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2023 NSARB 2023-001

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: *Fisheries and Coastal Resources Act*, SNS 1996, c 25

- and –

IN THE MATTER OF: An Application by KELLY COVE SALMON LTD for a boundary amendment and expansion for the cultivation of Atlantic salmon (*Salmo salar*) - AQ#1205x, in Liverpool Bay, Queens County (the "Application")

BETWEEN:

Kelly Cove Salmon Ltd. (KCS)

APPLICANT

and

Minister of Nova Scotia Department of Fisheries and Aquaculture (DFA)

PARTY

and

Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO)

22 Fishermen of Liverpool Bay

Region of Queens Municipality (RQM)

Protect Liverpool Bay Association (PLBA)

INTERVENORS

BOOK OF AUTHORITIES ON BEHALF OF
KWILMU'KW MAW-KLUSUAQN

November 21, 2025

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TAB A

Supreme Court Judgments

Haida Nation v. British Columbia (Minister of Forests)

Collection	Supreme Court Judgments
Date	2004-11-18
Neutral citation	2004 SCC 73
Report	[2004] 3 SCR 511
Case number	29419
Judges	McLachlin, Beverley; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.
On appeal from	British Columbia
Subjects	State
Notes	SCC Case Information: 29419

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

Minister of Forests and Attorney General of British Columbia

on behalf of Her Majesty The Queen in Right of the Province

of British Columbia *Appellants*

v.

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

and on behalf of all members of the Haida Nation *Respondents*

and between

Weyerhaeuser Company Limited *Appellant*

v.

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

and

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

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

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

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

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

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

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

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982* , demands.

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

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

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

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

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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.

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

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

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

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

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

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

The judgment of the Court was delivered by

The Chief Justice —

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their

ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

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

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

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

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

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the

chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

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

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

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

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

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

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

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

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

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

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

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

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

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

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

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

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982* . Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

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

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

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

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

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

C. *When the Duty to Consult and Accommodate Arises*

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

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

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

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

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

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal

remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982* . This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

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

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*, *supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

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

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

infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

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

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

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

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

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

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

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

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

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

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

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

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with 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, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

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

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

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139,

at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

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

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

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

53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

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

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

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

F. *The Province's Duty*

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

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

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling*, *supra*. There is therefore no foundation to the Province's argument on this point.

G. *Administrative Review*

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

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

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

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

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

H. *Application to the Facts*

(1) Existence of the Duty

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

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

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. . . . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

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

(2) Scope of the Duty

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

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found

that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

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

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

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

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

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

(ii) *Seriousness of the Potential Impact*

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

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

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

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

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

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

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

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

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

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

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

III. Conclusion

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

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

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.

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.

TAB B

Supreme Court Judgments

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)

Collection	Supreme Court Judgments
Date	2005-11-24
Neutral citation	2005 SCC 69
Report	[2005] 3 SCR 388
Case number	30246
Judges	McLachlin, Beverley; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.; Abella, Rosalie Silberman; Charron, Louise
On appeal from	Federal Court of Appeal
Subjects	Aboriginal law Appeal State
Notes	SCC Case Information: 30246

SUPREME COURT OF CANADA

Citation: Mikisew Cree First Nation *v.* Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

Date: 20051124

Docket: 30246

Between:

Mikisew Cree First Nation

Appellant

and

Sheila Copps, Minister of Canadian Heritage,

and Thebacha Road Society

Respondents

- and -

Attorney General for Saskatchewan, Attorney General

of Alberta, Big Island Lake Cree Nation, Lesser Slave

Lake Indian Regional Council, Treaty 8 First Nations

of Alberta, Treaty 8 Tribal Association, Blueberry

River First Nations and Assembly of First Nations

Interveners

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

Reasons for Judgment:	Binnie J. (McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)
(paras. 1 to 70)	

Mikisew Cree First Nation *v.* Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

Mikisew Cree First Nation *Appellant*

v.

Sheila Copps, Minister of Canadian Heritage,

and Thebacha Road Society *Respondents*

and

Attorney General for Saskatchewan, Attorney General

of Alberta, Big Island Lake Cree Nation, Lesser Slave

Lake Indian Regional Council, Treaty 8 First Nations

of Alberta, Treaty 8 Tribal Association, Blueberry

River First Nations and Assembly of First Nations *Interveners*

Indexed as: Mikisew Cree First Nation *v.* Canada (Minister of Canadian Heritage)

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

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

on appeal from the federal court of appeal

Indians — Treaty rights — Crown's duty to consult — Crown exercising its treaty right and "taking up" surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples

Appeal — Role of intervener — New argument.

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba, Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [33-34] [59]

The Crown, while it has a treaty right to "take up" surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown's duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown's argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the "taking up" limitation, the content of the Crown's duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), [2004] 3 S.C.R. 550, 2004 SCC 74; **distinguished:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2. S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982 , s. 35 .

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, (2004), 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] F.C.J. No. 277 (QL), 2004 FCA 66, reversing a judgment of Hansen J. (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169, [2001] F.C.J. No. 1877 (QL), 2001 FCT 1426. Appeal allowed.

Jeffrey R. W. Rath and *Allisun Taylor Rana*, for the appellant.

Cheryl J. Tobias and *Mark R. Kindrachuk*, *Q.C.*, for the respondent Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey and *Angela J. Brown*, for the intervener the Attorney General of Alberta.

James D. Jodouin and *Gary L. Bainbridge*, for the intervener the Big Island Lake Cree Nation.

C. Allan Donovan and *Bram Rogachevsky*, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and *Dominique Nouvet*, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and *Jay Nelson*, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and *Gary A. Nelson*, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

1 Binnie J. — The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange

for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

(*Report of Commissioners for Treaty No. 8* (1899), at p. 12)

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the "Mikisew") until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act , 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it has been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living by hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the Treaty Land Entitlement Agreement, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. *The Winter Road Project*

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": (2001), 214 F.T.R. 48, 2001 FCT 1426, at para. 115.

B. *The Consultation Process*

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because ". . . an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, at para. 26).

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

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

III. Judicial History

A. *Federal Court, Trial Division* ((2001), 214 F.T.R. 48, 2001 FCT 1426)

19 Hansen J. held that the lands included in Wood Buffalo National Park were not "taken up" by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a "visible use" incompatible with the existing rights to hunt and trap (*R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sioui*, [1990] 1 S.C.R. 1025). The proposed winter road and its 200-metre "[no] firearm" corridor would adversely impact the Mikisew's treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In Hansen J.'s view, the Minister's decision to approve the road infringed the Mikisew's Treaty 8 rights and could not be justified under the *Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

The applicant complains that the mitigation measures attached to the Minister's decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew's rights. I agree. Even the realignment, apparently adopted in response to Mikisew's objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew's treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew's concerns.

Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. *Federal Court of Appeal* ([2004] 3 F.C.R. 436, 2004 FCA 66)

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was

more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), [2004] 3 S.C.R. 550, 2004 SCC 74.)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.

(C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)

As Cory J. explained in *Badger*, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble" (Mair, at p. 61).

A. *Interpretation of the Treaty*

28 The interpretation of the treaty "must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty . . . the completeness of any written record . . . and the interpretation of treaty terms once found to exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" the [First Nation] interests and those of the Crown. [Emphasis in original; citations omitted.]

See also *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, *per* McLachlin C.J. at paras. 22-24, and *per* LeBel J. at para. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of

lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it" (p. 5).

31 I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982* " (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

B. *The Process of Treaty Implementation*

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

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

. . .

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. *The Mikisew Legal Submission*

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in *Haida Nation* and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a "good practice" (para. 24).

D. *The Minister's Response*

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River*. Her counsel advances three broad propositions in support of the Minister's approval of the proposed winter road.

1. In "taking up" the 23 square kilometres for the winter road, the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to "take up" land is not an infringement of the Treaty but the performance of it.

2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a "taking up" occurs.

3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must be rejected.

(1) <u>In "taking up" Land for the Winter Road the Crown Was Doing No More Than It Was Entitled To Do Under the Treaty</u>

38 The majority judgment in the Federal Court of Appeal held that "[w]ith the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt" (para. 19).

39 The "Crown rights" argument was initially put forward in the Federal Court of Appeal by the Attorney General of Alberta as an intervener. The respondent Minister advised the Federal Court of Appeal that, while she did not dispute the argument, "[she] was simply not relying on it" (para. 3). As a preliminary objection, the Mikisew say that an intervener is not permitted "to

widen or add to the points in issue": *R. v. Morgentaler*, [1993] 1 S.C.R. 462, at p. 463. Therefore it was not open to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) *Preliminary Objection: Did the Attorney General of Alberta Overstep the Proper Role of an Intervener?*

40 This branch of the Mikisew argument is, with respect, misconceived. In their application for judicial review, the Mikisew argued that the Minister's approval of the winter road infringed Treaty 8. The infringement issue has been central to the proceedings. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 51-52.

41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could "further light" have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, that "[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta's legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to "risk an injustice".

(b) *The Content of Treaty 8*

42 The "hunting, trapping and fishing clause" of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that "even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation" (para. 37). The members of the First Nations, he continued, "would have understood that land had been 'required or taken up' when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt" (para. 53).

[T]he oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. [para. 58]

43 While *Badger* noted the "geographic limitation" to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which "from time to time" land would be "taken up" and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to "regulations as may from time to time be made by the government". The Alberta licensing scheme denied to "holders of treaty rights as modified by the [*Natural Resources Transfer Agreement, 1930*] the very means of exercising those rights" (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement* is not at issue in this case as the Mikisew reserve is vested in Her Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof".)

44 The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains" (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road

corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that's been what Parks Canada observed in the past with regards to other roads, correct?

A: It is documented that roads do impact. I would be foolish if I said they didn't.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be "whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so" (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National Park and out of 840,000 square

kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

48 What Rothstein J.A. actually said at para. 18 is as follows:

With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty

8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister's argument a strong advocacy of unilateral Crown action (a sort of "this is surrendered land and we can do with it what we like" approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister's acknowledgment at para. 41 of her factum that "[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians' exercise of hunting, fishing and trapping rights without consultation".

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties.

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River*. There is no need to repeat here what was said in those cases about the overarching objective of reconciliation rather than confrontation.

(d) *Honour of the Crown*

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province*

of Ontario v. Dominion of Canada (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown's Duty of Consultation and Accommodation?

53 The Crown's second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the

impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

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

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

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

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

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

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433, (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown's duty to consult. The answer turns on the particulars of that duty shaped by the circumstances here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

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

62 In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. . . .

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

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. . . . [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on

those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge's findings of fact make it clear that the Crown failed to demonstrate an "'intention of substantially addressing [Aboriginal] concerns' . . . through a meaningful process of consultation" (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

[i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting

could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

. . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was "fundamentally flawed" (para. 153).

69 In the result I would allow the appeal, quash the Minister's approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

V. Conclusion

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: Rath & Co., Priddis, Alberta.

Solicitor for the respondent Sheila Copps, Minister of Canadian Heritage: Attorney General of Canada, Edmonton.

Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Co., Saskatoon.

Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Donovan & Co., Vancouver.

Solicitors for the intervener the Treaty 8 First Nations of Alberta: Cook Roberts, Victoria.

Solicitors for the intervener the Treaty 8 Tribal Association: Woodward & Co., Victoria.

Solicitors for the intervener the Blueberry River First Nations: Thomas R. Berger, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

TAB C

Supreme Court Judgments

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council

Collection	Supreme Court Judgments
Date	2010-10-28
Neutral citation	2010 SCC 43
Report	[2010] 2 SCR 650
Case number	33132
Judges	McLachlin, Beverley; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.; Abella, Rosalie Silberman; Charron, Louise; Rothstein, Marshall; Cromwell, Thomas Albert
On appeal from	British Columbia
Subjects	Administrative law Constitutional law
Notes	SCC Case Information: 33132

SUPREME COURT OF CANADA

Citation: Rio Tinto Alcan Inc. *v.* Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650

Date: 20101028

Docket: 33132

Between:

Rio Tinto Alcan Inc. and

British Columbia Hydro and Power Authority

Appellants

and

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 Incorporated,

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

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

Reasons for Judgment:	McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)
(paras. 1 to 95)	

Rio Tinto Alcan Inc. *v.* Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650

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*

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.

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 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 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 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.

In this case, the Commission had the power to consider whether adequate consultation had taken place. The *Utilities Commission Act* empowered it to decide questions of law in the course of determining whether an EPA is in the public interest, which implied a power to decide constitutional issues properly before it. At the time, it also required the Commission to consider "any other factor that the commission considers relevant to the public interest", including the adequacy of consultation. This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over any "constitutional question", since the application for reconsideration does not fall within the narrow statutory definition of that term.

The Legislature did not delegate the Crown's duty to consult to the Commission. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to engage in consultation because consultation is a distinct constitutional process, not a question of law.

The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, and reasonably concluded that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. In this case, the Crown had knowledge of a potential Aboriginal claim or right and BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. However, the 2007 EPA would have neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the First Nations. The failure to consult on the initial project was an underlying infringement, and was not sufficient to trigger a duty to consult. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives will nevertheless be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them.

Cases Cited

Followed: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [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

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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 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.

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.

[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 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 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 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] 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 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).

[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 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": *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 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:

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 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 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 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 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 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.

(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, 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 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 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.

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 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 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 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 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 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, 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 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.

[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.

[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 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 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 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.

[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 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 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.

Solicitors for the appellant Rio Tinto Alcan Inc.: Bull, Housser & Tupper, Vancouver.

Solicitors for the appellant the British Columbia Hydro and Power Authority: Lawson Lundell, Vancouver.

Solicitors for the respondent: Ratcliff & Company, North Vancouver.

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

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the British Columbia Utilities Commission: Boughton Law Corporation, Vancouver.

Solicitors for the interveners the Mikisew Cree First Nation and the Lakes Division of the Secwepemc Nation: Janes Freedman Kyle Law Corporation, Victoria.

Solicitors for the intervener the Moosomin First Nation: Rath & Company, Priddis, Alberta.

Solicitor for the intervener Nunavut Tunngavik Inc.: Richard Spaulding, Ottawa.

Solicitors for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band: Mandell Pinder, Vancouver.

Solicitors for the intervener the Assembly of First 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.

TAB D

Court of Appeal

Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)

Court	Court of Appeal
Date	2019-08-09
Citation	2019 NSCA 66
Docket	CA 480920
Judge/Registrar/Adjudicator	Farrar, David P.S. (Honourable Justice) (CA); Fichaud, Joel E. (Honourable Justice)
Document Type	Decision

Nova Scotia Court of Appeal

Citation: *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board),* 2019 NSCA 66

Date: 20190809

Docket: CA 480920

Registry: Halifax

Between:

The Attorney General of Nova Scotia representing

Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant

v.

The Nova Scotia Utilities and Review Board and Nova Scotia Power Inc.

Respondents

Kwilmu'kw Maw-klusuaqn Negotiation Office, Acadia First Nation,

and Sipekne'katik First Nation

Intervenors

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: May 17, 2019, in Halifax, Nova Scotia

Subject: Administrative tribunal's authority to consider adequacy of the Crown's consultation with aboriginal groups under s. 35(1) of *Constitution Act, 1982*

Summary: Nova Scotia Power decided to refurbish its obsolete Tusket Main Dam. The project would adversely affect the archeological and fishing interests of nearby Mi'kmaq communities. Section 35 of the *Public Utilities Act* says "[n]o public utility shall proceed with any new construction, improvements or betterments", costing over $250,000, "without first securing the approval thereof by the [Nova Scotia Utility and Review] Board". After consulting with Mi'kmaq representatives, Nova Scotia Power applied, under s. 35, for the Board's approval.

According to s. 35(1) of the *Constitution Act, 1982*, as interpreted by the courts, before Aboriginal peoples suffer an adverse effect to their potential rights caused by Crown conduct, they are entitled to consultation with the Crown and, when appropriate, to accommodation. The Supreme Court of Canada has directed when an administrative tribunal, before ruling on an application to approve a project, may determine whether prior consultations have been adequate. The Utility and Review Board determined that, in this case, prior consultations between the Crown and the Mi'kmaq had not been adequate.

The Board adjourned Nova Scotia Power's application for three months to allow an opportunity for further consultation.

The Province appealed to the Court of Appeal.

Issues: Did the Board have the jurisdiction to consider whether the prior consultations between the Crown and Mi'kmaq representatives had been adequate under s. 35(1) of the *Constitution Act, 1982*?

Result: The Court of Appeal dismissed the appeal.

According to the Supreme Court of Canada's rulings, the test has three elements: (1) the Crown must have actual or constructive knowledge of a potential Aboriginal right or claim, and (2) there must be contemplated Crown conduct (3) that would adversely affect the Aboriginal right or claim.

In this case, the three elements exist. The Crown had actual or constructive knowledge. According to the Supreme Court's directives on the point, the Board's process was itself "Crown conduct". The Board's

approval of Nova Scotia Power's application would cause an adverse effect. The Board had jurisdiction to consider the adequacy of prior Crown consultation with the Mi'kmaq representatives.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 51 pages.

Nova Scotia Court of Appeal

Citation: *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66

Date: 20190809

Docket: CA 480920

Registry: Halifax

Between:

The Attorney General of Nova Scotia representing

Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant

and

The Nova Scotia Utility and Review Board and Nova Scotia Power Inc.

Respondents

and

Kwilmu'kw Maw-klusuaqn Negotiation Office, Acadia First Nation,

and Sipekne'katik First Nation

Intervenors

Judges:	Farrar, Fichaud and Bryson, JJ.A.
Appeal Heard:	May 17, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud J.A., Farrar and Bryson JJ.A concurring
Counsel:	Sean Foreman, Q.C., and Myles Thompson, for the Appellant

Bruce Outhouse, Q.C., for the Respondent the Nova Scotia Utility and Review Board

Colin J. Clarke, Q.C. and Geoff Breen, for the Respondent Nova Scotia Power Inc.

Jason T. Cooke and Victor J. Ryan, for the Intervenors the Kwilmu'kw Maw-klusuaqn Negotiation Office and the Acadia First Nation

Raymond F. Larkin, Q.C. and Balraj Dosanjh, for the Intervenor the Sipekne'katik First Nation

Reasons for judgment:

[1] Nova Scotia Power Inc. is a privately-owned generator and distributor of electrical power. It supplies most of the electricity consumed in the Province and is a public utility under the *Public Utilities Act*. Section 35 of that *Act* says "[n]o public utility shall proceed with any new construction, improvements or betterments", costing over $250,000, "without first securing the approval thereof by the [Nova Scotia Utility and Review] Board".

[2] Nova Scotia Power decided to refurbish its obsolete Tusket Main Dam. The Dam generates electrical power from the Tusket waterway. The project could adversely affect the archeological and fishing interests of nearby Mi'kmaq communities. After consulting with Mi'kmaq representatives, Nova Scotia Power applied, under s. 35, for the Board's approval of its Tusket Dam project.

[3] According to s. 35(1) of the *Constitution Act, 1982*, as interpreted by the courts, before aboriginal peoples suffer an adverse effect to their known and credibly claimed rights caused by Crown conduct, they are entitled to consultation with the Crown and, in appropriate circumstances, to accommodation. At times, the project that would have an adverse effect is the subject of a private proponent's application for approval by an administrative tribunal. The Supreme Court of Canada has directed when such a tribunal must determine whether any prior consultations have satisfied the Crown's constitutional responsibility under s. 35(1).

[4] In this case, after inviting interventions and receiving submissions from the Province, Nova Scotia Power Inc. and Mi'kmaq groups, the Utility and Review Board determined that prior consultations with the Mi'kmaq had not satisfied the Crown's constitutional responsibility. The Board adjourned Nova Scotia Power's Tusket Dam application for three months to allow an opportunity for further consultation.

[5] The Province, supported by Nova Scotia Power, appeals. They submit that the Board had no jurisdiction to consider the adequacy of prior consultations between the Crown and the

Mi'kmaq. The arguments address various elements of the test in the Supreme Court's decisions. Central to the submissions is whether the requirement that NSPI obtain other regulatory permits, in addition to the Board's approval under s. 35, affects the Board's jurisdiction to assess the adequacy of prior Crown consultation.

Background

[6] Nova Scotia Power Incorporated ("NSPI") is the Province's largest generator and distributor of electricity. It is wholly owned by Emera Inc., a publicly traded corporation. NSPI is a public utility under the *Public Utilities Act*, R.S.N.S. 1989, c. 380.

[7] NSPI owns and operates the hydro system along the Tusket River in Yarmouth County. The system generates about 12,000 megawatts of electric power annually. The Tusket facilities were built in 1928. In 2012, after a safety review, NSPI determined that its main dam at Tusket Falls failed the current safety requirements in the guidelines of the Canadian Dam Association.

[8] NSPI assessed its options and concluded that the most economical course was to refurbish the main dam. Decommissioning and reconstruction would be more expensive. The refurbishment would replace the four existing gates with eight vertical gates, raise the dam embankment and canal dykes and replace the existing Hurlburt Falls highway bridge with a longer bridge at a higher elevation to reduce the current bridge's overflow restriction ("Project").

[9] The area surrounding the Tusket hydro system has long been occupied by the Nova Scotia Mi'kmaq and has archeological significance to them. The Project may impact the Mi'kmaq's gaspereau fishery in the Tusket River.

[10] Consequently, NSPI's planning for the Project involved engagement with the Mi'kmaq. NSPI first identified the Project in its 2016 Annual Capital Expenditure Plan but deferred seeking capital cost approval at that time, pending further design work and discussions with the Mi'kmaq representatives.

[11] The Mi'kmaq parties to this litigation are:

- The Intervenor, Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMKNO") is an incorporated society that, on behalf of eleven of the twelve member bands of the Assembly of Nova Scotia Mi'kmaq Chiefs, leads negotiations with the Governments of Canada and Nova Scotia further to the Crown's constitutional duty to consult.

- The Intervenor Acadia First Nation is a Mi'kmaw First Nation whose lands include reserves in the vicinity of the Tusket Dam.

- The Intervenor Sipekne'katik First Nation is a Mi'kmaw First Nation whose lands include reserves and holdings in several locations.

[12] In 2015, NSPI opened consultations with the KMKNO and the Acadia First Nation about their concerns related to the Project. In February 2017, they established a working group.

[13] The Project requires that NSPI obtain several government approvals. Apart from the approval of the Nova Scotia Utility and Review Board, that I will come to shortly, these are:

- The Nova Scotia Department of Communities, Culture and Heritage issued a permit, under the *Special Places Protection Act*, R.S.N.S. 1989, c. 438, for NSPI's consultant to undertake an archeological impact assessment of the area surrounding the Tusket Dam.

- On May 15, 2017, the Nova Scotia Department of the Environment ("DOE") issued a permit, further to s. 5A(1)(c) of the *Activities Designation Regulations* under the *Environment Act*, S.N.S. 1994-95, c. 1, for alteration of the watercourse that is associated with the Project.

- On July 31, 2017, the federal Department of Fisheries and Oceans ("DFO") issued an authorization, under s. 35(2)(b) of the *Fisheries Act*, R.S.C. 1985, c. F-14, to allow the harming of fish involved with the construction of the new dam.

- The Tusket Project involves refurbishment to the Hurlburt Falls Bridge, located 120 feet downstream from the main dam. The Bridge is owned by the Province, meaning NSPI will need the assent of Nova Scotia's Department of Transportation and Infrastructure Renewal.

[14] The Province treated NSPI's application for permission to alter the watercourse, filed with the DOE on November 29, 2016, as triggering the provincial Crown's duty to consult the Mi'kmaq under s. 35(1) of the *Constitution Act, 1982*. On December 22, 2016, the DOE wrote to the KMKNO and to the Sipekne'katik First Nation giving notice of NSPI's application, providing information about the Project and initiating consultation. The DOE sent similar letters to Nova Scotia's Office of Aboriginal Affairs, the provincial Department of Transportation and Infrastructure Renewal and the DFO. The DOE's letter to the KMKNO said:

I am writing to bring to your attention the proposed Tusket River Main Dam Refurbishment project and the application submitted by Nova Scotia Power Inc. to the Nova Scotia Department of Environment (NSE) for a watercourse alteration approval.

The purpose of this letter is to initiate consultation on this matter with the Assembly of Nova Scotia Mi'kmaq Chiefs under the Mi'kmaq-Nova Scotia-Canada Consultation Process, and provide information about:

1.Description of the project;

2.Provincial approval requirements;

3.Consultation with the Mi'kmaq of Nova Scotia

...

NSE will lead aboriginal consultation at the provincial level and coordinate the process with any departments (provincial or federal) that will be involved. ...

... Should you be interested, we would like to hear from the Assembly about any concerns you may have, including the details of any asserted Aboriginal or Treaty rights that could be adversely impacted by this project. ...

[15] As a regulated public utility, NSPI is subject to s. 35 of the *Public Utilities Act*:

Approval of improvement over $250,000

35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

The Board is established under the *Utility and Review Board Act*, S.N.S. 1992, c. 11. Section 4(1)(a) of that *Act* confirms that the Board exercises the powers assigned by the *Public Utilities Act*.

[16] On July 5, 2017, under s. 35, NSPI applied to the Board for approval of a capital work order totaling $18,157,609 to carry out the Project ("NSPI Application"). The NSPI Application included information that explained NSPI's preference for refurbishment over decommissioning and new construction, and the Project's methodology and costing. The NSPI Application discussed in detail and costed NSPI's attempts to accommodate the Mi'kmaq concerns about archeological preservation and the Mi'kmaw fishery. Later I will discuss this topic in more detail (paras. 77-84).

[17] The Board's panel for the NSPI Application comprised Steven M. Murphy, MBA, P.Eng., as chair, Roberta J. Clarke, Q.C., and Richard J. Melanson, LL.B.

[18] The Board invited interventions and retained Midgard Consulting Inc. as an independent expert to advise the Board. Several parties intervened. Following the Board's procedures, the Board and Midgard submitted information requests to NSPI requesting clarification of particulars in NSPI's Application. NSPI responded.

[19] On July 26, 2017, the Supreme Court of Canada issued decisions in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 S.C.R. 1069 ("*Clyde River*") and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*, [2017] 1 S.C.R. 1099 ("*Chippewas of the Thames*"). The rulings discussed the role of an administrative tribunal that assesses a project for which s. 35(1) of the *Constitution Act, 1982* requires consultation between the Crown and First Nations. I will summarize the Supreme Court's reasons later (paras. 50-60).

[20] On September 29, 2017, the Board advised the parties that, given the Supreme Court's rulings, the Board would consider the issue of the Crown's consultation with the Mi'kmaq respecting the Project. The Board's letters of September 29 invited the Province (through the Office of Aboriginal Affairs), the Acadia First Nation and the KMKNO to participate as intervenors. The letters said:

As the Board understands these decisions, the Board must consider whether adequate Crown consultation with First Nations has occurred, if the concern is raised before it. ...

The record filed with the Board by NSPI, in the Tusket Dam Refurbishment project, describes the presence of significant Aboriginal archeological sites in the area surrounding where the work is to be undertaken, including sites which are currently submerged. NSPI describes certain mitigation

measures relating to the protection of these sites. Other mitigation measures are set out in relation to fish ladders and the traditional gaspereau fishing season. ...

[21] The Province and the KMKNO (on behalf of itself, the Assembly of Nova Scotia Mi'kmaq Chiefs and the Acadia First Nation) filed with the Board Notices of Intention to Participate and documentary evidence. The Province's documents included its "Aboriginal Consultation Record", prepared by the provincial Office of Aboriginal Affairs.

[22] The Board notified the parties that it would deal with the issue of consultation by written submissions. The Board received final submissions on May 14, 2018. The Province submitted that the Board had no jurisdiction to consider the sufficiency of prior consultations and, in any case, sufficient consultations had occurred.

[23] The Board's Decision under appeal (2018 NSUARB 154), dated August 7, 2018, described the submissions, the process and the Board's conclusions:

[18] The Acadia First Nation and the ANSMC [Assembly of Nova Scotia Mi'kmaq Chiefs] submitted that the Crown had not fulfilled its duty to consult in this case. The Province disagreed. No other party took a position on the issue.

[19] As this is the first time the Board has directly addressed its jurisdiction in relation to duty to consult issues, and given the nature of the evidence and the parties' arguments, the Board has determined this important matter should be addressed in a Preliminary Decision.

II ISSUES

[20] The following issues will be addressed in this Preliminary Decision:

1. Does the Board have the jurisdiction to consider whether the Crown had a duty to consult First Nations in this matter; and,

2. Did the Crown discharge its duty to consult with the Mi'kmaq of Nova Scotia?

[21] The Board finds it has the jurisdiction, and corresponding obligation, to address whether there was a Crown duty to consult First Nations in relation to the Project, and whether the duty has been fulfilled. The Board has determined that further Crown consultation is required. These findings will be explained in the reasons which follow.

[24] To summarize the Board's reasons:

- The Board noted the Project's potential adverse effect:

[30] The Tusket Hydro System is located in an area of known archeological significance in relation to the Mi'kmaq of Nova Scotia. As well, there is an existing First Nations gaspereau fishery on the Tusket River.

[31] ... construction activities, including, in particular, the proposed dewatering of Lake Vaughan, will have an impact on known and potential Mi'kmaw archeological sites, and the Aboriginal fishery ... .

- The Province had acknowledged that NSPI's application for approval to alter the watercourse, filed with the DOE on November 29, 2016, engaged the Province's consultation process (above, para. 14). The Board said:

[111] There is therefore no dispute that a duty to consult arose in relation to the Project. No party to the proceeding has asserted otherwise.

- The Board (para. 20) identified two issues, (1) whether the Board had jurisdiction to consider the Crown's duty to consult and, if so, (2) whether the Crown discharged its duty.

- As to jurisdiction, the Board (paras. 78, 84 and 102) noted that s. 22 of the *Utility and Review Board Act* empowered the Board to determine questions of law and no statute withdrew authority for the Board to consider constitutional issues. The Board held that the test in the Supreme Court's decisions was satisfied, meaning the Board had the jurisdiction, and obligation, to consider the adequacy of prior consultations.

- The Board assessed the evidence of the consultations and determined that consultation to date had been inadequate (paras. 112-165).

- The Board determined that the appropriate remedy was a three-month adjournment of NSPI's Application, to allow further consultation (paras. 166-176).

[25] The Board's Order of August 20, 2018 gave the parties three months to bring consultations to a head and report to the Board:

AND IT IS ORDERED that this proceeding is adjourned pursuant to s. 20 of the *URB Act* to provide the parties with a further opportunity to complete consultations;

AND IT IS FURTHER ORDERED that the Board retains jurisdiction in this matter and that the parties are directed to report back to the Board within three months of the date of its Decision, to advise of the status of the consultation;

AND IT IS FURTHER ORDERED that the Application will be held in abeyance until the results of the consultation are known.

[26] On October 2, 2018, the Province filed a Notice of Appeal to this Court.

[27] The Province's factum, filed in January 2019, informed the Court:

54. ... the parties have completed a process of further consultation subsequent to the filing and setting down of this appeal and have reported back to the Board by way of written reports filed November 16, 2018.

55. By letter dated November 22, 2018, the Board has accepted the consultation update reports, and has confirmed that it will proceed to finalize its decision on the merits of NSPI's capital cost application, based on the evidence filed on the Record to date.

Issue

[28] The Province appealed under s. 30(1) of the *Utility and Review Board Act*. Section 30(1) permits an appeal from the Board's order "upon any question as to its jurisdiction or upon any question of law".

[29] The Province's factum (paras. 50-52) said the Province would not pursue one ground of appeal and consolidated its remaining grounds into one question:

Does the Board have the jurisdiction (and therefore a constitutional obligation) to consider and assess prior Crown consultation when making a capital cost approval decision pursuant to s. 35 of the *Public Utilities Act*?

Standard of Review

[30] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* [2010] 2 S.C.R. 650 ("*Carrier Sekani*"), McLachlin C.J.C. for the Court, discussed the standards of review for issues of consultation with First Nations:

[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* [*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511], 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 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: *Khosa v. Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.). 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.

...

[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. ...

...

[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 statues, 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 (S.C.C.).

...

[85] What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held that there could be none. **The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.**

...

[92] ... On this evidence, **it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect** the claims and rights 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.**

[emphasis added]

[31] In *Haida Nation*, before the passage quoted in *Carrier Sekani*, McLachlin C.J.C. for the Court said:

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

[emphasis added]

To similar effect: *Mi'kmaq of P.E.I. v. Province of P.E.I.*, 2018 PESC 20, paras. 60-63; *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, para. 34.

[32] Based on the authorities, the consultation issues are governed by the following standards of review:

- The Province's Notice of Appeal defines each of its four grounds as whether "the Board erred in law". The Province's factum (para. 51) states that its consolidated single ground is "one fundamental legal issue". Its factum concludes the discussion of standard of review with the submission:

70. It makes sense and is legally consistent, and the jurisprudence appears clear, that determination of when a duty to consult is triggered and the jurisdiction to consider consultation – whether on judicial review or statutory appeal – is a question of constitutional law subject to review on a standard of correctness.

The Province characterizes its submissions, on triggering and jurisdiction, as a pure or extractable question of constitutional law. As noted in *Carrier Sekani*, a legal question on a tribunal's jurisdiction to apply s. 35(1) of the *Constitution Act, 1982* is reviewed for correctness. See also *Beckman v. Little Salmon/Carmacks First Nation,* [2010] 3 S.C.R. 103, at para. 48, per Binnie J. for the majority. The correctness standard would apply whether the issue is termed "truly jurisdictional" or "constitutional" or of "central importance to the legal system" under *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras. 58-60.

- Elements of the test as to whether the Crown's duty to consult has been triggered may involve an issue of fact or of mixed fact and law with no extractable legal issue. An example is whether the Crown conduct would "adversely affect" the claimed aboriginal right. In *Carrier Sekani*, paras. 78, 85, 92-93, the Court reviewed that matter for reasonableness. See also *Dunsmuir*, para. 51.

- The court is to take account of legislative directions on the permitted grounds of appeal or review: *Carrier Sekani*, paras. 65, 72 and 78; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, paras. 18, 36, 41 and 51, per Binnie J. for the majority; *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, paras. 41-42. Under s. 30(1) of the *Utility and Review Board Act*, a pure issue of fact is not appealable to this Court. However, a finding of fact for which there is *no* evidence may be arbitrary and therefore appealable as an error of law: *Nova Scotia (Attorney*

General) v. S&D Smith Central Supplies Limited, 2019 NSCA 22, at paras. 41-47, and authorities there cited.

- The Decision under appeal included the Board's interpretation of provisions of the *Public Utilities Act*, one of the Board's home statutes. The Board's interpretation of its home legislation, undertaken discretely from the Board's interpretation of the constitutional principles, is reviewed for reasonableness. This topic was extensively reviewed in *Nova Scotia v. S&D Smith*, paras. 51-66, with authorities there cited.

- The Supreme Court has held that the adequacy of consultation attracts a reasonableness standard: *Haida Nation*, para. 62; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 S.C.R. 386, paras. 9, 77, 82, 8, 15, per McLachlin C.J.C. and Rowe J. for the majority. The Province's remaining grounds of appeal do not address whether the Board erred in its view that, in this case, the Crown's prior consultation was insufficient. It is unnecessary to consider the application of a standard of review to that issue.

The Legal Principles

[33] The *Constitution Act, 1982* says:

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

[34] Section 35(1) affirms that, before suffering an adverse effect to their known and credibly claimed rights caused by Crown conduct, Aboriginal peoples are entitled to consultation with the Crown and, in appropriate circumstances, to accommodation. The conditions and scope of the entitlement are governed by principles developed in a series of rulings by the Supreme Court of Canada.

[35] ***Haida Nation* (2004):** In *Haida Nation*, *supra*, McLachlin C.J.C. explained the rationale for consultation and set out the test to trigger the Crown's duty.

[36] The duty to consult and, if appropriate, accommodate "is grounded in the honour of the Crown", a term which "is not a mere incantation, but rather a core precept that finds its application in concrete practices": (*Haida Nation*, para. 16). The Chief Justice summarized the rationale:

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 the process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.**

[bolding added]

[37] This approach means the duty applies prospectively to potential Aboriginal rights before those rights have been finally determined:

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? ...

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. **It must respect these potential, but yet unproven, interests.** The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. ...

...

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. ...

[bolding added]

As the approach is prospective, the tribunal or reviewing court that assesses the adequacy of consultation does not determine the validity of the claimed aboriginal right. The merits of the underlying right await the appropriate trial process: *Ktunaxa Nation*, *supra*, paras. 84-85.

[38] In *Haida Nation*, the Chief Justice set out the test that triggers the duty to consult:

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that **the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it** ... .

36 ... As I stated (dissenting) in *Marshall* [*R. v. Marshall*, [1999] 3 S.C.R. 456], at para. 11, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. ...

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. **Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.** The content of the duty, however, varies with the circumstances, as discussed more fully below. A

dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. ...

[bolding added]

[39] The duty's content responds to the circumstances:

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

...

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* [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010], 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. [citations omitted] Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 ... At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ...

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. ...

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. ... 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. ...

[40] The Crown's duty may include an accommodation that is based on balance and compromise:

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. ...

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of the infringement, pending final resolution of the underlying claim. ...

...

50 ... **Balance and compromise are inherent in the notion of reconciliation.** Where accommodation is required in making decisions that 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.

[bolding added]

[41] NSPI, a private corporation, has consulted with the KMKNO and the Acadia First Nation. How do consultations between the aboriginal group and a private party affect the Crown's duty? In *Haida Nation*, the Chief Justice said:

53 ... 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.... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated. [bolding added]

[42] ***Carrier Sekani* (2010):** Six years later, in *Carrier Sekani*, *supra*, the Supreme Court refined *Haida Nation*'s directives.

[43] In the 1950s, without consultation, the Government of British Columbia authorized the construction of a dam and reservoir that affected First Nations' claims to their ancestral homeland and fishing rights. The sale of energy from the facilities was governed by Energy Purchase Agreements that were subject to approval by the British Columbia Utilities Commission. In 2007, the Government of British Columbia sought the Commission's approval of such an Agreement. At issue was the adequacy of the Crown's consultation with the Aboriginal groups. The Commission accepted that it had the jurisdiction to consider the adequacy of consultation. The Commission then found that the 2007 Energy Purchase Agreement did not adversely affect any Aboriginal interest. So the duty to consult was not triggered. The Commission approved the

Agreement. The Commission's ruling was overturned by the British Columbia Court of Appeal but reinstated by the Supreme Court of Canada.

[44] McLachlin C.J.C., for the Court, explained why the duty to consult applies before the final determination of the Aboriginal right or claim:

[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 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] ... 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 ... . **The duty is *prospective*,** fastening on rights yet to be proven.

[Supreme Court's italics, bolding added]

[45] The Chief Justice enumerated and explained *Haida Nation*'s test as to when the Crown's duty to consult arises:

[31] **... 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.** ...

[bolding added]

[46] As to the first element:

[40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted [citation omitted]. 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. ...

[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. [citations omitted].

[47] Then the second element, a key to this appeal:

[42] Second, for a duty to consult to arise, **there must be Crown conduct or a Crown decision** that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[43] This raises the question of what government action engages the duty to consult. It has been held that such action is **not confined to government exercise of statutory powers:** [citations omitted]. **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 ... .

[bolding added]

[48] Lastly, the third element:

[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. ... 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 the Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources" [citation omitted]. 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. ...

[49] The question is whether there is a claim or right that potentially may be 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. ...

...

[53] ... *Haida Nation* ... 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.

[Supreme Court's italics, bolding added]

[49] The Chief Justice then considered the role of an administrative tribunal – *i.e.* the British Columbia Utilities Commission – in the consultation process. A similar issue features in the appeal before this Court. McLachlin C.J.C. said:

B. *The Role of Tribunals in Consultation*

[55] The duty on a tribunal to consider consultation and the scope of the inquiry depends on the mandate conferred by the legislation that creates the tribunal. ...

[56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. ...

[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* [*R. v. Conway*, [2010] 1 S.C.R. 765]. 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] ... 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. ...

[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. … 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. …

[61] A tribunal that has the power to consider 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 statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

…

[68] … 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)*, 2002 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)

…

[73] For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place. …

…

[75] … 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.

[76] The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. …

[bolding added]

[50] ***Clyde River* (2017):** In *Clyde River*, *supra*, the National Energy Board was asked to authorize offshore seismic testing for oil and gas in Nunavut. The testing potentially could affect Inuit treaty rights. The Inuit in Clyde River alleged prior consultation with the Crown had been inadequate. The NEB determined prior consultation had sufficed and the testing was unlikely to cause a significant adverse effect. The NEB authorized the project. The Federal Court of Appeal dismissed the appeal. The Supreme Court of Canada allowed the further appeal and quashed the NEB's decision.

[51] Justices Karakatsanis and Brown, for the Court, (para. 25) reiterated the *Haida Nation*/*Carrier Sekani* test that the duty to consult is triggered when (1) the Crown has actual or constructive knowledge of a potential Aboriginal right, and there is (2) Crown conduct that (3) would adversely affect the Aboriginal right. Significant to the present appeal is their discussion of what constitutes "Crown conduct".

[52] The applicant to the NEB was a private party. The Government was not a formal party. At issue was whether the NEB was the "Crown". If so, the NEB's approval adversely affected a known potential Aboriginal right, which would satisfy the *Haida*/*Carrier Sekani* three-step test for consultation. Consequently, the NEB would have jurisdiction – and would be constitutionally obligated – to consider whether adequate consultations had occurred.

[53] Justices Karakatsanis and Brown held that the NEB was the "Crown" for the purposes of the test. They began with the Crown's responsibility to address the constitutional imperative:

[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. …

[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. … 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.

[bolding added]

[54] To satisfy the Constitution's reconciliatory objective, Justices Karakatsanis and Brown interpreted "Crown conduct" broadly as including the NEB:

[25] … 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 reserves. **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 short, the Federal Court of Appeal in both cases [*Clyde River* and *Chippewas*] 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. …

[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 … .

[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 [citation omitted]. **As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*** [*Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7], 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 the *COGOA* **to make final decisions respecting such testing** as was proposed here, clearly constitutes Crown action. [bolding added]

[55] Justices Karakatsanis and Brown then discussed what is expected of a tribunal that shoulders the authority to consider the adequacy of the Crown's consultation:

D. *What is the NEB's Role in Considering Crown Consultation Before Approval?*

…

[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 the 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).

[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.

[bolding added]

[56] Justices Karakatsanis and Brown held that this conclusion follows notwithstanding that the Crown was not a party to the proceeding before the tribunal:

[38] ... 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 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.).

[Supreme Court's italics, bolding added]

[57] ***Chippewas of the Thames* (2017):** In *Chippewas of the Thames*, *supra*, the National Energy Board was asked to approve a modification of a pipeline that crossed a First Nation's traditional

territory. The NEB considered whether there had been adequate consultation, held that the project's effect on Aboriginal interests would be minimal and approved the project with accommodating conditions.

[58] Justices Karakatsanis and Brown, for the Court, applied their ruling in *Clyde River* that a decision by a tribunal such as the NEB would be "Crown conduct" which triggers the Crown's 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 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** [citing *Carrier Sekani*, para. 31 and *Clyde River*, para. 25].

[bolding added]

[59] The Federal Court of Appeal had concluded that the absence of the Crown from the NEB's proceeding meant the NEB's decision would not be Crown conduct. Justices Karakatsanis and Brown rejected that view:

[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).

...

[35] ... 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. ... In dissent, Rennie J.A. 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). [Supreme Court's italics]

[36] We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. **If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate.** The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

[37] **As the final decision maker on certain projects**, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).

...

[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.** ...

...

[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). ...

[bolding added]

[60] Justices Karakatsanis and Brown reiterated that "balance and compromise" are at the heart of the process:

[59] ... 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).

[bolding added]

The Test

[61] *Carrier Sekani*, para. 31, says the test has three elements: (1) the Crown's actual or constructive knowledge of a potential Aboriginal right or claim, and (2) contemplated Crown conduct (3) that would adversely affect the Aboriginal right or claim.

First Element – Crown Knowledge

[62] There is no need to tarry with the first element. The Provincial DOE's letter of December 22, 2016 acknowledged that the NSPI's Tusket Project triggered the Crown's duty to consult (above, para. 14).

Second Element – Crown Conduct

[63] Was the Board's proceeding "Crown conduct"?

[64] In *Carrier Sekani*, paras. 55-58, the Chief Justice said the tribunal may have the authority to conduct consultations as a protagonist, or to determine whether prior consultations have been adequate, or no authority on the matter. In the first or second instances, the tribunal's proceeding qualifies as Crown conduct.

[65] Here, the legislation did not authorize the Utility and Review Board to conduct direct consultation with First Nations. Neither did the Board assert such authority (Board's Decision, paras. 75-76).

[66] This leaves the question – did the Board have the authority to determine whether prior consultations had satisfied the standard of the Crown's duty to consult? The analysis of that issue, according to the Supreme Court, should follow the following directions:

- the Board must have the authority to determine issues of law;
- the legislation must not show a "clear demonstration that the legislature intended to exclude" the Board's authority to determine the constitutional issue of Aboriginal consultation;
- the potential adverse effect to the Aboriginal interest must be "relevant to the decision at hand" by the Board;
- the Board must be a "final decision maker" on the matter to which the adverse effect is relevant;
- the Board's relief must agree with "the remedial powers expressly or impliedly conferred upon it by statute".

[67] I will take these points in turn.

[68] **Power to decide issues of law:** The starting point is *Carrier Sekani*:

[57] Alternatively, the legislature may choose to confine the 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.

...

[69] … 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. …

[bolding added]

[69] The approach stated in para. 69 had been articulated in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, para. 39, and reiterated in *R. v. Conway*, [2010] 1 S.C.R. 765, para. 77.

[70] In *Clyde River*, Justices Karakatsanis and Brown cited *Carrier Sekani*'s para. 69, then elaborated:

[36] … 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* … .

[bolding added]

[71] In *Chippewas of the Thames*, paras. 29-37, the Court confirmed its approach from *Clyde River*.

[72] Here, the *Utility and Review Board Act* assigns to the Board the exclusive jurisdiction over matters that are conferred on the Board, and the power "to determine all questions of law and of fact", to make binding findings of fact and to issue orders that are enforceable as court orders:

Jurisdiction

22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.

(2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and fact.

…

Order

24 In any matter before the Board, it shall grant an order, either as specified in the application or notice of appeal or as the Board decides.

…

Effect of finding

26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.

...

Enforcement of order

29 (1) An order made by the Board may be made a rule or order of the Supreme Court, and shall thereupon be enforced in like manner as a rule, order. decree or judgment of that Court.

...

(4) The Clerk shall forward the certified copy so endorsed to a prothonotary of the Supreme Court, who shall, upon receipt thereof, enter the same as of record, and it thereupon becomes and is an order of the Supreme Court and is enforceable as a rule, order, decree or judgment of the Court.

[73] **Clear demonstration of intent to exclude:** Does legislation clearly exclude the Board's authority to consider the constitutional issue of Aboriginal consultation?

[74] In *Carrier Sekani*, the Commission's enabling statute said: "the tribunal does not have jurisdiction over constitutional questions" (see para. 28 of the Court's reasons). The Supreme Court narrowly interpreted the restriction and concluded that the statute's words "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" (para. 72). The Court held the Commission was empowered to determine whether Crown consultation had been adequate.

[75] Here, there is no legislated restriction to be narrowly interpreted. Nothing in the *Utility and Review Board Act*, the *Public Utilities Act* or any other statute demonstrates an intention to exclude the Board's authority to determine a constitutional issue, such as compliance with s. 35(1) of the *Constitution Act, 1982*, that pertains to a matter before the Board.

[76] The Board's unrestricted power to decide issues of law satisfies the Supreme Court's first and second directions.

[77] **Relevance to the decision at hand:** Then there is the third direction. In *Carrier Sekani*, McLachlin C.J.C. said:

[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**.

[bolding added]

[78] In this case, the potential adverse impact to Mi'kmaq interests clearly related to the issues before the Board.

[79] The NSPI Application costed and proposed to the Board methods to accommodate the potential adverse impacts to the Mi'kmaq archeology and fishery. The NSPI Application included:

- The Introduction (page 8) said that Section 6 of the Application discusses the steps NSPI will take to resolve First Nations concerns.

- The discussion of the Dam Safety Management Program (page 14) noted that NSPI had "prepared a site specific design to mitigate risk and First Nations impacts", and "[w]ith this information now available, NS Power is able to proceed with a fully costed and well-designed project plan".

- The Proposed Scope of the Project (page 19) said "[t]he construction footprint of the proposed scope also avoids disturbance of previously delineated archeological sites, keeping Mi'kmaq cultural resources intact and avoiding the need for archeological mitigation".

- The Breakdown of Spending as of April 30, 2017 (page 22), noted Archeology costs "to develop mitigation strategies acceptable to the Mi'kmaq of Nova Scotia and to the customer".

- The section on Variance to 2017 ACE Plan Submission (page 30) explained the increase in the Project's proposed capital cost from an initial $9,940,664 to the revised $18,157,609. One of the reasons was "the level of First Nations engagement required to appropriately address any First Nations concerns and successfully execute the Project became better understood".

- The section on First Nations and Archeology Considerations (page 34) said that one reason for refurbishment, instead of decommissioning and reconstruction, was that "costs associated with First Nations and archeology considerations are unknown and potentially costly if a decommissioning option is pursued". The Report said (page 35) "if a complete mitigation was required, excavation of the area within the boundaries of the site, removal of any artifacts using standard archeological methodology, and recording/mapping of the location of any uncovered artifacts would be required", meaning "[d]ecommissioning costs, should 'complete mitigation' be required, could be as high as $30,000,000", instead of $18,157,609.

- The Refurbishment proposal (pages 35-36) noted that the design considered the "constraints" of "registered pre-contact First Nations archeology sites surrounding the main dam structure". The Refurbishment proposal (page 37) also noted that one scenario had "the potential to alter the effectiveness of a nearby Acadia First Nation gaspereau fishing stand". The Report said NSPI took that factor, and others, into account in selecting the recommended scenario.

- The section on Risk Mitigation and Stakeholder Management (page 38) said that there were "four primary risks associated with project design and execution", three being "environmental issues", "known archeological sites" and "First Nations engagement". The environmental issues included possible adverse impact on the gaspereau fishery used by the Mi'kmaq (page 39). The archeological concern (pages 41-42) involved "over 70 archeological sites, features and areas of potential". Of these "seven archeological resources were deemed to be at high or potentially high risk of impact", which "include the submerged historic and First Nations sites to the north of the dam and the submerged known site AIDI-18". The Report (page 41) says "the scope of the project was altered to minimize the archeology risks".

- The section on First Nations Engagement (pages 43-44) noted the Mi'kmaq's expressed concerns that the water elevation of Lake Vaughan would be altered, exposing or affecting submerged artifacts, that the construction or operation of the main dam might affect the effectiveness of the fish ladder needed for the gasperau fishery. NSPI said it was "committed to balance the needs and concerns of Mi'kmaq of Nova Scotia in conjunction with regulatory and business requirements in order to execute successful capital work orders to the benefit of all customers".

- NSPI's Response to Information Requests 15 and 16, filed August 29, 2017, said any consideration of the decommissioning option could include assessment of the costs associated with archeological procedures, lowering Lake Vaughan to expose Mi'kmaq artifacts, preserving, documenting and cleaning the artifacts, as well as compensation to the Mi'kmaq for losses to their commercial gaspereau fishery from a change to the river flow.

[80] The Board's independent consultant, Midgard, and Intervenors filed with the Board submissions that NSPI's Application had overstated the requirements and costing for Mi'kmaq archeological preservation and maintenance of fish stock. NSPI replied with submissions on February 28, 2018 and again on May 14, 2018, that defended its approach.

[81] NSPI applied to the Board under s. 35 of the *Public Utilities Act*:

Approval of improvement over $250,000

35 No public utility shall proceed with **any new construction, improvements or betterments in or extensions or additions** to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the **approval thereof** by the Board.

[emphasis added]

[82] NSPI asked the Board to approve the Project's scope – *i.e.* its construction, improvements, betterments, extensions or additions – and costing that included NSPI's proposed accommodation of Mi'kmaq concerns. The proposal represented NSPI's attempt, as the Application said (page 44), "to balance the needs and concerns of Mi'kmaq of Nova Scotia in conjunction with regulatory and business requirements in order to execute successful capital work orders to the benefit of all customers". A different scope, resulting from a different approach to accommodate and balance the Mi'kmaq's concerns, would reduce or heighten the potential adverse impact to Mi'kmaq interests by increasing or decreasing the capital costs that the Board was asked to approve.

[83] For example, if the Tusket Main Dam was decommissioned and rebuilt, instead of just refurbished as the NSPI Application proposed, then the Project's capital cost after a "complete mitigation" of the Mi'kmaq's concerns "could be as high as $30,000,000", to be recovered in rates, instead of the $18,157,609 in NSPI's Application (pages 34-35). The NSPI Application asked the Board to approve the less expensive balance without complete mitigation.

[84] In *Haida Nation*, para. 50 and *Chippewas of the Thames*, paras. 59 and 60, quoted earlier, the Court said "balance and compromise are inherent in [the] process" toward accommodation.

The NSPI Application requested the Board's endorsement of NSPI's version of the balance and compromise. The potential adverse impacts to the Mi'kmaq's interests from the NSPI's Application were explicitly "relevant to the decision at hand" by the Board.

[85] **Final decision maker:** In *Clyde River*, Justices Karakatsanis and Brown said:

[29] ... The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of the *COGOA* to make **final decisions** respecting such testing as was proposed here, clearly constitutes Crown action.

...

[39] ... 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). ...

[bolding added]

[86] Similarly, in *Chippewas of the Thames,* Karakatsanis and Brown JJ. said:

[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). ...

...

[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. ...

[bolding added]

[87] In *Chippewas of the Thames*, Justices Karakatsanis and Brown explained what they meant by saying the NEB was a "final decision maker":

[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)** [of the *National Energy Board Act*, R.S.C. 1985, c. N-7], 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 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.**

[bolding added]

[88] A tribunal that makes an enforceable order, without needing confirmation by another authority, makes a final decision. A tribunal that acts merely in an advisory capacity, and makes a recommendation to another authority, is not a final decision maker.

[89] In *Clyde River*, the proponents applied, under s. 5(1)(b) of the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, for an authorization to conduct seismic testing. Section 5(1)(b) said:

5(1) The National Energy Board may, on application made in the form and containing the information fixed by the National Energy Board, and made in the prescribed manner, issue

…

(b) an authorization with respect to each work or activity proposed to be carried on.

[90] Justices Karakatsanis and Brown (para. 29) said the NEB's statutory power "to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action". The NEB decision was not just a recommendation to another authority, such as the Minister or Cabinet. It was final.

[91] Did the Board have the statutory power to make a final decision respecting NSPI's Application?

[92] Under the *Utility and Review Board Act*: (1) the Board's jurisdiction over the NSPI Application is "exclusive", (2) the Board's findings of fact are "binding and conclusive", (3) the Board "shall grant an order" and (4) its order is "made a rule or order of the Supreme Court, and shall thereupon be enforced in like manner as a rule, order, decree or judgment of that Court". [ss. 22(1), 24, 26 and 29(1), quoted above, para. 72]

[93] The Board's order, under s. 35 of the *Public Utilities Act,* is not advice or a recommendation to a provincial minister or to Cabinet. It is binding. The Board is a final decision maker on the NSPI Application.

[94] **The Board's remedial power:** The Board described its remedial options:

[166] The Board generally would have two potential remedies in a situation where the Crown's duty to consult has not been completed:

i) The Board could adjourn the proceedings until the duty to consult had been fulfilled;

ii) The Board could approve a project and impose terms and conditions, within its jurisdiction, to alleviate First Nations' concerns which have not yet been addressed.

[95] The Board preferred the first option and adjourned for three months so the parties could conduct further consultations.

[96] In *Carrier Sekani*, the Chief Justice said:

[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 statute.** The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*. [bolding added]

[97] The *Utility and Review Board Act* says:

Adjournment of hearing

20 A hearing may be adjourned from time to time by the Board on reasonable grounds on its own motion or on the request of a party to the proceedings.

[98] An adjournment of the NSPI Application was within the Board's power under s. 20.

[99] **The Province's remaining submissions:** I have discussed the Supreme Court's directions on "Crown conduct". I will turn to the Province's remaining submissions. The Province says the Board's proceeding was not "Crown conduct" because:

- S. 35 of the *Public Utilities Act* does not authorize the Board to approve "the Project as a whole";
- the Board had no authority to consider the "public interest";
- the Board was not exercising an "executive function";
- the Board "judicially reviewed" the approvals of the DOE and DFO.

[100] **No authority to approve the "Project as a whole":** The Province submits that, under s. 35 of the *Public Utilities Act*, the Board merely approves the prudency of capital costs for NSPI's recovery in its rates to customers. The Province cites the DOE's permit to alter the watercourse and the DFO's permit to harm fish as other decisions that relate to NSPI's "Project as a whole". The Board has no authority over the watercourse or fish. From this, the Province submits:

- a Board approval under s. 35 "is not a 'final decision' on the Project as a whole" [factum, para. 71(b)], and
- "the Board is not making a 'final decision' on the entire Project itself" [factum, para. 133].

Consequently, says the Province, the Board's decision is not "final" under *Clyde River* and *Chippewas of the Thames* and the Board's proceeding is not "Crown conduct" under *Haida Nation* and *Carrier Sekani*.

[101] The Province assumes that "final", in the passages from *Clyde River* and *Chippewas of the Thames* (quoted above, paras. 85-87), means "all encompassing".

[102] The assumption is mistaken. In *Clyde River* and *Chippewas on the Thames*, the Supreme Court did not say that, to be a "final decision maker", the tribunal must have approval authority for the "project as a whole". Neither did the Court say that a statutory tribunal may consider the adequacy of prior consultations only when that tribunal's statutory mandate encompasses every

conceivable approval on the chain of causation that leads to an adverse effect. Nor did the Court say that the existence of a second authority, with an approval power over a different aspect of the project, disqualifies both authorities from assessing the adequacy of prior consultations with aboriginal groups.

[103] A tribunal that makes a binding decision – *i.e.* does not just give advice or a recommendation – is a "final decision maker": *Chippewas of the Thames*, paras. 9 and 10. The Board's decision under s. 35 of the *Public Utilities Act* is binding (enforceable as a court order) and "final". It does not matter that "the Project as a whole" also generated earlier decisions by the DOE and DFO for the alteration of the watercourse and harming of fish.

[104] I respectfully disagree with the Province's submission.

[105] **No "public interest":** The Province's factum says:

106. The Board is not … acting with the necessary "public interest" as recognized by the Supreme Court of Canada in *Carrier Sekani* ….

110. As such, the Province submits that it is "ratepayer interest" that s. 35 of the PUA is designed to protect, not a broader societal or "public interest" that gains constitutional status pursuant to s. 35 of the *Constitution Act, 1982*.

…

111. In *Carrier Sekani*, the Supreme Court held that beyond its general power to consider "questions of law", the factors that the B.C. Utilities Commission was required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, were broad enough to include the constitutional issue of Crown consultation, because the Commission was mandated to consider "any other factor that the Commission considers relevant to the public interest". [citing paras. 69-70 of *Carrier Sekani*]

[106] Unlike British Columbia's s. 71, no statute gives Nova Scotia's Board the express authority to consider the "public interest". The Province submits the omission is critical and the Board's mandate does not encompass issues of aboriginal consultation.

[107] For each of two reasons, I do not share the Province's view.

[108] First, the submission misinterprets the Supreme Court's reasons.

[109] In *Carrier Sekani*, the Chief Justice said:

[69] … 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. … "[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).

[bolding added]

[110] In *Carrier Sekani*, "public interest" brought the constitutional issue "properly before" the Commission. The Chief Justice stated the test earlier in *Carrier Sekani*:

[57] ... the tribunal ... 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**. [bolding added]

British Columbia's statutory criterion of "public interest" meant the consultation issue (with its constitutional "special public interest") was "relevant to the decision at hand" before the Utilities Commission.

[111] *Carrier Sekani* does not say that an express statutory mandate to consider the "public interest" is a *sine qua non* of any tribunal's jurisdiction to consider the adequacy of prior consultations. Rather, in each case, the question is whether the potential adverse impact is "relevant to the decision at hand" by the tribunal. Statutory authority to consider "public interest" is one avenue to relevance. It is not the only one.

[112] Here, the accommodation of potential adverse effects to the Mi'kmaq, balanced against cost to ratepayers, was spelt out in the NSPI Application to the Board. The matter was expressly "relevant to the decision at hand" (above, paras. 77-84). Relevance does not turn on whether the Board had explicit statutory authority to consider the "public interest".

[113] Second, the Board reasonably interpreted its mandate under the *Public Utilities Act* to encompass a significant component of public interest.

[114] The Board's Decision said:

[88] The comprehensive role in utility regulation of the Board is expressed in the often quoted *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.*, 1976 CanLII 1234 (NS CA) [(1976), 75 D.L.R. (3d) 72, page 77]:

The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined – that all rates must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the

public. Almost all provisions of the Act are directed toward securing these two objects – that a public utility give adequate service and charge only reasonable and just rates.

The service requirement is expressed in s. 48, as follows:

48. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

[89] The service requirement is now set out in s. 52 of the *PUA*, and there are now performance standards enacted in relation to service as well.

[90] There is no language in s. 35 of the *PUA* which specifically directs the Board to consider the public interest, as was the case in the legislative language discussed in *Carrier Sekani*. This said, the concepts of adequacy and safety of service, along with just and reasonable service requirements, expressed in s. 52 of the *PUA*, are examples of public interest considerations the Board can consider.

[91] That factors other than a pure economic cost-benefit and prudency analysis are considered by the Board is shown in the extensive record in this matter.

[92] Evidence and expert analysis have been provided to the Board on whether the project is needed for safety reasons in the first place, in order to meet Canadian Dam Safety Guidelines. A number of potential scenarios, completely different than those considered in the NSE and DFO permit applications, have been discussed and analysed in the evidence.

[93] The Board has the jurisdiction to consider all aspects of the proposed Project, to determine whether NS Power's facilities are safe and adequate, and whether alternative scenarios are available.

[115] The *Public Utilities Act* says: (1) "[t]he Board shall have the general supervision of all public utilities ..." (s. 18), and (2) "[e]very public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable" (s. 52).

[116] NSPI is a "public" utility because its operations and service have a significant impact on the public. Most Nova Scotians obtain electrical power from NSPI. Clearly, as the Province and NSPI point out, the Board is tasked to safeguard financial prudence for the benefit of NSPI's ratepayers. But the Board's mandate extends beyond that factor to the others noted in the Board's reasons. Those factors share a common denominator of public interest.

[117] **No "executive function":** The Province's factum says:

86. The Board is not exercising "executive power" or the powers of the "Crown" when it considers a capital cost application under s. 35 of the *PUA*, as contemplated and explained most recently by the Supreme Court of Canada in *Clyde River*:

[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).

[118] With respect, there is more to it. *Clyde River*'s passage continues:

[29] ... 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 decisions respecting such testing as was proposed here, clearly constitutes Crown conduct.

[bolding added]

[119] The Board had responsibility under s. 35 of the *Public Utilities Act* to make a final decision whether to approve the NSPI Application. Features of the Project described in the NSPI Application would potentially have an adverse effect on the Mi'kmaq's interests. According to *Clyde River,* para. 29, "it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures". The Board's approval, in furtherance of its statutory power, is executive action.

[120] The Province points out that "the Board acts primarily as a quasi-judicial economic regulatory tribunal" (factum, para. 87). With respect, that does not disqualify the Board's power of approval, under s. 35, from being "executive power as authorized by legislatures" (*Clyde River*, para. 29). In *Chippewas of the Thames*, Justices Karakatsanis and Brown spoke of the NEB's quasi-judicial authority:

[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. [bolding added]

[121] NSPI's challenge comes from the other direction. NSPI cites *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, to support its submission that the Utility and Review Board does not exercise executive power. NSPI's factum, para. 99, emphasizes the following passages from paras. 40 and 41 of Karakatsanis J.'s reasons in *Mikisew*:

40 Applying a duty to consult to the development of legislation by ministers, as the Mikisew propose, also raises practical concerns. ...

41 For these reasons, the duty to consult doctrine is ill-suited to be applied directly to the law-making process.

[122] With respect, *Mikisew* has no bearing on the Board's functions under s. 35 of the *Public Utilities Act*. In *Mikisew*, Karakatsanis J. said:

[1] ... The appellant Mikisew Cree First Nation argues that the Crown had a duty to consult them on the development of environmental legislation that had the potential to adversely affect their treaty rights to hunt, trap, and fish. This Court must therefore answer a vexing question it has left open in the past: Does the duty to consult apply to the **law-making process**?

