IN THE MATTER OF the *Electrical Power Control Act*, 1994, SNL 1994, Chapter E-5.1, as amended ("EPCA"); and

IN THE MATTER OF an application by Nalcor Energy to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited ("CF(L)Co") for the Churchill River, Labrador

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TO: The Board of Commissioners of Public Utilities

IN REPLY TO THE SUBMISSIONS OF NALCOR AND CF(L)CO, THE INNU OF UASHAT MAK MANI-UTENAM, THE INNU TAKUAIKAN UASHAT MAK MANI-UTENAM BAND COUNCIL AND CERTAIN TRADITIONAL FAMILIES OF THE UASHAT MAK MANI-UTENAM INNU NATION ("Intervenors") **SUBMIT:**

1. THE INTERVENORS SATISFY THE CRITERIA TO INTERVENE

a. The Board of Commissioners of Public Utilities board has limited discretion in regard to requests for intervenor status

1. For the purposes of the current proceedings the term "intervenor" is defined at s. 2(c)(i) of the *Board of Commissioners of Public Utilities Regulations, 1996*:

> [...]
>
> (c) "intervenor"
>
> > (i) when used in connection with proceedings commenced by an application to the board, means a person, other than the applicant, who files a submission [...]

2. The applicable statutes and regulations offer no further guidance as to the criteria for granting intervenor status.

3. According to MaCaulay & Sprague:

> [...] most agencies should allow standing to most intervenors. In the end, the agency will have to decide what weight should be given to the submissions. This practice is in the public interest.
>
> R.W. MacCaulay & J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 2009), p. 12-66.4(1) (emphasis added)

4. In these circumstances, the Intervenors submit that the Board of Commissioners of Public Utilities has a limited discretion in regard to determining requests for intervenor status.

5. More particularly, the general principle that administrative tribunals or boards apply when deciding whether a group or an individual should be granted intervenor status is one of:

> sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented.
>
> MaCaulay & Sprague, *supra*, p. 12-66.3 (emphasis added)

6. It is important to distinguish this test from the "specific interest" test applied by courts. Administrative tribunals or boards are not courts, and the threshold of interest required to intervene in proceedings before them is lower than that required to intervene in proceedings before the courts:

> The traditional differences between courts and agencies ought to make it clear to agencies that they cannot rely on court practice and procedure to declare whether a person has a right, or even a duty to appear before an agency.
>
> MaCaulay & Sprague, supra, p. 9-26.

7. In these circumstances, the decisions in *Dalton v. Hutton*, 2003 CarswellNfld 25 [TAB 8 in Nalcor's submission] and in *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 157 Nfld. & P.E.I.R. (TD) [TAB 7 in Nalcor's submission] are distinguishable from the present proceedings.

8. Nevertheless, the Court in *Dalton v. Hutton*, 2003 CarswellNfld 25, indicated that the test for intervenor status was not the same when a matter of public interest is at issue:

> There is a clear demarcation between public and private litigation in how courts view applications for leave to intervene. Applicants who have no direct interest in the outcome of proceedings are more likely to get leave to intervene if the proceedings involve "public law issues". Public law issues are matters of broad public and societal concern, and include such things as health, environmental and aboriginal matters.

Dalton v. Hutton, 2003 CarswellNfld 25, *at* para. 35 [TAB 8 in Nalcor's submission]

9. Consequently, the test for granting intervenor status is a low one, particularly in light of public interest issues such as environmental concerns and Aboriginal rights.

b. The Intervenors satisfy the criteria to intervene in these proceedings

10. The Intervenors have the requisite interest to intervene in the present proceedings.

11. The Intervenors claim Aboriginal title, Aboriginal rights and treaty rights in the portion of Nitassinan often referred to as Labrador. This traditional territory includes the entire area of the Upper Churchill hydroelectric project, a portion of the area of the Lower Churchill hydroelectric project, and the transmission lines that are connected to these projects. The traditional territory of the Intervenors includes all of the natural resources thereof, including living and inanimate things, and for greater certainty, surface and subsurface waters.

Comments provided by the Intervenors on July 17, 2009 and December 18, 2009 to the joint panel reviewing the proposed Lower Churchill hydroelectric project Amended Statement of Claim at the Federal Court of Canada, no. T-568-07, *Edouard Vollant et. al.* c. *Sa Majesté la Reine* – June 20, 2007

12. More particularly, the Intervenors use the air, lands, water, plant and animal life of the territory affected by the water management agreement. As such, the establishment of the water management agreement will adversely affect the Aboriginal rights and title of the Intervenors.

13. The Crown has knowledge – real or constructive – of the existence of Aboriginal rights and title of the Intervenors.

14. Consequently, the establishment of the water management agreement triggers a duty to consult and accommodate the Intervenors. This duty properly forms the basis of the Intervenors' intervention.

3. THE WATER MANAGEMENT AGREEMENT TRIGGERS A DUTY TO CONSULT AND ACCOMODATE

15. The following submissions will be further detailed in the course of these proceedings. These submissions are nevertheless necessary and relevant to the determination by the Board of Commissioners of Public Utilities of the Intervenors' request for Intervenor status.

A. The water management agreement triggers a statutory duty to consult

16. Nalcor and CF(L)Co have a statutory duty to consult with Aboriginal peoples affected by the establishment of the water management agreement.

17. The power policy of the province set out in the governing statute for these proceedings provides that:

> (b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner
>
> (i) that would result in the most efficient production, transmission and distribution of power
>
> *Electrical Power Control Act, 1994*, S.N.L. 1994, c. E-5.1, s. 3.

18. The notion of efficiency in power production is not scientific or technical, but is determined by the context:

> 4. In carrying out its duties and exercising its powers under this Act or under the Public Utilities Act, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.
>
> *Electrical Power Control Act, 1994*, S.N.L. 1994, c. E-5.1, s. 4 (emphasis added)

19. With respect to water management agreements in particular, "sound utility practice" is defined as follows:

> "good utility practice" means those practices, methods or acts, including but not limited to the practices, methods or acts engaged in or approved by a significant portion of the electric utility industry in Canada, that at a particular time, in the exercise of reasonable judgment, and in light of the facts known at the time a decision is made, would be expected to accomplish the desired result in a manner which is consistent with laws and regulations and with due consideration for reliability, safety, environmental protection, and economic and efficient operations.
>
> *Water Management Regulations*, N.L.R. 4/09, s. 2(d)

20. All of the utilities which are members of the Canadian Electricity Association, including Nalcor, have approved the following practices to which they have declared themselves to be committed:

> - Recognizing and respecting the status and diversity of Aboriginal peoples, and their historic and cultural ties to the land.

- Informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.

Canadian Electricity Association, "CEA Statement on Aboriginal Relations" (February, 2004)

21. Moreover, the "environmental protection" sought by "good utility practice" pursuant to s. 2(d) of the *Water Management Regulations* must be consistent with the definition of the environment provided by the legislature in other statutes:

(m) "environment" includes:
(i) air, land and water,
(ii) plant and animal life, including human life,
(iii) the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community,
(iv) a building, structure, machine or other device or thing made by humans,
(v) a solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of humans, or
(vi) a part or a combination of those things referred to in subparagraphs (i) to (v) and the interrelationships between 2 or more of them

Environmental Protection Act, S.N.L. 2002, c. E-14.2, s. 2

22. Aboriginal land use and occupation is one of the combinations or inter-relationships between land and water or plant and animal life, on the one hand, and the social, cultural and economic life of humans, on the other.

23. Aboriginal land use and occupation is therefore part of the environment which "good utility practice" seeks to protect.

24. Nalcor and CF(L)Co have not consulted the Intervenors in regard to the water management agreement. Consequently, Nalcor and CF(L)Co have not fulfilled their statutory obligations to consult the Intervenors.

B. The water management agreement triggers the constitutional duty to consult and accommodate

a. When is the constitutional duty to consult accommodate triggered?

25. According to the Supreme Court in *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, a duty to consult and accommodate:

arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

Haida Nation v. B.C. (Minister of Forests), [2004] 3 S.C.R. 511 at para 35 (emphasis added)

26. This duty is triggered prior to the proof of claims and the determination of rights. In other words, a ruling on consultation and accommodation is not a ruling on rights and title. In these circumstances, the submissions of Nalcor and CF(L)Co. are without merit when they allege that the Intervenors are asking the Board "to hear and determine matters of Aboriginal rights or title".

Haida Nation v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, at paras 26, 27, 34, 36, 38
Newfoundland and Labrador v. *Labrador Métis Nation* 2007 NLCA 75 (CanLII), at para. 29
Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and the Intervenors, para. 33
Reply by CF(L)Co. to Request for Intervenor Status by Intervenors, para. 14

27. More particularly, in the words of the Supreme Court:

> 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 to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

Haida Nation v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 27 (emphasis added)

28. The duty to consult and accommodate is triggered at a low threshold. According to the Court of Appeal of Newfoundland and Labrador:

> All that is necessary is that the Crown have "some idea" of the potential scope and nature of the aboriginal right asserted and of the alleged infringements of these rights.

Newfoundland and Labrador v. *Labrador Métis Nation* 2007 NLCA 75 (CanLII), at para. 29. See also *Mikisew Cree First Nation* v. *Canada*, [2005] 3. S.C.R. 388, at para. 55.

b. <u>What is the scope and content of the constitutional duty to consult and accommodate?</u>

29. There is a distinction between knowledge sufficient to trigger a duty to consult and accommodate and the content or the scope of the duty to consult and accommodate in a particular case.

30. Indeed, according to the Supreme Court in *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511:

> [...] 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.
>
> [...]
>
> The content of the duty to consult and accommodate varies with the circumstances [...]. 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 of title claimed.
>
> *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511at paras. 37, 39

c. <u>Does the establishment of the water management agreement trigger the duty to consult and accommodate?</u>

i. *<u>Intervenors claim Aboriginal rights and title to the area affected by the water management agreement</u>*

31. The Intervenors claim Aboriginal title, Aboriginal rights and treaty rights in the portion of Nitassinan often referred to as Labrador.

32. Since time immemorial, or, at least since several centuries prior to contact with Europeans, the Intervenors have continuously occupied, possessed, controlled and managed their traditional lands. The traditional lands of the Intervenors include all of Labrador, namely the lands and natural resources located approximately between Parallels 52 and 56 of latitude north and Meridians 61 and 69 of longitude west. Some parts of the traditional lands are shared with other Innu or Aboriginal groups.

33. This traditional territory includes the entire area of the Upper Churchill hydroelectric project, a portion of the area of the Lower Churchill hydroelectric project, and the transmission lines that are connected to these projects.

34. The traditional territory of the Intervenors includes all of the natural resources thereof, including living and inanimate things, and for greater certainty, surface and subsurface waters.

35. The Intervenors currently live, occupy, possess and use the western, central and northern portions of Labrador located approximately between Parallels 52 and 55 of latitude north and Meridians 62 and 68 of longitude west.

36. The Intervenors possess, occupy and use the territory and natural resources which will be affected by the water management agreement.

37. More particularly, the Intervenors use the air, lands, water, plant and animal life of the territory affected by the water management agreement.

ii. *The Crown has knowledge of the existence of Aboriginal rights and title*

38. The Crown has knowledge – real or constructive – of the existence of Aboriginal rights and title of the Intervenors.

39. In 1979, the Government of Canada agreed to negotiate with the Innu in regard to their land claims in Quebec and Labrador.

> Government of Canada, *Comprehensive claims policy and status of claims,* July 19, 2000, at pp. 11-12

40. In January 2005, the Government of Newfoundland and Labrador, in partnership with Newfoundland and Labrador Hydro, acknowledged that the Innu of Uashat mak Mani-Utenam claim Aboriginal rights in Labrador and that they may need to be consulted in regard to the lower Churchill hydroelectric development.

> Government of Newfoundland and Labrador, *Request for Expressions of Interest and Proposals*, January 2005

41. On April 5, 2007, certain traditional families of the Uashat mak Mani-Utenam Innu Nation filed proceedings in the Federal Court (*Edouard Vollant et. al.* c. *Sa Majesté la Reine* – file no. T-568-07) seeking a declaration of aboriginal title, aboriginal rights and treaty rights in respect to their family territories and traditional territory located in Labrador. The Attorney General of Newfoundland and Labrador and the Attorney General of Quebec are interveners in these proceedings. These proceedings were suspended by the Federal Court of Appeal in a decision dated June 3, 2009. However, the

plaintiffs, amongst others, plan to institute similar proceedings before the courts of the Province of Newfoundland and Labrador.

> Amended Statement of Claim at the Federal Court of Canada, no. T-568-07, *Edouard Vollant et. al.* c. *Sa Majesté la Reine* – June 20, 2007

42. In July 2008, the Government of Canada and the Government of Newfoundland and Labrador issued the *Environmental Impact Statement Guidelines* ("Guidelines") for the Lower Churchill hydroelectric project. The guidelines direct Nalcor Energy to consult with the Innu of Uashat mak Mani-Utenam. The guidelines specify that that the Innu of Uashat mak Mani-Utenam are one of the Aboriginal groups whose "interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues" is to be considered by Nalcor in its Environmental Impact Study.

> Government of Canada and Government of Newfoundland and Labrador, *Environmental Impact Statement Guidelines, Lower Churchill Generation Project*, July 2008, at para. 4.8

iii. *The establishment of the water management agreement will adversely affect Aboriginal rights and title of the Intervenors*

43. The Board The Board of Commissioners of Public Utilities has the duty to establish a water management agreement that is binding on two or more persons who have failed to reach a water management agreement and who have been granted rights by the province to the same body of water as a source for the production of power and who utilize, or propose to utilize, or to develop and utilize the body of water as a source of for the production of power.

> *Electrical Power Control Act, 1994*, S.N.L. 1994, c. E-5.1, s. 5.5

44. In these proceedings, event though Nalcor and CF(L)Co have failed to enter into a water management agreement pursuant to s. 5.4 *Electrical Power Control Act, 1994*, they have filed identical "proposed water management agreements".

> CF(L)Co Pre-Filed Evidence, p. 3

45. The establishment of the water management agreement primarily concerns the Churchill River. For greater certainty, the water management agreement deals with both the upper and lower Churchill River. The establishment of the water management agreement will adversely affect the Aboriginal rights and title of the Intervenors.

46. The establishment of the water management agreement is aimed at modifying, controlling, managing, and regulating water resources – resources which are included in the claims of Aboriginal rights and title of the Intervenors. More particularly, the establishment of the water management agreement will, among other things, modify, control, manage and regulate the following:

- the hydrology of the Churchill River basin;
- the use of the waters of the Churchill River;
- the flow of the waters of the Churchill River;
- the water levels of the Churchill River;
- the water volumes of the Churchill River;
- the runoff (from precipitation and snow melt) that reaches the Churchill River basin

Nalcor Pre-Filed Evidence, pp. 3-17
Water Management Regulations, NLR 4/06, art. 3

47. Consequently, such modification, control, management and regulation of the Churchill River will, among other things, negatively impact:

- the environment of the Churchill River basin and adjoining watersheds and tributaries, such as the Naskaupi and Kanatriktok rivers;
- the marine plants and animals of the Churchill River and adjoining watersheds and tributaries;
- the plants and animals that inhabit or use the Churchill River basin and adjoining watersheds and tributaries
- the use, possession, and control of the Churchill River and adjoining watersheds and tributaries, including natural resources therein, by the Intervenors.

Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume IA, pp. 5-4; 5-6
http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v1a.pdf
Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume IIA, pp. 2-73; 2-74; 4-38; 4-48
http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v2a.pdf
Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume IIB, pp. 5-61; 5-68 to 5-70; 5-73; 5-75; 5-83; 5-85
http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v2b.pdf
Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume III, p. 5-17
http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v3.pdf

48. The upper Churchill reservoirs will be the main source for the modification, control, management and regulation of water flow and water levels of the Churchill River.

Nalcor Pre-Filed Evidence, pp. 12-13
Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume IIA, p. 4-38
http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v2a.pdf

49. However, no environmental assessment has been performed in regard to the upper Churchill hydroelectric project, and particularly in regard to the effects of water management in the area of the upper Churchill river Basin (including the reservoirs of the upper Churchill hydroelectric development).

> Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume IA, p. 1-17
> http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v1a.pdf

50. Moreover, the upper Churchill hydroelectric development infringed and continues to infringe the Aboriginal rights and title of the Intervenors. Indeed, the construction and operation of the upper Churchill hydroelectric project caused and continues to cause major negative impacts on the way of life of the Intervenors. The upper Churchill hydroelectric project irreparably and irremediably transformed and continues to transform the natural environment of the traditional lands of the Intervenors. The Intervenors have never been compensated in regard to the upper Churchill hydroelectric development.

51. Additionally, the completion of the lower Churchill hydroelectric project will have major negative impacts on the way of life of the Intervenors — culturally, spiritually, socially and economically. The lower Churchill hydroelectric project will irreparably and irremediably transform the natural environment of the traditional lands of the Intervenors.

52. Furthermore, the Intervenors have not been consulted or accommodated in regard to:

- the establishment of the water management agreement;
- the Upper Churchill hydroelectric project; and
- the Lower Churchill hydroelectric project.

53. In these circumstances, the establishment of the water management agreement will adversely affect and infringe the Aboriginal rights and title of the Intervenors and perpetuate the historical infringement of the Aboriginal rights and title of the Intervenors – to the benefit of the province, Nalcor and CF(L)Co.

> Nalcor Energy, *Evironmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, Volume IA, p. 4-59
> http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31991/v1a.pdf

54. The establishment of the water management agreement will make a less satisfactory resolution of the Intervenors' claimed right to, among others, use, manage and control the water resources in the future, namely the Churchill River and adjoining watersheds and tributaries.

55. Consequently, the establishment of the water management agreement triggers a constitutional duty to consult and accommodate.

d. What is the scope and content of the duty to consult and accomodate in the circumstances?

56. The establishment of the water management agreement requires consultation at the high-end of the spectrum. In other words, the facts bear out the importance of full consultation and accommodation in the present circumstances. Indeed, there is a strong *prima facie* case in support of the claim to Aboriginal title, aboriginal rights and treaty rights of the Intervenors and the establishment of the water management agreement will infringe the Aboriginal rights and title of the Intervenors, as well as perpetuate the historical infringement of the Aboriginal rights and title of the Intervenors.

e. The duty to consult and accommodate has not been satisfied in the circumstances.

57. As previously mentioned, the Intervenors have not been consulted in regard to the establishment of the water management agreement and the upper and lower Churchill hydroelectric projects. As such the duty to consult and accommodate has not been satisfied in the circumstances.

3. THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES HAS THE JURISDICTION AND OBLIGATION TO CONSIDER CONSULTATION AND ACCOMODATION

A. Statutory duty to consult

58. The Board of Commissioners of Public Utilities has the jurisdiction and the obligation to determine whether Nalcor and CF(L)Co have fulfilled their statutory obligations to consult the Intervenors in accordance with "sound utility practice".

59. The *Electrical Power Control Act, 1994* explicitly grants jurisdiction to the Board of Commissioners of Public Utilities to determine such issues:

> 4. In carrying out its duties and exercising its powers under this Act or under the *Public Utilities Act*, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.
>
> *Electrical Power Control Act, 1994*, S.N.L. 1994, c. E-5.1, s. 4 (emphasis added)

60. In these circumstances, in establishing the water management agreement pursuant to 5.5 The *Electrical Power Control Act, 1994*, the Board of Commissioners of Public Utilities must determine whether Nalcor and CF(L)Co have fulfilled their obligations to consult the Intervenors in accordance with "sound utility practice".

B. Constitutional duty to consult and accomodate

61. The Board of Commissioners of Public Utilities must exercise its decision-making function in accordance with the dictates of the Constitution, including s. 35 of the *Constitution Act, 1982.*

> *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 185
> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at para. 45

62. The honour of the Crown requires not only that the Crown consult, but also that the Board of Commissioners of Public Utilities decides any consultation dispute which arises within the scheme of its regulation.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at paras. 51, 54)

63. The Board of Commissioners of Public Utilities is a quasi-judicial tribunal with authority to decide questions of law on proceedings under applicable statutes and regulations. It is not necessary to find an explicit grant of power in the applicable statutes and regulations to consider constitutional questions; so long as the Legislature intended that the Board of Commissioners of Public Utilities decide questions of law, that is sufficient.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at paras. 15, 45
> *Kwikwetlem First Nation v. B.C. (Utilities Commission)*, [2009] 9 W.W.R. 92, at para. 8
> *Public Utilities Act*, R.S.N.L. 1990, c. P-47, ss. 16, 99(1) and 118(2)
> *Board of Commissioners of Public Utilities Regulations, 1996*, NLR 39/96, art. 27

64. As such, the Board of Commissioners of Public Utilities has the jurisdiction and the obligation to decide whether the duty to consult and accommodate has been triggered and whether this duty has been discharched with respect to the establishment of the water management agreement.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at para. 15
> *Kwikwetlem First Nation v. B.C. (Utilities Commission)*, [2009] 9 W.W.R. 92, at para. 8

65. Not only does the Board of Commissioners of Public Utilities have the ability to decide the consultation issue, it is the appropriate forum to decide the issue. Indeed, if the Intervenors are entitled to early consultation in regard to water management agreement, it necessarily follows that the board with the power to establish the water management

agreement must accept the responsibility to assess the adequacy of consultation. Otherwise, the Intervenors will be driven to seek an interlocutory injunction, which, according to the Supreme Court in *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, is often an unsatisfactory route.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at para. 53
> *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 14

4. THE ENVIRONMENTAL ASSESSMENT OF THE LOWER CHURCHILL PROJECT CANNOT SATISFY THE DUTY TO CONSULT

A. The Intervenors have not been consulted in fact

66. Nalcor has not consulted the Intervenors in regard to the lower Churchill hydroelectric project. In these circumstances, Nalcor's Environmental Impact Statement remains incomplete, insufficient and inadequate.

