronne commandait que celle-ci consulte la PNTTR avant de décider de rouvrir la mine Tulsequah Chief. En l'espèce, la province s'est acquittée de son obligation en engageant le processus prévu à l'*Environmental Assessment Act*. La PNTTR faisait partie du comité d'examen du projet et elle a participé à part entière à l'examen environnemental. Elle a été déçue, trois ans et demi plus tard, de voir celui-ci prendre fin sur ordre du Bureau des évaluations environnementales. Ses vues ont toutefois été exposées aux ministres et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La province avait l'obligation de consulter. Elle l'a fait et elle a pris des mesures d'accommodement à l'égard des préoccupations exprimées. Elle n'avait cependant pas l'obligation de se mettre d'accord avec la PNTTR et le fait qu'elle n'y soit pas parvenue ne constitue pas un manquement à son obligation d'agir de bonne foi avec la PNTTR. 22

A. *La province avait-elle l'obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de cette dernière?*

La province plaide que, tant que les droits n'ont pas été fixés dans une décision, une procédure judiciaire ou un traité, elle n'a que l'obligation, prévue par la common law, de « négocier honorablement » avec les peuples autochtones dont les revendications risquent d'être touchées par les décisions gouvernementales. Elle affirme que l'obligation de consulter pourrait prendre naissance une fois les droits établis, par l'effet de ce qu'elle appelle une [TRADUCTION] « obligation fiduciaire de justification ». Subsidiairement, elle soutient qu'une obligation fiduciaire peut naître lorsque la Couronne s'engage à agir uniquement dans le meilleur intérêt d'un peuple autochtone. Elle prétend qu'en dehors de ces situations précises elle n'a aucune obligation envers la PNTTR. 23

Les prétentions de la province donnent une vision étroite de l'honneur de la Couronne et de 24

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

tout ce que ce principe implique. Comme il a été expliqué dans l'arrêt connexe *Haïda*, précité, l'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements à leurs préoccupations, même avant que l'existence des droits et titres ancestraux revendiqués n'ait été établie, repose sur le principe de l'honneur de la Couronne. L'obligation d'agir honorablement découle de l'affirmation de la souveraineté de la Couronne face à l'occupation antérieure des terres par les peuples autochtones. Ce principe a été consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits et titres ancestraux existants des peuples autochtones. Un des objectifs visés par le par. 35(1) est la négociation de règlements équitables des revendications autochtones. Dans toutes ses négociations avec les Autochtones, la Couronne doit agir honorablement, dans le respect de ses relations passées et futures avec le peuple autochtone concerné. Le principe de l'honneur de la Couronne ne peut recevoir une interprétation étroite ou formaliste. Au contraire, il convient de lui donner plein effet afin de promouvoir le processus de conciliation prescrit par le par. 35(1).

Comme il a été expliqué dans *Haïda*, les obligations requises pour que soit respecté le principe de l'honneur de la Couronne varient selon les circonstances. La Couronne peut être tenue de consulter les peuples autochtones et de trouver des accommodements aux préoccupations de ceux-ci avant de prendre des décisions : *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1119; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 168. L'obligation de consulter ne prend pas naissance seulement lorsque la revendication autochtone a été établie, pour justifier des violations. Une telle interprétation de l'obligation de consultation nierait l'importance des racines historiques de l'honneur de la Couronne et empêcherait ce principe de jouer son rôle dans la conciliation. Déterminer, avant le règlement définitif d'une revendication, l'ampleur des mesures de consultation et d'accommodement qui sont requises n'est pas une tâche facile, mais il s'agit d'un aspect essentiel du processus imposé par le par. 35(1). L'obligation de consulter naît lorsqu'un représentant de la Couronne a connaissance,

requirement of both consultation and accommodation.

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.

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.

concrètement ou par imputation, de l'existence potentielle d'un titre ou de droits ancestraux et envisage des mesures susceptibles d'avoir un effet préjudiciable sur ces droits ou ce titre. Cette obligation pourrait également obliger le gouvernement à modifier ses plans ou politiques afin de trouver des accommodements aux préoccupations des Autochtones. La volonté de répondre aux préoccupations est un élément clé tant à l'étape de la consultation qu'à celle de l'accommodement.