...

[29] However, the question in this appeal is whether the honour of the Crown gives rise to a justiciable duty to consult when ministers **develop legislation** that could adversely affect the Mikisew's treaty rights. ...

...

[32] For the reasons that follow, I conclude that **the law-making process** – that is, the **development, passage, and enactment of legislation** – does not trigger the duty to consult. ...

[bolding added]

[123] The Board's consideration of the NSPI Application, under s. 35 of the *Public Utilities Act*, did not involve the "law-making process" – *i.e.* the "development, passage, or enactment of legislation". Rather, the Board was a statutory decision-maker under existing legislation.
In *Mikisew*, Karakatsanis J. said this about statutory decision-makers:

[25] The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult [citations omitted]. This obligation has also been applied in the context of statutory decision-makers that – while not part of the executive – act on behalf of the Crown [citing *Clyde River*, para. 29]... .

[124] I am unpersuaded by the submissions of the Province and NSPI on this issue.

[125] **No power to "judicially review" prior approvals:** The Province's factum says:

The Board Cannot Judicially Review Prior Approvals

...

128. ... the Board does not possess the "remedial powers" required at law to consider the adequacy of consultation and remedy any defects it may potentially identify relating to previously issued regulatory approvals over which it has no control.

...

130. If a tribunal, such as the Board, does not have the necessary statutory authority or concomitant remedial powers to consider consultation and address the concerns raised by an Aboriginal group within the "relevant decision at hand", then the Aboriginal peoples that claim they

are affected by inadequate prior consultation for the Project itself "must seek appropriate remedies in the Courts" [citing *Carrier Sekani*, para. 75, and *Haida Nation*, para. 51].

[126] The Province assumes that the Board conducted a roving judicial review of prior approvals by the DOE and DFO. To the contrary, the Board's Decision said:

[157] The Board is not a reviewing court, but a tribunal which, in this case, will make a final determination as to whether or not the Tusket Main Dam Refurbishment Project should be approved.

...

[174] The Board does not have the jurisdiction to void any permits which have been issued by the Province, or DFO.

[127] The adequacy of consultations was relevant to the matter at hand before the Board – *i.e.* to features of the NSPI Application – as I have discussed. Under s. 35 of the *Public Utilities Act*, the Board was entitled to address the implications, including the constitutional ones, of the NSPI Application. The Board did not comment on the substantive merits of earlier approvals by the DOE (whether the watercourse may be altered) and DFO (whether fish may be harmed) under the provincial *Environment Act* and federal *Fisheries Act*.

[128] The Board merely adjourned the NSPI Application for three months so the parties could continue consultations. Section 20 of the *Utility and Review Board Act* authorizes the Board to adjourn "on reasonable grounds". Seeking compliance with s. 35(1) of the *Constitution Act, 1982* is a reasonable ground. The Board's relief was "in accordance with the remedial powers expressly or impliedly conferred upon it by statute" under *Carrier Sekani*, para. 61.

[129] I respectfully reject the Province's submission.

[130] **Summary:** The Board's findings of fact were supported by evidence. The Board reasonably interpreted its home statute. The Board correctly concluded that its consideration of the NSPI Application was Crown conduct under the Supreme Court's test.

Third Element – Causation of Adverse Effect

[131] NSPI says that the Board has no authority either to (1) "confirm" the DOE's (already issued) permit for the altered watercourse and the DFO's (already issued) permit to harm fish, or (2) give "substantive assurance" that the Project would maintain those permits through completion. Hence, according to NSPI, any adverse impact of a Board approval under s. 35 of the *Public Utilities Act* is "too remote" for the causation required by the third step in the *Haida Nation*/*Carrier Sekani* test.

[132] NSPI's factum puts it this way:

114. NSPI submits that, consistent with the case law cited above, any impact of a section 35 decision is too remote and indirect to trigger a duty to consult. While the Project itself might impact Aboriginal rights, a section 35 *PUA* decision does not confirm Crown permits or authorizations

issued or to be issued in connection with the Project nor does it absolve the Crown of any continuing duty to ensure its conduct respects its duty to consult. A section 35 *PUA* decision is a disconnected preliminary approval process that provides no substantive assurance, right or momentum to a project moving forward from the perspective of government processes.

[133] This is a variation of the Province's proposition that, to exercise "Crown conduct", a tribunal must have the statutory authority to approve the "Project as a whole". NSPI adapts the point to whether there is causation of an adverse effect.

[134] In my view, the proposition has no merit.

[135] Most substantial projects have features that are subject to approval by more than one office at some level of government or statutory authority. At the appeal hearing, responding to a question from the Court, NSPI's counsel acknowledged that a municipal rezoning requirement may be "another approval" that, according to NSPI's proposition, would negate "causation of adverse effect" by the principal tribunal. Other examples come to mind. A proponent may need approval by a highway authority to move building materials, a permit to operate necessary machinery, an acknowledgement of compliance with occupational health and safety or workers' compensation standards, a building or occupancy permit for a new structure, a tax clearance or a business license.

[136] No statutory entity may "confirm" the approval of another whose authority derives from a different statute. No such entity may give "substantive assurance" of what the other may do. It would be constitutionally impossible for a provincial tribunal, like the Board, to wade into DFO's federal jurisdiction over fisheries.

[137] If NSPI's proposition were correct, then whenever more than one approval is required for different aspects of a project – *i.e.* almost always – no single approving authority could cause an adverse effect. This would stultify the *Haida Nation*/*Carrier Sekani* test and counteract the "generous, purposive" rationale for the test that is meant to govern "adverse impacts, however made" (*Carrier Sekani*, paras. 43 and 46 and *Clyde River*, para. 25).

[138] The Province treated NSPI's application to the DOE as triggering the Crown's duty to consult (above, para. 14). This acknowledges that the DOE's consideration of whether to approve an altered watercourse may adversely affect a potential right under *Carrier Sekani*'s test. Yet the DOE's approval of an altered watercourse neither "confirmed" the other approvals required for the Project (DFO and Utility and Review Board) nor gave a "substantive assurance" that the DFO and the Board would issue and maintain their approvals.

[139] It is unnecessary that the Board confirm all the other approvals or assure that NSPI will maintain the conditions of other approvals that have been granted.

[140] Causation is a factual issue with a "but for" test and a civil standard of proof on a balance of probabilities. It suffices that, (1) without the Board's approval, the Project described in the NSPI Application probably would not proceed, meaning the adverse effect probably would not occur, and (2) with the Board's approval, the Project probably would proceed to cause the adverse effect.

[141] Without the Board's approval, would the Project proceed?

[142] Section 35 expresses a prohibition: "No public utility shall proceed with any new construction, improvements or betterments ... to its property ... without first securing the approval thereof by the Board".

[143] The Province submits that s. 35 should not be taken literally. The Province reads s. 35 as merely prohibiting NSPI from abusing its monopoly power by passing on to ratepayers the improvident capital cost of an unapproved project. According to that proposition, after a Board refusal under s. 35, NSPI could still refurbish the Tusket Main Dam at its own – *i.e.* its shareholders' – expense and refrain from including the amortized capital cost in its rates to its customers. Whether NSPI chooses to do so, says the Province, "is a practical commercial/business decision" for NSPI [factum, para. 118, note 50], and not the Board's concern.

[144] The Board gave short shrift to that proposition, legally and factually:

[87] While it is true that the Board's role in assessing an application pursuant to s. 35 of the *PUA* is primarily one of an economic regulator, reviewing a cost-benefit analysis, and assessing the economic prudency of a particular project, the Board does not only approve the capital expenditure, but also approves the project itself.

...

[97] A literal reading of s. 35 of the *PUA* indicates NS Power cannot proceed without Board approval. This is the position advanced by the ANSMC and Acadia First Nation. The situation may be slightly more nuanced, in that one of the potential remedies the Board has utilized, on limited occasions in the past, is to exclude expenditures for unapproved projects from the rate base.

[98] However, a Board refusal of this Application, for a project of this magnitude, with ongoing financial obligations for operational safety and maintenance requirements, for an asset designed to directly produce electricity for distribution to the public, would almost certainly result in the project not proceeding.

[99] Therefore, prior Crown approvals aside, the Board is effectively the final decision maker for the Project in the circumstances of this case.

[145] The Board interpreted s. 35 of the *Public Utilities Act*, the Board's home legislation. In my view, the Board's interpretation is reasonable. The Tusket Dam is integral to NSPI's hydro generation facilities. Electrical generation is a core utility function. The construction, commissioning and operation of the refurbished Main Dam described in the NSPI Application, after a Board refusal, would offend s. 35's prohibition, s. 18's statement that "[t]he Board shall have the general supervision of all public utilities" and this Court's ruling in *Board of Commissioners v. Nova Scotia Power Corp.*, *supra*, page 77:

The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operations in providing a controlled service.

[146] The Board's para. 98 is a finding of fact. In *Carrier Sekani*, para. 85 (also para. 92), the Chief Justice said that, on the judicial review of a tribunal's conclusion respecting causation of adverse effect, "[t]he question is whether this conclusion was reasonable based on the evidence".

[147] Here, there is no evidence that, if the Board refused approval under s. 35, NSPI would proceed with the rejected refurbishment anyway, spending millions of dollars at its shareholders' expense, without cost recovery in its rates. To the contrary, NSPI firmly asserted that the Project's future capital costs would be recoverable in rates from its customers:

- The NSPI Application said:

While the cost of this Project is significant, it is more cost-effective for **customers** than decommissioning the Tusket Main Dam. [page 8]

NS Power acknowledges that all spend **prior to UARB approval is at NS Power's shareholder risk** if the Board requires changes to the project or declines to approve the project in whole or in part. **All capital spend** is also subject to rules regarding its **treatment in rate base** pursuant to the Board approved Summary CEJC and Accounting Policy 1520 – Rate Base, with which this project complies. [page 23]

This analysis indicates that the proposed scope of rebuilding the Tusket Main Dam to address dam safety risks is the least costly alternative for **customers**. [page 34]

Based on this assessment, the EAM confirmed that the best option for **customers** is to rebuild the dam to meet CDA dam safety guidelines … . The present value of revenue requirements associated with the selected alternative is an increase, but is the best solution for **customers** given the analysis on decommissioning [page 37]

[bolding added]

- NSPI was given an Information Request that asked "What is the basis for flowing these costs [archeological costs and artifact salvage] through to customers" following a decommissioning. On December 6, 2017, NSPI replied:

As noted above, NS Power views the archeological costs associated with decommissioning a necessary and prudent component of the asset retirement costs associated with this hydro system and as such, **NS Power should have the ability to recover these costs from customers** if incurred. [bolding added]

- Asked by another Information Request "would NS Power's ratepayers be exposed to the cost impacts" resulting from the Project's risks, on December 6, 2017 NSPI replied:

All of the costs discussed in part (d) that are the responsibility of NS Power would be considered costs necessary and prudently incurred to put the project in service, thereby **recoverable from customers** as the benefit of the project accrues to customers. … [bolding added]

- NSPI's Reply to the comments of Midgard, the Board's independent consultant, and Intervenors, filed with the Board on February 28, 2018, repeats the submission:

CONCLUSION

As set out in NS Power's Application, refurbishing the Main Dam is the best cost option for **customers**.

...

... The cost alternatives, renewable generation considerations, and additional legal and environmental risks associated with decommissioning all suggest that refurbishing the Main Dam is the best option for **customers**.

[bolding added]

- NSPI's closing submission to the Board, signed by its Regulatory Counsel, dated May 7, 2018, concludes with:

The replacement of the Tusket Main Dam is in the best interest of **customers**. NS Power respectfully requests the Board to approve CI 29807 in the amount of $18,157,609. [bolding added]

[148] The Province endorsed the position that the capital costs would be recoverable from ratepayers. The Province's Intervenor Submission to the Board, dated February 14, 2018, said:

27. The Province makes no submission with respect to the estimated amounts, requirements, project alternatives, or other issues to be determined before the Board, other than to confirm the following:

...

C. As with any proponent, if NSPI is approved to undertake work on a Project that may require such costs as completing detailed archeological study and protection of Mi'kmaq artifacts, **such costs are properly a ratepayer cost** (relating to and flowing from that specific Project), and not a general "societal cost" to be paid by taxpayers at large. [bolding added]

[149] The Board reasonably found that, but for the Board's approval, the Project described in the NSPI Application would not proceed.

[150] After the Board's approval, would the Project proceed?

[151] Clearly NSPI wanted to do so. The NSPI Application (page 6) states:

.. the investment is required to ensure the Tusket Main Dam structure is compliant with current Canadian Dam Association (CDA) dam safety guidelines and Nova Scotia Environment requirements. Additionally, the existing gates within the main dam structure have reached the end of their expected useful life and must be replaced. This structure is important to NS Power customers. It is a significant component of the Tusket Hydro System and without it all generation at the Tusket Powerhouse would be lost.

[152] Would there be any barrier to the Project? There is no evidence that the permits issued by the DOE and DFO were at risk of withdrawal. The NSPI Application (page 21), under the heading "Project Milestones", identified five milestones. The only one that related to authorizations was "Receive all Environmental Permits". The "Description" beside that milestone comprised:

Nova Scotia Environment (NSE) Watercourse Alteration permit is issued for the planned duration of construction activities. Department of Fisheries and Oceans (DFO) Fisheries Act Authorization is granted.

[153] If the Project proceeds, would there be an adverse effect? The Board found:

[101] In this matter, the footprint of the existing dam is being altered, with an impact on the water flows, and the potential exposure, or disturbance, by virtue of dewatering and construction activities, of pre-contact Mi'kmaw archeological artifacts and a continuing Aboriginal fishery. Therefore, Board approval does have the potential to impact asserted Aboriginal or treaty rights.

[154] This finding of fact is supported by evidence. The NSPI Application acknowledges throughout that the Project could adversely affect Mi'kmaq interests (above, paras. 78-84). The provincial Department of the Environment's letter of December 22, 2016 to KMKNO treated the NSPI Application as triggering consultation respecting adverse effects (above, para. 14).

[155] The evidence of causation here contrasts with the record in *Carrier Sekani*, where the Commission found that the Energy Purchase Agreement would not cause an adverse effect. In upholding that finding as reasonable, the Chief Justice noted:

92 … The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA was approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it … . [Supreme Court's italics]

[156] Here there is direct and probable causation from the Board's decision under s. 35 of the *Public Utilities Act* to the potential adverse effect on the Mi'kmaq interests.

[157] The Board correctly applied the constitutional principles. It reasonably interpreted its home statute and made findings of fact supported by evidence.

Conclusion

[158] I would dismiss the appeal. No party requested costs. The disposition will be without costs.

Fichaud J.A.

Concurred:

Farrar J.A.

Bryson J.A.

TAB E

Supreme Court Judgments

Clyde River (Hamlet) v. Petroleum Geo-Services Inc.

Collection	Supreme Court Judgments
Date	2017-07-26
Neutral citation	2017 SCC 40
Report	[2017] 1 SCR 1069
Case number	36692
Judges	McLachlin, Beverley; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément; Côté, Suzanne; Brown, Russell; Rowe, Malcolm
On appeal from	Federal Court of Appeal
Subjects	Constitutional law
Notes	SCC Case Information: 36692

SUPREME COURT OF CANADA

Citation: Clyde River (Hamlet) *v.* Petroleum Geo-Services Inc., 2017 SCC 40, [2017] 1 S.C.R. 1069

Appeal heard: November 30, 2016

Judgment rendered: July 26, 2017

Docket: 36692

Between:

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River and Jerry Natanine

Appellants

and

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

Coram: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Reasons for Judgment: (paras. 1 to 53)	Karakatsanis and Brown JJ. (McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Côté and Rowe JJ. concurring)

Clyde River (Hamlet) *v.* Petroleum Geo-Services Inc., 2017 SCC 40, [2017] 1 S.C.R. 1069

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*

Indexed as: Clyde River (Hamlet) *v.* Petroleum Geo-Services Inc.

2017 SCC 40

File No.: 36692.

2016: November 30; 2017: July 26.[1]

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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 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. 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 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. 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.

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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.

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.

[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 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.[2]

[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 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.

[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[3] 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 "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 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).

[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 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 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 of the *NEB Act* [4] (*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:

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 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 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).[5]

[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 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).

[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 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 consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)). Written reasons

also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

[42] This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

E. *Was the Consultation Adequate in This Case?*

[43] The Crown acknowledges that deep consultation was required in this case, and we agree. As 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)

[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. 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.[6] 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 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.

[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.

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.

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[1] The judgment was amended on October 30, 2017, by adding the footnotes that now appear at paras. 31 and 47 of the English and French versions of the reasons.

[2] 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* .

[3] 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).

[4] *National Energy Board Act* , S.C. 1959, c. 46.

[5] 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).

[6] 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.

TAB F

Nova Scotia Court of Appeal

R. v. Denny

1990 CarswellNS 388, [1990] 2 C.N.L.R. 115, [1990] N.S.J. No. 56, 247 A.P.R. 253, 55 C.C.C. (3d) 322, 94 N.S.R. (2d) 253, 9 W.C.B. (2d) 438

David Denny, Lawrence John Paul and Thomas Frank Sylliboy, Appellants v. Her Majesty The Queen, Respondent

Clarke C.J.N.S., Hart, Jones, Macdonald, Matthews JJ.A.

Heard: October 15, 1987

Heard: November 16, 1987

Heard: December 9, 1987

Heard: February 11, 1988

Heard: May 20, 1988

Heard: September 7, 1988

Heard: September 8, 1988

Heard: April 26, 1988

Judgment: March 5, 1990

Docket: Docs. 01965, 01966, 01983

Counsel: *Mr. Bruce H. Wildsmith*, for the appellants.

Mr. James D. Bissell, Q.C., and *Mr. Michael A. Pare*, for the respondent.

Subject: Criminal; Public; Constitutional

Related Abridgment

Aboriginal and Indigenous law

V Indigenous rights to natural resources and environmental protections

V.2 Right of access to natural resources

V.2.b Fishing

V.2.b.ii Application of federal statutes

Headnote

Native Law --- Constitutional issues — Hunting and fishing — Fishing offences — Application of federal statutes

Limited immunity from prosecution — Right to share in surplus — Fisheries Act, R.S.C. 1970, c. F-14 — Constitution Act, 1982, ss. 35(1), 52 — Nova Scotia Fishery Regulations, C.R.C. 1978, c. 848.

Accused Micmac Indians were convicted of fishing in a time, place and manner contrary to the Regulations. Accused were fishing for food, not for sale, in waters off reserve land. There was a surplus of fish. Accused appealed their convictions on the basis that they had existing aboriginal rights to fish for food in those waters, they had a right to immunity from prosecution, and they had a right to an allocation of any surplus. Held, the appeals were allowed. The original aboriginal rights had not been extinguished by legislation or treaty. S. 35(1) of the Constitution Act, 1982 protected existing aboriginal rights. Those rights were subject to valid federal regulation. The aboriginal rights were second only to conservation measures and, given the surplus, the Regulations were of no force and effect. Accused were entitled to limited immunity subject to reasonable regulation. Accused were entitled to priority in allocation of surplus.

Table of Authorities

Words and phrases considered:

ABORIGINAL RIGHTS

A definition of the term "aboriginal rights" is provided by Brian Slatterly in his article entitled: "The Constitutional Guarantee of Aboriginal and Treaty Rights", 8 Queen's L.J. 232, where he writes at p. 243:

The expression, "aboriginal rights" . . . refers to a range of rights held by native peoples, not by virtue of Crown grant, agreement or legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands now making up Canada.

Professor Hogg, in his text, Constitutional Law of Canada, 2nd ed. (1985), states at p. 563:

. . . it seems likely that the aboriginal peoples of Canada held rights of some kind with respect to the lands that they occupied at the time of European settlement, and that those rights, unless voluntarily surrendered or taken away by statute, survived the reception of French and English law that occurred as the result of European settlement.

EXISTING

Professor Hogg continues at p. 565 [Hogg, Constitutional Law of Canada, 2nd ed. (1985)]:

The word "existing" in sub-section (1) probably has the effect of excluding aboriginal or treaty rights that have before April 17, 1982 been extinguished by voluntary surrender or competent legislation. In other words, Section 35 does not retroactively annul prior extinguishments of native rights so as to restore the rights to their original unimpaired condition. Such an interpretation would leave the word "existing" with no work to do, not to mention the unpredictable ramifications of such a radical interpretation . . . the word "existing" in Section 35 means "unextinguished".

I accept the proposition that "existing" as used in the context of s. 35(1) of the *Constitution Act*, 1982, is to be equated with the term "unextinguished".

By The Court:

1 Appeals allowed, convictions quashed and verdicts of acquittal entered per reasons for judgment of Clarke, C.J.N.S., Hart, Jones, Macdonald and Matthews, JJ.A. concurring.

***Clarke, C.J.N.S.*:**

2 These appeals involve the aboriginal and treaty rights of Nova Scotia Micmac Indians to fish for food. The appellants are three Nova Scotia Micmac Indians who were convicted of offences contrary to the *Fisheries Act*, R.S.C. 1970, c. F-14 and regulations made pursuant to the Act.

3 The trials of the appellants David B. Denny (Denny) and Lawrence John Paul (Paul) were held in Provincial Court before His Honour, Judge Charles O'Connell. The trial of the appellant Thomas Frank Sylliboy (Sylliboy) was also heard in Provincial Court by His Honour, Judge R.A. MacDonald.

4 All three cases proceeded on agreed statements of fact and were supplemented with historical documents and oral evidence concerning the needs of resource conservation and the allocation of the resource surplus to those needs. Documentary evidence including exhibits of an historical nature, were also tendered.

THE TRIALS OF DENNY AND PAUL

5 On October 8, 1987, the appellant Denny, caught and retained a salmon by means of a net without possessing a license authorizing him to do so. This offence occurred in the waters of the Bras d'Or Lake near Eskasoni, in the County of Cape Breton, Nova Scotia. Denny was charged with the following offences:

(a) That on or about the 8th day of October, 1987, he "did unlawfully catch and retain salmon by means of a net without being authorized by license or permit to do so, contrary to s. 20(1.1) of the *Nova Scotia Fishery Regulations* and s. 61(1) of the *Fisheries Act*."

(b) *And further*, that in waters of the Bras d'Or Lake, near Eskasoni, County of Cape Breton, Nova Scotia, on or about the 8th day of October, 1987, did unlawfully have in his possession salmon at a place where at that time fishing for such fish was prohibited by law, contrary to s. 19 of the *Fisheries Act*.

6 Section 20(1.1) of the *Nova Scotia Fishery Regulations*, C.R.C. 1978, c. 848, as amended, S.O.R./81-428; 81-604 provides:

No person shall fish for, catch or kill salmon with a net of any kind or retain any salmon so caught except under a salmon license.

7 Section 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended by S.C. 1976-77, c. 35, s. 18 states:

Except as otherwise provided in this Act, every person who contravenes any provision of this Act or the regulations is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both.

[Section 61(1) is now s. 79(1) of the *Fisheries Act, R.S.C.* 1985, c. F-14.]

8 Section 19 provides:

No one, without lawful excuse, the proof whereof lies on him, shall fish for, buy, sell or have in his possession any fish, or portion of any fish, at a place where at that time fishing for such fish is prohibited by law.

9 At the time of the offence, Denny not only had been fishing for himself but also for the benefit of the appellant Paul. Paul was charged that:

On or about the 8th day of October, 1987, did unlawfully fish for a species of fish, to wit: cod, not being the holder of a license to so fish, contrary to s. 14(1) of the *Atlantic Fishery Regulations* and s. 61(1) of the *Fisheries Act*.

10 Section 14(1) of the *Atlantic Fishery Regulations* provides:

Subject to subsection (4) and section 15, no person shall fish for any species of fish set out in Schedule I unless

(a) he holds a fisherman's registration card; and

(b) he is authorized, pursuant to subsection (2), to fish for that species.

11 The trial of the appellant Denny proceeded on the following statement of facts:

At approximately 7:25 a.m. on the 8th day of October, 1987, Mr. David B. Denny, the Defendant, arrived alone in a small truck at a location on the shoreline on the Eskasoni Indian Reserve in the County of Cape Breton, Province of Nova Scotia. Mr. Denny is a full-blooded Micmac Indian registered under the provisions of the Indian Act of Canada and a member of the Eskasoni Indian band. Mr. Denny launched a small boat with outboard motor and proceeded out in a westerly direction into the waters of the Bras d'Or Lake, adjacent to the Eskasoni Reserve. He proceeded to an area of the water near the estuary of a brook running through the Reserve and into the Lake. The brook in question is Indian Brook which is within the boundaries of the Reserve for about one and a half miles of its length measured from the estuary. Salmon ascend Indian Brook in the the month of October.

At this time Mr. Denny hauled three gill nets, which had been set 40 to 400 feet distant from and at right angles to the shore. He returned to the shore at approximately 8:05 a.m. where he was met by Fishery Officer R.A. MacDonald and R.C.M.P. Officer Travis Budge. At this time three gill nets were located in the boat occupied by Mr. Denny, together with one salmon and several other species of fish including flounder, mackerel and cod.

The three gill nets were seized and tagged by the Fishery Officer, in accordance with the list attached hereto. Photographs were taken of the seized items, together with the truck and the boat

being operated by Mr. Denny, and also a photograph of the salmon which was found in the possession of Mr. Denny.

Mr. Denny gave a statement to the Fishery Officer in the form attached in which he indicated that the boat was owned by a Mr. Lawrence Paul, that he had fished the nets that morning and the previous morning, that the salmon in the boat was claimed by him and that he owned the nets. Mr. Denny was cooperative throughout.

Mr. Denny had not been issued a license or permit to catch and retain salmon by means of a net pursuant to the *Fisheries Act* or any Regulations made thereunder.

Close times for salmon fishing are set forth in Section 77 and Schedule XXII of the Atlantic Fishery Regulations. The waters of the Bras d'Or Lake adjacent to the Eskasoni Indian Reserve are tidal waters within salmon fishing area #19. Pursuant to Variation Order No. 1987-040 dated March 30, 1987, the close time for salmon fishing by means of any gear except angling gear, in salmon fishing area #19 was varied to be January 1 to December 31. Notice of such variation was given by publication of the Order in the Halifax-Chronicle Herald newspaper on April 4, 1987 being a newspaper circulated in the area affected by the variation. Mr. Denny was personally served with a true copy of this Variation Order and with a Notice of the Crown's intention to produce into evidence a certified copy of this Order, a copy of which is attached.

At the time and place where Mr. Denny was found in possession of the salmon it was permissible to fish for salmon by means of angling, subject to the licensing, tagging and other requirements of the Nova Scotia Fishery Regulations and the Atlantic Fishery Regulations.

Attached are photographs showing Mr. Denny hauling the boat ashore, the three gill nets as they were located in the boat, and the salmon caught by Mr. Denny.

Mr. Denny caught and retained the salmon for his personal consumption or that of his family, with no intent to sell the salmon or profit in the commercial sense.

Mr. Denny is thirty years of age, and is married with three children ages 3, 9 and 12. He has a grade 8 education, is unemployed and lives on welfare (except for occasional work on the Reserve as a labourer). He has since his marriage regularly hunted and fished for food for his family.

Agreed to for the purpose of this charge only and subject to further evidence being called by the parties. The parties will file with the Court by agreement the 1987 Atlantic Salmon Management Plan and a topographical map of the area produced by the Department of Energy, Mines and Resources, titled Grand Narrows, 11F/15, edition three.

12 The trial of Paul proceeded on a somewhat similar statement of facts. As noted earlier, Denny had been fishing on behalf of himself and the appellant Paul. On October 9, 1987, as a result of the seizure of the three gill nets found in the possession of Denny, Paul visited the Department of Fisheries office and gave a statement to Fishery Officers Muise and MacDonald in which he stated that one of the three gill nets found in the possession of Denny the previous day belonged to him. Paul indicated that he had no involvement in the events of October 8, 1987 leading up to the seizure of the nets. Paul was not the holder of a license to fish for codfish by means of a gill net being the

type referred to in s. 14 of the *Atlantic Fishery Regulations*. The fish caught in the net owned by Paul were to be used for food for himself and his family and not for the purpose of commercial gain. Paul is a fullblooded Micmac Indian, registered under the provisions of the *Indian Act* of Canada.

13 The following are additional facts relevant to the trials of Denny and Paul.

1. The alleged offences were committed off Reserve lands.

2. Fishing for salmon by means of a net was prohibited at the material date and place pursuant to a *Salmon Close Time Variation Order*, issued pursuant to s. 4 of the *Atlantic Fishery Regulations*, 1985, made under the *Fisheries Act* (Canada).

3. Fishing for salmon by means of angling gear between June 15 and October 15 was permitted at the material date and place, while commercial fishing was absolutely prohibited.

4. The appellants Denny and Paul did not apply for a license or permit to fish for salmon or cod with a net. Had they done so, the respondent Crown says at p. 8 of its factum, "they would not have been issued one".

5. The appellants were entitled to obtain a license to fish for salmon by means of angling gear and to fish for cod without a license provided such fishing was done by means of a hand-line or by angling.

14 In decisions filed August 29, 1988, the trial judge found the appellants Denny and Paul guilty as charged and entered convictions. Sentencing proceeded on September 8. Paul was sentenced to a fine of $ 100.00 or 5 days in jail in the event of default, while Denny was ordered to pay fines of $ 400.00 on the Section 20(1.1) violation, $ 300.00 on the Section 19 offence and in default, 10 days in jail on each count. The salmon and three gill nets previously seized were ordered to be forfeited. The appellants appeal from these convictions and seek leave and if granted, appeal from the sentences imposed.

The Appellant Sylliboy

15 The trial of the appellant Sylliboy also proceeded on an agreed statement of facts. Sylliboy is a registered Micmac Indian and a member of the Afton Indian Band in Antigonish County, Nova Scotia. On November 18, 1987, he was standing on the banks of the Afton River where it intersects the Trans-Canada Highway. Sylliboy was observed by approaching Fisheries Officers to be holding a long pole with a snare at the end of it. He was searching for salmon within a stream along the Afton River. He did not see any and did not put the snare in the water. The Afton Indian Reserve includes two parcels of land and the Afton River flows through both parcels. While Sylliboy had no fish, he intended to use any fish caught as food for himself and his family. The appellant was approached by the two Fisheries Officers who seized the snare. On or about December 14th, 1987, the appellant and another individual were duly charged that they

(a) did engage in fishing in non-tidal waters by means of snaring, contrary to s. 6(4) of the *Nova Scotia Fishery Regulations* [sic], C.R.C., 1978, c. 848, as amended, made pursuant to s. 34 [now s.

43] of the *Fisheries Act*, R.S., c. 119, as amended, and did thereby commit an offence under s. 61(1) [now s. 79] of the said *Fisheries Act*, as amended.

(b) and also at the same place and on the same date they did have in their possession a snare within 15 metres [sic] of non-tidal waters contrary to s. 6(5)(a) of the *Nova Scotia Fishery Regulations*, C.R.C. 1987, c. 848, as amended, made pursuant to s. 34 [now s. 43] of the *Fisheries Act*, R.S., c. 119, as amended, and did thereby commit an offence under s. 61(1) [now s. 79] of the said *Fisheries Act*, as amended.

16 As in the cases of the appellants Denny and Paul, the alleged offence took place in a fishing area off Reserve lands. As well, there was a general prohibition of fishing for salmon in effect during the time of the offence. At the material date the *Nova Scotia Fishery Regulations* and indeed all Fishery Regulations from coast to coast made under the *Fisheries Act* prohibited fishing in non-tidal waters by means of a snare.

17 After a trial at Antigonish, Nova Scotia on April 26, 1988, Sylliboy was convicted of both charges and fined $ 10.00 and $ 20.00 costs, on each count. Sylliboy appeals from these convictions and seeks leave to appeal and if granted, appeals from the sentences.

Issues on Appeal

18 The issues, common to these three appeals, are:

1. Do the appellants have an existing aboriginal or treaty right to fish for food in the waters in question?

2. If the appellants have such a right to fish, does s. 35(1) of the *Constitution Act, 1982*, give the appellants a right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account?

3. If the appellants have such a right, then by reason of s. 35(1) of the *Constitution Act, 1982*, do the appellants have an immunity from prosecution under the *Fisheries Act* and *Regulations* with respect to the charges in question?

19 In the Denny appeal, two additional issues are raised:

4. Does s. 19 of the *Fisheries Act* require that all fishing for salmon be "prohibited by law" at the time and place that the appellant Denny was in possession of a salmon?

5. Can the appellant Denny be convicted of both catching and retaining a salmon by means of a net without a license and of being in possession at the same time and place of the same salmon?

20 In the Sylliboy appeal, a further issue is advanced:

6. Can the appellant be convicted on the same set of circumstances of both fishing with a snare in non-tidal waters (s. 6(4), *Nova Scotia Fishery Regulations*) and of being in possession of a snare within 15 metres of non-tidal waters (s. 6(5)(a), *Nova Scotia Fishery Regulations*?

The Submissions of the Appellants and the Respondent

21 The appellants' position is that they should each be acquitted because, as Micmac Indians, they have a right to harvest fish for food and that right gives each, by virtue of s. 35(1) of the *Constitution Act, 1982*, priority over other user groups in the allocation of any surplus fishery resources, once the needs of conservation have been met. They argue that under the regulatory scheme which now exists, this constitutional right to an allocation of the fisheries resource is denied them. The federal fisheries authorities, taking into account the needs of conservation, have determined that for both of the fisheries resources involved in the cases under appeal, namely Atlantic salmon and cod, a limited harvest can and should be permitted. This harvest, by policy and practice, has been allocated to user groups other than the appellants, namely commercial and recreational fishermen. The appellants say that the federal regulatory scheme is inconsistent with the Constitution and, as such, is of no force and effect as against the appellants, pursuant to s. 52 of the *Constitution Act, 1982*.

22 The respondent argues that the appellants do not possess aboriginal or treaty rights which allow them to fish for food in the waters in question in Contravention of the Federal Fishery Regulations. It is further submitted, that, as of April 17, 1982 (the date upon which s. 35(1) of the *Constitution Act, 1982*, was brought into force and effect) the appellants did not have any "existing" rights worthy of Constitutional protection.

The Appellants' Claim to an Aboriginal Right to Fish for Food

23 The appellants contend that they enjoy an aboriginal right to fish. Support for this proposition is stated in the following manner at p. 21 of their factum:

...This is because the Micmac in their treaties have never given up these rights, unlike most treaty Indians in Canada. From Northern Ontario through the Prairie Provinces and in northeast British Columbia, the model for Indian treaties was the extinguishment of Indian rights as part of the cession of land rights, in exchange for the promises contained in the treaties. In the Maritimes the treaties confirmed pre-existing aboriginal rights ... that the concept of aboriginal rights is legally recognized as a legitimate, enforceable right by the courts of Canada is no longer the subject of debate. ...Thus, the Appellants as Micmac Indians in Nova Scotia continue to enjoy aboriginal rights as well as treaty rights.

24 A definition of the term "aboriginal rights" is provided by Brian Slatterly in his article entitled: "*The Constitutional Guarantee of Aboriginal and Treaty Rights*", 8 Queen's L.J. 232 where he writes at p. 243:

The expression, "aboriginal rights" ... refers to a range of rights held by native peoples, not by virtue of Crown grant, agreement or legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands now making up Canada.

25 Professor Hogg, in his text *Constitutional Law of Canada* (2 ed., 1985) states at p. 563:

...it seems likely that the aboriginal peoples of Canada held rights of some kind with respect to the lands that they occupied at the time of European settlement, and that those rights, unless

voluntarily surrendered or taken away by statute, survived the reception of French and English law that occurred as the result of European settlement.

26 In *Calder v. The Attorney General of British Columbia*, [1973] S.C.R. 313, the Supreme Court of Canada recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. The Supreme Court of Canada has confirmed the existence of such rights in subsequent decisions including *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *Simon v. The Queen*, [1985] 2 S.C.R. 387. In *Simon*, Chief Justice Dickson, referring to the Treaty of 1752, wrote at p. 402:

The fact that the right to hunt already existed at the time the Treaty was entered into by virtue of the Micmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the Treaty.

27 The aboriginal rights of Indians (to fish, for example) can be extinguished. Such abrogation could take place in either of two ways:

1. The federal government could enact legislation for such a purpose pursuant to its power to make laws in relation to "Indians, and lands reserved for the Indians" under s. 91 (24) of the *Constitution Act*, 1864: see Hogg, *Constitutional Law of Canada* (*supra*) at p. 563; *Calder v. A.G.B.C.* (1973) 34 D.L.R. (3d) 145 (S.C.C.); *R. v. Derriksan* (1976) 71 D.L.R. (3d) 159 (S.C.C.) and *Jack v. The Queen*, [1980] 1 S.C.R. 294.

2. Voluntary surrender of the rights by the Indians: *Constitutional Law of Canada* (*supra*) at p. 563.

28 In *R. v. Isaac* (1975) 13 N.S.R. (2d) 460 (N.S.S.C.A.D.), this court recognized the existence of Indian aboriginal rights to hunt and fish. The decision of Chief Justice MacKeigan is also relevant for his particularly thorough historical analysis of the basis upon which the Micmac aboriginal rights exist. The court found that the "original Indian rights" of Nova Scotian Indians to hunt and fish had not been diminished by treaty, other agreement or competent legislation. Chief Justice MacKeigan stated at p. 478:

The original Indian rights as defined by Chief Justice Marshall were not modified by any treaty or ordinance during the French regime which lasted until 1713 in Acadia, and until 1758 in Cape Breton, and must be deemed to have been accepted by the British on their entry. Such acceptance is shown by the British Royal Proclamation of October 7, 1763 (R.S.C. 1970, Appendices, pp. 123-129), which has been perhaps a little extravagantly termed the "Indian Bill of Rights".

29 The Chief Justice continued:

The Proclamation was clearly not the exclusive source of Indian rights ... but rather was "declaratory of the aboriginal rights"...

I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p. 127) acknowledged that in all colonies, including Nova Scotia, all land which had not been "ceded to or purchased by" the Crown was reserved to the

Indians as "*their Hunting Grounds*". Any trespass upon any lands thus reserved to the Indians was forbidden.

30 As to the issue of whether the Indians of Nova Scotia had given up these particular rights, Chief Justice MacKeigan noted at p. 479 of the decision:

No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves, although thorough archival research might well disclose record of informal agreements, especially in the early 1800's when reserves were established by executive order.

Agreements with the Indians in the Maritimes were primarily treaties of peace, informal and sometimes oral. ...They often acknowledged gifts to the Indians and sometimes specifically assured hunting and fishing rights to the Indians.

31 In determining that these rights continued to exist, the Chief Justice stated at p. 483:

I have been unable to find any record of any treaty, agreement or arrangement after 1780, extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians.

32 Having stated earlier in his decision (p. 478) that a usufructuary right is a right to the use of land and includes "the right to catch and use the fish and game and other products of the streams and forests of that land", the Chief Justice wrote at p. 485:

This Part (of the decision) has established that Indians in Nova Scotia had a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act.

33 The result in *Isaac* was stated succinctly in *R. v. Cope* (1981) 132 D.L.R. (3d) 36 (N.S.S.C.A.D.) at p. 37:

...Indians had a personal and usufructuary right to hunt, a right historically associated with their lands, and that that aboriginal right had been affirmed by various treaties ... the lands in Nova Scotia where that aboriginal right might still be enjoyed were essentially limited to Indian reserve land. *We thus concluded that the aboriginal right to hunt, which impliedly included a right to fish, had been preserved for the Indians on reserve land* and could not be affected by provincial laws, having regard to the exclusive federal power in respect of Indians and lands reserved for the Indians. (emphasis added)

34 Relying upon *Isaac* and the fact situation upon which it was based, it is appropriate in the circumstances that give rise to these appeals to find that the aboriginal rights of Nova Scotian Micmac Indians extend beyond the strict perimeter of Reserve lands to the waters incidental and adjacent to the Reserves. To limit an aboriginal fishing right purely to Reserve lands is inconsistent with the fact that, in Nova Scotia, no treaty has been found to exist clearly showing that the Indians have released that right.

35 The respondent submits that, in the event this court finds the existence of an aboriginal right of the appellants to fish for food, such right has been extinguished by the enactment of the Regulations made pursuant to the *Fisheries Act*. It states at p. 33 of its factum:

Prior to April 17, 1982, it is submitted that an effective expression of the Crown's intent to extinguish an aboriginal right did not depend on whether the intent was manifested in statute or in subordinate legislation such as regulations. There is no basis in law that would preclude otherwise valid regulations from extinguishing an aboriginal right. The regulations are an exercise of the will of Parliament.

36 And at p. 34 of the factum:

If regulations manifest a sovereign intent "necessarily inconsistent" with the continued existence of the aboriginal right, as opposed to merely regulating its exercise, then extinguishment will result.

37 Section 6.1 of the *Nova Scotia Fishery Regulations*, S.O.R. 83-705, is evidence of federal legislation establishing or making possible a food fishery for Nova Scotian Indians.

38 Section 6.1(1) provides:

Provisions Respecting Indians

Notwithstanding any other provision of these Regulations, a licence may be issued to an Indian or an Indian Band authorizing that Indian or Members of that Band to fish for food.

This regulation, effective September 15, 1983, is evidence of the federal government's intention to recognize and preserve an Indian food fishery. It adds support to the proposition that Nova Scotian Indians' aboriginal right to fish for food has not been extinguished.

39 In *R. v. Sparrow*, (1986) 36 D.L.R. (4th) 246 (B.C.C.A.) (on appeal to the Supreme Court of Canada), the Court considered Indian aboriginal and treaty rights to fish for food where the accused was charged with the offence of fishing with a drift-net longer than that permitted by the terms of an Indian Food Fishing License, contrary to 61.1 of the *Fisheries Act*, R.S.C. 1970, c. F-14. Counsel for the federal Crown put forth a similar argument to the effect that any existing aboriginal right to fish had been extinguished by validly enacted federal regulations. In disposing of this argument, the Court stated at p. 265:

The only submission that the right is not an existing one was that of counsel for the federal Crown who put forward the doctrine, apparently propounded in this case for the first time, of "extinguishment by regulation". The major premise is that the aboriginal right to fish was unrestricted. The minor premise is that, over the past century or so, restrictions have been imposed by both federal and provincial fisheries legislation. So, it is said, that whatever right to fish is retained by Indians cannot be an aboriginal right because it has been restricted. No logical basis is suggested for the proposition that a right which is restricted ceases to be a right.

40 The Court continued at p. 266:

In our view, the "extinguishment by regulation" proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognized the Indian right to fish, are strong evidence that the right does exist.

41 Similarly, the federal government, by s. 6.1 of the *Nova Scotia Fishery Regulations*, recognizes the potential existence of an Indian food fishery, both on an individual and Band basis. Following the reasoning in *Sparrow*, the fact that these regulations were enacted is further recognition of the existence of an aboriginal right to fish for food possessed by the Micmac Indians of Nova Scotia. As stated in the decision at p. 266:

If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have constantly recognized the Indian right to fish, are strong evidence that the right does exist. It is clear that here was an aboriginal right...

42 I am persuaded that the appellants have an aboriginal right to fish for food in the waters in question, namely Indian Brook and the Afton River. And further, based upon the decision in Isaac, this right has not been extinguished through treaty, other agreement or competent legislation.

The Appellants' Claim to a Treaty Right to Fish for Food in the Waters of the Bras d'Or Lake

43 The appellants submit that the Micmacs of Cape Breton come within the provisions of the Treaties of 1725 and 1752. They argue that these documents show that Micmacs throughout Nova Scotia enjoyed treaty-protected rights to "have free liberty of ... fishing as usual," to use the language of the Treaty of 1752. In response, the respondent submits that the treaties do not refer to the Micmacs of Cape Breton and as a matter of fact and law, could not have included them.

44 Given the conclusion that the appellants possess an aboriginal right to fish for food in the relevant waters, it is not necessary to determine whether the appellants have a right to fish protected by treaty.

Constitution Act, 1982, Section 35(1)

45 Section 35(1) states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

46 Section 35 is a substantive guarantee of the aboriginal and treaty rights of the aboriginal peoples of Canada. Professor Hogg provides a useful overview of this section in *Constitutional Law of Canada* (*supra*) at p. 564:

Section 35 is outside the *Charter of Rights*, which occupies ss. 1 to 34 of the *Constitution Act, 1982*. Section 35's location outside the *Charter of Rights* provides certain advantages. The rights referred to in Section 35 are not qualified by Section 1 of the *Charter*, that is, the rights are not subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and

democratic society". Nor are the rights subject to legislative override under Section 33 of the *Charter*. Nor are the rights effective only against governmental action, as stipulated by Section 32 of the *Charter*. On the other hand, Section 35's location outside the *Charter* carries the disadvantage that the rights are not enforceable under Section 24, a provision that permits enforcement only of *Charter* rights.

47 Professor Hogg continues at p. 565:

The word "existing" in sub-section (1) probably has the effect of excluding aboriginal or treaty rights that have before April 17, 1982 been extinguished by voluntary surrender or competent legislation. In other words, Section 35 does not retroactively annul prior extinguishments of native rights so as to restore the rights to their original unimpaired condition. Such an interpretation would leave the word "existing" with no work to do, not to mention the unpredictable ramifications of such a radical interpretation. ...*the word* "*existing*" *in Section 35 means* "*unextinguished*". (emphasis added)

48 I accept the proposition that "existing" as used in the context of s. 35(1) of the *Constitution Act, 1982* is to be equated with the term "unextinguished". That leads to the question whether s. 35(1) recognizes unextinguished aboriginal and treaty rights in their original form or whether protection is only to be given to rights as they existed on April 17, 1982 subject to regulation by valid federal statutory enactment. (See the Supreme Court of Canada decisions in *Calder, Guerin* and *Jack*.)

49 In *R. v. Sparrow* (*supra*), the British Columbia Court of Appeal considered s. 35(1) of the *Constitution Act, 1982*. The evidence adduced at trial established that *Sparrow* was fishing in ancient tribal territory where his ancestors had fished from time immemorial and, thus, he was exercising an existing aboriginal right. After concluding that this right was not extinguished, the court went on to consider the effect of s. 35(1).

50 In finding that the aboriginal fishing right that was protected by s. 35(1) was the substantive right which existed on April 17, 1982 rather than the right to fish as it existed in its original form many years earlier, the Court stated at p. 272:

It must be borne in mind that what is recognized and affirmed by s. 35(1) is the "existing" right. In 1982, the Indian right to fish existed in circumstances profoundly different from those prevailing before or in the early years of white settlement when the fishery was thought to be "inexhaustible": see Dickson, J. in *Jack et al v. The Queen* ... The Constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a Parliamentary system of government and of federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with its complexities and competing interests. *The* "*existing right*" *in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all*. (emphasis added)

The court added at p. 276:

Parliament has the Constitutional authority and responsibility under head 12 of s. 91 of the *Constitution Act*, 1867, to make laws in relation to sea-coast and inland fisheries. Indians share with other Canadians the need for reasonable regulations to ensure the proper management and conservation of this resource. The regulations made pursuant to the *Fisheries Act* place limits on the rights of all persons including Indians.

Parliament has the Constitutional authority and responsibility under head 24 of s. 91 of the *Constitution Act*, 1867, to make laws in relation to Indians and lands reserved to Indians.

Section 35(1) of the *Constitution Act, 1982* does not purport to revoke the power of Parliament to act under heads 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new Constitutional guarantee that the aboriginal rights existing on April 17, 1982, may not be taken away.

The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on April 17, 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected then reasonable regulations to ensure the proper management and conservation of the resource must be continued. (emphasis added)

51 By applying this reasoning in *Sparrow*, which I adopt, to this appeal, it follows that the appellants' aboriginal right to fish in the waters in question is protected pursuant to s. 35(1) of the *Constitution Act, 1982*. The precise nature of the right protected may be determined by an examination of the right as it existed on April 17, 1982. It is not the original right to fish possessed by the appellants' ancestors that is protected by this section in the Constitution. Rather, it is the unextinguished right which existed on April 17, 1982 - a right which could potentially be regulated through a valid federal enactment. Therefore, to use the words of the court in *Sparrow*: "It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right and on April 17, 1982, it was a regulated right."

52 As a consequence, the regulations under which the three appellants were charged are a valid exercise of federal legislative power pursuant to s. 92 (12) of the *Constitution Act, 1867*, notwithstanding the fact that the appellants' aboriginal right to fish has been recognized and afforded protection under s. 35(1) of the *Constitution Act*.

53 However, the federal power to regulate the protected aboriginal right under s. 35(1) is limited. It is not absolute. I agree with the the following statement of the court in *Sparrow* at p. 277:

The general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. *The essential limitation upon that power is that which is already recognized by government policy as it emerges from the evidence in this case. That is, in allocating the right to take fish, the Indian food fishery is given priority over the interest of other user groups*. What is different is that, where the Indian food fishery is in the exercise of an aboriginal right, *it is*

constitutionally entitled to such a priority. Furthermore, by reason of s. 35(1) it is a constitutionally protected right and cannot be extinguished. (emphasis added)

54 The offical policy of the Federal Government recognizes the priority of an Indian Food Fishery with respect to salmon stocks. The goal of conservation receives paramount consideration while the Indian Food Fishery is given secondary priority. Evidence of this policy appears in the *Atlantic Salmon Management Plan* (*1987*) which contains the following principles:

1. Conservation of Atlantic salmon stocks, particularly the large salmon component, remains the overriding priority in the management of this fishery.

2. The social and cultural importance of fishing to Native communities, which have traditionally harvested the resource for their own consumption is recognized and will be given priority after conservation.

55 The existence of this policy is supported by a paper entitled *Blueprint for the Future of Atlantic Salmon* (*1980*) which was prepared by the Department of Fisheries and Oceans and tendered as evidence during the course of the trials. Page seven of the document states:

Policy Statement for Atlantic Salmon

In light of the problems inherent in a mixed stock fishery, the best way to manage Atlantic salmon is through discreet stock management...

It is the intention of the Department of Fisheries and Oceans to manage the Atlantic salmon resource in Atlantic Canada on a "best use" basis, in consultation with the appropriate provinces and all user groups, in order to both conserve stocks of Atlantic salmon and to optimize the economic and social benefits of this natural resource to the people of this region and the rest of Canada.

The priority for allocation of stocks will be the same as is currently followed, that is (1) resource conservation, (2) Native food fisheries, and (3) commercial and recreational fisheries.

56 On the issue of the Indians' priority to a food fishery after the needs of conservation have been considered, Judge MacDonald commented at p. 9 of his decision in the *Sylliboy* case:

There's no doubt that in fact the evidence that was brought forth by the experts that were examined by counsel, was to the effect that there is some awareness in the Federal Department of Fisheries that this priority is considered but I must say I was not impressed from the evidence as a whole that the needs of the Indian food fishery as asserted under the Treaty Rights were in fact given any priority. It is quite clear from the evidence at the trial that while perhaps a great deal of thought has been given and perhaps in some places there are some priorities ... *the fact is that there is no real evidence of any priority given to the needs of the Indian Food Fishery*. (emphasis added)

57 I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account. As stated in *Sparrow* at p. 277:

...where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to such priority....

Those regulations which do not infringe the aboriginal food fishery, in the sense of reducing the available catch below that required for reasonable food and societal needs, will not be affected by the constitutional recognition of the right. Regulations which do bear upon the exercise of the right may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest....

58 To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

59 Expert evidence was adduced at the Denny trial indicating that a surplus of salmon existed in the waters of Indian Brook after provision was made for conservation. This evidence was not contradicted by the Crown. In particular, Peter Amiro was qualified as an expert to give opinion evidence in relation to the biology of Atlantic salmon and the scientific factors involved in Atlantic salmon conservation. Mr. Amiro made an assessment of Indian Brook in 1987. Counsel for Denny and Paul asked this expert the following question at p. 115 of the transcript:

Q. And could you advise why you took a look at Eskasoni River or Indian Brook in October of '87?

A. Fred Allen was the area manager in Eastern Nova Scotia, asked of Gary Turner, who is the senior advisor, what might be the harvestable surplus of salmon for Eskasoni Brook if they were to ask for a excess. Gary referred the question to our assessment group, headed by R.E. Cutting, who asked me to see what I could do. And at that time, there were very little data available, so I used a very old technique to get an idea of what might be possible provided you managed the stock. And this addresses that if you manage the stock, that is achieve spawning escapement, and there are no other salmonids in the brook competing, i.e. rainbow trout, that the possibility of ten to seventy adult salmon per year being surplus could be, and that would reflect the change in variable marine mortality due to variance and natural fishing mortalities, and that ten to seventy includes surpluses available to all home water fisheries.

60 A further analysis by Mr. Amiro, conducted three days prior to his giving testimony at the trials of Denny and Paul, confirmed the existence of a surplus of salmon once conservation needs had been taken into account. It follows that the appellant Denny was entitled to receive priority in the allocation of this surplus over other user groups, based upon his aboriginal right to fish which is protected by s. 35(1) of the *Constitution Act, 1982*.

61 Brian Slatterly in his article, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, (*supra*), writes appropriately at p. 235:

The legal effect of the aboriginal rights provisions is governed by section 52. This states that the Constitution of Canada "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." ...The effect is to put the Constitution in a position of legal paramountcy. The Act overrides "any law" ... that is inconsistent with its terms, including both statutes and the common law.

And at p. 255:

Section 35 ensures that the rights named there remain fully operable. A statute that directly impedes the exercise of a constitutional right is inconsistent with that right and consequently fails.

62 Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

63 In the case of Denny, the evidence at trial indicates that a surplus was, in fact, present. The impugned regulations are inconsistent with Denny's entitlement to fish for food, in the waters adjacent to the Reserve, to the extent that they fail to give him priority over other persons legally permitted to fish. In that way, and to that extent, the impugned regulations are of no force and effect when applied to Denny.

64 The appeals of Paul and Sylliboy are slightly more problematic in that cogent evidence of a surplus of fish, after conservation, was not presented. However, since no evidence was adduced to the contrary, it is reasonable to assume that resource surplus existed in each case. The trial judge in the Sylliboy case commented on there being "a self sustained yield of salmon in the Afton River" and that "whatever fishing may have been engaged in by the Native peoples at Afton, has not interfered with the quantity of fish now there".

65 Both Paul and Sylliboy, in accordance with their respective constitutional entitlements to a priority in the allocation of the resource, after the needs of conservation have been recognized, were entitled to fish for the purpose of satisfying their personal and their familial nutritional requirements. As with Denny, the impugned legislation fails to give them priority over other persons legally entitled to fish in the waters adjacent to the Reserve. It thus precluded Paul and Sylliboy from fishing in the exercise of their constitutionally guaranteed rights and to that extent is of no force and effect.

66 These constitutionally guaranteed rights are not violated by the legislative exercise of reasonable regulation. The salmon fishery is entitled to be protected so that it may continue to thrive and prosper for the benefit of all who fish the waters salmon inhabit. This includes the right to license and to prohibit unsavory practices in the manner by which fish are caught. It includes, as well, the right to require native Indians to be licensed to fish for food in waters adjacent to Reserve

lands. Any regulatory scheme must be consistent with the guaranteed constitutional rights of persons such as these appellants. Reasonable regulation for the purposes suggested in this paragraph will not be inconsistent with those rights but rather will achieve valid objectives that are in the interests of the native people and the preservation and enhancement of the fishery.

Conclusion

67 I would respond to the common issues, earlier stated, in the following manner.

1. The appellants have an existing aboriginal right to fish for food in the subject waters in these appeals. Given this finding, it is not necessary to determine whether the appellants have a right to fish protected by treaty.

2. Section 35 of the *Constitution Act, 1982*, provides the appellants with the right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account. This right is subject to reasonable regulation of the resource in a manner that recognizes and is consistent with the appellants' guaranteed constitutional rights.

3. Based upon the appellants aboriginal right to fish for food and the protection afforded by s. 35(1) of the *Constitution Act, 1982*, the three appellants enjoy a limited immunity from prosecution under the provisions of the *Fisheries Act and Regulations*. To the extent that the provisions under which they have been charged are inconsistent with the constitutional rights of the appellants, s. 52 of the *Constitution Act* renders them of no force and effect.

68 In view of these responses to the issues that are common to the three appeals, it is unnecessary to consider the additional grounds raised by the appellants Denny and Sylliboy.

69 For the reasons given, the trial judges, in my respectful opinion, erred in law by entering convictions against the three appellants on the counts with which they were charged. Accordingly, I would allow the appeals of the appellants Denny, Paul and Sylliboy, quash their convictions and enter verdicts of acquittal.

***Hart, J.A.*, *Jones, J.A.*, *Macdonald, J.A.*, *Matthews, J.A.*:**

70 Concurred in.

TAB G

Supreme Court Judgments

R. v. Marshall

Collection	Supreme Court Judgments
Date	1999-09-17
Report	[1999] 3 SCR 456
Case number	26014
Judges	Lamer, Antonio; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank; Binnie, William Ian Corneil
On appeal from	Nova Scotia
Subjects	Aboriginal law
Notes	SCC Case Information: 26014

R. *v*. Marshall, [1999] 3 S.C.R. 456

Donald John Marshall, Jr. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for New Brunswick,

the West Nova Fishermen's Coalition,

the Native Council of Nova Scotia

and the Union of New Brunswick Indians *Interveners*

Indexed as: R. *v.* Marshall

File No.: 26014.

1998: November 5; 1999: September 17.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Binnie JJ.

on appeal from the court of appeal for nova scotia

Indians -- Treaty rights – Fishing rights -- Accused, a Mi'kmaq Indian, fishing with prohibited net during close period and selling fish caught without a licence in violation of federal fishery regulations -- Whether accused possessed treaty right to catch and sell fish that exempted him from compliance with regulations -- Mi'kmaq Treaties of 1760-61 -- Maritime Provinces Fishery Regulations, SOR/93-55, ss. 4(1)(a), 20 -- Fishery (General) Regulations, SOR/93-53, s. 35(2).

The accused, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. He admitted that he had caught and sold 463 pounds of eels without a licence and with a prohibited net within close times. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations. During the negotiations leading to the treaties of 1760-61, the aboriginal leaders asked for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry" in response to the Governor's inquiry "Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time". The written document, however, contained only the promise by the Mi'kmaq not to "Traffick, Barter or Exchange any Commodities in any manner but with such persons, or the Manager of such Truckhouses as shall be appointed or established by His majesty's Governor". While this "trade clause" is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. He also found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. The accused was convicted on all three counts. The Court of Appeal upheld the convictions. It concluded that the trade clause did not grant the Mi'kmaq any rights, but represented a mechanism imposed upon them to help ensure that the peace between the Mi'kmaq

and the British was a lasting one, by obviating the need of the Mi'kmaq to trade with the enemies of the British or unscrupulous traders.

Held (Gonthier and McLachlin JJ. dissenting): The appeal should be allowed and an acquittal entered on all charges.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ.: When interpreting the treaties the Court of Appeal erred in rejecting the use of extrinsic evidence in the absence of ambiguity. Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Secondly, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

There was more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses. While the treaties set out a restrictive covenant and do not say anything about a positive Mi'kmaq right to trade, they do not contain all the promises made and all the terms and conditions mutually agreed to. Although the trial judge drew positive implications from the negative trade clause, such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the treaty document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people. The trial judge's narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. It is the common intention of the parties in 1760 to which effect must be given. The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to a harvest of wildlife to trade.

This appeal should be allowed because 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, as best the content of those treaty promises can now be ascertained. If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. An

interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

There is a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. A general right enjoyed by all citizens can be made the subject of an enforceable treaty promise. Thus the accused need not show preferential trading rights, but only treaty trading rights. Following the enactment of the *Constitution Act, 1982* , the fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.

The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. Thus construed, however, they are treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* . The surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test. What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. Such regulations would accommodate the treaty right and would not constitute an infringement that would have to be justified under the *Badger* standard.

The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Accordingly, the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty right to fish for trading purposes, and the ban on sales would, if

enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.

Per Gonthier and McLachlin JJ. (dissenting): Each treaty must be considered in its unique historical and cultural context, and extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. It may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading.

The treaties of 1760-61 do not grant a general right to trade. The core of the trade clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade. Nor does the historic and cultural context in which the treaties were made establish such a right. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. On the historical record, moreover, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade. To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. The finding that both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them, and replaced the expensive truckhouses with licenced traders in 1762. The system of licenced traders, in turn, died out by the 1780s. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the accused from the application of the fisheries regulations.

Cases Cited

By Binnie J.

Referred to: *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Badger*, [1996] 1 S.C.R. 771; *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167; *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227, leave to appeal refused, [1981] 2 S.C.R. xi; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Sioui*, [1990] 1 S.C.R.

1025; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Horse*, [1988] 1 S.C.R. 187; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, aff'g (1993), 80 B.C.L.R. (2d) 75; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Isaac* (1975), 13 N.S.R. (2d) 460; *R. v. Cope* (1981), 132 D.L.R. (3d) 36; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *The "Moorcock"* (1889), 14 P.D. 64; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025; *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Sikyea v. The Queen*, [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Bombay*, [1993] 1 C.N.L.R. 92; *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 25 S.C.R. 434; *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139.

By McLachlin J. (dissenting)

R. v. Sundown, [1999] 1 S.C.R. 393; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Horseman*, [1990] 1 S.C.R. 901; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. Horse*, [1988] 1 S.C.R. 187.

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Act to prevent any private Trade or Commerce with the Indians, 34 Geo. II, c. 11.

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Criminal Code , R.S.C., 1985, c. C-46 , s. 830 [rep. & sub. c. 27 (1st Supp.), s. 182; am. 1991, c. 43, s. 9 (Sch., item 15)].

Fisheries Act , R.S.C., 1985, c. F-14 , s. 7(1) .

Fishery (General) Regulations, SOR/93-53, s. 35(2).

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APPEAL from a judgment of the Nova Scotia Court of Appeal (1997), 159 N.S.R. (2d) 186, 468 A.P.R. 186, 146 D.L.R. (4th) 257, [1997] 3 C.N.L.R. 209, [1997] N.S.J. No. 131 (QL), affirming a decision of the Provincial Court, [1996] N.S.J. No. 246 (QL), convicting the accused of three offences under the *Fisheries Act* . Appeal allowed, Gonthier and McLachlin JJ. dissenting.

Bruce H. Wildsmith, *Q.C.*, and *Eric A. Zscheile*, for the appellant.

Michael A. Paré, *Ian MacRae* and *Gordon Campbell*, for the respondent.

Bruce Judah, *Q.C.*, for the intervener the Attorney General for New Brunswick.

A. William Moreira, *Q.C.*, and *Daniel R. Pust*, for the intervener the West Nova Fishermen's Coalition.

D. Bruce Clarke, for the intervener the Native Council of Nova Scotia.

Henry J. Bear, for the intervener the Union of New Brunswick Indians.

The judgment of Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ. was delivered by

1 Binnie J. – On an August morning six years ago the appellant and a companion, both Mi'kmaq Indians, slipped their small outboard motorboat into the coastal waters of Pomquet Harbour, Antigonish County, Nova Scotia to fish for eels. They landed 463 pounds, which they sold for $787.10, and for which the appellant was arrested and prosecuted.

2 On an earlier August morning, some 235 years previously, the Reverend John Seycombe of Chester, Nova Scotia, a missionary and sometime dining companion of the Governor, noted with satisfaction in his diary, "Two Indian squaws brought seal skins and eels to sell". That transaction was apparently completed without arrest or other incident. The thread of continuity between these events, it seems, is that the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century. The appellant says that they are entitled to continue to do so now by virtue of a treaty right agreed to by the British Crown in 1760. As noted by my colleague, Justice McLachlin, the appellant is guilty as charged unless his activities were protected by an existing aboriginal or treaty right. No reliance was placed on any aboriginal right; the appellant chooses to rest his case entirely on the Mi'kmaq treaties of 1760-61.

3 The trial judge ([1996] N.S.J. No. 246 (QL) (Prov. Ct.)) accepted as applicable the terms of a Treaty of Peace and Friendship signed on March 10, 1760 at Halifax. The parties disagree about the existence of alleged oral terms, as well as the implications of the "trade clause" written into that document. From this distance, across more than two centuries, events are necessarily seen as "through a glass, darkly". The parties were negotiating in March 1760 in the shadow of the great military and political turmoil following the fall of the French fortresses at Louisbourg, Cape Breton (June 1758) and Quebec (September 1759). The Mi'kmaq signatories had been allies of the French King, and Montreal would continue to be part of New France until it subsequently fell in June 1760. The British had almost completed the process of expelling the Acadians from southern Nova Scotia. Both the Treaty of Paris, ending hostilities, and the Royal Proclamation of 1763 were still three years in the future. Only six years prior to the signing of the treaties, the British Governor of Nova Scotia had issued a Proclamation (May 14, 1756) offering rewards for the killing and capturing of Mi'kmaq throughout Nova Scotia, which then included New Brunswick. The treaties were entered into in a period where the British were attempting to expand and secure their control over their northern possessions. The subtext of the Mi'kmaq treaties was reconciliation and mutual advantage.