> Comments provided by the Intervenors on July 17, 2009 and December 18, 2009 to the joint panel reviewing the proposed Lower Churchill hydroelectric project.

67. More particularly, there has only been one information meeting with Nalcor on January 12, 2009. There have been no other meetings.

> Comments provided by the Intervenors on December 18, 2009 to the joint panel reviewing the proposed Lower Churchill hydroelectric project.

68. The allegation by Nalcor that the Intervenors are being consulted by Nalcor as part of the environmental assessment process of the lower Churchill hydroelectric project is therefore manifestly untrue.

> Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors, para. 19

69. The allegation by Nalcor that the Intervenors have received funding to participate in the environmental assessment of the lower Churchill project is also untrue. The Intervenors have not received any funding in that regard.

> Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors, para. 19

70. In the alternative, even if there was consultation in respect to the lower Churchill hydroelectric project, which is expressly denied, this consultation would be inadequate in satisfying the duty to consult and accommodate in respect to the water management agreement. Indeed, as previously mentioned, the water management agreement encompasses both the upper and lower Churchill River and triggers a duty to consult and

accommodate that is specific to the water management agreement, particularly in light of the fact that was no consultation and no environmental assessment in regard to the upper Churchill hydroelectric project, including water management.

B. The lower Churchill Joint Review Panel cannot ensure consultation as a matter of law

71. Nalcor's own exhibit flatly contradicts its submissions and those of CF(L)Co. that the lower Churchill environmental assessment process could be the appropriate forum for consultation and accommodation of the Innu of Ekuanitshit.

> Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors, para. 33 and Tab 4
> Reply by CF(L)Co. to Request for Intervenor Status by Intervenors, para. 12

72. As a matter of law, the federal-provincial agreement produced by Nalcor expressly forbids the Lower Churchill Hydroelectric Generation Project Joint Review Panel from considering the adequacy of consultation and accommodation of Aboriginal interests by the Crown:

> The Panel will not have a mandate to make any determinations or interpretations of:
> - the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;
> - the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
> - whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the Constitution Act, 1982; and
> - The scope, nature or meaning of the Labrador Inuit Land Claims Agreement.
>
> *Agreement Concerning the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project between the Government of Canada and the Government of Newfoundland and Labrador* (2008), "Part II – Scope of the Environmental Assessment", p. 10 (emphasis added) [Tab 4 of Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors]

C. Environmental assessment is not equivalent to consultation and accommodation

73. The Supreme Court of Canada found that a decision taken pursuant to the *Canadian Environmental Assessment Act* was insufficient to satisfy the Crown's duty to consult and

accommodate Aboriginal peoples in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

74. The Court found that even though the actual content of the Crown's duty of consultation lay at the lower end of the spectrum, nonetheless:

> 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's duty to consult imposes on it a positive obligation to reasonably ensure [...] that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.
>
> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 64

75. The judge at first instance, whose judgment was upheld by the Supreme Court of Canada, made a distinction between the "standard procedures mandated by the environmental assessment rules... designed to minimize environmental impacts" and the "steps taken to minimize the effects of the proposed road on the constitutional rights" of members of a Aboriginal people: *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 (CanLII) (F.C.), at para. 173, see also paras. 141, 143, 156, 157.

76. It therefore cannot be presumed that the Crown's obligation to consult would be fulfilled in simply following the process in the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, or the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

77. The Supreme Court of Canada did find that the process engaged in by the Province of British Columbia under its *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

78. However, the process which the Supreme Court held was acceptable provided the Aboriginal party with a special role:

a) the provincial statute required that Aboriginal peoples whose traditional territory included the site of the project be invited to participate in a Project Committee;

b) representatives of the First Nation participated fully as Project Committee members;

c) the First Nation received financial assistance to participate in Project Committee meetings; and

d) in face of concerns raised by the First Nation, the provincial office responsible for assessment commissioned a study on traditional land use by an expert approved by the First Nation and under the auspices of an Aboriginal study steering group.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, at pp. 568-570

79. Unlike the Appellants in the Supreme Court decision in *Taku River Tlingit First Nation v. B.C.*, [2004] 3. S.C.R. 550, the Intervenors are not "full participants" in the environmental assessment of the lower Churchill hydroelectric project. The Intervenors have only provided comments to the joint panel. They have not received any funding to participate in this process. They have no control over the panel's process. In any event, there has been no consultation of the Intervenors in respect to lower Churchill hydroelectric project.

Montreal, this 14th day of January 2010

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in a somewhat irregular fashion in *Thorson, McNeil* and *Borowski*. Unfortunately, Mr. Justice LeDain did not engage in a concerted effort to fully delineate what each of these criteria involve. Thus, the meaning of concepts such as "justiciability", "serious issues" and "genuine interest" remain fairly elusive in nature.

Notwithstanding the weakness mentioned in the last point, the *Finlay* case represents a positive development. It is now clear that the Supreme Court considers it inappropriate for the Attorney General to exercise final control over non-constitutional challenges to legislation much as it found such control unacceptable in the constitutional realm. Thus, the *Finlay* case establishes that the ultimate discretion as to when an individual may challenge the administration of public legislation is now squarely in the hands of the courts. This is to be applauded, in so far as it removes from the political arena the determination as to whether politically-hued cases will be brought to court. Of course, the danger is that the courts will become excessively involved in purely political issues. In the era of the Charter, however, this concern may be superfluous. The Charter has already injected political considerations into the judicial arena; it would be hypocritical, therefore, to restrict "public interest" standing on those grounds alone. Furthermore, it is better to incur the risk that a court might issue on overtly political decision once in a while than to completely immunize such questions from judicial review altogether.

I believe that the *Finlay* decision confirms that the court is becoming more open, an attitude which should be mirrored by administrative agencies where the jurisdiction exists to do so.[47.2]

9.7(b) Intervening in Agency Proceedings

In section 9.7(a), I reviewed for the reader the trend of the courts in the last few years to open up their proceedings to a broader spectrum of participation by

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47.2 However, see the caution sounded by the Supreme Court of Canada in *Canadian Council of Churches v. R.*, 1992 CarswellNat 25, 2 Admin. L.R. (2d) 229, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 (S.C.C.) in its refusal to extend public interest standing beyond the *Finlay* criteria that "care must be taken to ensure that judicial resources are not overextended."

For a case where "public interest standing" was granted by a court, see also *Friends of the Earth – Les Amit(e)s de la Terre v. Canada (Governor in Council)*, 2008 CarswellNat 3763, 2008 FC 1183 (Fed. Ct.). That case dealt with the attempt by a public interest group to enforce the *Kyoto Protocol Implementation Act*. The *Kyoto Protocol Implementation Act* had been forced on a (minority) government by a (majority) opposition. In these unusual, to say the least, circumstances, the public interest group sought standing to bring judicial reviews to force the government to comply with its alleged obligations under the Act. The Federal Court held that the group met the requirements for public interest standing:

> in that it has a genuine interest in the subject matter raised, there is a serious issue presented that there is no other reasonable and effective way to bring these matters before the Court. . .

those wishing to take part in court proceedings. Some court practice, in terms of standing comes very close to, if it does not contravene both the Rules of Natural Justice as well as basic underlying principles of the Charter of Rights.

The permission or right to participate in agency hearings in Canada has always been much more democratically practised by agencies than by the Canadian courts. There are unfortunately some exceptions to this general rule, lamentably, usually at the hand of agencies which are chaired by lawyers with insufficient practical administrative experience.

More agencies in Canada are very open about who and what they will recognize, largely because most agencies have a duty to represent and consider the public interest in addition to any particular interest of a party appearing before the agency in a given matter. It is patently difficult for an agency to consider the public interest if a member of the public is excluded from giving evidence or otherwise taking part in the proceedings. Agencies, on the whole, have adopted a low hearth of interest as an entrance requirement. The basic test that is most often applied is that of relevance. If what the person seeking to participate has to say or to bring to the hearing is relevant, the person ought to be able to participate.

Further, it is far better to err on the open side of admission in the early stages of a hearing before ruling at a later date that the evidence or participation of the person is not helpful to the producers and considerations of the agency.

Patently, there is an exception to this general view, that is, where the mandating legislation makes it very clear — and I repeat "very clear" that such a person is not to be heard by the agency. However, even then, I would be of the view that there is very little legislation to that effect in Canada, and whatever there is, is likely contrary to the Charter of Rights in which case the agency ought to so find and declare, where appropriate, that the constraint is unconstitutional. (See the *Cuddy Chicks*[48] case after tab "Cases and Comments".)

The traditional differences between courts and agencies ought to make it clear to agencies that they cannot rely on court practice and procedures to declare whether a person has a right, or even a duty to appear before an agency.

Forty years of experience in administrative practice has taught me that there is far less time consumed and fewer risks taken by admitting rather than excluding a party. It doesn't take much imagination, if such is justified, to hear the evidence, insist that it be relevant, and then not rely on it. (But be careful to explain why you heard what you heard and why you did not rely upon it — if in fact that turns out to be the case.)[49]

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48 *Cuddy Chicks Ltd. v. Ontario (Labour Relations Bd.)*, 70 O.R. (2d) 179, 35 O.A.C. 94, 38 Admin. L.R. 48, 62 D.L.R. (4th) 125, [1989] O.L.R.B. Rep. 989, 89 C.L.L.C. 14,051 (C.A.), leave to appeal to S.C.C. granted February 22, 1990, Doc. No. 21675.

49 But see *Leisureland Sports Bar Inc. v. Edmonton (City)*, 2001 ABQB 745, [2001] A.J. No. 1136 (Alta. Q.B.) which I cite simply as a caution for agencies to ensure that the firmly establish the reasons and basis for allowing broad participation in their proceedings. An agency cannot rely on the courts to fully appreciate the realities, and sometimes even legalities, of agency proceedings. In that case the Alberta Court of Queen's Bench ruled that the Community Services Committee

There are a number of cases on standing before administrative agencies in Canada, but each of them relies so specifically upon the mandating legislation of that agency, or at least upon the interpretation of some judicially-oriented chairperson, that they are not really very helpful as a general guide.

A more extensive discussion relating to the grant of intervenor status in agency proceedings to persons who are not parties will be found later in chapter 12 under heading "12.4 Interventions."

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of the City of Edmonton breached the terms of its enabling statute when it heard the views of local residents in considering an appeal by a bar from a business licence inspector. The relevant licence by-law provided that "The Community Services Committee shall hear from the Appellant and the City officials concerned. . . ." The Court construed this provision as an implicit direction that the Committee could not hear anyone else. Beyond simply noting the by-law and stating its conclusion the Court really does not provide any analysis for that conclusion. It does not appear to consider, for example, that a direction to hear from some groups does not necessarily amount to a direction not to hear others as well and that the provision may merely have served as a direction as to those who have a right to be heard rather than a restriction on the rather common ability of agencies to allow others to be heard as well. Nor does the Court appear to consider that the Committee could have heard the very views in question from the very groups if the Committee chose simply to refer to them as witnesses. The Court did say that it understood the frustration of the local residents as they would not be heard at any time in the decision that would affect their community. Indeed.

that matter is delayed or stretched unreasonably. The agency must, as well, avoid the impression of attempting to build the case for one party or another.

12.4 INTERVENTIONS

Intervenors are generally individuals or groups who do not meet the criteria to be a party but who still have a sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented. As the Supreme Court of Canada commented in the *Canadian Council of Churches v. Canada*[162] "[T]he views of the public litigant who cannot obtain standing need not be lost. Public interest organizations are, as they should be, frequently granted intervenor status. *The views and submissions of intervenors on issues of public importance frequently provide great assistance to the courts.*" [emphasis added.]

A statute may expressly give an agency the authority to grant intervener status to a person or group.[162.1] Otherwise an agency's authority to grant intervener status flows implicitly from the power to conduct a hearing or to hold an inquiry.[163] It appears that, at least in the case of a public officer, in order for an agency to grant such status the person seeking intervenor status must have the ability himself to receive the grant.[164]

There is no common law *right* to be an intervenor. Statute may, of course, grant such a right but in the absence of such a statutory provision, intervenors are added at the discretion of the agency. Furthermore, unlike a party, who is given certain rights by natural justice and fairness, the extent of an intervenor's participation is fixed by the agency (subject to statutory direction, of course). The

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162 (1992), 132 N.R. 241 (S.C.C.).

162.1 See, for example, section 33 of British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

163 *Nfld. Telephone Co. v. TAS Communications Systems Ltd.* (1987), 45 D.L.R. (4th) 570 (S.C.C.).

164 In *Nfld. Telephone Co. v. TAS Communications Systems Ltd.* (1987), 45 D.L.R. (4th) 570 (S.C.C.) the Supreme Court held that the Newfoundland Board of Commissioners of Public Utilities could not grant intervenor standing to the federal Director of Investigation and Research as the federal government had not given that officer the mandate to appear before provincial agencies. The Court held that "Whatever scope may be reasonably assigned to the implied power or discretion of the board to permit intervention, it cannot have been intended that the board should have authority to permit intervention by a public officer in his official capacity if the officer has been denied the necessary authority to intervene by his governing statute. . . . To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law." The Court had earlier held that the official required some statutory authority to intervene in the capacity of his office as that intervention would amount to "an assertion, in an adjudicative context, of the authority and expertise of a public official. In such a case, a public officer puts the weight of his opinion and knowledge acquired in the exercise of his official duties, on the adjudicative scales. He extends, on his own initiative, the effective reach and influence of his office and authority with potential direct legal effect." For a similar decision see *City of Edmonton v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 358 (C.A.).

degree of participation will be determined by the extent the agency feels the intervenor's participation will assist it in its mandate.[165] Sometimes two or more individuals or groups may bring before the agency essentially the same expertise or views. In that case the agency may require that they pool their resources and appear through a single spokesman.[165.1] However, it must be remembered that an intervenor is there to bring a view or an expertise before the agency which will be useful in determining the matter which is before the agency. If the person seeking intervenor status is not bringing anything of potential use to the agency, or is simply repeating which will already be brought or could be brought to the agency by the other parties, the agency should not grant intervenor status out of concerns respecting the public (and the parties') interest in efficient and expeditious proceedings.[165.2] An intervenor should not be given leave to speak to ques-

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165 See for example, the description of the role of intervenors before the National Energy Board in c. 5.5(d)(iv) and the Ontario Energy Board in c. 5.4.

165.1 Of relevance to this point is the caution sounded by Lord Hoffman in the British House of Lords decision in *In Re E (a child)*, [2008] UKHL 66 (H.L.) respecting interventions in proceedings before the House of Lords. Those comments are also applicable to proceedings before Canadian agencies.

> It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organizations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.

165.2 In *Canada (Prime Minister) v. Khadr*, 2009 CarswellNat 1637, 2009 FCA 191 (Fed. C.A.) (which dealt with efforts to repatriate Omar Khadr from Guantanamo Bay and the American military process) Amnesty International sought, and was refused intervenor status before the Federal Court of Appeal. The Court applied the test set out in *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (Fed. C.A.). That test set out the following factors for consideration:

> 1) Is the proposed intervener directly affected by the outcome?
>
> 2) Does there exist a justiciable issue and a veritable public interest?
>
> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
>
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the

tions which are not raised by the underlying proceeding.[166]

Once notice has been given of the hearing, those who want to take part will give notice of their wish to participate in the hearing by filing with the tribunal a notice of intervention: see Appendix 12.4.

The notice of intervention should be precise and should set out:

(1) the style of cause (to allow the agency to identify the proceeding in question);

(2) a description of the intervenor (to allow the agency to know who is seeking the intervention and what he can bring to the proceeding);

(3) a description of how the intervenor can be impacted or affected by the matters before the agency;

(4) a brief description of the positions being taken by the intervenor for or against; and

(5) the address for service upon the intervenor.

Few agencies have a procedure to strike out a notice of intervention if it fails to disclose any substantial interest of the intervenor. I believe that most agencies should allow standing to most intervenors.[167] In the end, the agency will have to decide what weight should be given to the submissions. This practice is in the public interest.

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case?

5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the case on its merits without the proposed intervener?

Of those, the Court of Appeal stated that it considered particularly whether:

- the position of the proposed intervener is adequately defended by one of the parties to the case;
- the interests of justice are better served by the intervention of the proposed third party;
- the Court can hear and decide the cause on its merits without the proposed intervener.

Amnesty had stated that it had expertise on the issue of human rights and, while it supported the position of the respondent it sought to make supplemental argument. In denying the application the Court stated that:

> at its highest, AI's interest is jurisprudential in nature. It is well-established that this kind of interest alone cannot justify an application to intervene.

166 *Rudolph v. Canada (Minister of Employment & Immigration)* (1992), 139 N.R. 233 (Fed. C.A.).

167 For an interesting limitation on the authority of an agency to grant intervenor status see *Director of Investigations and Research Under the Combines Investigation Act v. Nfld. Telephone Co.*, [1987] 2 S.C.R. 466, 68 Nfld. & P.E.I.R. 1, 209 A.P.R. 1, where the Supreme Court of Canada held that an provincial agency could not grant a federal official intervenor status in its proceedings when Parliament had not given that office the mandate to intervene. The agency's provincially based power could not alter the mandate of the federal official.

Where an agency has no requirement for the filing of any supporting material in advance by the applicant, there will obviously be no requirement that material be filed with a notice of intervention. Many agencies have no requirement that an intervenor file any material. He only has to appear the day the hearing commences, having given notice of his intent to intervene. Many agencies do not even require a notice of intervention to intervene. Most agencies fall somewhere between the extremes of substantial pre-filings and no filings at all.[167a]

12.5 INTERROGATORIES

Once a notice calling a hearing has been given and the notices of intervention have been received, the tribunal may issue a procedural order advising all parties of the procedure, in terms of interrogatories and other preliminary matters.

Interrogatories are written questions directed by parties to each other, copies of which are filed with the tribunal and sent to or served on all other parties. Usually the procedural order, where interrogatories are part of a tribunal's practice, will described how a party may intervene and put interrogatories to opposing parties. Such a procedural order is attached as Appendix 12.5.

Interrogatories were introduced many years ago by some agencies such as the NEB and the OEB as a substitute for examination-for-discovery. Most boards can authorize (order) discovery, but it is not common to do so. The concept of interrogatories is that if a party does not understand material that has been filed, it may address questions in writing to another party. The interrogatories shall be answered by the other party in writing on or before a certain date, unless a motion is brought before the tribunal dispensing with a duty to answer the question. The practice, where there are interrogatories, is that the question and answers are numbered so that they can be easily associated with the party asking the question and the subject matter.

Needless to say, an interrogatory process, although common with regulatory tribunals is not common with other kinds of agencies. This is, perhaps, because the issues coming before regulatory boards are unusually complex. They involve, as a rule, a large volume of paper and statistics.

It is not possible to lay down any rule as to how, if at all, agencies should make use of the interrogatory process. However, there is something to be said for the use of more, rather than less, pre-filed material so that parties have a clearer advance knowledge of how parties' interests are affected or could be affected by the hearing. In addition, the parties can more usefully participate on behalf of the public interest and assist a tribunal if it knows more rather then less about the issues in advance. The pre-filed material becomes part of the record as soon as it is identified by the witness. The material is not read into the record. The tribunal must have read and understood the material, as filed, before the hearing com-

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167a Inventions are also discussed briefly earlier in chapter 9 under the heading "9.7(b) Intervening in Agency Proceedings".

Canadian Electricity
Association

- **CEA Statement on Aboriginal Relations**
  February 2004

Statement on Aboriginal Relations

The Context

Aboriginal communities across Canada – First Nation, Inuit, and Métis – seek increased participation in the economic, political and, social affairs of this country.

While sharing this common objective, these communities represent a complex and diverse set of interests. They also present an increasingly evident and compelling reality:

- Aboriginal youth, between the ages of 15 and 35, are the fastest growing demographic group in Canada;[1]
- Aboriginal communities exercise some measure of influence – and, in the case of reserve lands, direct control – over a significant percentage of Canada's land area, and the resolution of land claims may see the percentage of lands under direct control increase significantly;[2]
- Effective political representation and success in the courts have given issues of importance to Aboriginal peoples a key place in provincial and federal political agendas; and
- There are now more than 10,000 Aboriginal-owned businesses operating in Canada, up from an estimated few hundred in the late 1960's.[3]

This new reality presents challenges for Canadian society. From the perspective of the electricity industry, it also presents new opportunities – for Aboriginal and non-Aboriginal Canadians alike.