26 En 1981, le gouvernement fédéral a annoncé la mise en place d'une politique de règlement des revendications territoriales globales devant régir la négociation des revendications territoriales autochtones. En 1983, la PNTTR a présenté sa revendication territoriale au ministre des Affaires indiennes. Cette revendication a été acceptée pour négociation en 1984, sur le fondement de l'utilisation et de l'occupation traditionnelles des terres par la PNTTR. Il n'y a eu aucune négociation en vertu de la politique fédérale. Cependant, la PNTTR a par la suite entamé la négociation de sa revendication territoriale dans le cadre du processus de conclusion de traités établi par la Commission des traités de la Colombie-Britannique en 1993. En 1999, la PNTTR avait déjà signé un protocole d'entente et un accord-cadre et elle négociait un accord de principe. Il est clair que la province connaissait l'existence des revendications de titre et de droits de la PNTTR.

27 Lorsque Redfern a présenté sa demande d'approbation du projet visant la réouverture de la mine Tulsequah Chief, il était évident que la décision pouvait avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR. Celle-ci revendique le titre ancestral sur une grande partie du nord-ouest de la Colombie-Britannique, territoire qui comprend le secteur où passerait la route d'accès étudiée durant le processus d'approbation. La PNTTR revendique également des droits ancestraux de chasse, de pêche, de cueillette et d'utilisation des terres pour d'autres activités traditionnelles, qui risqueraient d'être touchés si une route traversait cette région. La mesure envisagée était donc susceptible d'avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR.

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.

La province était au courant des revendications et envisageait de prendre une décision susceptible d'avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR. L'honneur de la Couronne commandait donc que celle-ci consulte la PNTTR et, au besoin, qu'elle prenne des mesures d'accommodement à l'égard des préoccupations de cette dernière avant de décider d'approuver le projet de Redfern et de fixer les conditions dont son approbation doit être assortie.

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

B. *Quelle est l'étendue de l'obligation de la province de consulter la PNTTR et de trouver des accommodements aux préoccupations de celle-ci?*

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.

L'étendue de l'obligation de consultation « dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre » (*Haïda*, précité, par. 39). L'obligation varie selon les circonstances, mais elle requiert dans tous les cas que la Couronne consulte véritablement et de bonne foi les Autochtones concernés et qu'elle soit disposée à modifier ses plans à la lumière des données recueillies au cours du processus.

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

La preuve permet de conclure que, à première vue, la PNTTR détient un titre et des droits ancestraux sur au moins une partie de la région revendiquée. Sa revendication territoriale a été soumise à une procédure exhaustive de validation avant d'être jugée recevable dans le processus fédéral de règlement des revendications territoriales en 1984. Le ministère des Affaires indiennes a engagé une chercheuse pour préparer un rapport sur les revendications de la PNTTR, rapport qui a été examiné à différentes étapes avant que le ministre déclare la revendication valide, sur le fondement de l'utilisation et de l'occupation traditionnelles par la PNTTR des terres et des ressources en question. Pour participer aux négociations de traités sous l'égide de la Commission des traités de la Colombie-Britannique, la PNTTR a dû produire une déclaration d'intention précisant les territoires revendiqués et le fondement de sa demande. Il n'est pas nécessaire qu'un groupe autochtone soit admis à participer au processus de

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.

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.

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

négociation de traités pour que la Couronne ait l'obligation de le consulter. Néanmoins, la revendication de la PNTTR a été acceptée en vue de la négociation d'un traité, par suite d'une décision préliminaire sur sa validité. À l'inverse de l'affaire *Haïda*, les juridictions inférieures n'ont pas en l'espèce procédé à une évaluation préliminaire détaillée des divers aspects des revendications de la PNTTR, revendications qui ont une large portée. Toutefois, l'acceptation de leur revendication de titre en vue de la négociation d'un traité constitue une preuve *prima facie* du bien-fondé de leurs revendications d'un titre et de droits ancestraux.

31 L'effet négatif que la décision des ministres risque d'avoir sur les revendications de la PNTTR semble relativement grave. La juge en son cabinet a conclu que tous les experts ayant préparé un rapport pour l'examen de la proposition ont reconnu que la PNTTR dépendait de son régime d'utilisation du territoire pour soutenir son économie ainsi que la vie sociale et culturelle de sa communauté (par. 70). La route d'accès proposée ne compte que 160 kilomètres et ne représente donc qu'une faible proportion des 32 000 kilomètres carrés revendiqués par la PNTTR. Cependant, les experts ont signalé que cette route traverserait une zone critique pour l'économie de la PNTTR : voir, par exemple, le rapport Dewhirst (d.i., vol. I, p. 175, 187, 190 et 200) et l'addenda du rapport Staples (d.a., vol. IV, p. 595-600, 604-605 et 629). La PNTTR craint également que la route n'attire d'autres projets. La route proposée pourrait donc avoir une incidence sur sa capacité de continuer d'exercer ses droits ancestraux et pourrait modifier le territoire qui est revendiqué.