4 I would allow this appeal because 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, as best the content of those treaty promises can now be ascertained. In reaching this conclusion, I recognize that if the present dispute had arisen out of a modern commercial transaction between two parties of relatively equal bargaining power, or if, as held by the courts below, the short document prepared at Halifax under the direction of Governor Charles Lawrence on March 10, 1760 was to be taken as being the "entire agreement" between the parties, it would have to be concluded that the Mi'kmaq had inadequately protected their interests. However, the courts have not applied strict rules of interpretation to treaty relationships. In *R. v. Denny* (1990), 55 C.C.C. (3d) 322, and earlier decisions cited therein, the Nova Scotia Court of Appeal has affirmed the Mi'kmaq aboriginal right to fish for food. The appellant says the treaty allows him to fish for

trade. In my view, the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries". This right was always subject to regulation. The Crown does not suggest that the regulations in question accommodate the treaty right. The Crown's case is that no such treaty right exists. Further, no argument was made that the treaty right was extinguished prior to 1982, and no justification was offered by the Crown for the several prohibitions at issue in this case. Accordingly, in my view, the appellant is entitled to an acquittal.

Analysis

5 The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms. In this case, the task is complicated by the fact the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence. The trial judge, Embree Prov. Ct. J., found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. Some of these documents are missing. Despite some variations among some of the documents, Embree Prov. Ct. J. was satisfied that the written terms applicable to this dispute were contained in a Treaty of Peace and Friendship entered into by Governor Charles Lawrence on March 10, 1760, which in its entirety provides as follows:

Treaty of Peace and Friendship concluded by [His Excellency Charles Lawrence] Esq. Govr and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia.

I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty or elsewhere and if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured.

That neither I nor any of my tribe shall in any manner entice any of his said Majesty's troops or soldiers to desert, nor in any manner assist in conveying them away but on the contrary will do our utmost endeavours to bring them back to the Company, Regiment, Fort or Garrison to which they shall belong.

That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.

That all English prisoners made by myself or my tribe shall be sett at Liberty and that we will use our utmost endeavours to prevail on the other tribes to do the same, if any prisoners shall happen to be in their hands.

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.

And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places in this Province of Nova Scotia or Accadia as shall be appointed for that purpose by His Majesty's Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.

And all these foregoing articles and every one of them made with His Excellency C. L., His Majesty's Governor I do promise for myself and on of sd part -- behalf of my tribe that we will most strictly keep and observe in the most solemn manner.

In witness whereof I have hereunto putt my mark and seal at Halifax in Nova Scotia this day of March one thousand

Paul Laurent

I do accept and agree to all the articles of the forgoing treaty in Faith and Testimony whereof I have signed these present I have caused my seal to be hereunto affixed this day of march in the 33 year of His Majesty's Reign and in the year of Our lord - 1760

Chas Lawrence [Emphasis added.]

6 The underlined portion of the document, the so-called "trade clause", is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals. A "truckhouse" was a type of trading post. The evidence showed that the promised government truckhouses disappeared from Nova Scotia within a few years and by 1780 a replacement regime of government licensed traders had also fallen into disuse while the British Crown was attending to the American Revolution. The trial judge, Embree Prov. Ct. J., rejected the Crown's argument that the trade clause amounted to nothing more than a negative covenant. He found, at para. 116, that it reflected a grant to the Mi'kmaq of the positive right to "bring the products of their hunting, fishing and gathering to a truckhouse to trade". The Court of Appeal ((1997), 159 N.S.R. (2d) 186) found that the trial judge misspoke when he used the word "right". It held that the trade clause does not grant the Mi'kmaq any rights. Instead, the trade clause represented a "mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British" (p. 208). When the truckhouses disappeared, said the court, so did any vestiges of the restriction or entitlement, and that was the end of it.

7 The appellant's position is that the truckhouse provision not only incorporated the alleged right to trade, but also the right to pursue traditional hunting, fishing and gathering activities in support of that trade. It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant's argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mi'kmaq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant's activities that are the subject of the prosecution. I should say at the outset that the appellant overstates his case. In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* , and are subject to regulations that can be justified under the *Badger* test (*R. v. Badger*, [1996] 1 S.C.R 771).

8 Although the agreed statement of facts does not state explicitly that the appellant was exercising his rights for the purpose of necessaries, the Court was advised in the course of oral argument that the appellant "was engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse". The Crown did not dispute this characterization and it is consistent with the scale of the operation, the amount of money involved, and the other surrounding facts. If at some point the appellant's trade and related fishing activities were to extend beyond what is reasonably required for necessaries, as hereinafter defined, he would be outside treaty protection, and can expect to be dealt with accordingly.

Evidentiary Sources

9 The Court of Appeal took a strict approach to the use of extrinsic evidence when interpreting the Treaties of 1760-61. Roscoe and Bateman JJ.A. stated at p. 194: "While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity". I think this approach should be rejected for at least three reasons.

10 Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Rules of interpretation in contract law are in general more strict than those applicable to treaties, yet Professor Waddams states in *The Law of Contracts* (3rd ed. 1993), at para. 316:

The parol evidence rule does not purport to exclude evidence designed to show whether or not the agreement has been "reduced to writing", or whether it was, or was not, the intention of the parties that it should be the exclusive record of their agreement. Proof of this question is a pre-condition to the operation of the rule, and all relevant evidence is admissible on it. This is the view taken by Corbin and other writers, and followed in the Second Restatement.

See also *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167, *per* Idington J., at p. 191, and G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 177. For an example of a treaty only partly reduced to writing, see *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.) (leave to appeal dismissed, [1981] 2 S.C.R. xi).

11 Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and

cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams*, *supra*, at p. 236:

. . . if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The proposition is cited with approval in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 87, and *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1045.

12 Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, *per* Dickson J. (as he then was) in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Dickson J. stated for the majority, at p. 388:

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.

The *Guerin* case is a strong authority in this respect because the surrender there could only be accepted by the Governor in Council, who was not made aware of any oral terms. The surrender could *not* have been accepted by the departmental officials who were present when the Musqueam made known their conditions. Nevertheless, the Governor in Council was held bound by the oral terms which "the Band understood would be embodied in the lease" (p. 388). In this case, unlike *Guerin*, the Governor did have authority to bind the Crown and was present when the aboriginal leaders made known their terms.

13 The narrow approach applied by the Court of Appeal to the use of extrinsic evidence apparently derives from the comments of Estey J. in *R. v. Horse*, [1988] 1 S.C.R. 187, where, at p. 201, he expressed some reservations about the use of extrinsic materials, such as the transcript of negotiations surrounding the signing of Treaty No. 6, except in the case of ambiguity. (Estey J. went on to consider the extrinsic evidence anyway, at p. 203.) Lamer J., as he

then was, mentioned this aspect of *Horse* in *Sioui*, *supra*, at p. 1049, but advocated a more flexible approach when determining the existence of treaties. Lamer J. stated, at p. 1068, that "[t]he 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".

14 Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger*, *supra*, at para. 52:

. . . 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 Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added.]

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. 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 (*Sioui*, *supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). 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 Mi'kmaq interests and those of the British Crown (*Sioui*, *per* Lamer J., at p. 1069 (emphasis added)). In *Taylor and Williams*, *supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). The historical record in the present case is admittedly less clear-cut, and there is no parallel concession by the Crown.

The 1752 Mi'kmaq Treaty

15 In 1749, following one of the continuing wars between Britain and France, the British Governor at Halifax had issued what was apparently the first of the Proclamations "authorizing the military and all British subjects to kill or capture any Mi'kmaq found, and offering a reward". This prompted what the Crown's expert witness at trial referred to as a "British-Mi'kmaq war". By 1751 relations had eased to the point where the 1749 Proclamation was revoked, and in November 1752 the Shubenacadie Mi'kmaq entered into the 1752 Treaty which was the subject of this Court's decision in *Simon*. This treaty stated in Article 4 that:

It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and that if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage. [Emphasis added.]

16 It will be noted that unlike the March 10, 1760 document, the earlier 1752 Treaty contains both a treaty right to hunt and fish "as usual" as well as a more elaborate trade clause. The appellant here initially relied on the 1752 Treaty as the source of his treaty entitlement. In *Simon*, Dickson C.J., at p. 404, concluded that on the basis of the evidence adduced in that case, "[t]he Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities" and left the termination issue open (at pp. 406-7). The Crown led more detailed evidence of hostilities in this case. It appears that while the British had hoped that by entering the 1752 Treaty other Mi'kmaq communities would come forward to make peace, skirmishing commenced again in 1753 with the Mi'kmaq. France and Britain themselves went to war in 1754 in North America. In 1756, as stated, another Proclamation was issued by the British authorizing the killing and capturing of Mi'kmaq throughout Nova Scotia. According to the trial judge, at para. 63, during the 1750s the "French were relying on Mi'kmaq assistance in almost every aspect of their military plans including scouting and reconnaissance, and guarding the Cape Breton coast line". This evidence apparently persuaded the appellant at trial to abandon his reliance on the 1752 Peace and Friendship Treaty. The Court is thus not called upon to consider the 1752 Treaty in the present appeal.

17 It should be pointed out that the Mi'kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi'kmaq were accomplished sailors. Dr. William Wicken, for the defence, spoke of "the Maritime coastal adaptation of the Micmac":

There are fishing people who live along the coastline who encounter countless fishermen, traders, on a regular basis off their coastline.

The Mi'kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland. They were not people to be trifled with. However, by 1760, the British and Mi'kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.

Findings of Fact by the Trial Judge

18 The appellant admitted that he did what he was alleged to have done on August 24, 1993. The only contentious issues arose on the historical record and with respect to the conclusions and inferences drawn by Embree Prov. Ct. J. from the documents, as explained by the expert witnesses. The permissible scope of appellate review in these circumstances was outlined by Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 82:

In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis – his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them – is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however – the findings of fact from which that legal inference was drawn – do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error".

19 In the present case, the trial judge, after a careful and detailed review of the evidence, concluded at para. 116:

I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life. Moreover, it's my conclusion that the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle. The British did not want the Mi'kmaq to become a long-term burden on the public treasury although they did seem prepared to tolerate certain losses in their trade with the Mi'kmaq for the purpose of securing and maintaining their friendship and discouraging their future trade with the French. I am satisfied that this trade clause in the 1760-61 Treaties gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. [Emphasis added.]

The treaty document of March 10, 1760 sets out a restrictive covenant and does not say anything about a positive Mi'kmaq right to trade. In fact, the written document does not set out any Mi'kmaq rights at all, merely Mi'kmaq "promises" and the Governor's acceptance. I cannot reconcile the trial judge's conclusion, at para. 116, that the treaties "gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", with his conclusion at para. 112 that:

The written treaties with the Mi'kmaq in 1760 and 1761 which are before me contain, and fairly represent, all the promises made and all the terms and conditions mutually agreed to.

It was, after all, the aboriginal leaders who asked for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry" in response to the Governor's inquiry "Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time". It cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction. As the Crown acknowledges in its factum, "The restrictive nature of the truckhouse clause was British in origin". The trial judge's view that the treaty obligations are all found within the four corners of the March 10, 1760 document, albeit generously interpreted, erred in law by failing to give adequate weight to the concerns and perspective of the Mi'kmaq people, despite the recorded history of the negotiations, and by giving excessive weight to the concerns and perspective of the British, who held the pen. (See *Badger*, at para. 41, and *Sioui*, at p. 1036.) The need to give balanced weight to the aboriginal perspective is equally applied in aboriginal rights cases: *Van der Peet*, at paras. 49-50; *Delgamuukw*, at para. 81.

20 While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the March 10, 1760 document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people, a

principle emphasized in the treaty context by *Simon*, at p. 408, and *Badger*, at para. 4, and in the aboriginal rights context in *Van der Peet*, at para. 68, and *Delgamuukw*, at paras. 80-82. The trial judge interrogated himself on the scope of the March 10, 1760 text. He thus asked himself the wrong question. His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different.

21 The Court of Appeal, with respect, compounded the errors of law. It not only read the Mi'kmaq "right", such as it was, out of the trial judgment, it also took the view, at p. 204, that the principles of interpretation of Indian treaties developed in connection with land cessions are of "limited specific assistance" to treaties of peace and friendship where "the significant 'commodity' exchanged was mutual promises of peace". While it is true that there is no applicable land cession treaty in Nova Scotia, it is also true that the Mi'kmaq were largely dispossessed of their lands in any event, and (as elsewhere) assigned to reserves to accommodate the wave of European settlement which the Treaty of 1760 was designed to facilitate. It seems harsh to put aboriginal people in a worse legal position where land has been taken without their formal cession than where they have agreed to terms of cession. A deal is a deal. The same rules of interpretation should apply. If, as I believe, the courts below erred as a matter of law in these respects, it is open to an appellate court to correct the errors in an appeal under s. 830 of the *Criminal Code* , R.S.C., 1985, c. C-46 .

The 1760 Negotiations

22 I propose to review briefly the documentary record to emphasize and amplify certain aspects of the trial judge's findings. He accepted in general the evidence of the Crown's only expert witness, Dr. Stephen Patterson, a Professor of History at the University of New Brunswick, who testified at length about what the trial judge referred to (at para. 116) as British encouragement of the Mi'kmaq "hunting, fishing and gathering lifestyle". That evidence puts the trade clause in context, and answers the question whether there was something more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses.

(i) *The Documentary Record*

23 I take the following points from the matters particularly emphasized by the trial judge at para. 90 following his thorough review of the historical background:

1. The 1760-61 treaties were the culmination of more than a decade of intermittent hostilities between the British and the Mi'kmaq. Hostilities with the French were also prevalent in Nova Scotia throughout the 1750's, and the Mi'kmaq were constantly allied with the French against the British.

2. The use of firearms for hunting had an important impact on Mi'kmaq society. The Mi'kmaq remained dependant on others for gun powder and the primary sources of that were the French, Acadians and the British.

3. The French frequently supplied the Mi'kmaq with food and European trade goods. By the mid-18th century, the Mi'kmaq were accustomed to, and in some cases relied on, receiving various European trade goods [including shot, gun powder, metal tools, clothing cloth, blankets and many other things].

. . .

6. The British wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia.

24 Shortly after the fall of Louisbourg in June 1758, the British commander sent emissaries to the Mi'kmaq, through the French missionary, Father Maillard (who served as translator at the subsequent negotiations), holding out an offer of the enjoyment of peace, liberty, property, possessions and religion:

. . . my Reverend Father, It is necessary that I make known to you that your Capital Quebec has fallen to the arms of the King, my master, your armies are in flight, thus if you and your people are so reckless to continue [this war] without justification, it is certain that you will perish by starvation since you have no other assistance.

So you, My Reverend Father, would do well to accept the olive branches that I send to you and to put me in possession of the vessels that your people took from me and return them all to me, I am commanded to assure you by His Majesty that you will enjoy all your possessions, your liberty, property with the free exercise of your religion as you can see by the declaration that I have the honour of sending you. [Emphasis added.]

25 In the harsh winter of 1759-1760, so many Mi'kmaq turned up at Louisbourg seeking sustenance that the British Commander expressed concern that unless their demand for necessaries was met, they would become "very Troublesome" and "entirely putt a Stop to any Settling or fishing all along the Coast" or indeed "the Settlement of Nova Scotia" generally. This is stated in the dispatch from the Governor at Louisbourg, Brigadier-General Edward Whitmore to General Jeffrey Amherst, based in New York, who commanded the British forces in North America:

I acquainted you in some of my Letters in December [1759] and January [1760] last that the Indians were Come in, and that they had agreed to live with us upon a footing of Friendship. Accordingly Several of their Chiefs came in here and articles were agreed on and Signed by Them and Me in Form. On which Occassion as They pleaded they were Naked and Starving I Cloathed Them and gave Them Some Presents of Provisions etc. Afterwards Several Others came in to whom I was Obliged to do the like. And at this time the Chief of the Island is here who beside some Cloathing makes a demand of Powder, Shott, and Arms for four men, which if I would Remain in Peace with Them I find I must Comply with. They Say the French always Supplyed Them with these Things and They expect that we will do the Same. I can fore See that this will be a Constant annual Expence, and therefore I should be glad to have Your Directions both for my own Satisfaction and as a Rule to whoever may be left to Command here when I am Called away. Its Certain unless They are keep'd Quiet They might be very Troublesome to this Town with only a Small Garrison in it, and would entirely putt a Stop to any Settling or fishing all along the Coast, and which is yet of greater Consequence might much disturb and hinder the Settlement of Nova Scotia as They are so near to the back Settlements of that Province.

(Dispatch dated November 14, 1760.)

It is apparent that the British saw the Mi'kmaq trade issue in terms of peace, as the Crown expert Dr. Stephen Patterson testified, "people who trade together do not fight, that was the theory". Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent. The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. A comparable policy was pursued at a later date on the west coast where, as Dickson J. commented in *Jack v. The Queen*, [1980] 1 S.C.R. 294, at p. 311:

What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes.

The same strategy of economic aboriginal self-sufficiency was pursued across the prairies in terms of hunting: see *R. v. Horseman*, [1990] 1 S.C.R. 901, *per* Wilson J., at p. 919, and Cory J., at p. 928.

26 The trial judge concluded that in 1760 the British Crown entered into a series of negotiations with communities of first nations spread across what is now Nova Scotia and New Brunswick. These treaties were essentially "adhesions" by different Mi'kmaq communities to identical terms because, as stated, it was contemplated that they would be consolidated in a more comprehensive and all-inclusive document at a later date, which never happened. The trial judge considered that the key negotiations took place not with the Mi'kmaq people directly, but with the St. John River Indians, part of the Maliseet First Nation, and the Passamaquody First Nation, who lived in present-day New Brunswick.

27 The trial judge found as a fact, at para. 108, that the relevant Mi'kmaq treaty did "make peace upon the same conditions" (emphasis added) as the Maliseet and Passamaquody. Meetings took place between the Crown and the Maliseet and the Passamaquody on February 11, 1760, twelve days before these bands signed their treaty with the British and eighteen days prior to the meeting between the Governor and the Mi'kmaq representatives, Paul Laurent of LaHave and Michel Augustine of the Richibucto region, where the terms of the Maliseet and Passamaquody treaties were "communicated" and accepted.

28 The trial judge found (at para. 101) that on February 29, 1760, at a meeting between the Governor in Council and the Mi'kmaq chiefs, the following exchange occurred:

His Excellency then Ordered the Several Articles of the Treaty made with the Indians of St. John's River and Passamaquody to be Communicated to the said Paul Laurent and Michel Augustine who expressed their satisfaction therewith, and declar'd that all the Tribe of Mickmacks would be glad to make peace upon the *same* Conditions. [Emphasis added.]

Governor Lawrence afterwards confirmed, in his May 11, 1760 report to the Board of Trade, that he had treated with the Mi'kmaq Indians on "the same terms".

29 The genesis of the Mi'kmaq trade clause is therefore found in the Governor's earlier negotiations with the Maliseet and Passamaquody First Nations. In that regard, the appellant places great reliance on a meeting between the Governor and their chiefs on February 11, 1760 for the purpose of reviewing various aspects of the proposed treaty. The following exchange is

recorded in contemporaneous minutes of the meeting prepared by the British Governor's Secretary:

His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.

Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreable to their desire, and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Trafic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chiefs expressed their entire Approbation. [Emphasis added.]

30 It is true, as my colleague points out at para. 97, that the British made it clear from the outset that the Mi'kmaq were not to have any commerce with "any of His Majesty's Enemies". A Treaty of Peace and Friendship could not be otherwise. The subject of trading with the British government as distinguished from British settlers, however, did not arise until after the Indians had first requested truckhouses. The limitation to government trade came as a response to the request for truckhouses, not the other way around.

31 At a meeting of the Governor's Council on February 16, 1760 (less than a week later), the Council and the representatives of the Indians proceeded to settle the prices of various articles of merchandise including beaver, marten, otter, mink, fox, moose, deer, ermine and bird feathers, etc. Prices of "necessaries" for purchase at the truckhouse were also agreed, e.g., one pound of spring beaver could purchase 30 pounds of flour or 14 pounds of pork. The British took a liberal view of "necessaries". Two gallons of rum cost one pound of spring beaver pelts. The oral agreement on a price list was reflected in an Order in Council dated February 23, 1760, which provided "[t]hat the Prizes of all other kinds of Merchandize not mention'd herein be Regulated according to the Rates of the Foregoing articles". At trial the Crown expert and the defence experts agreed that fish could be among the items that the Mi'kmaq would trade.

32 In furtherance of this trade arrangement, the British established six truckhouses following the signing of the treaties in 1760 and 1761, including Chignecto, Lunenburg, St. John, Windsor, Annapolis and "the Eastern Battery" along the coast from Halifax. The existence of advantageous terms at the truckhouses was part of an imperial peace strategy. As Governor Lawrence wrote to the Board of Trade on May 11, 1760, "the greatest advantage from this [trade] Article . . . is the friendship of these Indians". The British were concerned that matters might again become "troublesome" if the Mi'kmaq were subjected to the "pernicious practices" of "unscrupulous traders". The cost to the public purse of Nova Scotia of supporting Mi'kmaq trade was an investment in peace and the promotion of ongoing colonial settlement. The strategy would be effective only if the Mi'kmaq had access *both* to trade *and* to the fish and wildlife resources necessary to provide them with something to trade.

33 Accordingly, on March 21, 1760, the Nova Scotia House of Assembly passed *An Act to prevent any private Trade or Commerce with the Indians*, 34 Geo. II, c. 11. In July 1761, however, the "Lords of Trade and Plantation" (the Board of Trade) in London objected and the King disallowed the Act as a restraint on trade that disadvantaged British merchants. This coincided with exposure of venality by the local truckhouse merchants. As Dr. Patterson testified:

. . . the first Indian commissary, Halifax merchant, Benjamin Garrish, managed the system so that it was the Government which lost money while he profited usuriously.

34 By 1762, Garrish was removed and the number of truckhouses was reduced to three. By 1764, the system itself was replaced by the impartial licensing of private traders approved by the London Board of Trade's "Plan for the Future Management of Indian Affairs", but that eventually died out as well, as mentioned earlier.

35 In my view, all of this evidence, reflected in the trial judgment, demonstrates the inadequacy and incompleteness of the written memorial of the treaty terms by selectively isolating the restrictive trade covenant. Indeed, the truckhouse system offered such advantageous terms that it hardly seems likely that Mi'kmaq traders had to be compelled to buy at lower prices and sell at higher prices. At a later date, they objected when truckhouses were abandoned. The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade. This was confirmed by the expert historian called by the Crown, as set out below.

(ii) *The Expert Evidence*

36 The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history: G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation", *Canadian Historical Review*, LXVIII (1987), 576; D. J. Bourgeois, "The Role of the Historian in the Litigation Process", *Canadian Historical Review*, LXVII (1986), 195; R. Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*", *B.C. Studies*, XCV (1992), 43; A. J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court", *Native Studies Review*, VI (1990), 13.

37 While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can. In this particular case, however, there was an unusual level of agreement amongst all of the professional historians who testified about the underlying expectations of the participants regarding the treaty obligations entered into by the Crown with the Mi'kmaq. I set out, in particular, the evidence of the Crown's expert, Dr. Stephen Patterson, who spent many days of testimony reviewing the minutiae of the historical record. While he generally supported the Crown's narrow approach to the interpretation of the Treaty, which I have rejected on points of law, he did make a number of important concessions to the defence in a relatively lengthy and reflective statement which should be set out in full:

Q. I guess it's fair to say that the British would have understood that the Micmac lived and survived by hunting and fishing and gathering activities.

A. Yes, of course.

Q. And that in this time period, 1760 and '61, fish would be amongst the items they would have to trade. And they would have the right under this treaty to bring fish and feathers and furs into a truckhouse in exchange for commodities that were available.

A. Well, it's not mentioned but it's not excluded. So I think it's fair to assume that it was permissible.

Q. Okay. It's fair to say that it's an assumption on which the trade truckhouse clause is based.

A. That the truckhouse clause is based on the assumption that natives will have a variety of things to trade, some of which are mentioned and some not. Yes, I think that's fair.

Q. Yes. And wouldn't be out of line to call that a right to fish and a right to bring the fish or furs or feathers or fowl or venison or whatever they might have, into the truckhouses to trade.

A. Ah, a right. I think the implication here is that there is a right to trade under a certain form of regulation –

Q. Yes.

A. – that's laid down. And if you're saying right to fish, I've assumed that in recognizing the Micmac by treaty, the British were recognizing them as the people they were. They understood how they lived and that that meant that those people had a *right* to live in Nova Scotia in their traditional ways. And, to me, that *implies* that the British were accepting that the Micmac would continue to be a hunting and gathering people, that they would fish, that they would hunt to support themselves. I don't see any problem with that.

It seems to me that that's implicit in the thing. Even though it doesn't say it, and I know that there seems to, in the 20th century, be some reluctance to see the value of the 1760 and 1761 treaties because they're not so explicit on these matters, but I personally don't see the hang-up. Because it strikes me that there is a recognition that the Micmac are a people and they have the right to exist. And that has – carries certain implications with it.

More than this, the very fact that there is a truckhouse and that the truckhouse does list some of the things that natives are expected to trade, implies that the British are condoning or recognizing

that this is the way that natives live. They do live by hunting and, therefore, this is the produce of their hunting. They have the *right* to trade it.

Q. And you have, in fact, said that in your May 17th, 1994 draft article.

A. That's correct.

Q. Yeah. And you testified to that effect in the *Pelletier* case, as well.

A. Well, my understanding of this issue, Mr. Wildsmith, has developed and grown with my close reading of the material. It's the position that I come to accept as being a reasonable interpretation of what is here in these documents. [Emphasis added.]

38 The trial judge gave effect to this evidence in finding a *right* to bring fish to the truckhouse to trade, but he declined to find a treaty right to fish and hunt to obtain the wherewithal to trade, and concluded that the right to trade expired along with the truckhouses and subsequent special arrangements. The Court of Appeal concluded, at p. 207, that Dr. Patterson used the word "right" interchangeably with the word "permissible", and that the trade clause gave rise to no "rights" at all. I think the view taken by the courts below rather underestimates Dr. Patterson. No reason is given for doubting that Dr. Patterson meant what he said about the common understanding of the parties that he considered at least implicit in this particular treaty arrangement. He initially uses the words "permissible" and "assumption", but when asked specifically by counsel about a "right" to fish and to trade fish, he says, "Ah, a *right*" (emphasis added), then, weighing his words carefully, he addresses a "right to fish" and concludes that "by treaty" the British did recognize that the Mi'kmaq "had a right to live in Nova Scotia in their traditional ways" (emphasis added) which included hunting and fishing and trading their catch for necessaries. (Trading was traditional. The trial judge found, at para. 93, that the Mi'kmaq had already been trading with Europeans, including French and Portugese fishermen, for about 250 years prior to the making of this treaty.) Dr. Patterson said his opinion was based on the historic documents produced in evidence. He said that this was "the position that I come to accept as being a reasonable interpretation of what is here in these documents" (emphasis added). Dr. Patterson went on to emphasize that the understanding of the Mi'kmaq would have been that these treaty rights were subject to regulation, which I accept.

39 Dr. Patterson's evidence regarding the assumptions underlying and "implicit" in the treaty were generally agreed with by the defence experts, Dr. John Reid and Dr. William Wicken. While the trial judge was not bound to accept the whole or any particular part of Dr. Patterson's evidence, even if supported by the other experts, I do not think there was any basis in the evidence for the trial judge to find (at para. 129) that the appellant's claim, to the extent it tracked Dr. Patterson's evidence, was "not even among the 'various possible interpretations of the common intention'" of the parties when they entered into the 1760 Treaty. Lamer J. in *Sioui*, *supra*, at p. 1069, it will be recalled, said it was the Court's duty to search amongst such reasonable interpretations for the one that best accommodates the interests of the parties at the time the treaty was signed. The trial judge erred, I think, because he thought he was boxed in by the March 10, 1760 document.

40 In my view, the Nova Scotia judgments erred in concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760, whether construed flexibly (as did the trial judge) or narrowly (as did the Nova Scotia Court of Appeal). The findings of fact made by the trial judge taken as a whole demonstrate that the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people. It is their common intention in 1760 – not just the terms of the March 10, 1760 document – to which effect must be given.

Ascertaining the Terms of the Treaty

41 Having concluded that the written text is incomplete, it is necessary to ascertain the treaty terms not only by reference to the fragmentary historical record, as interpreted by the expert historians, but also in light of the stated objectives of the British and Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled.

42 I mentioned earlier that the Nova Scotia Court of Appeal has held on several occasions that the "peace and friendship" treaties with the Mi'kmaq did not extinguish aboriginal hunting and fishing rights in Nova Scotia: *R. v. Isaac* (1975), 13 N.S.R. (2d) 460, *R. v. Cope* (1981), 132 D.L.R. (3d) 36, *Denny*, *supra*. We are not here concerned with the exercise of such a right. The appellant asserts the right of Mi'kmaq people to catch fish and wildlife in support of trade as an alternative or supplementary method of obtaining necessaries. The right to fish is not mentioned in the March 10, 1760 document, nor is it expressly noted elsewhere in the records of the negotiation put in evidence. This is not surprising. As Dickson J. mentioned with reference to the west coast in *Jack*, *supra*, at p. 311, in colonial times the perception of the fishery resource was one of "limitless proportions".

43 The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract, e.g., where it meets the "officious bystander test": *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 30. (See also: *The "Moorcock"* (1889), 14 P.D. 64; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; and see generally: Waddams, *supra*, at para. 490; Treitel, *supra*, at pp. 190-94.) Here, if the ubiquitous officious bystander had said, "This talk about truckhouses is all very well, but if the Mi'kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course". If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. The honour of the Crown was, in fact, specifically invoked by courts in the early 17th century to ensure that a Crown grant was effective to accomplish its intended purpose: *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, at p. 67b and p. 1026, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555, at p. 56b and pp. 557-58.

44 An example of the Court's recognition of the necessity of supplying the deficiencies of aboriginal treaties is *Sioui*, *supra*, where Lamer J. considered a treaty document that stated simply (at p. 1031) that the Huron tribe "are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English". Lamer J. found that, in order to give real value and meaning to these words, it was necessary that a territorial component be supplied, as follows, at p. 1067:

The treaty gives the Hurons the freedom to carry on their customs and their religion. No mention is made in the treaty itself of the territory over which these rights may be exercised. There is also no indication that the territory of what is now Jacques-Cartier park was contemplated. However, <u>for a freedom to have real value and meaning</u>, it must be possible to exercise it somewhere. [Emphasis added.]

Similarly, in *Sundown*, *supra*, the Court found that the express right to hunt included the implied right to build shelters required to carry out the hunt. See also *Simon*, *supra*, where the Court recognized an implied right to carry a gun and ammunition on the way to exercise the right to hunt. These cases employed the concept of implied rights to support the meaningful exercise of express rights granted to the first nations in circumstances where no such implication might necessarily have been made absent the *sui generis* nature of the Crown's relationship to aboriginal people. While I do not believe that in ordinary commercial situations a right to trade implies any

right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations.

Rights of the Other Inhabitants

45 My colleague, McLachlin J., takes the view that, subject to the negative restriction in the treaty, the Mi'kmaq possessed only the liberty to hunt, fish, gather and trade "enjoyed by other British subjects in the region" (para. 103). The Mi'kmaq were, in effect, "citizens minus" with no greater liberties but with greater restrictions. I accept that in terms of the *content* of the hunting, fishing and gathering activities, this may be true. There is of course a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. Even if this distinction is ignored, it is still true that a general right enjoyed by all citizens can nevertheless be made the subject of an enforceable treaty promise. In *Taylor and Williams*, *supra*, at p. 235, the treaty was found to include a term that "[t]he Rivers are open to all & you have an equal right to fish & hunt on them", and yet, despite the reference to equal rather than preferential rights, "the historic right of these Indians to hunt and fish" was found to be incorporated in the treaty, *per* MacKinnon A.C.J.O., at p. 236.

46 Similarly, in *Sioui*, at p. 1031, as mentioned above, the treaty provided that the Hurons would be "received upon the *same terms* with the Canadians" (emphasis added), yet their religious freedom, which in terms of content was no greater than that of the non-aboriginal inhabitants in 1760, was in 1990 accorded treaty protection.

47 The Crown objects strongly to any suggestion that the treaty conferred "*preferential* trading rights". I do not think the appellant needs to show *preferential* trading rights. He only has to show *treaty* trading rights. The settlers and the military undoubtedly hunted and fished for sport or necessaries as well, and traded goods with each other. The issue here is not so much the content of the rights or liberties as the level of legal protection thrown around them. A treaty could, to take a fanciful example, provide for a right of the Mi'kmaq to promenade down Barrington Street, Halifax, on each anniversary of the treaty. Barrington Street is a common thoroughfare enjoyed by all. There would be nothing "special" about the Mi'kmaq use of a common right of way. The point is that the treaty rights-holder not only has the *right* or liberty "enjoyed by other British subjects" but may enjoy special treaty *protection* against interference with its exercise. So it is with the trading arrangement. On June 25, 1761, following the signing of the Treaties of 1760-61 by the last group of Mi'kmaq villages, a ceremony was held at the farm of Lieutenant Governor Jonathan Belcher, the first Chief Justice of Nova Scotia, who was acting in the

place of Governor Charles Lawrence, who had recently been drowned on his way to Boston. In reference to the treaties, including the trade clause, Lieutenant Governor Belcher proclaimed:

The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.

48 Until enactment of the *Constitution Act, 1982* , the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants. The hedge offered no special protection, as the aboriginal people learned in earlier hunting cases such as *Sikyea v. The Queen*, [1964] S.C.R. 642, and *R. v. George*, [1966] S.C.R. 267. On April 17, 1982, however, this particular type of "hedge" was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to the test laid down in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1112 *et seq.*, as adapted to apply to treaties in *Badger*, *supra*, *per* Cory J., at paras. 75 *et seq*. See also *R. v. Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.). The fact the *content* of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher *protection* they presently offer to the Mi'kmaq people.

The Honour of the Crown

49 This appeal puts to the test the principle, emphasized by this Court on several occasions, that the honour of the Crown is always at stake in its dealings with aboriginal people. This is one of the principles of interpretation set forth in *Badger*, *supra*, by Cory J., at para. 41:

. . . the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.

50 This principle that the Crown's honour is at stake when the Crown enters into treaties with first nations dates back at least to this Court's decision in 1895, *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 25 S.C.R. 434. In that decision, Gwynne J. (dissenting) stated, at pp. 511-12:

. . . what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown. [Emphasis added.]

See also *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1, at p. 2.

51 In more recent times, as mentioned, the principle that the honour of the Crown is always at stake was asserted by the Ontario Court of Appeal in *Taylor and Williams*, *supra*. In that case, as here, the issue was to determine the actual terms of a treaty, whose terms were partly oral and partly written. MacKinnon A.C.J.O. said for the court, at pp. 235-36:

The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned. Mr. Justice Cartwright emphasized this in his dissenting reasons in *R. v. George*, . . . [1966] S.C.R. 267 at p. 279, where he said:

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at p. 652 . . . (B.C.C.A.); affirmed . . . [1965] S.C.R. vi. . . .

This statement by MacKinnon A.C.J.O. (who had acted as counsel for the native person convicted of hunting offences in *George*, *supra*) has been adopted subsequently in numerous cases, including decisions of this Court in *Badger*, *supra*, para. 41, and *Sparrow*, *supra*, at pp. 1107-8.

52 I do not think an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Lieutenant Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. This was not a commercial contract. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. In my view, with respect, the interpretation adopted by the courts below left the Mi'kmaq with an empty shell of a treaty promise.

Contradictory Interpretations of the Truckhouse Clause

53 The appellant argues that the Crown has been in breach of the treaty since 1762, when the truckhouses were terminated, or at least since the 1780s when the replacement system of licensed traders was abandoned. This argument suffers from the same quality of unreasonableness as does the Crown's argument that the treaty left the Mi'kmaq with nothing more than a negative covenant. It was established in *Simon*, *supra*, at p. 402, that treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal" practice, and *Sundown*, *supra*, at para. 32, confirms that courts should not use a "frozen-in-time" approach to treaty rights. The appellant cannot, with any show of logic, claim to exercise his treaty rights using an outboard motor while at the same time insist on restoration of the peculiar 18th century institution known as truckhouses.

54 The Crown, on the other hand, argues that the truckhouse was a time-limited response to a temporary problem. As my colleague McLachlin J. sets out at para. 96, the "core" of the treaty was said to be that "[t]he Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed". My disagreement with that view, with respect, is that the aboriginal people, as found by the trial judge, relied on European powder, shot and other goods and pushed a trade agenda with the British because their alternative sources of supply had dried up; the real inhibition on trade with the

French was not the treaty but the absence of the French, whose military had retreated up the St. Lawrence and whose settlers had been expelled; there is no suggestion in the negotiating records that the truckhouse system was a sort of transitional arrangement expected to be temporary, it only became temporary because the King unexpectedly disallowed the enabling legislation passed by the Nova Scotia House of Assembly; and the notion that the truckhouse was merely a response to a trade restriction overlooks the fact the truckhouse system offered very considerable financial benefits to the Mi'kmaq which they would have wanted to exploit, restriction or no restriction. The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

55 The Crown further argues that the treaty rights, if they exist at all, were "subject to regulation, *ab initio*". The effect, it is argued, is that no *Badger* justification would be required. The Crown's attempt to distinguish *Badger* is not persuasive. *Badger* dealt with treaty rights which were specifically expressed in the treaty (at para. 31) to be "subject to such regulations as may from time to time be made by the Government of the country". Yet the Court concluded that a *Sparrow*-type justification was required.

56 My view is that the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test.

The Limited Scope of the Treaty Right

57 The Crown expresses the concern that recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources. Whereas hunting and fishing for food naturally restricts quantities to the needs and appetites of those entitled to share in the harvest, it is argued that there is no comparable, built-in restriction associated with a trading right, short of the paramount need to conserve the resource. The Court has already addressed this issue in *R. v. Gladstone*, [1996] 2 S.C.R. 723, *per* Lamer C.J., at paras. 57-63, L'Heureux-Dubé J., at para. 137, and McLachlin J., at para. 164; *Van der Peet*, *supra*, *per* L'Heureux-Dubé J., at para. 192, and *per* McLachlin J., at para. 279; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, *per* L'Heureux-Dubé J., at para. 47; and *Horseman*, *supra*, *per* Wilson J., at p. 908, and Cory J., at pp. 928-29. The ultimate fear is that the appellant, who in this case fished for eels from a small boat using a fyke net, could lever the treaty right into a factory trawler in Pomquet Harbour gathering the available

harvest in preference to all non-aboriginal commercial or recreational fishermen. (This is indeed the position advanced by the intervener the Union of New Brunswick Indians.) This fear (or hope) is based on a misunderstanding of the narrow ambit and extent of the treaty right.

58 The recorded note of February 11, 1760 was that "there might be a Truckhouse established, for the furnishing them with necessaries" (emphasis added). What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits.

59 The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone*, *supra*, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

60 The distinction between a commercial right and a right to trade for necessaries or sustenance was discussed in *Gladstone*, *supra*, where Lamer C.J., speaking for the majority, held that the Heiltsuk of British Columbia have "an aboriginal right to sell herring spawn on kelp to an extent best described as commercial" (para. 28). This finding was based on the evidence that "tons" of the herring spawn on kelp was traded and that such trade was a central and defining feature of Heiltsuk society. McLachlin J., however, took a different view of the evidence, which she concluded supported a finding that the Heiltsuk derived only sustenance from the trade of the herring spawn on kelp. "Sustenance" provided a manageable limitation on what would otherwise be a free-standing commercial right. She wrote at para. 165:

Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. [Emphasis added.]

In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760.

61 Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.

Application to the Facts of this Case

62 The appellant is charged with three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. These acts took place at Pomquet Harbour, Antigonish County. For Marshall to have satisfied the regulations, he was required to secure a licence under either the *Fishery (General) Regulations*, SOR/93-53, the *Maritime Provinces Fishery Regulations*, SOR/93-55, or the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

63 All of these regulations place the issuance of licences within the absolute discretion of the Minister. Section 7(1) of the *Fisheries Act* , R.S.C., 1985, c. F-14 , so provides:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on. [Emphasis added.]

The *Maritime Provinces Fishery Regulations* provides that the Minister "may issue" a commercial fishing licence (s. 5). The *Aboriginal Communal Fishing Licences Regulations* state as well that the Minister "may issue" a communal licence to an aboriginal organization to carry on food fishing and related activities (s. 4). The licences described in the *Fishery (General) Regulations* are all discretionary as well, although none of those licences would have assisted the appellant in this situation.

64 Furthermore, there is nothing in these regulations which gives direction to the Minister to explain how she or he should exercise this discretionary authority in a manner which would respect the appellant's treaty rights. This Court has had the opportunity to review the effect of discretionary licensing schemes on aboriginal and treaty rights: *Badger*, *supra*, *R. v. Nikal*, [1996] 1 S.C.R. 1013, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139. The test for infringement under s. 35(1) of the *Constitution Act, 1982* was set out in *Sparrow*, *supra*, at p. 1112:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Lamer C.J. in *Adams*, *supra*, applied this test to licensing schemes and stated as follows at para. 54:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament 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. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. [Emphasis added.]

Cory J. in *Badger*, *supra*, at para. 79, found that the test for infringement under s. 35(1) of the *Constitution Act, 1982* was the same for both aboriginal and treaty rights, and thus the words of Lamer C.J. in *Adams*, although in relation to the infringement of aboriginal rights, are equally applicable here. There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected. To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(*a*)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test.

65 Further, the appellant was charged with fishing during the close season with improper nets, contrary to s. 20 of the *Maritime Provinces Fishery Regulations*. Such a regulation is also a *prima facie* infringement, as noted by Cory J. in *Badger*, *supra*, at para. 90: "This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty", apart, I would add, from a treaty limitation to that effect.

66 The appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal.

Disposition

67 The constitutional question stated by the Chief Justice on February 9, 1998, as follows:

Are the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish, contained in ss. 4(1)(*a*) and 20 of the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations*, inconsistent with the treaty rights of the appellant contained in the Mi'kmaq Treaties of 1760-61 and therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982* ?

should be answered in the affirmative. I would therefore allow the appeal and order an acquittal on all charges.

The reasons of Gonthier and McLachlin JJ. were delivered by

McLachlin J. (dissenting) --

I. Introduction

68 The issue in this case is whether the appellant Marshall, a Mi'kmaq Indian, possesses a treaty right that exempts him from the federal fisheries legislation under which he was charged with fishing without a licence, fishing with a prohibited net during the closed period, and selling fish caught without a licence.

69 At trial, Marshall admitted that he caught and sold 463 pounds of eels without a licence and with a prohibited net within closed times. The only issue at trial was whether he possessed a treaty right to catch and sell fish that exempted him from compliance with the federal fisheries legislation and mandated his acquittal. The trial judge held that he did not. The Nova Scotia Court of Appeal dismissed his appeal. Marshall now appeals to this Court.

70 I conclude that the Treaties of 1760-61 created an exclusive trade and truckhouse regime which implicitly gave rise to a limited Mi'kmaq right to bring goods to British trade outlets so long as this regime was extant. The Treaties of 1760-61 granted neither a freestanding right to truckhouses nor a general underlying right to trade outside of the exclusive trade and truckhouse regime. The system of trade exclusivity and correlative British trading outlets died out in the 1780s and with it, the incidental right to bring goods to trade. There is therefore no existing right to trade in the Treaties of 1760-61 that exempts the appellant from the federal fisheries legislation. The charges against him stand.

II. Relevant Treaty and Constitutional Provisions

71 *Trade Clause in Treaties of 1760-61*

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at [insert location of closest truck house] or Elsewhere in Nova Scotia or Accadia.

Constitution Act, 1982

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

III. Judgments

72 The trial judge, Embree Prov. Ct. J., concluded ([1996] N.S.J. No. 246 (QL)) that the trade clause in the Treaties of 1760-61 imposed an obligation on the Mi'kmaq to trade only at English truckhouses or with licensed traders. The clause gave the Mi'kmaq a limited "right to bring"

their trade goods (the products of their hunting, fishing and gathering lifestyle) to such outlets or traders to trade. The trial judge found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. He concluded, at para. 125:

It was a pre-requisite to the Mi'kmaq being able to trade under the terms of the trade clause that the British provide truckhouses or appoint persons to trade with. When the British stopped doing that, the requirement (or if I had taken the Defence view, the option) to trade with truckhouses or licensed traders disappeared. The trade clause says nothing about that eventuality and it is my view that no further trade right arises from the trade clause.

73 The trial judge was unequivocal on the limited nature of this Treaty "right to bring" goods to truckhouses and licensed traders to trade. He concluded that the British did not intend to convey, and would not have conveyed, a trading right beyond the limited right to trade at truckhouses and with licensed traders within the exclusive trade regime, and that the Mi'kmaq appreciated and understood the position and objectives of the British. In light of these conclusions, he rejected the appellant's claim that the Treaties granted him a treaty right to catch and sell fish. He found, at para. 129, that such an interpretation was not even among the "various possible interpretations of the common intention" of the Mi'kmaq and the British.

74 The Court of Appeal ((1997), 159 N.S.R. (2d) 186), *per* Roscoe and Bateman JJ.A., affirmed the trial judge's decision that the Treaties of 1760-61 did not grant a treaty right to catch and sell fish. The court found, at p. 200, that "the mercantile nature of the British economy; the fact that the Governor had been instructed not to place any subject in a preferential trading position; and the fact that, pursuant to this *Treaty*, the Mi'kmaq were submitting to British law" all lent support to the trial judge's conclusion. Unlike the trial judge, however, the Court of Appeal concluded that the Treaties did not grant any right to trade, not even a limited "right to bring" goods to truckhouses. The court held that the mere reference to trading at truckhouses in the trade clause of the Treaties of 1760-61 could not, without more, constitute the grant of a right to trade. The Treaties of 1760-61 were peace treaties, not land cession treaties, and hence no grant of rights could be presumed. Moreover, the negative language of the clause was unlike that traditionally found in rights-granting treaties. The Court of Appeal concluded, at p. 200, that the Treaties of 1760-61 were negotiated following a long period of British-Mi'kmaq hostilities and that "[t]rade was not central to the *Treaties* but a vehicle by which the British could encourage the maintenance of a friendly relationship with the Mi'kmaq". The requirement imposed upon the Mi'kmaq to trade solely at truckhouses was characterized as a mechanism to help ensure the maintenance of peace. Thus, while the Treaties made trade at truckhouses "permissible", they did not confer a legal right on the Mi'kmaq to do so. The Court of Appeal upheld the trial judge's decision and dismissed the appeal.

IV. The Issues

75 The ultimate issue before the Court on this appeal is whether the appellant possesses a treaty right which exempts him from the federal fisheries legislation under which he is charged. The arguments urged in support of this position, however, are more difficult to articulate. The appellant's oral and written submissions, taken together, suggest that he contends that the Treaties of 1760-61 granted either or both of two separate rights, one unlimited, one more restricted. The appellant's arguments may be summarized as follows:

A. *The Rights Claimed*

1. The treaties conferred on the Mi'kmaq a general right to trade.

2. Alternatively, or in addition, the treaties conferred on the Mi'kmaq a right to truckhouses or licensed traders.

B. *Justification Arguments*

1. In the event a general right to trade is established, the federal fisheries legislation governing fishing and trade in fish fails to accommodate this treaty right to trade.

2. The government has not shown that this failure is justified as required by s. 35 of the *Constitution Act, 1982* .

3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

Alternatively, or in addition:

1. In the event a right to truckhouses or licensed traders is established, the government has been in breach of its treaty obligations since the 1780s.

2. The government has not shown that this infringement is justified as required by s. 35 of the *Constitution Act, 1982* .

3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

76 I will first consider the principles of interpretation relevant to this appeal. I will then consider in turn the appellant's "general trade right" and "right to trading outlets" arguments.

77 It should be noted that the appellant does not argue for an aboriginal (as distinct from treaty) right to trade on this appeal.

V. Discussion

A. *What Principles of Interpretation Apply to the Interpretation of the Treaty Trade Clause?*

78 This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, *supra*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, *supra*; *Horseman*, *supra*; *Nowegijick*, *supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger*, *supra*, at para. 76; *Sioui*, *supra*, at p. 1069; *Horseman*, *supra*, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon*, *supra*, at p. 402.

79 Two specific issues of interpretation arise on this appeal. The answer to each is found in the foregoing summary of principles.

80 The first issue of interpretation arises from the Court of Appeal's apparent suggestion that peace treaties fall in a different category from land cession treaties for purposes of interpretation, with the result that, when interpreting peace treaties, there is no "presumption" that rights were granted to the aboriginal signatories in exchange for entering into the treaty. This raises

the issue of whether it is useful to slot treaties into different categories, each with its own rules of interpretation. The principle that each treaty must be considered in its unique historical and cultural context suggests that this practice should be avoided.

81 The second issue of interpretation raised on this appeal is whether extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. Again, the principle that every treaty must be understood in its historical and cultural context suggests the answer must be yes. It is true that in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, this Court alluded with approval to the strict contract rule that extrinsic evidence is not admissible to construe a contract in the absence of ambiguity. However, subsequent decisions have made it clear that extrinsic evidence of the historic and cultural context of a treaty may be received absent ambiguity: *Sundown*, *supra*, at para. 25; *Badger*, *supra*, at para. 52. As Cory J. wrote in *Badger*, *supra*, at para. 52, courts interpreting treaties "must take into account the context in which the treaties were negotiated, concluded and committed to writing".

82 The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger*, *supra*, at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

83 At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui*, *supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon*, *supra*, at pp. 402-3; *Sundown*, *supra*, at paras. 30 and 33.

84 In the case on appeal, the trial judge heard 40 days of trial, the testimony of three expert witnesses, and was presented with over 400 documents. After a meticulous review of this evidence, the trial judge stated, at para. 92:

With the full benefit of the cultural and historical context, I now need to address the following questions. What did the Mi'kmaq and the British agree to and intend to agree to in the Treaties of 1760 and 1761? Directly related to that are the questions of Mi'kmaq understanding of these treaties' contents. Did they understand and agree to all of the written portions of the treaties before me? Were there other statements or promises made orally which the Mi'kmaq considered were part of these treaties and which have an impact on their meaning? Did the Mi'kmaq consider that previous treaties were renewed by and combined with the 1760-61 Treaties? Are there any other aspects of the historical record, whether referred to me by Counsel for the defendant or otherwise, which reflect on the contents or the proper understanding of the contents of these treaties?

The trial judge's review of the historical context, the cultural differences between the parties, their different methods of communication, and the pre-treaty negotiations, led him to conclude that there was no misunderstanding or lack of agreement between the British and the Mi'kmaq that trade under the treaties was to be carried out in accordance with the terms of the trade clause. Having come to this conclusion, the trial judge turned again to the historical context to interpret the content of such terms, in accordance with the parties' common intention. In my opinion, the trial judge's approach to the interpretation of the Treaties of 1760-61 is in keeping with the principles governing treaty interpretation. With the greatest respect for the contrary view of my colleague, Justice Binnie, I find no basis for error in the trial judge's approach.

B. *Do the Treaties of 1760-61 Grant a General Right to Trade?*

85 At trial, the appellant argued that the treaty trade clause conferred on the Mi'kmaq a general trading right. The trial judge rejected this submission, finding that the treaties conferred only a limited "right to bring" goods to truckhouses and licensed traders to trade. The Court of Appeal went even further, finding that the treaties conferred no trade right at all. Before this Court, the appellant once again advances the argument that the Treaties of 1760-61 conferred a general trade right on the Mi'kmaq.

86 Before addressing whether the words of the treaties, taken in their historic and cultural context support a general treaty right to trade, it is necessary to distinguish between a right to trade under the law applicable to all citizens, and a treaty right to trade. All inhabitants of the province of Nova Scotia or Acadia enjoyed a general right to trade. No treaty was required to confer

such a right as it vested in all British subjects. The Mi'kmaq, upon signing the Treaties of 1760-61 and thereby acknowledging the jurisdiction of the British king over Nova Scotia, automatically inherited this general right. This public right must be distinguished from the asserted treaty right to trade. Treaty rights are by definition special rights conferred by treaty. They are given protection over and above rights enjoyed by the general populace. Only rights conferred by treaty are protected by s. 35 of the *Constitution Act, 1982* . I note that while rights enjoyed by the general populace can be included in treaties, where this occurs, they become separate and distinct treaty rights subject to a higher level of protection. The appellant in this case must establish a distinct treaty right if he is to succeed.

(1) The Wording of the Trade Clause

87 This brings me to the words of the treaty trade clause. It states:

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at [insert location of closest truck house] or Elsewhere in Nova Scotia or Accadia.

The clause is short, the words simple. The Mi'kmaq covenant that they will "not traffick, barter or Exchange any Commodities in any manner but with [British agents]" (emphasis added). The core of this clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade.

88 The next question is whether the historic and cultural context in which the treaties were made establishes a general right to trade, having due regard for the need to interpret treaty rights generously. I will deal first with the linguistic and cultural differences between the parties, then with the historical record generally.

(2) Cultural and Linguistic Considerations

89 The trial judge found that there was no misunderstanding or lack of agreement between the British and the Mi'kmaq that trade under the treaties was to be carried out in accordance with the terms of the trade clause, and that the Mi'kmaq understood those terms. He addressed and discounted the possibility that the French-speaking Mi'kmaq might not have

understood the English treaty terms. The record amply supports this conclusion. French missionaries, long allied with the Mi'kmaq, were employed by the British as interpreters in the treaty negotiations. In the course of the negotiations, the Mi'kmaq were referred to an earlier treaty entered into by the Maliseet and Passamaquody, containing a similar trade clause in French. Some of the Mi'kmaq appeared to have acquired English; the records speak of Paul Laurent of LaHave, a Mi'kmaq Sakamow and one of the first signatories, as speaking English. More generally, by the time the Treaties of 1760-61 were entered into, the record suggests that the Mi'kmaq had developed an understanding of the importance of the written word to the British in treaty-making and had a sufficiently sophisticated knowledge of the treaty-making process to compare and discern the differences between treaties. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. There is nothing in the linguistic or cultural differences between the parties to suggest that the words of the trade clause were not fully understood or appreciated by the Mi'kmaq.

(3) The Historical Context and the Scope of the Trade Clause

90 After a meticulous review of the historical evidence, the trial judge concluded that: (1) the Treaties of 1760-61 were primarily peace treaties, cast against the background of both a long struggle between the British and the French in which the Mi'kmaq were allied with the French, and over a decade of intermittent hostilities between the British and the Mi'kmaq; (2) the French defeat and withdrawal from Nova Scotia left the Mi'kmaq to co-exist with the British without the presence of their former ally and supplier; (3) the Mi'kmaq were accustomed to and in some cases dependent on trade for firearms, gunpowder, food and European trade goods; and (4) the British wanted peace and a safe environment for settlers and, despite recent victories, did not feel completely secure in Nova Scotia.

91 Considering the wording of the trade clause in this historical context, the trial judge concluded that it was not within the common intention of the parties that the treaties granted a general right to trade. He found that at the time of entering the treaties, the Mi'kmaq wanted to secure peace and continuing access to European trade goods. He described the Mi'kmaq concerns at the time as very focussed and immediate. The British, for their part, wanted peace in the region to ensure the safety of their settlers. While the British were willing to support the costly truckhouse system to secure peace, they did not want the Mi'kmaq to become a long-term burden on the public treasury. To this end, the trial judge found that the British wanted the Mi'kmaq to continue their traditional way of life. The trial judge found that the interpretation of the treaty trade clause which best reconciled the intentions of both parties was that the trade clause imposed an obligation on the Mi'kmaq to trade only at British truckhouses or with licensed traders, as well as a correlative obligation on the British to provide the Mi'kmaq with such trading outlets so long as this restriction on Mi'kmaq trade existed. This correlative obligation on the British gave rise to a limited Mi'kmaq "right to bring" goods to trade at these outlets. When the British ceased to provide trading

outlets to the Mi'kmaq, the restriction on their trade fell as did the limited "right to bring" which arose out of the system of mutual obligations.

92 Although trade was central to the Treaties of 1760-61, it cannot be doubted that achieving and securing peace was the preeminent objective of both parties in entering into the treaties. See: *"As Long as the Sun and Moon Shall Endure": A Brief History of the Maritime First Nations Treaties, 1675 to 1783* (1986), at pp. 101-2; The MAWIW District Council and Indian and Northern Affairs Canada, *"We Should Walk in the Tract Mr. Dummer Made": A Written Joint Assessment of Historical Materials ... Relative to Dummer's Treaty of 1725 and All Other Related or Relevant Maritime Treaties and Treaty Negotiations* (1992), at pp. 23-24, 31-34 and 90; and L. F. S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (1979), at p. 63.

93 The desire to establish a secure and successful peace led each party to make significant concessions. The Mi'kmaq accepted that forging a peaceful relationship with the British was essential to ensuring continued access to European trade goods and to their continued security in the region. To this end, the Mi'kmaq agreed to limit their autonomy by trading only with the British and ceasing all trading relations with the French. Agreeing to restricted trade at truckhouses made the limit on Mi'kmaq autonomy more palatable as truckhouses were recognized as vehicles for stable trade at guaranteed and favourable terms. See: O. P. Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763", *American Indian Culture and Research Journal*, X (1986), 31, at p. 46; and MAWIW District Council and Indian and Northern Affairs Canada, *supra*, at pp. 23, 31 and 32.

94 The British, for their part, saw continued relations between the Mi'kmaq and the French as a threat to British dominance in the region and to British-Mi'kmaq relations. Although the fall of the French in 1760 established British power in the region, the trial judge concluded, at para. 90, that the British "did not feel completely secure in Nova Scotia". Evidence submitted at trial indicated that the British feared the possibility of a renewed military alliance between the Mi'kmaq and the French as late as 1793. These concerns of the British are reflected in the Treaties of 1760-61, which, in addition to restricting Mi'kmaq trade, prevent the Mi'kmaq from attacking British settlers and from assisting any of the Crown's enemies. The British were also acutely aware that trading between unregulated private traders and the Mi'kmaq was often unfair and the cause of many disruptions of the peace. Preventing such disruptive practices was a central concern of the Nova Scotia governors and the British Board of Trade who hoped to cement the fragile peace in the region.

95 To secure the peace, the British therefore required the Mi'kmaq to trade only at truckhouses, even though truckhouses ran counter to the British policy not to place the Crown in a monopolistic trading position and imposed a significant financial burden on the public purse. The

Nova Scotia government in "Remarks on the Indian Commerce Carried on by the Government of Nova Scotia 1760, 1761 and part of 1762", expressed the view that the benefits of "Settling [of] the Province and securing the Peace of the New Settlers" were "much more than an Equivalent for any exceedings" in cost, (see: R. O. MacFarlane, "Indian Trade in Nova Scotia to 1764", *Report of the Annual Meeting of the Canadian Historical Association with Historical Papers* (1935), 57, at pp. 59-60; Upton, *supra*, at p. 63; J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (1981), at p. 278; W. E. Daugherty, *Maritime Indian Treaties in Historical Perspective* (1983); and "*We Should Walk in the Tract Mr. Dummer Made . . .*", *supra*, at p. 90. On British policy see: Letter from the British Board of Trade to Lieutenant Governor Belcher, March 3, 1761, and June 23, 1761; Board of Trade and Privy Council Minutes, June 23 and July 2, 1761).

96 To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. This is the core of what the parties intended. The wording of the trade clause, taken in its linguistic, cultural and historical context, permits no other conclusion. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. On the historical record, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade.

97 The parties' pre-treaty negotiations and post-treaty conduct point to the same conclusion. I turn first to the pre-treaty negotiations. British negotiations with the Mi'kmaq took place against the background of earlier negotiations with the Maliseet and Passamaquody on February 11, 1760. These negotiations led to the treaty of February 23, 1760, the first of the 1760-61 Treaties. When Mi'kmaq representatives came to negotiate peace with the British 18 days later on February 29, 1760, they were informed of the treaty entered into by the Maliseet and Passamaquody and agreed to make peace on the same conditions. The minutes record that at the very outset of the February 11, 1760, meeting, the Maliseet and Passamaquody representatives were informed:

. . . that it was now expected that they should engage, in behalf of their Tribes, that they will not aid or assist any of His Majesty's Enemies, nor hold any Correspondence or Commerce with them.

The Maliseet and Passamaquody consented to this term of trade exclusivity. After some discussion about "hostages" the following exchange took place:

His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.

Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreable to their desire, and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Trafic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chiefs expressed their entire Approbation. [Nova Scotia Executive Council Minutes, February 11, 1760.]

98 The pre-treaty negotiations between the British and the Maliseet and the Passamaquody, indicate that the aboriginal leaders requested truckhouses in response to their accommodation of the British desire for restricted trade. The negotiations also indicate that the British agreed to furnish truckhouses where necessary to ensure that the Maliseet and the Passamaquody could continue to acquire commodities and necessities through trade. The negotiations highlight the concessions that both the aboriginal and the British signatories made in order to secure the mutually desired objective of peace. The negotiations also indicate that both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade.

99 This finding is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Neither party's conduct is consistent with an expectation that the treaty granted the Mi'kmaq any trade right except the implied "right to bring" incidental to their obligation to trade exclusively with the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them. The British replaced the expensive truckhouses with licensed traders in 1762. The system of licensed traders, in turn, died out by the 1780s. Mi'kmaq adherence to the exclusive trade and truckhouse regime was also ambiguous. Records exist of Mi'kmaq trade with the French on the islands of St. Pierre and Miquelon in 1763 and again in 1767: Upton, *supra*, at pp. 64-65.

100 The fall of the licensed trading system marked the fall of the trading regime established under the Treaties. This left the Mi'kmaq free to trade with whomever they wished, like all other inhabitants of the colonies. The British expressly confirmed that the obligation on the aboriginal signatories to trade exclusively with the British fell with the demise of the truckhouse and licensed trader system at a meeting between two Maliseet Sakamows and the Lieutenant Governor of Nova Scotia on July 18, 1768:

Chiefs 9.

We shall be glad that the Prices of Goods were regulated, as formerly, for Beaver skins were Sold at a better price than some people will now give for them.

Answer

There is no Restriction on your Trade you may Traffick with those who sell Cheapest, which will be more for your Interest than limitting the Price of Beaver.

(Nova Scotia Executive Council Minutes, July 18, 1768.)

101 The record thus shows that within a few years of the signing of the Treaty, the Mi'kmaq treaty obligation to trade only with the British fell into disuse and with it the correlative British obligation to supply the Mi'kmaq with trading outlets. Both parties contributed to the demise of the system of mutual obligations and, apart from a lament that prices were better regulated under the truckhouse system, neither seems to have mourned it. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities. To achieve this elusive peace, the parties agreed that the trading autonomy possessed by all British subjects would be taken away from the Mi'kmaq, and that compensation for the removal of this right would be provided through the provision of preferential and stable trade at truckhouses. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

102 The historical context, as the trial judge points out, supports the view that the British wanted the Mi'kmaq to maintain their traditional way of life and that trade was important to the Mi'kmaq. From this, Binnie J. suggests that the purpose of the treaty trading regime was to promote the self-sufficiency of the Mi'kmaq, and finds a treaty right to hunt, to fish, and to trade for sustenance. Yet, with respect, the historical record does not support this inference. The dominant purpose of the treaties was to prevent the Mi'kmaq from maintaining alliances with the French. To this end, the British insisted on a treaty term that the Mi'kmaq trade exclusively with British agents at British trading outlets -- the truckhouses. Implicit in this is the expectation that the Mi'kmaq would continue to trade. But it does not support the inference that the treaty clause conveyed a general right to trade and to sustenance. The treaty reference to the right to bring goods to truckhouses was required by and incidental to the obligation of the Mi'kmaq to trade with the British, and cannot be stretched to embrace a general treaty right to trade surviving the exclusive trade and truckhouse regime. To do so is to transform a specific right agreed to by both parties into an unintended right of broad and undefined scope.

103 The importance of trade to the Mi'kmaq was recognized in two ways. First, as discussed above, so long as the Mi'kmaq were bound to an exclusive covenant of trade with the British, the British promised to provide the Mi'kmaq with truckhouses at which they could trade on favourable terms and obtain the European products they desired. Second, as noted, upon entering into a treaty with the British and acknowledging the sovereignty of the British king, the Mi'kmaq automatically acquired all rights enjoyed by other British subjects in the region. Although these rights were supplanted by the exclusive trade and truckhouse regime while it was extant, when this regime came to an end, the Mi'kmaq trading interest continued to be protected by the general laws of the province under which the Mi'kmaq were free to trade with whomever they wished.