The Opportunity

Much has been learned from the history of the relationship between Aboriginals and non-Aboriginals. The new reality described above affords Canadian society at large, and the electricity industry in particular, an opportunity to benefit from that learning. Key is the recognition that the interests of Aboriginal communities and the electricity industry are more common than different.

Electricity is a major natural resource-derived commodity critical to the Canadian economy, meeting the needs of residential homeowners, businesses, and industry from coast to coast to coast. A large part of both current and potential Canadian electricity generation and transmission originates in or crosses over land traditionally used by Aboriginal communities.

Common interests in business are identified by getting to know people, their institutions, their decision-making processes, and how they do business. During the last 15 years, electrical utilities have dedicated substantial resources to create specific policies, programs and projects designed to reach out and constructively engage local Aboriginal communities in the day-to-day business of the industry. This process is on-going, expanding, and of benefit to both groups.

There are already many successful business relationships between Canadian electricity companies and Aboriginal communities. Member companies of the Canadian Electricity Association believe that additional mutually beneficial business arrangements can and will be forged with Aboriginal communities for electricity projects, particularly in the near-term when the industry faces significant change in its scale and design. Creative thinking and innovative business agreements have demonstrated that cultural differences can be bridged to serve a common purpose. It is a solid foundation on which to build.

- **CEA Statement on Aboriginal Relations**
  February 2004

The Commitment

Member companies of the Canadian Electricity Association are committed to:

- Recognizing and respecting the status and diversity of Aboriginal peoples, and their historic and cultural ties to the land.
- Informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.
- Building relationships with Aboriginal communities based on trust, respect, and mutual understanding.
- Building on the success of existing relationships by pursuing direct meetings and consultations to help local utilities and Aboriginal communities to develop new and better business relationships.
- Increasing employment and contracting opportunities for Aboriginal peoples.
- Creating a supportive work environment for Aboriginal peoples employed at our companies.
- Becoming an Employer of Choice for the growing demographic of Aboriginal youth.
- Supporting educational opportunities for Aboriginal people to provide a well-trained source of employees for the industry.

Conclusion

The member companies of the Canadian Electricity Association are confident that we can do business with the Aboriginal peoples of Canada to our mutual benefit. With respect for their often unique historic and cultural links to the land, waterways, and natural resources of Canada, we are committed to working with them as we meet the electricity needs of all Canadians.

For more information:

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[1] 2001 Census, Statistics Canada

[2] Corporate Aboriginal Relations: Best Practice Case Studies, Pamela Sloan & Roger Hill, Hill Sloan Associates Inc., Toronto: 1995, p. xi

[3] CANDO Statement on the Economic Development Recommendations of the Royal Commission on Aboriginal Peoples, David Newhouse & Corinne Mount Pleasant-Jette, The Joint CANDO-Royal Bank Symposium, October 23, 1997, p. 3

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

v.

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

and between

Weyerhaeuser Company Limited *Appellant*

v.

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

and

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

Ministre des Forêts et procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Appelants*

c.

Conseil de la Nation haïda et Guujaaw, en leur propre nom et au nom des membres de la Nation haïda *Intimés*

et entre

Weyerhaeuser Company Limited *Appelante*

c.

Conseil de la Nation haïda et Guujaaw, en leur propre nom et au nom des membres de la Nation haïda *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Nouvelle-Écosse, procureur général de la Saskatchewan, procureur général de l'Alberta, Bande indienne de Squamish et Bande indienne des Lax-kw'alaams, Nation haisla, Sommet des Premières nations, Première nation Dene Tha', Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of

British Columbia Cattlemen's Association and Village of Port Clements *Interveners*

INDEXED AS: HAIDA NATION v. BRITISH COLUMBIA (MINISTER OF FORESTS)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which

Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association et Village de Port Clements *Intervenants*

RÉPERTORIÉ : NATION HAÏDA c. COLOMBIE-BRITANNIQUE (MINISTRE DES FORÊTS)

Référence neutre : 2004 CSC 73.

N° du greffe : 29419.

2004 : 24 mars; 2004 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

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

Couronne — Honneur de la Couronne — Obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations — La Couronne a-t-elle envers les peuples autochtones une obligation de consultation et d'accommodement avant de prendre une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et titres ancestraux non encore prouvées? — L'obligation vise-t-elle aussi les tiers?

Depuis plus de 100 ans, les Haïda revendiquent un titre sur les terres des îles Haïda Gwaii et les eaux les entourant; ce titre n'a pas encore été juridiquement reconnu. En 1961, la province de la Colombie-Britannique a délivré à une grosse compagnie forestière une « concession de ferme forestière » (CFF 39) l'autorisant à récolter des arbres dans la région des îles Haïda Gwaii connue sous le nom de Bloc 6. En 1981, en 1995 et en l'an 2000, le ministre a remplacé la CFF 39 et en 1999 il a autorisé la cession de la CFF 39 à Weyerhaeuser Co. Les Haïda ont contesté devant les tribunaux ces remplacements et cette cession, qui ont été effectués sans leur consentement et, depuis 1994 au moins, en dépit de leurs objections. Ils demandent leur annulation. Le juge en son cabinet a rejeté la demande, mais a conclu que le gouvernement a l'obligation morale, mais non légale, de négocier avec les Haïda. La Cour d'appel a infirmé cette décision, déclarant que le gouvernement et Weyerhaeuser Co. ont tous deux l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations.

Arrêt : Le pourvoi de la Couronne est rejeté. Le pourvoi de Weyerhaeuser Co. est accueilli.

Il est loisible aux Haïda de demander une injonction interlocutoire, mais ce n'est pas leur seul recours. Par

may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

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

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

ailleurs, il est possible que l'injonction interlocutoire ne tienne pas suffisamment compte de leurs intérêts avant qu'une décision définitive soit rendue au sujet de ceux-ci. S'ils sont en mesure d'établir l'existence d'une obligation particulière donnant naissance à l'obligation de consulter ou d'accommoder, ils sont libres de demander l'application de ces mesures.

L'obligation du gouvernement de consulter les peuples autochtones et de trouver des accommodements à leurs intérêts découle du principe de l'honneur de la Couronne, auquel il faut donner une interprétation généreuse. Bien que les droits et titre ancestraux revendiqués, mais non encore définis ou prouvés, ne soient pas suffisamment précis pour que l'honneur de la Couronne oblige celle-ci à agir comme fiduciaire, cette dernière, si elle entend agir honorablement, ne peut traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité. L'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà de la reconnaissance formelle des revendications. L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci. La prise de mesures de consultation et d'accommodement avant le règlement définitif d'une revendication permet de protéger les intérêts autochtones et constitue même un aspect essentiel du processus honorable de conciliation imposé par l'art. 35 de la *Loi constitutionnelle de 1982*.

L'étendue de l'obligation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre. La Couronne n'a pas l'obligation de parvenir à une entente mais plutôt de mener de bonne foi de véritables consultations. Le contenu de l'obligation varie selon les circonstances et il faut procéder au cas par cas. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. Des consultations menées de bonne foi peuvent faire naître l'obligation d'accommodement. Lorsque des mesures d'accommodement sont nécessaires lors de la prise d'une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et de titre ancestraux non encore prouvées, la Couronne doit établir un équilibre

with the potential impact of the decision on the asserted right or title and with other societal interests.

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

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

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

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raisonnable entre les préoccupations des Autochtones, d'une part, et l'incidence potentielle de la décision sur le droit ou titre revendiqué et les autres intérêts sociétaux, d'autre part.

Les tiers ne peuvent être jugés responsables de ne pas avoir rempli l'obligation de consultation et d'accommodement qui incombe à la Couronne. Le respect du principe de l'honneur de la Couronne ne peut être délégué, et la responsabilité juridique en ce qui a trait à la consultation et à l'accommodement incombe à la Couronne. Toutefois, cela ne signifie pas que des tiers ne peuvent jamais être tenus responsables envers des peuples autochtones.

Enfin, l'obligation de consultation et d'accommodement s'applique au gouvernement provincial. Les intérêts acquis par la province sur les terres lors de l'Union sont subordonnés à tous intérêts autres que ceux que peut y avoir la province. Comme l'obligation de consulter et d'accommoder qui est en litige dans la présente affaire est fondée sur l'affirmation par la province, avant l'Union, de sa souveraineté sur le territoire visé, la province a acquis les terres sous réserve de cette obligation.

En l'espèce, la Couronne avait l'obligation de consulter les Haïda au sujet du remplacement de la CFF 39. Les revendications par les Haïda du titre et du droit ancestral de récolter du cèdre rouge étaient étayées par une preuve à première vue valable, et la province savait que les droits et titre ancestraux potentiels visaient le Bloc 6 et qu'ils pouvaient être touchés par la décision de remplacer la CFF 39. Les décisions rendues à l'égard des CFF reflètent la planification stratégique touchant l'utilisation de la ressource en cause et risquent d'avoir des conséquences graves sur les droits ou titres ancestraux. Pour que les consultations soient utiles, elles doivent avoir lieu à l'étape de l'octroi ou du renouvellement de la CFF. De plus, la solidité de la preuve étayant l'existence d'un titre haïda et d'un droit haïda autorisant la récolte du cèdre rouge, conjuguée aux répercussions sérieuses sur ces intérêts des décisions stratégiques successives, indique que l'honneur de la Couronne pourrait bien commander des mesures d'accommodement substantielles pour protéger les intérêts des Haïda en attendant que leurs revendications soient réglées.

Jurisprudence

Arrêt appliqué : *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; **arrêts mentionnés :** *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Marshall*, [1999] 3 R.C.S. 456; *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1

2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

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with supplementary reasons (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, reversing a decision of the British Columbia Supreme Court (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

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

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

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

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

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

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

Written submissions only by *Alexander MacBain Cameron*, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, Q.C., and *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

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

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

Allan Donovan, for the intervener the Haisla Nation.

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Paul J. Pearlman, c.r., et *Kathryn L. Kickbush*, pour les appelants le ministre des Forêts et le procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

John J. L. Hunter, c.r., et *K. Michael Stephens*, pour l'appelante Weyerhaeuser Company Limited.

Louise Mandell, c.r., *Michael Jackson, c.r.*, *Terri-Lynn Williams-Davidson*, *Gidfahl Gudsllaay* et *Cheryl Y. Sharvit*, pour les intimés.

Mitchell R. Taylor et *Brian McLaughlin*, pour l'intervenant le procureur général du Canada.

E. Ria Tzimas et *Mark Crow*, pour l'intervenant le procureur général de l'Ontario.

Pierre-Christian Labeau, pour l'intervenant le procureur général du Québec.

Argumentation écrite seulement par *Alexander MacBain Cameron*, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Graeme G. Mitchell, c.r., et *P. Mitch McAdam*, pour l'intervenant le procureur général de la Saskatchewan.

Stanley H. Rutwind et *Kurt Sandstrom*, pour l'intervenant le procureur général de l'Alberta.

Gregory J. McDade, c.r., et *John R. Rich*, pour les intervenantes la Bande indienne de Squamish et la Bande indienne des Lax-kw'alaams.

Allan Donovan, pour l'intervenante la Nation haisla.

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

Hugh M. G. Braker, c.r., Anja Brown, Arthur C. Pape et *Jean Teillet*, pour l'intervenant le Sommet des Premières nations.

Robert C. Freedman, pour l'intervenante la Première nation Dene Tha'.

Robert J. M. Janes et *Dominique Nouvet*, pour l'intervenant Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan.

Charles F. Willms et *Kevin O'Callaghan*, pour les intervenants Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries et Mining Association of British Columbia.

Thomas F. Isaac, pour l'intervenante British Columbia Cattlemen's Association.

Stuart A. Rush, c.r., pour l'intervenant le village de Port Clements.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

À l'ouest de la partie continentale de la Colombie-Britannique s'étendent les îles de la Reine-Charlotte, patrie traditionnelle des Haïda. Les îles Haïda Gwaii, comme leurs habitants les appellent, se composent de deux grandes îles et de plusieurs petites îles. Depuis plus de 100 ans, les Haïda revendiquent un titre sur les terres des îles Haïda Gwaii et les eaux les entourant. Ce titre en est toujours à l'étape de la revendication et n'a pas encore été juridiquement reconnu. 1

Les îles Haïda Gwaii sont densément boisées. L'épinette, la pruche et le cèdre y foisonnent. Le plus important de ces arbres est le cèdre, qui, depuis des temps immémoriaux, joue un rôle central dans l'économie et la culture des Haïda. C'est à partir du cèdre qu'ils fabriquaient leurs canots maritimes, leurs vêtements, leurs ustensiles et les totems qui 2

lodges. The cedar forest remains central to their life and their conception of themselves.

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

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

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

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the

protégeaient leurs habitations. La forêt de cèdres demeure essentielle à leur vie et à la conception qu'ils se font d'eux-mêmes.

Les forêts des îles Haïda Gwaii étaient déjà exploitées avant la Première Guerre mondiale. Certaines parties du territoire ont été coupées à blanc. D'autres sont occupées par une forêt secondaire. Dans certaines régions, on peut encore trouver de vieilles forêts.

La province de la Colombie-Britannique continue de délivrer à des compagnies forestières des permis de coupe autorisant l'abattage d'arbres sur les îles Haïda Gwaii. Ce sont ces permis, maintenant appelés [TRADUCTION] « concessions de ferme forestière » (« CFF »), qui sont au cœur du présent litige. En 1961, MacMillan Bloedel Limited, une grosse compagnie forestière, a obtenu la CFF 39, qui lui permettait de récolter des arbres dans la région connue sous le nom de « Bloc 6 ». En 1981, en 1995 et en l'an 2000, le ministre a remplacé la CFF 39 conformément à la procédure prévue par la *Forest Act*, R.S.B.C. 1996, ch. 157. En 1999, il a autorisé la cession de la CFF 39 à Weyerhaeuser Company Limited (« Weyerhaeuser »). Les Haïda ont contesté ces remplacements et cette cession, qui ont été effectués sans leur consentement et, depuis 1994 au moins, en dépit de leurs objections. La CFF 39 est cependant restée en vigueur.

En janvier 2000, les Haïda ont engagé une procédure par laquelle ils s'opposent aux trois remplacements et à la cession de la CFF 39 à Weyerhaeuser, et demandent leur annulation. Invoquant l'existence d'un titre ancestral, ils ont plaidé grèvement en common law, grèvement en equity et manquement à l'obligation de fiduciaire.

Cela nous amène à la question dont la Cour est saisie. Le gouvernement détient le titre en common law sur les terres en question. Dans l'exercice des pouvoirs que lui confère ce titre, il a accordé à Weyerhaeuser le droit d'exploiter les forêts du Bloc 6. Mais les Haïda prétendent également détenir un titre sur ces terres — titre dont ils tentent actuellement d'établir l'existence — et s'opposent à l'exploitation des forêts du Bloc 6 prévue par la

Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

CFF 39. Dans ces circonstances, le gouvernement est-il tenu à une obligation envers les Haïda et, si oui, laquelle? De façon plus concrète, a-t-il l'obligation de consulter les Haïda avant de prendre des décisions concernant l'exploitation des forêts et de trouver des accommodements à leurs préoccupations quant à la question de savoir si les forêts du Bloc 6 peuvent être exploitées — et, dans l'affirmative, lesquelles — avant qu'ils aient pu établir l'existence de leur titre sur les terres et leurs droits ancestraux?

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

7 Les enjeux sont énormes. Les Haïda font valoir que, si on ne procède pas à ces consultation et accommodement, ils obtiendront leur titre mais se retrouveront privés de forêts qui sont vitales à leur économie et à leur culture. Il faut des générations aux forêts pour parvenir à maturité, soulignent-ils, et les vieilles forêts sont irremplaçables. Comme a conclu le juge en son cabinet, leur revendication du titre sur les îles Haïda Gwaii s'appuie sur des arguments solides. Mais elle est également complexe, et il faudra de nombreuses années pour l'établir. Les Haïda affirment qu'entre-temps ils auront été irrémédiablement dépouillés de leur héritage.

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

8 Le gouvernement, pour sa part, soutient qu'il a le droit et le devoir d'aménager les ressources forestières dans l'intérêt de tous les habitants de la Colombie-Britannique et que, tant que les Haïda n'auront pas formellement établi le bien-fondé de leur revendication, ils n'ont aucun droit à des consultations ou à des accommodements à leurs besoins et intérêts.

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

9 Le juge en son cabinet a décidé que le gouvernement a l'obligation morale, mais non légale, de négocier avec les Haïda : [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. La Cour d'appel de la Colombie-Britannique a infirmé cette décision, déclarant que le gouvernement et Weyerhaeuser ont tous deux l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations en ce qui concerne la récolte de bois sur le bloc 6 : (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, avec motifs supplémentaires (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

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

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

II. Analysis

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

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be

Je conclus que le gouvernement est légalement tenu de consulter les Haïda au sujet de la récolte de bois sur le bloc 6, y compris en ce qui concerne la cession ou le remplacement des CFF. Une consultation menée de bonne foi pourrait à son tour entraîner l'obligation de trouver des accommodements aux préoccupations des Haïda à propos de la récolte de bois, mais il est impossible pour le moment de préciser le genre d'accommodement qui s'impose, à supposer qu'une telle mesure soit requise. Il faut une véritable consultation. Les intéressés n'ont aucune obligation de parvenir à une entente. Le gouvernement ne peut se décharger des obligations de consultation et d'accommodement en les déléguant à Weyerhaeuser. De son côté, cette dernière n'a pas d'obligation indépendante de consulter les Haïda ou de trouver des accommodements à leurs préoccupations, bien qu'il demeure possible qu'elle soit tenue responsable à l'égard d'obligations qu'elle aurait assumées. Je suis donc d'avis de rejeter l'appel de la Couronne et d'accueillir l'appel de Weyerhaeuser.

Il s'agit de la première affaire du genre à être soumise à la Cour. Notre tâche se limite modestement à établir le cadre général d'application, dans les cas indiqués, de l'obligation de consultation et d'accommodement avant que les revendications de titre et droits ancestraux soient tranchées. Au fur et à mesure de l'application de ce cadre, les tribunaux seront appelés, conformément à la méthode traditionnelle de la common law, à préciser l'obligation de consultation et d'accommodement.

II. Analyse

A. *Le droit en matière d'injonction s'applique-t-il en l'espèce?*

On fait valoir que le recours approprié pour les Haïda consiste à demander une injonction interlocutoire contre le gouvernement et contre Weyerhaeuser et qu'il est en conséquence inutile d'examiner la question de l'existence de l'obligation de consulter ou d'accommoder. Dans *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, les critères à respecter pour obtenir une injonction interlocutoire ont été examinés. Le demandeur

suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

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

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

doit établir les éléments suivants : (1) il existe une question sérieuse à juger; (2) le refus de l'injonction causera un préjudice irréparable; (3) la prépondérance des inconvénients favorise l'octroi de l'injonction.

13 Il est loisible à des demandeurs comme les Haïda de demander une injonction interlocutoire. Cependant, cela ne signifie pas qu'il s'agit là de leur seul recours. Si des demandeurs sont en mesure d'établir l'existence d'une obligation particulière donnant naissance à l'obligation de consulter ou d'accommoder, ils sont libres de demander l'application de ces mesures. Ici, les Haïda invoquent l'obligation découlant du principe que la Couronne doit agir honorablement envers les peuples autochtones.

14 L'injonction interlocutoire n'offre parfois qu'une réparation partielle et imparfaite. Premièrement, comme nous l'avons déjà mentionné, elle peut ne pas faire apparaître toute l'obligation du gouvernement, qui, selon les Haïda, incombe au gouvernement. Deuxièmement, elle représente généralement la solution du tout ou rien. Ou le projet se poursuit, ou il s'arrête. Par contre, l'obligation de consulter et d'accommoder invoquée en l'espèce nécessite, de par sa nature même, une mise en balance des intérêts autochtones et des intérêts non autochtones et se rapproche donc de l'objectif de conciliation qui est au cœur des rapports entre la Couronne et les Autochtones et qui a été énoncé dans les arrêts *R. c. Van der Peet*, [1996] 2 R.C.S. 507, par. 31, et *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 186. Troisièmement, le critère de la balance des inconvénients fait pencher la balance du côté de la protection des emplois et des recettes de l'État, de sorte que les intérêts autochtones tendent à « être écartés » totalement jusqu'à ce que la question en litige ait été tranchée de façon définitive, au lieu d'être convenablement mis en balance avec les préoccupations opposées : J. J. L. Hunter, « Advancing Aboriginal Title Claims after *Delgamuukw* : The Role of the Injunction » (juin 2000). Quatrièmement, l'injonction interlocutoire est considérée comme une mesure corrective provisoire jusqu'à ce que le tribunal ait statué sur la question litigieuse fondamentale. Les affaires portant sur des revendications autochtones peuvent

and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

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

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

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

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

être extrêmement complexes et prendre des années, voire des décennies, avant d'être tranchées par les tribunaux. L'application d'une injonction interlocutoire pendant une si longue période pourrait causer des préjudices inutiles et pourrait inciter la partie en bénéficiant à faire moins de compromis. Même si les revendications autochtones sont et peuvent être réglées dans le cadre de litiges, il est préférable de recourir à la négociation pour concilier les intérêts de la Couronne et ceux des Autochtones. Pour toutes ces raisons, il est possible qu'une injonction interlocutoire ne tienne pas suffisamment compte des intérêts autochtones avant qu'une décision définitive soit rendue au sujet de ceux-ci.