32 En résumé, les revendications de la PNTTR sont relativement solides et à première vue fondées, comme le démontre le fait qu'elles ont été acceptées en vue de la négociation d'un traité. La route proposée n'occupe qu'une petite partie du territoire sur lequel la PNTTR revendique un titre; toutefois, le risque de conséquences négatives sur les revendications est élevé. En ce qui concerne le niveau de consultation que requiert le principe de l'honneur de la Couronne, la PNTTR avait droit à davantage que le minimum prescrit, à savoir un avis, la

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

communication d'information et la tenue de discussions en conséquence. Bien qu'il soit impossible de déterminer à l'avance le niveau de consultation requis, il est clair que, dans les circonstances, la PNTTR avait le droit de s'attendre à des consultations plus poussées que le strict minimum et à une volonté de répondre à ses préoccupations qui puisse être qualifiée d'accommodement.

C. *La Couronne s'est-elle acquittée envers la PNTTR de son obligation de consultation et d'accommodement?*

Le processus d'approbation du projet de Redfern a duré trois ans et demi et a dans une large mesure été mené en vertu de l'*Environmental Assessment Act*. Comme il a été expliqué précédemment, la Loi prévoit un processus de collecte d'information et de consultation. Selon la Loi, les peuples autochtones dont le territoire traditionnel abrite le chantier d'un projet assujetti à la procédure d'examen doivent être invités à faire partie du comité d'examen du projet.

Il s'agit en l'espèce de décider si cette obligation a été respectée. Au par. 28 de ses motifs dissidents dans la présente affaire, la juge Southin de la Cour d'appel décrit utilement les événements jusqu'au 1er août 2000. En novembre 1994, la PNTTR a été invitée à faire partie du comité chargé de coordonner l'examen du projet et s'est vu remettre pour examen et commentaires la demande originale qui comportait deux volumes : la juge Southin, par. 39. Elle a participé à part entière en tant que membre du comité d'examen du projet, sauf de février à août 1995, où elle a choisi de se retirer, préférant se concentrer sur les pourparlers au sujet du traité et l'élaboration d'une politique d'utilisation du territoire.

Les spécifications du rapport de projet final (« spécifications ») précisent le nombre de réunions qui ont eu lieu, avant février 1996, entre la PNTTR, le personnel de l'agence d'examen et des représentants de l'entreprise dans les communautés de la PNTTR : la juge Southin, par. 41. De juin 1993 à février 1995, Redfern et la PNTTR se sont rencontrées plusieurs fois pour discuter des activités d'exploration de Redfern ainsi que des inquiétudes et des demandes d'information de la PNTTR. Redfern a

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.

aussi chargé un consultant indépendant d'effectuer, avec le concours de la PNTTR, des études archéologiques et ethnographiques pour déterminer les effets possibles du projet sur le mode de vie traditionnel de celle-ci : la juge Southin, par. 41. Les spécifications montrent que la PNTTR a, tant par écrit que verbalement, demandé à Redfern des renseignements concernant les effets sur la faune, la pêche et la sensibilité du terrain, l'impact de la route d'accès proposée, le transport par chaland et les activités minières : la juge Southin, par. 41.

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.

36 Jusqu'au 26 janvier 1998, la PNTTR a refusé de participer aux travaux du sous-comité chargé d'examiner la question de l'accès à la route. Le Bureau des évaluations environnementales a compris le dilemme de la PNTTR, qui préférait voir ses préoccupations examinées sur une plus grande échelle que ce qui est prévu par la Loi. Elle a été informée que tous ses sujets de préoccupation ne pouvaient pas être examinés à l'étape de la délivrance du certificat ou dans le cadre de l'évaluation environnementale, et on l'a aidée à prendre contact avec les décideurs et les politiciens compétents.

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.

37 Aidée financièrement, la PNTTR a participé à de nombreuses réunions du comité d'examen du projet. Devant les préoccupations de la PNTTR à propos du niveau d'information fourni par Redfern au sujet des effets sur l'utilisation du territoire par les Autochtones, le Bureau des évaluations environnementales a chargé un expert, jugé acceptable par la PNTTR, d'effectuer une étude sur l'utilisation traditionnelle des terres, sous les auspices d'un groupe directeur autochtone. Comme le premier rapport Staples n'a pas su dissiper les inquiétudes de la PNTTR, le Bureau des évaluations environnementales a commandé la préparation d'un addenda à ce rapport. La PNTTR souligne que cet addenda n'était pas mentionné expressément dans le rapport faisant état des recommandations qui a été présenté ultérieurement aux ministres. Il faisait toutefois partie du rapport de projet de Redfern.