104 I conclude that the trial judge did not err – indeed was manifestly correct -- in his interpretation of the historical record and the limited nature of the treaty right that this suggests.

(4) The Argument on the Treaty of 1752

105 The appellant suggests that when the Treaties of 1760-61 are considered together with the earlier Treaty of 1752, the inference arises that the parties understood the trade clause of the later treaties to confer a general trade right on the Mi'kmaq. The Treaty of 1752 stated that "the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have

liberty to dispose thereof to the best Advantage" (emphasis added). These words, unlike the words of the Treaties of 1760-61, arguably confer a positive right to trade. The appellant admits that this broad right, if that is what it was, was supplanted by the quite different negative wording of the Treaties of 1760-61. However, he suggests that when the exclusive trade-truckhouse regime of the Treaties of 1760-61 fell into disuse, the more general trade right of the Treaty of 1752 was revived. The difficulty with this argument is that the Treaty of 1752 was completely displaced by the new Treaties of 1760-61, which pointedly made no reference to a general right to trade. Moreover, the different wording of the two treaties cannot be supposed to have gone unperceived by the parties. To conclude that the parties would have understood that a general right to trade would be revived in the event that the exclusive trade and truckhouse regime fell into disuse is not supportable on the historical record and is to "exceed what is possible on the language", to paraphrase from *Sioui*, *supra*.

106 In summary, a review of the wording, the historical record, the pre-treaty negotiations between the British and the Maliseet and Passamaquody, as well as the post-treaty conduct of the British and the Mi'kmaq, support the trial judge's conclusion that the treaty trade clause granted only a limited "right to bring" trade goods to truckhouses, a right that ended with the obligation to trade only with the British on which it was premised. The trial judge's conclusion that the treaties granted no general trade right must be confirmed.

C. *Do the Treaties of 1760-61 Grant a Right to Government Trading Outlets?*

107 The appellant suggests both in the alternative and in addition, that the trial judge's decision makes it clear that the Treaties of 1760-61 granted a right to truckhouses or licensed traders which was breached by the government's failure to provide such outlets after the 1780s. In the absence of government outlets and any justification for the failure to provide them, the appellant suggests that the federal fisheries regulations are inconsistent with his right to a Mi'kmaq trade vehicle and therefore are null and void in their application to him and other treaty beneficiaries. This argument rests on one aspect of the trial judge's finding, while ignoring the other. Specifically, it asserts the right to truckhouses as an independent freestanding treaty right, while ignoring the finding that this was a dependent right to bring goods to truckhouses collateral to the obligation to trade exclusively with the British. It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised, that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the appellant from the application of the fisheries regulations.

108 Even if the appellant surmounted the trial judge's finding that the "right to bring" died with the exclusive trade obligation upon which it was premised, he has failed to establish how a breach of the obligation to provide trading outlets would exempt him from the federal fisheries regulations and, specifically, acquit him of illegally catching fish and illegally selling them to a private party. In my opinion, it is difficult to see how a government obligation to provide trading outlets could be stretched to include a treaty right to fish and a treaty right to trade the product of such fishing with private individuals. Even a broad conception of a right to government trading outlets does not take us to the quite different proposition of a general treaty right to take goods from the land and the sea and sell them to whomever one wishes.

109 This brings me to a variation on the appellant's argument of a right to trading outlets. When pressed on the exact nature and scope of the trade right asserted, the appellant at times seemed to suggest that this did not matter. A finding that the treaties granted a right to truckhouses or licensed traders, undefined as it might be in scope and modern counterpart, would shift the onus to the government to justify its failure to provide such trading outlets, he suggested. The absence of any justification would put the government in breach and preclude it from applying its regulations against the appellant.

110 The appeal of this argument cannot be denied. It engages, at a superficial glance, many of the concerns that underlie the principles of interpretation addressed at the outset of these reasons. The treaty rights of aboriginal peoples should be interpreted in a generous manner. The honour of the Crown is presumed and must be upheld. Ambiguities must be resolved in favour of the aboriginal signatories. Yet the argument, in my opinion, cannot succeed.

111 A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish a treaty right that protects, expressly or by inference, the activities in question, see: *Sioui*, *supra*, at pp. 1066-67. Only then does the onus shift to the government to show that it has accommodated the right or that its limitations of the right are justified.

112 To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the "right" in the generalized abstraction risks both circumventing the parties' common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

113 Instead of positing an undefined right and then requiring justification, a claim for breach of a treaty right should begin by defining the core of that right and seeking its modern counterpart. Then the question of whether the law at issue derogates from that right can be explored, and any justification for such derogation examined, in a meaningful way.

114 Based on the wording of the treaties and an extensive review of the historical evidence, the trial judge concluded that the only trade right conferred by the treaties was a "right to bring" goods to truckhouses that terminated with the demise of the exclusive trading and truckhouse regime. This led to the conclusion that no Crown breach was established and therefore no accommodation or justification required. The record amply supports this conclusion, and the trial judge made no error of legal principle. I see no basis upon which this Court can interfere.

VI. Justification

115 Having concluded that the Treaties of 1760-61 confer no general trade right, I need not consider the arguments specifically relating to justification.

VII. Conclusion

116 There is no existing right to trade in the Treaties of 1760-61 that exempts the appellant from the federal fisheries regulations. It follows that I would dismiss the appeal.

Appeal allowed, Gonthier *and* McLachlin JJ. *dissenting*.

Solicitor for the appellant: Bruce H. Wildsmith, Barss Corner, Nova Scotia.

Solicitor for the respondent: The Attorney General of Canada, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitors for the intervener the West Nova Fishermen's Coalition: Daley, Black & Moreira, Halifax.

Solicitors for the intervener the Native Council of Nova Scotia: Burchell, Hayman, Barnes, Halifax.

Solicitors for the intervener the Union of New Brunswick Indians: Getty, Bear, Fredericton.

TAB H

Supreme Court Judgments

R. v. Sappier; R. v. Gray

Collection	Supreme Court Judgments
Date	2006-12-07
Neutral citation	2006 SCC 54
Report	[2006] 2 SCR 686
Case number	30531, 30533
Judges	McLachlin, Beverley; Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.; Abella, Rosalie Silberman; Charron, Louise; Rothstein, Marshall
On appeal from	New Brunswick
Subjects	Aboriginal law
Notes	SCC Case Information: 30531, 30533

SUPREME COURT OF CANADA

Citation: R. *v*. Sappier; R. *v*. Gray, [2006] 2 S.C.R. 686, 2006 SCC 54 **Date:** 20061207

Docket: 30533, 30531

Between:

Her Majesty The Queen

Appellant

and

Dale Sappier and Clark Polchies

Respondents

and between:

Her Majesty The Queen

Appellant

and

Darrell Joseph Gray

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario,

Attorney General of Quebec, Attorney General of Nova Scotia,

Attorney General of British Columbia, Attorney General of

Alberta, Attorney General of Newfoundland and Labrador,

Union of New Brunswick Indians, Forest Products Association

of Nova Scotia, Mi'gmawei Mawiomi, New Brunswick

Aboriginal Peoples Council, Assembly of First Nations,

New Brunswick Forest Products Association, Assembly of

Nova Scotia Mi'kmaq Chiefs, Okanagan Nation Alliance and

Shuswap Nation Tribal Council, Congress of Aboriginal Peoples,

Songhees Indian Band, Malahat First Nation,

T'Sou-ke First Nation, and Snaw-naw-as (Nanoose) First Nation

and Beecher Bay Indian Band (collectively Te'mexw Nations)

Interveners

Coram: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

Reasons for Judgment: (paras. 1 to 73)	Bastarache J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)
Concurring Reasons: (para. 74)	Binnie J.

_____

R. *v*. Sappier; R. *v*. Gray, [2006] 2 S.C.R. 686, 2006 SCC 54

Her Majesty The Queen *Appellant*

v.

Dale Sappier and Clark Polchies *Respondents*

- and -

Her Majesty The Queen *Appellant*

v.

Darrell Joseph Gray *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Union of New Brunswick Indians, Forest Products Association of Nova Scotia, Mi'gmawei Mawiomi, New Brunswick Aboriginal Peoples Council, Assembly of First Nations, New Brunswick Forest Products Association, Assembly of Nova Scotia Mi'kmaq Chiefs, Okanagan Nation Alliance and Shuswap Nation Tribal Council, Congress of Aboriginal Peoples, and Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations) *Interveners*

Indexed as: R. *v.* Sappier; R. *v.* Gray

Neutral citation: 2006 SCC 54.

File Nos.: 30533, 30531.

2006: May 17, 18; 2006: December 7.

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

on appeal from the court of appeal for new brunswick

Aboriginal law — Aboriginal rights — Right to harvest wood for personal uses — Members of Maliseet and Mi'kmaq First Nations charged in New Brunswick with unlawful possession or

unlawful cutting of Crown timber — Crown lands where timber harvested forming part of First Nations' traditional territory — Whether Maliseet and Mi'kmaq have aboriginal right to harvest wood for personal uses on Crown lands.

Aboriginal law — Van der Peet test — Meaning of "distinctive culture".

The respondents, S and P who are Maliseet and G who is Mi'kmaq, were charged under New Brunswick's *Crown Lands and Forests Act* with unlawful possession of or cutting of Crown timber from Crown lands. The logs had been cut or taken from lands traditionally harvested by the respondents' respective First Nations. Those taken by S and P were to be used for the construction of P's house and the residue for community firewood. Those cut by G were to be used to fashion his furniture. The respondents had no intention of selling the logs or any product made from them. Their defence was that they possessed an aboriginal and treaty right to harvest timber for personal use. They were acquitted at trial. S and P's acquittals were upheld by the Court of Queen's Bench and the Court of Appeal. G's acquittal was set aside by the Court of Queen's Bench but restored on appeal. G did not pursue his treaty right claim before the Court of Appeal or before this Court.

Held: The appeals should be dismissed. The respondents made out a defence of aboriginal right.

Per McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. Here, the way of life of the Maliseet and of the Mi'kmaq during the pre-contact period was that of migratory peoples who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. The record also showed that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. The relevant practice in the present cases, therefore, must be characterized as a right to harvest wood for domestic uses as a member of the aboriginal community. This right so characterized has no commercial dimension and the harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter is to finance the building of a dwelling. Further, it is a communal right; it cannot be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve. Lastly, the right is site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members' respective First Nations. In these cases, the respondents possessed an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by their respective First Nations. [21] [24-26] [72]

Although very little evidence was led with respect to the actual harvesting practice, an aboriginal right can be based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people. Courts must be flexible and be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available. The evidence in these cases established that wood was critically important to the pre-contact Maliseet and Mi'kmaq, and it can be inferred from the evidence that the practice of harvesting wood for domestic uses was significant, though undertaken primarily for survival purposes. [27-28] [33]

A practice undertaken for survival purposes can be considered integral to an aboriginal community's distinctive culture. The nature of the practice which founds an aboriginal right claim must be considered in the context of the pre-contact distinctive culture. "Culture" is an inquiry into the pre-contact way of life of a particular aboriginal community, including means of survival, socialization methods, legal systems, and, potentially, trading habits. The qualifier "distinctive" incorporates an element of aboriginal specificity but does not mean "distinct". The notion of aboriginality must not be reduced to racialized stereotypes of aboriginal peoples. A court, therefore, must first inquire into the way of life of the pre-contact peoples and seek to understand how the particular pre-contact practice relied upon by the rights claimants relates to that way of life. A practice of harvesting wood for domestic uses undertaken in order to survive is directly related to the pre-contact way of life and meets the "integral to a distinctive culture" threshold. [38] [45-48]

The nature of the right cannot be frozen in its pre-contact form but rather must be determined in light of present-day circumstances. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into one to harvest wood by modern means to be used in the construction of a modern dwelling. The site-specific requirement was also met. The Crown conceded in the case of S and P and the evidence established in the case of G that the harvesting of trees occurred within Crown lands traditionally used for this activity by members of their respective First nations. [48] [52-53]

The Crown either accepted or did not challenge before the Court of Appeal that the relevant provisions of the *Crown Lands and Forests Act* infringed the respondents' aboriginal right, and it did not attempt to justify the infringement in this Court. [54-55]

The Crown did not discharge its burden of proving that the aboriginal right had been extinguished by pre-Confederation statutes. The power to extinguish aboriginal rights in the colonial period rested with the Imperial Crown and it was unclear whether the colonial legislature had ever been granted the legal authority to do so. In any event, the legislation relied upon by the Crown as proof of extinguishment was primarily regulatory in nature. The regulation of Crown timber through a

licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the aboriginal right to harvest wood for domestic uses. [57-60]

Given this Court's decision on the aboriginal right issue, there was no need to decide whether S and P also would benefit from a treaty right to harvest wood for personal uses. [3]

Per Binnie J.: The reasons of Bastarache J. were agreed with except as to his limitation of the exercise of aboriginal rights within modern aboriginal communities. A division of labour existed in aboriginal communities, pre-contact. Barter (and, its modern equivalent, sale) within the reserve or other local aboriginal community would reflect a more efficient use of human resources than requiring all members of the community to do everything for themselves. Trade, barter or sale outside the reserve or other local aboriginal community where the person exercising the aboriginal right lives would represent a commercial activity outside the scope of the aboriginal right established in this case. [74]

Cases Cited

By Bastarache J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Bernard* (2003), 262 N.B.R. (2d) 1, 2003 NBCA 55; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Newfoundland v. Drew* (2006), 260 Nfld. & P.E.I.R. 1, 2006 NLCA 53, aff'g (2003), 228 Nfld. & P.E.I.R. 1, 2003 NLSCTD 105.

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Act further to amend Chapter 133, Title xxxiv, of the Revised Statutes, "Of trespasses on lands, private property, and lumber", S.N.B. 1862, 25 Vict., c. 24.

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APPEAL from a judgment of the New Brunswick Court of Appeal (Daigle, Deschênes and Robertson JJ.A.) (2004), 273 N.B.R. (2d) 93, 717 A.P.R. 93, 242 D.L.R. (4th) 433, [2004] 4 C.N.L.R. 252, [2004] N.B.J. No. 295 (QL), 2004 NBCA 56, affirming a decision of Clendening J. (2003), 267 N.B.R. (2d) 51, 702 A.P.R. 51, [2004] 2 C.N.L.R. 281, [2003] N.B.J. No. 386 (QL), 2003 NBQB 389, affirming a decision of Cain Prov. Ct. J. (2003), 267 N.B.R. (2d) 1, 702 A.P.R. 1, [2003] 2 C.N.L.R. 294, [2003] N.B.J. No. 25 (QL), 2003 NBPC 2. Appeal dismissed.

APPEAL from a judgment of the New Brunswick Court of Appeal (Daigle, Deschênes and Robertson JJ.A.) (2004), 273 N.B.R. (2d) 157, 717 A.P.R. 157, [2004] 4 C.N.L.R. 201, [2004] N.B.J. No. 291 (QL), 2004 NBCA 57, setting aside a decision of McIntyre J., 2003 CarswellNB 635, setting aside a decision of Arsenault Prov. Ct. J. Appeal dismissed.

William B. Richards, *Henry S. Brown*, *Q.C.*, and *Iain R. W. Hollett*, for the appellant.

Richard Hatchette and *Maria G. Henheffer*, *Q.C.*, for the respondents Dale Sappier and Clark Polchies.

Ronald E. Gaffney and *Thomas J. Burke*, for the respondent Darrell Joseph Gray.

Mitchell R. Taylor and *Mark Kindrachuk*, *Q.C.*, for the intervener the Attorney General of Canada.

Owen Young and *Ria Tzimas*, for the intervener the Attorney General of Ontario.

René Morin and *Caroline Renaud*, for the intervener the Attorney General of Quebec.

Alexander MacBain Cameron, for the intervener the Attorney General of Nova Scotia.

Patrick G. Foy, *Q.C.*, and *Robert J. C. Deane*, for the intervener the Attorney General of British Columbia.

Robert J. Normey and *Thomas G. Rothwell*, for the intervener the Attorney General of Alberta.

Donald H. Burrage, *Q.C.*, and *Justin S. C. Mellor*, for the intervener the Attorney General of Newfoundland and Labrador.

Daniel R. Theriault, for the intervener the Union of New Brunswick Indians.

Thomas E. Hart and *Jane O'Neill*, for the intervener the Forest Products Association of Nova Scotia.

D. Bruce Clarke, for the intervener Mi'gmawei Mawiomi.

Michael J. Wood, *Q.C.*, for the intervener the New Brunswick Aboriginal Peoples Council.

Bryan P. Schwartz and *Jack R. London*, *Q.C.*, for the intervener the Assembly of First Nations.

Mahmud Jamal and *Neil Paris*, for the intervener the New Brunswick Forest Products Association.

Ronalda Murphy, *Mary Jane Abram* and *Douglas Brown*, for the intervener the Assembly of Nova Scotia Mi'kmaq Chiefs.

Clarine Ostrove and *Leslie J. Pinder*, for the interveners the Okanagan Nation Alliance and the Shuswap Nation Tribal Council.

Andrew K. Lokan and *Joseph E. Magnet*, for the intervener the Congress of Aboriginal Peoples.

Robert J. M. Janes, for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively Te'mexw Nations).

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

Bastarache J. —

1. Introduction

1 The three respondents were charged with unlawful possession or cutting of Crown timber. Messrs. Sappier and Polchies are Maliseet, and Mr. Gray is Mi'kmaq. All three respondents argued in defence that they possess an aboriginal and treaty right to harvest timber for personal use. Mr. Gray has since abandoned his treaty right claim.

2 The respondents submit that the practice of harvesting timber for personal use was an integral part of the distinctive culture of the Maliseet and Mi'kmaq peoples prior to contact with Europeans. The claimed right refers to the practice of harvesting trees to fulfil the domestic needs of the pre-contact communities for such things as shelter, transportation, fuel and tools. The Maliseet and Mi'kmaq were migratory living from hunting and fishing, and using the rivers and lakes of Eastern Canada for transportation. The central question on appeal is how to define the distinctive culture of such peoples, and how to determine which pre-contact practices were integral to that culture. The Crown submits that the evidence of wood usage in pre-contact Maliseet and Mi'kmaq societies was primarily a reference to the need for harvesting wood on a daily basis in order to survive. In the Crown's submission, this is not sufficient to establish a defining practice, custom or tradition that truly made the society what it was.

3 For the reasons that follow, I find that all three respondents have established an aboriginal right to harvest wood for domestic uses. Given this Court's decision on the aboriginal right issue, I need not decide whether Messrs. Sappier and Polchies also benefit from a treaty right to harvest wood.

2. Facts

2.1 *R. v. Sappier and Polchies*

4 The parties entered into an agreed statement of facts at the opening of the trial. On January 12, 2001, at approximately 18:00 hours, a truck load of timber driven by Mr. Sappier was stopped by Department of Natural Resources and Energy officers at the junction of the Nashwaak Road and the wood access road to the Native Harvest Block 1266 near Gorby Gulch, New Brunswick. Mr. Clark Polchies was one of the passengers in the truck. Officer Wallace noticed that there were 16 hardwood logs, 4 yellow birch and 12 sugar maple, in the truck.

5 During some preliminary questioning by Officer Wallace, Mr. Sappier was asked as to where the wood had originated, to which he replied that it was firewood and that it came from Harvest Block 1266. The officers determined that the 16 hardwood logs did not come from Harvest

Block 1266, but from Crown Lands approximately 1.5 kilometres away from Harvest Block 1266. Officer Wallace proceeded to read the *Charter* Notice and Police Caution to Messrs. Sappier and Polchies and seized the truck and logs based on the respondents' unauthorized possession of Crown timber. They were charged with unlawful possession of Crown timber pursuant to s. 67(1)(*c*) and s. 67(2) of the *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1. Officer Collicott then questioned Messrs. Sappier and Polchies regarding who had cut the timber on the truck. Mr. Polchies indicated to Officer Collicott that it was he who had cut all the timber on the truck.

6 The parties agreed that Messrs. Sappier and Polchies were not at the time of their arrest authorized to be in possession of such timber pursuant to the *Crown Lands and Forests Act* or by any other Act of New Brunswick or regulations thereto, or by the Minister of Natural Resources and Energy of New Brunswick. Messrs. Sappier and Polchies are both Maliseet and members of the Woodstock First Nation. They are also registered under the provisions of the *Indian Act* , R.S.C. 1985, c. I-5 .

7 Judge Cain of the Provincial Court of New Brunswick found that the 16 hardwood logs were to be used by Mr. Polchies in the construction of a house and furniture on the Woodstock First Nation, with the residue's being made available to the Reserve for fire wood. The learned trial judge also found that the hardwood logs represented an amount sufficient to make hardwood flooring and furniture consisting of tables, beds and cabinets.

2.2 *R. v. Gray*

8 Mr. Gray was charged with unlawful cutting of Crown timber pursuant to s. 67(1)(*a*) and s. 67(2) of the *Crown Lands and Forests Act*. On December 9, 1999, two forest service officers with the New Brunswick Department of Natural Resources and Energy saw Mr. Gray cut down a bird's eye maple tree on Crown lands. Mr. Gray, who was accompanied by two other men, proceeded to cut a log from the tree. All three men were recognized and acknowledged to be status Indians. The men were not asked the use to which the logs would be put. Mr. Gray is Mi'kmaq and lives on the Pabineau First Nation, near Bathurst, New Brunswick. Judge Arsenault of the Provincial Court of New Brunswick accepted Mr. Gray's evidence that four logs had been cut from trees from which he intended to make cabinets, end tables, coffee tables and mouldings for his home. The trial judge also accepted that Mr. Gray had no intention of selling the logs or any product made from them.

9 In both cases, the critical issue at trial was whether the cutting or possession of Crown timber was unlawful within the meaning of the Act. All three defendants claimed an aboriginal and treaty right to harvest timber for personal use.

3. Judicial History

3.1 *R. v. Sappier and Polchies*

3.1.1 New Brunswick Provincial Court, [2003] 2 C.N.L.R. 294, 2003 NBPC 2

10 Cain Prov. Ct. J. held that the defendants did not benefit from an aboriginal right to harvest timber for personal use. Cain Prov. Ct. J. opined that any human society living on the same lands at the same time would have used wood and wood products for the same purposes. On this basis, Cain Prov. Ct. J. held that the practice of using wood to construct shelters or to make furniture was not in any way integral to the distinctive culture of the ancestors of the Woodstock First Nation. The learned trial judge ultimately concluded that the culture of this pre-contact society would have not been fundamentally altered had wood not been available for use because the Maliseet would probably have found some other available material to use in its place.

11 Cain Prov. Ct. J. concluded, however, that the defendants benefited from a valid treaty right to harvest timber for personal use. He held that the *Crown Lands and Forests Act* infringed the treaty right, and that the Crown had not succeeded in justifying the infringement. Accordingly, the defendants were acquitted.

3.1.2 New Brunswick Court of Queen's Bench, [2004] 2 C.N.L.R. 281, 2003 NBQB 389

12 In a relatively short decision, Clendening J. dismissed the Crown's appeal and affirmed the decision of the trial judge.

3.1.3 New Brunswick Court of Appeal (2004), 273 N.B.R. (2d) 93, 2004 NBCA 56

13 Robertson J.A., writing on behalf of the Court of Appeal, held that the defendants benefited from both an aboriginal right and a treaty right to harvest timber for personal use. He

emphasized that a practice need not be distinct in order to found an aboriginal right claim — it need only be integral to a distinctive culture. In his view, the fact that tree harvesting was undertaken for survival purposes, and that perhaps any human society would have done the same, was not determinative. Moreover, in direct response to Cain Prov. Ct. J.'s reasons, Robertson J.A. queried what other resource could have been used had timber not been available.

14 Before the Court of Appeal, the Crown no longer alleged that the right was extinguished by either pre- or post-Confederation legislation. The Crown also accepted that the relevant provisions of the *Crown Lands and Forests Act* infringed the alleged right and that the infringement could not be justified under the *R. v. Badger*, [1996] 1 S.C.R. 771, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, test.

3.2 *R. v. Gray*

3.2.1 New Brunswick Provincial Court (No. 03190311, August 27, 2001)

15 Arsenault Prov. Ct. J. held that the defendant benefited from an aboriginal right to gather and harvest wood for personal use. In finding an aboriginal right, Arsenault Prov. Ct. J. relied heavily on the evidence of Mr. Sewell, a Mi'kmaq and status Indian, recognized as an elder and historian, and declared as an expert, "regarding oral traditions and customs which have been passed down through the generations and more particularly in the field of describing practices and customs relating to the use of and gathering of wood by aboriginals in the geographical area encompassed by the terms of the charge" (p. 3). Mr. Sewell's evidence was not contradicted by the Crown on cross-examination or by the introduction of any other documentary or historical evidence. The Crown did not lead evidence to justify the infringement of the aboriginal right.

16 Arsenault Prov. Ct. J. also held that Mr. Gray did not benefit from a treaty right to harvest timber for personal use.

3.2.2 New Brunswick Court of Queen's Bench, 2003 CarswellNB 635

17 McIntyre J. allowed the Crown's appeal and found the defendant guilty. In finding that the claim for an aboriginal right had not been made out, McIntyre J. cited a portion of Judge Cain's reasons in *R. v. Sappier and Polchies*. He found that Mr. Sewell's evidence was insufficient to

conclude that furniture making for personal use was a central defining feature of the Mi'kmaq culture. He agreed with Cain Prov. Ct. J. that any human society would have done the same.

3.2.3 New Brunswick Court of Appeal (2004), 273 N.B.R. (2d) 157, 2004 NBCA 57

18 On behalf of a unanimous Court of Appeal, Robertson J.A., relying on his reasons in *R. v. Sappier and Polchies*, allowed Mr. Gray's appeal and found that a successful claim for an aboriginal right to harvest timber for personal use had been made out. Robertson J.A. further held that his concurring opinion and that of Daigle J.A. in *R. v. Bernard* (2003), 262 N.B.R. (2d) 1, 2003 NBCA 55, were sufficient to dispose of the Crown's extinguishment argument. The Crown did not dispute that the *Crown Lands and Forests Act* infringed the alleged right, nor did it challenge the trial judge's finding that the Crown had failed to justify the infringement.

19 Mr. Gray did not pursue his treaty right claim before the Court of Appeal or before this Court.

4. The Aboriginal Right Claim

4.1 *Characterization of the Respondents' Claim*

20 In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46. The first step is to identify the precise nature of the applicant's claim of having exercised an aboriginal right: *Van der Peet*, at para. 76. In so doing, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right: *Van der Peet*, at para. 53. In this case, the respondents were charged with the unlawful cutting and possession of Crown timber. They claimed an aboriginal right to harvest timber for personal use so as a defence to those charges. The statute at issue prohibits the unauthorized cutting, damaging, removing and possession of timber from Crown lands. The respondents rely on the pre-contact practice of harvesting timber in order to establish their aboriginal right.

21 The difficulty in the present cases is that the practice relied upon to found the claims as characterized by the respondents was the object of very little evidence at trial. Instead,

the respondents led most of their evidence about the importance of wood in Maliseet and Mi'kmaq cultures and the many uses to which it was put. This is unusual because the jurisprudence of this Court establishes the central importance of the actual practice in founding a claim for an aboriginal right. Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people. They are not generally founded upon the importance of a particular resource. In fact, an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right. In characterizing aboriginal rights as *sui generis*, this Court has rejected the application of traditional common law property concepts to such rights: *Sparrow*, at pp. 1111-12. In my view, the pre-contact practice is central to the *Van der Peet* test for two reasons.

22 First, in order to grasp the importance of a resource to a particular aboriginal people, the Court seeks to understand how that resource was harvested, extracted and utilized. These practices are the necessary "aboriginal" component in aboriginal rights. As Lamer C.J. explained in *Van der Peet*, at para. 20:

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures *both* the aboriginal and the rights in aboriginal rights. [Emphasis in original.]

Section 35 of the *Constitution Act, 1982* seeks to provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown: *Van der Peet*, at para. 31. In an oft-quoted passage, Lamer C.J. acknowledged in *Van der Peet*, at para. 30, that, "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (emphasis deleted). The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.

23 Second, it is also necessary to identify the pre-contact practice upon which the claim is founded in order to consider how it might have evolved to its present-day form. This Court has long recognized that aboriginal rights are not frozen in their pre-contact form, and that ancestral rights may find modern expression: *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 13; *Van der Peet*, at para. 64.

24 In the present cases, the relevant practice for the purposes of the *Van der Peet* test is harvesting wood. It is this practice upon which the respondents opted to found their claims. However, the respondents do not claim a right to harvest wood for any and all purposes — such a right would not provide sufficient specificity to apply the reasoning I have just described. The respondents instead claim the right to harvest timber for personal uses; I find this characterization to be too general as well. As previously explained, it is critical that the Court identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community. The claimed right should then be delineated in accordance with that practice: *Van der Peet*, at para. 52. The way of life of the Maliseet and of the Mi'kmaq during the pre-contact period is that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation. Thus, the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community.

25 The word "domestic" qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is to finance the building of a dwelling. In other words, although the right would permit the harvesting of timber to be used in the construction of a dwelling, it is not the case that a right holder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components.

26 The right to harvest wood for domestic uses is a communal one. Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the aboriginal right to harvest wood for domestic uses must be tied to this purpose. The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.

4.2 *The Integral to a Distinctive Culture Test*

4.2.1 The Evidentiary Problem

27 The question before the Court at this stage is whether the practice of harvesting wood for domestic uses was integral to the distinctive culture of the Maliseet and Mi'kmaq, pre-contact. As previously explained, very little evidence was led with respect to the actual harvesting practice. Nevertheless, this Court has previously recognized an aboriginal right based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people. In *R. v. Adams*, [1996] 3 S.C.R. 101, this Court recognized an aboriginal right to fish for food in Lake St. Francis despite the fact that "[t]he fish were not significant to the Mohawks for social or ceremonial reasons" (para. 45). The Court based its holding on the fact that "[the fish] were an important and significant source of subsistence for the Mohawks" (para. 45). In other words, the Court recognized a right to fish for food based on the importance of the resource. Fishing was such a significant practice as to constitute a way of life. In this sense, it was part of what made the pre-contact Mohawk community distinctive.

28 In the present cases, the evidence established that wood was critically important to the Maliseet and the Mi'kmaq, pre-contact. The learned trial judge in the *Sappier and Polchies* prosecution found that the Maliseet people used wood or wood products from the forest in which they lived to construct shelters, implements of husbandry and perhaps in the construction of what might be called rude furnishings (para. 12). Cain Prov. Ct. J. also referred to evidence that was led to the effect that the pre-European Maliseet society revered wood and considered it sacred (para. 13). Referring to the *Gray* prosecution, Cain Prov. Ct. J. stated that, "[t]here is no question that the evidence of Mr. Sewell in *Gray* (*supra*) clearly established an historical pattern and tradition of the use of wood from Crown lands for the construction of furniture and housing" (para. 27). He went on to comment that "[s]imilar evidence was led in the case at bar" (para. 27).

29 In the *Gray* prosecution, the trial judge declared the defence witness, Mr. Sewell, an expert "regarding oral traditions and customs which have been passed down through the generations and more particularly in the field of describing practices and customs relating to the use of and gathering of wood by aboriginals in the geographical area encompassed by the terms of the charge" (Arsenault Prov. Ct. J., at p. 3). As previously mentioned, Mr. Sewell is Mi'kmaq and a status Indian who is recognized as an elder and historian within his community. Arsenault Prov. Ct. J. stated that:

I have found and I do find that the evidence of Mr. Sewell was reliable and extremely useful to this court and I might point out that it was in no way diminished by cross-examination nor did the Crown in this case elect to contradict it by any documentary evidence or the evidence of any historian. [p. 23]

30 Mr. Sewell testified about the many uses to which wood was and continues to be put. He spoke of using the inner bark of a cedar tree for rope, and of cutting strips of it to be used in the construction of the old birch bark canoes. Birch bark and ash were used to make baskets. Birch, poplar and black spruce were fashioned into paddles. Any leftover birch or maple was used for firewood. He spoke of using cedar to make drums, and of how the aboriginal peoples were also carvers. He testified that some of the figureheads on the first ships to arrive in Canada were done by aboriginals. Mr. Sewell spoke of building camps and making pots out of wood. He testified that the pots were made out of large logs, using fire first to burn out the centre and then chiselling it out. He spoke of using bird's eye maple and curly maple in the construction of axe handles and boat paddles, either for sale or for gifts. He confirmed that the extraction of sap from maple and birch trees had been known to the Mi'kmaq for centuries (testimony of Gilbert Sewell, presented during examination-in-chief, October 4, 2000, pp. 16-19 (A.R., vol. I, at pp. 80-83)). Finally, he spoke of the practice of fashioning spears for fishing out of ash (A.R., vol. I, at p. 94).

31 Mr. Sewell concluded that, "[s]o, as far back as I can read in history or the oral tradition that has been passed down to me, it's been — we've been always gathering and we've been always using wood as, as, as a way of life" (A.R., vol. I, at p. 81). This evidence detailing the many uses to which wood was put by the Mi'kmaq as a whole is important given the communal nature of aboriginal rights. The trial judge accepted this evidence as proof that the practice of harvesting wood for domestic uses was integral to the pre-contact Mi'kmaq way of life.

32 Before this Court, the Crown conceded in the *Sappier and Polchies* appeal that wood was important to the Maliseet for survival purposes in the pre-contact period (appellant's factum, at para. 46). The Crown also acknowledged that "wood was undeniably used in many facets of aboriginal life" (*ibid.*). In the *Gray* appeal, the Crown similarly conceded that "wood was used in Mi'kmaq society to ensure survival" (*ibid.*, at para. 44).

33 As in *Adams*, I infer from this evidence that the practice of harvesting wood for domestic uses was also significant, though undertaken primarily for survival purposes. Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the

analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.

34 Flexibility is also important in the present cases with regard to the relevant time frame during which the practice must be found to have been integral to the distinctive culture of the aboriginal society in question. It is settled law that the time period courts consider in determining whether the *Van der Peet* test has been met is the period prior to contact with the Europeans (see *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43, which modified the *Van der Peet* test insofar as it applies to the Métis although it affirmed it otherwise). As Lamer C.J. explained in *Van der Peet*, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights" (para. 60). Before this Court, the Attorney General of Nova Scotia, intervener, objected to some of Mr. Sewell's evidence insofar as he did not specify to which time period he was referring when describing the uses to which harvested wood was put by the Mi'kmaq. In other words, it was respectfully submitted that it was unclear whether he was always describing pre-contact practices. In dismissing this concern, I need only repeat what was said in *Van der Peet*, and reiterated more recently in *Mitchell* at para. 29, about the adapted rules of evidence applicable in aboriginal rights litigation and the use of post-contact evidence to prove the existence and integrality of pre-contact practices:

That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights. [para. 62]

4.2.2 Whether a Practice Undertaken for Survival Purposes Can Be Considered Integral to an Aboriginal Community's Distinctive Culture

35 The principal issue on appeal is whether a practice undertaken for survival purposes can meet the integral to a distinctive culture test. The learned trial judge in the *Sappier and Polchies* trial concluded that it could not. Cain Prov. Ct. J. was of the view that:

The practice of using wood to construct shelters, irrespective of whether they were wigwams or wooden building or of using wood to make furniture, was not in any way integral to the distinctive culture of the ancestors of the Woodstock First Nation in pre-European times. From the evidence adduced it is clear that they used wood or wood products from the forest in which they lived to construct shelters, implements of husbandry and perhaps in the construction of what might be called rude furnishings. Any humane society who would have been living on the same lands in New Brunswick at the same time would have used wood and wood products for the same purpose. [para. 12]

36 In making these comments, Cain Prov. Ct. J. relied on a statement made by Lamer C.J. in *Van der Peet*, at para. 56:

To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [Emphasis added; emphasis in original deleted.]

Relying on this passage, Cain Prov. Ct. J. concluded that harvesting timber to construct a shelter was akin to eating to survive. This statement by Lamer C.J. appears to have resulted in considerable confusion as to whether a practice undertaken strictly for survival purposes can found an aboriginal right claim. However, further in his decision, Lamer C.J. clarifies that the pre-contact practice, custom or tradition relied on need not be distinct; it need only be distinctive. In so doing, he confirms that fishing for food can, in certain contexts, meet the integral to a distinctive culture test:

That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow*, *supra*, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in *Sparrow*, *supra*, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a distinctive part of that culture. Since it was so it constituted an aboriginal right under s. 35(1). [Emphasis deleted; para. 72.]

37 More recently, this Court has recognized a right to fish for food in *Adams* and in *R. v. Côté*, [1996] 3 S.C.R. 139. In *Adams*, the Court specifically noted that fish were only important as a source of subsistence. In *Côté*, Lamer C.J. emphasized that "[f]ishing was significant to the Algonquins, as it represented the predominant source of subsistence during the season leading up to winter" (para. 68). Moreover, this Court has previously suggested that the scope of s. 35 should extend to protect the means by which an aboriginal society traditionally sustained itself, and that the *Van der Peet* test emphasizes practices that are vital to the life of the aboriginal society in question: see *R. v. Pamajewon*, [1996] 2 S.C.R. 821, at para. 28, and *Mitchell*, at para. 12, respectively. I wish to clarify, however, that there is no such thing as an aboriginal right to sustenance. Rather, these cases stand for the proposition that the traditional *means* of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people.

38 I can therefore find no jurisprudential authority to support the proposition that a practice undertaken merely for survival purposes cannot be considered integral to the distinctive culture of an aboriginal people. Rather, I find that the jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community.

39 McLachlin C.J. explained in *Mitchell* that in order to satisfy the *Van der Peet* test, the practice, custom or tradition must have been integral to the distinctive culture of the aboriginal peoples, in the sense that

it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 . . .). [Emphasis deleted; para. 12.]

40 As I have already explained, the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival. Although this was affirmed in *Sparrow*, *Adams* and *Côté*, the courts below queried whether a practice undertaken strictly for survival purposes really went to the core of a people's identity. Although intended as a helpful description of the *Van der Peet* test, the reference in *Mitchell* to a "core identity" may have

unintentionally resulted in a heightened threshold for establishing an aboriginal right. For this reason, I think it necessary to discard the notion that the pre-contact practice upon which the right is based must go to the core of the society's identity, i.e. its single most important defining character. This has never been the test for establishing an aboriginal right. This Court has clearly held that a claimant need only show that the practice was integral to the aboriginal society's pre-contact distinctive culture.

41 The notion that the pre-contact practice must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it, has also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights. The trial judge in the *Sappier and Polchies* prosecution concluded that Maliseet culture would not have been fundamentally altered had wood not been available to it. In his opinion, "[t]he society would in all probability have used some other available material" (para. 14). In response, I would adopt the following comments made by Robertson J.A., on behalf of the Court of Appeal:

. . . I am at a loss to speculate on what other natural resource might have been used had wood not been available. Snow houses would have provided New Brunswick's aboriginal societies with adequate shelter during the winter months only. Whether fish and wildlife by-products would have served as an alternative source of fuel, and an adequate one, is a question on which I need not speculate. There is also the question as to how the aboriginal societies of New Brunswick would have traversed the lakes and rivers of this Province, in pursuit of fish and wildlife, without the traditional means of transportation: canoes. [para. 91]

I further agree with Robertson J.A. that courts should be cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued. The learned judge correctly notes that "[a] society that fishes for sustenance will survive even if it does not consume meat and the converse is equally true" (para. 92).

4.2.3 Applying the *Van der Peet* Test: the Meaning of "Distinctive Culture"

42 This brings us to the question of what is meant by "distinctive culture". As previously explained, this Court in *Van der Peet* set out to interpret s. 35 of the Constitution in a way which captures both the aboriginal and the rights in aboriginal rights. Lamer C.J. spoke of the "necessary specificity which comes from granting special constitutional protection to one part of Canadian society" (para. 20). It is that aboriginal specificity which the notion of a "distinctive culture" seeks to capture. However, it is clear that "Aboriginality means more than interesting

cultural practices and anthropological curiosities worthy only of a museum" (C. C. Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997), 55 *U.T. Fac. L. Rev.* 419, at p. 434). R. L. Barsh and J. Y. Henderson argue that as a result of the *Van der Peet* decision, "'culture' has implicitly been taken to mean a fixed inventory of traits or characteristics" ("The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 *McGill L.J.* 993, at p. 1002).

43 Many of these concerns echo those expressed by McLachlin J. (as she then was) and by L'Heureux-Dubé J. in dissenting opinions in *Van der Peet*. L'Heureux-Dubé J. was of the view that "[t]he approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted" (para. 150). McLachlin J. opined that "different people may entertain different ideas of what is distinctive", thereby creating problems of indeterminacy in the *Van der Peet* test (para. 257).

44 Culture, let alone "distinctive culture", has proven to be a difficult concept to grasp for Canadian courts. Moreover, the term "culture" as it is used in the English language may not find a perfect parallel in certain aboriginal languages. Barsh and Henderson note that "[w]e can find no precise equivalent of European concepts of 'culture' in Mi'kmaq, for example. How we maintain contact with our traditions is *tan'telo'tlieki-p*. How we perpetuate our consciousness is described as *tlilnuo'lti'k*. How we maintain our language is *tlinuita'sim*. Each of these terms connotes a process rather than a thing" (p. 1002, note 30). Ultimately, the concept of culture is itself inherently cultural.

45 The aboriginal rights doctrine, which has been constitutionalized by s. 35, arises from the simple fact of prior occupation of the lands now forming Canada. The "integral to a distinctive culture" test must necessarily be understood in this context. As L'Heureux-Dubé J. explained in dissent in *Van der Peet*, "[t]he 'distinctive aboriginal culture' must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was)" (para. 159). The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes of Aboriginal peoples" (J. Borrows and L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev.* 9, at p. 36).

46 In post-hearing submissions to the Court of Appeal in the *Sappier and Polchies* case, the Crown admitted that gathering birch bark for the construction of canoes or hemlock for basket-making were practices likely integral to the distinctive Maliseet culture (para. 94). But it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes. Instead, the Court must first inquire into the way of life of the Maliseet and Mi'kmaq, pre-contact. As previously explained, these were migratory communities using the rivers and lakes of Eastern Canada for transportation and living essentially from hunting and fishing. The Court must therefore seek to understand how the particular pre-contact practice relied upon relates to that way of life. In the present cases, the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools is directly related to the way of life I have just described. I have already explained that we must discard the idea that the practice must go to the core of a people's culture. The fact that harvesting wood for domestic uses was undertaken for survival purposes is sufficient, given the evidence adduced at trial, to meet the integral to a distinctive culture threshold.

47 I therefore conclude that the practice of harvesting wood for domestic uses was integral to the pre-contact distinctive culture of both the Maliseet and Mi'kmaq peoples.

4.3 *Continuity of the Claimed Right With the Pre-Contact Practice*

48 Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present-day circumstances. As McLachlin C.J. explained in *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 25, "[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means." It is the practice, along with its associated uses, which must be allowed to evolve. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to harvest wood by modern means to be used in the construction of a modern dwelling. Any other conclusion would freeze the right in its pre-contact form.

49 Before this Court, the Crown submitted that "[l]arge permanent dwellings, constructed from multi-dimensional wood, obtained by modern methods of forest extraction and milling of lumber, cannot resonate as a Maliseet aboriginal right, or as a proper application of the logical evolution principle", because they are not grounded in traditional Maliseet culture (appellant's factum in *Sappier and Polchies* appeal at para. 76; appellant's factum in *Gray* appeal at

para. 80). I find this submission to be contrary to the established jurisprudence of this Court, which has consistently held that ancestral rights may find modern form: *Mitchell*, at para. 13. In *Sparrow*, Dickson C.J. explained that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (p. 1093). Citing Professor Slattery, he stated that "the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'" (p. 1093, citing B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 782). In *Mitchell*, McLachlin C.J. drew a distinction between the particular aboriginal right, which is established at the moment of contact, and its expression, which evolves over time (para. 13). L'Heureux-Dubé J. in dissent in *Van der Peet* emphasized that "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live" (para. 172). If aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless. Surely the Crown cannot be suggesting that the respondents, all of whom live on a reserve, would be limited to building wigwams. If such were the case, the doctrine of aboriginal rights would truly be limited to recognizing and affirming a narrow subset of "anthropological curiosities", and our notion of aboriginality would be reduced to a small number of outdated stereotypes. The cultures of the aboriginal peoples who occupied the lands now forming Canada prior to the arrival of the Europeans, and who did so while living in organized societies with their own distinctive ways of life, cannot be reduced to wigwams, baskets and canoes.

4.4 *The Site-Specific Requirement*

50 This Court has imposed a site-specific requirement on the aboriginal hunting and fishing rights it recognized in *Adams*, *Côté*, *Mitchell*, and *Powley*. Lamer C.J. explained in *Adams*, at para. 30, that

if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question. [Emphasis deleted.]

51 The characterization of the claimed right in the present cases, as in *Adams*, *Côté* and *Mitchell*, imports a necessary geographical element, and its integrality to the Maliseet and Mi'kmaq cultures should be assessed on this basis: *Mitchell*, at para. 59. I agree with

Robertson J.A. in the *Sappier and Polchies* decision that "[t]his result is hardly surprising once it is recognized that all harvesting activities are land and water based" (para. 50).

52 At the trial of Messrs. Sappier and Polchies, the Crown conceded that "the issue of territoriality does not arise in the trial of the Defendants on the charge set out herein" (Agreed Statement of Facts at para. 12, reproduced in the trial decision at p. 296). Moreover, in its reply to the defendants' Notice of Contention, the Crown addressed the question of whether the harvesting of trees occurred within Crown lands traditionally used for this practice. The Crown responded: "This question would not appear to be an issue as wood was gathered at will within the traditional Maliseet territory" (reproduced in the reasons of the Court of Appeal at para. 71). Territoriality is therefore not at issue in the *Sappier and Polchies* prosecution.

53 In the *Gray* trial, the trial judge accepted Mr. Sewell's evidence that the Mi'kmaq had traditionally used the Crown lands in question for the purpose of tree harvesting. The Court of Appeal noted that the Crown did not dispute this finding (para. 15). I would conclude on this basis that Mr. Gray has established an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation.

4.5 *Infringement and Justification*

54 In the *Sappier and Polchies* litigation, the Crown accepted that the relevant provisions of the *Crown Lands and Forests Act* infringed the alleged right and that the infringement could not be justified under the test set out in *Sparrow* and in *Badger* (Court of Appeal reasons, at para. 3). The Crown did not argue otherwise before this Court. Before the Court of Appeal in the *Gray* case, the Crown did not challenge the trial judge's conclusions that the impugned legislation infringed the right and that the Crown had failed to justify the infringement (para. 26).

55 The aboriginal right to harvest wood for domestic uses is subject to regulation pursuant to the ordinary rules applicable in that regard. However, given that the Crown did not attempt to justify the infringement in the present cases, this is a question that need not be addressed in the circumstances of these appeals.

4.6 *Extinguishment*

56 The Crown did not allege before the Court of Appeal in the *Sappier and Polchies* litigation that the aboriginal right was extinguished by either pre- or post-Confederation legislation (see Court of Appeal reasons, at para. 3). The argument was raised at trial, but not advanced on appeal because of that Court's decision in *Bernard*, in which the Crown had argued that any right of the Miramichi Mi'kmaq to cut logs on Crown lands as an aspect of their aboriginal title over the area in question had been extinguished by the same series of four pre-Confederation statutes enacted by the province of New Brunswick between 1837 and 1862 (*per* Robertson J.A., at para. 177). The argument was advanced on appeal in the *Gray* case, where Robertson J.A. explicitly held that:

My concurring opinion and that of Justice Daigle in *Bernard* is a sufficient basis for purposes of disposing of any argument that an existing aboriginal right was extinguished by either pre- or post-Confederation provincial legislation: see *Bernard* at paras. 176-179 and 523-541. [para. 25]

57 The Crown bears the burden of proving extinguishment. Before this Court, it relied on four pre-Confederation statutes enacted by the New Brunswick legislature between 1840 and 1862 as evidence of the Crown's intent to extinguish any aboriginal right to harvest wood. A clear intent is necessary in order to extinguish aboriginal rights. However, that intent need not be express and therefore aboriginal rights may also be extinguished implicitly: *Sparrow*, at p. 1099; *R. v. Gladstone*, [1996] 2 S.C.R. 723, at paras. 31 and 34.

58 First, it must be emphasized that during the colonial period, the power to extinguish aboriginal rights rested with the Imperial Crown: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 15. Given the submissions advanced on behalf of the respondents and the Assembly of First Nations, intervener, it is not at all clear that the colonial legislature of New Brunswick was ever granted the legal authority by the Imperial Crown to extinguish aboriginal rights. I do not deal with this argument in any detail as I conclude that the pre-Confederation legislation does not indicate a clear intention to extinguish aboriginal rights.

59 The legislation relied upon by the Crown as proof of extinguishment is primarily regulatory in nature, although it does introduce prohibitions and create misdemeanour offences. The earlier legislation aimed to penalize those who harvested timber on Crown lands without permission. Starting in 1850, the statutes sought to strengthen the rights of Crown lessees and licensees by providing the legal method by which they could regain timber which had been unlawfully taken. The Crown relies in particular on the 1862 amendment, which defined the rights of licensees as existing notwithstanding "any law, usage or custom to the contrary thereof" (S.N.B. 1862, 25 Vict., c. 24).

60 Following this Court's decision in *Sparrow*, the regulation of Crown timber through a licensing scheme does not meet the high standard of demonstrating a clear intent to extinguish the aboriginal right to harvest wood for domestic uses. As Lamer C.J. explained in *Delgamuukw*, at para. 180, "[i]n [*Sparrow*], the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been 'necessarily inconsistent' with the continued exercise of aboriginal rights, they could not extinguish those rights." The same distinction was made in *Gladstone*, where the Court explained that a varying regulatory scheme that at times entirely prohibited aboriginal peoples from harvesting herring spawn on kelp could not be said to express a clear and plain intention to eliminate the aboriginal rights of the appellants and of the Heiltsuk Band. Lamer C.J. concluded that, "[a]s in *Sparrow*, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of aboriginal rights" (para. 34).

61 For this reason, I find that the Crown has not discharged its onus of proving that the aboriginal right to harvest wood for domestic uses has been extinguished.

5. The Treaty Right Claim

62 As part of the agreed statement of facts put before the Court in the trial of Messrs. Sappier and Polchies, the Crown admitted that the Treaty of 1725 and the ratification thereof in 1726 are valid Treaties and that the defendants are beneficiaries of those Treaties. The Crown's concession about the validity of the Treaty is one of law. This Court has recognized that it is not bound by concessions of law: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45. Nonetheless, the fact that this concession occurred in the context of a criminal prosecution raises fundamental fairness concerns.

63 The onus of proving that a treaty right has been extinguished rests with the Crown, and not with the claimant: *Badger*, at para. 41; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1061; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 406; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404. The Crown's concession in this regard is akin to it leading no evidence with respect to extinguishment, insofar as it bears the burden of proof in this respect. The concession was made at the beginning of trial, although the Crown's own witness, Dr. Stephen Patterson, presented contradictory evidence with respect to the validity of the 1725 Treaty. The defendants, Messrs. Sappier and Polchies, have rightly relied on this concession since trial. It is fundamental to their defence that they were not in unlawful possession of Crown timber because they were exercising a valid treaty right to harvest timber for personal use.

64 Although I would not discourage concessions regarding the applicable law in a criminal prosecution, the Crown's concession in the present case has important implications outside the Province of New Brunswick. The Treaty of 1725 was negotiated in Boston by the Penobscots and ratified by Mi'kmaq representatives at Annapolis Royal, Nova Scotia, in 1726 (see W. C. Wicken, *Mi'kmaq Treaties on Trial* (2002), at pp. 28, 86 and 89; S. E. Patterson, "Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context" (1999), 48 *U.N.B.L.J.* 41, at pp. 51 and 55). As New Brunswick was not recognized as a separate colony until the partition of Nova Scotia in 1784, it was Nova Scotia which negotiated on behalf of the British Crown with the aboriginal peoples of the region: Patterson, at pp. 45-46. The precise boundaries of British Nova Scotia following the 1713 *Treaty of Utrecht*, and the intended geographic scope of the 1725 Treaty, are complex issues which have yet to be historically or judicially resolved (see Wicken, at p. 101; Patterson, at pp. 42-46). These issues, along with the validity of the 1725 Treaty, were recently the subject of judicial consideration in the Province of Newfoundland and Labrador. In *Newfoundland v. Drew* (2003), 228 Nfld. & P.E.I.R. 1, 2003 NLSCTD 105, the trial judge concluded that the 1725-1726 Treaties have no legal force insofar as they were terminated by subsequent hostilities between the Mi'kmaq and the British. Alternatively, he held that the 1725 Treaty by its express terms did not apply to Newfoundland, and that, in any event, the scope of the Treaty should be interpreted as restricted to territory within the jurisdiction of the Governor of Nova Scotia. An appeal from that judgment was dismissed by the Newfoundland and Labrador Court of Appeal ((2006), 260 Nfld. & P.E.I.R. 1, 2006 NLCA 53). I raise this case only to illustrate the contentious nature of the Crown's concession in the *Sappier and Polchies* trial and its potential implications outside the Province of New Brunswick. I do not wish to be taken as pronouncing on the validity or geographical scope of the 1725 Treaty.

65 Given the Court's decision on the aboriginal rights issue, there is no need to consider the treaty right claim in further detail.

6. Incorporation of Extrinsic Evidence by the Court of Appeal

66 Before concluding, I wish to address the Crown's argument that Robertson J.A. on behalf of the Court of Appeal inappropriately incorporated extrinsic evidence into his reasons for judgment. The dispute over the alleged incorporation of extrinsic evidence arises partly out of Robertson J.A.'s reasons in the *Sappier and Polchies* case:

The Crown admitted that the *Treaty of 1725*, which includes the promises of Major Paul Mascarene and the ratifications of 1726 (hereafter the *Mascarene Treaty*) is valid and subsisting, and that the defendants are beneficiaries of that *Treaty*. The historical events leading up to and surrounding the signing of this "Peace and Friendship" treaty are set out in *R. v. Bernard (J.)* (2003), 262 N.B.R. (2d) 1

. . . (C.A.), and in Professor Patterson's article, *Anatomy of a Treaty: Nova Scotia's First Native Treaty in Historical Context* (1999), 48 U.N.B.L.J. 41. [Emphasis added; para. 5.]

67 The Crown also objects to para. 19 of Robertson J.A.'s reasons in the *Gray* decision:

Applying *Sappier and Polchies*, I agree with the trial judge's finding that the harvesting of trees for personal use was integral to the Mi'kmaq's distinctive culture. Just as hunting and fishing for food are essential to survival, so too was the need for shelter to protect against the natural elements and for fuel to generate sufficient warmth. Moreover, the use of artifacts crafted from wood in pursuit of an aboriginal lifestyle is well documented. One need only turn to the use of the canoe in aboriginal societies in New Brunswick to appreciate the significance and importance of trees. From the decision of this Court in *Bernard* at para. 370, we know that at the time of contact with Europeans the Mi'kmaq were a hunting and fishing people who migrated seasonally from their inland hunting grounds to the coast for summer fishing. The reality that trees provided them with a practical means of constructing a convenient mode of transport for purposes of traversing New Brunswick's intricate network of waterways is well-documented. Had the Mi'kmaq not harvested wood from time immemorial, surely that aboriginal society would have been fundamentally altered. Finally, one cannot seriously argue that the harvesting of wood for personal use was merely incidental or marginal to the Mi'kmaq culture, in the sense that it was an activity that occurred infrequently. History tells us otherwise: see *Bernard* at paras. 490, 495 and 497, in which the same findings were made of those Mi'kmaq communities of the Miramichi. [Emphasis added.]

68 First, the Crown objects to Robertson J.A.'s reference to the findings of fact made in the *Bernard* case, which was decided and released prior to the Court of Appeal hearings in both of the cases at bar. *Bernard* was released on August 28, 2003. The *Sappier and Polchies* hearing before the Court of Appeal took place on February 11, 2004, while the *Gray* hearing occurred on November 26, 2003. In other words, by the times the hearings occurred in the cases at bar, the *Bernard* decision, including its findings of fact, was in the public record and ought to have been known to the Crown. Moreover, in the *Sappier and Polchies* decision, the reference to *Bernard* is merely informative, given the Crown's concession about the validity of the 1725 Treaty. It is not operative in Robertson J.A.'s reasoning precisely because the historical events leading up to the signing of the treaty were not contentious.

69 Similarly, in the *Gray* decision, Robertson J.A. clearly stated that he agreed with the trial judge's finding that the harvesting of trees for personal use was integral to the Mi'kmaq's distinctive culture. The reference to the *Bernard* decision and to its findings of fact in respect of the Mi'kmaq communities of the Miramichi are merely offered in support of his conclusion. In any

event, the Crown concedes at para. 44 of its factum that "wood was used in Mi'kmaq society to ensure survival", and generally does not take issue with the significance of wood and the many uses to which it was put in pre-contact Mi'kmaq society.

70 Second, the Crown also takes issue with Robertson J.A.'s reference to Dr. Patterson's article in the *Sappier and Polchies* reasons for judgment. Dr. Patterson gave evidence at the *Sappier and Polchies* trial as the Crown's own witness. The article Robertson J.A. referred to was also referred to by Dr. Patterson in his oral evidence. He offered to provide a copy to the trial court. The Crown declined that invitation, noting it was unnecessary in view of Dr. Patterson's presence to provide oral testimony (A.R., vol. III, at pp. 392-93). In any event, the Crown conceded the validity of the treaty. Dr. Patterson's article is merely offered as a source of information about the historical events surrounding the signing of the treaty, as they are not addressed in the reasons as a result of the Crown's concession.

71 Lamer J. (as he then was) relied on additional documents in *Sioui* and took judicial notice of historical facts contained therein. Some of those documents were put forth by the intervener in that case and others were obtained by way of personal research. The Crown is correct to note, however, that the parties in *Sioui* were provided with notice of these additional documents. I would agree that it is generally wise not to incorporate evidence submitted in other cases without disclosing it to the parties and allowing them the possibility of challenging it or presenting contrary evidence. But because the *Bernard* decision and Dr. Patterson's article were in the public record and well known to the Crown, and because the Crown has failed to allege any material dispute or discrepancy as a result of this so-called incorporation of extrinsic evidence, I respectfully conclude that extrinsic evidence was not improperly incorporated into the learned judge's reasons.

7. Conclusion

72 For the above reasons, I conclude that the respondents have made out the defence of aboriginal right. The respondent Mr. Gray possesses an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by members of the Pabineau First Nation. The respondents Messrs. Sappier and Polchies possess an aboriginal right to harvest wood for domestic uses. That right is also site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members of the Woodstock First Nation.

73 Accordingly, I would dismiss the appeals.

The following are the reasons delivered by

74 Binnie J. — I agree with my colleague, Bastarache J., about the disposition of this appeal for the reasons he gives except, with respect, for his ruling that

[t]he harvested wood cannot be sold, traded or bartered to produce assets or raise money. This is so even if the object of such trade or barter is to finance the building of a dwelling. In other words, although the right would permit the harvesting of timber to be used in the construction of a dwelling, it is not the case that a right holder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components. [para. 25]

In aboriginal communities pre-contact, as in most societies, there existed a division of labour. This should be reflected in a more flexible concept of the exercise of aboriginal rights *within* modern aboriginal communities, especially considering that the aboriginal right itself is communal in nature. Barter (and, its modern equivalent, sale) within the reserve or other local aboriginal community would reflect a more efficient use of human resources than requiring all members of the reserve or other local aboriginal community to which the right pertains to do everything for themselves. They did not do so historically and they should not have to do so now. On the one hand, it seems to me a Mi'kmaq or Maliseet should be able to sell firewood to his or her aboriginal neighbour or barter it for, say, a side of venison or roofing a house. On the other hand, I agree that trade, barter or sale *outside* the reserve or other local aboriginal community would represent a commercial activity outside the scope of the aboriginal right established in this case. In other respects I agree with my colleague.

Appeals dismissed.

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TAB I

Please see attached document

TAB J

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Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011

Update:

Starting in 2023-24, the 2023 federal budget provides $11.4 million over 3 years to Crown-Indigenous Relations Northern Affairs Canada to engage with Indigenous communities. Engagement activities will inform the development of new federal guidelines for federal officials to fulfil the Crown's duty to consult Indigenous peoples and accommodate impacts on their rights. This will support the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act* and provide more clarity on how the government will proceed to ensure an effective and efficient whole-of-government approach to consultation and accommodation.

For more information, please contact: indigenous.consultations.autochtones@rcaanc-cirnac.gc.ca

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QS-7105-002-BB-A1
Catalog R3-111/2012E-PDF
ISBN 978-1-100-20350-8

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Executive Summary

In the Haida and Taku River decisions in 2004, and the Mikisew Cree decision in 2005, the Supreme Court of Canada held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. The Court explained that the duty stems from the Honour of the Crown and the Crown's unique relationship with Aboriginal peoples.

To demonstrate Canada's commitment to address issues of Aboriginal consultation and accommodation, a federal Action Plan was announced in November 2007. The Consultation and Accommodation Unit was established within Aboriginal Affairs and Northern Development Canada (AANDC) in early 2008 to implement the Action Plan. Some of the accomplishments of the Action Plan were the release of the February 2008 Interim Guidelines, the training provided to over 1700 federal officials across the country, the engagement with Aboriginal communities and organizations, provinces and territories and industry representatives and the development of tools to support officials in their consultation and accommodation activities.

In more recent decisions, the Court further explained that: the duty to consult is a constitutional duty; applies in the context of modern treaties; officials must look at treaty provisions first; and where treaty consultation provisions do not apply to a proposed activity, a "parallel" duty to consult exists. The Court has also clarified, that depending on their mandate, entities such as boards and tribunals may also play a role in fulfilling the duty to consult; that high level strategic decisions may now trigger the duty to consult; and, that the duty applies to current and future activities and not historical infringements.

The Interim Guidelines have been updated with the collaboration of federal departments and agencies. This document reflects evolving case law and engagement with Aboriginal organizations and communities, provinces and territories and industry representatives. A key element of the Updated Guidelines is the Guiding Principles and Consultation Directives which provide clearer direction on the government-wide responsibility of departments and agencies to fulfill the duty to consult. The Updated Guidelines focus on the increased need for policy leadership, coordination and collaboration, federal accountability, strengthening partnerships and strategic and practical guidance, training and support. These new or enhanced elements demonstrate the progress made by the federal government to address consultation and accommodation issues.

Departments are responsible for integrating the Guiding Principles and Directives within their own day-to-day activities. The Updated Guidelines also reference the Consultation Information Service and the Aboriginal and Treaty Rights Information System and other tools developed to assist officials in determining the scope and nature of consultations.

Additional information can be found on the AANDC Consultation and Accommodation Unit web site.

Part A – Overview

I. Introduction

The Government of Canada consults with Canadians on matters of interest and concern to them. Consulting is an important part of good governance, sound policy development and decision-making. Through consultation, the Crown seeks to strengthen relationships and partnerships with Aboriginal peoples and thereby achieve reconciliation objectives. In addition to pursuing policy objectives, the federal government consults with Aboriginal peoples for legal reasons. Canada has statutory, contractual and common law obligations to consult with Aboriginal groups. The process leading to a decision on whether to consult includes a consideration of all of these factors and their interplay.

The Updated Guidelines provide practical advice and guidance to federal departments and agencies in determining when the duty to consult may arise and how it may be fulfilled, as described by the Supreme Court of Canada in the *Haida, Taku River* and *Mikisew Cree* decisions (See Annex B: Legal Case Summaries).

The Guidelines are informed by Canada's understanding of the legal parameters of the duty and provide policy-based guidance to assist officials in their efforts to effectively incorporate consultations and, where appropriate, accommodation into government activities and processes.

The Guidelines are divided into three parts: Part A — Overview; Part B — Getting Ready for Consultation and Accommodation; Part C — Step-by-Step Guide to Consultation and Accommodation. Part C includes a detailed list of questions and considerations to assist departments and agencies when managing their consultation and accommodation activities.

Good governance/Policy Reasons

- Make informed and appropriate decisions
- Create and improve working relations with all those affected
- Address new business and policy developments

Legal Reasons

- S. 35 Common law requirements
- Statutory requirements
- Agreements/Contractual requirements

II. Common Law Duty to Consult

The common law duty to consult is based on judicial interpretation of the obligations of the Crown (federal, provincial and territorial governments) in relation to potential or established Aboriginal or

Treaty rights of the Aboriginal peoples of Canada, recognized and affirmed in section 35 of the *Constitution Act, 1982*. The duty cannot be delegated to third parties.