J'estime que le recours en injonction interlocutoire ne fait pas obstacle à la revendication des Haïda. Nous devons aller plus loin et décider si les rapports particuliers avec la Couronne qu'invoquent les Haïda font naître une obligation de consulter et, s'il y a lieu, d'accommoder. Je vais maintenant analyser la source de l'obligation, le moment où elle prend naissance, sa portée et son contenu, la question de savoir si elle vise aussi les tiers et si elle s'applique au gouvernement provincial, et non exclusivement au gouvernement fédéral. J'appliquerai ensuite les conclusions de cette analyse aux faits de l'espèce.

B. *La source de l'obligation de consulter et d'accommoder*

L'obligation du gouvernement de consulter les peuples autochtones et de prendre en compte leurs intérêts découle du principe de l'honneur de la Couronne. L'honneur de la Couronne est toujours en jeu lorsque cette dernière transige avec les peuples autochtones : voir par exemple *R. c. Badger*, [1996] 1 R.C.S. 771, par. 41; *R. c. Marshall*, [1999] 3 R.C.S. 456. Il ne s'agit pas simplement d'une belle formule, mais d'un précepte fondamental qui peut s'appliquer dans des situations concrètes.

Les origines historiques du principe de l'honneur de la Couronne tendent à indiquer que ce dernier doit recevoir une interprétation généreuse afin de refléter les réalités sous-jacentes dont il découle. Dans tous ses rapports avec les peuples autochtones, qu'il s'agisse de l'affirmation de sa souveraineté, du règlement de revendications ou de la mise en œuvre

honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

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

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

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

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by

de traités, la Couronne doit agir honorablement. Il s'agit là du minimum requis pour parvenir à « concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté » : *Delgamuukw*, précité, par. 186, citant *Van der Peet*, précité, par. 31.

18 L'honneur de la Couronne fait naître différentes obligations selon les circonstances. Lorsque la Couronne assume des pouvoirs discrétionnaires à l'égard d'intérêts autochtones particuliers, le principe de l'honneur de la Couronne donne naissance à une obligation de fiduciaire : *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79, par. 79. Le contenu de l'obligation de fiduciaire peut varier en fonction des autres obligations, plus larges, de la Couronne. Cependant, pour s'acquitter de son obligation de fiduciaire, la Couronne doit agir dans le meilleur intérêt du groupe autochtone lorsqu'elle exerce des pouvoirs discrétionnaires à l'égard des intérêts autochtones en jeu. Comme il est expliqué dans *Wewaykum*, par. 81, l'expression « obligation de fiduciaire » ne dénote pas un rapport fiduciaire universel englobant tous les aspects des rapports entre la Couronne et les peuples autochtones :

> . . . [considérer l'] « obligation de fiduciaire » [. . .] comme si elle imposait à la Couronne une responsabilité totale à l'égard de tous les aspects des rapports entre la Couronne et les bandes indiennes[, c'est] aller trop loin. L'obligation de fiduciaire incombant à la Couronne n'a pas un caractère général, mais existe plutôt à l'égard de droits particuliers des Indiens.

En l'espèce, des droits et un titre ancestraux ont été revendiqués, mais n'ont pas été définis ou prouvés. L'intérêt autochtone en question n'est pas suffisamment précis pour que l'honneur de la Couronne oblige celle-ci à agir, comme fiduciaire, dans le meilleur intérêt du groupe autochtone lorsqu'elle exerce des pouvoirs discrétionnaires à l'égard de l'objet du droit ou du titre.

19 L'honneur de la Couronne imprègne également les processus de négociation et d'interprétation des traités. Lorsqu'elle conclut et applique un traité, la Couronne doit agir avec honneur et intégrité, et éviter la moindre apparence de « manœuvres malhonnêtes » (*Badger*, par. 41). Ainsi, dans *Marshall*, précité, par. 4, les juges majoritaires de la Cour ont

stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

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

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

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

justifié leur interprétation du traité en déclarant que « rien de moins ne saurait protéger l'honneur et l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié . . . ».

Tant qu'un traité n'a pas été conclu, l'honneur de la Couronne exige la tenue de négociations menant à un règlement équitable des revendications autochtones : *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1105-1106. Les traités permettent de concilier la souveraineté autochtone préexistante et la souveraineté proclamée de la Couronne, et ils servent à définir les droits ancestraux garantis par l'art. 35 de la *Loi constitutionnelle de 1982*. L'article 35 promet la reconnaissance de droits, et « [i]l faut toujours présumer que [la Couronne] entend respecter ses promesses » (*Badger*, précité, par. 41). Un processus de négociation honnête permet de concrétiser cette promesse et de concilier les revendications de souveraineté respectives. L'article 35 a pour corollaire que la Couronne doit agir honorablement lorsqu'il s'agit de définir les droits garantis par celui-ci et de les concilier avec d'autres droits et intérêts. Cette obligation emporte à son tour celle de consulter et, s'il y a lieu, d'accommoder.

Cette obligation de consulter a été reconnue et analysée dans la jurisprudence. Dans *Sparrow*, précité, p. 1119, la Cour a confirmé l'existence de l'obligation de consulter les Salish de la côte ouest qui revendiquaient un droit de pêche non encore reconnu. Le juge en chef Dickson et le juge La Forest ont écrit que, pour déterminer si les restrictions imposées au droit sont justifiées, il faut notamment se demander « si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre ».

Quelques années plus tard, la Cour a confirmé l'existence de l'obligation de consultation à l'égard des ressources visées par une revendication autochtone dans *R. c. Nikal*, [1996] 1 R.C.S. 1013, où le juge Cory a écrit que « [d]ans la mesure où tous les efforts raisonnables ont été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier » (par. 110).

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

Dans l'arrêt connexe *R. c. Gladstone*, [1996] 2 R.C.S. 723, le juge en chef Lamer a fait état de la nécessité « [des] consultations et [de] l'indemnisation », et de la nécessité d'examiner « la manière dont l'État a concilié les différents droits ancestraux visant une pêche donnée [. . .], l'importance de la pêche pour le bien-être économique et matériel de la bande en question, ainsi que les critères appliqués par l'État, par exemple, dans la répartition des permis de pêche commerciale entre les divers usagers » (par. 64). 23

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

Au paragraphe 168 de l'arrêt de principe *Delgamuukw*, précité, prononcé dans le contexte d'une revendication de titre sur des terres et des ressources, la Cour a confirmé l'existence de l'obligation de consulter et a précisé cette obligation, affirmant que son contenu variait selon les circonstances : de la simple « obligation de discuter des décisions importantes » « lorsque le manquement est moins grave ou relativement mineur », en passant par l'obligation nécessitant « beaucoup plus qu'une simple consultation » qui s'impose « [d]ans la plupart des cas », jusqu'à la nécessité d'obtenir le « consentement [de la] nation autochtone » sur les questions très importantes. Ces remarques s'appliquent autant aux revendications non réglées qu'aux revendications déjà réglées et auxquelles il est porté atteinte. 24

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

En bref, les Autochtones du Canada étaient déjà ici à l'arrivée des Européens; ils n'ont jamais été conquis. De nombreuses bandes ont concilié leurs revendications avec la souveraineté de la Couronne en négociant des traités. D'autres, notamment en Colombie-Britannique, ne l'ont pas encore fait. Les droits potentiels visés par ces revendications sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*. L'honneur de la Couronne commande que ces droits soient déterminés, reconnus et respectés. Pour ce faire, la Couronne doit agir honorablement et négocier. Au cours des négociations, l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et, s'il y a lieu, à trouver des accommodements à leurs intérêts. 25

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

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

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

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only

C. *Le moment où l'obligation de consulter et d'accommoder prend naissance*

L'obligation de négocier honorablement emporte celle de consulter les demandeurs autochtones et de parvenir à une entente honorable, qui tienne compte de leurs droits inhérents. Mais prouver l'existence de droits peut prendre du temps, parfois même beaucoup de temps. Comment faut-il traiter les intérêts en jeu dans l'intervalle? Pour répondre à cette question, il faut tenir compte de la nécessité de concilier l'occupation antérieure des terres par les peuples autochtones et la réalité de la souveraineté de la Couronne. Celle-ci peut-elle, en vertu de la souveraineté qu'elle a proclamée, exploiter les ressources en question comme bon lui semble en attendant que la revendication autochtone soit établie et réglée? Ou doit-elle plutôt adapter son comportement de manière à tenir compte des droits, non encore reconnus, visés par cette revendication?

La réponse à cette question découle, encore une fois, de l'honneur de la Couronne. Si cette dernière entend agir honorablement, elle ne peut traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité. Elle doit respecter ces intérêts potentiels mais non encore reconnus. La Couronne n'est pas paralysée pour autant. Elle peut continuer à gérer les ressources en question en attendant le règlement des revendications. Toutefois, selon les circonstances, question examinée de façon plus approfondie plus loin, le principe de l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et à prendre raisonnablement en compte leurs intérêts jusqu'au règlement de la revendication. Le fait d'exploiter unilatéralement une ressource faisant l'objet d'une revendication au cours du processus visant à établir et à régler cette revendication peut revenir à dépouiller les demandeurs autochtones d'une partie ou de l'ensemble des avantages liés à cette ressource. Agir ainsi n'est pas une attitude honorable.

Le gouvernement prétend qu'il n'a aucune obligation de consulter et d'accommoder tant qu'une décision définitive n'a pas été rendue quant à la portée et au contenu du droit. Avant que le droit ne soit

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

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

As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The

établi, affirme-t-on, il n'existe qu'une « obligation d'équité » générale en common law, fondée sur la règle générale selon laquelle une décision administrative qui touche « les droits, privilèges ou biens d'une personne » entraîne l'application de cette obligation d'équité : *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 20. Le gouvernement affirme que, en dehors des obligations générales découlant du droit administratif, l'obligation de consulter et d'accommoder n'existe que dans le cas où le gouvernement s'est engagé à protéger un intérêt autochtone particulier ou cherche à restreindre un intérêt autochtone reconnu. Le gouvernement soutient donc qu'il n'existe, à ce stade-ci, aucune obligation légale de consulter les Haïda et de prendre en compte leurs intérêts, bien qu'il admette qu'il puisse exister de [TRADUCTION] « bonnes raisons sur le plan pratique et politique » de le faire.

29 Le gouvernement invoque des précédents et des considérations d'intérêt général à l'appui de sa thèse. Il cite *Sparrow*, précité, p. 1110-1113 et 1119, où l'étendue et le contenu du droit avaient été déterminés et l'atteinte avait été établie, avant que soit examinée la question de savoir si l'atteinte était justifiée. Le gouvernement prétend que sa position est également étayée par le point de vue exprimé dans *TransCanada Pipelines Ltd. c. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, où la Cour d'appel de l'Ontario a jugé que [TRADUCTION] « ce qui déclenche l'examen de l'obligation de la Couronne de consulter, c'est la démonstration par la Première nation qu'il y a eu violation d'un droit existant, ancestral ou issu de traité, reconnu et confirmé par le par. 35(1) » (par. 120).

30 Du point de vue des considérations d'intérêt général, le gouvernement invoque les difficultés que pose sur le plan pratique l'application de l'obligation de consulter ou d'accommoder dans les cas de revendications non établies. Si, selon les circonstances, l'obligation de consulter peut aller de la « simple » obligation d'informer et d'écouter, à une extrémité de la gamme, à l'obligation d'obtenir le consentement des Autochtones, à l'autre extrémité, comment, demande le gouvernement, les parties peuvent-elles

government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

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

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

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and

s'entendre sur le degré de consultation lorsque des revendications et des droits sont contestés? Et si elles n'arrivent pas à s'entendre, comment les tribunaux judiciaires ou administratifs sont-ils censés trancher la question? Le gouvernement affirme également qu'il est irréaliste et injuste d'imposer une consultation avant que les revendications soient réglées de façon définitive, car cela revient à accorder réparation avant que la question de l'atteinte et celle de la justification aient été tranchées.

Les arguments du gouvernement ne résistent pas à un examen minutieux. Ni les précédents ni les considérations d'ordre pratique n'appuient la thèse selon laquelle l'obligation de consulter et, s'il y a lieu, d'accommoder ne prend naissance que lorsqu'une décision définitive a été rendue quant à la portée et au contenu du droit.

La jurisprudence de la Cour étaye le point de vue selon lequel l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*. Ce processus de conciliation découle de l'obligation de la Couronne de se conduire honorablement envers les peuples autochtones, obligation qui, à son tour, tire son origine de l'affirmation par la Couronne de sa souveraineté sur un peuple autochtone et par l'exercice de fait de son autorité sur des terres et ressources qui étaient jusque-là sous l'autorité de ce peuple. Comme il est mentionné dans *Mitchell c. M.R.N.*, [2001] 1 R.C.S. 911, 2001 CSC 33, par. 9, « [c]ette affirmation de souveraineté a fait naître l'obligation de traiter les peuples autochtones de façon équitable et honorable, et de les protéger contre l'exploitation » (je souligne).

Limiter l'application du processus de conciliation aux revendications prouvées comporte le risque que la conciliation soit considérée comme un objectif formaliste éloigné et se voie dénuée du « sens utile » qu'elle doit avoir par suite de l'« engagement

title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

solennel » pris par la Couronne lorsqu'elle a reconnu et confirmé les droits et titres ancestraux : *Sparrow*, précité, p. 1108. Une telle attitude risque également d'avoir des conséquences fâcheuses. En effet, il est possible que, lorsque les Autochtones parviennent finalement à établir le bien-fondé de leur revendication, ils trouvent leurs terres changées et leurs ressources épuisées. Ce n'est pas de la conciliation, ni un comportement honorable.

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

34 L'existence d'une obligation légale de consulter le groupe intéressé avant qu'il ait apporté la preuve de sa revendication est nécessaire pour comprendre le langage employé dans des affaires comme *Sparrow*, *Nikal* et *Gladstone*, précitées, où la confirmation du droit et la justification de l'atteinte reprochée ont été débattues en même temps. Dans *Sparrow*, par exemple, la référence au comportement de la Couronne au cours de l'examen de la justification des atteintes s'entend du comportement avant l'établissement du droit, ce qui réfute l'argument que ce soit la preuve de l'existence du droit revendiqué qui déclenche l'obligation légale de consulter et, s'il y a lieu, d'accommoder, même dans le contexte de la justification.

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

35 Mais à quel moment, précisément, l'obligation de consulter prend-elle naissance? L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci : voir *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (C.S.C.-B.), p. 71, le juge Dorgan.

This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will

36 Il reste l'argument d'ordre pratique. On affirme que, tant qu'une revendication n'est pas réglée, la Couronne ne peut pas savoir si les droits revendiqués existent ou non et que, de ce fait, elle ne peut être tenue à une obligation de consulter ou d'accommoder. Cette difficulté ne saurait être niée ou minimisée. Comme je l'ai déclaré (dans mes motifs dissidents) dans *Marshall*, précité, par. 112, on ne peut « analyser utilement la question de la prise en

frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

compte d'un droit ou de la justification de ses limites sans avoir une idée de l'essence de ce droit et de sa portée actuelle ». Cependant, il est souvent possible de se faire, à l'égard des droits revendiqués et de leur solidité, une idée suffisamment précise pour que l'obligation de consulter et d'accommoder s'applique, même si ces droits n'ont pas fait l'objet d'un règlement définitif ou d'une décision judiciaire finale. Pour faciliter cette détermination, les demandeurs devraient exposer clairement leurs revendications, en insistant sur la portée et la nature des droits ancestraux qu'ils revendiquent ainsi que sur les violations qu'ils allèguent. C'est ce qui s'est produit en l'espèce, lorsque le juge en son cabinet a procédé à une évaluation préliminaire, fondée sur la preuve, de la solidité des revendications des Haïda à l'égard des terres et des ressources des îles Haïda Gwaii, en particulier du Bloc 6.

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

Il y a une différence entre une connaissance suffisante pour entraîner l'application de l'obligation de consulter et, s'il y a lieu, d'accommoder, et le contenu ou l'étendue de cette obligation dans une affaire donnée. La connaissance d'une revendication crédible mais non encore établie suffit à faire naître l'obligation de consulter et d'accommoder. Toutefois, le contenu de l'obligation varie selon les circonstances, comme nous le verrons de façon plus approfondie plus loin. Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes. Il est possible en droit de différencier les revendications reposant sur une preuve ténue des revendications reposant sur une preuve à première vue solide et de celles déjà établies. Les parties peuvent examiner la question et, si elles ne réussissent pas à s'entendre, les tribunaux administratifs et judiciaires peuvent leur venir en aide. Il faut régler les problèmes liés à l'absence de preuve et de définition des revendications en délimitant l'obligation de façon appropriée et non en niant son existence.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest

J'estime que, bien que le respect des obligations de consultation et d'accommodement avant le règlement définitif d'une revendication ne soit pas sans poser de problèmes, de telles mesures ne sont toutefois pas impossibles et constituent même un aspect

pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

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

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

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

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

essentiel du processus honorable de conciliation imposé par l'art. 35. Elles protègent les intérêts autochtones jusqu'au règlement des revendications et favorisent le développement entre les parties d'une relation propice à la négociation, processus à privilégier pour parvenir finalement à la conciliation : voir S. Lawrence et P. Macklem, « From Consultation to Reconciliation : Aboriginal Rights and the Crown's Duty to Consult » (2000), 79 *R. du B. can.* 252, p. 262. Les mesures précises que doit prendre le gouvernement peuvent varier selon la solidité de la revendication et les circonstances, mais elles doivent à tout le moins être compatibles avec l'honneur de la Couronne.

D. *L'étendue et le contenu de l'obligation de consulter et d'accommoder*

Le contenu de l'obligation de consulter et d'accommoder varie selon les circonstances. La nature précise des obligations qui naissent dans différentes situations sera définie à mesure que les tribunaux se prononceront sur cette nouvelle question. En termes généraux, il est néanmoins possible d'affirmer que l'étendue de l'obligation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre. 39

Dans *Delgamuukw*, précité, par. 168, la Cour a examiné l'obligation de consulter et d'accommoder dans le contexte de revendications dont le bien-fondé a été établi. Le juge en chef Lamer a écrit : 40

> La nature et l'étendue de l'obligation de consultation dépendront des circonstances. Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones.

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

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

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty

La transposition de ce passage dans le contexte des revendications non encore établies permet d'avancer ce qui suit. Bien qu'il ne soit pas utile de classer les situations dans des compartiments étanches, il est possible d'identifier différentes situations appelant des solutions différentes. Dans tous les cas, le principe de l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation, qui soit appropriée eu égard aux circonstances. Lorsque vient le temps de s'acquitter de cette obligation, les garanties procédurales de justice naturelle exigées par le droit administratif peuvent servir de guide.

À toutes les étapes, les deux parties sont tenues de faire montre de bonne foi. Le fil conducteur du côté de la Couronne doit être « l'intention de tenir compte réellement des préoccupations [des Autochtones] » à mesure qu'elles sont exprimées (*Delgamuukw*, précité, par. 168), dans le cadre d'un véritable processus de consultation. Les manœuvres malhonnêtes sont interdites. Cependant, il n'y a pas obligation de parvenir à une entente mais plutôt de procéder à de véritables consultations. Quant aux demandeurs autochtones, ils ne doivent pas contrecarrer les efforts déployés de bonne foi par la Couronne et ne devraient pas non plus défendre des positions déraisonnables pour empêcher le gouvernement de prendre des décisions ou d'agir dans les cas où, malgré une véritable consultation, on ne parvient pas à s'entendre : voir *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (C.A.C.-B.), p. 44; *Heiltsuk Tribal Council c. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (C.S.C.-B.). Toutefois, le seul fait de négocier de façon serrée ne porte pas atteinte au droit des Autochtones d'être consultés.

Sur cette toile de fond, je vais maintenant examiner le type d'obligations qui peuvent découler de différentes situations. À cet égard, l'utilisation de la notion de continuum peut se révéler utile, non pas pour créer des compartiments juridiques étanches, mais plutôt pour préciser ce que le principe de l'honneur de la Couronne est susceptible d'exiger dans des circonstances particulières. À une extrémité du continuum se trouvent les cas où la revendication

on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

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

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

de titre est peu solide, le droit ancestral limité ou le risque d'atteinte faible. Dans ces cas, les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis. La [TRADUCTION] « "consultation", dans son sens le moins technique, s'entend de l'action de se parler dans le but de se comprendre les uns les autres » : T. Isaac et A. Knox, « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49, p. 61.