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,

38 La PNTTR reconnaît avoir participé à la consultation, mais soutient que la clôture rapide de l'évaluation l'a privée du bénéfice d'une véritable consultation. Après plus de trois années ponctuées

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.

de nombreuses études et réunions et de prorogations des délais prévus par la Loi, il a été mis fin à l'évaluation au début de 1998. Invoquant sa charge de travail, le Bureau des évaluations environnementales a déclaré, le 26 février, que la consultation devait se terminer le 4 mars. Il a ordonné au comité d'examen du projet d'examiner le rapport faisant état des recommandations et de remettre ses conclusions le 3 mars, soit le jour même où le comité a reçu les 18 dernières pages du rapport. Il est mentionné à l'annexe C du rapport faisant état des recommandations que la PNTTR a exprimé son désaccord au sujet du rapport en raison de certaines [TRADUCTION] « lacunes de l'information » : la juge Southin, par. 46. La PNTTR a donc préparé un rapport minoritaire, qui a été soumis aux ministres avec le rapport majoritaire le 12 mars. Le certificat d'approbation de projet a été délivré peu après.

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.

Il ne fait pas de doute qu'il y a eu, à la fin, accélération du processus d'approbation du projet. Mais la consultation menée par la province a-t-elle été suffisante malgré tout? Les constatations des juridictions inférieures m'amènent à conclure affirmativement.

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.

La juge en son cabinet a estimé que l'obligation de consulter a été respectée jusqu'en décembre 1997, parce que la PNTTR participait alors à part entière à l'évaluation (par. 132). Je souscris à son opinion. La province n'était pas tenue de mettre sur pied, pour l'examen des préoccupations de la PNTTR, une procédure spéciale de consultation différente de celle établie par l'*Environmental Assessment Act*, qui requiert expressément la consultation des Autochtones concernés.

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

La Loi autorisait le comité à établir lui-même sa procédure. Il a ainsi décidé de former des groupes de travail et des sous-comités, de commander des études et la préparation d'un rapport faisant état de ses recommandations. La PNTTR a été l'instigatrice des décisions de mettre sur pied un groupe directeur chargé d'étudier les questions autochtones et un sous-comité pour l'examen de la proposition concernant l'accès à la route. Les renseignements et l'analyse demandés à Redfern reflétaient clairement les préoccupations de la PNTTR. À la fin de

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.

l'évaluation, plus d'une prorogation des délais prévus par la Loi avait été accordée et, selon le directeur de l'évaluation du projet, [TRADUCTION] « tous les membres du comité responsable du projet, y compris la PNTTR, avaient formé leur opinion » (par. 82 de l'affidavit de Norman Ringstad (cité au par. 57 de l'arrêt de la Cour d'appel)). Les préoccupations de la PNTTR ont été bien comprises, comme le montrent le rapport faisant état des recommandations et le rapport de projet, et elles ont été analysées en profondeur. La province s'est pleinement acquittée de son obligation de consultation.

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.

42 Comme il a été expliqué dans l'affaire *Haïda*, la consultation peut donner lieu à l'obligation de trouver des accommodements aux préoccupations des Autochtones en adaptant des décisions ou des politiques en conséquence. L'objectif du par. 35(1) de la *Loi constitutionnelle de 1982* est de favoriser la conciliation ultime de l'occupation antérieure du territoire par les Autochtones et la souveraineté de fait de la Couronne. Tant que la question n'est pas réglée, le principe de l'honneur de la Couronne commande que celle-ci mette en balance les intérêts de la société et ceux des peuples autochtones lorsqu'elle prend des décisions susceptibles d'entraîner des répercussions sur les revendications autochtones. Elle peut être appelée à prendre des décisions en cas de désaccord quant au caractère suffisant des mesures adoptées en réponse aux préoccupations exprimées par les Autochtones. Une attitude de pondération et de compromis s'impose alors.

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.

43 En l'espèce, la PNTTR conteste le caractère suffisant des mesures d'accommodement prévues par les conditions dont est assorti le certificat d'approbation de projet. Elle soutient que celui-ci n'aurait pas dû être délivré tant qu'on n'avait pas répondu de façon satisfaisante à ses préoccupations, surtout en ce qui concerne l'établissement de données de base.