Section 35 of the *Constitution Act, 1982* provides that:

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.

In the *Haida* and *Taku River* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada (SCC) held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. This duty has been applied to an array of Crown actions and in relation to a variety of potential or established Aboriginal or Treaty rights.

In these decisions, the SCC determined that the duty to consult stems from the Honour of the Crown and the Crown's unique relationship with Aboriginal peoples. The Court explained that it will look at how the Crown manages its relationships with Aboriginal groups and how it conducts itself when making decisions that may adversely impact the rights recognized and affirmed by section 35. In the more recent decisions of *Rio Tinto* and *Little Salmon Carmacks* the Court has further explained that the duty to consult is a constitutional duty that invokes the Honour of the Crown and that it must be met. The context will inform what is required to meet the duty and demonstrate honourable dealings.

The duty to consult and, where appropriate, accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty by the Crown and continues beyond formal claims resolution through to the application and implementation of Treaties. The Crown's efforts to consult and, where appropriate accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation.

Reconciliation has two main objectives: 1) the reconciliation between the Crown and Aboriginal peoples and; 2) the reconciliation by the Crown of Aboriginal and other societal interests. Consultation and accommodation play a key role in the fulfillment of these two objectives.

As the consultation and accommodation processes are being developed and implemented, the Crown will be guided by principles that have emerged from the case law and from government consultation practices. The Guiding Principles and Consultation Directives set out below highlight

how these key principles may be applied in the planning and design of government activities (Refer to Part A, Section VI of the Updated Guidelines).

III. Government's Response

The courts have generally left to government the detailed exercise of implementing processes that seek to fulfill the duty to consult. An awareness of the duty and a consideration of when and how it might apply must become part of the government's daily business. A wide array of consultation practices exist and are being implemented by federal departments and agencies across the country to better fulfill the duty to consult and, where appropriate, accommodate. Examples include consultations with Aboriginal groups that occur within the context of environmental assessments and regulatory processes as well as separate consultation activities undertaken in relation to specific projects and agreed to processes set out within treaties.

Since 2004, the federal government has been engaging in dialogue with First Nations, Inuit and Métis communities and organizations as well as provinces, territories and industry representatives to address key consultation and accommodation issues. Discussions have focussed on the scope of the duty, what constitutes meaningful consultation, capacity to participate in a consultation process, Crown coordination, consultation guidelines and protocols, accommodation, and the reconciliation of the evolving duty with other legal obligations to consult such as statutory requirements and provisions in comprehensive land claim agreements and self-government agreements.

An Action Plan on consultation and accommodation was announced in November 2007 led by Aboriginal Affairs and Northern Developments Canada (AANDC) and Justice Canada. A Consultation and Accommodation Unit was established within AANDC in early 2008 to implement Canada's Action Plan on consultation and accommodation. Interim Consultation Guidelines were released in February 2008 and related training has been provided to over 1700 federal officials across the country.

Within AANDC, a Consultation Information Service and an information system on the location and nature of potential and established Aboriginal and Treaty rights has been created to provide baseline information to federal officials. As well, the Regional Consultation Coordinators within AANDC will act as liaison between federal departments, provincial and territorial governments and Aboriginal organizations and communities to facilitate relationships on key consultation files and to ensure that Canada's interests are addressed.

Guiding Principles and Directives have been developed to further guide federal officials in implementing the duty and are included in the Updated Guidelines. Initiatives to better integrate Aboriginal consultation with environmental assessments and regulatory processes were also undertaken, including in relation to major natural resources and infrastructure projects.

These elements of Canada's approach to consultation and accommodation are being expanded upon and others will continue to be developed over time to enable the Crown to fulfill the duty in a more consistent, coherent, and efficient way across the federal government.

IV. Context across Canada

Consultation with First Nations, Métis and Inuit communities must be understood in the broader context of the evolving relationship between Aboriginal Peoples and the Crown.

Departmental and agency approaches to consultation should integrate, to the extent possible, the fulfilment of consultation obligations with departmental policy objectives and with other overarching government policy objectives. For example, in pursuing reconciliation objectives, Canada continues its efforts to improve its relationship with Aboriginal peoples. This includes through its historic apology in 2008 to former students of the residential school system, the subsequent establishment of the Truth and Reconciliation Commission and the recent Apology for relocation of Inuit families to the High Arctic. These important steps build on progress that has been made in negotiating Aboriginal self-government and land claims agreements; and, partnership approaches to economic development, education, health and other issues.

The development of a federal approach to consultation and accommodation is not intended to be a one-size-fits-all approach. Differences in history, geography, demographics, governance, relationships and other circumstances of Aboriginal communities and organizations in Canada are relevant when considering how to address any consultation obligations that may arise. Thus, understanding the historical, geographic and legal context relevant to Crown activities is essential. Differences in contexts can require different approaches to fulfilling the duty to consult and, where appropriate, accommodate.

1. Historical and Geographical

The application of common approaches to consultation and, where appropriate, accommodation across the country must be reconciled with the fact that potential or established Aboriginal or Treaty rights vary in both scope and content. Such rights vary depending on the historical presence of Aboriginal groups, including the historical relationship between particular Aboriginal communities and between the Aboriginal communities and the Crown, in different areas of the country. For example, Aboriginal communities may be signatories to historic treaties, comprehensive land claim agreements, and self-government agreements or be claiming many different kinds of Aboriginal rights and overlapping territories.

Issues addressed in consultation are specific to the location and nature of the activity. Consultation procedures and approaches must be adapted to address the different kinds of rights and Crown obligations that are at issue. There is significant variability across the country.

For example, in British Columbia and Quebec, there are a few Treaties but many overlapping assertions of Aboriginal rights and title, when compared with the Peace and Friendship Treaties in the Maritimes and the historic Treaties in Ontario and in the Prairie provinces. This landscape differs from the modern Treaties in the territories, northern B.C., and in James Bay, some of which contain specific consultation provisions.

2. Legal

In addition to the common law duty to consult, there are a number of other legal reasons for the Crown to consult with Aboriginal groups, including specific requirements to consult that are set out in statutes and regulations as well as provisions in land claim agreements, self-government agreements and consultation agreements.

It is important to identify the legal source of potential consultation obligations as this will inform and guide what is required in the particular context, including the interplay between these other legal reasons to consult with Aboriginal groups and the common law duty. Departments and agencies should work with their counsel to understand what legal considerations are relevant to their activities.

3. International

On November 12, 2010 Canada issued a Statement of Support endorsing the United Nations Declaration on the Rights of Indigenous peoples (Declaration), an aspirational document, in a manner fully consistent with Canada's Constitution and laws. The Declaration describes a number of principles such as equality, partnership, good faith and mutual respect. Canada strongly supports these principles and believes that they are consistent with the Government's approach to working with Aboriginal peoples.

However, Canada has concerns with some of the principles in the Declaration and has placed on record its concerns with free, prior and informed consent when interpreted as a veto. As noted in Canada's Statement of Support, the Declaration is a non-legally binding document that does not change Canadian laws. Therefore, it does not alter the legal duty to consult. A copy of Canada's statement of support, along with other materials, can be found at: United Nations Declaration on the Rights of Indigenous Peoples.

V. Updated Consultation Guidelines

The Interim Guidelines were developed to provide direction to federal departments and agencies when assessing the common law requirements for consultation and, where appropriate, accommodation with Aboriginal groups, including how to prepare for meaningful consultations.

Since the release of the Interim Guidelines in February 2008, much has been learned about consultation and accommodation which is reflected in these Updated Guidelines. Changes to the Guidelines have been informed by developments in the case law and engagement with Aboriginal organizations and communities, provinces and territories and industry representatives. Discussions and information-sharing during training sessions held with federal officials across the country have also contributed to these changes.

This updated edition provides a more detailed step-by-step guide to consultation and accommodation. It also stresses the importance for departments and agencies to prepare, in advance, to effectively carry out their consultation and accommodation responsibilities by developing a departmental or agency wide approach instead of addressing consultation files simply on a case by case basis.

The evolution of case law and federal policy development combined with "lessons learned" and best practices from within and outside the federal government will continue to influence the content of the Guidelines, which will evolve over time. As part of this ongoing process, departments and agencies need to continue reviewing their Aboriginal consultation and accommodation approaches to ensure that they are consistent with the Guidelines and with evolving legal and policy developments.

In many instances, departments and agencies have developed departmental or agency specific policies or guidelines to support their officials in handling consultation files. The implementation of these Guidelines is a step towards greater consistency in federal practices and approaches.

The objective of the Guidelines is to provide an approach to consultation and accommodation that:

- acknowledges and respects the Crown's unique relationships with Aboriginal peoples;
- promotes reconciliation of Aboriginal and other societal interests;
- integrates consultation into government day-to-day activities, e.g. environmental and regulatory processes;
- reconciles the need for consistency in fulfilling the Crown's duty to consult with the desired flexibility, responsibility and accountability of departments and agencies in determining how best to do so; and
- fosters better relations between the federal government and Aboriginal peoples, provinces, territories, industry and the public.

VI. Guiding Principles and Consultation Directives

As part of its on-going efforts to better address Aboriginal consultation and accommodation, the federal government approved the following *Guiding Principles and Consultation Directives* which will guide federal officials in their efforts to address the duty to consult and, where appropriate, accommodate.

The Government of Canada consults with First Nation, Métis and Inuit people for many reasons, including: statutory and contractual; policy and good governance; and the common law duty to consult. The Supreme Court of Canada affirmed, in a number of landmark decisions, such as *Haida* (2004), *Taku River* (2004) and *Mikisew Cree* (2005) that the Crown has a duty to consult when three elements are present:

- Contemplated Crown conduct;
- Potential adverse impact; and
- Potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*.

Guiding Principle No. 1

The Government of Canada, in carrying out its activities, will respect the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit people by consulting with Aboriginal groups whose rights and related interests may be adversely impacted by a proposed Government of Canada activity.

Consultation Directive

The Government of Canada, in its consultation with Aboriginal groups, seeks to identify potential adverse impacts of federal activities on potential or established Aboriginal or Treaty rights and related interests and find ways to avoid or minimize these adverse impacts. If there is information available or that becomes available during the planning or implementation of the proposed activity about potential adverse impacts on potential or established rights exercised by an Aboriginal group in the area of an activity, federal officials must undertake the appropriate consultations.

Government actions that may adversely impact Aboriginal and Treaty rights can include decisions with respect to a pipeline that may affect wildlife movement, supply and access; decisions with respect to pollution from construction or use that may affect flora or animal populations; change in regulation or policy that may restrict land use; federal life cycle of land management that may affect legal obligations and relationships with Aboriginal groups; or decisions with respect to use of natural resources that may limit supply and use by Aboriginal groups.

Officials from federal departments and agencies can gather information on Aboriginal and Treaty rights assertions in their proposed activity area by accessing the following resources at all stages of a consultation and accommodation process:

- Officials within your department or agency;
- The Consultation Information Service, which includes the Aboriginal and Treaty Rights Information System, at AANDC – this service provides a single point of access to information on Aboriginal and Treaty rights assertions held by AANDC. The information includes contact information for Aboriginal groups and their leadership, information on multipartite agreements, historic Treaties, comprehensive land claim agreements, self-government agreements, Treaty Land Entitlement agreements, comprehensive and specific claims and other assertions;
- Aboriginal groups in the area of your activity with which your department or agency has relationships;
- AANDC's Consultation Information Service, Treaties and Aboriginal Government and the Department of Justice, which can assist with more detailed assessments of complex situations, overlapping claims to lands or resources, title, etc.; or,
- Other government departments and agencies, provinces, territories and industry with which your department or agency has relationships.

Guiding Principle No. 2

The Government of Canada will assess how proposed federal activities may adversely impact on potential or established Aboriginal or Treaty rights, Aboriginal groups and their related interests. As part of this assessment, the Government of Canada will identify when consultation should form part of their operations and ensure that consultations are initiated early in the planning, design or decision making processes.

Consultation Directive

Departments and agencies must assess their activities, policies and programs that may adversely impact potential or established Aboriginal or Treaty rights and related interests. Based on this review, federal officials will ensure that appropriate consultation activities with Aboriginal groups are carried out. Key departments involved in Aboriginal consultation should develop a consultation approach that is responsive to the needs of the department or agency and reflects its operational realities. This approach should build from the guidance set out in the Updated Guidelines.

Guiding Principle No. 3

Early consultations will assist the Government of Canada in seeking to identify and address Aboriginal concerns, avoid or minimize any adverse impacts on potential or established Aboriginal or Treaty rights as a result of a federal activity and assess and implement mechanisms that seek to address their related interests, where appropriate.

Consultation Directive

Federal officials must be able to demonstrate in decision making processes that Aboriginal concerns have been addressed or incorporated into the planning of proposed federal activities. As such, early discussions with the Aboriginal groups who may be adversely impacted by a federal activity are crucial. It is possible that there could be multiple Aboriginal groups impacted by a proposed activity, therefore they should be part of the consultation process.

Guiding Principle No. 4

Consultation and accommodation will be carried out in a manner that seeks to balance Aboriginal interests with other societal interests, relationships and positive outcomes for all partners. A meaningful consultation process is one which is:

- *carried out in a timely, efficient and responsive manner;*
- *transparent and predictable;*
- *accessible, reasonable, flexible and fair;*
- *founded in the principles of good faith, respect and reciprocal responsibility;*
- *respectful of the uniqueness of First Nation, Métis and Inuit communities; and,*
- *includes accommodation (e.g. changing of timelines, project parameters), where appropriate*

Consultation Directive

The Government of Canada and its officials are required to carry out a fair and reasonable process for consultations. A meaningful consultation process is characterized by good faith and an attempt by parties to understand each other's concerns, and move to address them. Federal officials can begin a consultation process by applying the Updated Guidelines in concert with any tools, policies or guidelines developed by their department or agency. Federals officials, during a consultation process, must reasonably ensure that Aboriginal groups have an opportunity to express their interests and concerns, and that they are seriously considered and, wherever possible, clearly reflected in a proposed activity. Aboriginal groups also have a reciprocal responsibility to participate in consultation processes.

The Government of Canada will conduct consultation activities, in a timely and efficient manner, including, when appropriate, the development of a consultation plan and the provision of relevant information to Aboriginal groups, to inform and support decision-making processes. Federal officials must seek to develop processes that move beyond a project-by-project approach to consultation and move towards one that facilitates the inclusion of Aboriginal perspectives, timely decision making, integrates with and strengthens regulatory processes and promotes economic benefits for all Canadians.

Guiding Principle No. 5

The Government of Canada recognizes that Aboriginal consultation is a Crown responsibility that flows from Government activities. The Government of Canada will ensure that a lead federal department or agency is identified and made accountable for any consultation processes that may be carried out for federal government activities. Should a consultation process move a department or agency beyond their mandate, mechanisms will be in place to address additional issues raised in a consultation process.

Consultation Directive

To manage Aboriginal consultation and accommodation, the Government of Canada will facilitate efficient and effective cooperation among and within federal departments and agencies via senior federal official governance structures which will assign a lead in a consultation process where the lead is not clear. When consultation and accommodation activities move a department or agency beyond their identified mandate, memorandum of understanding and other processes will be developed to coordinate other departments and agencies and processes whose function and expertise can support an effective consultation process.

Guiding Principle No. 6

The Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessment and regulatory approval processes in which Aboriginal consultation will be integrated, to coordinate decision making and will assess if additional consultation activities may be necessary.

Consultation Directive

A whole of government approach for Aboriginal consultation will be used in the regulatory review process for major natural resource projects. Consultation will be integrated into environmental assessment and regulatory approval processes. To assist in this approach, each major project will have a Crown consultation coordinator, who will develop and use a consultation plan to integrate the activities of all departments throughout the environmental assessment and regulatory processes. The interdepartmental committee process and interdepartmental memoranda of understanding will assist in providing clarity to these issues. The Government of Canada may rely on, where possible, existing consultation mechanisms, processes and expertise (e.g. provincial or territorial government or industry consultations) to streamline decision making and will assess if additional consultation activities may be necessary.

Federal officials must align consultation processes to existing regulatory or legislative processes, to the extent possible. Officials should, however, consider that:

- issues that arise during the consultation may be beyond the mandate of the existing process therefore additional consultation activities may need to occur;
- the existing process must allow for appropriate, meaningful consultation; and,
- consultation may be required throughout the lifecycle of an activity, thus they must ensure that any existing process is appropriate for all stages of the activity.

Guiding Principle No. 7

The Government of Canada will coordinate consultation and accommodation activities with its partners (e.g. Aboriginal groups, provinces, territories and industry). While the Crown cannot delegate its obligation, the Government of Canada will, where appropriate, use consultation processes and accommodation measures carried out by its partners to assist it in meeting its commitments and responsibilities.

Consultation Directive

The Government of Canada and its officials can rely on its partners, such as Aboriginal groups, industry and provinces and territories, to carry out procedural aspects of a consultation process (e.g. information sessions or consultations with Aboriginal groups, mitigation measures and other forms of accommodation, etc.). The information collected during these processes can be used by the Government of Canada and its officials in meeting its consultation obligations.

Guiding Principle No. 8

The Government of Canada will carry out its activities and related consultation processes in accordance with its commitments and processes involving Aboriginal groups. The Government of Canada will seek out opportunities to develop and maintain a meaningful dialogue with Aboriginal groups in support of building relationships with its partners.

Consultation Directive

The Government of Canada, in carrying out consultation processes, must act in accordance with its existing commitments and processes (e.g. Treaties, Treaty land entitlement agreements, settlements and consultation agreements). Federal officials need to inform themselves and be aware of Canada's policy approach and legal commitments to Aboriginal groups and how these commitments and processes may be aligned with department and agency consultation processes. Federal officials should also seek to develop positive, long-term relationships with Aboriginal groups. These positive relationships and the dialogue that results from them will assist the federal government in moving forward on future activities.

Part B — Getting Ready for Consultation and Accommodation

I. Roles and Responsibilities

Federal Departments and Agencies

An effective consultation process requires collaboration with Aboriginal groups and coordination and cooperation within the federal government and with other jurisdictions and stakeholders, as appropriate.

The Crown as a whole must fulfill its duty to consult and, where appropriate, accommodate. In turn, each federal department or agency must support the Crown's efforts in meeting this obligation. To do so, departments and agencies must assess the consultation requirements that relate to their respective activities and develop approaches to consultation and accommodation that will allow the Crown as a whole to meet its duty. Some departments and agencies may have existing processes and/or mandates which may assist in fulfilling the duty.

Coordination between the relevant federal departments and agencies is essential to ensure that the Crown is responsive and able to relate effectively with the Aboriginal groups involved. Limitations on the mandate of any one department, agency or other federal entity will not limit what is required of the whole Crown in the circumstances (Refer to Guiding Principle and Directive #5).

The designation of a lead department, agency or committee is recommended to oversee and track all consultation efforts and the issues raised by Aboriginal groups. The lead will follow up with relevant departments and agencies to ensure that they take appropriate action in relation to any consultation processes that may be carried out for federal government activities. The lead will also act as the federal point of contact for Aboriginal groups, industry representatives and various stakeholders.

As mentioned in Guiding Principle and Directive #6, in seeking to ensure that its obligations towards Aboriginal groups are satisfied, Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessments and regulatory approval processes that allow it to gather information and address issues raised by Aboriginal groups.

Agencies, boards, commissions and tribunals, including the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) have a role to play in assisting the Crown in discharging, in whole or in part, the duty to consult. The role to be played by any given board,

commission or tribunal is determined by its statutory mandate or its terms of reference. More specifically, an ability to address questions of law and an ability to remedy or address consultation related issues will inform the role of such boards, tribunals and commissions in Crown consultation processes.

Departments with responsibilities for real property management such as disposal should be aware of Aboriginal interests in federal Crown land under their management. While decisions to dispose of federal Crown land is the most common trigger for a duty to consult in real property matters, there are other aspects of land management, such as access restrictions, management of burial sites and infrastructure. Guidance on this subject can be found in the Treasury Board Secretariat's *Guide to Real Property Management: Aboriginal Context*.

Provinces and Territories

The Crown's duty to consult applies to provincial and territorial governments. Some have instituted their own Crown consultation processes, policies and guidelines for projects within their jurisdictions. Departments and agencies should look at provincial, territorial and community websites for additional information on provincial, territorial, regional or community-specific consultation agreements and protocols, processes and policies. They can also contact the AANDC Regional Consultation Coordinator. Inquiries can be sent to CAU-UCA@aandc-aadnc.gc.ca.

Guiding Principle and Directive #7 speaks to Canada coordinating its consultation and accommodation activities with those of its partners (e.g. Aboriginal groups, provinces, territories and industry). For initiatives involving federal, provincial and territorial governments, opportunities to coordinate efforts between jurisdictions should be pursued to the maximum extent possible, to increase efficiency by minimizing duplication.

Departments and agencies are encouraged to develop long-term working relationships and processes rather than work together only on an *ad hoc* or case-by-case basis. Where both federal and provincial or territorial governments are involved in an activity, their consultation efforts should be coordinated. In some instances, Canada, with their agreement, may wish to use provincial or territorial consultation processes to fulfill, in whole or in part, its consultation obligations. Federal departments and agencies will need to assess these processes to ensure that they lead to a meaningful consultation and are capable of addressing matters related to federal activities.

AANDC, on behalf of Canada, will engage with provincial and territorial partners to explore the potential for developing memoranda of understanding aimed at reducing duplication, working collaboratively, sharing information and improving collaboration on Aboriginal consultation. Consultation agreements with provinces/territories and First Nation, Métis or Inuit groups may also assist in addressing consultation and accommodation issues.

In 2007, federal, provincial and territorial Deputy Ministers Responsible for Aboriginal Affairs agreed to establish an ongoing information- and priority-sharing process on Aboriginal consultation and accommodation across their respective jurisdictions. The Federal/Provincial/Territorial working group has made real progress in relation to the duty to consult. Key areas that have been explored

include: capacity, the duty to consult and the Métis, traditional land use studies as a tool to inform consultation processes, developing information repositories, coordination, inter-jurisdictional challenges and approaches to dealing with municipalities.

Aboriginal Groups

In keeping with court decisions on consultation, Guiding Principle and Directive #4 makes it clear that First Nation, Métis and Inuit groups have a reciprocal duty to participate in reasonable processes and Crown efforts to consult and accommodate them. It is in the interest of all concerned parties to develop effective processes and agreements that reflect shared interests and contribute to a consultation process that creates clarity, certainty, trust and reliability. In that respect, the Crown may reasonably expect Aboriginal groups to:

- clearly outline in a timely manner any potential adverse impacts of the Crown activity, or that of a third party, on the nature and scope of their potential or established Aboriginal or Treaty rights and related interests;
- make their concerns known to the Crown and share any other relevant information that can assist in assessing the strength of their claim or the seriousness of any impacts on their potential or established Aboriginal or Treaty rights and related interests;
- attempt to resolve any issues with any other Aboriginal groups with overlapping claims and interests;
- attempt to reach a mutually satisfactory resolution to a particular situation;
- consider that they do not have a veto over the proposed project; that consultation may not always lead to accommodation or that there may not always be agreement on what accommodation measures may be appropriate.

Third Parties

All industry sectors seek predictable timelines, clarity on the respective roles of parties, certainty and criteria to determine the adequacy of consultation and accommodation. Industry representatives indicate that earlier government consultations at the federal, provincial and territorial levels would help to establish a transparent process for the proponent, Aboriginal communities and the Crown.

The Crown could discuss with industry proponents early in the process about the possibility and extent to which it may rely on the proponent's engagement with Aboriginal groups as part of the formal consultation and accommodation process. Creating this understanding early in the planning stages of a project could help to define each party's roles and responsibilities and expectations.

Third parties, such as proponents, do not have a legal obligation to consult Aboriginal groups. The Crown may delegate to the proponent such aspects of consultation as the gathering of information about the impact of the proposed project on the potential or established Aboriginal or Treaty rights. The Crown should clearly communicate what is expected of third parties to industry proponents, Aboriginal groups and various stakeholders. The role that a third party can play in carrying out

consultation and accommodation processes should be incorporated into any Crown consultation plans and efforts. The information collected during these processes, for example, can be used by the federal government and its officials in its decision-making process.

Industry's overall relationship with Aboriginal groups, including its business practices, can assist the Crown's overall consultation and accommodation efforts. Industry proponents are often in the best position to accommodate an Aboriginal group for any adverse impacts on its potential or established Aboriginal or Treaty rights, for example, by modifying the design or routing of a project. Canada will seek to benefit from the outcomes of a third-party consultation process and any accommodation measures undertaken by third parties. However, the ultimate responsibility for consultation and accommodation rests with the Crown as the Honour of the Crown cannot be delegated.

There are some formalized processes for industry involvement in Aboriginal consultation such as in the case of oil and gas development in the Treaty 8 area within B.C.'s north-east. Ontario's new mining legislation includes measures to ensure that proponents consider Aboriginal consultation.

II. Developing a Departmental or Agency Approach to Consultation and Accommodation

This section outlines how departments and agencies should prepare for consultation and accommodation and, building on the Updated Guidelines, develop a departmental or agency approach that assists the Crown in fulfilling the duty while supporting other departmental and agency objectives.

Creating an approach that is consistent with the Updated Guidelines allows departments and agencies to integrate Aboriginal consultation into their activities and ensures consistency in addressing consultation and accommodation issues (refer to Guiding Principle and Directive #8). Such an approach can support the overall objective of reconciliation highlighted by the Supreme Court of Canada in decisions such as *Haida* and *Taku River*.

1) Identify Crown conduct in relation to the duty to consult

Crown conduct refers to the Crown's own activities, such as land disposal, park creation, infrastructure development, Treaty implementation, or to Crown activities and authorizations and permits for projects to be carried out by a third party. Refer to Guiding Principle and Directive #1 for some examples of government actions that may adversely impact potential or established Aboriginal or Treaty rights.

The duty extends to "strategic, higher level decisions" that may have an impact on potential or established Aboriginal or Treaty Rights. These could include structural or organisational changes that reduce the Crown's oversight and decision-making ability.

By becoming familiar with their departmental or agency mandate and objectives and the related activities that may adversely impact on the rights of Aboriginal groups, departments and agencies will:

a. be able to identify which of their activities, policies and programs may give rise to the duty to consult;

b. be able to support a department or agency to support the consultation or accommodation activities of other departments or agencies whose Crown conduct has given rise to a duty to consult. This may apply even when their own activities do not give rise to a duty to consult.

See "Part C, Phase 2 – Crown Consultation Process" for a detailed list of questions for consideration.

2) Assess potential adverse impacts of departmental and agency activities

As highlighted in Guiding Principle and Directive #3, by assessing, in advance, what might be the adverse impacts of their activities, departments and agencies can determine how these impacts could be avoided or mitigated and what related measures may be taken by the federal, provincial and territorial governments and/or industry.

Departmental and agency officials should anticipate the types of accommodation measures that may be needed to address the kinds of adverse impacts that their activities may have on potential or established Aboriginal or Treaty rights and related interests. This will help managers and officials prepare for consultation processes, as the department or agency will define, in advance, the role it can generally play in relation to accommodation, examine the potential role of other federal departments and agencies or other governments, the role of the proponent, the steps that can be taken by each, the approvals that may need to be sought, the authorities required, etc. See "Part C, Phase 3 – Accommodation" for more information on accommodation.

3) Identify potential or established Aboriginal or Treaty rights and related interests

Managers should be familiar with the nature and location of these rights in their respective regions so that they are able to anticipate how these rights may be adversely impacted by their Crown conduct. A departmental approach must also take into account the diversity of potential or established Aboriginal or Treaty rights in each region across Canada.

Canada's Treaty relationship with groups is an important consideration in assessing how to proceed with Crown conduct in a Treaty area. Departments and agencies will also need to obtain information about relevant Treaty land entitlement agreements, comprehensive land claims agreements, self-government agreements or negotiations in a region.

An Aboriginal group may also have interests related to its potential or established Aboriginal or Treaty rights that may be adversely impacted by the proposed Crown conduct. The Crown may, for policy reasons, seek to address these related interests. As a result of a consultation process, the Crown may determine that there is no duty to accommodate, however it may still choose, for policy reasons, to address a related interest that is expressed by the Aboriginal group in the context of the activity.

For example:

a. An Aboriginal group may have an established hunting right that could be impacted by an activity and express a related interest in declaring a certain area of their traditional territory as a wildlife conservation zone to maintain a viable population of the wildlife.

b. The Crown is implementing measures to mitigate an adverse impact on an Aboriginal right. It can decide at the same time to address an expressed related interest from the Aboriginal group for economic development funding to take part in the project.

c. In the context of claims negotiations, an Aboriginal group expresses a related interest for federal lands that are being considered for disposal. After assessing any requirement to consult, the Crown may also choose to engage with the group for policy reasons.

4) Develop a departmental or agency approach to consultation and accommodation

The four previous steps lay the groundwork for the development of a departmental or agency approach to consultation and accommodation that is consistent with the Updated Guidelines and appropriate for the different types of activities of a department or agency. However, given the breadth of activities carried out by most departments, a departmental approach may have to include elements that would be specific to various programs and directorates.

Principle #4 states that officials should seek to develop consultation processes that move beyond a project-by-project approach to a comprehensive approach that will support their officials when making case-specific decisions. Developing consultation processes that can be consistently applied is more effective than consulting on a one-off basis. Some existing consultation practices may already be in place within a region or department or agency and may offer a foundation upon which to build effective consultation processes.

The overall relationship between the Crown and an Aboriginal group will influence, and be influenced, by how consultation and accommodation issues are being addressed by each department and agency. Managers must keep an eye on the "big picture" as their department's handling of a consultation file may strengthen or weaken Canada's relationship with a particular First Nation, Métis or Inuit group, thereby influencing not only their own department's or agency's future dealings with that community, but also the future dealings of other departments and agencies.

Determine whether there are any statutes or regulations that require the department or agency to consult with Aboriginal groups in relation to their activities or consider traditional knowledge (such as provisions in the *Species at Risk Act*, *Canada National Parks Act*).

Determine whether there are contractual requirements to consult in relation to departmental and agency activities such as consultation agreements or consultation provisions in comprehensive land claim agreements.

It is the responsibility of departments and agencies to develop consultation processes that respect consultation agreements or modern Treaty obligations. There may be other agreements, such as interim measures agreements or notification agreements, that contain guidance related to how the

parties should be notified about Crown activities or how the parties can work together to resolve issues.

Examples of Consultation Agreements

Mi'kmaq/Nova Scotia/Canada consultation process – A province-wide consultation process was established as part of a larger tri-partite negotiations process dealing with Aboriginal and Treaty rights issues. Although the consultation process established therein is optional, the Parties hope that the Terms of Reference for a Mi'kmaq/Nova Scotia/Canada consultation will become the preferred choice for government departments and agencies whenever the duty to consult with the Mi'kmaq in Nova Scotia arises.

Algonquins of Ontario Consultation Process Interim Measures Agreement – In 2009, Canada, Ontario and the Algonquins of Ontario reached an agreement on consultation that sets out a means for Canada and Ontario to consult the Algonquins of Ontario and the ten Algonquin communities they represent on proposed activities or projects within the claimed territory while negotiations of an Agreement-in-Principle are ongoing to resolve the Algonquin land claim in eastern Ontario. For the Algonquins of Ontario, this process is coordinated by a new Algonquin consultation office (ACO).

Consultation Protocols with the Dene Tha' First Nation – In July 2007, as part of an out-of-court settlement to resolve the Dene Tha' First Nation's concerns related to the Mackenzie Gas Project (MGP), two consultation protocols were signed between Canada and the First Nation – one for the MGP and Connecting Facilities and the other (the Federal Authorization Consultation Protocol) for other projects where federal authorizations are required.

Modern Treaties

Some modern Treaties include consultation provisions in relation to Crown activities and officials must consult in accordance with the consultation terms of those Treaties. Implementing Treaties is a responsibility of the Crown as a whole.

The duty to consult operates in law independently from the terms of a Treaty and can therefore apply where Crown actions have the potential to adversely impact Treaty rights provided for under a Treaty or Modern Land Claims Agreements. However consultation can be shaped and even fully addressed by the terms of an agreement for specific situations where such is made clear. Therefore, the first step for federal officials is to determine whether there are relevant consultation provisions within the Treaty itself.

Departments and agencies should contact the Aboriginal Affairs and Northern Development Canada Implementation Branch, Justice Canada and, in some cases, the AANDC regional offices to obtain advice and assistance in developing approaches for consulting Treaty groups.

Treaties are an important part of the process of reconciliation and provide guidance for the on-going relationship of the Crown and Aboriginal groups.

Developing effective working relationships through networks and forums with Aboriginal communities as well as with other departments and agencies in the region, with provincial and territorial counterparts and with industry will, in the long run, assist federal managers and their officials in leading consultation and accommodation efforts.

Departments and agencies with the advice of AANDC may also want to consider whether consultation agreements could support consultation activities. These arrangements between the Crown and Aboriginal groups can help to define roles and responsibilities, identify points of contact, determine timelines and steps to be followed and sometime address capacity needs. They can create clarity for the parties, and allow them to strengthen their relationship while making consultation more efficient.

Consultation agreements can facilitate the coordination of consultation processes that involve multiple departments and agencies (federal, provincial and territorial) and stakeholders. The AANDC Regional Consultation Coordinators will explore and negotiate consultation arrangements and protocols with Aboriginal groups and provinces and territories to achieve coordinated and efficient processes for Crown consultations.

Officials should assess whether provisions in land claim agreements or self-government agreements require that consultation take place in relation to legally binding international instruments. Second, officials must determine whether legislation requires Canada to consult on international instruments. Officials should seek legal advice, which will support the broader departmental or agency assessments and decision-making processes.

Federal horizontal policies

Horizontal policy objectives such as those related to Gender Equity, Sustainable Development and Official Language Minority Communities need to be considered during any interaction between Canada and Aboriginal peoples. These are Treasury Board policies that should be reflected in any activities, processes, programs and policies related to consultation and accommodation.

National Aboriginal Organizations such as the Native Women's Association of Canada, Pauktuutit and the Assembly of First Nations have created Culturally-relevant Gender-Based Analysis tools to promote fairness and equity of federal programs, services and processes directed at Aboriginal women and men. In the context of the engagement process on consultation and accommodation, Native Women's Association of Canada and Pauktuutit have examined Aboriginal consultation and accommodation using the Culturally-relevant Gender-Based Analysis lense and proposed some questions to be considered when preparing for consultations with Aboriginal communities such as:

1. At what stage of a consultation process should gender issues be considered? How can a Culturally-relevant Gender-Based Analysis be used to ensure adequate consideration of gender?
2. What should be the role of the Crown, if any, in ensuring that a consultation process and any ensuing agreements between a community and industry are inclusive of gender issues? How can this be achieved?

3. What questions and issues should the proponent and an Aboriginal community routinely consider in any consultation process to ensure that the perspective of both women and men are sought in the examination of the nature and extent of impacts on the community and options for addressing them?

5) Coordinate with partners, and/or rely on other consultation processes

Federal coordination and designation of lead

More than one federal department or agency may be involved in Crown conduct that requires consultation or may have a role in consulting or accommodating potential adverse impacts. It is important that all departments and agencies work collaboratively, as the Crown, to assess roles and responsibilities, manage the consultation process together and address accommodation, where appropriate (Refer to Guiding Principle and Directive #5). To accomplish this, departmental or agency officials must:

- 'Map out' all elements of the Crown conduct, including all of the potential decisions; roles and responsibilities of the federal, provincial and territorial departments and agencies, boards and tribunals that may be involved; subject areas or focus of each entity; any limitations on timelines or mandates etc.;
- Determine which departments and agencies or provincial and territorial ministries may have responsibility to consult and, where appropriate, accommodate. Designate a federal lead department to coordinate with partners;
- Identify whether there are gaps that may need to be filled to address consultation and accommodation issues.

Further to Guiding Principles and Consultation Directives #5 and #6 in Part A, the Canadian Environmental Assessment Agency serves as the Crown consultation coordinator for major resource projects and comprehensive studies under the *Canadian Environmental Assessment Act*. This lead role is fulfilled in cooperation with federal departments and agencies who serve as responsible authorities and federal authorities under the Act as well as the Major Projects Management Office.

In cases where these existing processes are not sufficient to fulfill the Crown's duty to consult and additional consultation activities are required, the Agency, in collaboration with federal departments and agencies, should ensure that any additional consultation activities supplement but do not duplicate the environmental assessment and regulatory review processes.

The *Canadian Environmental Assessment Act* was amended in July 2010 to improve timeliness of federal environmental assessment, establish clear accountability and focus resources where they would produce the greatest benefit to the environment and the economy. For comprehensive studies under the Act, the Canadian Environmental Assessment Agency will exercise the powers and perform the duties and functions of a responsible authority, except for those regulated by the National Energy Board and Canadian Nuclear Safety Commission.

For projects which are subject to public review processes under the *National Energy Board Act* or the *Canadian Nuclear Safety Act*, the National Energy Board and the Canadian Nuclear Safety Commission processes are used. Supplementary Crown consultation activities may be required to address the concerns of Aboriginal communities that fall outside the mandate of the National Energy Board or the Canadian Nuclear Safety Commission processes.

Use of existing federal processes

The Courts have not required a separate process for Crown consultation where the assessment or review or regulatory, statutory or contractual process that is in place can provide a sufficient consultation process (e.g., *Taku River* – B.C.'s *Environmental Assessment Act* process as implemented was sufficient. By contrast, in the *Mikisew Cree* case, while the statutory requirements of the relevant Acts were all met, the involvement of the Aboriginal community in the public review process was found not to be sufficient). Where a board or tribunal is involved, legal advice as to what role it may play may be needed early on in the planning process. The Crown must be satisfied that it can or that it has, through these processes, fulfilled its duty to consult.

Consultation or accommodation issues can arise during an existing review process or assessment or during any regulatory, statutory or contractual process by a federal department or agency. Departments and agencies should consider whether any of these issues are beyond the mandate of the given process or of the responsible federal department or agency.

Consequently, additional consultation and accommodation activities may need to occur. Departments and agencies have the ultimate responsibility for identifying and filling any gaps that could prevent the Crown from fulfilling its duty. The consultation process must allow for meaningful consultation throughout the lifecycle of an activity and must be adaptable to all stages of the activity to allow federal officials to respond to any Aboriginal concerns, and if appropriate, accommodate any adverse impacts on potential or established Aboriginal or Treaty rights. (Guiding Principle and Directive #6).

The environmental review process is generally viewed by Aboriginal groups and third parties (See Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation) as the most effective method managed by the Crown to identify environmental effects of proposed activities and related changes. Officials should assess early in the planning stages for proposed activities whether reliance on existing processes such as environmental assessments will be sufficient to fulfill the duty. If not, the Crown's efforts may need to include additional consultation activities or further efforts to address accommodation, where appropriate.

Environmental assessment, regulatory decision making, and Aboriginal consultation

Canada takes a whole-of-government approach to Crown consultation. With respect to major resource projects (See definition below), and all projects that are assessed as Comprehensive Studies under the *Canadian Environmental Assessment Act*, this approach involves the federal Crown integrating its Aboriginal consultation activities into the environmental assessment and regulatory process to the greatest extent possible.

Note: A major resource project is defined as a large-scale resource project south of 60 that is subject to a comprehensive study, review panel, or a complex (or multi-jurisdictional) screening under the *Canadian Environmental Assessment Act*. Resource sectors typically include mineral and metal mining, oil sands development and processing, and energy generation and transmission.

This approach capitalizes on the strength of the federal environmental assessment and regulatory process to gather information about potential impacts of Crown conduct on Aboriginal and Treaty rights in a consistent and coordinated way. It enables the efficient use of departmental resources and facilitates effective communication and relationship-building with Aboriginal groups. The approach also supports ongoing Crown efforts to satisfy the duty to consult before federal decisions are made. There should be timely efforts to coordinate with provincial and territorial environmental assessment processes.

The whole-of-government approach typically begins once the Crown becomes aware of a proposed project for which Crown conduct may be contemplated (e.g. submission of a Project Description). This phase commences with an analysis of the project's potential adverse impacts in the geographic area in which Aboriginal groups could have rights. The scope of the consultation is determined by the severity of the adverse impacts and the strength of the claims and any other relevant considerations.

This analysis is intended to support the establishment of an appropriate consultation process and to inform the development of an Aboriginal consultation work plan. All Aboriginal groups identified for involvement in the environmental assessment process are contacted to inform them of the intended consultation approach. Aboriginal groups should have the opportunity to provide the Crown with information about their potential or established Aboriginal or Treaty rights and any adverse impacts of the proposed activity. As well, Aboriginal groups may be invited to participate in the Environmental Assessment project committee as a way of better integrating Aboriginal consultation into the Environmental Assessment process.

Where government is seeking to rely on an environmental assessment process for identifying, assessing and guiding consultations, it will be necessary to determine what kinds of Aboriginal concerns may be considered or addressed through that process and to what extent it can assist the Crown in discharging its duty.

Once the environmental assessment commences, the Crown should continue to consider and address the potential need to consult additionally and, where appropriate, seek to accommodate potential adverse impacts of the Crown conduct. Consultation obligations that cannot be fulfilled in the course of the environmental assessment are to be undertaken prior to any final regulatory decisions that are being issued for the project.

Prior to the completion of the environmental assessment process, the Crown determines whether or not it has, so far, honourably discharged its duty to consult. Outstanding issues are summarized and carried forward into the regulatory approvals phase, where appropriate consultation and/or accommodation may be considered by the suitable regulatory authorities.

The consultation process should then carry on to the end of the project life cycle, as the Crown has a responsibility to ensure that measures put in place to accommodate impacts to potential or established Aboriginal or Treaty rights and related interests, are implemented. Throughout the environmental assessment, an official Crown consultation record is created and maintained. The Major Projects Management Office keeps a centralized database while relevant federal departments and agencies keep the original documents of their consultations.

Beyond the duty to consult, there are other reasons for including Aboriginal groups in the environmental assessment process. These include obligations under the *Canadian Environmental Assessment Act* to consider "environmental effects," including any change in the environment that affects the current use of lands and resources for traditional purposes by Aboriginal persons (s. 2 of the Act). Also, s. 16.1 of the Act provides the opportunity to include Aboriginal traditional knowledge in the environmental assessment. Finally, the federal government may have obligations relating to the environmental assessment under modern Treaties and self-government agreements.

Due to the complexity and size of major natural resources projects, the federal government has put in place the Major Projects Management Office to fulfill a Crown coordinating function.

Major Projects Management Office

The Major Projects Management Office (housed within Natural Resources Canada) was created in 2008 to provide a single point of entry into the federal regulatory system as well as to provide overarching management of the federal regulatory process for major resource projects in the provinces south of 60, in both operational and policy areas.

The Major Projects Management Office initiative was launched to foster a more accountable, efficient, transparent, and effective whole-of-government approach to the review of major resource projects in Canada. The Government's initiative was targeted at providing additional capacity and expertise to key federal regulatory departments and agencies to enable these organizations to deliver their environmental assessment, regulatory and Aboriginal consultation responsibilities in a timely and predictable manner.

The primary role of Major Projects Management Office is to provide overall project management, accountability and policy leadership with respect to the performance of the overall regulatory system. Working collaboratively with federal departments and agencies, the Major Projects Management Office serves as a single window into the federal regulatory process, coordinating project agreements and timelines between federal departments and agencies and tracking the progress of major resource projects through the federal regulatory review process.

The Major Projects Management Office also oversees the implementation of the whole of government approach to Crown consultation on major resource projects. The Major Projects Management Office works closely with the Canadian Environmental Assessment Agency, Indian and Northern Affairs Canada and other federal departments and agencies to ensure that the federal government fulfills its consultation responsibilities for these projects in a consistent, adequate and meaningful manner.

Regional project-specific teams of federal and, where relevant, provincial officials are established on a project-by-project basis to ensure the consistent and coordinated delivery of any Crown consultation requirements. These teams are coordinated by the Canadian Environmental Assessment Agency or other relevant environmental assessment manager (as Crown Consultation Coordinator) throughout the environmental assessment process. Crown reliance and oversight mechanisms have been established for National Energy Board projects under the Major Projects Management Office. The Canadian Nuclear Safety Commission takes on the Crown Consultation Coordinator role when it is a Responsible Authority. Once the environmental assessment phase has been completed, a lead federal department or agency may be assigned to carry out outstanding consultation requirements in respect of their regulatory decision-making responsibilities.

Northern Projects Management Office

The Northern Projects Management Office (NPMO) was established in September 2009 within the Canadian Northern Economic Development Agency (CanNor). The mandate of the Northern Projects Management Office is to provide government-wide leadership in developing a systematic approach for federal participation in the environmental assessment and regulatory review and approvals of northern projects.

The Northern Projects Management Office is responsible for federal coordination, project management, project tracking and coordination of consultations for northern projects in the three territories. It ensures the federal government meets its obligations to consult. Its main functions are to:

- provide clear direction and assistance to proponents regarding the regulatory review and consultation process;
- coordinate the work of federal regulatory departments and agencies during the environmental assessment and permitting phases;
- create and maintain a repository of Crown consultation records for projects that fall within its mandate.

For the purposes of Crown consultation the Northern Projects Management Office proposes to act as a coordinator or facilitator for northern projects that include all projects that undergo an environmental assessment, joint or panel review. Also included are smaller scale projects that the Northern Projects Management Office considers to be of potential economic interest or complex projects that could benefit from the coordination of the Northern Projects Management Office.

Individual departments or agencies are responsible for determining which Aboriginal groups may be impacted by a project, for carrying out strength of claim assessments, for monitoring and evaluating the robustness of third party consultations and where required for undertaking targeted Crown consultations. As well, departments or agencies are responsible for accommodating, when appropriate.

The mandate of the Northern Projects Management Office in the territories complements the mandate of the Major Projects Management Offices in the provinces south of 60. However, because

of the differences and complexities of the northern regulatory environment, the Northern Projects Management Office was established as a separate entity.

The Northern Projects Management Office is headquartered in Yellowknife, Northwest Territories, with staff in each of the other two territories. These regional offices coordinate the early engagement of all federal players in resource development, work with territorial governments and boards, and coordinate federal Aboriginal consultation efforts with relevant federal departments.

Use of existing provincial and territorial processes

In developing and implementing a departmental or agency approach, managers and their officials are encouraged to learn as much as possible about provincial and territorial approaches as set out in consultation policies, guidelines and practices with the view to better coordinating federal consultation and accommodation efforts with those of its provincial and territorial partners.

In the planning phase of any Crown conduct (See Part C, Phase 1 for a full list of pre-consultation activities), federal officials must assess the Aboriginal consultation requirements related to the conduct. The federal department or agency may be able to use provincial or territorial consultation processes to assist in fulfilling, in whole or in part, its consultation obligations.

Federal departments and agencies are encouraged to learn about any concurrent provincial or territorial conduct and relevant consultation processes and discuss how these processes might assist the Crown in meeting its consultation obligations.

A departmental approach might include details of how and when a provincial or territorial consultation process may be relied on to fulfill the federal Crown's duty.

Federal officials may consider the following factors:

- Can federal issues be discussed (e.g. fish habitat, migratory birds, safe and accessible waterways)?
- Will the federal, provincial or territorial process include meaningful participation of all Aboriginal groups whose involvement is required to fulfill the federal duty?
- What is the mandate of the provincial or territorial department or agency and are there any limits to it that could have an impact on consultation activities, specifically in the case of boards or commissions?
- Will federal departments and agencies need to anticipate additional consultation activities?
- Are there any accommodation measures that have been established within the provincial or territorial process on which the federal Crown could rely?

Memoranda of understanding may be in place with certain provinces or territories to guide how federal, provincial and territorial governments can work together on Aboriginal consultation.

Reliance on industry consultations

Where departments and agencies are responsible for approving third-party activity, Crown decision makers will need to determine the role that third parties, such as industry proponents, will play in relation to consultation and accommodation.

Departments and agencies will need to inquire about the following before they decide whether or not and to what extent they can rely on third party consultation:

- To what extent have the proponents consulted Aboriginal groups? With which groups have they consulted?
- Does the Crown have access to the consultation record to date?
- Are future consultations anticipated and what are the timelines?
- Should federal officials attend the consultation sessions and if so, what would be their role?
- What procedural aspects of the consultation is the Crown delegating, if any?
- Will there be a consultation record for future consultations and will the Crown have access to that record?

The Crown is ultimately responsible for ensuring that the duty to consult and, where appropriate, accommodate is fulfilled. Therefore, it will need to evaluate whether the proponent has adequately consulted with Aboriginal groups and whether further consultations are required to be undertaken by the Crown to fulfill its consultation obligations.

III. Organizing Your Department or Agency for Consultation and Accommodation

This section identifies some issues to be addressed by managers to organize their department or agency for consultation and accommodation. This includes evaluating financial, human resources and training requirements, as well as assessing the need to involve Department of Justice counsel. Step-by-step tasks to be undertaken by managers and practitioners will be described in Part C.

1) General considerations

- Ensure that officials are adequately equipped with the appropriate tools, resources and training to carry out meaningful and reasonable consultation efforts in each case. The development of a departmental or agency approach will support them in addressing case-specific issues.
- Put into place a records management system and procedure to document and file agendas, meeting notes, correspondence, actions, decisions, and ensure that procedures are used consistently by officials. Recording in a consistent format and storing in an accessible and retrievable location all relevant consultation meeting records and correspondence with Aboriginal groups is important to ensure that a complete record of the process, the concerns raised and the efforts to address such concerns are documented. Where more than one department or agency is involved, departments and agencies are encouraged to use a central or shared document storage system, wherever possible.

- Ensure officials are aware that all meetings and correspondence are "on the record" to enable the Crown to rely on such information, if necessary, in court. Information provided to government may be subject to *Access to Information Act* requests. Therefore specific measures may be required before agreeing to any confidential or off-the-record discussions or treatment of documents. Consult Department of Justice Counsel before determining how discussions or particular materials exchanged in the course of the consultation process may be treated or classified.

2) Organizational, financial and human resources considerations

Throughout the development and implementation of Crown activities and any corresponding consultation processes, officials must ensure meaningful consultation such as: timely sharing of detailed information about the activity; providing support, as required, to Aboriginal groups to achieve the objective of meaningful participation in consultation processes; providing enough time for Aboriginal groups to assess adverse impacts and present their concerns, promoting discussion with communities about impacts and ways these can be avoided or mitigated, etc.

To achieve this, departments and agencies need to have access to financial, human and technological resources that can be used for consultation and accommodation activities. They must also identify what role could be played by other partners to support the fulfillment of the duty.

Departmental or agency approaches should take into account the following:

- Assessment of departmental and agency activities that may give rise to a duty to consult;
- Assessment of any potential adverse impacts of departmental and agency activities, the severity of impact and the strength of any potential or established Aboriginal or Treaty rights to determine the scope of the duty to consult and related consultation processes;
- Frequency of consultation-related activities;
- Assessment and documentation of resource requirements for Aboriginal consultation and accommodation activities. For example, departments and agencies should consider the cost implications for the participation of Aboriginal groups, which includes determining whether their program and financial authorities can assist them in funding Aboriginal consultation-related activities;
- Records management systems to document the consultation and accommodation process;
- Human resources required to plan, research, implement and monitor reasonable and meaningful consultation processes, namely a skilled, trained and informed staff;
- Other departmental and agency policies, programs, initiatives that may complement and support the fulfillment of the duty;
- Opportunities, through protocols or Memoranda of Understanding, for collaboration, relationship building and sharing costs of consultation and accommodation with other

federal departments and agencies, provincial and territorial governments and industry, and opportunities to better integrate consultation processes;

- Internal and external communications related to consultation activities;
- Approval processes and procedures;
- Evaluation of consultation and accommodation activities undertaken;
- Existing financial authorities that can support internal or external consultation and accommodation related expenditures such as capacity funding to Aboriginal groups, where appropriate. For example, the Canadian Nuclear Safety Commission and the National Energy Board have participant funding programs to support Aboriginal consultation in the review of major energy projects. The Canadian Environmental Assessment Agency can provide funding in relation to projects that are assessed by a review panel or a comprehensive study under the *Canadian Environmental Assessment Act*. The Canadian Environmental Assessment Agency participant funding program includes an Aboriginal funding envelope to provide support to Aboriginal groups to assist them with regard to Aboriginal or public consultation activities;
- Financial resources at the disposal of the departments and agencies and opportunities to seek additional resources (e.g. Treasury Board submissions). For example, federal officials can refer to legislation and to Treasury Board Secretariat guidelines on expenditures as well as departmental or agency-specific policies, directives, guidelines and practices; and,
- Other consultation-related needs such as dispute resolution processes.

In some instances, First Nation, Métis or Inuit groups may seek financial assistance to support their participation in the consultation process. Officials should first determine if there are other means available to support Aboriginal capacity to participate in the consultation process, for example, whether other partners are able to contribute to capacity funding or other forms of assistance to Aboriginal groups.

See "Part C, Phase II – Crown Consultation Process" for more details on ways to support meaningful consultation.

3) Training considerations

Training of federal officials is critical to a consistent understanding and implementation of the duty to consult and, where appropriate, accommodate. It should:

- increase awareness and understanding of what the duty to consult, and accommodate entails;
- situate the duty to consult and accommodate in the larger context of the relationship between the Crown and Aboriginal peoples, including how the duty relates to other reasons to engage with Aboriginal groups;

- promote an understanding of the roles and responsibilities of the entities involved in the consultation process such as the Crown, Aboriginal groups and third parties;
- allow officials to understand how the duty to consult may apply in the context of their departmental or agency mandates and activities and how they can fulfill it;
- identify the specific implications of developments in case law, consultation policies and practices and the public environment for their departments and agencies and for the Crown as a whole;
- explain where officials can obtain information and practical tools that will support their consultation and accommodation activities;
- provide examples of best practices and opportunities for federal officials to share their experiences of implementing the duty to consult and accommodate;
- promote the development and efficient implementation of mechanisms for interdepartmental and intergovernmental coordination and collaboration; and,
- provide a basis for the development of common consultation approaches and practices within federal departments and agencies and across government.

Training on consultation and accommodation continues to be offered by the Consultation and Accommodation Unit of AANDC in conjunction with the Department of Justice. Federal officials or their managers seeking more information on training or wishing to register for the training sessions may contact: consultation-sessions@aandc-aadnc.gc.ca.

Various departments and agencies have also developed department and agency specific training on consultation and accommodation. For example, the Canadian Environmental Assessment Agency offers training on the integration of Aboriginal consultation into the environmental assessment process.

4) Engaging Justice counsel in the consultation and accommodation process

The Department of Justice is not responsible for conducting consultations or collecting the appropriate factual information regarding potential or established Aboriginal or Treaty rights and potential adverse impacts of an activity. However, the duty to consult is a legal obligation and raises a number of legal issues. Therefore, it is important to work closely with Justice when assessing if and how consultation may need to be incorporated into departmental or agency activities and approaches for identifying and addressing this duty.

In addition there will be situations where departments and agencies will need to engage counsel to assist in reviewing or advising on how best to do the various assessments discussed in Part C of these Guidelines. Justice provides an important advisory role to departments and agencies on the legal aspects of consultation policy choices, especially as it relates to consistency in legal advice across government and as the case law in this area continues to develop.

As departments and agencies become more familiar with the consultation requirements associated with their operations and build Aboriginal consultation and accommodation into their operations through these Guidelines as well as other policies and procedures, the need for legal advice on routine matters may decrease.

Remember:

- When identifying consultation requirements related to general departmental and agency activities or other factors that may influence consultation requirements, managers should seek their counsel's assistance. By keeping Justice informed at the outset about your approach to consultation and the nature of departmental activities, you may reduce the need for your officials to seek guidance from Justice late in the process or for every consultation process. It is also important to work with them to establish and maintain good record-keeping processes.
- Developing standard departmental and agency consultation approaches will reduce the need for advice on a case-by-case basis.
- Make sure that your officials gather all relevant information about their anticipated activities and related assessments as to how these activities may adversely impact potential or established Aboriginal or Treaty rights and related interests. Counsel will be available to review such assessments and provide advice based on the factual information provided.
- When your officials gather information and do their initial assessment of a situation, make sure they identify the legal issues and questions that may need to be answered. **Not everything is a legal question.** Your department could also benefit from prioritizing questions needing legal clarification on various files and from relevant departments and agencies working on a common consultation file, thereby streamlining requests for legal advice.
- In most instances, depending on the information gathered and the initial assessment made, departmental officials will be able to determine whether a duty is triggered and consultation is required. Identifying, in advance, which departmental activities may trigger a duty to consult will help officials more efficiently make case-specific initial assessments. As this question is a question of law, it will be assessed on a standard of correctness should this assessment be reviewed by a court.
- The information gathered by your officials from relevant sources such as others in the federal government, provincial and territorial governments, affected Aboriginal groups will allow them to 1) identify if their activities may adversely impact any potential or established Aboriginal or Treaty rights; 2) assess the severity of the potential adverse impact and the nature and/or strength of claims; 3) determine the appropriate approach and scope of consultation required; and 4) develop a reasonable approach to consultation. Counsel could assist in ensuring that a statement of a government's intentions and planned undertakings is reasonable and appropriate from a legal perspective.

- Officials will need to seek counsel's advice to answer specific legal questions such as how to address title and exclusive use claims, treaty interpretation, sufficiency of Crown responsiveness, gaps in regulatory or environmental assessment processes, linkages to litigation or negotiations files and other novel legal questions.
- Departments need to do a preliminary assessment of a claim and determine whether groups in the area have raised any concerns regarding the activity or notified the Crown that any activities in a given territory require consultation. Justice can assist in the determination of whether that Crown or third party activity requires consultation and assist in addressing new or novel claims that raise new legal or policy issues that may arise with new kinds of proposed activities or in the course of consultation processes.
- Assess whether a more detailed strength of claim analysis from Justice or other appropriate experts or other key legal analysis are warranted in the circumstances and plan accordingly (baseline information to provide to Justice, delay to obtain analysis, costs, etc.).
- Justice does not make decisions on how departments and agencies should carry out their mandates and activities. Legal advice will complement the broader departmental or agency assessments and decision-making processes which will include good governance and other policy considerations.
- Departments and agencies should keep their counsel informed of their adverse impact assessments for their various activities. As well, departments and agencies can seek Justice advice on their consultation approaches and plans, consultation records, consultation adequacy assessments and accommodation measures that are being considered.
- Where appropriate, discuss document disclosure and the creation and maintenance of a record of the consultation with your counsel.
- Where appropriate, seek counsel's advice when assessing the implementation of an activity and determining whether adjustments are required.

Part C – Step-by-Step Guide to Consultation and Accommodation

Introduction

Part C provides a step-by-step, chronological guide for federal officials when fulfilling the Crown's duty to consult and, where appropriate, accommodate. The same basic steps are appropriate for consultation for good governance and other policy reasons.

Crown activities that may trigger the duty vary and therefore the consultation and accommodation approach taken may vary as well. The steps, tips and factors outlined below will apply to a wide variety of government conduct. Such conduct may involve, for example, management of federal real property (e.g. the disposal of a federal building or a change in the use of federal lands). It may also involve government approvals and authorizations for an activity proposed by a third party (e.g., issuance of licenses, permits, authorizations for the use of lands or resource extraction). Officials

can use this step-by-step guide when developing and implementing their overall departmental or agency approach to consultation and accommodation (See Part B).

Depending on the circumstances, a process for consultation and accommodation with Aboriginal groups may involve up to four phases. The following sections will discuss each phase and provide guidance on the steps to consider in each one. Where there is more than one federal department or agency or other government(s) involved, the steps should be carried out collaboratively.

The positive relationships that departments and agencies develop with Aboriginal groups over time and the resulting dialogue will assist the federal government to implement the following phases.

Phase 1: Pre-Consultation Analysis and Planning

The departmental or agency approach to consultation and accommodation (See Part B) will be useful in this phase. As early as possible, officials need to assemble information to assess whether the Crown has a duty to consult, the scope of that duty, and how to design a consultation process. Officials will first need to assess the potential adverse impacts of the proposed Crown conduct and then determine if there are any potential or established Aboriginal or Treaty rights in the area of the activity that may be adversely affected.

Step 1: Describe and "map out" the proposed Crown conduct

The first step involves describing the contemplated Crown conduct such as a Crown activity or an approval of a third party activity and determining which department or agency is responsible for the conduct. In their departmental or agency consultation and accommodation policy approaches or assessments, departments and agencies should have already identified activities, policies, programs or strategic, higher level decisions that may give rise to a duty to consult (See Part B).

Departments and agencies should identify other federal departments and agencies and other orders of government that may be involved in the activity, including the decisions they are responsible for making and any regulatory, statutory and other program timelines that may apply. Where multiple departments and agencies are involved, a lead department must be identified and the contact information communicated to the relevant departments and agencies and to Justice.

Some questions to consider at this step include:

- What is the nature of the proposed Crown conduct? For example a) Crown activity such as the construction of a building, the creation of a park, the disposal of Crown land; b) Crown authorization of a third party project, issuance of a permit; c) other Crown activity that enables the project to proceed such as funding; d) strategic higher level decisions such as structural or organizational changes that reduce the Crown's oversight and decision-making ability.
- What is the purpose of the initiative?
- What are the details of the project? What is the project's geographic scope? Identify all of its components. Is there more information that is needed to fully understand the project?

- Where the proponent is a third party, has it provided a detailed project description?
- What are the key decisions to be made and related timelines?
- Are there any maps of the project site and surrounding areas?
- What other departments and agencies and other orders of government, corporation(s), or authorities are involved? Who is responsible for authorizing the project or carrying it out?
- Have Aboriginal groups in the area raised concerns about the proposed activity or any other activities (in the past /present)?

Step 2: Identify potential adverse impacts of Crown conduct

Officials must anticipate the potential adverse impacts of the proposed activity. The nature and severity of adverse impacts depends on a variety of factors including: the scope and size of the activity, its environmental effects, and whether the impact is permanent or temporary.

Officials must determine whether the current Crown conduct in question may have an adverse impact on potential or established Aboriginal or Treaty rights. Where departments and agencies are responsible for approving third-party activity, a detailed understanding of the nature and scope of that activity will assist Crown officials to anticipate its potential adverse impacts.

Where adverse impacts are uncertain, it is important to identify those groups whose potential or established Aboriginal or Treaty rights may be impacted. Early engagement with them regarding the proposed activity will enable them to articulate any concerns they may have about the activity. This provides officials with time to adequately assess potential adverse impacts, and identify measures to avoid or mitigate such impacts (Guiding Principle and Directive #3).

Questions and issues for consideration include:

- What is the likely or potential impact of the activity on the land, water and resources? If there are any impacts, what changes to the current condition or use of lands, water or resources are likely to occur as a result of the activity? Are these changes significant?
- Are departmental or agency officials aware of any communication from groups which are raising concerns about the particular activity or similar activities in the area?
- Have any groups notified Canada of any concerns about the proposed activity and suggested any remedial measures that may accommodate the adverse impacts on their rights? Discussing accommodation options with the relevant decision-makers as early as possible in the consultation process will allow federal officials to discuss them appropriately with Aboriginal groups later in the process.
- Does the activity involve lands or resources that are currently the subject of treaty negotiations or are part of existing comprehensive land claim agreements or self-government agreements?

- Are the potential adverse impacts you've identified likely to be of a temporary or permanent nature?
- Have any environmental or other assessments of the proposed activity been carried out? Have any environmental or other assessments been undertaken for similar activities in the vicinity of the proposed activity? If so, what adverse impacts on rights are revealed, if any, by these assessments?
- Are there any other activities occurring in the same area? Is this activity likely to have any cumulative effects in combination with other activities in the same or surrounding area?

In the design or planning stages of contemplated Crown conduct, in the federal environmental assessment process and throughout the consultation process, managers and officials need to identify measures that could be implemented to avoid or mitigate potential adverse impacts of the project on potential or established Aboriginal or Treaty rights and related interests.

The Courts have emphasized the need for flexibility and responsiveness; for an ability and willingness to adjust the activity in question; to provide options for addressing the interests and concerns raised in the course of consultations; and to do so in good faith. It is also important to be clear and explain the limits to what changes can be made to the proposed activity. In the end, the Crown must demonstrate that it sought to reconcile Aboriginal concerns with other societal interests and that its consultation process was carried out with a view to reconciliation.

Step 3: Identify which Aboriginal groups are in the area of the proposed Crown conduct and ascertain their respective potential or established Aboriginal or Treaty rights and related interests

To assess whether the proposed Crown conduct will have any potential adverse impacts on potential or established Aboriginal or Treaty rights in the area(s), officials must gather information about those specific rights. These may include the right to hunt, fish, trap, gather and trade and may either be established by a court or in a Treaty, or may be asserted by an Aboriginal group, for example, in litigation or for the purpose of Treaty negotiations.