44 À l'autre extrémité du continuum on trouve les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé. Dans de tels cas, il peut s'avérer nécessaire de tenir une consultation approfondie en vue de trouver une solution provisoire acceptable. Quoique les exigences précises puissent varier selon les circonstances, la consultation requise à cette étape pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision. Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. Dans les affaires complexes ou difficiles, le gouvernement peut décider de recourir à un mécanisme de règlement des différends comme la médiation ou un régime administratif mettant en scène des décideurs impartiaux.

45 Entre les deux extrémités du continuum décrit précédemment, on rencontrera d'autres situations. Il faut procéder au cas par cas. Il faut également faire preuve de souplesse, car le degré de consultation nécessaire peut varier à mesure que se déroule le processus et que de nouveaux renseignements sont mis au jour. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. Tant que la question n'est pas réglée, le principe de l'honneur de la Couronne commande que celle-ci mette en balance les

may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1997) provides insight (at pp. 21 and 31):

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . .
>
> . . .
>
> . . . genuine consultation means a process that involves . . .:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalised
> - seeking Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim,

intérêts de la société et ceux des peuples autochtones lorsqu'elle prend des décisions susceptibles d'entraîner des répercussions sur les revendications autochtones. Elle peut être appelée à prendre des décisions en cas de désaccord quant au caractère suffisant des mesures qu'elle adopte en réponse aux préoccupations exprimées par les Autochtones. Une attitude de pondération et de compromis s'impose alors.

À la suite de consultations véritables, la Couronne pourrait être amenée à modifier la mesure envisagée en fonction des renseignements obtenus lors des consultations. Le *Guide for Consultation with Mäori* (1997) du ministère de la Justice de la Nouvelle-Zélande fournit des indications sur la question (aux p. 21 et 31):

> [TRADUCTION] La consultation n'est pas seulement un simple mécanisme d'échange de renseignements. Elle comporte également des mises à l'épreuve et la modification éventuelle des énoncés de politique compte tenu des renseignements obtenus ainsi que la rétroaction. Elle devient donc un processus grâce auquel les deux parties sont mieux informées . . .
>
> . . .
>
> . . . de véritables consultations s'entendent d'un processus qui consiste . . . :
>
> - à recueillir des renseignements pour mettre à l'épreuve les énoncés de politique;
> - à proposer des énoncés qui ne sont pas encore arrêtés définitivement;
> - à chercher à obtenir l'opinion des Mäoris sur ces énoncés;
> - à informer les Mäoris de tous les renseignements pertinents sur lesquels reposent ces énoncés;
> - à écouter avec un esprit ouvert ce que les Mäoris ont à dire sans avoir à en faire la promotion;
> - à être prêt à modifier l'énoncé original;
> - à fournir une rétroaction tant au cours de la consultation qu'après la prise de décision.

S'il ressort des consultations que des modifications à la politique de la Couronne s'imposent, il faut alors passer à l'étape de l'accommodement. Des consultations menées de bonne foi peuvent donc faire naître l'obligation d'accommoder. Lorsque la

and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

revendication repose sur une preuve à première vue solide et que la décision que le gouvernement entend prendre risque de porter atteinte de manière appréciable aux droits visés par la revendication, l'obligation d'accommodement pourrait exiger l'adoption de mesures pour éviter un préjudice irréparable ou pour réduire au minimum les conséquences de l'atteinte jusqu'au règlement définitif de la revendication sous-jacente. L'accommodement est le fruit des consultations, comme la Cour l'a reconnu dans *R. c. Marshall*, [1999] 3 R.C.S. 533, par. 22 : « . . . il est préférable de réaliser la prise en compte du droit issu du traité par des consultations et par la négociation ».

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

48 Ce processus ne donne pas aux groupes autochtones un droit de veto sur les mesures susceptibles d'être prises à l'égard des terres en cause en attendant que la revendication soit établie de façon définitive. Le « consentement » dont il est question dans *Delgamuukw* n'est nécessaire que lorsque les droits invoqués ont été établis, et même là pas dans tous les cas. Ce qu'il faut au contraire, c'est plutôt un processus de mise en balance des intérêts, de concessions mutuelles.

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

49 Cette conclusion découle du sens des termes « accommoder » et « accommodement », définis respectivement ainsi : « **Accommoder qqc. à.** L'adapter à, la mettre en correspondance avec quelque chose . . . » et « Action, résultat de l'action d'accommoder (ou de s'accommoder); moyen employé en vue de cette action. [. . .] Action de (se) mettre ou fait d'être en accord avec quelqu'un; règlement à l'amiable, transaction » (*Trésor de la langue française*, t. 1, 1971, p. 391 et 388). L'accommodement susceptible de résulter de consultations menées avant l'établissement du bien-fondé de la revendication correspond exactement à cela : la recherche d'un compromis dans le but d'harmoniser des intérêts opposés et de continuer dans la voie de la réconciliation. L'engagement à suivre le processus n'emporte pas l'obligation de se mettre d'accord, mais exige de chaque partie qu'elle s'efforce de bonne foi à comprendre les préoccupations de l'autre et à y répondre.

The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised

50 La jurisprudence de la Cour confirme cette conception d'accommodement. Dans *Sparrow*, la Cour

the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

a évoqué cette notion, insistant sur la nécessité d'établir un équilibre entre des intérêts sociétaux opposés et les droits ancestraux et issus de traités des Autochtones. Dans *R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1072, la Cour a affirmé qu'il incombe à la Couronne de prouver que son occupation des terres « ne peut s'accommoder de l'exercice raisonnable des droits des Hurons ». Et, dans *R. c. Côté*, [1996] 3 R.C.S. 139, par. 81, la Cour s'est demandé si les restrictions imposées aux droits ancestraux « [étaient] conciliable[s] avec les rapports spéciaux de fiduciaire de l'État à l'égard des premières nations ». La mise en équilibre et le compromis font partie intégrante de la notion de conciliation. Lorsque l'accommodement est nécessaire à l'occasion d'une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et de titre ancestraux non encore prouvées, la Couronne doit établir un équilibre raisonnable entre les préoccupations des Autochtones, d'une part, et l'incidence potentielle de la décision sur le droit ou titre revendiqué et les autres intérêts sociétaux, d'autre part.

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

Il est loisible aux gouvernements de mettre en place des régimes de réglementation fixant les exigences procédurales applicables aux différents problèmes survenant à différentes étapes, et ainsi de renforcer le processus de conciliation et réduire le recours aux tribunaux. Comme il a été mentionné dans *R. c. Adams*, [1996] 3 R.C.S. 101, par. 54, le gouvernement « ne peut pas se contenter d'établir un régime administratif fondé sur l'exercice d'un pouvoir discrétionnaire non structuré et qui, en l'absence d'indications explicites, risque de porter atteinte aux droits ancestraux dans un nombre considérable de cas ». Il convient de souligner que, depuis octobre 2002, la Colombie-Britannique dispose d'une politique provinciale de consultation des Premières nations établissant les modalités d'application des lignes directrices opérationnelles des ministères et organismes provinciaux. Même si elle ne constitue pas un régime de réglementation, une telle politique peut néanmoins prévenir l'exercice d'un pouvoir discrétionnaire non structuré et servir de guide aux décideurs.

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

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

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

It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests.

E. *Les tiers ont-ils l'obligation de consulter et d'accommoder?*

52 La Cour d'appel a conclu que Weyerhaeuser, l'entreprise forestière détenant la CFF 39, avait l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations. En toute déférence, je ne puis souscrire à cette conclusion.

53 Il a été dit (le juge Lambert de la Cour d'appel) qu'un tiers peut être tenu de consulter les Autochtones concernés du fait qu'il a la faculté, en cas de violation des droits de ces derniers, de plaider en défense que l'atteinte est justifiée. Comme nous l'avons vu, cependant, l'obligation de consulter et d'accommoder découle de la proclamation de la souveraineté de la Couronne sur des terres et ressources autrefois détenues par le groupe autochtone concerné. Cette théorie ne permet pas de conclure que les tiers ont l'obligation de consulter ou d'accommoder. La Couronne demeure seule légalement responsable des conséquences de ses actes et de ses rapports avec des tiers qui ont une incidence sur des intérêts autochtones. Elle peut déléguer certains aspects procéduraux de la consultation à des acteurs industriels qui proposent des activités d'exploitation; cela n'est pas rare en matière d'évaluations environnementales. Ainsi, la CFF 39 obligeait Weyerhaeuser à préciser les mesures qu'elle entendait prendre pour identifier et consulter les [TRADUCTION] « Autochtones qui revendiquaient un intérêt ancestral dans la région » (CFF 39, CFF haïda, paragraphe 2.09g)(ii)). Cependant, la responsabilité juridique en ce qui a trait à la consultation et à l'accommodement incombe en dernier ressort à la Couronne. Le respect du principe de l'honneur de la Couronne ne peut être délégué.

54 Il a également été avancé (le juge Lambert de la Cour d'appel) que les tiers pourraient être assujettis à l'obligation de consulter et d'accommoder par l'effet de la doctrine du droit des fiducies appelée « réception en connaissance de cause ». Cependant, comme nous l'avons vu, même si les obligations de fiduciaire de la Couronne et son obligation de consulter et d'accommoder découlent toutes du principe que l'honneur de la Couronne est en jeu dans ses rapports avec les peuples autochtones, l'obligation de

As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it

consulter est différente de l'obligation de fiduciaire qui existe à l'égard de certains intérêts autochtones reconnus. Comme il a été indiqué plus tôt, la Cour a souligné, dans *Wewaykum*, qu'il fallait se garder de supposer l'existence d'une obligation générale de fiduciaire régissant tous les aspects des rapports entre la Couronne et les peuples autochtones. En outre, dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, la Cour a clairement dit que la relation « semblable à une fiducie » qui existe entre la Couronne et les peuples autochtones n'est pas une vraie « fiducie », faisant observer que « [l]e droit des fiducies constitue un domaine juridique très perfectionné et spécialisé » (p. 386). Il n'y a aucune raison d'introduire la doctrine de la réception en connaissance de cause dans la relation spéciale qui existe entre la Couronne et les peuples autochtones. Il n'est pas certain non plus qu'une entreprise en vertu d'une concession de la Couronne puisse être assimilée à une personne qui, en toute connaissance de cause, divertit à son profit des fonds en fiducie.

Enfin, il a été affirmé (le juge Finch, juge en chef de la C.-B.) que, pour qu'il soit possible d'accorder une réparation efficace, il faudrait considérer que les tiers sont tenus à l'obligation. La première difficulté que comporte cette affirmation réside dans le fait que la réparation ne détermine pas la responsabilité. Ce n'est qu'une fois la question de la responsabilité tranchée que se soulève la question de la réparation. Il ne faut pas mettre la charrue (la réparation) devant les bœufs (la responsabilité). Nous ne pouvons poursuivre une personne riche simplement parce qu'elle a de l'argent plein les poches ou que cela permet d'obtenir le résultat souhaité. La seconde difficulté est qu'il n'est pas certain que le gouvernement ne dispose pas de mécanismes suffisants pour procéder à des mesures de consultation et d'accommodement utiles. En l'espèce, la partie 10 de la CFF 39 prévoit que le ministre des Forêts peut modifier toute concession accordée à Weyerhaeuser pour la rendre conforme aux décisions des tribunaux relativement aux droits ou titres ancestraux. Le gouvernement peut également exiger de Weyerhaeuser qu'elle modifie son plan d'aménagement si le chef des services forestiers le considère inadéquat du fait qu'il porte atteinte à un droit ancestral (paragraphe 2.38d)). Enfin, le

a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

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*

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

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

gouvernement peut exercer son autorité sur la question par voie législative, comme il l'a fait en édictant la *Forestry Revitalization Act*, S.B.C. 2003, ch. 17, qui permet de récupérer 20 pour 100 du droit de coupe des titulaires de concession, en partie pour mettre des terres à la disposition des peuples autochtones. De par son pouvoir de légiférer sur les ressources naturelles de la province, le gouvernement provincial dispose d'un outil puissant pour s'acquitter de ses obligations légales, situation qui met en doute l'affirmation du juge en chef Finch de la C.-B. qu'il [TRADUCTION] « ne peut allouer une partie de ce bois d'œuvre aux Haïda sans le consentement ou la collaboration de Weyerhaeuser » ((2002), 5 B.C.L.R. (4th) 33, par. 119). Le fait de ne pas imposer à Weyerhaeuser l'obligation de consulter et d'accommoder ne rend pas la réparation [TRADUCTION] « futile ou illusoire ».

56 Le fait que les tiers n'aient aucune obligation de consulter les peuples autochtones ou de trouver des accommodements à leurs préoccupations ne signifie pas qu'ils ne peuvent jamais être tenus responsables envers ceux-ci. S'ils font preuve de négligence dans des circonstances où ils ont une obligation de diligence envers les peuples autochtones, ou s'ils ne respectent pas les contrats conclus avec les Autochtones ou traitent avec eux d'une manière malhonnête, ils peuvent être tenus légalement responsables. Cependant, les tiers ne peuvent être jugés responsables de ne pas avoir rempli l'obligation de consulter et d'accommoder qui incombe à la Couronne.

F. *L'obligation de la province*

57 La province de la Colombie-Britannique soutient que l'obligation de consulter ou d'accommoder, si elle existe, incombe uniquement au gouvernement fédéral. Je ne peux accepter cet argument.

58 L'argument de la province repose sur l'art. 109 de la *Loi constitutionnelle de 1867*, qui dispose que « [t]outes les terres, mines, minéraux et réserves royales appartenant aux différentes provinces du Canada [. . .] lors de l'union [. . .] appartiendront aux différentes provinces. » Selon la province, cette disposition lui confère des droits exclusifs sur les terres en question. Ce droit, affirme-t-elle, ne peut être limité par la protection accordée aux

so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

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

G. *Administrative Review*

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

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

droits ancestraux par l'art. 35 de la *Loi constitutionnelle de 1982*. La province affirme qu'agir ainsi reviendrait à [TRADUCTION] « rompre l'équilibre du fédéralisme » (mémoire de la Couronne, par. 96).

La réponse à cet argument est que les intérêts que détenait la province sur les terres sont subordonnés à « tous intérêts autres que ceux que peut y avoir la province » (art. 109). L'obligation de consulter et d'accommoder en litige dans la présente affaire est fondée sur l'affirmation de la souveraineté de la Couronne qui a précédé l'Union. Il s'ensuit que la province a acquis les terres sous réserve de cette obligation. Elle ne peut donc pas prétendre que l'art. 35 la prive de pouvoirs dont elle aurait joui autrement. Comme il est précisé dans *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 App. Cas. 46 (C.P.), les terres situées dans la province [TRADUCTION] « peuvent constituer une source de revenus [pour la province] dans tous les cas où les biens de la Couronne ne sont plus grevés du titre indien » (p. 59). L'argument de la Couronne sur ce point a été examiné de façon approfondie par la Cour dans *Delgamuukw*, précité, par. 175, où le juge en chef Lamer a réitéré les conclusions tirées dans *St. Catherine's Milling*, précité. Cet argument n'est en conséquence pas fondé.

G. *L'examen administratif*

Lorsque la conduite du gouvernement est contestée au motif qu'il ne se serait pas acquitté de son obligation de consulter et d'accommoder en attendant le règlement des revendications, la question peut être soumise aux tribunaux pour examen. La province n'a pas encore établi de mécanisme à cette fin. En l'absence d'un tel mécanisme, il est impossible de déterminer quelle norme de contrôle devrait appliquer le tribunal appelé à statuer sur le caractère suffisant des efforts déployés par le gouvernement. Les principes généraux du droit administratif permettent toutefois de dégager les notions suivantes.

Quant aux questions de droit, le décideur doit, en règle générale, rendre une décision correcte : voir, par exemple, *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S.

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

585, 2003 CSC 55. Par contre, en ce qui a trait aux questions de fait et aux questions mixtes de fait et de droit, l'organisme de révision peut devoir faire preuve de déférence à l'égard du décideur. L'existence et l'étendue de l'obligation de consulter ou d'accommoder sont des questions de droit en ce sens qu'elles définissent une obligation légale. Cependant, la réponse à ces questions repose habituellement sur l'appréciation des faits. Il se peut donc qu'il convienne de faire preuve de déférence à l'égard des conclusions de fait du premier décideur. La question de savoir s'il y a lieu de faire montre de déférence et, si oui, le degré de déférence requis dépendent de la nature de la question dont était saisi le tribunal administratif et de la mesure dans laquelle les faits relevaient de son expertise : *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Paul*, précité. En l'absence d'erreur sur des questions de droit, il est possible que le tribunal administratif soit mieux placé que le tribunal de révision pour étudier la question, auquel cas une certaine déférence peut s'imposer. Dans ce cas, la norme de contrôle applicable est vraisemblablement la norme de la décision raisonnable. Dans la mesure où la question est une question de droit pur et peut être isolée des questions de fait, la norme applicable est celle de la décision correcte. Toutefois, lorsque les deux types de questions sont inextricablement liées entre elles, la norme de contrôle applicable est vraisemblablement celle de la décision raisonnable : *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

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

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Le processus lui-même devrait vraisemblablement être examiné selon la norme de la décision raisonnable. La perfection n'est pas requise; il s'agit de se demander si, « considéré dans son ensemble, le régime de réglementation [ou la mesure gouvernementale] respecte le droit ancestral collectif en question » : *Gladstone*, précité, par. 170. Ce qui est requis, ce n'est pas une mesure parfaite mais une mesure raisonnable. Comme il est précisé dans *Nikal*, précité, par. 110, « [l]e concept du caractère raisonnable doit [. . .] entrer en jeu pour ce qui [. . .] concern[e] l'information et la consultation. [. . .] Dans la mesure où tous les efforts raisonnables ont

to inform and consult. This suffices to discharge the duty.

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

H. *Application to the Facts*

(1) Existence of the Duty

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

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

été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier. » Le gouvernement doit déployer des efforts raisonnables pour informer et consulter. Cela suffit pour satisfaire à l'obligation.

Si le gouvernement n'a pas bien saisi l'importance de la revendication ou la gravité de l'atteinte, il s'agit d'une question de droit qui devra vraisemblablement être jugée selon la norme de la décision correcte. Si le gouvernement a raison sur ces points et agit conformément à la norme applicable, la décision ne sera annulée que si le processus qu'il a suivi était déraisonnable. Comme il a été expliqué précédemment, l'élément central n'est pas le résultat, mais le processus de consultation et d'accommodement.

H. *L'application aux faits*

(1) L'existence de l'obligation

Il s'agit de savoir si la province connaissait, concrètement ou par imputation, l'existence potentielle d'un droit ou titre ancestral et envisageait des mesures susceptibles d'avoir un effet préjudiciable sur ce droit ou titre. Compte tenu de la preuve présentée à la Cour en l'espèce, il ne fait aucun doute qu'il faut répondre « oui » à cette question.

Les Haïda revendiquent depuis au moins 100 ans le titre sur l'ensemble des îles Haida Gwaii. Le juge de première instance a conclu que les Haïda se plaignaient depuis plusieurs années auprès de la province du rythme d'exploitation des vieilles forêts, des méthodes d'exploitation et des répercussions de l'exploitation forestière sur l'environnement. De plus, la province savait, depuis au moins 1994, que les Haïda s'opposaient à ce qu'on remplace la CFF 39 sans leur consentement et sans que leurs revendications aient fait l'objet de mesures d'accommodement. Comme l'a constaté le juge en son cabinet, la province disposait, [TRADUCTION] « [d]epuis 1994, et peut-être bien avant », d'éléments de preuve établissant que les Haïda utilisaient et occupaient à titre exclusif certaines régions du Bloc 6. Depuis au moins 1846 (affirmation de la souveraineté britannique), elle possède des preuves témoignant de l'importance du cèdre rouge dans la culture haïda.

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

66 La province se dit inquiète de l'ampleur des revendications des Haïda, faisant observer que, [TRADUCTION] « [d]ans une action distincte, les Haïda revendiquent un titre ancestral sur l'ensemble des îles de la Reine-Charlotte, sur les eaux les entourant et sur l'espace aérien. [. . .] La revendication des Haïda vise le droit à l'utilisation, à l'occupation et au bénéfice exclusifs des terres, des eaux intérieures, du fond marin, des eaux pélagiques et de l'espace aérien » (mémoire de la Couronne, par. 35). Cependant, se demander si l'obligation de consulter et d'accommoder s'applique avant que la preuve de l'existence d'un droit n'ait été apportée n'équivaut pas à préjuger de l'affaire sur le fond. D'ailleurs, il convient de souligner que, avant que le juge en son cabinet ait rendu sa décision en l'espèce, la province avait obtenu que la question de l'existence du titre et des droits des Haïda et de l'atteinte portée à ceux-ci soit examinée séparément des questions se rapportant à l'obligation de consulter et d'accommoder. Les questions ont été clairement séparées dans l'instance, à l'instigation de la province.

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

67 Le juge en son cabinet a estimé que la province savait que les droits et titre ancestraux potentiels en question visaient le Bloc 6 et qu'ils pouvaient être touchés par la décision de remplacer la CFF 39. Pour ce motif, l'honneur de la Couronne commandait que celle-ci procède à une consultation avant de prendre une décision susceptible d'avoir un effet préjudiciable sur les droits et titre ancestraux revendiqués.