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

44 En toute déférence, je ne souscris pas à cette opinion. Dans le cadre du processus prévu par la Loi pour la délivrance du certificat d'approbation de projet, les préoccupations de la PNTTR ont fait l'objet de mesures d'accommodement suffisantes. En plus de l'analyse présentée dans le rapport minoritaire, le rapport majoritaire a exposé en détail les

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

préoccupations de la PNTTR et a recommandé des mesures d'atténuation, lesquelles ont été intégrées dans les conditions du certificat. Ces mesures prévoyaient notamment qu'il soit ordonné à Redfern d'établir des données de base et comprenaient des recommandations au sujet de la gestion future de la route et sa fermeture.

La délivrance du certificat d'approbation de projet est simplement l'étape du processus qui permet la mise en œuvre du projet. Dans l'affaire *Haïda*, la province a fait valoir que, même s'il n'y avait pas eu du tout de consultation à l'étape en litige, soit celle de la [TRADUCTION] « stratégie », les Haïda avaient la possibilité de se faire entendre ultérieurement, à l'étape des [TRADUCTION] « activités ». La situation est différente en l'espèce, car la PNTTR a été consultée tout au long du processus de délivrance du certificat, et ses préoccupations ont fait l'objet de mesures d'accommodement.

Le comité d'examen du projet a conclu que certaines préoccupations non encore examinées pourraient être étudiées de façon plus efficace à l'étape du permis, dans le contexte plus large de la négociation de traités ou lors de la planification d'une stratégie d'utilisation du territoire. Il ressort clairement du rapport majoritaire et des conditions du certificat que, pour la délivrance des permis subséquents, Redfern devra fournir d'autres renseignements et analyses, et que des consultations et négociations ultérieures avec la PNTTR pourront entraîner la prise de mesures d'accommodement. Par exemple, Redfern devra fournir des données de base plus détaillées à l'étape du permis, ce qui pourrait entraîner un rajustement du tracé de la route. D'autres études socio-économiques seront effectuées. Il a été recommandé de former un groupe conjoint d'aménagement et de répondre aux préoccupations de la PNTTR par la négociation avec la province et par le recours aux pouvoirs de réglementation de celle-ci. Il ne fait donc aucun doute que le comité d'examen du projet, et par voie de conséquence les ministres, ont examiné la question de savoir dans quelle mesure les préoccupations de la PNTTR devaient faire l'objet d'accommodements à ce stade du projet et dans quelles autres instances celle-ci pourrait continuer de participer au processus. On s'attend à ce que, à

honourable duty to consult and, if indicated, accommodate the TRTFN.

IV. Conclusion

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.

Solicitors for the appellants: Fuller Pearlman & McNeil, Victoria.

Solicitors 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: Pape & Salter, Vancouver.

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

chacune des étapes (permis, licences et autres autorisations) ainsi que lors de l'élaboration d'une stratégie d'utilisation du territoire, la Couronne continue de s'acquitter honorablement de son obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de celle-ci.

IV. Conclusion

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En résumé, je conclus que les mesures de consultation et d'accommodement adoptées par la province avant de délivrer le certificat d'approbation du projet de la mine Tulsequah Chief étaient suffisantes pour préserver l'honneur de la Couronne. Le pourvoi est accueilli. L'autorisation de pourvoi a été accordée à la condition que les appelants paient, sur la base partie-partie, les dépens des intimés PNTTR et Melvin Jack pour la demande d'autorisation de pourvoi et pour le pourvoi, quelle que soit l'issue de la cause. Aucune ordonnance relative aux dépens n'est rendue à l'égard des intimées Redfern Resources Ltd. et Redcorp Ventures Ltd.

Pourvoi accueilli.

Procureurs des appelants : Fuller Pearlman & McNeil, Victoria.

Procureurs des intimés la Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River : Pape & Salter, Vancouver.

Procureurs des intimées Redfern Resources Ltd. et Redcorp Ventures Ltd. auparavant connue sous le nom de Redfern Resources Ltd. : Blake Cassels & Graydon, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Ministère de la Justice, Vancouver.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général de l'Alberta : Alberta Justice, Edmonton.

Procureurs des intervenants 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.

Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia et Aggregate Producers Association of British Columbia : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante la Première nation de Doig River : Rath & Company, Priddis, Alberta.

Procureurs de l'intervenant le Sommet des Premières nations : Braker & Company, Port Alberni, Colombie-Britannique.

Procureurs de l'intervenante Union of British Columbia Indian Chiefs : Cook Roberts, Victoria.