Where Aboriginal rights are asserted, the Crown must make a preliminary assessment as to whether there is a credible basis for such claims and compare their assessment with the information gathered through consultation with Aboriginal groups. In the event that the proposed activity may have adverse impacts on the rights of Aboriginal groups living in the area, learn more about the potential or established Aboriginal or Treaty rights in question such as: what are their traditional practices; when and where were these practices historically carried out; are these practices still carried out today; where, by what means, and at what time of the year?

Departments and agencies are encouraged to obtain and to share, internally and with other federal departments and agencies, information about the potential and established rights of Aboriginal groups in various regions of the country. The exchange of regional information will help officials to anticipate potential adverse impacts on rights, and plan proposed federal activity in such a way as to avoid or mitigate those impacts.

Information about potential or established Aboriginal or Treaty rights across the country will also help officials to design and tailor their consultation approach and could support broader departmental or agency priorities to establish and maintain long-term working relationships with First Nation, Métis and Inuit groups.

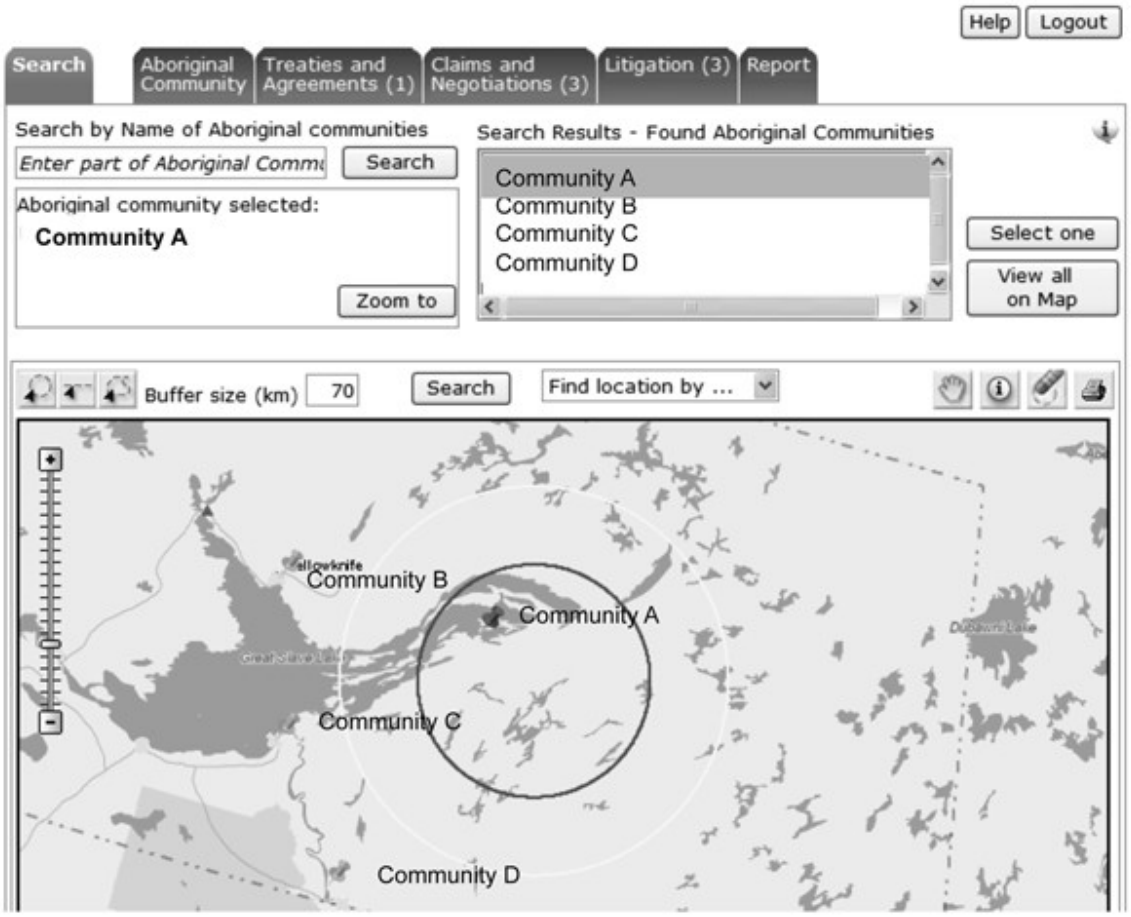
Keep in mind that even if only one department or agency is aware of an asserted right, the federal Crown as a whole (i.e. every department and agency) is deemed to have knowledge of it. The Crown and its officials are also deemed to know about established Aboriginal and Treaty rights.

Managers must ensure officials can obtain relevant information on potential or established Aboriginal or Treaty rights and related interests, which includes having access to the Aboriginal and Treaty Rights Information System and the Consultation Information Service at AANDC.

Aboriginal and Treaty Rights Information System

The Aboriginal and Treaty Rights Information System is an electronic system that will bring together information on the location of Aboriginal communities and information pertaining to their potential or established Aboriginal or Treaty rights. It is a web-based application that leverages Geomatic Information System technology to geo-reference electronic data that is stored in existing AANDC databases.

The purpose of the Aboriginal and Treaty Rights Information System is to display this information using one system and to make it available to federal officials. It will display baseline information on First Nation, Métis and Inuit communities. The Aboriginal and Treaty Rights Information System has the ability to display maps to assist federal officials to locate information on communities, claims, Treaties and litigation. The Aboriginal and Treaty Rights Information System may evolve over time to include information from other federal sources.



Consultation Information Service

The Consultation Information Service of AANDC – which will be responsible for the Aboriginal and Treaty Rights Information System – provides a single point of access for other government departments and external stakeholders, particularly those which do not have access to the Aboriginal and Treaty Rights Information System or require additional AANDC information on potential or established Aboriginal or Treaty rights in Canada.

The Consultation Information Service will provide contact information for Aboriginal groups and their leadership, information on multipartite agreements, historic and modern Treaties and their provisions, comprehensive and specific claims, litigation and other assertions. Queries regarding specific projects can be sent to: CAU-UCA@aandc-aadnc.gc.ca. Officials will first seek information through the Aboriginal and Treaty Rights Information System before sending queries for additional information to the Consultation Information Service.

Other sources of information include:

- departmental and agency records on Aboriginal claims asserted in litigation, in negotiations, or through prior consultation or other transactions with the department;

- the AANDC Regional Consultation Coordinators should be contacted to assist in the coordination of consultation efforts as they may be aware of on-going or contemplated consultation processes;
- information provided by proponents to departments and agencies and specific boards and tribunals involved in the decision making process;
- traditional Use Studies, for example, those prepared in the context of Environmental Assessments and in land disposal contexts;
- colleagues who have worked with or consulted with Aboriginal groups in the area;
- the databases and records of other government departments and agencies, provinces and territories;
- the websites and information of Aboriginal groups;
- records of consultations between federal, provincial or territorial, industry and Aboriginal groups;
- court websites (federal, provincial and territorial) listing decisions, proceedings on Aboriginal and Treaty rights assertions and interpretation of potential and established rights; and,
- press coverage and public statements, in which Aboriginal groups have asserted rights, expressed concerns and proposed desired outcomes.

Federal officials must gather all relevant information. Justice can then assist with legal issues that may arise in an assessment of the strength of the claim, overlapping claims, and assertions of rights and title. Justice counsel can also advise on the appropriate consultation approach when the Crown is involved in litigation or negotiations with an Aboriginal group with whom the Crown may also need to consult.

Step 4: Make an initial determination as to whether there is a duty to consult

Next, an initial assessment of the information gathered in Steps 1, 2 and 3 must be undertaken to determine whether or not there is a common law duty to consult. This information will also lay the groundwork for determining, in Step 5, the extent of the duty and, in Step 6, an appropriate consultation process.

Three factors are required to trigger the common law duty to consult:

1. There is a proposed Crown conduct;
2. The proposed Crown conduct could potentially have an adverse impact on potential or established Aboriginal or Treaty rights; and
3. There are potential or established Aboriginal or Treaty rights in the area.

For a duty to consult to exist, all three factors must be present.

The threshold to determine if a duty is triggered is low. The objective of the duty is to ascertain if conduct that is being contemplated by the Crown may adversely impact potential or established Aboriginal or Treaty rights before any adverse impacts are caused. To do so will require knowledge of the rights that may be affected by departmental or agency specific activities and a process for discussing any potential concerns early in the planning phases and decision making process.

Departments and agencies can seek Justice's advice when determining whether such a duty exists. For good governance and other policy reasons, your department or agency may decide to consult regardless of whether there is a duty, and this approach should be expressed to the Aboriginal groups being consulted.

(i) No Duty to Consult

The initial analysis indicates that there is no duty to consult. For example:

- There is no Crown conduct;
- No adverse impact is anticipated;
- No credible basis to support a claim;
- The claim does not include Treaty rights or activities or practices that could meet the test for Aboriginal Rights.

It is important to remember that the threshold to assert a credible claim to Aboriginal rights, informed by the need to maintain the Honour of the Crown, is not high. While the existence of a potential claim is essential, proof that the claim will succeed is not. The courts have consistently stated that the Crown must adopt a generous and purposive approach when assessing whether it has a duty to consult.

The department or agency may want to communicate its determination to the Aboriginal group. If the Aboriginal group brings forward new evidence supporting a claim or if they provide new information on potential adverse impacts, then the Crown must re-examine its determination that there is no duty to consult.

(ii) Uncertainty about the Duty to Consult

Where it is uncertain from the initial analysis whether the proposed Crown conduct is likely to have adverse impacts on potential or established Aboriginal or Treaty rights, the Crown may wish to verify the results of their initial analysis with the Aboriginal group.

Further discussions about the potential adverse impacts of the proposed Crown conduct on their potential or established Aboriginal or Treaty rights and related interests as well as the nature and basis for those rights and interests may assist the Crown when determining whether there is a duty to consult and what role, if any, consultations may play in the planning of the proposed activity.

If it is uncertain whether a duty to consult exists, officials must consider whether there are other legal reasons or policy considerations for consulting.

(iii) A Duty to Consult Exists

If the analysis indicates that the proposed Crown activity may adversely impact potential or established Aboriginal or Treaty rights, the Crown has a duty to consult and, where appropriate, accommodate.

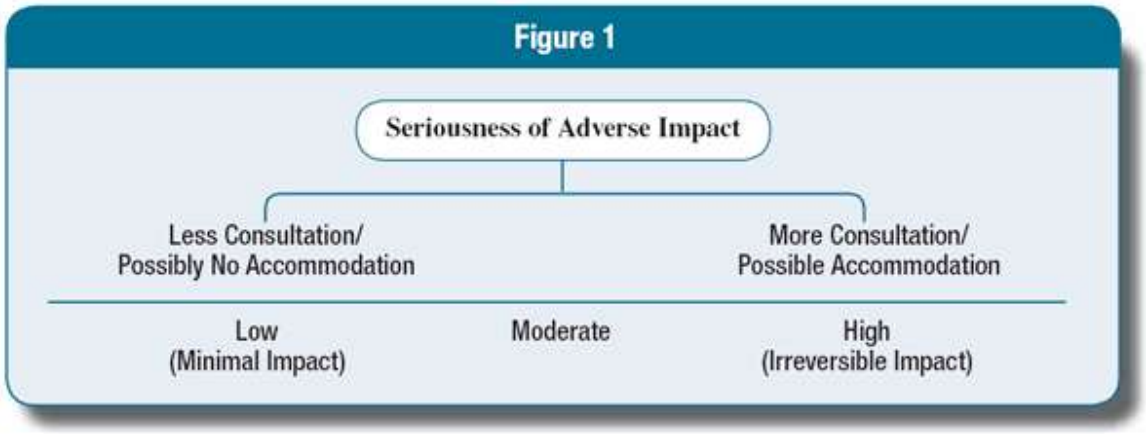
Step 5: Assess the scope of the duty to consult and, where appropriate, accommodate

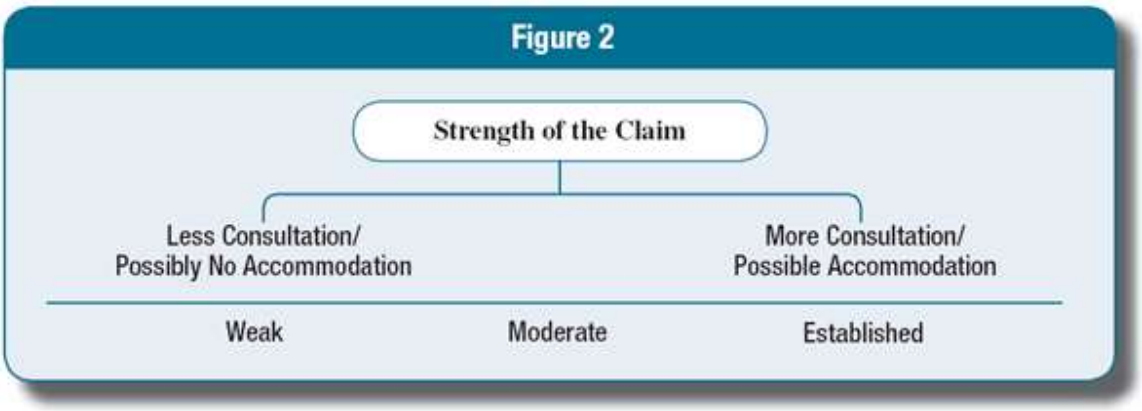
The scope of the consultation and any appropriate accommodation will be informed by the strength of the claim and the severity of adverse impacts on potential or established Aboriginal or Treaty rights. A number of factors should be considered.

Where rights have been established (e.g. in a Treaty or where a court has found an Aboriginal right), a strength of claim assessment is not usually necessary and a more extensive consultation process is generally required.

Where potential rights are claimed, the scope of consultation will need to be proportionate to the seriousness of the potential adverse impact(s) of the proposed Crown conduct and the strength of the potential Aboriginal right(s) claimed (See Figures 1 and 2 below).

Determine the level of seriousness of the potential adverse impact on the right(s), as depicted in Figure 1 below, keeping in mind that re-assessment may be required as the consultation process proceeds and new information comes to light.





Based on experience, officials should be able to anticipate the potential adverse impacts of the Crown conduct in which their departments and agencies typically engage (See Part B). The nature and seriousness of potential adverse impacts of a proposed activity will become more apparent to officials as information from Aboriginal groups is gathered as part of an on-going relationship and information sharing, or during a consultation process.

Strength of claim assessment is an historical and anthropological analysis of the facts of a particular claim asserted by an Aboriginal group in the area of the proposed activity. In conducting the assessment, federal officials should gather the following information:

- What are the nature and scope of these asserted rights?
- Has the Aboriginal group(s) continually occupied the area?
- Does the group still occupy the area? If the Aboriginal group does not still occupy the area, at what period of time did they occupy it?
- What were their traditional practices historically and what are their practices today?
- Is the Aboriginal group alleging that the claimed rights were exercised prior to European contact (or for the Métis, prior to effective control)? Do they continue to exercise these rights today in a traditional or modernized form?

Justice can advise managers and their officials as to when to seek legal advice in the development of strength of claim analysis.

Documents that may alert the Crown to the existence of a claim or contain historical information in support of a claim include: protective writs and other court actions filed by Aboriginal groups; public statements made by Aboriginal groups or their letters to the Crown about their potential or established Aboriginal or Treaty rights; ethno-historical research and reports or similar research submitted by Aboriginal groups for the purposes of a claims negotiation process; traditional knowledge and use studies prepared by Aboriginal groups for an environmental assessment process; or materials prepared by Aboriginal groups for the purposes of litigation. Confidentiality issues related to the above-noted sources of information may need to be addressed.

Other factors may influence the Crown's decision to consult with an Aboriginal group such as participation of the group in a comprehensive or specific claims negotiation process.

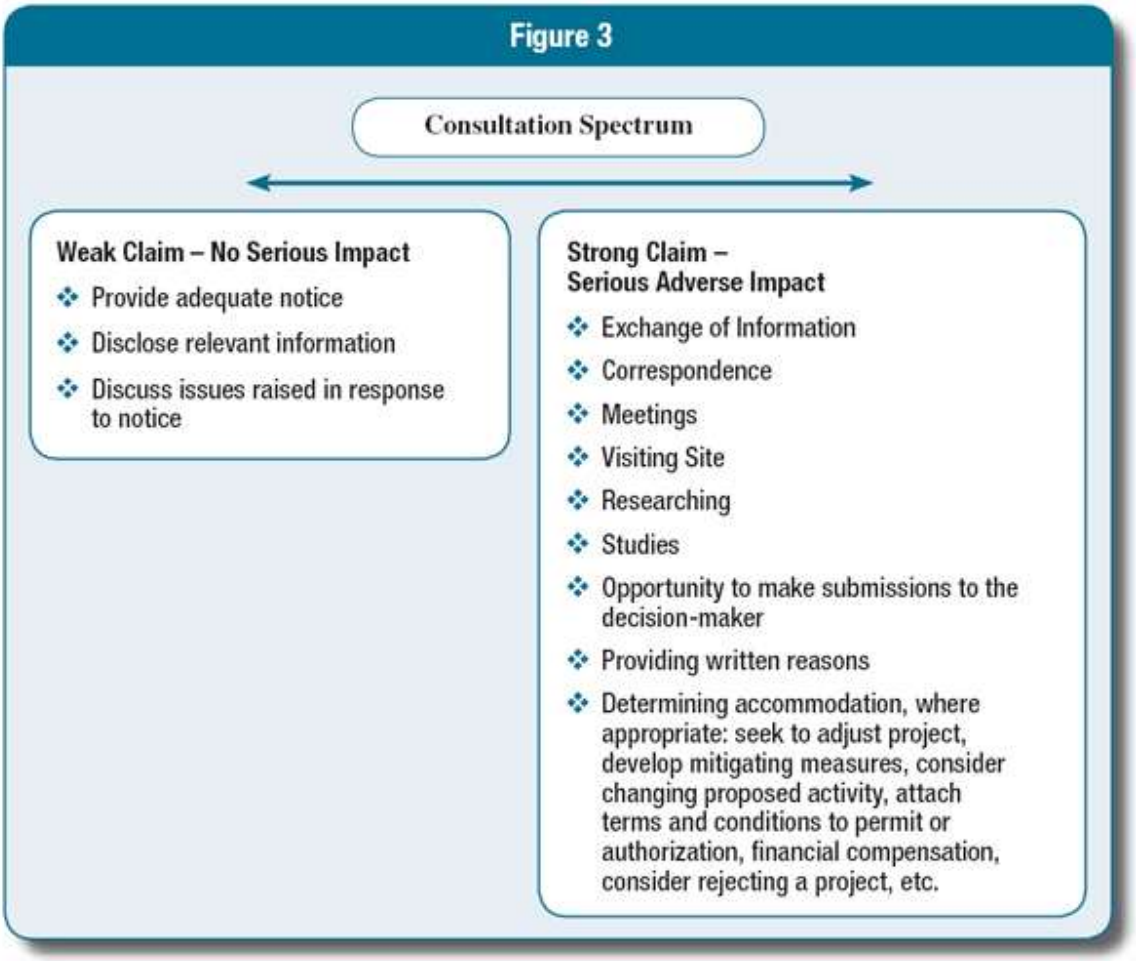
When the Crown is dealing with an Aboriginal group with a modern land claim treaty, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. It is important to be aware that, while consultation may be shaped by agreement of the parties in a treaty, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people – it is a doctrine that applies independently of the treaty itself.

In some cases the treaty itself will set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted, and an opportunity to present such views to the party obliged to consult; and full and fair consideration by the party obliged to consult of any views presented.

Once it has been established that the Crown has a duty to consult, departments and agencies involved in the activity need to work together to assess the scope of that duty. The initial assessment of the scope of consultation may change as the consultation unfolds and more information comes to light about the potential adverse impacts of the proposed activity on the community's Aboriginal or Treaty rights.

Departments and agencies must ensure that assessments of the scope of the duty are well documented. Managers can support officials to assess the scope of the duty to consult by ensuring they have access to previous assessments of similar activities in the vicinity. However, it is important to remember that Crown consultation, including strength of claim analysis, is not a rights determination process designed to establish the rights of an Aboriginal group.

The design of the consultation process should reflect the assessment and any changes made to it (See Figure 3 below).



Step 6: Design the form and content of the consultation process

The Crown's assessment of the scope of the duty to consult, and where appropriate, accommodate together with departmental and agency approaches to consultation (See Part B) will guide the development of a consultation process. As the consultation process unfolds, and new information becomes available, its form and content may also evolve to reflect resulting changes to the scope of consultation. The consultation process must therefore be flexible. When designing a consultation process, officials should become aware of existing interactions, processes and dealings between the relevant Aboriginal groups and other federal departments and agencies that may support an effective consultation process.

It is important to establish goals and objectives and develop evaluation questions that will assist federal officials in determining the effectiveness of actions and decisions made at key stages of the process. Further, as officials prepare to implement their activity, they should focus the consultation process on avoiding or minimizing adverse impacts of the Crown conduct on the potential or established Aboriginal or Treaty rights and addressing any related interests, to the greatest extent possible.

Guiding Principle and Directive #4 sums up the key elements of a meaningful consultation process and reflects what Aboriginal groups across the country have stated during the preparatory discussions (2005–06), the engagement process under Canada's Action Plan (2008–10) and in other forums on consultation and accommodation as follows:

- A Crown approach that is forthcoming, flexible and responsive;
- Inclusive processes to manage issues, decision-making and ensure accountability;
- Early consultation and policy-based discussions with communities on accommodation with the objective of avoiding or minimizing adverse impacts;
- Pro-active solicitation of Aboriginal involvement and active listening to their concerns;
- Real opportunities to inform and influence decisions before they are made;
- Assistance to support Aboriginal groups' meaningful participation in a consultation process;
- Time lines for information-sharing and responses that are appropriate and adapted to the specific circumstance;
- Serious consideration of feedback during the consultation process and prior to any decisions being final;
- Clear and direct responses on how concerns have been addressed or why they cannot be addressed;
- Better coordination, cooperation and collaboration between Crown and industry with respect to Aboriginal consultations;
- Consideration of accommodation as part of a meaningful consultation process. When looking at accommodation options, seriously consider Aboriginal perspectives, concerns and options for addressing impacts on potential or established Aboriginal or Treaty rights and related interests;
- Sustainable economic development balanced by an awareness of cumulative impacts and environmental stewardship;
- Openness to altering the original proposal and if necessary, not going forward at all with the project or decision.

Identify roles and responsibilities and opportunities for coordination

Where more than one department or agency is involved in Crown consultations for a proposed activity, officials should determine the contribution that their departments and agencies could make to the consultation and accommodation effort, having regard to their respective mandates. Effective collaboration and coordination mechanisms such as inter-departmental teams and memoranda of understanding will be essential in carrying out consultations. Coordination mechanisms should be reviewed periodically by managers to address challenges and ensure

efficiency. As set out in Guiding Principle and Directive #5, coordination includes the identification of a lead department for consultation.

Federal officials must determine:

- if other departments and agencies need to be involved, based on their mandates. If more than one federal department or agency is involved, has an interdepartmental team been assembled? For example, have the First Nation or AANDC been contacted when the proposed activity is to be located on a reserve, or could possibly affect a reserve or when the lands are the subject of Treaty settlements or negotiations, Self-Government or Specific Claims?
- if other Crown entities such as federal Crown corporations and Canadian Port Authorities, and provincial or territorial governments or third parties may be involved. If so, do they have jurisdiction over the land or resources that may be affected by the federal activity in question?
- if boards and tribunals will be involved in the Aboriginal consultation process and, if so, how? What are their mandates and terms of reference?
- if the proposed Crown conduct is subject to statutory or non-statutory timelines. In the case of an activity initiated by a third party proponent, inquire about the timelines for the project;
- a lead for the Crown consultation process. The lead may change as the project shifts from the environmental assessment process to a regulatory permitting phase. When identifying a lead department or agency, consider which department or agency is: undertaking the proposed activity, such as a Crown infrastructure project or real property disposal; responsible for issuing any form of approval for the proposed activity; likely to cause more significant adverse impacts; best positioned to assume the responsibility for leading the consultations and addressing Aboriginal concerns;
- the contact information for the lead federal department or agency. Has this information been clearly communicated to all parties involved in the consultation?
- what federal programs and policies might inform or otherwise be relevant to the consultation process or to addressing the concerns of Aboriginal groups (comprehensive claims negotiations, specific claims negotiations, self-government negotiations, treaty land entitlement, additions to reserve, economic development, procurement policies, relevant Treasury Board Guidelines on transfer payments, etc.)?
- if the proposed activity is contemplated to take place on a reserve, or could have adverse impacts on a reserve. It is important to note that the Crown's obligation to consult applies in these circumstances. However, decisions about activities on reserves may also be subject to various legislation such as the *Indian Act*, the *First Nations Land Management Act* or the *First Nations Commercial and Industrial Development Act* as well as approval processes. By-laws enacted by First Nations may also apply. Contact the First Nation

directly for information on their laws, land codes and administrative procedures. You may contact the AANDC Regional Lands Officer to find out which legislation applies;

- if a proposed activity that is contemplated to take place on a reserve may have potential adverse impacts on the rights or interests of other communities? If so, they may also need to be consulted;
- in relation to other Crown activities, what consultation processes within your or in another department or agency are ongoing with the same Aboriginal groups? Is it possible to coordinate your efforts with theirs to avoid consultation fatigue?
- are there any existing working forums and relationships between the Crown and Aboriginal groups (e.g. committees, Councils, round tables, consultation agreements) that can assist you when you need to undertake consultations?

Reliance on other processes to support decision-making

Officials should find out whether other processes with a consultation component have been or will be carried out by federal, provincial or territorial entities including boards, panels and tribunals or by third parties. Officials can then determine the extent to which the Crown can use information gathered in processes such as environmental assessments, other public review or regulatory processes that include Aboriginal consultation to assist them in fulfilling their duty to consult. If the processes that the Crown is seeking to rely on do not result in meaningful consultation, federal officials will need to undertake additional consultations. Please refer to Guiding Principles and Directives #6 and #7.

Communication and coordination throughout the consultation process is important in the early identification of issues and solutions.

Federal officials must determine:

- if there are any statutes or agreements that require Aboriginal consultation. Consultation requirements under these statutes or agreements must be fulfilled. Identify the degree to which they can assist in fulfilling the Crown's duty to consult and, where appropriate, accommodate;
- if the third party proponent or the provincial or territorial government plans to consult with potentially affected Aboriginal groups. For example, a provincial or territorial government may consult as part of an environmental assessment process or other public review process;
- if there are opportunities for the federal department or agency to participate in the third party or provincial or territorial consultation process, or to rely on the information gathered during any of those processes to assist it in fulfilling its duty to consult. Did the process that the Crown is seeking to rely on include all of the elements necessary for a meaningful consultation process? (Refer to Guiding Principle and Consultation Directive #4);

- if the proposed activity will be subject to a federal environmental assessment process, a National Energy Board or Canadian Nuclear Safety Commission hearing or a regulatory review process. Seek to incorporate the results of those processes into your departmental or agency consultation;
- if there are limits to the extent to which the federal department or agency can rely on third party, federal, provincial or territorial processes and the information generated by these processes to meet the duty? If so, what is the nature of those limitations?
- if, in specific circumstances, it is possible to access the relevant consultation records of third parties (i.e. industry), the provincial or territorial Crown or Boards. Determine the usefulness of these consultation records in assisting the Crown to fulfill its duty to consult.

Federal and provincial or territorial collaboration

Once a lead contact has been established at the provincial or territorial level, develop an approach for collaboration. This discussion may include:

- agreement on the roles of the federal departments and provincial or territorial ministries during the consultation process (e.g. federal presence at consultation sessions, federal department or agency hosting some sessions and the province or territory hosting others, federal department or agency relying, in whole or in part, on provincial consultation report, inclusion in agreements or other arrangements of measures to address concerns related to the potential adverse impacts, etc.);
- agreement on how information is going to be shared between federal, provincial or territorial departments and agencies. There may be strategic or policy reasons why information cannot be fully shared between levels of government. Federal officials should not assume that they will be privy to all information gathered during a provincial consultation process;
- agreement on how to notify Aboriginal groups of the proposed activity. This notification can be joint with the province or territory, separate notification letters or other communication can be sent. The notification must be provided in advance of the consultation so that Aboriginal groups are aware of the process;
- agreement on timelines.

Aboriginal groups that would be consulted must be notified that Canada intends to rely, in whole or in part, on the provincial or territorial consultation process and on any accommodation measures or agreement that may be reached to fulfill its consultation obligations. Aboriginal group(s) may opt to share different information in a provincial or territorial process than in a federal one. If the provincial process does not include meaningful participation of all Aboriginal groups required to discharge the federal duty to consult, it may be necessary for a federal department or agency to expand upon the provincial process.

Taking into account the information gathered through other processes, federal officials must determine what else needs to be included in the design of the Crown consultation process. What

type of information is still needed? What issues may still need to be discussed with Aboriginal groups? Taking into account any expertise required to address outstanding issues, are there other departments and agencies that need to participate in this consultation?

Determine with whom to consult

The Crown must consult directly with the Aboriginal communities with potential or established Aboriginal or Treaty rights. It is important to remember that political organizations are not necessarily the rights holders although they may be authorized to speak on behalf of the Aboriginal communities which hold the rights.

Prior to consulting with any representative organization of affected rights holders, the Crown needs to ensure that the leadership and their members agree. For example, the representative organization can provide the department or agency with a letter confirming the community's acceptance to be represented by them in relation to the activity. The role of such organizations is generally to provide informational, organizational, administrative and political support to the Aboriginal communities they represent. If it is difficult to ascertain who are the appropriate spokespersons for the rights holders, or if there appears to be differences of opinion within the groups as to who represents or speaks on behalf of the communities, seek legal advice.

Verify if there are any Aboriginal groups with overlapping claims in the area of the proposed activity. If so, you may need to invite them to participate in the consultation process.

Determine if the project is going to be carried out on, or may have effects on a reserve. If so, consult with the relevant First Nation. If the activity may have impacts off the reserve in question, for example, on the rights of any other Aboriginal groups located in the area, consultation may also need to take place with these groups.

Learn about and understand the context and current situation of the Aboriginal groups with which you will be consulting (e.g. language, geography, cultural practices, seasonal activities, interactions with departmental and agency officials). For example:

- What are the characteristics of the community (e.g. language, history, culture, socio-economic conditions, location or remoteness)?
- What is important to community leadership and community members (e.g. interests, aspirations, consultation policies or guidelines they may have developed, etiquette as to how to approach meetings and relationship building, etc.)?
- What are their relationships with neighbouring communities?
- Have memoranda of understanding, agreements or protocols been negotiated between the Crown and the communities?
- Are they currently involved in litigation with the federal or provincial Crown?
- Are there any other considerations?

For the purpose of developing appropriate consultations, a strong knowledge of community and regional issues can assist federal officials in accurately assessing the impacts of the proposed activity on individual communities and their traditional territories and their claims.

Knowledge of the Aboriginal groups with which you will be consulting is important, as is early engagement with them regarding the proposed activity, so that they have an opportunity to outline how their potential or established Aboriginal or Treaty rights and any related interests may be adversely affected by the proposed activity.

Questions and issues for consideration include:

- Which Aboriginal communities might be affected by the activity?
- What is known about the Aboriginal communities which live in the area and assert or hold Aboriginal or Treaty rights?
- What knowledge does the Crown have about the potential or established rights of the Aboriginal groups?
- What are the current and past uses by Aboriginal groups of the land, water or other natural resources potentially affected by the proposed activity? Are there traditional use studies for this area that have been shared, in whole or part, with the Crown?
- Is there more than one Aboriginal group that is claiming rights to the same area (i.e. overlapping claims)? If so, what rights are claimed for which areas and by which Aboriginal groups? Is any Aboriginal group claiming title (e.g. exclusive occupation and rights to the land, water or other natural resources in the location and area of the activity)?
- Is the Aboriginal group in Self-Government, Treaty or Specific Claims negotiations? Inform yourself about the history, nature and status of those negotiations;
- Have the Aboriginal rights been declared by a court? Have Treaty rights been negotiated in an historic Treaty or a comprehensive land claim agreement? Has the Aboriginal group concluded a self-government agreement?
- What are the potential adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights such as hunting, fishing, trapping, gathering and trade, and on related interests? For example, will there be any impacts on wildlife or habitat, water quality or temperature, restricted access to lands or water ways, disruption of traditional techniques or timing of harvesting activities?
- What is the potential adverse impact of the proposed activity on Aboriginal archaeological sites, burial grounds, or other areas of Aboriginal interest?
- Are there any reserves in the area? Does the activity overlap or have an adverse impact on reserve lands?

Design effective consultation processes

When designing a consultation process, consider the following:

- Consider involving Aboriginal groups in the design of effective consultation processes. For example, agreeing on meeting objectives, in advance, can help all parties to focus their efforts and develop effective working relations.
- Where possible adapt the content and the process to respect the circumstances of the Aboriginal group. Identify potential challenges to the Crown consultation process in this regard.
- Many First Nation, Métis or Inuit groups have developed consultation policies, guidelines or protocols and request that the Crown adhere to them. Officials must follow the Updated Guidelines and their departmental or agency approaches. However, understanding the policies, guidelines or protocols of the Aboriginal group may become the starting point for a discussion on an effective and meaningful consultation process.
- Establish reasonable timelines for consultation activities. Meaningful consultation may require more time than anticipated; ensure that your plan is flexible.
- Design the consultation process to begin as early as possible. Take into account existing federal, provincial or territorial processes such as environmental assessments or regulatory reviews.
- Consider board and tribunal hearings that are involved in the decision-making and that the Crown may rely on to fulfill its duty. In some circumstances, the Crown could be required to demonstrate adequate consultation efforts to boards or tribunals. Early consultation enables parties to: determine whether changes to Crown conduct and other appropriate accommodation measures are needed; explore what these changes could be; and provide sufficient time to make appropriate changes (Guiding Principles and Directives #2 and #3).
- The duty to consult does not require the Crown and the Aboriginal communities to agree on how to resolve the issues raised during the consultation process. Nevertheless, there may be benefit in considering various means to overcome disagreements, such as dispute resolution mechanisms, to minimize conflicts, as they arise, and provide alternatives to litigation in the course of consultation or during the implementation of accommodation measures.
- In the context of established Aboriginal and Treaty rights, given the strength of those rights, federal departments and agencies must work closely with Aboriginal groups to seek ways to avoid adverse impacts on those rights. Federal officials should do the same when there is a severe adverse impact.

Anticipating requests for support

As noted earlier, in some instances, Aboriginal groups may seek support (financial or otherwise) to participate in the consultation process. As a general rule, the courts have indicated that consultation must be meaningful and that the process must be reasonable. Courts look favourably

upon government providing assistance, where needed, to support Aboriginal participation in the consultation process.

Support can take many forms, including in-kind assistance that could be provided by the Crown (federal, provincial or territorial) or, in many instances, by the proponent. This could include proponent or other expert technical expertise and information; assuming the costs of translation and interpretation; document production; travel; providing Aboriginal groups with access to government technical expertise or other relevant contextual data about the resource sectors and related statutes; organizing meetings; and modifying timelines that will assist Aboriginal groups to assess the potential adverse impacts on their rights.

If financial support is requested, departments and agencies must assess whether financial support should be provided and the extent of that support. Where a department or agency seeks to transfer funds to Aboriginal groups, it must ensure it has the appropriate departmental program and financial authorities in place. Officials should identify departmental authorities or potential programs or initiatives that may assist in providing capacity to Aboriginal groups, where appropriate. Financial support may also come from the participant funding programs of the Canadian Environmental Assessment Agency, National Energy Board or Canadian Nuclear Safety Commission.

The following provides a list of capacity areas for which financial support has been provided to Aboriginal groups in the context of consultation and accommodation processes:

- information-sharing and awareness-raising;
- participation at meetings including honorarium for elders and others;
- travel costs;
- preparation of scientific, technical and legal reviews to provide advice in relation to the consultation;
- analysis and reporting related to the consultation and accommodation activities and to potential impacts on potential or established Aboriginal or Treaty rights and related interests;
- training;
- professional fees (for example, for facilitation, writing of documents, translation and interpretation);
- communications and printing;
- research and development;
- land use, traditional knowledge and use or targeted resource planning, management and implementation;
- administrative fees.

Officials must:

- monitor transfers of funding for consultation purposes and reporting, as directed by legislation and Treasury Board Secretariat policies, directives, guidelines and practices;
- seek opportunities, through protocols or memorandum of understanding with other federal departments and agencies, provincial and territorial governments and industry, to share capacity requirements for consultation. Open dialogue and transparency can enhance efficiencies and reduce costs for all involved in a consultation process;
- seek opportunities, where appropriate, to foster aggregations among Aboriginal groups (if they do not already exist) to enhance efficiencies and reduce costs through collective efforts. However, caution should be exercised not to impose aggregations as a cost and time saving measure at the risk of alienating the concerned Aboriginal groups.

Step 7: Ensure that a records management and filing system is in place

Federal departments and agencies should approach Aboriginal consultation with the awareness that they may be required to (1) access their own or other Crown records during the consultation process and (2) demonstrate the completeness and integrity of the process at a later date. To this end, federal departments and agencies that do not have a record management system for Aboriginal-Crown consultations should develop and maintain a consistent approach and format to record keeping for each step in the consultation and accommodation process.

An efficient record keeping system should ensure that the information is accessible, searchable, retrievable and reliable. It should also enable the sharing of documents between federal departments and agencies, and take into account security classification levels and privacy issues. Where multiple departments and agencies are involved in a consultation process, a centralized record keeping system is essential to maintain a complete record of consultations. For example, the Major Projects Management Office and the Canadian Environmental Assessment Agency have created a centralized Crown consultation records management system for federal departments and agencies working on Aboriginal-Crown consultations on major resource projects.

Examples of information that qualifies as a Crown record may include:

- background/technical information about the proposed project;
- any relevant information about the Aboriginal group(s) which might be affected by the proposed activity;
- a consultation plan;
- correspondence and meeting notes between federal departments and agencies and the Aboriginal group(s) in relation to the proposed activity;
- correspondence detailing each contact made with Aboriginal group(s) in relation to the proposed activity (e.g. letters, phone calls);
- letters of opinion from Aboriginal groups related to the proposed project or Crown conduct;

- an adverse impact assessment of the proposed activity;
- a strength of claim analysis on asserted Aboriginal rights;
- legal advice sought at any point during the consultation process;
- notices of consultation sessions or funding issuance (e.g. participant funding program);
- issues management tracking table.

A consultation record typically includes:

- date and time of correspondence or meeting;
- where the meeting took place and who attended;
- information shared with Aboriginal group(s) regarding the proposed activity and related consultation process;
- feedback received from Aboriginal groups;
- departmental or agency responses to the concerns and information requests made by Aboriginal group(s) related to the consultation process;
- rationale for key decisions taken in relation to the activity.

All correspondence with the Aboriginal groups (e.g. letters, e-mail messages, notes on telephone calls, notes from each meeting with the Aboriginal group) should be recorded and filed in their records management system.

It is also recommended practice for federal officials to indicate who created the record and who performed the activity recorded.

Phase 2: Crown Consultation Process

Officials will need to implement their consultation plan and corresponding process and adjust it as may be appropriate. The departmental or agency approach and the work done during the "Pre-Consultation Analysis and Planning" phase will help officials to anticipate and address issues and carry out a meaningful consultation process.

Step 1: Implement the consultation process

- Notify the Aboriginal group(s) of the proposed activity, provide a government contact for any questions or concerns, and, where appropriate, offer to meet to discuss the proposed activity and any concerns they may have about it;
- In a timely manner, provide Aboriginal groups with clear and relevant information relating to the proposed activity and any adverse impacts that may be anticipated, to enable them to provide meaningful feedback;

- To ensure that Aboriginal groups are adequately notified and able to meet timelines, federal departments and agencies should send information to them by a variety of means including registered mail, email and fax. Using registered mail ensures that recipients have an original copy on file; however, this method of correspondence can be slow. E-mails and faxes ensure timely receipt of documents. Follow-up phone calls are recommended. Timely communication facilitates an open and respectful dialogue between the Aboriginal community and the Crown;
- Confirm who is authorized to represent Aboriginal group(s) in relation to their Aboriginal or Treaty Rights and related interests;
- Identify and determine the nature of any overlapping claims that may exist in the area of the activity;
- Provide the Aboriginal group(s) with enough time to assess any adverse impacts of the proposed activity on their rights and to prepare their views on the matter. Officials should follow-up to discuss concerns, as necessary;
- Ensure that the Crown responds in a coordinated and timely fashion to communication received from Aboriginal groups. To facilitate these efforts, managers may wish to establish service standards or letter templates;
- Consider the concerns of Aboriginal groups, and respond in a meaningful way by ensuring that the Crown's responses consider and address Aboriginal representations, questions and concerns;
- Throughout the consultation process, consider ways and means to avoid or mitigate potential adverse impacts of the activity on potential or established Aboriginal or Treaty rights and related interests;
- Depending on the nature of the concerns, ensure that the third party proponent is involved in the discussion of measures to prevent or reduce any potential adverse impacts of the project. A proponent is typically in the best position to alter the project to avoid or mitigate adverse impacts (e.g., placement of docks, routing of pipelines, alignment of roads, etc.);
- Review periodically, throughout the consultation process, the extent to which environmental assessments or regulatory processes, as they are implemented, can be relied upon and how the information generated in those processes can be used to fulfill the Crown's duty in whole or in part;
- Review periodically whether the Crown has demonstrated to the board or tribunal, where appropriate, that adequate consultation has occurred;
- Ensure that throughout the consultation process, all relevant information is shared with government departments and agencies involved in the consultation. To achieve effectiveness, managers are encouraged to periodically review coordination and information sharing practices;

- Follow agreed upon dispute resolution mechanisms to resolve conflicts as they arise, and to avoid litigation related to the consultation and accommodation process.

Step 2: Document, catalogue and store all Crown consultation meeting records and other correspondence

Good practices to consider in relation to record keeping include:

- update records regularly;
- provide the same level of information detail consistently and as needed to relevant departments and agencies involved in Crown consultations;
- share information in a timely way with departments and agencies;
- ensure that the records are filed according to a set standard in a records management system that is accessible by all departments and agencies involved in the consultation process;
- ensure that all records are easily accessible and filed using an appropriate security classification; and,
- preserve corporate memory of a consultation file.

Step 3: Develop and maintain an issues management tracking table

An issues management table should be created and should include a summary of:

- Aboriginal concerns about potential adverse impacts of an activity on potential or established Aboriginal or Treaty rights, as conveyed to government decision makers;
- Crown's efforts to address concerns raised by Aboriginal groups about potential adverse impacts of the activity on potential or established Aboriginal or Treaty rights;
- any communication sent to Aboriginal groups informing them of steps taken to address their concerns;
- any outstanding issues remaining between the Crown and Aboriginal groups with information about why these issues have not been resolved and some of the challenges encountered in relation to these issues. If the intention is to address these issues at a later date, provide a rationale for the timing and a plan for implementation and follow-up.

Step 4: Adjust the consultation and accommodation process, as necessary

The consultation process should be responsive and flexible. Officials need to adjust the process as new information about the strength of claim or the severity of adverse impacts comes to light, or if a new Aboriginal group, with a credible claim, alleges that their potential or established Aboriginal or Treaty rights may be impacted by the project. If the processes being relied on by the Crown will not allow it to fulfill its consultation obligations, additional steps must be taken.

Phase 3: Accommodation

The courts have said that consultation would be meaningless if, from the outset, it excluded any consideration of the potential need to accommodate the concerns raised by Aboriginal groups. Consultation may reveal a need to accommodate. Accommodation may take many forms.

The primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts. In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity. The Crown may be able to rely on what the industry proponent does in terms of accommodation, to fulfill, in whole or in part, the Crown's duty to consult, and where appropriate, accommodate.

The examples included below are not an exhaustive list but present a range of accommodation options. Making changes to the project design early in the planning stages of the project can help avoid or eliminate adverse impacts.

When such impacts are unavoidable or cannot be eliminated, the focus of accommodation must turn to mitigating those impacts. Sometimes this may be accomplished by making changes to the activity. The proponent is often in the best position to modify the project to avoid, eliminate or minimize the adverse impacts.

In its regulatory role, the Crown may also place terms or conditions on any permits, licences or authorizations to avoid or minimize adverse impacts. It can also enter into agreements with the proponent pursuant to which the proponent undertakes to carry out measures designed to reduce the adverse impacts.

Where it is not possible to avoid, eliminate, or substantially reduce adverse impacts, it may be appropriate to compensate the Aboriginal group for any adverse impacts on their potential or established Aboriginal or Treaty rights. Compensation could take a variety of forms including habitat replacement; providing skills, training or employment opportunities for members of the Aboriginal group; land exchanges; impact-benefit agreements; or cash compensation.

Where accommodation is appropriate, departments and agencies should work with the Aboriginal group to identify solutions that balance the interests of the Aboriginal group with the societal interests of all Canadians. While there is no obligation on the Crown and Aboriginal group to agree on what is appropriate accommodation (i.e. Aboriginal groups do not have a veto), all parties must make reasonable efforts to find solutions that will accommodate the adverse impacts of the project on potential or established Aboriginal or Treaty rights.

Where accommodation measures proposed by the proponent or other parties are acceptable to the Aboriginal group, the federal Crown will need to determine if it is appropriate to rely on these measures in the fulfilment of its duty to consult (Guiding Principle and Directive #7). In relying on accommodation measures proposed by a proponent or other parties, the Crown needs to be satisfied that these measures appropriately accommodate the Aboriginal group for the adverse impacts on their Aboriginal and Treaty rights.

When considering appropriate accommodation options, departments and agencies need to:

- work collaboratively to understand how the mandates of participating federal departments and agencies can be used to assist the Crown to accommodate the adverse impacts on potential or established Aboriginal or Treaty rights (Guiding Principle and Directive #5);
- determine whether it is appropriate to involve other departments and agencies or other orders of government when any proposed accommodation measures fall outside your department's or agency's mandate. The mandates of federal departments and agencies should not limit the options for accommodation available to Aboriginal groups;
- understand and be aware of how the approval and decision-making processes within each department or agency may serve as a vehicle for accommodation; and,
- assess the extent to which the mitigation measures proposed through environmental assessment, regulatory or other consultation processes may serve as accommodation.

The following section outlines four steps for identifying appropriate accommodation measures during and following the consultation process. This section will be informed by future policy direction and practical experience in dealing with accommodation.

Step 1: Gather and analyze information supporting the basis for accommodation

The following factors are relevant when federal departments and agencies consider whether accommodation is appropriate in the circumstances. This information will be gathered during the "Pre-consultation Analysis and Planning" and the 'Crown Consultation Process' phases of the process (See Phases 1 and 2). Some of this information will be contained in the issues management tracking table.

- What potential or established Aboriginal or Treaty rights stand to be adversely impacted by the project?
- In the case of potential Aboriginal rights, what is the strength of the claim?
- What is the degree and severity of the adverse impacts on the potential or established Aboriginal or Treaty rights and related interests?

Step 2: Identify possible accommodation measures and options

After determining that accommodation is appropriate in the circumstances, the next step is to assess the range of possible accommodation measures and discuss these measures with Aboriginal groups. In identifying possible accommodation measures, officials may take into account:

- options identified by Aboriginal groups or the proponents to eliminate or reduce the adverse impacts of the proposed project (e.g. changes to the design or approach to the project);
- the extent to which any proposed accommodation measures may reduce the adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights;

- whether the adverse impacts of the proposed activity on potential or established Aboriginal or Treaty rights can be eliminated or reduced, and if not, whether some sort of compensation may be appropriate;
- the cost to the Crown of each possible accommodation measure and the existing sources of funds (e.g. Treasury Board submissions, existing authorities, shared cost with other federal departments and agencies, other levels of government or industry);
- whether there are consultation protocols with Aboriginal groups that serve as a basis to discuss, and where appropriate, to implement accommodation measures;
- whether there are any existing or new financial authorities that are necessary to implement accommodation measures?
- whether the mandates of federal departments and agencies enable them to proceed with selected accommodation options?
- what other departments and agencies can offer in terms of accommodation, having regard to their mandates, financial authorities and legislation. For example, Human Resources and Social Development Canada – job training; Public Works Government Services Canada – sale or purchase of lands; Parks Canada – commemoration of Aboriginal sacred sites; such measures may meet the concerns and interests without requiring new resources.

This assessment allows the Crown to identify accommodation options for discussion with rights holders. It is essential that federal departments and agencies have the appropriate internal approvals in place. It is also important that proposed accommodation measures are approved by senior management with decision-making and financial authority. Federal officials must ensure that internal approvals are obtained prior to presenting accommodation options to Aboriginal groups.

The mandates and processes of boards, tribunals or commissions and other regulatory, statutory or contractual processes that may be relied on by the Crown may not be sufficient to address certain accommodation measures or options. Therefore, the Crown may need to supplement these processes.

A clear distinction is required between accommodation of potential or established Aboriginal or Treaty Rights by avoiding or mitigating any adverse impacts on those rights and other socio-economic measures that are offered to address the Aboriginal communities' interests in relation to the activity. These latter activities are business initiatives that are linked to the project or other corporate or governmental programs that support communities. They do not always serve as accommodation measures necessary for the Crown to fulfill its duty.

Step 3: Select appropriate accommodation options

Informed by its discussions with Aboriginal groups during the consultation process, the Crown must select appropriate accommodation option(s). Generally, the most appropriate measure(s) are

those which are most effective in eliminating or reducing adverse impacts on potential or established Aboriginal or Treaty rights while taking into account broader societal interests.

The duty to consult does not include an obligation on the Crown to agree with Aboriginal groups on how the concerns raised during consultations will be resolved.

Selecting accommodation measures requires cooperation amongst federal departments and agencies and effective inter-departmental mechanisms for collaboration.

Step 4: Communicate and document selected accommodation measures

It is important to document and communicate to all parties, in writing, the accommodation measures. The following factors may assist departments and agencies in communicating accommodation decisions:

- A description of the steps in the consultation process that led to the accommodation decision;
- Evidence that the selected options are supported by information provided to the Crown during the consultation process;
- Evidence that the consultation process was meaningful and reasonable and that the Crown acted in good faith;
- The reasons for selecting the chosen accommodation measure(s);
- How Aboriginal concerns and suggestions for accommodation measures were addressed or the reasons why the accommodation options suggested by Aboriginal groups were not selected;
- Roles and responsibilities of all parties involved in implementing the accommodation measures (e.g. Crown, rights holders, third parties); and,
- How to communicate the selected accommodation measures to all parties. Such communication should be coordinated if more than one federal department or agency or the provincial or territorial government is involved in the consultation process. In the issues management tracking table, the federal lead department or agency should maintain a list of the various accommodation measures proposed by all participants in the consultation process.

Phase 4: Implementation, Monitoring and Follow-Up

In this Phase, departments and agencies will implement the Crown's decision and accommodation measures. This typically involves taking steps to put the accommodation measures in place and carrying out monitoring or other follow-up activities. Officials should verify whether the accommodation measures are in place and advise whether they are effective in eliminating or mitigating the adverse impacts of the activity on potential or established Aboriginal or Treaty rights and related interests.

Step 1: Communicate and implement the decision(s)

In some circumstances, departments and agencies will find it helpful to develop, in collaboration with the Aboriginal groups and other parties, if appropriate, an implementation plan that sets out the steps necessary to put the accommodation measures in place, and to guide and track the Crown's monitoring and follow-up activities. Departments and agencies can look to their departmental or agency approaches to consultation (See Part B) and the issues management tracking table for guidance in the development of an implementation plan.

Step 2: Monitor and follow-up

Departments and agencies need to coordinate their roles in carrying out monitoring or other follow-up activities. A coordinated effort will help them assess whether accommodation measures are effective in eliminating or mitigating the adverse impacts of the project.

If monitoring and follow-up activities reveal that some accommodation measures are ineffective in mitigating the adverse impacts, the Crown needs to work collaboratively with Aboriginal groups, the proponent and other parties to find appropriate accommodation measures, and monitor the effectiveness of the new measures. The Crown discharges its duty to consult, and, where appropriate, accommodate, and strengthens its working relationship with Aboriginal groups when it puts in place effective accommodation measures. (Refer to Guiding Principle and Directive #8).

This could be facilitated by an implementation plan to guide and track the Crown's monitoring and follow-up activities. The plan may include:

- designation of a federal lead for the reporting and issues management tracking process, and for on-going communication with Aboriginal groups and proponent, as necessary. Where more than one department or agency is involved, the lead is responsible for ensuring that appropriate action is taken;
- requirements and measures that ensure that adverse impacts on rights continue to be addressed during the life cycle of the activity; and
- existing or newly developed tracking and reporting processes for each of the accommodation measures implemented, federal and regulatory activities, management and disposal of Crown land, financial requirements.

Step 3: Evaluate the consultation process

Following the implementation of the selected accommodation measures, departments and agencies should evaluate the results of their consultation and accommodation activities. A Crown consultation record, if well developed and consistently maintained, will facilitate the analysis of whether or not Aboriginal concerns about any adverse impacts on potential or established Aboriginal or Treaty rights and related interests have been adequately addressed.

Evaluating a process as it proceeds enables officials to verify the effectiveness of actions and decisions taken along the way and to correct them in a timely fashion. Therefore, undertaking an evaluation of a consultation and accommodation process at key stages will allow the Crown to

ensure that it continues to act in accordance with the goals and objectives or to adjust them as new developments occur or new information becomes available. The Audit and Evaluation Unit Staff of the departments and agencies involved can assist in developing a useful evaluation process that can be shared to improve various aspects of future consultations.

When developing a process for evaluating the consultation and accommodation process, departments and agencies should take into consideration the:

- design of evaluation criteria at the outset so the goals, objectives and outcomes are clear and can be tracked over a reasonable period of time;
- advice and guidance from the Audit and Evaluation units of the departments and agencies involved on how to effectively evaluate a consultation and accommodation process; and
- potential involvement of Aboriginal groups in the development of the evaluation criteria.

Some evaluation questions to be considered:

- What Crown processes were used? What worked, what didn't?
- Were all the relevant parties properly identified and appropriately involved?
- Were roles and responsibilities in the process appropriate and understood?
- Did the consultation plan and process reflect the respective objectives and interests of the parties?
- Was the consultation process reasonable, meaningful, flexible and achievable?
- Did the consultation process reflect the nature, scope and complexity of the intended project, activity or decision?
- Were all parties clear on process objectives and outcomes?
- On what proponent activities did the Crown rely? To what extent did they assist in fulfilling the Crown's consultation obligations?
- Was the consultation process well documented in an official record and is the information generated during the process easily accessible?
- Were decisions justified and clearly communicated to the appropriate parties?
- Was legal advice sought appropriately?

The evaluation should also include information about whether or not the Crown acted in a manner consistent with the following standards, principles and relevant legal tests:

1. Has consultation been meaningful? Is the depth of consultation adequate given the circumstances? Has it been carried out in a timely and reasonable manner? Has the Crown been responsive to the concerns raised?

2. Have any concerns raised by Aboriginal groups not been addressed? Have any concerns been overlooked?
3. Is the recorded response to a concern meaningful? Is there any sense of lack of clarity or avoidance in the response? Has the Aboriginal group raised any concerns about the response?
4. Are there accommodation measures that should be implemented now? Can the consultation to date be deemed adequate, even if accommodation has not been undertaken or has been put off to a later stage of the project?
5. In the event of new information, was the scope of the consultations reassessed? Specifically, does the new information affect the strength of the claim or the significance of the adverse impact?

Evaluation questions on the procedural aspects of a consultation process to determine if the Crown has conducted a thorough and reasonable consultation process could include:

1. Has each Aboriginal group's concern been consistently considered and followed-up on?
2. Has each response been communicated to the Aboriginal group(s)?
3. Has the Crown tried to solicit Aboriginal views and concerns?
4. Has there been a good flow of information? Have all Aboriginal groups been appropriately informed through such means as information packages?
5. Have there been face-to-face meetings and, if not, were they necessary? Did groups request such meetings? If so, what was the response?
6. Is there a good correspondence record? For example, copies of correspondence, phone calls and face-to-face meetings?
7. Is there a good consultation record?
8. Was a particular board or tribunal relied on for the consultation process? Was a provincial or territorial process relied on? Was it sufficient to address the Aboriginal groups' concerns?
9. Is a third party proponent involved? Who was it and what was their role?
10. What concerns were raised and how has the third party proponent responded? What was the follow-up and monitoring process used?
11. Were the affected Aboriginal groups able to participate in the consultation and accommodation process? How were issues of capacity addressed? Was it through monetary or non monetary means or both? Were funding authorities in place? Was funding available in the department or agency to support capacity? Is a funding agreement in place? Were other departments and agencies or governments contributing to support capacity? Were final and financial reports provided in relation to transfer payments? Have transfer

payments contributed to consultation objectives? Have recommendations been made for future consultations?

12. Did your department or agency lead the consultation? If so, what follow-up and monitoring processes were implemented? If not, was a lead department or agency identified?

Annexes

Annex A – Definitions

Aboriginal group: A community of First Nations, Inuit or Métis people that holds or may hold Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982*.

Aboriginal rights: Practices, traditions and customs integral to the distinctive culture of the Aboriginal group claiming the right that existed prior to contact with the Europeans (*Van der Peet*). In the context of Métis groups, Aboriginal rights means practices, traditions and customs integral to the distinctive culture of the Métis group that existed prior to effective European control, that is, prior to the time when Europeans effectively established political and legal control in the claimed area (*Powley*). Generally, these rights are fact and site specific.

Aboriginal title: An Aboriginal right to the exclusive use and occupation of land. It is possible that two or more Aboriginal groups may be able to establish Aboriginal title to the same land.

Activity: Any Crown or proponent undertaking, application, proposal, project, regulatory, policy or other initiative or decision that is contemplated and may have an adverse impact on potential or established Aboriginal or Treaty rights and related interests.

Capacity: It is the ability of Aboriginal groups to understand the nature of the activity the Crown or proponent is contemplating and how that activity might adversely impact their potential or established Aboriginal or Treaty rights.

Common law: In general, a body of law that develops through judicial decisions, as distinguished from legislative enactments.

Comprehensive land claim: Comprehensive claims deal with the unfinished business of treaty-making in Canada through a negotiation process. These claims arise in areas of Canada where Aboriginal land rights have not been dealt with by past treaties or through other legal means. In these areas, forward-looking modern treaties are negotiated between the Aboriginal group, Canada and the province or territory. Comprehensive land claim negotiations address concerns raised by Aboriginal peoples, governments and third parties about who has the legal right to own or use the lands and resources in areas under claim.

Constructive knowledge: *Black's Law Dictionary (Eighth Edition)* states: "Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person". Therefore, if one part of the Crown has knowledge of potential rights, other Crown entities will be deemed to know.

Crown: Refers to all government departments, ministries (both federal, provincial and territorial) and Crown agencies.

Crown conduct: Means the exercise of the Crown's jurisdiction and authority whether the Crown may be in charge of the activity or may be approving an activity through permits and authorizations. In either context, its actions would constitute Crown conduct.

Crown knowledge: The Supreme Court of Canada stated that the duty to consult arises when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights of which the Crown has real or constructive knowledge.

Cumulative Environmental Effects: "The concept of cumulative environmental effects recognizes that the environmental effects of individual human activities can combine and interact with each other to cause aggregate effects that may be different in nature or extent from the effects of the individual activities. Cumulative environmental effects can be characterized as the effect on the environment of a proposed project when combined with those of other past, existing and imminent projects and activities, and which may occur over a certain period of time and distance".

Duty to Consult: The duty to consult is an obligation of the government as a whole. In *Haida, Taku River* and *Mikisew Cree,* the Supreme Court of Canada held that provincial and federal governments have a legal obligation to consult when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights.

Engagement: Examples of engagement includes discussion groups and formal dialogue, sharing knowledge and seeking input on activities such as policy, legislation, program development or renewal.

Existing Aboriginal and Treaty rights: "Existing" includes potential or established Aboriginal or Treaty rights.

First Nation: A term that came into common usage in the 1970s to replace the word "Indian" which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term "First Nations peoples" refers to the Indian peoples in Canada, both Status and non-Status. Some Indian peoples have also adopted the term "First Nation" to replace the word "band" in the name of their community.

Inuit: An Aboriginal people in Northern Canada, who live in Nunavut, Northwest Territories, Northern Quebec and Northern Labrador. The word means "people" in the Inuit language, Inuktitut. The singular of Inuit is Inuk.

Métis: For purposes of section 35 rights, the term Métis refers to distinctive peoples who, in addition to their mixed First Nation, Inuit and European ancestry, developed their own customs, and recognizable group identity separate from their First Nation or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.

Proponent: In the Updated Guidelines, proponent refers to industry, foreign governments or any other parties which initiate or propose an activity.

Reserve: As specified by the *Indian Act*, a tract of land, the legal title to which is vested in Her Majesty the Queen in Right of Canada and that has been set apart by Her Majesty for the use and benefit of a First Nation.

Traditional territory: Any designated lands and boundaries to which First Nations, Métis and Inuit communities claim or have established traditional use or occupation.

Treaty rights: Rights that are defined by the terms of a historic Treaty, rights set out in a modern land claims agreement or certain aspects of some self-government agreements. In general, Treaties (historic and modern) are characterized by the intention to create obligations, the presence of mutually binding obligations and a measure of solemnity (*Simon, Sioui*). A treaty right may be an expressed term in a Treaty, an implied term or reasonably incidental to the expressed Treaty right. The scope of Treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by the Supreme Court of Canada (*Badger* 1996, *Sundown* 1999, *Marshall* 1999)

Where the parties disagree on the scope of obligations or what rights are provided for, a number of principles unique to Treaty interpretation apply. For example, Treaties should be liberally construed; ambiguities ought to be resolved in favour of the signatories in the context of historic Treaties; the goal of Treaty interpretation is to find the common intention and the result that best reconciles the interests of both parties at the time the Treaty was signed; the integrity and Honour of the Crown is presumed in such interpretations; the courts cannot alter the terms of the Treaty and Treaty rights cannot be interpreted in a rigid or static way as they must be updated to provide for modern exercise (*Marshall* 1999; 2005).

Trigger: Any of the three elements that are necessary for a duty to consult to exist. Specifically, a Crown conduct, a potential adverse impact and potential or established Aboriginal or Treaty rights that might be adversely affected.

With or Without Prejudice: Describes communication, either written or verbal. To designate a communication as "without prejudice" is to declare that the party does not waive its right to non-disclosure of the communication. Such communications may be referred to as being "off- the-record". This term is often used during negotiations and litigation. Should there be a request for without prejudice or off-the-record discussion, advice from legal counsel should be sought.

In the context of consultation, if agreements or protocols are being entered into for the purposes of meeting Crown obligations to consult as per the *Haida, Taku River, Mikisew Cree* or *Sparrow* cases, it is recommended that the agreement be "with prejudice". With prejudice means that the Crown can use this documentation in court as evidence that it has fulfilled its duty to consult obligations, and that the Aboriginal group may use the documentation in relation to its legal positions. Such communications may be referred to as being "on-the-record".

Annex B – Legal Case Summaries

The case law outlined below relate to consultation and accommodation matters. However, federal officials should also consider judgements or cases that speak to potential or established Aboriginal or Treaty rights and title. These cases may influence or dictate government decisions on questions such as who to consult as well as the nature and extent of consultations and the requirement for accommodation.

1. Duty to Consult

Seminal Supreme Court of Canada cases

Haida Nation v. *British Columbia (Minister of Forests)*, 2004 SCC 73

The Supreme Court of Canada dismissed the Province's appeal and allowed the appeal of Weyerhaeuser Company Ltd. The Court held that the Province has a duty to consult with the Haida about decisions relating to the harvest of timber from an area of the Queen Charlotte Islands over which the Haida have asserted, but have not yet proven, Aboriginal rights and title. The Court stated that 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 could not yet be ascertained. The Court found that the Province had failed to engage in any meaningful consultation. The Court also found that Weyerhaeuser did not owe the Haida any duty to consult or accommodate. The Court held that the duty to consult does not extend to third parties.

The Court stated that the Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honour of the Crown which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. 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.

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. As to the content of the duty, the Court said that, at all stages, good faith on both sides is required and sharp dealing is not permitted. The effect of good faith consultation may be to reveal a duty to accommodate.

The Court said that this process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim; nor does it impose a duty to reach an agreement. The Court also stated that, although the Crown may delegate procedural aspects of consultation to industry proponents of a particular development, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The Honour of the Crown cannot be delegated.