(2) Scope of the Duty

(2) L'étendue de l'obligation

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

68 Comme il a été expliqué plus tôt, l'ampleur de la consultation requise dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre, ainsi que de la gravité de l'effet préjudiciable potentiel sur le droit ou titre revendiqué.

(i) *Strength of the Case*

(i) *Solidité de la preuve*

On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their

69 Après avoir examiné une preuve qu'il a qualifiée d'[TRADUCTION] « abondante », le juge en son cabinet a, au par. 25 de sa décision, tiré un certain nombre de conclusions [TRADUCTION] « incontournables » relativement aux revendications des Haïda. Il a conclu que les Haïda habitaient les îles Haïda Gwaii depuis au moins 1774, qu'ils n'avaient jamais

rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

été conquis, qu'ils n'avaient jamais cédé leurs droits dans un traité et qu'aucune loi fédérale n'avait éteint leurs droits. Depuis au moins 1846, l'utilisation du cèdre rouge provenant des vieilles forêts des régions côtières et intérieures de la zone maintenant connue comme étant le Bloc 6 de la CFF 39 fait partie de leur culture.

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

> (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
>
> (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

Le juge en son cabinet a rigoureusement évalué la preuve et établi une distinction entre les différentes revendications des Haïda visant le Bloc 6. Au terme d'un examen approfondi de la preuve, il a tiré les conclusions suivantes au par. 47 :

> (1) il existe une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à établir l'existence d'un titre sur [TRADUCTION] « au moins quelques parties » des régions côtières et intérieures des îles Haïda Gwaii, notamment les régions côtières du Bloc 6; il semble exister une [TRADUCTION] « possibilité raisonnable » que ces régions comprennent les régions intérieures du Bloc 6;
>
> (2) il existe une [TRADUCTION] « forte probabilité » que les Haïda réussissent à établir l'existence d'un droit ancestral de récolter le cèdre rouge provenant des vieilles forêts des régions côtières et intérieures du Bloc 6.

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

Le juge en son cabinet a reconnu qu'un règlement définitif nécessiterait beaucoup plus d'éléments de preuve, mais, selon lui, [TRADUCTION] « il est juste de dire que la revendication des Haïda est beaucoup plus qu'une simple "affirmation" de titre ancestral » (par. 50).

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

La Cour d'appel s'est fondée sur les constatations du juge en son cabinet pour conclure que les revendications par les Haïda du titre et de droits ancestraux étaient [TRADUCTION] « étayées par une preuve à première vue valable » (par. 49). La solidité de la preuve influe sur l'étendue de l'obligation que doit satisfaire la province. En l'espèce, le dossier permet clairement de conclure, en attendant le règlement définitif, qu'il existe une preuve *prima facie* de l'existence d'un titre ancestral et une solide preuve *prima facie* de l'existence d'un droit ancestral de récolter le cèdre rouge.

(ii) *Seriousness of the Potential Impact*

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

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

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

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

(ii) *Gravité des conséquences potentielles*

72 La preuve présentée au juge en son cabinet indiquait que l'utilisation du cèdre rouge fait depuis longtemps partie intégrante de la culture haïda. Le juge a considéré qu'il existait une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à démontrer une atteinte à un droit ancestral de récolter le cèdre rouge [TRADUCTION] « en prouvant que le cèdre des vieilles forêts a été et continuera d'être exploité dans le Bloc 6, et que cette ressource est limitée » (par. 48). La perspective de l'exploitation continue d'une ressource par ailleurs limitée laisse entrevoir les répercussions que la décision de remplacer la CFF 39 pourrait avoir sur un droit ancestral.

73 Les CFF ont un caractère exclusif et sont accordées pour de longues périodes. La CFF 39 confère à Weyerhaeuser le droit exclusif de récolter le bois dans une région qui représente près du quart de la superficie totale des îles Haïda Gwaii. Le juge en son cabinet a fait observer qu'[TRADUCTION] « il [est] manifeste que de vastes étendues du Bloc 6 ont été coupées à blanc » (par. 59). Ce fait illustre les conséquences potentielles que la décision de remplacer la CFF 39 a sur les droits ancestraux.

74 Il faut reconnaître à la province d'avoir imposé à Weyerhaeuser, dans la CFF 39, des conditions à l'égard des peuples autochtones. Mais la province devait faire davantage. Lorsque le gouvernement sait qu'un droit ou un titre ancestral est revendiqué, il doit consulter les Autochtones sur la façon dont les terres visées devraient être exploitées.

75 Il faut maintenant se demander à quel moment prend naissance l'obligation de consulter. Est-ce à l'étape de l'octroi d'une CFF, ou seulement à l'étape de la délivrance des permis de coupe? Le remplacement d'une CFF n'autorise pas en soi la récolte de bois, qui ne peut se faire qu'en vertu des permis de coupe. Les CFF sont périodiquement remplacées, et la décision de remplacer une CFF en particulier n'a pas nécessairement pour effet de détruire l'essence même du droit revendiqué. La province fait valoir que, bien qu'elle ne les ait pas consultés avant de remplacer la CFF, elle [TRADUCTION]

prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

« a consulté et continue de consulter les Haïda avant d'autoriser les permis de coupe ou autres plans d'aménagement » (mémoire de la Couronne, par. 64).

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

J'estime que, lorsqu'elle prend des décisions concernant les CFF, la province est tenue à une obligation de consultation, et peut-être à une obligation d'accommodement. La décision rendue à l'égard d'une CFF reflète la planification stratégique touchant l'utilisation de la ressource en cause. Les décisions prises durant la planification stratégique risquent d'avoir des conséquences graves sur un droit ou titre ancestral. Tous les cinq ans, le titulaire de la CFF 39 doit présenter au chef des services forestiers un plan d'aménagement comprenant l'inventaire des ressources du secteur visé par la concession, une analyse des approvisionnements en bois d'œuvre et un « plan de 20 ans » présentant une séquence hypothétique de blocs de coupe. C'est à partir de l'inventaire et de l'analyse des approvisionnements en bois d'œuvre qu'est fixée la possibilité annuelle de coupe (« PAC ») pour la concession. Ainsi, le titulaire de la concession établit les renseignements techniques servant à calculer la PAC. La tenue de consultations au niveau de l'exploitation a donc peu d'incidence sur le volume fixé dans la PAC, qui, à son tour, détermine les modalités du permis de coupe. Pour que les consultations soient utiles, elles doivent avoir lieu à l'étape de l'octroi ou du renouvellement de la CFF.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

Il s'agit enfin de décider si la Couronne avait l'obligation non seulement de consulter les Haïda au sujet des décisions relatives aux CFF mais aussi de trouver des accommodements à leurs préoccupations. Les faits de l'espèce ne permettent pas de dire si la consultation aurait entraîné la nécessité de telles mesures. Cependant, la solidité de la preuve étayant l'existence et d'un titre haïda et d'un droit haïda autorisant la récolte du cèdre rouge, conjuguée aux répercussions sérieuses sur ces intérêts des décisions stratégiques successives, indique que l'honneur de la Couronne pourrait bien commander des mesures d'accommodement substantielles pour protéger les intérêts des Haïda en attendant que leurs revendications soient réglées.

(3) Did the Crown Fulfill its Duty?

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

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

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

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

III. Conclusion

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

(3) La Couronne s'est-elle acquittée de son obligation?

78 La province n'a pas consulté les Haïda au sujet du remplacement de la CFF 39. Le juge en son cabinet a tiré la conclusion suivante (par. 42) :

> [TRADUCTION] [S]elon la preuve présentée, il est manifeste que le ministre a refusé de consulter les Haïda au sujet du remplacement de la CFF 39 en 1995 et en l'an 2000, au motif que la loi ne l'obligeait pas à le faire et qu'une telle consultation ne pouvait avoir d'incidence sur son obligation, prévue par la loi, de remplacer la CFF 39.

La province a attiré l'attention de la Cour et des tribunaux d'instance inférieure sur les nombreuses mesures et politiques qu'elle a adoptées pour tenir compte des intérêts autochtones. Devant la Cour, elle a affirmé que [TRADUCTION] « [l]es Haïda ont été et sont consultés au sujet des plans d'aménagement forestier et des permis de coupe. [. . .] À la suite de consultations antérieures auprès des Haïda, la province a pris plusieurs mesures pour atténuer les effets de l'exploitation forestière [. . .] » (mémoire de la Couronne, par. 75). Cependant, ces mesures et politiques n'équivalent pas à une consultation au sujet de la décision de remplacer la CFF 39 et de l'établissement de ses modalités, et ne peuvent la remplacer.

79 Par conséquent, la province ne s'est pas acquittée de son obligation de procéder à davantage qu'une simple consultation. Elle n'a procédé à absolument aucune consultation utile.

III. Conclusion

80 Le pourvoi de la Couronne est rejeté et celui de Weyerhaeuser est accueilli. L'ordonnance de la Cour d'appel de la Colombie-Britannique est modifiée de manière que l'obligation de consultation de la Couronne ne s'étende pas à Weyerhaeuser. La Couronne a accepté de payer les dépens des intimés pour la demande d'autorisation de pourvoi et pour le pourvoi. Weyerhaeuser est dispensée de toute obligation de payer les dépens des Haïda devant les instances inférieures. Il n'est pas nécessaire de répondre à la question constitutionnelle dans le présent pourvoi.

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

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

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

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

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

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

Solicitors for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

Pourvoi de la Couronne rejeté. Pourvoi de Weyerhaeuser Co. accueilli.

Procureurs de l'appelant le ministre des Forêts : Fuller Pearlman & McNeil, Victoria.

Procureur de l'appelant le procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'appelante Weyerhaeuser Company Limited : Hunter Voith, Vancouver.

Procureurs des intimés : EAGLE, Surrey.

Procureur de l'intervenant le procureur général du Canada : Ministère de la Justice, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse : Ministère de la Justice, Halifax.

Procureur de l'intervenant le procureur général de la Saskatchewan : Sous-procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Ministère de la Justice, Edmonton.

Procureurs des intervenantes la Bande indienne de Squamish et la Bande indienne des Lax-kw'alaams : Ratcliff & Company, North Vancouver.

Procureurs de l'intervenante la Nation haisla : Donovan & Company, Vancouver.

Procureurs de l'intervenant le Sommet des Premières nations : Braker & Company, West Vancouver.

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

Procureurs de l'intervenante la Première nation Dene Tha' : Cook Roberts, Victoria.

Procureurs de l'intervenant Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan : Cook Roberts, Victoria.

Procureurs des intervenants Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries et Mining Association of British Columbia : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante British Columbia Cattlemen's Association : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenant le village de Port Clements : Rush Crane Guenther & Adams, Vancouver.

Date: 20071212
Docket: 06/95 & 06/105
Citation: 2007 NLCA 75

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

HER MAJESTY IN RIGHT OF
NEWFOUNDLAND AND LABRADOR,
as represented by the Minister of
Environment and Conservation and the
Minister of Transportation and Works APPELLANTS

AND:

THE LABRADOR MÉTIS NATION,
a body corporate under the laws of the
Province of Newfoundland and Labrador
and CARTER RUSSELL, of Happy Valley-
Goose Bay, Labrador RESPONDENTS

Coram: Roberts, Mercer and Barry JJ.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division, 200508T0060

Appeal Heard: November 14 and 15, 2007
Judgment Rendered: December 12, 2007

Reasons for Judgment by Barry J.A.
Concurred in by Roberts and Mercer JJA.

Counsel for the Appellants: Donald H. Burrage, Q.C. & Justin S.C. Mellor
Counsel for the Respondents: D. Bruce Clarke and Cory J. Withrow

Barry J.A.:

[1] The underlying issue in this case is whether individuals of aboriginal descent living in southern Labrador have a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them concerning wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway ("TLH"). The applications judge concluded they did. The Crown bases its appeal primarily on the grounds that the respondents failed to produce sufficient evidence of a continuing aboriginal community and that neither the Labrador Métis Nation ("LMN") nor Carter Russell should have standing to pursue the claim.

Background Facts

[2] The LMN participated in the public environmental assessment process relating to Phases II and III of the TLH project. Phase III is now being constructed between Happy Valley-Goose Bay and Cartwright junction. In October, 2004, the LMN requested that the Minister of Transportation and Works and the Minister of Environment and Conservation provide them with applications for all wetland and watercourse crossings along with adequate time to comment on them. The Ministers denied this request on the basis that providing these applications was not required by law, nor was it standard practice for government to distribute these materials to stake holders. On May 18, 2005, the LMN filed an originating application for certiorari seeking to quash the Ministers' decisions.

[3] The applications judge concluded the Crown had an ongoing duty to engage in meaningful consultation with the LMN during construction of Phase III and quashed the decisions. The Crown appealed. The respondents cross-appealed on the basis that, while the applications judge was correct that there were sufficient Métis rights to give rise to a duty to consult, there were also sufficient Inuit rights to sustain the duty. In any event, the respondents maintain that there is no need to identify their members' aboriginal ethnicity in a duty to consult application. The respondents also submit the applications judge did not have sufficient evidence before him to determine that the effective date of European control was 1760 and suggest that, in fact, this may have been as late as the 1950s.

[4] The LMN says that approximately 6,000 individuals in 24 communities in southern and central Labrador have authorized it as their agent to pursue an aboriginal rights claim and enforce their rights to

consultation with government until the claim is resolved. Nine of its members (2 of which are honourary) have Micmac, Innu or Cree ancestry, but the remainder are of mixed Inuit and European descent.

[5] Carter Russell claims a right to act as representative plaintiff for individuals of Inuit descent in southern and central Labrador in asserting the claim.

[6] The 24 communities, where the members of the LMN reside, are (roughly from south to north):

> L'Anse-Au-Clair, Forteau, L'Anse-Amour, L'Anse-Au-Loup, Capstan Island, West St. Modeste, Pinware, Red Bay, Lodge Bay, Mary's Harbour, St. Lewis, Port Hope Simpson, Williams Harbour, Pinsent's Arm, Charlottetown, Norman Bay, Black Tickle-Domino, Paradise River, Cartwright, Happy Valley-Goose Bay, Mud Lake, North West River, Churchill Falls and Labrador City-Wabush.

Of these, the 14 from Lodge Bay to North West River are most directly affected by Phase III of the TLH project.

[7] The LMN alleges its members are beneficiaries of Inuit aboriginal rights, in that they are of Inuit descent and have continued the practices and traditions of the Inuit in their subsistence hunting, fishing and gathering. The LMN submits its members are the current manifestation of Inuit culture in southern and central Labrador.

[8] While presenting their claim as beneficiaries of Inuit aboriginal rights, the respondents say it is possible that, as a matter of law, their claim may eventually be founded upon Métis rights. They submit, however, that they need not definitively take a position, at this stage, as to whether they are Inuit or Métis, saying that this will ultimately be determined by the courts, as a matter of law, once the essential facts have been established. For now, say the respondents, in order to trigger a duty on the Crown to consult with them, they need only establish a credible claim as aboriginal people.

[9] The Crown submits that no duty to consult arises until the respondents have asserted a credible claim. It argues the claim must be based upon a specific ethnic identity, since this is essential to show rights claimed flow from an aboriginal community.

[10] The Crown also submits that the LMN, as a body corporate, cannot have standing to enforce aboriginal rights because those rights cannot be

transferred from the communities holding them. In addition, the Crown challenges Carter Russell's right to act as a representative plaintiff on the basis that sufficient evidence has not been presented to establish that he is a member of an aboriginal community.

The Evidence at Trial

[11] Much of the evidence on the hearing of the application consisted of competing experts providing opinions whether the Inuit had a sufficient presence south of Hamilton Inlet between the period of Inuit and European contact and the date Europeans established effective control in the area.

[12] Evidence relating to continuity of Inuit culture may be summarized as follows:

- Each of the 14 communities most directly affected by Phase III of the TLH have inhabitants who are members of the LMN with mixed Inuit and European ancestry.

- These individuals, who call themselves Inuit–Metis, comprise the majority population in most of these 14 communities.

- These communities rely upon the lands and waters of this area for food, cultural, economical and spiritual purposes.

  [Parr affidavit, para. 34]

- The majority of the population in many of the 14 communities is the modern manifestation of the south and central Inuit culture tracing back to before European contact, which occurred in Labrador in the mid-1500s.

- The British became the only European country asserting sovereignty over Labrador after the Treaty of Paris in 1763.

- Beginning in the late 1700s, occasional European males began to remain in Labrador and enter into family relationships with Inuit. The mixed-blood descendants merged with the Inuit families of the area.

- The mixed-blood descendants lived within their ancestors' traditional Inuit-Metis lifestyle, in the summer fishing for cod, capelin, herring and salmon, hunting seals and seabirds, and gathering berries and greens. In the winter they hunted small game, such as partridge, rabbits and porcupine, gathered water and firewood, and ran trap lines.

- Over 90% of Inuit-Metis still hunt, 93% fish for food, 90% collect their own wood, almost 70% trap, and almost all harvest berries and other flora.

[Affidavit of Carter Russell, paras. 8, 9, 13, 14]

The Decision Below

[13] The applications judge made the following findings:

(i) … from the scholarly evidence presented so far, notwithstanding disagreement as to the time that the Inuit people fully occupied southern Labrador, … generally it is agreed that the period from first contact around 1550, to the period of effective European control around 1760 that there were Inuit people using the southern regions of Labrador in one capacity or another. (para. 48)

(ii) Whatever the date of full occupation by the Inuit it is the conclusion of this court that there is a very high probability that the Inuit people emerged along the southern coast of Labrador prior to and continuous with the gradual appearance and introduction of the Europeans for at least two hundred years before effective control by the British. (para. 49)

(iii) In the present case all the Labrador Metis people belong to the same aboriginal community notwithstanding that this community of people is scattered in a number of villages throughout a well defined region of Labrador and for the most part along the coastal region of southern Labrador. (para. 52)

(iv) … I am more in agreement with Counsel for the [LMN] when he argues that the law of agency applies and that the aboriginal community can be represented by an agent, in this case, the … LMN. (para. 60)

(v) [Having treated the Labrador Inuit Association as the agent for the Inuit people of Labrador for the purposes of negotiating the Labrador Inuit Land Claims Agreement] I would think that [the Crown is] now estopped from refusing the same recognition to the Labrador Metis Nation as the agent representing the Labrador people claiming Aboriginal status as Metis people. (para. 70)

(vi) … I am satisfied that there is a strong case to be made for recognizing a regional community of Labrador Metis people of mixed Inuit and European ancestry along the east and south coast of Labrador. I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration. I am satisfied as well that the modern day people who claim that they are Metis

> are descendants of this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador from Hamilton Inlet all the way to the present border with Quebec and Labrador. (para. 72)
>
> (vii) … there is a high degree of probability that the ancestral people of those people who call themselves Labrador Metis were of Inuit origin. (para. 74)
>
> (viii) I am satisfied that Mr. Russell's account of his cultural background satisfies the criteria to establish his Aboriginal status to a very high degree of probability … . (para. 76)
>
> (ix) … the evidence strongly supports the position that the Inuit-Metis period began between first contact with the Europeans and the time ascribed to be effective control by the British over the coast of Labrador. That is from about 1550 A.D. to 1760 A.D. (para. 87)
>
> (x) The evidence is convincing that the customs and traditions of the Metis people … included a broad use of the land and its resources and was an integral part of the lifestyle of the Metis people from earliest times and continues to be maintained to this day throughout the Metis community of Labrador. (para. 90)

[14] The parties agree that the hearing and submissions before the applications judge proceeded on the basis that the respondents were founding their right of consultation upon an Inuit rights claim. The Crown submits that the reasons of the applications judge indicate that his analysis, including following the ten step approach employed in **R. v. Powley**, [2003] 2 S.C.R. 207, a Métis claims case, proceeded on the basis of the respondents' rights being based upon a Métis claim.

[15] The respondents, while admitting that the interspersing of Métis references with Inuit ones results in some confusion, argues that the applications judge made all the findings necessary to found the respondents' claim in Inuit rights but also, in the alternative, went on to show the right of consultation could also be founded upon a Métis claim. The respondents note that, throughout his reasons, the applications judge never made a specific finding that the claimants were Métis or Inuit and employed language such as "those people who call themselves Labrador Metis" (para. 74). The Crown notes, however, language such as:

> It is helpful to consider how those who claim to be Metis come to that determination. While not all members of the Labrador Metis Nation can be identified and evaluated in this case, those whose affidavits have been entered

> into evidence are relevant to show that these individuals self-identify as Metis. (para. 26)
>
> In the case of the Labrador Metis people there is no precise time that can be attached to their cultural emergence however, it is the very fact that the Europeans had arrived that gave them their distinctive cultural status. It made little difference to the emerging culture that this was prior to actual British control over the region. (para. 46)
>
> … I am satisfied that there is a strong case to be made for recognizing a regional community of Labrador Metis people of mixed Inuit and European ancestry along the east and south coast of Labrador. I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration. I am satisfied as well that the modern day people who claim that they are Metis are descendents of this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador from Hamilton Inlet all the way to the present border with Quebec and Labrador. (para. 72)

[16] The Crown argues references such as "self-identify as Metis", "their cultural emergence", "distinctive cultural status", "emerging culture" and "descendants of this early new culture", show the applications judge had concluded the respondents' claim flowed from Métis rights.

The Law

[17] Section 35 of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982,** (U.K.), 1982, c. 11, provides:

> (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.

[18] The Supreme Court of Canada set out the test for identifying s. 35(1) aboriginal rights in **R. v. Van der Peet**, [1996] 2 S.C.R. 507, where Lamer C.J.C. stated for the majority, at para. 44:

> In order to fulfill the purpose underlying s. 35(1) - i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions - the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at

> identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

And further, at para. 46:

> … the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): 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.

[19] The Court held in **Van der Peet** that the evidence relied upon by the applicant 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.

[20] To succeed, an aboriginal group must also demonstrate that the connection with the land in its customs and laws has continued to the present day.

[21] The Court dealt with Métis rights in **Powley**. It applied the basic elements of the **Van der Peet** test but modified these to recognize that Métis communities evolved post-contact but prior to the entrenchment of European control, when the influence of European settlements and political institutions became pre-eminent. At para. 18 of **Powley**, the court referred to **Van der Peet** as the "template" for the discussion of Métis rights. It modified the pre-contact focus of the **Van der Peet** test to account for the important differences between Indian and Métis claims. The Court stated:

> Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

[22] The Court affirmed in **Powley** that aboriginal hunting rights, including Métis rights, are contextual and site-specific. It confirmed that aboriginal rights are communal rights and a historic rights-bearing community must be identified. The claimant's membership in the relevant contemporary Métis community must be verified by considering three factors as indicia of Métis

identity: self-identification, ancestral connection, and community acceptance. (para. 30) The claimant must self-identify as a member of a Métis community and this self-identification should not be of recent vintage merely to benefit from a s. 35 right. Also, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a "real link" to the historic community whose practices ground the right being claimed. A minimum "blood quantum" is not required. Finally, the claimant must demonstrate he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identify and distinguish it from other groups. Membership in a Métis political organization is relevant but not necessarily sufficient on the question of community acceptance. (paras. 31-33).

[23] By analogy from **Van der Peet**, the test for Métis practices was held to focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. (para. 37)

[24] The constitutional duty to consult and accommodate was first set out by the Supreme Court of Canada in **Haida Nation v. British Columbia (Minister of Forests)**, [2004] 3 S.C.R. 511. At para. 25, the Court stated:

> 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.

[25] In **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)**, [2004] 3 S.C.R. 550, a companion case to **Haida,** McLachlin C.J.C. stated, at para. 24:

> … the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted

> Aboriginal rights and title. … The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[26] The right of an aboriginal people to be consulted by the Crown is a procedural right, not a substantive one. See **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)**, [2005] 3 S.C.R. 388, which dealt with consultation before construction of a winter road.

[27] In assessing whether a duty to consult exists and the extent of any such duty, the Crown is not permitted to narrowly interpret the facts. See **Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)**, [2005] 3 C.N.L.R. 74 (B.C.S.C.), at para. 94:

> The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution … . In its review, the Court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process … .

[28] Each case must be approached individually and with flexibility. The honour of the Crown does not permit sharp dealing. See **Haida**, at paras. 42 and 45.

[29] The Crown obligation to undertake an analysis of whether the Crown owes a duty to consult is triggered at a low threshold. See **Mikisew Cree**, at para. 55. To trigger that obligation, the Crown must have knowledge, real or constructive, of the "potential" existence of an aboriginal right that "might" be adversely affected by conduct contemplated by the Crown. See **Haida**, at para. 35. All that is necessary is that the Crown have "some idea" of the potential scope and nature of the aboriginal right asserted and of the alleged infringements of these rights. See **Haida**, at para. 36.

[30] There is a distinction between knowledge sufficient to trigger a duty to consult and the content or the scope of the duty to consult in a particular case. As the Court noted in **Haida**, 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… . 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. … 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.

[31] In order to determine what the scope of the Crown's duty to consult may be in any given case, the Court must consider 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 the title claimed. See **Haida**, at para. 39.

[32] The kind of duties to consult are discussed in **Haida**, at paras. 43-46, where the Court stated:

> [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 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 the 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. …

Issues

[33] Five issues arise:

(i) Must claimants ethnically identify themselves before the Crown can be compelled to consult and accommodate them?

(ii) Did the applications judge err in identifying the respondents as Métis when the parties had made their submissions on the basis of Inuit rights?

(iii) Did the applications judge err in concluding that the respondents had a credible but unproven claim?

(iv) Are the Labrador Métis Nation and Carter Russell proper parties to enforce the duty to consult?

(v) What may be said on the scope of the duty to consult?

The Applicable Standard of Review

[34] The appropriate standard of review was discussed by this Court in **Newfoundland v. Drew et al.** (2006), 260 Nfld. & P.E.I.R. 1 (NLCA), as follows:

> [11] The standard of appellate review to be applied is determined by whether the question being considered is one of law, of fact, or of mixed fact and law. The standard of review for pure questions of law is correctness: **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235 … at para. 8. This means that an appeal court is free to substitute its opinion for that of the trial judge on questions of law.
>
> [12] As to findings of fact, including the weight to be given to evidence, an appeal court can only reverse a lower court decision where the trial judge has made a palpable and overriding error: **Housen** at paras. 10 & 23, and **K.L.B. et al. v. British Columbia et al.**, [2003] 2 S.C.R. 403 … at para. 62. A palpable error is one that is plainly seen: **Housen** at para. 5. An overriding error is one that 'is sufficiently significant to vitiate the challenged finding of fact. … The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error… .' In **H.L. v. Canada (Attorney General) et al.,** [2005] 1 S.C.R. 401 … at para.

> 110, Fish J., for the majority, described the functional equivalents of palpable and overriding error as including 'clearly wrong', 'unreasonable' and 'not reasonably supported by the evidence.' Lamer C.J.C., in **Delgamuukw et al. v. British Columbia et al**, [1997] 3 S.C.R. 1010 … at para. 80 stated that interference with factual findings was warranted 'where the courts below have misapprehended or overlooked material evidence…'. The standard of palpable and overriding error is also applicable to a review of the trial judge's inference of fact: **Housen** at para. 21.
>
> [13] Questions of mixed fact and law are subject to a 'standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.'

[35] Issue (i), the necessity of ethnic identification, is a pure question of law and the standard of review is correctness. Issue (ii) concerning identification as Métis, would normally be a mixed question of law and fact; if the issue were properly before him, the applications judge would have to apply the **Powley** legal standard to the facts of this case. But whether the issue was properly before him is a question of law. Issue (iii), assessing the credibility of the respondents' claim, is also a mixed question of law and fact; the legal principles earlier discussed had to be applied to the facts. Issue (iv), the matter of standing, is another mixed question of law and fact; legal questions of agency and entitlement to be a representative plaintiff must be applied to the circumstances of the LMN and Carter Russell. Issue (v), the scope of the duty to consult, depends on (a) legal principles relating to the extent and scope of the Crown's duty to consult; (b) the potential strength of the LMN communities' claim to aboriginal rights; (c) the extent of the potential adverse effects the construction of the TLH may have; and (d) whether the Crown failed in its constitutional duties to consult and accommodate. Question (a) is a pure question of law, (b) and (d) mixed questions of law and fact, and (c) a pure question of fact.

Analysis

(i) Must claimants ethnically identify themselves before the Crown can be compelled to consult and accommodate them?

[36] I do not accept the appellants' submission that claimants always have to self-identify as either Inuit or Métis before the Crown's duty to consult and accommodate is triggered. I agree with the respondents that it was sufficient in the present case to assert a credible claim that the claimants

belong to an aboriginal people within s. 35(1) of the **Constitution Act, 1982**. The respondents have established this by the affidavit evidence of Carter Russell, Todd Russell and Trent Parr, showing they are of mixed Inuit and European ancestry whose Inuit bloodlines have originated from those Inuit ancestors that resided in south and central Labrador prior to European contact. The unrefuted evidence before the applications judge was sufficient to demonstrate a credible claim that the members of the 24 LMN communities know they have genetic, cultural and land use continuity with their Inuit forebears, have a regional consciousness of a regional community, and occupy and use, for traditional hunter/gatherer purposes, lands and waters threatened with adverse effects by construction of the TLH.

[37] Whether the present day LMN communities are the result of an ethnogenesis of a new culture of aboriginal peoples, that arose between the period of contact with Europeans and the date of the effective imposition of European control, is not yet established, although it is possible that such an ethnogenesis occurred. If so, the members of the LMN communities could be, in law, constitutional Métis.

[38] However, it is also possible that the LMN communities are simply the present-day manifestation of the historic Inuit communities of south and central Labrador that were present in the area prior to contact with the Europeans. Or they may be the manifestation of a culture which developed only after effective European control in Labrador had occurred, in which case, on the basis of **Powley**, the culture could be viewed as involving non-aboriginal customs and practices, unprotected by s. 35(1). The fact that the actual bloodlines of the present-day aboriginal persons may have a mix of European and Inuit ancestry does not detract from the argument that the LMN communities may have "Inuit" aboriginal rights. The present-day manifestation of this authentic Inuit culture may simply have been impacted by centuries of Euro-Canadian encounter and influence.

[39] The LMN communities have not refused to self-identify with a specific constitutional definition but they reasonably say they are unable, at the present time, to do so definitively. This position may change as further historical, archeological, anthropological and other information is obtained and as the law provides further guidance on these complex issues. In any event, definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown's obligation to consult arises. All the respondents had to do was establish, as they did, certain essential facts sufficient to show a credible claim to

aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not the case. Here fishing rights are in issue. Those rights are not dependent upon whether the claim is Inuit or Métis-based. Fishing rights flow from both types of claims. The applications judge did not need to determine the issue of ethnicity.

(ii) Did the applications judge err in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights?

[40] The respondents concede and the Crown agrees that the applications judge had insufficient evidence before him to conclude that an ethnogenesis in law occurred so as to result in the evolution of a Métis culture separate and distinct from the pre-existing Inuit culture. I agree with the respondents that the Crown in this case had sufficient information to know the respondents had a credible claim based on aboriginal rights, whether they be of Inuit or Métis origin. All the respondents had to do was set out, as they did, the essential facts underlying and supporting their aboriginal community's claim to aboriginal rights and the facts supporting their submission that the Crown's actions could adversely affect those aboriginal rights. The known facts had to be considered by the Crown in accordance with the applicable legal tests and doctrines for each such type of aboriginal claim. If the Crown was uncertain as to the type of aboriginal rights asserted, be they Indian, Inuit or Métis, the Crown had an obligation to analyze them in the alternative. If the facts as presented by the aboriginal community could reasonably support the conclusion that the aboriginal rights asserted are potentially Métis rights, then a legal analysis used in the case law applicable to Métis rights should be undertaken by the Crown. However, if the same rights could lead to the possibility that the aboriginal rights asserted could be Inuit rights instead, then the Crown should do an analysis on that basis as well.

[41] In the present case, the Crown had a responsibility to carry out a dual-analysis of the potential strength of the aboriginal rights using both the Métis and the Inuit legal tests, in order to determine whether a duty to consult arose. In effect, the Crown carried out this dual-analysis case by initially preparing its submissions on the understanding that the respondents were basing their claim upon Métis rights. Subsequently, both the appellants and the respondents proceeded on the basis that the claim was founded on Inuit rights.

[42] In their factum, the respondents submit that the applications judge followed the dual-analysis approach and first applied the facts to the tests for Métis aboriginal rights. At the appeal hearing, the respondents acknowledged that both parties made their submissions on the basis of an Inuit claim. They also concede there is some confusion in the language employed by the applications judge. That language does, however, particularly in paras. 26 and 46, where he refers to the emergence of a new culture, on balance indicate an analysis based upon Métis aboriginal rights. This conclusion is supported by the applications judge's utilization of the ten step **Powley** approach. I agree, therefore, with the Crown that the applications judge clearly erred in employing a Métis analysis, when the case was argued on the basis of an Inuit-based claim.

(*iii*) *Did the applications judge err in concluding that the respondents had a credible but unproven claim?*

[43] But what was the effect of this error by the applications judge? Accepting that the evidence before him was insufficient to establish an ethnogenesis or the actual date of effective control, his other findings were sufficient to satisfy the **Van der Peet** test and establish a credible claim based upon Inuit ancestry.

[44] As previously noted, the Supreme Court in **Van der Peet** held that, in order to establish an aboriginal right protected by s. 35(1), an applicant must prove the continuing activity for which protection is sought was an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The applications judge found this to be established, particularly where he stated, at para. 72:

> I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration.

And further, at para. 90:

> The evidence is convincing that the customs and traditions of the Metis people … included a broad use of the land and its resources and was an integral part of the lifestyle of the Metis people from earliest times and continues to be maintained to this day throughout the Metis community of Labrador.

[45] The Crown's analysis should have arrived at the same result, namely, that the respondents have a credible claim which triggers a duty to consult.

(iv) Are the LMN and Carter Russell proper parties to enforce the duty to consult?

[46] I reject the Crown's submission that a corporate plaintiff may not be the vehicle for enforcement of an aboriginal right to consultation. The Crown provided no authority for its submission that s. 35 rights could not be asserted and protected by an agent. Also, the Crown provided no authority for its proposition that, in order for an agent to so assert and protect, the rights would have to be transferred, which is impossible with s. 35 rights. I know of no proposition in the law of principle and agent which requires that rights be transferred to an agent before the agent can act to protect them. In the present case, the LMN has established through its memorandum and articles of association, including the preamble to its articles, that it has the authority of its 6,000 members in 24 communities to take measures to protect aboriginal rights. The preamble states in part (after describing the basis of the aboriginal rights claim of LMN members):

> We are entitled to consultation from government when any action they may take could impair or interfere with our rights. We have a right to involvement in the management, as an equal and full participant, of the natural resources of our lands.

[47] Anyone becoming a member of the LMN should be deemed to know they were authorizing the LMN to deal on their behalf to pursue the objects of the LMN, including those set out in the preamble to its articles of association. This is sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in the present case. This well-publicized case has been proceeding since May, 2005. No evidence was presented that any of the 6,000 LMN members or any other aboriginal person questioned the authority of the LMN to act on their behalf.

[48] The trial judge concluded the Crown should be estopped from questioning the authority of a corporation to deal with aboriginal rights because the Crown had signed a treaty with the Labrador Inuit Association, which is also a corporation, dealing with Inuit rights in Northern Labrador. I agree with the Crown that this was an error. The Crown has the authority to create new constitutionally protected rights through the treaty process. See **R. v. Sioui**, [1990] 1 S.C.R. 1025, at pp. 1042-43. The legitimacy of the LMN's involvement comes not from the LIA land claims process but from the authority granted the LMN by its members.

[49] With respect to Carter Russell, as a representative plaintiff he had no obligation to show any authorization from other potential plaintiffs. It was sufficient for him to establish, as he has, that he has a credible claim, as a member of an aboriginal community situated at Williams Harbour where he resided and elsewhere, to aboriginal rights, which trigger a duty to consult on the part of the Crown. It is his assertion of the same interest as other members of his community which entitled him to act as a representative plaintiff.

(v) What may be said on the scope of the duty to consult?

[50] As noted in **Haida**, at paras. 37 and 39, the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The second aspect, seriousness of the potentially adverse effect of highway water crossings interfering with fish habitats, is not in dispute. On the first aspect, with the admitted paucity of the evidence on the process of ethnogenesis, which may or may not have occurred before effective European control, and on the date of effective European control in Labrador, it is difficult to see how the references of the applications judge to a "strong" case may be supported at this stage. A conclusion not reasonably supported by the evidence constitutes a palpable error. See **Drew**, at para. 12. But the error is not overriding here since the respondents did not need to show a strong case in order to trigger the low level of consultation here requested.

[51] A "preliminary evidence-based assessment" of the strength of the respondents' claim, such as discussed in **Haida**, at paras. 37 and 39, supports the view in the present case that the claim is more than a "dubious" or "peripheral" or "tenuous" one, which would attract merely a duty of notice. The respondents have established a prima facie connection with pre-contact Inuit culture and a continuing involvement with the traditional Inuit lifestyle. They have presented sufficient evidence to establish that any aboriginal rights upheld will include subsistence hunting and fishing.

[52] The scope of consultation requested by the respondents was set out in a letter to the Minister of Environment and Conservation on October 26, 2004:

> We now request that your office forward to us any and all applications for water crossings and other relevant permit requirements under your legislated mandate

> during the construction phase of the Trans Labrador Highway – Phase III. We also request adequate time to review and comment on the various permit applications.

An obligation to consult at this relatively low level would be triggered by a claim of less prima facie strength than that of the respondents. While it would be helpful to provide more guidance to the parties as to the scope of future duties to consult, this is not possible without knowing the future evidence which may be presented regarding the strength of the respondents' claim and regarding the types of adverse effects on the potential aboriginal claim from future Crown activity. Any unsatisfactory consequences for the parties, from the Court's inability to provide greater guidance, may be alleviated by their implementing a process for reasonable ongoing dialogue.

Summary and Disposition

[53] In summary:

(i) The respondents need not ethnically identify themselves definitively as Inuit or Métis, before the Crown's duty to consult and accommodate arises.

(ii) The applications judge erred in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights, but this error does not invalidate his ultimate conclusion.

(iii) The applications judge did not err in concluding that the respondents had a credible but unproven claim, giving rise to the Crown's duty to consult.

(iv) The LMN and Carter Russell are proper parties to enforce the duty to consult.

(v) The respondents' claim is at least strong enough to trigger a duty to consult at the low level requested.

(vi) The appeal is dismissed and the cross-appeal is allowed with party and party costs to the respondents.

L. Barry, J.A.

I concur:

D. Roberts, J.A.

I concur:

K. Mercer, J.A.

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.

Première nation crie Mikisew *Appelante*

c.

Sheila Copps, ministre du Patrimoine canadien, et Thebacha Road Society *Intimées*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Nation crie de Big Island Lake, Lesser Slave Lake Indian Regional Council, Premières nations de l'Alberta signataires du Traité nº 8, Treaty 8 Tribal Association, Premières nations de Blueberry River et Assemblée des Premières Nations *Intervenants*

RÉPERTORIÉ : PREMIÈRE NATION CRIE MIKISEW c. CANADA (MINISTRE DU PATRIMOINE CANADIEN)

Référence neutre : 2005 CSC 69.

Nº du greffe : 30246.

2005 : 14 mars; 2005 : 24 novembre.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Droits issus de traités — Obligation de consultation de la Couronne — Exercice par la Couronne du droit issu du traité et « prise » de terres cédées afin de construire une route d'hiver pour répondre aux besoins régionaux en matière de transport — Route proposée réduisant le territoire sur lequel la Première nation crie Mikisew aurait le droit d'exercer ses droits de chasse, de pêche et de piégeage issus du traité — La Couronne avait-elle l'obligation de consulter les Mikisew? — Dans l'affirmative, la Couronne s'est-elle acquittée de cette obligation? — Traité nº 8.

Couronne — Honneur de la Couronne — Obligation de consulter et d'accommoder les peuples autochtones.

Appel — Rôle de l'intervenant — Nouvel argument.

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

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.

Aux termes du Traité nº 8 signé en 1899, les premières nations qui vivaient dans la région ont cédé à la Couronne 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest, une superficie de très loin supérieure à celle de la France, qui excède celle du Manitoba, de la Saskatchewan ou de l'Alberta et qui équivaut presque à celle de la Colombie-Britannique. En contrepartie de cette cession, on a promis aux premières nations des réserves et certains autres avantages, les plus importants pour eux étant les droits de chasse, de pêche et de piégeage sur tout le territoire cédé à la Couronne à l'exception de « tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ».

La réserve des Mikisew se trouve sur le territoire visé par le Traité nº 8 dans ce qui est maintenant le parc national Wood Buffalo. En 2000, le gouvernement fédéral a approuvé la construction d'une route d'hiver, qui devait traverser la réserve des Mikisew, sans consulter ceux-ci. À la suite des protestations des Mikisew, le tracé de la route a été modifié (mais sans consultation) de manière à ce qu'il longe la limite de la réserve. La superficie totale du corridor de la route est d'environ 23 kilomètres carrés. L'objection des Mikisew à la construction de la route va au-delà de l'effet direct qu'aurait l'interdiction de chasser et de piéger dans le secteur visé par la route d'hiver et porte sur le préjudice causé au mode de vie traditionnel qui est essentiel à leur culture. La Section de première instance de la Cour fédérale a annulé l'approbation de la ministre en se fondant sur la violation de l'obligation de fiduciaire de la Couronne de consulter adéquatement les Mikisew et a accordé une injonction interlocutoire interdisant la construction de la route d'hiver. La cour a conclu que les avis publics types et la tenue de séances portes ouvertes n'étaient pas suffisants et que les Mikisew avaient droit à un processus de consultation distinct. La Cour d'appel fédérale a annulé cette décision et a conclu, en s'appuyant sur un argument présenté par un intervenant, que la route d'hiver constituait plus justement une « prise » de terres cédées effectuée conformément au traité plutôt qu'une violation de celui-ci. Cette décision a été rendue avant que notre Cour se prononce dans les affaires *Nation Haïda* et *Première nation Tlingit de Taku River.*

Arrêt : Le pourvoi est accueilli. L'obligation de consultation qui découle du principe de l'honneur de la Couronne n'a pas été respectée.