Taku River Tlingit First Nation v. *British Columbia (Project Assessment Director)*, 2004 SCC 74

The Supreme Court of Canada, applying its analysis in *Haida Nation* v. *British Columbia (Minister of Forests),* [2004] SCC 73, released concurrently with this decision, allowed the Province's appeal and held that the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of the Crown's duty to consult with the First Nation and to accommodate its concerns.

At issue was whether the Crown had a duty to consult prior to approving the re-opening of a mine and the construction of an access road to the mine through territory over which the First Nation claimed, but had not yet proven, Aboriginal rights and title. In *Haida,* the Court confirmed the existence of the Crown's duty to consult Aboriginal peoples prior to proof of rights or title claims. The Court found that the Crown's duty to consult was engaged in this case because the Province was aware of the First Nation's claims through its involvement in the Treaty negotiation process and knew that the decision to reopen the mine and to build the access road had the potential to adversely affect the substance of the rights and title claims.

The Court concluded that the Crown had fulfilled its duty to consult on the basis that the First Nation was part of the Project Committee, participating fully in the environmental review process; its views were put before the appropriate Ministers and; the final project approval contained measures designed to address both immediate and long-term concerns of the First Nation.

The Court also stated that the Province was not under a duty to reach agreement with the First Nation and its failure to do so did not breach its duty of good faith consultations. The Court also confirmed that the Honour of the Crown cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation between the Crown and Aboriginal peoples as mandated by s. 35(1) of the *Constitution Act, 1982*.

Mikisew Cree First Nation v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69

The Supreme Court of Canada allowed the First Nation's appeal, quashed the Minister's decision to approve the construction of a winter road through Wood Buffalo National Park, Alberta, and returned the matter to the Minister for further consultation and consideration.

The Court held that the Crown's duty of consultation, which the Court said flows from the Honour of the Crown and its obligation to respect the existing Treaty rights of Aboriginal peoples, was breached in this case because the Minister failed to adequately consult with the First Nation in advance of the decision to build the road. The Court stated that when the Crown exercises its right under Treaty 8 to "take up" land, it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a Treaty right. Rather, the Court said that it must first consider the process by which the "taking up" is planned and whether it is compatible with the Honour of the Crown.

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 people so as to trigger the duty to consult. In this case, the Court found that the duty to consult was triggered because the impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the First Nation's hunting and trapping rights over the lands in question.

The Court found that the Crown's duty to consult in this case lies at the lower end of the spectrum because the proposed road is fairly minor and situated on surrendered lands where the First Nation's treaty rights are expressly subject to the "taking up" limitation in Treaty 8.

With respect to the content of the duty to consult, the Court found that the Crown was required to provide notice to the First Nation and to engage it directly. This engagement should have included the provision of information about the project, addressing what the Crown knew to be First Nation's interests and what the Crown anticipated might be the potential adverse impact on those interests.

The Crown was also required to solicit and to listen carefully to the First Nation's concerns and to attempt to minimize adverse impacts on the First Nation's hunting, fishing and trapping rights. Had the consultation process gone ahead, the Court confirmed that it would not have given the First Nation a veto over the alignment of the road. The Court reiterated that consultation will not always lead to accommodation and accommodation may or may not result in an agreement.

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy Mines and Resources et al. v. *Little Salmon/Carmacks First Nation et al.*, 2010 SCC 53

This decision builds on the prior *Mikisew Cree* decision (2005) by setting out how the duty to consult applies to federal, provincial and territorial government conduct that may adversely impact lands and resources covered by more recent Land Claim Agreements. The Court held that the duty of consultation stems from the honour of the Crown and operates in law independently to treaties. A duty to consult can apply where Crown conduct may adversely impact treaty rights. The Little Salmon Carmacks First Nation (LSCFN) Treaty was not a "complete code" of all of the obligations that may exists as between the parties.

When assessing how the duty to consult applies to matters covered by a treaty, the first place to look is the at the specific treaty terms. Treaties may shape how consultation is to be addressed.

The Court reiterated the importance of the honour of the Crown as a constitutional principle that inform all Crown dealings with Aboriginal people, including the interpretation and implementation of treaties. The Court reiterated the importance of treaties as part of the process of reconciliation and as providing guidance for the on-going relationship of the Crown and Aboriginal groups.

Treaty Interpretation Principles

Marshall: R. v. *Marshall*, [1999] 3 S.C.R. 456

The accused, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760–61 that exempted him from compliance with the regulations.

The court held that extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones. There was more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses. While the treaties set out a restrictive covenant

and do not say anything about a positive Mi'kmaq right to trade, they do not contain all the promises made and all the terms and conditions mutually agreed to.

Nowegijick: Nowegijick v. *The Queen*, [1983] 1 S.C.R. 29

Mr. Nowegijick is an Indian within the meaning of the *Indian Act* and a member of the Gull Bay (Ontario) Indian Band. During the 1975 taxation year Mr. Nowegijick was an employee of the Gull Bay Development Corporation, a company without share capital, having its head office and administrative offices on the Gull Bay Reserve. All the directors, members and employees of the Corporation live on the Reserve and are registered Indians.

The Federal Court of Appeal concluded that the tax imposed on Mr. Nowegijick under the *Income Tax Act* was not taxation in respect of personal property within the meaning of s. 87 of the *Indian Act*. Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

Ted Moses: Attorney General of Quebec v. *Grand Chief Dr. Ted Moses, et al.*, 2010 SCC 17

The Vanadium case concerns the applicability of the *Canadian Environmental Assessment Act* ("CEAA") to a proposed mine project located in the territory contemplated by s. 22 of the James Bay and Northern Quebec Agreement ("JBNQA"). While the Vanadium case is nominally about environmental assessments, it is also relevant as the first Supreme Court decision to interpret the provisions of a modern treaty. While both sets of reasons are clear in taking the position that the JBNQA is a treaty covered by s. 35 of the *Constitution Act, 1982*, they diverge in the amount of analysis they provide as to how a modern treaty should be interpreted. It is clear that the Court sees a difference between how historic treaties and modern treaties are to be interpreted.

While it would seem to be correct to continue to posit that modern treaties are not to be interpreted in the exact same way as historic treaties, it will be interesting to see if the dissent's approach is adopted by a majority of the Court in a future decision, as that would help to clarify how the interpretation of modern treaties should differ.

The majority clearly took a contractual approach to interpreting the provisions of the JBNQA and sought to discern the common intention of the parties, but it remains to be seen whether they would take the same approach in other cases. Based on the Vanadium decision, it is clear that courts should pay careful attention to the terms of the agreement that comprises the modern treaty.

Interpretation and Application of Duty to Consult by Lower Courts

Since the seminal Supreme Court decisions noted above, lower courts across Canada have been assessing and applying the duty to consult to a variety of different kinds of Crown conduct and in relation to a number of different Aboriginal and Treaty rights. For a listing and greater details on these decisions contact your legal advisor.

2. Legal Tests for Assessing Interference with and Existence of Aboriginal and Treaty Rights

Interpretation of s. 35 (1): Test for Crown justification for infringement of s. 35(1) rights

R. v. *Sparrow*, [1990] 1 S.C.R. 1075

Mr. Sparrow was prosecuted by the Attorney General of Canada under the federal *Fisheries Act* for fishing contrary to the terms of his Band's food fishing licence. The Supreme Court of Canada held that Mr. Sparrow enjoyed an Aboriginal right to fish for food which was protected by section 35 of the *Constitution Act, 1982*. According to the Court, the Crown must demonstrate a "clear and plain" intention to extinguish Aboriginal rights. In this case, the test had not been met by the Crown's evidence.

The Court also found that there is a fiduciary relationship between the Crown and Aboriginal peoples based on the need for the Crown to act honourably. Therefore, section 35 must be interpreted in a manner consistent with this relationship. The Court placed a high burden on the Crown to justify any infringement with the enjoyment of Aboriginal rights protected by s. 35.

See also *R.* v. *Badger* wherein the Court held that the justification test developed in *R.* v. *Sparrow* applied to Treaty rights.

Test for Aboriginal Title

Delgamuukw v. *British Columbia*, [1997] 3 S.C.R. 1010

This action involved a claim by the Gitskan and Wet'suwet'en hereditary Chiefs for Aboriginal title and an inherent right to self-government over 58,000 square kilometers of British Columbia. The Supreme Court of Canada ruled that, due to evidentiary problems with the case, a new trial is required to determine whether the plaintiffs enjoy the claimed Aboriginal title and self-government rights.

While not providing any guidance on the issue of rights of self-government, the Court made general pronouncements on the scope and content of Aboriginal title. In essence, if an Aboriginal group can establish that, at time of sovereignty, it exclusively occupied a territory to which a substantial connection has been maintained, then it has the communal right to exclusive use and occupation of such lands. The Aboriginal group can use the lands for far ranging purposes including economic exploitation. The only limitations are that the lands can not be disposed of without surrender to the Crown nor can they be used in such a fashion that would destroy the Aboriginal group's special bond with the land.

The Court also ruled that both the federal and provincial Crown can justifiably interfere with an Aboriginal group's Aboriginal title. The Court rejected the province's counterclaim regarding provincial power to extinguish Aboriginal rights in finding that, since Confederation, only the federal Crown has such a power.

Roles of Boards and Tribunals

Rio Tinto Alcan Inc. et al. v. *Carrier Sekani Tribal Council*, [2010] SCC 43

The Supreme Court of Canada unanimously held that the BC Utilities Commission (the Commission) had properly exercised its jurisdiction in relation to the duty to consult and had correctly determined that a duty to consult did not arise in this case.

The Supreme Court of Canada set out guidelines for determining whether a tribunal can assess the adequacy of consultation, when it can do consultation and when it cannot do either. The Court provided further guidance on what is required to engage a duty to consult and explained that it applies to current and future activities and impacts, not historical infringements.

In this case, the Commission had the authority to assess whether adequate consultation had occurred because it could decide questions of law and determine if the contract in issue was in the public interest. It also had the authority to consider any "other relevant factors" and make any order it considered advisable in the circumstances. These features of its statutory mandate authorized and required the Commission to address whether the duty to consult was triggered and if there had been adequate Crown consultation and accommodation. The Commission did not, however, have jurisdiction to engage in consultation itself.

The Court confirmed that the duty to consult is a constitutional duty.

Tests for Aboriginal Rights

R. v. *Van der Peet*, [1996] 2 S.C.R. 507; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723;

R. v. *NTC Smokehouse Ltd*, [1996] 2 S.C.R. 672

These cases involve the question of whether section 35 of the *Constitution Act, 1982* includes, as an Aboriginal right, a right to fish commercially. In the *R.* v. *Van der Peet* case, the Court outlined the test for identifying Aboriginal rights protected under section 35. Essentially, an Aboriginal group must establish that, at time of contact with Europeans, the particular activity claimed as an Aboriginal right was a practice, tradition or custom that was integral to the society's distinctive culture.

Applying the above test to the facts of the cases, the Court ruled that the accused in *R.* v. *Gladstone* had established an Aboriginal commercial fishing right. However, the Court also indicated that, in the context of Aboriginal commercial fishing rights, there are no internal limitations to the right. As such, the *R.* v. *Sparrow* justification test had to be refined for Aboriginal commercial fishing rights. Other considerations, apart from conservation goals, are to be taken into account in determining whether governmental restrictions were justified.

Objectives such as the pursuit of economic and regional fairness, as well as, the historic non-native participation in the fishery are relevant objectives in the context of the justification analysis. Aboriginal rights have to be given priority but they also have to be reconciled with other rights and interests. The case was remitted for trial on the question of whether the regulation of the accused's Aboriginal commercial fishing rights could be justified.

R. v. *Powley*, [2003] SCC 43

The accused were charged with unlawfully hunting moose and possessing game contrary to ss. 46 and 47(1) of the *Ontario Game and Fish Act*. The central issue was whether two individuals from the Sault Ste. Marie area, who self-identify as Métis, can establish Métis Aboriginal rights to hunt that are protected by s. 35 of the *Constitution Act, 1982*.

The Supreme Court of Canada held that the impugned legislation was of no force or effect with respect to the accused on the basis that, as members of the Métis community in and around Sault Ste. Marie, the accused have an Aboriginal right to hunt for food under s. 35(1). The Court concluded that the lack of recognition of any Métis right to hunt for food in the legislation infringed the Métis Aboriginal right and conservation concerns did not justify the infringement. The Court held that, to support a site-specific Aboriginal rights claim, the claimant must demonstrate membership in an identifiable Métis community with some degree of continuity and stability as established through evidence of shared customs, traditions and collective identity, as well as demographic evidence.

The Court modified the pre-contact aspect of the *R.* v. *Van der Peet* test to reflect the distinctive history and post-contact ethnogenesis of the Métis. The test for Métis rights should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land after a particular Métis community arose but before it came under the effective control of European laws and customs.

The Court found that the term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. While not setting down a comprehensive definition of who is a Métis for the purpose of asserting a claim under s. 35, of the *Constitution Act, 1982*, the Court cited three broad factors as indicia of Métis identity: self-identification, ancestral connection and community acceptance.

TAB K

https://novascotia.ca/abor/docs/April%202015_GNS%20Mi'kmaq%20Consultation%20Policy%20and%20Guidelines%20FINAL.pdf

Please see attached document

PRELIMINARY DECISION **2018 NSUARB 154**
M08162

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

[redacted]

- and -

IN THE MATTER OF AN APPLICATION by **NOVA SCOTIA POWER INCORPORATED** for approval of capital work order CI#29807 for its Tusket Main Dam Refurbishment project in the amount of $18,157,609

BEFORE: Steven M. Murphy, MBA, P.Eng., Panel Chair
Roberta J. Clarke, Q.C., Member
Richard J. Melanson, LL.B., Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
Matthew Gorman, LL.B.

INTERVENORS: **ASSEMBLY OF NOVA SCOTIA MI'KMAQ CHIEFS**
Terrence Paul, Chief and Co-Chair
Sidney Peters, Chief and Co-Chair

ACADIA FIRST NATION
Deborah Robinson, Chief

CONSUMER ADVOCATE
William L. Mahody, Q.C.

INDUSTRIAL GROUP
Nancy G. Rubin, Q.C.

KWILMU'KW MAW-KLUSUAQN NEGOTIATION OFFICE
Janice M. Maloney, B.A., LL.B., Executive Director

PROVINCE OF NOVA SCOTIA
Sean Foreman, LL.B.

	SMALL BUSINESS ADVOCATE E.A. Nelson Blackburn, Q.C.
BOARD COUNSEL:	S. Bruce Outhouse, Q.C.
FINAL SUBMISSIONS:	May 14, 2018
DECISION DATE:	**August 7, 2018**
DECISION:	**Application is suspended pending a further consultation between the Province and Nova Scotia First Nations. See paragraphs [170] to [177].**

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I INTRODUCTION AND BACKGROUND

[1] Nova Scotia Power Incorporated (NS Power, Utility or Company) made application to the Nova Scotia Utility and Review Board (Board) on July 5, 2017, for approval of capital work order CI#29807 for its Tusket Main Dam Refurbishment Project in the amount of $18,157,609 (Application). NS Power also requested approval of its Confidentiality Undertaking and confidential treatment of certain information filed in support of the Application.

[2] The Utility says the Project is required to help ensure the dam is compliant with current Canadian Dam Association (CDA) dam safety guidelines and Nova Scotia Environment (NSE) requirements. NS Power also indicated that the existing gates within the main dam structure have reached the end of their expected useful life and need replacement.

[3] The Tusket Dam Refurbishment Project was identified in the Company's 2016 Annual Capital Expenditure (ACE) Plan in the amount of $6,543,233, as part of the proposed spending on subsequent approval items. NS Power subsequently deferred the project to allow for engagement with First Nations. The Project was again listed, among projects for subsequent approval, in the 2017 ACE Plan, for $9,940,664.

[4] Given the amount of the capital work order, and in accordance with Board practice, on July 13, 2017, the Board advised a number of parties, who frequently participate in Utility proceedings before the Board, that the Application had been filed and asked whether they wished to become Intervenors in the proceeding.

[5] A Notice of Intervention was filed by the Small Business Advocate (SBA), in response to the Board's notice of the proceeding.

[6] By letter dated July 21, 2017, the Board approved the Company's confidentiality requests and determined the matter could proceed by way of a paper hearing. A timetable was established for the issuance and responses to Information Requests (IRs) and written submissions. This timetable was subsequently amended by letter dated July 28, 2017.

[7] The Board timetable envisaged the completion of the paper hearing by September 26, 2017, when NS Power's Reply Submissions were due.

[8] On August 29, 2017, NS Power responded to IRs from the SBA and Board staff. On August 31, 2017, after reviewing the IR responses, the Board advised the parties it was retaining an expert, in the field of dam refurbishment, construction and decommissioning, to assist in its review. The original timeline was suspended pending the retention of such an expert. Ultimately, Midgard Consulting Inc. (Midgard) was retained by the Board.

[9] On July 27, 2017, the Supreme Court of Canada issued two decisions on the role of tribunals in assessing the adequacy of Crown consultation with Aboriginal peoples: *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*, 2017 SCC 41 and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40. The Crown's consultation obligations arise from s. 35(1) of the *Constitution Act, 1982*, and the interpretation of this provision by the Courts:

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

[10] After conducting a review and analysis of these cases, the Board determined a further process was required in this proceeding to address any potential duty to consult issues arising as a result of the Project.

[11] On September 29, 2017, the Board sent a letter to the Acadia First Nation, and Kwilmu'kw Maw-Klusuaqn Negotiation Office (KMKNO), which were the entities that had been identified in the Application as having been engaged by NSPI in the First Nations consultation process. The Board notes the KMKNO, also known as the Mi'kmaq Rights Initiative, is often designated to conduct consultations by 11 of the 13 Mi'kmaq First Nations. The letter said, in part:

> This is to advise the Board is in the process of reviewing an application by NSPI for the approval of a capital work order relating to the refurbishment of the Tusket Main Dam located on the Tusket River in Tusket Falls, Yarmouth County.
>
> ...
>
> Any capital expenditure NSPI proposes to incur in excess of $250,000 must be approved by the Board pursuant to the *Public Utilities Act*. The estimated cost of this project is $18,157,609.
>
> The timeline for processing this application was temporarily suspended while the Board engaged an expert in the field of dam design, construction and decommissioning to review the matter.
>
> The Board has now retained Midgard Consulting Inc. to review the application.
> In the interim, the Board identified an issue relating to Aboriginal consultation which it wishes to bring to your attention.
>
> The recent decisions issued by the Supreme Court of Canada in *Chippewas of Thames First Nations v. Enbridge Pipeline Inc.*, 2017 SCC 41 (CanLII) and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII) have clarified the role of regulatory administrative tribunals in relation to Aboriginal consultation.
>
> As the Board understands these decisions, the Board must consider whether adequate Crown consultation with First Nations has occurred, if the concern is raised before it. This assumes both the Crown and any impacted Aboriginal group are aware of a matter before the Board that might require consultation.
>
> The record filed with the Board by NSPI, in the Tusket Dam Refurbishment project, describes the presence of significant Aboriginal archeological sites in the area surrounding where the work is to be undertaken, including sites which are currently submerged. NSPI describes certain mitigation measures relating to the protection of these sites. Other mitigation measures are set out in relation to fish ladders and the traditional gaspereau fishing season. NSPI says consultation with the Acadia First Nation and the Kwilmu'kw Maw-klusuaqn Negotiation Office was undertaken, and a Working Group established to monitor the project.
>
> The purpose of this correspondence is to bring the application to your attention, and to give you an opportunity to participate in the process, if KMKNO has any Aboriginal consultation issues which you wish the Board to consider in this matter.
>
> Please note that if you wish to participate in this matter you can become a Formal Intervenor, which status includes the right to make Information Requests and view confidential filings, provided a Confidentiality Undertaking is signed. Alternatively, you may wish to comment on the application in writing.

...

Once the Board knows whether you wish to participate in this matter, and if so, in what capacity, a timeline will be developed to complete the review of this application.

[Letter to KMKNO, September 29, 2017]

[12] Similar correspondence was forwarded to the Province.

[13] The Province filed a Notice of Intervention on October 12, 2017. On October 13, 2017, KMKNO indicated more time was required to determine whether they would participate as an intervenor.

[14] On October 13, 2017, upon receiving correspondence from the Province and KMKNO, the Board issued a Hearing Order, and Notice of Paper Hearing, with a revised timeline, and further opportunity for the filing of interventions.

[15] Following the issuance of the Hearing Order, Notices of Intervention were received from the Consumer Advocate (CA), the Industrial Group, the Acadia First Nation, the Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC) and KMKNO.

[16] Evidence, including IR responses, was filed in this matter by NS Power, Midgard, the CA, and the SBA. The Province, ANSMC and Acadia First Nation filed evidence relating to the duty to consult, but no IRs were issued to these parties.

[17] Submissions were filed by NS Power, the CA, the SBA, the Province, ANSMC, and the Acadia First Nation, with final submissions being received on May 14, 2018.

[18] The Acadia First Nation and the ANSMC submitted that the Crown had not fulfilled its duty to consult in this case. The Province disagreed. No other party took a position on the issue.

[19] As this is the first time this Board has directly addressed its jurisdiction in relation to duty to consult issues, and given the nature of the evidence and the parties'

arguments, the Board has determined this important matter should be addressed in a Preliminary Decision.

II ISSUES

[20] The following issues will be addressed in this Preliminary Decision:

1. Does the Board have the jurisdiction to consider whether the Crown had a duty to consult First Nations in this matter; and,
2. Did the Crown discharge its duty to consult with the Mi'kmaq of Nova Scotia?

[21] The Board finds it has the jurisdiction, and corresponding obligation, to address whether there was a Crown duty to consult First Nations in relation to the Project, and whether the duty has been fulfilled. The Board has determined that further Crown consultation is required. These findings will be explained in the reasons which follow.

III FACTS

[22] While there is disagreement amongst the parties as to the significance of certain actions and processes, as well as disagreement as to how to apply the relevant constitutional principles in this matter, there is no real dispute as to the factual background related to the consultation, or alleged lack thereof, which occurred.

i) The Province's Aboriginal Consultation Process

[23] Nova Scotia's Aboriginal consultation process has been developed in collaboration with the Mi'kmaq of Nova Scotia and the Federal Government. In 2007, the *Mi'kmaq-Nova Scotia-Canada Consultation Terms of Reference* (TOR) was instituted for

the purpose of a three-year pilot project. After evaluating the results of the pilot project, the TOR was revised, and signed by all the parties in 2010.

[24] The TOR sets out how Aboriginal consultation will take place, and with whom. Originally, all thirteen Mi'kmaq First Nations were part of the TOR process. In 2013, Sipekne'katik First Nation opted out of this process. Millbrook First Nation followed suit in 2016.

[25] The Province has developed a policy document to assist in implementing the TOR, which is set out in the *Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia* (*Policy*).

[26] In its evidence, the Province describes the main elements of the *Policy*:

> Key elements of the Policy include clear principles for consultation, the legal and policy considerations for consultation, the clarification of roles and responsibilities of all participants in consultation, and a full description of Nova Scotia's six steps of consultation.
>
> 1. Consultation Screening
> 2. Initiate Consultation
> 3. Identification of Mi'kmaw Concerns
> 4. Accommodation
> 5. Decision
> 6. Monitoring
>
> [Exhibit N-7, p. 1]

[27] The Province advised the Board that, in the absence of any formal agreements, "…both Sipekne'katik and Millbrook First Nations have in the interim decided to follow a consultation process that is similar to…" the *Policy*. [Exhibit N-7, p. 2]

[28] As industrial projects, and the permits and approvals required to undertake such projects, may impact on the Crown's duty to consult, the Province, in collaboration with the Mi'kmaq of Nova Scotia and industry, has developed the *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* (*Proponents' Guide*).

[29] The Province described the *Proponents' Guide* "...as a means of supporting proponent engagement and better Crown consultation...". The Province goes on to state:

> The Proponents' Guide provides practical assistance to proponents considering a development or other activities that may impact Mi'kmaq interests in Nova Scotia. This assistance includes six steps proponents should follow when engaging the Mi'kmaq of Nova Scotia, an overview on Benefit Agreements, roles and responsibilities and key definitions.
>
> The six steps outlined in the Proponents' guide are:
>
> 1. Notify Mi'kmaq Early in the Development Process
> 2. Provide as Much Information as Possible
> 3. Meet with the Mi'kmaq Community(s)
> 4. Complete a Mi'kmaq Ecological Knowledge Study (MEKS)
> 5. Address Potential Project-Specific Impacts
> 6. Document the Engagement Process
>
> [Exhibit N-7, p. 2]

ii) NS Power Engagement

[30] The Tusket Hydro System is located in an area of known archaeological significance in relation to the Mi'kmaq of Nova Scotia. As well, there is an existing First Nations gaspereau fishery on the Tusket River.

[31] As construction activities, including, in particular, the proposed dewatering of Lake Vaughan, will have an impact on known and potential Mi'kmaw archaeological sites, and the Aboriginal fishery, NS Power sought to engage the Mi'kmaq of Nova Scotia.

[32] NS Power initiated the engagement process in 2015. Throughout 2015-2016, NS Power indicated "...discussions were focused on the archaeological reports conducted to understand the culturally significant areas within the footprint of construction" [Exhibit N-3 – IR-18 – Attachment 4, p. 8].

[33] A Working Group was established in February of 2017, with representatives from Acadia First Nation, KMKNO and NS Power.

[34] NS Power summarized its engagement process with the Mi'kmaq of Nova Scotia as follows:

6.3 First Nations Engagement

As indicated in the 2012 and 2013 archaeological resource impact assessments, the area surrounding the Tusket Main Dam structure has been occupied by the Mi'kmaq and their ancestors. Therefore, the area is of significance to the local First Nations communities.
As previously indicated, the environmental permitting process requires First Nations consultation and there are different levels of consultation required based on the significance of the archeological findings. In order to streamline the consultation process and establish ongoing relationships with local First Nations communities, NS Power decided to engage with the communities directly. This involved the formation of an official working group with representatives from the NS Power project team, the KMKNO, and representatives from the Acadia First Nation. The goals of the working group are to identify areas of concern to the First Nations communities, resolve the identified concerns, solicit information from First Nation elders regarding the project site, establish protocols in the event that archaeological resources are identified during construction, and communicate project information to the larger First Nation community. The engagement for the Project has included a review of all archeological impact assessment reports, test results, a review of the detailed design, and discussions on areas of concern with possible methods of resolution. It has also included a community open house at the Acadia First Nation Entertainment Centre in Arcadia, NS and a site visit to the Tusket Main Dam site. Please refer to **Figure 17** for a summary of the key concerns and resolutions that were addressed during each of the working group meetings.

Figure 17: First Nations Concerns

Concern	Resolution
Protection of First Nations archaeological resources	Water elevation of Lake Vaughan will only be reduced to its minimum approved operating level during construction. A professional archaeologist will be on site monitoring excavation activities within potentially sensitive areas. A shoreline reconnaissance and collection of any artifacts around Lake Vaughan will be completed by professional archaeologists if the water level is dropped to its low operating level.
Protection of AlDl-18	AlDl-18 is currently submerged under Lake Vaughan. Construction activities will be completed without exposing AlDl-18. However, the existing safety booms upstream of the Tusket Main Dam will be extended to contain AlDl-18 and not allow public boat traffic to travel in that area and disturb AlDl-18.
Fish passage	The construction strategy of constructing the main dam structure over two construction seasons will allow the first half of the dam to be constructed with no impact to the operation of the existing Main Dam fish ladder. In the second year the fish ladder will only be dewatered after the completion of the primary Gaspereau fish run and diversion tactics will be implemented to direct upstream fishes towards the Powerhouse fish ladder. Additionally, the upstream and downstream fish passage at the Tusket Powerhouse will remain in operation throughout the project.

Concern	Resolution
Modifications to the Tusket Main Dam Fish Ladder	The baffles and the water flows within the fish ladder will not be altered. Only the side walls of the fish ladder will be extended vertically to the new ground elevation. The effectiveness of the fish ladder will be monitored using cameras after the dam construction is completed to ensure its continued effective operation.
Construction during Gaspereau fishing season	NS Power will not be completing any in-stream construction activities during the Gaspereau fishing season. The NSE watercourse alteration permit defines when in-stream construction activities can occur. There will be no in-stream blasting or alteration of the river bed outside of the construction footprint.
Fish habitat compensation within the local area	Under the DFO Fisheries Act Authorization a HADD will be required. NS Power was unaware of anyone locally performing projects that would meet the HADD requirements and made alternate arrangements. However, local content is always a consideration and there may be opportunities in the future.

> NS Power remains committed to balance the needs and concerns of Mi'kmaq of Nova Scotia in conjunction with regulatory and business requirements in order to execute successful capital work orders to the benefit of all customers.
>
> [Exhibit N-1, pp. 42-44]

[35] It is apparent, from the responses to Board IRs, the only option discussed with the Mi'kmaw representatives and communities during the engagement process was the proposed dam refurbishment project submitted to the Board.

[36] NS Power advised the Board that while it has maintained documentation regarding First Nations engagement, it cannot be disclosed without the permission of the First Nations involved in the process. [Exhibit N-2, IR-13(c)]

[37] The Board notes the ANSMC and Acadia First Nation were complimentary of NS Power's efforts to recognize and address Mi'kmaq concerns:

> We would like to be clear that in this project, relations with NSPI have, on the whole, gone smoothly. We commend NSPI for its commitment to recognizing our interests and concerns and their respectful treatment of our heritage and our culture. Our relationship-building with NSPI on this project and others is substantive and we urge the Board to encourage NSPI to continue to work with us in the future as they are at the present. We believe their corporate philosophy of respectful relationship building does indeed promote reconciliation and bode well for a future of good relations.
>
> [Exhibit N-20, p. 30]

[38] The Board commends NS Power for its engagement efforts.

[39] This said, the ANSMC and Acadia First Nation take the position that NS Power's efforts were not part of a formally delegated Crown consultation process pursuant to the TOR, but an exercise in relationship building.

iii) Crown Consultation Record

[40] As part of Exhibit N-7, the Province submitted an Aboriginal Consultation Record, which includes its communications with the Mi'kmaq of Nova Scotia in relation to the Tusket Main Dam Refurbishment Project. Many of the same documents were included in Exhibit N-10, which is a Book of Documents jointly submitted by KMKNO and Acadia First Nation.

[41] There is no disagreement as to the extent and content of the communications discussed in more detail below. There is disagreement between the Province and ANSMC/Acadia First Nation as to whether these communications, together with NS Power's engagement, fulfill the Crown's constitutional duty to consult.

[42] On December 22, 2016, the Province wrote to KMKNO. This correspondence described the nature of the proposed Tusket Main Dam Refurbishment Project, the construction activities required to complete the project, mitigation measures in relation to water management, erosion and sediment control, the dewatering process, including in relation to an existing fish ladder, and the return of areas disturbed by machinery to pre-construction conditions.

[43] The Province advised that NS Power would require a watercourse alteration permit from NSE. An application for this permit had been received by NSE, and a condensed version was attached to the December 22, 2016, correspondence.

[44] The Province also advised that because of the size of the Project's footprint, the federal Department of Fisheries and Oceans (DFO) had been notified of the application. The Province advised it was likely an authorization pursuant to the federal *Fisheries Act* would be required.

[45] The Province further advised "...NSE, DFO, and NSPI will discuss any recommendations or requirements prepared by DFO regarding authorization for the project when this information becomes available."

[46] Finally, it was suggested additional "authorizations from NSTIR may be required as part of replacing the bridge downstream of the dam structure, and will be obtained by NSPI prior to completing the works."

[47] The December 22, 2016, letter addressed potential Aboriginal consultation as follows:

> NSE will lead aboriginal consultation at the provincial level and coordinate the process with any departments (provincial or federal) that will be involved. We anticipate that the project will involve the following departments: DFO, NSTIR. Note that the coordination of Aboriginal consultation is subject to change as the approval process evolves, in which case the Assembly will be kept informed.
>
> Please advise us whether you are interested in consultation on this matter. Should you be interested, we would like to hear from the Assembly about any concerns you may have, including the details of any asserted Aboriginal or Treaty rights that could be adversely impacted by this project. We require a response outlining the concerns and interests of Assembly with this project by January 31, 2017. [Emphasis added]
>
> [Exhibit N-7, Schedule D]

[48] On the same date, the Province wrote to the Chiefs and Councils of the Sipekne'katik First Nation and the Millbrook First Nation. These letters were in substantially the same form as the one addressed to KMKNO. The Board notes Millbrook First Nation did not respond to this correspondence. No further communications between the Province and Millbrook First Nation appear on the record.

[49] On January 23, 2017, the Chief of the Sipekne'katik First Nation wrote to the Province acknowledging receipt of the December 22, 2016, correspondence. Chief Michael P. Sack advised as follows:

> Within the attachment provided, you advise that NSPI has engaged KMKNO as well as the closest Mi'kmaq communities of Acadia First Nation and Bear River First Nation with engagement continuing with the development of a working group with regularly scheduled meetings to address issues and concerns related to potential impact to those communities.
>
> Please provide a copy of each (3) archaeological assessment which were completed in 2012 and 2013.
>
> At the time when the Department of Fisheries and Oceans (DFO) has completed its review of the application and recommendations are prepared, a copy of these recommendations is requested.
>
> [Exhibit N-7, Schedule G]

[50] On January 25, 2017, Twila Gaudet, LL.B., Director of Consultation with KMKNO, wrote to the Province. Ms. Gaudet stated:

> This will advise we have received your letter dated December 22, 2016 and that we wish to proceed with consultation under the *Terms of Reference Mi'kmaq-Nova Scotia-Canada Consultation Process* as ratified on August 31, 2010 on the above noted.
>
> We request a copy of any reports relevant to the Tusket Main Dam Refurbishment. KMKNO wishes to conduct an internal analysis to determine any potential impacts to Mi'kmaq Right and Title, as well as, any other concerns pertinent to the Mi'kmaq of Nova Scotia.
>
> It is requested that all information and correspondence be forwarded to KMKNO to facilitate the flow of the process and communication. I will be the contact person for KMKNO and accordingly, I will coordinate further consultation with regards to this project.
>
> We look forward to consulting with you on this matter. [Emphasis added]
>
> [Exhibit N-7, Schedule H]

[51] By email dated February 3, 2017, which attached NS Power's full application, as submitted to NSE, the Province advised Ms. Gaudet that DFO would require NS Power to obtain a permit pursuant to s. 35(2)(b) of the *Fisheries Act* because of the potential for serious harm to fish occasioned by "...permanently destroying approximately 1600 m^2 of freshwater habitat in the Tusket River...".

[52] The February 3, 2017, email went on to state:

> As the project is a multi-year project, there are some design details that are still in a state of flux – I will send through correspondence and supporting information for any substantive

> changes (e.g., changes that would require additional environmental considerations/mitigations) as the project progresses.
>
> Cheers Twila and please let me know of any questions/comments/concerns!
>
> [Exhibit N-7, Schedule I]

[53] On February 15, the Province emailed Ms. Gaudet asking for confirmation she had received the February 3, 2017, email, and again asked if KMKNO had any questions, comments or concerns.

[54] On February 22, 2017, the Province wrote to the Sipekne'katik First Nation, enclosing the requested archaeological assessments, which totaled 265 pages, and summarizing DFO's decision that NSPI would require a permit under the *Fisheries Act.*

[55] The February 22, 2017, letter concluded with the following:

> The watercourse alteration application was submitted by NSPI on November 30th, 2016 and NSE's review of the application is nearing completion, subject to continued consultation with Sipekne'katik First Nation and the Assembly of Nova Scotia Mi'kmaq Chiefs. Please be advised that the Proponent has tentatively scheduled project development work for the spring season of 2017 and would like to proceed. We require a response outlining the concerns and interests of Sipekne'katik First Nation with this project/policy by April 1, 2017.
>
> [Exhibit N-7, Schedule L]

[56] On March 21, 2017, the Province wrote to KMKNO outlining two changes to the replacement bridge contemplated by the Project:

- A change to the construction schedule such that this Project would commence in 2017 instead of 2018; and
- A slight change in the orientation of the bridge.

[57] The Province again requested KMKNO provide any questions, concerns or comments.

[58] On the same date, an email outlining the same information was sent to the Sipekne'katik First Nation. No further communications between the Province and Sipekne'katik First Nation appear in the record.

[59] On March 31, 2017, the Province wrote to KMKNO, stating the following:

> As part of continued consultation on the proposed Tusket Main Dam refurbishment project, Nova Scotia Environment (NSE) would like to highlight the fact that we have not received any comment from the Assembly related to the information provided in our email dated February 3, 2017. We have now passed the 30 day window since this email was provided (current date: March 31, 2017), and are looking for any feedback prior to issuing the approval.
>
> Further to the project update provided on February 3rd, 2017 by email, additional information related to minor changes to the project schedule were communicated through an email sent March 21st, 2017. The changes summarized in the March 21st, 2017 email relate to the timing of the bridge replacement and a proposed change in alignment. As well, the changes highlighted are now proposed to be completed in the 2017 construction season.
>
> Please note, if we do not receive any comments on this project by April 14th, 2017, NSE will proceed with the approval process.
>
> [Exhibit N-7, Schedule R]

[60] This correspondence was also sent by email on April 3, 2017.

[61] On May 4, 2017, the Province advised it would be issuing the watercourse alteration permit, which was ultimately issued on May 15, 2017.

[62] No further communications between the Province and KMKNO occurred until October 25, 2017, when Ms. Gaudet emailed the Province requesting information on the status of the watercourse alteration application before NSE and the DFO authorization under the *Fisheries Act*.

[63] On November 3, 2017, the Province advised KMKNO that both the watercourse application before NSE, and the authorization required from DFO, had been issued.

IV ANALYSIS AND FINDINGS

ISSUE 1: Does the Board have the jurisdiction to consider whether the Crown had a duty to consult First Nations in this matter?

a) General Principles

[64] Identifying the Board's role in the Aboriginal consultation process is a question of statutory interpretation. The object is to determine what role, if any, has been assigned to the Board by the Legislature. As the Board is a statutory tribunal, its jurisdiction is prescribed by the legislation which created and empowers it, together with any powers necessarily incidental thereto.

[65] The general principles of law relating to the roles of statutory tribunals in Aboriginal consultation are discussed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribunal Council*, [2010] 2 S.C.R. 650 (*Carrier Sekani)*.

[66] Chief Justice McLachlin set out various considerations:

> [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 (CanLII), [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. [Emphasis added]

[67] The Supreme Court of Canada went on to hold that the British Columbia Utilities Commission had the jurisdiction to consider whether adequate consultation with concerned Aboriginal peoples had taken place, but not the duty to engage in the consultation process itself.

[68] The key factors in support of its conclusion on the first issue are set out in *Carrier Sekani*:

> [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 (CanLII), [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). [Emphasis added]

[69] Despite the findings in *Carrier Sekani*, an unresolved issue arose relating to a tribunal's role where the Crown was neither a proponent nor a party to a proceeding. This issue was addressed in decisions of the Federal Court of Appeal such as *Standing Buffalo Dakota v. Enbridge Pipelines Inc.*, 2009 FCA 308, and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* [2015] F.C.J. No. 222. The Board notes that *Standing Buffalo* was decided before *Carrier Sekani*, but leave to appeal to the Supreme Court of Canada was denied, without reasons, after *Carrier Sekani* was decided.

[70] In *Chippewas*, the Federal Court of Appeal explained its rationale for distinguishing *Carrier Sekani:*

> [38] In *Carrier Sekani*, the party seeking an approval from BCUC was the Crown itself. In contrast, the Crown did not participate in the approval proceedings before the Board in *Standing Buffalo*. Instead, the party seeking approval from the Board was Enbridge, a private-sector corporation that was unrelated to the Crown.
>
> [39] The non-participation of the Crown in the hearing process in *Standing Buffalo* is significant.
>
> [40] While it is clear that the Board has the power to decide questions of law, it is important to note that the *Haida* Determinations also include factual findings. As stated by the Supreme Court in *Haida Nation*, at paragraph 61:
>
> > [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. ...
>
> Similarly the question of whether an existing *Haida* duty has been met is largely factual.
>
> [41] Because the Crown participated in the proceedings in *Carrier Sekani*, BCUC was in a position to make the factual findings required by the *Haida* Determinations in the normal adversarial context. If the Board had decided to make the Haida Determinations in *Standing Buffalo*, it would have had to make the requisite factual findings outside of that adversarial context.
>
> [42] Moreover, it is noteworthy that the implied power of a tribunal to undertake the *Haida* Determinations, which is stipulated in paragraph 69 of *Carrier Sekani*, refers to "constitutional issues that are properly before" the tribunal. Because the Crown was not a party to the Project approval proceedings, it is not clear that the *Haida D*eterminations were "properly before" the Board in these proceedings.
>
> [[2015] FCJ No. 222, paras. 38-47]

[71] *Chippewas* was appealed to the Supreme Court of Canada. On July 26, 2017, the Supreme Court of Canada released its decision in the *Chippewas* matter [see 2017 SCC 41], along with a decision in a companion case [see *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40].

[72] While one of the primary issues addressed in *Chippewas* and *Clyde River* relates to whether the process followed by the National Energy Board (NEB) fulfilled the Crown's duty to consult, the issue of the Crown not being a party to the proceedings before the NEB was also addressed.

[73] In *Clyde River*, the Supreme Court of Canada held:

> [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 decisions respecting such testing as was proposed here, clearly constitutes Crown action.

[74] In *Chippewas*, the proposition was restated:

> [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.

[75] No party argued the Board is empowered to conduct Aboriginal consultation as part of its mandate. The relevant legislation does not provide any statutory authority in this regard, and the Crown has not sought to delegate this role to the Board. The Board therefore plays no role in actually conducting Aboriginal consultation in this matter. That issue need not be discussed further.

[76] The issue is whether under the statutory scheme applicable to NS Power's application before the Board, the principles discussed above provide the Board with the

jurisdiction, and the accompanying obligation, to address whether adequate Crown consultation occurred in this case.

b) Application of legal principles to the matter before the Board

[77] NS Power applied for Board approval of a capital work order for its Tusket Main Dam Refurbishment Project pursuant to s. 35 of the *Public Utilities Act* (*PUA*), which states:

> **Approval of improvement over $250,000**
> **35** No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

[78] The Board was created pursuant to the *Utility and Review Board Act* (*URB Act*). Its overarching jurisdiction is set out in s. 22 of the *URB Act*:

> **22 (1)** The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact. [Emphasis added]

[79] With respect to the Application, the Province argued that unlike the *Clyde River* and *Chippewas* matters, the Board itself will not authorize a specific project activity that could have a physical or strategic, high level impact on asserted Aboriginal or treaty rights.

[80] It is the Province's position that s. 35 of the *PUA* only directs the Board to perform a cost-benefit analysis of the proposed project to ensure the prudency of the required capital expenditure.

[81] The Province's argument is summarized in the following excerpt:

> 18. Required approval of the estimated costs for a proposed project or activity is altogether a different exercise to approving the actual or specific activities themselves (which has already been completed in other forums).

19. While the Board may, in appropriate circumstances, have the legal powers to consider the adequacy of consultation directly related to a specific project approval it may issue within its jurisdiction, it does not enjoy the same powers as the Supreme Court to "judicially review" and potentially "void" unrelated prior approvals within this current process.

20. The Province submits that the role of the Board in this proceeding is closer to the situation in *Rio Tinto Alcan*[6] where the BC Utilities Commission accepted that it had the power to consider the adequacy of consultation in an appropriate case, but reasonably determined that approval of an Energy Purchase Agreement itself did not trigger a duty to consult, as it could not adversely affect any aboriginal or treaty interest.

21. To be clear, the Province is not arguing that the Board may never be required to assess the adequacy of Crown consultation in other types of proceedings, as clarified by the Supreme Court of Canada, where the Board may be acting as a final decision-maker in determining whether to issue actual project approvals under its legal powers and jurisdiction that could itself impact an aboriginal or treaty right.

22. However, in this type of proceeding, the role and purely economic nature of the specific decision to be made by the Board can have no independent potential impact on the aboriginal or treaty rights asserted by the KMKNO.

23. While it may be argued that the Project cannot proceed at this stage until the Board gives approval for estimated costs pursuant to s.35 of the Act, it does not mean that the Board's decision in this proceeding authorizes the actual work and project activities to proceed (which is the "conduct" from which any potential impacts to asserted aboriginal or treaty rights may arise).

24. Approval of costs greater than $250,000.00 required by s.35 of the Act (flowing from an analysis of whether the estimated costs are prudent for the benefit of ratepayers) does not equal prior or subsequent "project approvals" required from another regulator, and independently cannot impact aboriginal or treaty rights absent further action or conduct approved in other forums.

25. As such, the various concerns raised by the KMKNO as "failures to consult" in relation to now-existing permits or approvals, cannot be "judicially reviewed" or assessed in this forum or proceeding.

26. What is at issue for the Board here is the prudency of the costs associated with various components of the Project sought by NSPI, which include the costs of engagement and mitigation of Mi'kmaq concerns that have already been properly identified in the prior regulatory process. [Emphasis in original]

[Province's Final Submissions, May 7, 2018]

[82] The ANSMC and Acadia First Nation response to the Province's argument clarifies that its suggested remedy to the alleged failure of the Crown in its duty to consult is that the Application be suspended or delayed; the matter be remitted for further consultation; and, that the Board remain seized with jurisdiction in this matter and take no further action in relation to the Application until it is satisfied adequate consultation has taken place.

[83] After citing s. 22 of the *URB Act*, the ANSMC and Acadia First Nation said:

> In *Clyde River*, the Court stated:
>
> > [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*, 2017 SCC 40 (CanLII) 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).
>
> In the companion case, *Chippewas of the Thames*, the Court built on its decision in *Clyde River*, stating
>
> > [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).
>
> Contrary to the assertion in paragraph 21 of the Province's Final Submission, the UARB *is* the final decision maker in relation to the Tusket Dam refurbishment project. Without Board approval a project may not proceed, despite any other permits or Ministerial Authorizations the project may have received or may receive in future.
>
> Therefore, we submit, the Board does have a constitutionally mandated duty to determine if the Crown has fulfilled its duty to consult. "The role and purely economic nature of the specific decision to be made by the Board" does, we submit, have a very real potential impact on Mi'kmaw rights and title. Unlike the Energy Purchase Agreement (EPA) at issue in *Rio Tinto* where it was determined that the EPA would not affect water levels in the Nechako River, the work on the Tusket Dam proposed by NSPI will affect the physical environment of the Tusket River watershed.
>
> [ANSMC and Acadia First Nation Final Submissions, May 14, 2018]

[84] The Board has the power to consider and determine questions of law. There are no statutory provisions in the *PUA*, or the *URB Act*, which demonstrably indicate that the Legislature intended to withdraw the Board's jurisdiction to consider and determine constitutional issues. The Board must therefore generally ensure its decisions comply with s. 35 of the *Constitution Act, 1982*, if the issue is properly before it. This is

the basic premise of the *Carrier Sekani* case, which was confirmed in *Chippewas* and *Clyde River.*

[85] In *Standing Buffalo* and *Chippewas*, the Federal Court of Appeal essentially determined a s. 35 constitutional issue is not properly before a tribunal where the Crown is neither a proponent nor a party. The Supreme Court of Canada decisions in *Chippewas* and *Clyde River* effectively overrule the Federal Court of Appeal's decisions.

[86] As well, the Province participated as a party in this proceeding, and did not limit its arguments, or its evidence, to the issue of whether or not the Board had the jurisdiction to consider the adequacy of the Crown's duty to consult. It presented evidence and submissions on the adequacy of Crown consultation as well. However, as the Board invited participation in this matter, based on its preliminary interpretation of the *Clyde River* and *Chippewas* decisions, without the benefit of adversarial legal argument, such participation does not determine the issue.

[87] While it is true that the Board's role in assessing an application pursuant to s. 35 of the *PUA* is primarily one of an economic regulator, reviewing a cost-benefit analysis, and assessing the economic prudency of a particular project, the Board does not only approve the capital expenditure, but also approves the project itself.

[88] The comprehensive role in utility regulation of the Board is expressed in the often quoted *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.,* 1976 CanLII 1234 (NS CA):

> The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined — that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects — that a public utility give adequate service and charge only reasonable and just rates.

The service requirement is expressed in s. 48, as follows:

> 48. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

[89] The service requirement is now set out in s. 52 of the *PUA*, and there are now performance standards enacted in relation to service as well.

[90] There is no language in s. 35 of the *PUA* which specifically directs the Board to consider the public interest, as was the case in the legislative language discussed in *Carrier Sekani*. This said, the concepts of adequacy and safety of service, along with just and reasonable service requirements, expressed in s. 52 of the *PUA*, are examples of public interest considerations the Board can consider.

[91] That factors other than a pure economic cost-benefit and prudency analysis are considered by the Board is shown in the extensive record in this matter.

[92] Evidence and expert analysis have been provided to the Board on whether the project is needed for safety reasons in the first place, in order to meet Canadian Dam Safety Guidelines. A number of potential scenarios, completely different than those considered in the NSE and DFO permit applications, have been discussed and analysed in the evidence.

[93] The Board has the jurisdiction to consider all aspects of the proposed Project, to determine whether NS Power's facilities are safe and adequate, and whether alternative scenarios are available.

[94] With respect to the Province's argument that the Board is essentially not a final decision maker, as the term is used in *Chippewas* and *Clyde River*, the Board does not agree.

[95] It is true that, in this Application, the Board does not have the same extensive approval authority as the NEB, and that it plays no role in the issuance of

permits under the *Fisheries Act*, the *Environment Act*, or the *Special Places Protection Act*. In this regard, the Board agrees with the Crown that it does not have the powers of a court to void permits and authorizations which have already been issued pursuant to the foregoing legislation.

[96] Nevertheless, absent Board approval for the Tusket Main Dam Refurbishment Project, it cannot be inferred that NS Power will proceed with construction, even though it already has the required provincial and federal approvals in hand.

[97] A literal reading of s. 35 of the *PUA* indicates NS Power cannot proceed without Board approval. This is the position advanced by the ANSMC and Acadia First Nation. The situation may be slightly more nuanced, in that one of the potential remedies the Board has utilized, on limited occasions in the past, is to exclude expenditures for unapproved projects from rate base.

[98] However, a Board refusal of this Application, for a project of this magnitude, with ongoing financial obligations for operational, safety and maintenance requirements, for an asset designed to directly produce electricity for distribution to the public, would almost certainly result in the project not proceeding.

[99] Therefore, prior Crown approvals aside, the Board is effectively the final decision maker for the Project in the circumstances of this case.

[100] Finally, the Board agrees with the ANSMC and Acadia First Nation that the nature of this requested approval is fundamentally different than the one discussed in *Carrier Sekani*. There, although the Supreme Court of Canada found that the British Columbia regulator had the jurisdiction to consider the duty to consult issue, no consultation was required, because it was considering the approval of power purchase

agreements for existing hydro facilities. Approving commercial agreements which did not alter the footprint of the hydro facilities did not engage a duty to consult.

[101] In this matter, the footprint of the existing dam is being altered, with an impact on water flows, and the potential exposure, or disturbance, by virtue of dewatering and construction activities, of pre-contact Mi'kmaw archeological artifacts and a continuing Aboriginal fishery. Therefore, Board approval does have the potential to impact asserted Aboriginal or treaty rights.

[102] The Board notes that while there may well be differences in the extent to which public policy considerations may be considered by a particular tribunal, or the extent to which a particular Board's own decision may be the Crown action which triggers a duty to consult, the basic premise found in the jurisprudence is that where a tribunal has the power to interpret questions of law, absent a clear expression to the contrary, it should consider and apply the *Constitution Act, 1982.*

[103] Based on the foregoing considerations, in the context of this Application, the Board finds it has the jurisdiction to consider duty to consult issues arising pursuant to s. 35(1) of the *Constitution Act, 1982*, and the corresponding duty to make decisions in conformity with constitutional requirements. This means it must assess the adequacy of the Crown's consultation in relation to the Tusket Main Dam Refurbishment Project.

ISSUE 2: Did the Crown discharge its duty to consult with the Mi'kmaq of Nova Scotia?

a) General Principles

[104] *Clyde River* provides a concise summary of the conceptual underpinnings of the duty to consult:

> [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 (CanLII), [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41 (CanLII), [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 (CanLII), [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).

[105] The scope of the duty to consult is addressed in some detail in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. As the *Haida Nation* principles have formed the basis for the subsequent caselaw relating to this issue, it is helpful to set out a portion of this decision:

> 39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.
>
> ...
>
> 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 BCCA 470 (CanLII), [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), 2003 BCSC 1422 (CanLII), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

> 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
>
> ...
>
> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".
>
> 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take. [Emphasis added]

[106] While certain procedural aspects of the Crown's duty to consult may be delegated to third party proponents, such as NS Power, "...the ultimate legal responsibility

for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated" [see *Haida Nation* at para. 53].

[107] The ANSMC and Acadia First Nation, citing *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, say that "reasonableness, not perfection, is required, of the Crown in its efforts to consult with and accommodate Aboriginal peoples when it makes decisions potentially affecting claimed Aboriginal rights" (see para. 252). The Province agrees with this proposition.

b) Application of legal principles to the matter before the Board

[108] The TOR, *Policy* and *Proponents' Guide* were developed as a response to the jurisprudence related to the Crown's duty to consult Aboriginal peoples derived from s. 35(1) of the *Constitution Act, 1982*.

[109] In this matter, the Province initiated the TOR consultation process by virtue of its December 22, 2016, correspondence. As the purpose of the TOR is to allow for "consultation on the record and with prejudice with one or more Mi'kmaq Bands respecting established or asserted Mi'kmaq Aboriginal or treaty rights…", it is apparent the Province determined that NS Power's Tusket Main Dam Refurbishment Project attracted a duty to consult.

[110] The Province acknowledges this obligation in its February 14, 2018 submission:

> 18. As noted by the KMKNO at page 2 of its Notice of Intervention, the requirement for NSPI to obtain the Watercourse Alteration Permit from NSE as a component of the proposed Project triggered the Crown duty to consult, considering the potential impacts on Mi'kmaq archaeological resources in proximity to the Tusket Main Dam and other environmental and fishery-related considerations.
>
> [Exhibit N-18, p. 4]

[111] There is therefore no dispute that a duty to consult arose in relation to the Project. No party to the proceeding has asserted otherwise.

[112] The Province argued it followed the agreed upon consultation process set out in the TOR and *Policy*. It says it initiated the formal TOR process in accordance with the *Policy*, provided project information, and responded to any queries.

[113] The Province submitted that none of the notified parties raised any treaty or Aboriginal rights concerns, despite numerous requests; including the March 31, 2017, letter to KMKNO, which indicated the Province intended to process the Watercourse Alteration Permit if no response was received by April 14, 2017. The permit was ultimately issued on May 15, 2017.

[114] The Province further submitted it was informed of the proponent engagement process by NS Power, which included the formation of a working group, and the hiring of an observer from Acadia First Nation to monitor the Project site and keep the community informed. A summary of this information was included in NS Power's application to NSE, which summary was included in NS Power's application materials provided by NSE to KMKNO.

[115] The Province's position is summarized as follows:

> 28. Perfection is not required. What is required are reasonable steps and collaboration by all parties involved. A holistic review of all the evidence filed that touches on the issue of consultation, filed to support the costs that NSPI says it is required to incur should the Project proceed, leads to the conclusion that it was reasonable for the Province to understand that the KMKNO was satisfied with the overall process of consultation and perhaps most importantly proponent engagement, and that any concerns identified in consultation with the KMKNO regarding potential impacts of the Project were being satisfactorily identified and addressed (e.g. archaeological resources).
>
> [Province's Final Submission, May 7, 2018, p. 7]

[116] The ANSMC and Acadia First Nation submitted that no adequate consultation has taken place. They said that the Province did not follow the TOR process, as expanded upon by the Guidelines.

[117] While discussed in detail in its February 14, 2018, submission, a summary of the alleged failures is set out in the final submission of the ANSMC and Acadia First Nation, dated May 14, 2018:

> In its submission of 14 February 2018, the Crown states "Provincial Crown consultation on the Project has followed the agreed consultation process set out in the [*Nova Scotia Policy & Guidelines: Consultation with the Mi'kmaq of Nova Scotia*]." We disagree. As outlined in our 14 February 2018 submission, the Crown has failed to follow its own consultation policy by:
>
> - Failing to inform the proponent (and the Mi'kmaq) in writing of its delegated consultation duties;
> - Failing to properly coordinate with Canada on the issuance of a *Fisheries Act* Ministerial authorization and ensuring that as the lead on the project that both Crowns properly fulfilled their respective duties to consult;
> - Failing to properly screen the Tusket Dam refurbishment project to assess the depth of consultation required for the project and to discuss that assessment with the Mi'kmaq;
> - Failing to properly oversee any delegated consultation (which we dispute) undertaken on its behalf by NSPI;
> - Failing to ensure that the Mi'kmaw Nation had and has sufficient resources to respond to the Crown in a timely manner and insisting upon the thirty (30) day suggested "typical" timeline for a response from the Mi'kmaw Nation regarding potential impacts on asserted rights and title;
> - Failing entirely to consult prior to the issuance of Heritage Research Permits; and,
> - Failing to properly document the consultation process (which we expressly deny occurred) and ensure both the Crown and NSPI properly communicated with each other and the Mi'kmaq and to ensure adequate accommodation of Mi'kmaw rights and title.
>
> [ANSMC and Acadia First Nation's Final Submission, May 14, 2017, p. 7]

[118] The ANSMC and Acadia First Nation place particular emphasis on the failure to properly delegate any procedural aspects of consultation to NS Power, or to properly oversee this engagement process. They say NS Power was never advised in writing of what delegated duties it was to undertake. They further say the ANSMC and Acadia First Nation were unaware the Province was relying on their relationship building as if NS Power was a component of the Crown's consultation.

[119] With respect to the failure to respond to the Province's communications requesting Aboriginal rights and concerns be expressed, the ANSMC and Acadia First Nation raise the following concerns:

- Until the March 31, 2017, correspondence, providing notice the Application would be processed if no comments were received by April 14, 2017, there was no indication by the Province that there was a looming deadline;
- The thirty day deadline set out in the *Policy* is flexible, and a reasonable timeline must take account of First Nations' ability to respond;
- In fiscal 2016-2017, KMKNO staff, consisting of three full-time employees, one 80% time employee, and three other employees who could offer assistance, handled 315 new consultation requests, with a total of 451 active consultations for the fiscal year;
- Limited staffing and resources simply did not allow for a response within the stipulated time.

[120] The Board notes s. 12(a) of the TOR directs the Province to "...provide notification in writing to the Chief and Council of all thirteen (13) Mi'kmaq Bands and the Assembly..." when it wishes to initiate the formal process. In this case, the evidence shows the original December 22, 2016, notification was only sent to KMKNO (which arguably is also notice to the ANSMC, as the two entities share an address), and the two First Nations who no longer participate in the TOR process.

[121] While arguably this could have had some impact on any delay in responding to the consultation request, as no party raised this issue in argument, it may be that the practice has developed otherwise. In any event, the KMKNO's response of January 25,

2017, made it clear that for those First Nations under its representation umbrella, comments should flow to Ms. Gaudet.

[122] The Province submits that it would have been a relatively simple matter for the KMKNO to express its concerns with respect to timing and process in a letter or email for consideration by the Crown. However, absent such contact, the Province could not respond to concerns of which it was unaware.

[123] In order to determine whether adequate consultation has taken place, the Board would ordinarily have to assess the nature of the Aboriginal or treaty rights which will potentially be impacted, and if they are asserted rights, the strength of the claim, together with the extent of any potential adverse impact.

[124] In this case, the main areas addressed in the evidence and submissions relate to the impact on an existing Aboriginal fishery on the Tusket River, and the potential disturbance, and exposure to looting, of pre-contact archaeological sites.

[125] The Aboriginal fishery is an existing one, and it is clear that dewatering and fish ladder alterations, together with construction itself, could have significant impacts on this fishery.

[126] The number of known and potential archaeological sites are extensive. It is clear that as part of the consultation arising pursuant to Step 1 of the *Policy*, the possible disturbance of recognized historic or cultural sites forms part of an assessment relating to the level of consultation required.

[127] These cultural and historic sites can be tied, as gleaned from the ANSMC and Acadia First Nation submissions, to asserted rights of self-governance, ownership by the Mi'kmaq people of their own material culture and archaeological heritage, and

potential land title claims. The ANSMC and Acadia First Nation's position is that Nova Scotia lands were not ceded to the Province or Canada, by treaty or otherwise, as was the case with many First Nations who entered into more modern treaties. Evidence of occupation and use, and the nature of this occupation and use, could be valuable.

[128] The Board notes that there was no direct analysis in the parties' submissions with respect to the level of consultation required. In fact, this is one of the concerns raised by the ANSMC and Acadia First Nation in relation to the Province's initial screening, and subsequent consultation letter of December 22, 2016.

[129] The situation is not dissimilar to *Chippewas*, where neither the NEB, nor the Federal Court of Appeal, discussed the degree of consultation required. In that case, the Supreme Court of Canada still was able to address the issues holding the Crown's obligation had been met, even assuming a deep level of consultation.

[130] Given the potential negative impacts of the Project on the Aboriginal fishery, and the archaeological sites, as discussed in the evidence, the level of consultation would be relatively deep. An assessment of the potential impact, an opportunity to make submissions, and participation in the decision-making process, which could lead to negotiations and accommodations, would be required in the circumstances of this case.

[131] It is clear from the initial exchange of correspondence between the Province and KMKNO (December 22, 2016, and January 25, 2017) that it was this level of consultation which was contemplated. The Board notes the content of the initial letter seems to have followed the form set out in the *Policy*. Addressing the issue of inadequate screening at the front end, it would be difficult for the Province to determine the full extent of consultation required, absent input from the impacted First Nations. In the Board's

view, the difficulty which arose in this consultation did not solely relate to the initial screening. Rather, capacity and communication issues appear to have led to a misunderstanding as to whether and how the consultation should unfold.

[132] KMKNO's January 25, 2017, response to the Province's December 22, 2016, letter, made it clear that it wished to engage in consultation pursuant to the TOR, and needed to perform an impact assessment to determine any pertinent concerns.

[133] While the Province's subsequent communications asked if the KMKNO wished to raise any concerns, there was no further discussion on how the consultation would unfold. It was only the March 31, 2017, letter that imposed an actual deadline of April 14, 2017.

[134] The Board notes that Figure 7 titled Project Milestones, in NS Power's Application, indicated it was only anticipated the NSE and DFO permits would be issued in May of 2018. This was updated in response to Board IR-10. In fact, the NSE permit was obtained on May 15, 2017, and the DFO permit was obtained on July 31, 2017.

[135] This said, it appears from Attachment 4 to NS Power's response to SBA IR-18, that the working group was established in February, 2017.

[136] Attachment 4 to SBA IR-18 is described by NS Power as presentation boards which were given to the Acadia First Nation "for their use during Open House sessions and temporarily installed at the Southwest Nova Biosphere Reserve facility on the Yarmouth Waterfront."

[137] The presentation boards indicated a proposed timeline for the installation of the replacement bridge in mid-2017, and completion of 50% of the new main dam by 2017

Q4, fish ladder modification to be completed by early 2018, and concrete construction completed by September, 2018.

[138] KMKNO responded to the Province's consultation offer within the time frame contemplated by the December 22, 2016, letter. KMKNO anticipated it would have an opportunity to complete an internal assessment, and that a further process would follow.

[139] While KMKNO may have been aware of the anticipated timeline to commence work on the Project, given the ongoing discussions with NS Power, and as the thirty day timeframe is stated to be flexible in the *Policy*, and as additional materials were provided by the Province after the original December 22, 2016, correspondence; KMKNO cannot be faulted for not appreciating there was a looming deadline until the March 31, 2017, letter.

[140] Given the number of consultation matters which KMKNO was dealing with, it is apparent, from the submissions of ANSMC and Acadia First Nation, that KMKNO simply was not able to respond within the fourteen day deadline set out in the March 31, 2017, letter.

[141] While it is incumbent on First Nations to assert their rights in a timely manner, the Board agrees that the capacity of First Nations to respond to consultation requests is a relevant consideration, as are the public interest, or safety considerations, where immediate action may be required.

[142] In this case, where the Tusket Main Dam Refurbishment Project was initially identified in the 2016 ACE Plan, and the Application itself showed a proposed start date of 2018, immediate public interest or safety concerns are not apparent.

[143] The immediacy of the requested response time appears to have related primarily to NS Power's desire to initiate construction in 2017, rather than in 2018. While this is a relevant consideration, as it is in the public interest that governmental authorizations to project proponents be issued in a timely manner, in this particular case, it is not a determining factor.

[144] This said, it is difficult to fault the Province for having proceeded with the issuance of the Watercourse Alteration Permit, when KMKNO did not advise of any ongoing concerns, which would show an ongoing desire for consultation, when KMKNO did not advise the Province of its inability to adequately deal with the consultation request within the indicated timeframe.

[145] This is particularly the case, where the Province had NS Power's written description of its engagement process, and how First Nations' concerns were being addressed, which information was shared with KMKNO on February 13, 2017, without any indication these mitigation measures were insufficient to address any Aboriginal concerns KMKNO wished to raise.

[146] The process whereby procedural aspects of consultation are delegated to third party proponents is not entirely clear. The *Policy* says:

> While proponents do not have a duty to consult, they will be delegated certain procedural aspects of consultation, where appropriate. OAA and the lead department will inform third parties of their delegated responsibilities, in writing (see section on Roles and Responsibilities, "Project Proponents or Third Parties"). [Emphasis added]
>
> [Exhibit N-7, Schedule B, p. 20]

[147] The section on "Project Proponents or Third Parties", in the "Rules and Responsibilities" part of the *Policy*, says, in part:

> The duty to consult always belongs to the provincial and/or federal Crown, and the Crown cannot delegate the duty to consult to a third party. Courts have been clear, however, that procedural aspects of consultation may be delegated to proponents or third parties. This is because it is the proponent that knows the details of their project best and will be best

> suited to mitigate or avoid any potential adverse impacts. Unmitigated potential impacts to Mi'kmaw interests can delay decision-making and other related processes. Establishing positive relationships and regular communications with the Mi'kmaq of Nova Scotia early in the project development process is beneficial to all parties involved and can help build better projects.
>
> Procedural aspects of consultation, such as information exchange, conducting studies, and communication and relationship building between proponents and communities (including the Mi'kmaq of Nova Scotia), is commonly called "engagement." Proponents have an opportunity to engage the Mi'kmaq of Nova Scotia early and throughout the development of their projects. In Nova Scotia, this has resulted in partnership opportunities with the Mi'kmaq, improved and more efficient decision making, and project improvements that benefit all Nova Scotians.
>
> Proponents have asked governments to provide clear instructions regarding the delegation of procedural aspects and their role in Crown consultation. Nova Scotia has developed a *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* that outlines third-party responsibilities in consultation, and lays out a step-by-step process for proponents to follow. It is the proponents' responsibility to be informed and carry out those tasks. Government of Nova Scotia departments should ensure this document is accessible to proponents seeking permits and authorizations. OAA can help proponents to develop an engagement plan with the Mi'kmaq of Nova Scotia; however, the lead department will be the main contact for the proponent throughout the consultation process. [Emphasis added]
>
> [Exhibit N-7, Schedule B, p. 13]

[148] The above section of the *Policy* then refers the reader to the published *Proponents' Guide*, which says:

> The SCC also stated that proponents have no legal duty to consult with Aboriginal peoples. However, the SCC said that prior to or concurrent with Crown consultation, the Province may delegate certain procedural aspects of consultation to proponents. This document outlines how the Province may delegate the procedural aspects of consultation to the proponent, and how the proponent can play a proactive role in engaging the Mi'kmaq throughout the approval process. In instances where there is no Crown duty to consult, proponents may still wish to engage the Mi'kmaq to share information about their project.
>
> [Exhibit N-7, Schedule 3, p. 2]

[149] One of the requirements of the engagement process in the *Proponents' Guide* is that the proponent document the engagement process, share the documentation with the applicable government departments, and provide a summary report to government.

[150] It is not clear whether the *Guidelines* envisage a written delegation from the Province each time it intends to rely on project engagement, as the ANSMC and Acadia

First Nation argue, or whether the provisions above, read together, mean that the delegation in writing comes from the obligations set out in the *Proponents' Guide.*

[151] The Board considers, from a transparency and oversight point of view, that at an early stage, the Province, the proponent and the impacted First Nation must have a common understanding of what has been delegated in a particular consultation, and what gaps need to be addressed outside the engagement process. This would alleviate potential confusion.

[152] This concept is similar to the situation in *Chippewas* and *Clyde River*, where the Supreme Court of Canada indicated if consultation was to be delegated to a regulatory body, the impacted First Nation should be notified as soon as possible.

[153] This said, *Haida Nation* makes it clear that the Crown cannot delegate the ultimate responsibility for consultation to a third party proponent. This would ordinarily mean a measure of Crown coordination, and this is what is envisaged by the *Policy*.

[154] In any event, while NS Power submitted a summary of its Aboriginal engagement to the Province, it appears there was no coordinated process, directly involving the Province, NS Power and KMKNO.

[155] The Board is therefore left with a situation where:

- NS Power attempted to fulfill its engagement obligations as a third party proponent by providing impacted First Nations with project information; listened to First Nations' concerns throughout a meaningful engagement process; and attempted to mitigate those concerns in a cooperative manner, with input from the KMKNO and Acadia First Nation;
- NS Power provided a summary of its engagement activities to the Province;

- The Province initiated the formal TOR consultation process, and, in the absence of any indication to the contrary, appears to have assumed Aboriginal concerns had been addressed to the impacted First Nations satisfactorily;
- The KMKNO desired to engage in a formal TOR consultation process with the Province, on behalf of the ANSMC, and the Band Councils it represents, but did not appreciate to what extent its ongoing engagement with NS Power would be relied upon by the Province, and was unable to respond in relation to its concerns, due to capacity issues, within the deadlines requested by the Province.

[156] There is no evidence any party was acting in bad faith. There is no evidence the failure to respond by KMKNO was in any way an attempt to delay or frustrate the consultation process. Rather, it appears to have been a capacity issue.

[157] The Board is not a reviewing court, but a tribunal which, in this case, will make a final determination as to whether or not the Tusket Main Dam Refurbishment Project should be approved.

[158] The undesirable result of the KMKNO's inability to respond discussed above is that the formal TOR consultation process did not occur, in that the KMKNO did not have the opportunity to fully engage with the Province, and become involved in direct consultation with the Province as a result of that response. In the Board's view, it is not too late to address this issue and complete the TOR process. In fact, it is required if the Board is to fulfill its constitutional mandate.

[159] Crown consultation is an ongoing responsibility. It may be impacted as additional information is acquired. In this matter, the Board has before it considerably more information about the Project, its design, and potential alternative scenarios, such

as complete decommissioning of the hydro system. Each of these potential alternatives would potentially have a different impact on the Mi'kmaq of Nova Scotia, and the record does not show that any of these alternatives were discussed with the First Nations.

[160] While the Board cannot approve any project which is not placed before it, these potential alternatives, which, it is acknowledged, NS Power said are not in the best interest of ratepayers, may assist in informing continuing consultation.

[161] Attempting to assign blame in the context of this proceeding would also not assist in achieving the goal of reconciliation. All parties appear to have had a genuine desire to undertake meaningful consultation.

[162] It would be most unfortunate if the comprehensive engagement performed by NS Power did not result in a consultation process with which the Province, NS Power and the Mi'kmaq of Nova Scotia were not mutually satisfied. This would not appear to be the best avenue for achieving reconciliation objectives.

[163] The capacity of impacted First Nations to respond is a relevant issue, as identified in *Clyde River*. The objective of reconciliation is not advanced if the ANSMC and Acadia First Nation, through the KMKNO, are unable to complete the full consultation contemplated by the initial exchange of correspondence with the Province, because KMKNO was overburdened when this consultation request was made.

[164] The ANSMC and Acadia First Nation expressed a continuing desire to complete the TOR consultation process, and have been timely in responses to the Board's process.

[165] Based on all the foregoing considerations, the Board finds that the Crown has not adequately met its duty to consult obligations. In order to meet these obligations, as outlined in *Chippewas* and *Clyde* River, a further process is required.

V REMEDY

[166] The Board generally would have two potential remedies in a situation where the Crown's duty to consult has not been completed:

i) The Board could adjourn the proceedings until the duty to consult had been fulfilled;

ii) The Board could approve a project and impose terms and conditions, within its jurisdiction, to alleviate First Nations' concerns which have not yet been addressed.

[167] In this case, the Board finds the appropriate remedy is, as submitted by ANSMC and Acadia First Nation, to adjourn the proceedings pursuant to s. 20 of the *URB Act* and provide the parties with a further opportunity to complete consultations.

[168] At page 4 of its February 14, 2018, submission, the ANSMC and Acadia First Nation have outlined a potential manner of completing the consultation process, which would utilize the information gathering and engagement which has occurred to date, and attempt to fill any gaps.

[169] While this proposal appears a sensible way to proceed, as the Board does not have the jurisdiction to conduct the consultation, and may be required to further adjudicate on the adequacy of such consultation in the future, it will defer comment on this issue, and not attempt to impose any particular process at this stage.

VI CONCLUSION

[170] The Board has determined it has the jurisdiction, and the corresponding obligation, to consider whether the Crown's duty to consult has been fulfilled in relation to the Tusket Main Dam Refurbishment Project.

[171] Due to internal capacity issues, KMKNO was unable to respond to the Province's requests to set out its comments or concerns about the proposed consultation and the Project's potential impact on asserted Mi'kmaq Aboriginal or Treaty rights within the time frame requested.

[172] The failure to respond resulted in KMKNO not being able to avail itself of the full TOR formal process.

[173] In the circumstances of this case, in order to afford KMKNO the opportunity to engage in a meaningful consultation pursuant to the TOR, further consultation is required.

[174] The Board does not have the jurisdiction to void any permits which have been issued by the Province, or DFO.

[175] The Board will retain jurisdiction in this matter. The parties are requested to report back to the Board within three months to advise of the status of the consultation.

[176] Any decision on the Application will be held in abeyance until the results of the consultation are known.

[177] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 7th day of August, 2018.

[redacted]

Steven M. Murphy

[redacted]

Roberta J. Clarke

[redacted]

Richard J. Melanson

Government of Nova Scotia
Policy and Guidelines:

CONSULTATION WITH THE MI'KMAQ OF NOVA SCOTIA

April 2015

NOVA SCOTIA

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EXECUTIVE SUMMARY

In 2004 and 2005, the Supreme Court of Canada released three landmark decisions that established the common law duty to consult with Aboriginal peoples. The Supreme Court of Canada held that provincial and federal governments have a duty to consult with Aboriginal peoples, and accommodate their interests, where appropriate, when contemplating conduct that may adversely impact established and asserted Aboriginal or treaty rights.

The Government of Nova Scotia recognizes the duty to consult with the Mi'kmaq of Nova Scotia and, beginning in 2007, established an institutional framework for consultation. This includes an Interim Consultation Policy, the Mi'kmaq–Nova Scotia–Canada Consultation Terms of Reference, a Consultation Cooperation Agreement with the federal government, a Guide for Proponents, a Consultation Division at the Office of Aboriginal Affairs, a number of training and capacity-building initiatives, and supporting tools to ensure the duty is met.

The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia achieves another important step in developing a consistent process that respects the established and asserted rights of the Mi'kmaq of Nova Scotia. The Policy and Guidelines provide detailed direction to Nova Scotia government departments that may have a duty to consult with the Mi'kmaq of Nova Scotia. This document outlines why and when consultation may be required, and how to proceed with consultation.

The Policy was developed in consultation with the Mi'kmaq of Nova Scotia, key consultation practitioners from provincial and federal government departments, and industry representatives that have played an active role in consultation practice. Key elements of the Policy include clear principles for consultation, the legal and policy considerations for consultation, the clarification of roles and responsibilities of all participants in consultation, and a full description of Nova Scotia's six steps of consultation.

This Policy demonstrates the Government of Nova Scotia's commitment to carrying out the duty to consult in collaboration with the Mi'kmaq of Nova Scotia and the Government of Canada.

LIST OF ABBREVIATIONS

Assembly: Assembly of Nova Scotia Mi'kmaq Chiefs

OAA: Office of Aboriginal Affairs

KMKNO: Kwilmu'kw Maw-klusuaqn Negotiation Office (Mi'kmaq Rights Initiative)

SCC: Supreme Court of Canada

TOR: Mi'kmaq–Nova Scotia–Canada Consultation Terms of Reference

INTRODUCTION

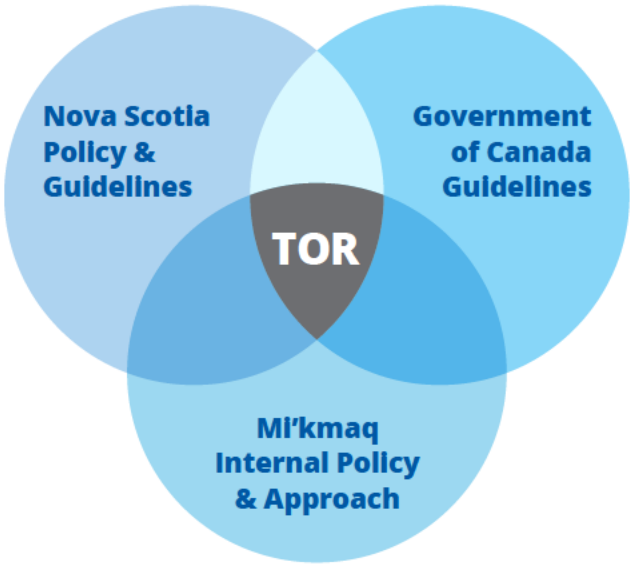
The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia sets out the Government of Nova Scotia's policy and procedures for administering one of the most important aspects of its relationship with the Mi'kmaq of Nova Scotia: the Crown's duty to consult and accommodate, where appropriate. This Policy reflects the hard work and collaboration of all parties to strengthen their mutually beneficial relationships.

The Haida and Taku River Tlingit Supreme Court of Canada decisions of 2004 held that the Crown has a duty to consult and, where appropriate, accommodate Aboriginal peoples when contemplating decisions that might adversely impact potential or established Aboriginal and treaty rights. Since 2004, governments across Canada have worked together to develop policies, frameworks, and practices that respect their particular contexts, and are consistent with Supreme Court of Canada decisions about the duty to consult and accommodate, where appropriate. This Policy will help provincial staff determine when consultation is required, how consultation should take place, and which parties should be involved.

In Nova Scotia, the provincial government has focused on implementing the Terms of Reference as the preferred approach to consultation agreed to by the three parties and developing consultation tools to support the Terms of Reference, including:

- the development of this Policy
- a *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* ("TOR" or "Consultation Terms of Reference")
- a *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia*
- a *Memorandum of Understanding on Consultation Cooperation* with the federal government
- a number of departmental guidelines to support consultation
- a Consultation Division within the Office of Aboriginal Affairs to manage and administer the process

The federal and provincial governments, as well as the Mi'kmaq of Nova Scotia, have developed policies and procedures for meeting the duty to consult that reflect their own circumstances, structures, and processes.



PURPOSE

POLICY STATEMENT

The Government of Nova Scotia will consult with the Mi'kmaq of Nova Scotia and accommodate, where appropriate, when contemplating conduct that has the potential to adversely impact established and/or asserted Mi'kmaw Aboriginal rights, including Title, and treaty rights (together referred to in this document as "asserted rights" or "asserted Mi'kmaw rights."[1]) The Government of Nova Scotia is committed to making decisions in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in Section 35 of the Constitution Act, 1982, and within the legal parameters established by the Supreme Court of Canada concerning the duty to consult. The Policy and any form of consultation conducted by the Government of Nova Scotia are not intended to prove or disprove any asserted Aboriginal or treaty rights.

POLICY OBJECTIVES

The purpose of this Policy is to provide clear direction and practical, consistent guidance to ministers of the Crown and to provincial government staff, including those working at departments, agencies, Crown corporations, boards, and commissions, when they are contemplating decisions or actions that have the potential to adversely impact established and/or asserted Mi'kmaw rights. The Policy outlines the reasons the Crown consults with the Mi'kmaq of Nova Scotia, the principles that guide consultation, the roles and responsibilities of the principal participants, and the procedures for consultation. The Policy is consistent with the *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* and replaces the *Province of Nova Scotia Consultation with the Mi'kmaq: Interim Consultation Policy* (June 19, 2007).

As the law and practice around the duty to consult continues to evolve in Canada, the Policy and any associated documents, such as guidelines, protocols, and agreements, will be updated to reflect the current status and practice. The Policy allows the Government of Nova Scotia to issue policy statements that address matters associated with consultation that arise from time to time.

POLICY SCOPE

The Policy applies to all provincial government departments, offices, agencies, Crown corporations, boards, and commissions that are contemplating decisions or actions that have the potential to adversely impact established and/or asserted Mi'kmaw rights, including the ability to exercise these rights (e.g., access to lands). Those rights may include, but may not be limited to, the following:

- hunting
- fishing
- gathering (black ash, sweetgrass, medicinal plants, etc.)
- trapping
- other traditional uses

[1] The expression "Mi'kmaw rights" is used since the Mi'kmaq are the only First Nation officially recognized in Nova Scotia.

The types of government decisions that may trigger consultation are:

- decisions affecting Crown and other provincially owned land
- policies, permits, approvals, licences, initiatives, plans, and procedures related to managing or using natural resources (environment, fish, wildlife, forests, water, minerals, petroleum, or other resources)
- development in proximity to Mi'kmaw communities, or lands used by the Mi'kmaq of Nova Scotia (the scale of proximity depends on the scope of the project and the potential level of impact)
- other actions or decisions that may negatively impact asserted Mi'kmaw rights

The introduction of new legislation or regulation may also trigger a duty to consult if it has the potential to adversely impact established and/or asserted Mi'kmaq rights. However, based on current direction from the Courts, consultation regarding the law-making process requires special consideration in terms of if, when and how consultation should take place.

The Government of Nova Scotia regularly engages in processes of public consultation and stakeholder engagement with the general public of Nova Scotia. These processes are separate from, but complementary to, the duty to consult with the Mi'kmaq of Nova Scotia. Mi'kmaw individuals and organizations are welcome to participate in public consultation and stakeholder engagement processes as interested members of the general public. However, any such participation does not constitute consultation for the purposes of fulfilling the Crown's duty to consult. This Policy does not address the broader processes of public consultation and stakeholder engagement.

THE DUTY TO CONSULT

The Government of Nova Scotia's approach to provincial Aboriginal relations includes

- consultation
- negotiation (Made-in-Nova Scotia process)
- community and intergovernmental relations (e.g., Tripartite Forum)

Consultation deals with operational and strategic-level decisions, and is meant to ensure fair consideration is given to the asserted rights and interests of the Mi'kmaq of Nova Scotia in government decision making.

The Policy and associated consultation do not seek to settle the question of the recognition or practice of Aboriginal or treaty rights for the Mi'kmaq of Nova Scotia. These matters are being addressed through the Made-in-Nova Scotia negotiation process. The negotiation process is the forum for the Mi'kmaq, Nova Scotia, and Canada to resolve issues related to Mi'kmaw treaty rights, Aboriginal rights (including Aboriginal title), and Mi'kmaw governance.

The Mi'kmaq–Nova Scotia–Canada Tripartite Forum is a partnership between the Mi'kmaq, Nova Scotia, and Canada to strengthen relationships and work on socio-economic issues of mutual concern in the modern context.

Courts have generally directed First Nations and governments to achieve negotiated solutions to resource disputes through consultation rather than resorting to litigation.

LEGAL CONTEXT

Long before Europeans settled in Canada, indigenous peoples occupied these lands and waters, and as such have a unique legal status. Existing and proven Aboriginal and treaty rights received constitutional protection in Canada in 1982 with the patriation of the Constitution. Section 35 of the Constitution Act, 1982, states, "The existing aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognized and affirmed." While the constitution protects existing rights, the nature and extent of those rights have not been exhaustively defined, and Section 35 does not deal with asserted, but still unproven, Aboriginal rights. Accordingly, one of the purposes of consultation is to consider the impact of Crown decisions on these not yet proven, but asserted, rights.

Please refer to Appendix B: Glossary of Terms for definitions of Aboriginal rights, Aboriginal title, and treaty rights, particularly in the Nova Scotia context.

Canadian law concerning Aboriginal peoples continues to develop and evolve. This is especially true of the law on the duty to consult. To date, there are several Supreme Court of Canada cases that define the Crown's duty to consult with Aboriginal peoples: Haida Nation v. BC (Minister of Forests)

2004, Taku River Tlingit First Nation v. BC (Project Assessment Director) 2004, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council 2010, and Beckman v. Little Salmon/Carmacks First Nation 2010. These cases provide a general and consistent framework, with the expectation that governments will provide clarity around process by creating policies, guidelines, and procedures to fulfill the duty to consult.

The Supreme Court of Canada decisions provide a legal framework that the Government of Nova Scotia recognizes as its duty to consult. The following section lists some of the more significant observations from the SCC decisions listed above:

- "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."[2]
- The Crown (both federal and provincial), having knowledge of asserted and/or proven Aboriginal and treaty rights, has a duty to consult Aboriginal peoples when contemplating decisions or actions that have the potential to adversely impact those rights, and accommodate their interests, where appropriate. The court recognized the duty exists even though rights have not been proven in a court of law.
- The goal of consultation is to reach consensus or agreement on how to avoid adverse impacts on asserted Aboriginal and/or treaty rights. However, there is no duty to reach an agreement, and Aboriginal groups do not have a veto over government decision making.
- Aboriginal groups have a reciprocal duty to express their interests and concerns once they have had an opportunity to consider the information provided by the government. However, they must not frustrate the government's attempts to consult, or take unreasonable positions.
- It is the government's duty to consult; however, third parties can be delegated some procedural aspects of consultation.
- Consultation must engage First Nations directly and cannot simply be a component of a public consultation process.
- The duty to consult exists to protect the collective rights of Aboriginal peoples. Therefore, the duty to consult is owed to the First Nation as a collective or community, not to individuals. However, an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its constitutionally protected rights.
- Past decisions, including breaches of the duty to consult, do not trigger consultation obligations. The duty to consult is triggered by a current proposed government action that creates a further or new adverse impact. Speculative impacts and impacts on future negotiating positions do not trigger the duty to consult.
- The duty to consult is not limited to the exercise of statutory powers and may extend to strategic higher-level decisions that may impact rights.
- Tribunals may carry out the duty to consult if they are explicitly mandated to do so through their enabling statutes. In addition, tribunals may be delegated the duty to consult or to consider the adequacy of consultation by legislatures.

New court cases will continue to further define the duty to consult, requiring governments and Aboriginal peoples to refine their approaches to consultation.

[2] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, 2004 SCC 73, para 1.

POLICY CONSIDERATIONS

In addition to the constitutional and common law obligations outlined above, there are a number of policy reasons for ensuring meaningful consultation takes place with the Mi'kmaq of Nova Scotia. One of the benefits of consulting with the Mi'kmaq of Nova Scotia is building, strengthening, and maintaining long-lasting relationships and engaging the Mi'kmaq as partners in the sustainable development of the province. A well-defined consultation process supported by clear consultation policies and procedures helps create an environment of trust and certainty that is good for business development that ultimately benefits all Nova Scotians. The Mi'kmaw people and the Government of Nova Scotia have a historical relationship that has improved and strengthened in recent years. Consultation supports the advancement of this relationship.

Although the Province consults with the Mi'kmaq of Nova Scotia for legal reasons, consultation helps the Province ensure it is making the best strategic and operational decisions possible by including information and ideas that may not necessarily come to light without proper consultation. Although at times there may appear to be no duty to consult on a particular issue as legally required, the Government of Nova Scotia may wish to include the views and ideas of the Mi'kmaq of Nova Scotia in the strategic planning of important areas of public policy. In this instance, the processes outlined in this Policy can be applied as it provides a clear administrative process.

Consultation also contributes to the process of reconciliation between the Government of Nova Scotia and the Mi'kmaw people, and the reconciliation of the interests of Mi'kmaw people with those of broader society. Strong, long-lasting, and equitable relationships with the Mi'kmaq benefit all Nova Scotians.

GUIDING PRINCIPLES

> *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. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.*[3]

The Government of Nova Scotia will take a proactive, meaningful, consistent, and coordinated government-wide approach to consultation, based on the following principles:

GOOD FAITH

Consultation must be carried out in good faith. Consultation will be undertaken in the spirit of trust, collaboration, and mutual respect among all parties.

RECONCILIATION

Consultation will be carried out with the goal of reconciliation of government and Mi'kmaw interests, and the reconciliation of Mi'kmaw interests with broader society.

TRANSPARENCY

Information that supports or contributes to the decision or action that is the subject of consultation is generally shared with the Mi'kmaq of Nova Scotia. The exception to this practice may be when there are statutory obligations or confidentiality agreements in place to protect proprietary or financial information, or when the parties agree that information will not be shared for other reasons.

ACCOUNTABILITY

All parties share the responsibility to ensure the consultation process is carried out in a manner consistent with agreements and the principles of consultation. The Government of Nova Scotia will provide information related to the decision or action under consideration; participate in a meaningful process of dialogue that considers all interests and concerns of the Mi'kmaq of Nova Scotia; and provide a response, once decisions are made, that outlines how the government is responding to those interests and concerns, including any accommodation measures, where appropriate.

TIMELINESS

Consultation will take place in a timely and efficient manner, within reasonable time periods, and with respect for Mi'kmaw decision-making processes and any statutory or legislated timeframes. Consultation should begin as early in the decision-making process as reasonably possible. Parties should remain flexible and adjust time periods as needed based on the complexity of the file and when exceptional circumstances arise.

[3] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73, para 17.

ROLES AND RESPONSIBILITIES

NOVA SCOTIA OFFICE OF ABORIGINAL AFFAIRS

The Office of Aboriginal Affairs, through its Consultation Division, provides policy leadership, guidance, and advice to government departments and proponents about the duty to consult with the Mi'kmaq of Nova Scotia, and advise on the process to fulfill consultation obligations. OAA works directly with departments to determine if consultation should be initiated, and if so, then guides and coordinates the consultation process from start to finish. This includes facilitating all consultation with the Mi'kmaq of Nova Scotia, tracking the progress of consultation, helping keep the process on track with respect to timelines and procedural requirements, and maintaining a record of all consultations. The Consultation Division regularly provides training to provincial government staff, and also provides outreach services to organizations and businesses that are interested in learning more about consultation with the Mi'kmaq of Nova Scotia or their role in the consultation process. Consultation advisors are assigned to departments that are regularly involved in consultation. Please contact OAA's Consultation Division for a current list of assigned consultation advisors.

GOVERNMENT OF NOVA SCOTIA DEPARTMENTS

Government of Nova Scotia departments may have different roles in the consultation process. The **lead department** is the department (or office, agency, Crown corporation, board or commission) that has the broadest scope of authority for the proposed measure or action, and has authority for the type of project under consideration. For complex, multi-phased projects, the lead department may change from one department to another during the development of a project, depending on which department has the primary authority at the time. OAA will work with departments to identify their roles in the consultation process. Lead departments will be accountable for ensuring the consultation process takes place according to the principles outlined in this document, as well as the Consultation Terms of Reference, or any other consultation arrangements with the Mi'kmaq of Nova Scotia. Lead departments should be aware of and coordinate the involvement of other provincial and federal departments in consultation in conjunction with OAA. Lead departments are required to keep their own consultation records and to monitor the implementation of any accommodation that may be reached as a result of consultation.

Supporting departments may provide an approval or authorization that contributes to the overall project. Those departments will be expected to participate in the consultation process as needed. Some departments may be asked to contribute technical advice on some aspect of the project, even though they do not have any direct authority for approvals. Supporting departments and technical advisors will be invited to participate in consultations at the discretion of the lead department.

Departments may also be asked to contribute funds to support their specific consultation activities. Departments should consult with OAA, Consultation Division, before providing any funding to support consultation activities.

Departments will develop operational procedures for consultation that are consistent with the Policy, TOR, and any other consultation arrangements. Department- and program-specific procedural guidelines more accurately align the consultation process with departmental business practices, and provide practical, step-by-step guidance to operational staff. OAA's Consultation Division will provide guidance and assistance in developing and carrying out these procedures. Departments may also wish to develop streamlined mechanisms with the Mi'kmaq of Nova Scotia to establish mutually acceptable and efficient processes of consultation (for example, quarterly notifications of Crown Land transactions or sectoral consultation roundtables). Any streamlined mechanisms for consultation must be consistent with this Policy, the TOR, and any other consultation arrangements. Departments should collaborate with OAA's Consultation Division to develop alternative mechanisms.

To date, the following provincial government departments have either led or supported consultation with the Mi'kmaq of Nova Scotia:[4]

- Department of Communities, Culture and Heritage
- Department of Economic and Rural Development and Tourism
- Department of Energy
- Department of Environment
- Department of Fisheries and Aquaculture
- Department of Justice
- Department of Municipal Affairs
- Department of Natural Resources
- Department of Transportation and Infrastructure Renewal
- Office of Aboriginal Affairs

MI'KMAQ OF NOVA SCOTIA

The Mi'kmaq of Nova Scotia have developed their own institutions, structures, and procedures to represent the collective rights of the Mi'kmaw people and to facilitate consultation with the governments of Nova Scotia and Canada. There are three main entities that may be involved in consultation:

- *Thirteen Mi'kmaw chiefs and councils (band councils)*: Band councils are legal entities democratically elected under the federal Indian Act by the on- and off-reserve members of their communities to represent their interests with government authorities, and make decisions related to the community. In 2010, all 13 Mi'kmaw communities signed the TOR, giving authority to the Assembly of Nova Scotia Mi'kmaq Chiefs to consult on their behalf. Presently, 12 of the 13 communities operate under the TOR, while the community of Sipekne'katik consults independently.
- *The Assembly of Nova Scotia Mi'kmaq Chiefs*: The Assembly consists of the 13 elected Mi'kmaw chiefs and 2 ex officio members, supported by staff and advisors. Two chiefs serve as co-chairs of the Assembly, and most chiefs have responsibilities for specific portfolios (e.g., Fisheries, Mining, Lands, Wildlife, Forestry, etc.). The Assembly plays a significant role in collective decision making for the Mi'kmaq of Nova Scotia, particularly on issues pertaining to Mi'kmaw rights and governance. On behalf of 12 Mi'kmaw communities under the TOR, the Assembly leads negotiations with the provincial and federal governments, and oversees the consultation process. The Assembly meets regularly to deliberate on issues related to consultation with the federal and provincial governments.

[4] This is a general list of key departments, in alphabetical order. There may be other departments, as well as agencies, boards, and commissions that will, from time to time, need to consult with the Mi'kmaq of Nova Scotia. If you have questions about whether or not you may need to consult with the Mi'kmaq, please contact the Office of Aboriginal Affairs, Consultation Division, at (902) 424-4174.

- *Kwilmu'kw Maw-klusuaqn Negotiation Office*: The KMKNO is the technical and administrative office that coordinates and supports the work of negotiation and consultation for the Assembly. Together with the chiefs and councils, the KMKNO is the main interface of consultation for 12 of the 13 Mi'kmaw communities. The KMKNO administers and facilitates the consultation process on behalf of the 12 communities that are signatories to the TOR, and conducts research and analysis on government decisions and actions requiring consultation. The KMKNO takes its direction from the Assembly.

THE GOVERNMENT OF CANADA

The Government of Canada also has a duty to consult, and accommodate, where appropriate, the Mi'kmaq of Nova Scotia when contemplating conduct that may adversely impact potential or established Mi'kmaw rights. The Government of Canada is also a signatory to the TOR.

The Government of Nova Scotia takes a collaborative approach to consultation and has worked closely with the Government of Canada through Aboriginal Affairs and Northern Development Canada to develop and sign a *Memorandum of Understanding (MOU) on Consultation Cooperation*. The MOU is the first of its kind in Canada, and outlines co-operation for the coordination of consultation, information sharing, capacity building, and funding.

The Nova Scotia–Canada Memorandum of Understanding on Consultation Cooperation can be found on the Office of Aboriginal Affairs website.

The following federal government departments may be responsible for consultation with the Mi'kmaq of Nova Scotia:[5]

- Fisheries and Oceans Canada
- Transport Canada
- Canadian Environmental Assessment Agency
- Public Works and Government Services Canada
- Natural Resources Canada
- Environment Canada
- Parks Canada
- Aboriginal Affairs and Northern Development Canada

BEST PRACTICE:

When working with federal government departments on consultation, establish consistent methods of communication to ensure all parties have the same information.

[5] Although not exhaustive, this is a list of key federal government departments that have coordinated consultation with the Province of Nova Scotia. There may be other federal departments, as well as agencies, boards, Crown corporations, and commissions, that will, from time to time, need to consult with the Mi'kmaq of Nova Scotia.

PROJECT PROPONENTS OR THIRD PARTIES

The duty to consult always belongs to the provincial and/or federal Crown, and the Crown cannot delegate the duty to consult to a third party. Courts have been clear, however, that procedural aspects of consultation may be delegated to proponents or third parties.[6] This is because it is the proponent that knows the details of their project best and will be best suited to mitigate or avoid any potential adverse impacts. Unmitigated potential impacts to Mi'kmaw interests can delay decision-making and other related processes. Establishing positive relationships and regular communications with the Mi'kmaq of Nova Scotia early in the project development process is beneficial to all parties involved and can help build better projects.

Procedural aspects of consultation, such as information exchange, conducting studies, and communication and relationship building between proponents and communities (including the Mi'kmaq of Nova Scotia), is commonly called "engagement." Proponents have an opportunity to engage the Mi'kmaq of Nova Scotia early and throughout the development of their projects. In Nova Scotia, this has resulted in partnership opportunities with the Mi'kmaq, improved and more efficient decision making, and project improvements that benefit all Nova Scotians.

Proponents have asked governments to provide clear instructions regarding the delegation of procedural aspects and their role in Crown consultation. Nova Scotia has developed a *Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia* that outlines third-party responsibilities in consultation, and lays out a step-by-step process for proponents to follow. It is the proponents' responsibility to be informed and carry out those tasks. Government of Nova Scotia departments should ensure this document is accessible to proponents seeking permits and authorizations. OAA can help proponents to develop an engagement plan with the Mi'kmaq of Nova Scotia; however, the lead department will be the main contact for the proponent throughout the consultation process.

Proponents are also expected to cover their own costs for engaging the Mi'kmaq of Nova Scotia, including costs for studies that are recommended by the Crown to identify potential impacts on Mi'kmaw rights in the proposed area of the project. Where potential impacts can be identified, proponents should make every reasonable effort to avoid, minimize, or mitigate those impacts, and to seek ways to involve the Mi'kmaq of Nova Scotia in their project. The Government of Nova Scotia encourages proponents to work with the Mi'kmaq to develop mutually favourable agreements where potential impacts on asserted rights are significant.

> ***The Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia*** **can be found on the Office of Aboriginal Affairs website.**

[6] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73, para 53.

DELEGATION OF PROCEDURAL ASPECTS OF CONSULTATION (PROPONENT ENGAGEMENT)

1. Seek guidance from OAA.
2. Notify the Mi'kmaq of Nova Scotia as early as possible in the development process.
3. Provide as much project information as possible.
4. Meet with potentially impacted Mi'kmaw communities (project dependent).
5. Complete a Mi'kmaq Ecological Knowledge Study (project dependent).
6. Address potential project-specific impacts.
7. Document the engagement process.

TERMS OF REFERENCE FOR MI'KMAQ–NOVA SCOTIA–CANADA CONSULTATION

The Mi'kmaq of Nova Scotia, the Government of Nova Scotia, and the Government of Canada recognized a need to establish formal processes and institutions for consultation long before the 2004 SCC consultation decisions. In fact, in 2002 when the three parties signed an Umbrella Agreement that led to the establishment of the Made-in-Nova Scotia negotiation process, they identified consultation as one of the key issues requiring resolution. As a result of that agreement, the three parties entered into discussions to develop a TOR for consultation.

The *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* describes how consultation will take place and with whom. It was the first consultation agreement in Canada to cover an entire province. After a three-year pilot project, and a joint evaluation of the TOR document and the process, the three parties revised and formally signed the TOR in August 2010.

The TOR applies to all potential consultations undertaken by both the federal and provincial governments with the Mi'kmaq of Nova Scotia, unless another arrangement is reached with the Assembly or a particular Mi'kmaw community. Any other negotiated consultation arrangements will strive to follow the same approach as the TOR. This Policy is consistent with the TOR.

The *Terms of Reference for a Mi'kmaq–Nova Scotia–Canada Consultation Process* can be found on the Office of Aboriginal Affairs website.

OPTING OUT OF THE TOR

A Mi'kmaw community may decide to opt out of the TOR on a particular issue, or terminate their participation under the agreement completely.

According to Articles 6–8 of the TOR, a Mi'kmaw chief and council may conduct their own consultation outside of the TOR process on a specific project or decision. In practice, this is the exception and not the norm. If a chief and council decide to conduct their own consultation, they will notify the Government of Nova Scotia directly, and the Assembly will notify the Government of Nova Scotia through the KMKNO.

Article 22 of the TOR provides for withdrawal from the TOR altogether. If a Mi'kmaw community decides to opt out of, or withdraw, from the TOR altogether, the Government of Nova Scotia will strive to follow a similar approach to consultation under the TOR, as outlined below.

THE CONSULTATION PROCESS

The Government of Nova Scotia will consult with the Mi'kmaq of Nova Scotia, and accommodate their interests and concerns, where appropriate, before making decisions that have the potential to adversely impact established and/or asserted Mi'kmaw rights. The following section describes in plain language how decisions are made on whether or not consultation will be carried out, and if so, what the appropriate steps are in the consultation process.

STEP 1: CONSULTATION SCREENING

Not all decisions, actions, measures, or authorizations listed in the Policy Scope section will require consultation. Before undertaking any actions related to consultation, a consultation screening should be undertaken to determine whether or not consultation is necessary. There are three potential outcomes of a consultation screening: no duty to consult, notification, or consultation. These are explained in more detail below.

At times, the determination may be straightforward. There may be some decisions, however, that are more complex. OAA provides assistance to all provincial departments that need to complete a consultation screening to determine whether or not they should consult on decisions or actions that are under consideration.[7] While this is not mandatory, this advice is helpful when a department is assessing how to proceed.

The consultation screening is focused on understanding if the contemplated action or decision has the potential to adversely impact established and/or asserted Mi'kmaw Aboriginal and/or treaty rights.

In assessing the potential for an adverse impact, the consultation screening examines a number of elements related to the decision or action being contemplated by government. There may not be complete information available to indicate an explicit adverse impact—that is the subject of consultation. However, there are a number of questions that can be asked to help determine the potential for an adverse impact.

The following list provides examples of the type of information examined during a consultation screening:[8]

- existing information on Mi'kmaw land use
- proximity of Mi'kmaw reserve lands and lands of interest (e.g., lands used for hunting, recognized historic sites, and lands set aside for the potential future use of the Mi'kmaq of Nova Scotia)
- size, nature, duration, and location of the proposed project, and level of ground disturbance
- activities proposed during all phases of the project (e.g., preparation, construction, operation, decommissioning, and reclamation, if applicable)
- land ownership, land description, and potential interests in the land (e.g., private or public land, is there an existing specific claim or asserted title, is the land currently subject to negotiation or accommodation, is it reserve land?)
- potential environmental, social, and cultural impacts
- potential impacts on cultural sites (see Special Places Protection Act)
- potential impacts on asserted Mi'kmaw rights (hunting, fishing, gathering, cultural)
- existing statutory deadlines for decision making

The Mi'kmaq of Nova Scotia generally assert both Aboriginal rights (including Title) and treaty rights to all of Nova Scotia and its offshore. While the extent of the practice of those rights is currently the subject of negotiations, the Government of Nova Scotia proactively manages risk using a low threshold when determining whether or not consultation should be initiated.

[7] For a legal opinion on whether or not there is a duty to consult, please contact your department's solicitor.
[8] Note: These are examples and do not constitute an exhaustive list.

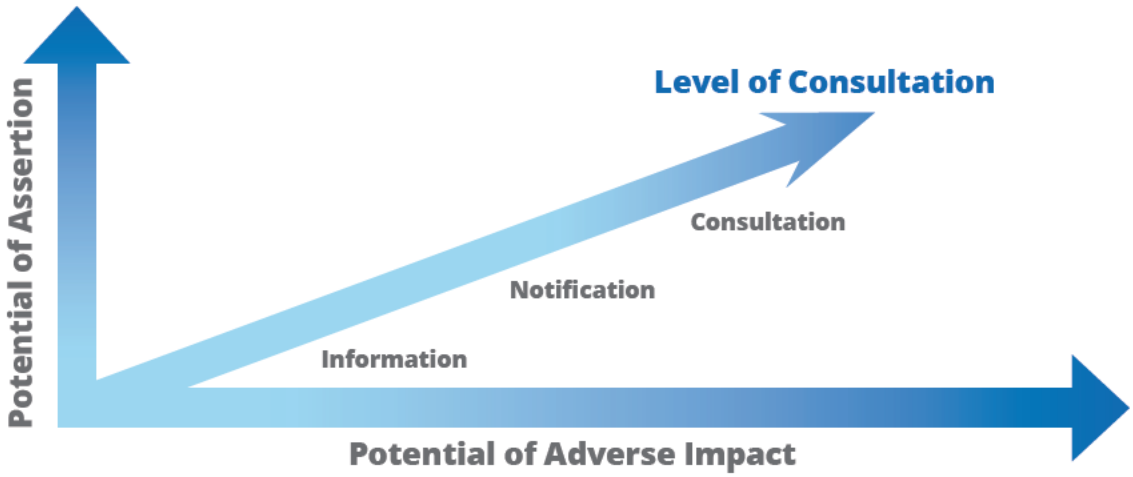
Based on the results of the consultation screening, there are three potential outcomes:

- **No duty to consult**: No action required. However, departments may decide to share information.
- **Notification**: If it is determined that the Mi'kmaq of Nova Scotia should be notified about the pending decision, the process described below under the Notification section will be followed.
- **Consultation**: If it is determined that there is a duty to consult with the Mi'kmaq of Nova Scotia, the process described in detail below in Steps 2–6 will be followed.

SPECTRUM OF CONSULTATION

> *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.*[9]

Canadian courts have been clear that the depth of consultation will vary according to the strength of the claim of asserted rights and the potential level of impact of the measure under consideration on those asserted rights. It is important to note that it is not the size or type of project or decision or the size of the proponent that determines consultation and accommodation, but rather the magnitude of potential impact on asserted Mi'kmaw rights and the credibility of the assertion. In any case, the honour of the Crown is always at stake, and the government must act in "utmost good faith"[10] in assessing and carrying out the duty to consult. A consultation assessment (see above) will help determine whether or not there is a duty to consult, and if so, the scope or depth of consultation required. Please contact OAA for assistance with the consultation screening. Should OAA do the screening, a recommendation on consultation is issued to the lead department.



[9] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73
[10] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, SCC 73, para 34

KEEPING CONSULTATION RECORDS

It is important to note that the consultation process is on the record. This means that it is essential for all departments to keep good consultation records. From the screening stage, and unless agreed otherwise by all parties in advance, all correspondence, information exchanged, electronic files, e-mail messages, meeting notes and minutes, agendas, consultation screenings, written legal advice, records of funding provided for additional studies or consultation activities, and notes from telephone conversations become part of the overall consultation record. Lead departments should keep all records of their involvement in consultation. All correspondence and related files should be copied to OAA. OAA keeps centralized consultation records and tracks all consultation.

STEP 2: INITIATE CONSULTATION

IDENTIFY LEAD AND OTHER RESPONSIBLE DEPARTMENT(S)/JURISDICTIONS AND COORDINATE CONSULTATION

There may be more than one department or jurisdiction involved in making decisions about a government action under consideration. The Government of Nova Scotia takes a "whole-of-project" approach to consultation ("one project = one consultation"). An effective and efficient consultation process requires coordination, collaboration, and co-operation between all parties, including the Mi'kmaq of Nova Scotia, provincial government departments, the Government of Canada, and proponents.

OAA provides coordination support to all provincial departments and helps coordinate with the federal government. The lead department will work with OAA to identify all authorizations that are required for the project and their provincial or federal authorities. OAA and the lead department will then coordinate the consultation process among departments and jurisdictions, where necessary.

While proponents do not have a duty to consult, they will be delegated certain procedural aspects of consultation, where appropriate. OAA and the lead department will inform third parties of their delegated responsibilities, in writing (see section on Roles and Responsibilities, "Project Proponents or Third Parties").

GATHER AND PROVIDE RELEVANT INFORMATION

Lead departments should gather all relevant information that will assist the Mi'kmaq of Nova Scotia in their deliberations about potential impacts on asserted rights. This could include a project description, maps, available studies, or other documents of interest. This information should be provided in electronic or printed format, and it should be attached to the offer to consult. If all relevant information is not available at the time of the offer to consult, it should be forwarded as soon as it becomes so.

The Government of Nova Scotia will ask proponents to share all relevant information with the Mi'kmaq of Nova Scotia. At times, however, there may be legislative or regulatory requirements to protect certain information. For example, there may be information that is not accessible because of confidentiality agreements in place to protect proprietary or financial information, or when the parties agree that information will not be shared for other reasons.

OFFER TO CONSULT

If it has been determined that consultation should take place with the Mi'kmaq of Nova Scotia under the TOR, the lead department will prepare a consultation letter to be sent to all Mi'kmaw chiefs and councils that have formally adopted the TOR, and provide a copy to the KMKNO, OAA, and any other identified responsible provincial or federal government departments.

If it has been determined that the decision being considered may impact a Mi'kmaw community that does not participate in the TOR process, the lead department will send a separate letter to the chief and council, and provide a copy to any identified responsible provincial or federal government departments.

The letter should include (if applicable):

- a description of the proposed decision, action, or project
- a list of all permits, authorizations, and other decisions required, and their responsible authorities
- timelines for decisions
- a request for the Mi'kmaq of Nova Scotia to indicate whether they are interested in consultation and how they would prefer to proceed
- a request that the Mi'kmaq of Nova Scotia provide comments about any concerns and potential impacts on rights
- a deadline for response, typically 30 days
- contact information
- any other relevant information

All relevant information to support deliberations will be attached to the offer to consult.

Please contact OAA for a copy of the template letter for consultation.

ONE PROJECT = ONE CONSULTATION

Many projects require multiple authorizations and permits by various government departments or ministries and, at times, different jurisdictions. Where multiple permits or authorizations are required, Nova Scotia has adopted the practice of opening one consultation for an entire project. This requires careful coordination and planning. If it has been determined that consultation should take place, OAA will identify all authorizations and permits required over the life cycle of the project, as well as the responsible authorities (lead and supporting departments). Once the consultation has been opened, it continues until the last permit has undergone consultation.

RESPONSE FROM THE MI'KMAQ OF NOVA SCOTIA

The Mi'kmaq of Nova Scotia will provide a written response to the offer to consult that:

- indicates whether or not the Mi'kmaq are interested in consultation
- states whether the consultation will take place with the Assembly or an individual chief and council
- identifies any known potential impacts on asserted Mi'kmaw rights
- provides any other relevant information to begin the consultation process

Typically, responses are received within 30 calendar days of receiving the request for consultation. Departments should remain flexible with this timeframe, as it could vary according to the scale and complexity of the project, the potential impact on asserted Mi'kmaw rights, or unforeseen circumstances. If no response is received within 30 calendar days, the lead department should send a reminder to provide additional time for response. This additional timeframe is at the discretion of the lead department. If no response is received within the additional timeframe, the Government of Nova Scotia will proceed with making decisions.

NOTIFICATION

If it has been determined to not proceed with an offer to consult, but the decision or measure may be of interest to the Mi'kmaq of Nova Scotia or on the low end of the spectrum of consultation, the lead department will prepare a notification letter to be sent to the Mi'kmaw communities in closest geographic proximity to the location or site of the proposed decision or action, with a copy to OAA and the KMKNO. If a Mi'kmaw community is outside the TOR process and is notified, then a separate letter should notify the KMKNO as well. The purpose of this letter is to provide general information that may be of interest to the Mi'kmaq of Nova Scotia. It is not an offer to consult. After receiving a notification, the notified Mi'kmaw community (or communities) or the KMKNO may request consultation, which should be accompanied by an explanation of any potential impacts on asserted Mi'kmaw rights. The lead department and OAA will use this information to assess whether it will proceed with its decision or consult with the Mi'kmaq of Nova Scotia as requested. If no reply is received within the required response period, the Government of Nova Scotia will proceed with making decisions.

Please contact OAA for a copy of the template letter for notification.

BEST PRACTICE:

To avoid confusion, be concise and use non-technical, clear language when describing projects, timelines, and actions required for decision making.

STEP 3: IDENTIFICATION OF MI'KMAW CONCERNS

The objective of consultation is to have a full understanding of Mi'kmaw concerns, interests, and asserted rights that may be negatively impacted by the decision or action under consideration, and, if appropriate, accommodate those concerns or interests. The Mi'kmaq of Nova Scotia are responsible for outlining potential adverse impacts on any asserted rights during the consultation process. For the Government of Nova Scotia to give full consideration to potential impacts and contemplate appropriate accommodation, claims must be specific in nature. According to the SCC, First Nations "must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending claims or rights. Past wrongs, including breaches of the duty to consult, do not suffice."[11]

[11] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43, para 45.

Understanding is created through a thorough exchange of information—this can be done in face-to-face dialogue or through written correspondence, or both. Although the process below is described in a linear manner, consultation is often iterative, and may consist of a number of meetings, deliberations, and information exchanges. The success of any consultation depends on the collaboration and commitment of all parties involved. All parties will work together to provide complete information, have meaningful dialogue, provide appropriate time to respond, and to respect any statutory or regulatory timeframes that are already in place.

INFORMATION MEETINGS

To initiate the dialogue process, the Mi'kmaq of Nova Scotia may request an information meeting before beginning internal deliberations and the consultation dialogue. This meeting is an opportunity to clarify any questions or concerns about information provided about a decision or action under consideration with the lead and responsible department(s).

MI'KMAW INTERNAL DELIBERATIONS

The Mi'kmaq of Nova Scotia will hold internal deliberations. This could include background research, review of available documents, and discussions with chiefs, councils, committees, communities, individuals, organizations, and the Assembly to determine any negative impacts on asserted rights. The Mi'kmaq of Nova Scotia will decide the format and methodology of their internal deliberations.

ADDITIONAL STUDIES

After review of the information provided by the Government of Nova Scotia to support the consultation process, the Mi'kmaq of Nova Scotia may request additional studies, such as Mi'kmaq Ecological Knowledge Studies (MEKS), archaeological studies, or engineering analyses, to supplement gaps in the existing information, particularly about impacts on asserted rights. The studies support the consultation process and may provide important information to the Mi'kmaq of Nova Scotia and the Province to help determine potential impacts on asserted rights. The lead department will consider these requests on a case-by-case basis in collaboration with OAA based on specific information provided by the Mi'kmaq of Nova Scotia about the impact of the proposed activity on asserted rights. The Province may recommend that proponents provide these additional studies before seeking approvals or registering documents for review. As these studies take time, proponents should contact OAA for guidance as early in the process as possible. Where applicable, proponents are expected to cover the costs of additional studies.

EXCHANGE OF INFORMATION AND DIALOGUE

Meetings may be convened between the Mi'kmaq of Nova Scotia, government(s), and sometimes proponents as well, to hold more in-depth dialogue about information related to the decision or action under consideration, potential impacts on asserted rights, any Mi'kmaw concerns or interests, and any potential accommodation, where appropriate. At the conclusion of discussions, the Assembly or, if outside of the TOR, the Mi'kmaw chief and council involved in the consultation, will provide a written response to the government(s) outlining all potential impacts on asserted rights and any other concerns or interests.

In practice, the Mi'kmaq of Nova Scotia and the Government of Nova Scotia often agree to conduct the consultation through written correspondence, particularly when a measure or action is perceived to have a low potential impact or in the interest of efficiency.

Through the use of the TOR, the Mi'kmaq of Nova Scotia and the Government of Nova Scotia have developed a number of innovative approaches to consultation. One of those approaches is the use of consultation roundtables. For example, there are currently consultation roundtables in the mining, energy, fisheries, transportation, and infrastructure sectors, as well as an environment technical committee. A consultation roundtable is a bilateral committee that meets regularly to discuss issues related to consultation in a particular sector. The committee consists of representation from the Mi'kmaq of Nova Scotia, the lead department responsible for the sector, and the OAA. Proponents and federal departments may be asked to attend by invitation. The roundtables meet on a regular basis to discuss strategic issues in their sector, to build capacity, and to consult on decisions or actions that are currently under consideration.

GOVERNMENT INTERNAL DELIBERATIONS

Once discussions between the parties have concluded, the lead department and any responsible or supporting departments will hold internal discussions to consider all information arising from the dialogue process or correspondence with the Mi'kmaq of Nova Scotia, and how to respond to any expressed potential impacts on asserted rights or other Mi'kmaw concerns or interests. Deliberations should include the identification of options for accommodation, where applicable. This may require further dialogue with the Mi'kmaq of Nova Scotia to attempt to reach an agreement on accommodation measures.

STEP 4: ACCOMMODATION

> *Consultation that excludes from the outset any form of accommodation is meaningless.*[12]

Consultation carries with it a concurrent obligation to consider the accommodation of Mi'kmaw interests. For consultation to be meaningful, it must consider accommodation from the outset.[13] This does not mean that every consultation process will result in accommodation—that will depend on the strength of the asserted Mi'kmaw claim and the potential for adverse impact on those claims. Since there is no "one-size-fits-all" approach to accommodation, all parties involved in consultation should be flexible and consider all avenues of addressing any adverse impacts to asserted rights expressed during the consultation process—"responsiveness is a key requirement of both consultation and accommodation."[14] However, in discussing accommodation measures, the government may have to balance Mi'kmaw interests with broader societal interests.

The primary goal of consultation and accommodation is to avoid adverse impacts on asserted rights. If the consultation process also reveals a duty to accommodate, accommodation measures should be proportionate to the level of impact a particular government action will have on asserted

[12] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, para 54.*
[13] Ibid.
[14] *Taku River Tlingit First Nation v. BC (Project Assessment Director),* 2004 SCC 76, para 25.

rights. Accommodation can take many forms, including placing terms and conditions in permits, licences, or authorizations, as well as other avoidance, minimizing, or mitigation measures. Mitigation measures may be as varied as, for example, requiring the carrying out of a plan to protect heritage resources, re-routing a pipeline, or adjusting the proposed construction schedule. Depending on the circumstances, where avoidance or mitigation is not possible, compensation (financial and/or non-financial) may also be considered.

SPECTRUM OF ACCOMMODATION

Since the Government of Nova Scotia takes a collaborative approach to consultation, the same approach should be taken for accommodation. If accommodation measures are needed, joint efforts should be made by all parties (provincial and federal departments and agencies, proponents and other third parties, and the Mi'kmaq of Nova Scotia) to negotiate appropriate avoidance, mitigation, or compensation measures. During discussions about potential accommodation measures, parties should take a strategic approach and attempt to arrive at agreement.

Any mitigation or compensation measures provided by project proponents will also be considered to be part or all of Crown accommodation, since the proponent engagement process is delegated by the Crown. Proponents should ensure they capture accommodation measures, including the reasons for accommodation in their engagement reports to the government and the Mi'kmaq of Nova Scotia. All accommodation measures should be provided in writing to the Crown and shared with the Mi'kmaq of Nova Scotia.

If a benefit agreement is developed between a proponent and the Mi'kmaq of Nova Scotia as an accommodation measure, the Crown will request documentation from the proponent and the Mi'kmaq that confirms that an agreement has been signed. For example, this could be a copy of the actual agreement or a letter from the Mi'kmaq of Nova Scotia confirming that an agreement has been signed. The Crown needs to be in possession of all relevant information to determine if potential adverse impacts on Mi'kmaw rights have been adequately addressed.

The table on page 26 lists examples of possible accommodations. The list is based on actual accommodation measures made as a result of consultation in Nova Scotia and in other jurisdictions across Canada. Note: Some accommodation measures may overlap between avoidance, mitigation, and compensation.

EXAMPLES OF POSSIBLE ACCOMMODATIONS

AVOIDANCE	RESPONSIBILITY[15]
Specific habitat protections	Crown[16] and/or proponent
Alter/change project location	Crown and/or proponent
Reduce project footprint	Crown and/or proponent
Modify or abandon project components	Crown and/or proponent
Use different techniques (e.g., reduce quantity of materials extracted)	Crown and/or proponent
Adjust/change timing of work to avoid impacts on species of interest (e.g., fish or plants)	Crown and/or proponent

MITIGATION	RESPONSIBILITY
Habitat restoration	Crown and/or proponent
Include the Mi'kmaq of Nova Scotia in environmental monitoring (e.g., contracts)	Proponent
Involve the Mi'kmaq of Nova Scotia in site restoration (e.g., mine site rehabilitation)	Proponent
Include Mi'kmaw archaeologist to observe/ monitor materials removed when there are known heritage resources in proximity	Proponent
Use techniques to minimize disturbance	Proponent and/or Crown
Undertake additional projects studies not required by legislation or regulation	Proponent and/or Crown
Create alternative areas for traditional use	Crown

COMPENSATION	RESPONSIBILITY
Habitat restoration	Crown and/or proponent
Profit and/or resource sharing	Proponent
Direct payment	Crown and/or proponent
Benefit agreement	Proponent
Trusts	Crown and/or proponent
Board of directors appointments	Proponent
Scholarships	Crown and/or proponent
Skills training	Crown and/or proponent
Employment contracts	Proponent
Direct procurement opportunities	Proponent

[15] To the extent possible, proponents should be responsible for carrying out avoidance or mitigation measures. The Crown may include these measures as terms and conditions of permits/authorizations.
[16] Appropriate federal or provincial agency should coordinate these measures.

STEP 5: DECISION

Once a course of action has been decided, the lead department will report back in writing to the Mi'kmaq of Nova Scotia on the decision made and how information provided during the consultation process was used in the decision, including any accommodation measures. This correspondence will be copied to all parties that have been involved in the consultation process.

Please contact OAA for a copy of the template letter for informing the Mi'kmaq of Nova Scotia of the government's decision.

STEP 6: FOLLOW-UP/MONITORING

The lead department responsible for consultation should ensure that, with support from OAA, all requested information is provided to the Mi'kmaq of Nova Scotia, and any agreed-to accommodation measures are carried out. Accommodation measures may be expressed as terms and conditions of a permit, authorization, or licence. These should be treated in the same manner as other terms and conditions when they are found not to be in compliance.

During the consultation process, proponents and lead departments should establish ongoing communication channels with the Mi'kmaq of Nova Scotia that will continue throughout the life cycle of the project and allow for better monitoring.

For more information, as well as departmental guidelines, please contact OAA.

CLOSING STATEMENT

This Policy provides clear direction and practical, consistent guidance to the provincial government when contemplating decisions or actions that have the potential to adversely impact established and/or asserted Mi'kmaw rights. While this Policy should be followed as closely and consistently as possible across provincial government, the diversity of projects and approvals, and the constantly evolving legal landscape, requires flexibility by all parties in its implementation.

The Consultation Policy and Guidelines provide a strong foundation for a broader government-wide approach to build and maintain an enduring relationship with the Mi'kmaq of Nova Scotia based on the shared goals and principles of peace and friendship—a relationship that is inclusive, respectful, and focused on building a successful future for Mi'kmaw communities and for all Nova Scotians.

APPENDIX: GLOSSARY OF TERMS

Aboriginal: Section 35(2) of the Constitution Act states that "Aboriginal peoples of Canada" includes Indian, Inuit, and Métis peoples of Canada.

Aboriginal Rights: Aboriginal rights refer to any activity that has an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right.[17] They generally refer to the right to exercise traditional activities, such as fishing, hunting, trapping, and gathering for food, social, and ceremonial purposes (including spiritual and cultural use). Activities that are encompassed by the term Aboriginal rights must have continuity with practices, customs, or traditions that existed prior to contact with Europeans, which in Nova Scotia is around the 1500s.

Aboriginal Title: Aboriginal title is a form of Aboriginal right and is a unique and beneficial interest in the land itself. Aboriginal title confers ownership rights similar to fee simple, including the right of enjoyment and occupancy of the land and the right to decide how the land will be used, possess the land, reap economic benefits of the land, and practically use and manage the land.

Aboriginal title is not absolute and must be held collectively for the present and future generations. It cannot be alienated except to the Crown, nor encumbered in a way that would prevent future generations of the group from enjoying and using it. To prove Aboriginal title, an Aboriginal group must have exclusively occupied the land at the time of sovereignty and occupied it sufficiently and continuously (if relying on present occupation), along with exclusivity, to satisfy the standard of occupation. This standard is context-specific with respect to the manner of the people and the nature of the land. On June 26, 2014, the Supreme Court of Canada granted the Tsilhquot-in Nation a declaration of Aboriginal title to approximately 1,700 square kilometres of land. This was the first granting by the Supreme Court of Canada of Aboriginal title to an Aboriginal group.

Adverse Impacts: The phrase "adverse impacts on asserted Mi'kmaw rights" refers to possible negative effects or impacts, including, but not limited to, negative environmental effects, on asserted Mi'kmaw Aboriginal and treaty rights.

Band: An organizational structure defined in the Indian Act that represents a particular body of indigenous peoples, also defined in the Indian Act. Bands are legal entities that are constructs of the Indian Act. There are 13 bands with 34 reserve locations in Nova Scotia.

Chief and Council: Chiefs and councils are elected by band members to govern the band and pass laws on reserve lands. They are elected according to provisions of the Indian Act, charged with the responsibility for "the good government of the band," and delegated the authority to pass by-laws on reserve lands.

Crown: Refers to the provincial or federal government generally, and in this document refers to both the provincial and federal governments including departments, agencies, Crown corporations, boards, and commissions, and includes Ministers of the Crown and all government employees that are doing the work of the Nova Scotia government. The term Crown is used interchangeably in this document with the terms government, Nova Scotia government, Government of Nova Scotia, Province of Nova Scotia, and Province.

[17] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para 46.

Crown Conduct: This refers to the exercise of the Crown's jurisdiction and authority either as a proponent or by approving an activity through permits and authorizations.

First Nation: A term that came into common usage in the 1970s to replace the word "Indian" (an Indian Act term) which some people found offensive. Although the term "First Nation" is widely used, no legal definition exists. Among its uses, the term "First Nations peoples" refers to the indigenous peoples of Canada identified as "Indian" under the Indian Act. Some bands have also adopted the term "First Nation" to replace the word "band" in the name of their community.

Honour of the Crown: The honour of the Crown arises from the Crown's de facto assertion of sovereignty over all lands and peoples in Canada. The honour of the Crown requires governments to determine, recognize, and respect Aboriginal and treaty rights as outlined in Section 35 of the Constitution Act (1982). 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.[18]

Impact Benefits Agreements (IBA): IBAs (sometimes referred to as Community Agreements, Benefits Agreements, Good Neighbour Agreements, etc.) are formal, binding agreements developed between First Nations and proponents to establish formal relationships, reduce potential impacts of a project, and secure economic benefits for affected communities. For proponents, entering into IBAs can provide a social licence for operation—reducing risk and helping to garner local support for their project. IBAs also contribute to the overall reconciliation goals of governments by providing opportunities for increased employment, participation, and economic development for First Nations.

Project Proponent: The term "project proponent" may include, but is not limited to, industry and various levels of government including a department, ministry, other government agencies, Aboriginal governments, Crown corporations, municipalities, boards, private entities, and individuals requiring an authorization from the Crown.

Specific Claim: Specific claims are grievances brought by First Nations against the federal government for failure to fulfill certain obligations, either in treaties or the management of lands and assets of a band on behalf of that community.

Statutory Decision-Making Period: A period of time required by law, through legislation or regulation, in which the Minister/Department must render a decision on an application for a permit or authorization.

Traditional Uses: First Nation traditional uses of lands and resources, such as the gathering of plants for food and medicinal purposes and the carrying out of ceremonial and spiritual observances and practices on unoccupied Crown lands and other lands to which First Nations may have a right of access for these purposes.

Treaty Rights: Treaty rights refer to those rights outlined in treaties signed with the Crown. There were several treaties signed with the Mi'kmaq in the Maritimes, but the most relevant for the purpose of consultation are the pre-Confederation Peace and Friendship Treaties of 1760–61. The Mi'kmaw treaty rights to hunt, fish, and gather to obtain a moderate livelihood were affirmed in the *R. v. Donald Marshall* decision in 1999[19] and are protected under Section 35 of the Constitution Act, 1982. It is important to note that in Nova Scotia, the treaties did not include extinguishment of rights or ceding of territory, as was the case in many of the treaties signed in other parts of Canada.

Tribal Council: A self-identified entity that represents a group of bands or Aboriginal people sharing a common interest. The tribal council may provide a range of advice and/or services to its members. There are two tribal councils in Nova Scotia: the Confederacy of Mainland Mi'kmaq and the Union of Nova Scotia Indians.

[18] Haida Nation, supra, note 3 at para 25.
[19] Shortly after the release of this decision, the SCC released a second decision about Marshall that added the caveat that activities recognized in the treaties are still subject to government regulation.