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

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

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

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

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the

La démarche adoptée par le gouvernement a nui au processus de réconciliation entre la Couronne et les premières nations signataires du Traité n° 8 plutôt que de le faire progresser. [4]

Lorsque la Couronne exerce son droit issu du Traité n° 8 de « prendre » des terres, son obligation d'agir honorablement dicte le contenu du processus. La question dans chaque cas consiste à déterminer la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur les droits de chasse, de pêche et de piégeage des Autochtones de manière à rendre applicable l'obligation de consulter. Par conséquent, dans les cas où la Cour est en présence d'une « prise » projetée, il n'est pas indiqué de passer directement à une analyse de la justification fondée sur l'arrêt *Sparrow* même si on a conclu que la mesure envisagée, si elle était mise en œuvre, porterait atteinte à un droit issu du traité de la première nation. La Cour doit d'abord examiner le processus et se demander s'il est compatible avec l'honneur de la Couronne. [33-34] [59]

Même si le traité lui accorde un droit de « prendre » des terres cédées, la Couronne a néanmoins l'obligation de s'informer de l'effet qu'aura son projet sur l'exercice, par les Mikisew, de leurs droits de chasse, de pêche et de piégeage et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter avec les Mikisew de bonne foi et dans l'intention de tenir compte réellement de leurs préoccupations. L'obligation de consultation est vite déclenchée, mais l'effet préjudiciable et l'étendue du contenu de l'obligation de la Couronne sont des questions de degré. En vertu du Traité n° 8, les droits de chasse, de pêche et de piégeage issus du traité de la première nation sont par conséquent restreints non seulement par des limites géographiques et des mesures spécifiques de réglementation gouvernementale, mais aussi le droit pour la Couronne de prendre des terres aux termes du traité, sous réserve de son obligation de tenir des consultations et, s'il y a lieu, de trouver des accommodements aux intérêts de la première nation. [55-56]

En l'espèce, l'obligation de consultation est déclenchée. Les effets de la route proposée étaient clairs, démontrés et manifestement préjudiciables à l'exercice ininterrompu des droits de chasse et de piégeage des Mikisew sur les terres en question. Contrairement à ce qu'elle prétend, la Couronne ne s'est pas acquittée de l'obligation de consultation en 1899 lors des négociations qui ont précédé le traité. [54-55]

Cependant, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres cédées où les droits issus du

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

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

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

Cases Cited

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

traité des Mikisew sont expressément assujettis à la restriction de la « prise », le contenu de l'obligation de consultation de la Couronne se situe plutôt au bas du continuum. La Couronne doit aviser les Mikisew et nouer un dialogue directement avec eux. Ce dialogue devrait comporter la communication de renseignements au sujet du projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne doit aussi demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits issus du traité des Mikisew. [64]

La Couronne n'a pas respecté ses obligations lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Elle n'a pas réussi à démontrer qu'elle avait l'intention de tenir compte réellement des préoccupations des Autochtones dans le cadre d'un véritable processus de consultation. [64-67]

Le procureur général de l'Alberta n'a pas outrepassé le rôle d'un intervenant lorsqu'il a soulevé devant la Cour d'appel fédérale un nouvel argument pertinent à la question qui était au cœur du litige, à savoir si l'approbation de la route d'hiver par la ministre violait le Traité n° 8. Un intervenant peut toujours présenter un argument juridique à l'appui de ce qu'il prétend être la bonne conclusion juridique à l'égard d'une question dont la cour est régulièrement saisie pourvu que son argument juridique ne fasse pas appel à des faits additionnels qui n'ont pas été prouvés au procès, ou qu'il ne soulève pas un argument qui est par ailleurs injuste pour l'une des parties. [40]

Jurisprudence

Arrêts examinés : *R. c. Badger*, [1996] 1 R.C.S. 771; *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, [2004] 3 R.C.S. 550, 2004 CSC 74; **distinction d'avec l'arrêt :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés :** *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43; *Halfway River First Nation c. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. c. Morgentaler*, [1993] 1 R.C.S. 462; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19; *Province of*

Canada (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.
Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.
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Treaties and Proclamations

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

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

No one appeared for the respondent the Thebacha Road Society.

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

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

Ontario c. Dominion of Canada (1895), 25 R.C.S. 434; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *R. c. Smith*, [1935] 2 W.W.R. 433.

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Jeffrey R. W. Rath et *Allisun Taylor Rana*, pour l'appelante.

Cheryl J. Tobias et *Mark R. Kindrachuk, c.r.*, pour l'intimée Sheila Copps, ministre du Patrimoine canadien.

Personne n'a comparu pour l'intimée Thebacha Road Society.

P. Mitch McAdam, pour l'intervenant le procureur général de la Saskatchewan.

Robert J. Normey et *Angela J. Brown*, pour l'intervenant le procureur général de l'Alberta.

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

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

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

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

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

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

The judgment of the Court was delivered by

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

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

James D. Jodouin et *Gary L. Bainbridge*, pour l'intervenante la Nation crie de Big Island Lake.

Allan Donovan et *Bram Rogachevsky*, pour l'intervenant Lesser Slave Lake Indian Regional Council.

Robert C. Freedman et *Dominique Nouvet*, pour l'intervenante les Premières nations de l'Alberta signataires du Traité nº 8.

E. Jack Woodward et *Jay Nelson*, pour l'intervenante Treaty 8 Tribal Association.

Thomas R. Berger, c.r., et *Gary A. Nelson*, pour l'intervenante Premières nations de Blueberry River.

Jack R. London, c.r., et *Bryan P. Schwartz*, pour l'intervenante l'Assemblée des Premières Nations.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'objectif fondamental du droit moderne relatif aux droits ancestraux et issus de traités est la réconciliation entre les peuples autochtones et non autochtones et la conciliation de leurs revendications, intérêts et ambitions respectifs. La gestion de ces rapports s'exerce dans l'ombre d'une longue histoire parsemée de griefs et d'incompréhension. La multitude de griefs de moindre importance engendrés par l'indifférence de certains représentants du gouvernement à l'égard des préoccupations des peuples autochtones, et le manque de respect inhérent à cette indifférence, ont causé autant de tort au processus de réconciliation que certaines des controverses les plus importantes et les plus vives. Et c'est le cas en l'espèce. 1

Le Traité nº 8 est l'un des plus importants traités conclus après la Confédération. Les premières nations qui l'ont signé en 1899 ont cédé à la Couronne une superficie de 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest. Pour donner une idée de l'étendue du territoire cédé, sa superficie est 2

exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

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

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the "Mikisew") until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem

de très loin supérieure à celle de la France (543 998 kilomètres carrés), elle excède celle du Manitoba (650 087 kilomètres carrés), de la Saskatchewan (651 900 kilomètres carrés) et de l'Alberta (661 185 kilomètres carrés), et elle équivaut presque à celle de la Colombie-Britannique (948 596 kilomètres carrés). En contrepartie de cette cession, on a promis aux premières nations des réserves et certains autres avantages, y compris, ce qui leur importait le plus, les droits de chasse, de piégeage et de pêche suivants :

> [TRADUCTION] Et Sa Majesté la Reine convient par les présentes avec les dits sauvages qu'ils auront le droit de se livrer à leurs occupations ordinaires de la chasse au fusil, de la chasse au piège et de la pêche dans l'étendue de pays cédée telle que ci-dessus décrite, subordonnées à tels règlements qui pourront être faits de temps à autre par le gouvernement du pays agissant au nom de Sa Majesté et sauf et excepté tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets. [Je souligne.]

En fait, pour diverses raisons (y compris un manque d'intérêt de la part des Autochtones), on n'a pas mis de côté suffisamment de terres aux fins d'établissement de réserves pour la Première nation crie Mikisew (les « Mikisew ») avant l'adoption du Treaty Land Entitlement Agreement de 1986, soit 87 ans après la signature du Traité nº 8. Moins de 15 ans plus tard, le gouvernement fédéral a approuvé la construction d'une route d'hiver de 118 kilomètres qui, selon le plan original, traversait la nouvelle réserve de la Première nation Mikisew à Peace Point. Le gouvernement n'a pas jugé nécessaire de consulter directement les Mikisew avant de prendre cette décision. À la suite des protestations de ces derniers, le tracé de la route d'hiver a été modifié de manière à longer la limite de la réserve de Peace Point plutôt que de la traverser, toujours sans que les Mikisew aient été consultés. Le tracé modifié de la route traversait les lignes de piégeage d'environ 14 familles Mikisew vivant dans le secteur voisin de la route projetée, et ceux d'autres personnes pouvant installer des pièges dans ce secteur sans y vivre, ainsi que les territoires de chasse d'une centaine de Mikisew dont les activités de chasse (principalement à

very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

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

I. Facts

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

l'orignal) risquaient, selon les Mikisew, d'être perturbées. Le fait que la route d'hiver projetée ne nuise directement qu'à environ 14 trappeurs Mikisew et quelque 100 chasseurs peut ne pas sembler très dramatique (sauf si vous êtes vous-même un des trappeurs ou des chasseurs en question), mais dans le contexte d'une collectivité éloignée du nord composée d'un nombre relativement restreint de familles, ce fait a de l'importance. Au-delà de tout cela, le principe de tenir des consultations avant de porter atteinte à des droits issus de traités existants constitue néanmoins une question qui revêt une importance générale en ce qui concerne les rapports entre les peuples autochtones et non autochtones. Ce principe touche au cœur de ces rapports et concerne non seulement les Mikisew, mais aussi d'autres premières nations et les gouvernements non autochtones.

4 En l'espèce, les rapports n'ont pas été bien gérés. Aucune consultation adéquate n'a été tenue avant l'approbation de la ministre. La démarche adoptée par le gouvernement a nui au processus de réconciliation plutôt que de le faire progresser. L'obligation de consultation qui découle du principe de l'honneur de la Couronne, ainsi que l'obligation de celle-ci de respecter les droits issus de traités existants des peuples autochtones (maintenant reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*) ont été violées. Je suis d'avis d'accueillir le pourvoi des Mikisew, d'annuler l'approbation de la ministre et de lui renvoyer le dossier pour qu'elle tienne des consultations et qu'elle en poursuive l'examen.

I. Faits

5 Environ 5 p. 100 du territoire cédé en vertu du Traité nº 8 a été réservé en 1922 pour la création du parc national Wood Buffalo. Le parc a été créé principalement pour protéger les derniers troupeaux de bisons des bois du nord du Canada et il occupe une superficie de 44 807 kilomètres carrés de part et d'autre de la frontière entre le nord de l'Alberta et la partie du sud des Territoires du Nord-Ouest. Il a été désigné site du patrimoine mondial par l'UNESCO. Le parc est lui-même plus grand que la Suisse.

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

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

A. *The Winter Road Project*

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

B. *The Consultation Process*

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested

Il abrite actuellement le plus grand troupeau de bisons en liberté et à reproduction autonome du monde, et on y trouve la dernière aire de nidification naturelle des grues blanches, une espèce menacée, ainsi que de vastes forêts boréales naturelles intactes. Point plus pertinent encore, des Autochtones y habitent depuis plus de 8 000 ans et certains d'entre eux tirent encore leur subsistance de la chasse, de la pêche et du piégeage commercial pratiqués dans les limites du parc. Les terres ancestrales des Mikisew se trouvent dans le parc. Par l'effet du Treaty Land Entitlement Agreement, la réserve de Peace Point a été formellement exclue du parc en 1988, mais évidemment celui-ci entoure la réserve.

Les membres de la Première nation crie Mikisew sont des descendants des Cris de Fort Chipewyan qui ont signé le Traité n° 8 le 21 juin 1899. Il est établi que ses membres ont droit aux avantages conférés par le Traité n° 8.

A. *Le projet de route d'hiver*

La promotrice de la route d'hiver est l'intimée Thebacha Road Society, dont les membres comprennent la ville de Fort Smith (située dans les Territoires du Nord-Ouest, à la limite nord-est du parc national Wood Buffalo, où se trouve le centre administratif du parc), le Conseil des Métis de Fort Smith, la Première nation de Salt River et la Première nation crie de Little Red River. Pour ces gens, la route d'hiver présente l'avantage d'offrir un accès hivernal direct à un certain nombre de collectivités nordiques isolées et au réseau routier de l'Alberta au sud. La juge de première instance a reconnu que l'objectif du gouvernement était de répondre à des « besoins régionaux en matière de transport » : [2001] A.C.F. n° 1877 (QL), 2001 CFPI 1426, par. 115.

B. *Le processus de consultation*

Selon la juge de première instance, pour démontrer qu'une consultation appropriée avait été tenue, la ministre s'est appuyée sur le fait que la plupart des communications avec les Mikisew consistaient à leur fournir les mêmes renseignements généraux concernant le projet de route que ceux distribués à l'ensemble des parties intéressées, et ce, tant sur

stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because "an open house is not a forum for us to be consulted adequately".

le plan de la forme que du contenu. Le 19 janvier 2000, Parcs Canada a ainsi remis aux Mikisew, pour le compte de la ministre, le cadre de référence pour l'évaluation environnementale. Les Mikisew ont été informés que des séances portes ouvertes seraient tenues au cours de l'été 2000. La ministre affirme n'avoir reçu aucune réponse officielle des Mikisew avant le 10 octobre 2000, soit environ deux mois après l'expiration du délai qu'elle avait fixé pour la présentation des commentaires « publics ». Le chef Poitras a déclaré que les Mikisew n'avaient pas participé officiellement aux séances portes ouvertes parce que [TRADUCTION] « les séances portes ouvertes ne sont pas un moyen adéquat de nous consulter ».

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

Apparemment, Parcs Canada n'a pas mis la promotrice Thebacha Road Society dans le coup non plus. À la fin de janvier 2001, cette dernière a informé le chef Poitras qu'elle venait tout juste d'apprendre que les Mikisew n'appuyaient pas le projet de route. Jusque-là, on avait donné à entendre à Thebacha Road Society que les Mikisew ne s'opposaient pas à ce que la route traverse la réserve. Le 29 janvier 2001, le chef Poitras a écrit une autre lettre à la ministre et a reçu du cabinet de la ministre une réponse type disant [TRADUCTION] qu'« il sera[it] donné suite à la lettre avec toute l'attention requise ».

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

Finalement, le 30 avril 2001, après plusieurs autres malentendus, Parcs Canada a écrit au chef Poitras une lettre où on pouvait lire notamment ce qui suit : [TRADUCTION] « Je vous fais, à vous et à votre peuple, mes excuses pour la façon dont s'est déroulé le processus de consultation relatif au projet de route d'hiver et pour toute perception publique négative de la [Première nation crie Mikisew]. » En fait, la décision d'approuver une route au tracé modifié avait déjà été prise à ce moment-là.

On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". 12

Le 25 mai 2001, la ministre a annoncé sur le site Web de Parcs Canada que Thebacha Road Society était autorisée à construire une route d'hiver d'une largeur de 10 mètres dont les vitesses limites affichées seraient de 10 à 40 kilomètres à l'heure. Selon cette annonce, l'autorisation était conforme [TRADUCTION] « aux plans et politiques de Parcs

No reference was made to any obligations to the Mikisew.

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

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

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

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

Canada » et à « d'autres lois et règlements fédéraux ». Il n'était aucunement fait mention d'une quelconque obligation envers les Mikisew.

La ministre affirme maintenant que les Mikisew sont mal venus de se plaindre du processus de consultation puisqu'ils ont refusé de participer au processus public qui a été mis en place. La consultation, affirme-t-elle, doit se faire dans les deux sens. Il n'en tenait qu'à eux de profiter de ce qu'on leur offrait. Ils ne l'ont pas fait. À son avis, elle s'est acquittée de son obligation.

La route d'hiver projetée est suffisamment large pour permettre le passage de deux véhicules. Par application du par. 36(5) du *Règlement sur le gibier du parc de Wood-Buffalo*, DORS/78-830, l'aménagement de la route aurait pour effet de créer un corridor de 200 mètres de large à l'intérieur duquel il serait interdit d'utiliser des armes à feu. Ce corridor aurait une superficie totale d'environ 23 kilomètres carrés.

L'objection des Mikisew va bien au-delà de l'effet direct qu'aurait l'interdiction de chasser et de piéger dans le secteur visé par la route d'hiver. Selon la conclusion de la juge de première instance, le secteur environnant subirait un effet préjudiciable. Le maintien d'un mode de vie traditionnel, lequel est, au dire des Mikisew, essentiel à leur culture, dépend de la conservation des terres entourant la réserve de Peace Point dans leur état naturel, ce qui, soutiennent-ils, est nécessaire pour leur permettre de transmettre leur culture et leur savoir à la prochaine génération. L'effet préjudiciable de la route sur la chasse et le piégeage, affirment-ils, pourrait s'avérer constituer, pour leurs jeunes, une incitation de plus à abandonner leur mode de vie traditionnel pour se tourner vers d'autres modes de vie du sud.

Les Mikisew ont demandé à la Cour fédérale d'annuler l'approbation de la ministre en se fondant sur leur conception de l'obligation de fiduciaire de la Couronne, faisant valoir que la ministre est tenue à [TRADUCTION] « une obligation fiduciaire et [constitutionnelle] de consulter [adéquatement] la Première nation crie Mikisew au sujet de la construction de la route » (la juge de première instance, par. 26).

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

II. Relevant Enactments

Constitution Act, 1982

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

III. Judicial History

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

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

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

The applicant complains that the mitigation measures attached to the Minister's decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew's rights. I

Le 27 août 2001, la Section de première instance de la Cour fédérale a accordé une injonction interlocutoire interdisant la construction de la route d'hiver. 17

II. Dispositions pertinentes

Loi constitutionnelle de 1982 18

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

III. Historique judiciaire

A. *Section de première instance de la Cour fédérale* ([2001] A.C.F. nº 1877 (QL), 2001 CFPI 1426)

La juge Hansen a conclu que les terres comprises dans le parc national de Wood Buffalo n'avaient pas été « prises » par la Couronne au sens du Traité nº 8 puisque l'utilisation de ces terres comme parc national ne constituait pas une « utilisation visible » non compatible avec le droit de chasser et de piéger existant (*R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Sioui*, [1990] 1 R.C.S. 1025). La route d'hiver projetée et son corridor de 200 mètres « [sans] armes à feu » aurait un effet préjudiciable sur les droits issus du traité des Mikisew. Ces droits ont reçu une protection constitutionnelle en 1982, et toute atteinte à ces droits doit être justifiée conformément au critère énoncé dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075. Selon la juge Hansen, la décision de la ministre d'approuver la route portait atteinte aux droits issus du Traité nº 8 des Mikisew et ne pouvait être justifiée suivant le critère énoncé dans l'arrêt *Sparrow*. 19

Plus particulièrement, la juge de première instance a conclu que les avis publics types et la tenue de séances portes ouvertes n'étaient pas suffisants. Les Mikisew avaient droit à un processus de consultation distinct. Elle a affirmé ce qui suit (par. 170-171) : 20

La demanderesse critique les mesures d'atténuation accompagnant la décision de la Ministre parce qu'elles n'ont pas été élaborées en consultation avec les Mikisews et qu'elles n'étaient pas conçues pour minimiser les

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

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

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

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

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

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

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*,

empiétements sur leurs droits. Je partage ce point de vue. Même la bifurcation du tracé, apparemment adoptée par suite des objections élevées par les Mikisews, n'a pas été faite en consultation avec la Première nation. La preuve n'établit pas qu'on ait pris le moindrement en considération la question de savoir si la nouvelle route porterait le moins possible atteinte aux droits issus de traité des Mikisews. La déposition du chef Poitras met en évidence l'atmosphère de secret qui entourait le tracé de la bifurcation, alors que ce processus aurait dû comporter l'examen, en toute transparence, des préoccupations des Mikisews.

Parcs Canada a reconnu qu'il n'avait pas consulté les Mikisews au sujet du tracé de la bifurcation et qu'il n'avait pas non plus pris en considération les incidences du nouveau tracé sur les droits des trappeurs mikisews.

La juge de première instance a donc accueilli la demande de contrôle judiciaire et annulé l'approbation de la ministre.

B. *Cour d'appel fédérale* ([2004] 3 R.C.F. 436, 2004 CAF 66)

Le juge Rothstein, avec l'accord du juge Sexton, a accueilli l'appel et rétabli l'approbation de la ministre. Il s'est appuyé sur un argument présenté par le procureur général de l'Alberta, intervenant dans l'appel. Selon cet argument, le Traité nº 8 prévoyait expressément la « prise » de terres cédées pour différentes fins, y compris la construction de routes. Il était plus juste de considérer la route d'hiver comme une « prise » effectuée en application du traité plutôt que comme une violation de celui-ci. Selon la conclusion du juge Rothstein :

> Lorsqu'une limitation expressément prévue par un traité s'applique, le traité n'est pas violé et l'article 35 n'est donc pas non plus violé. Il faut faire la distinction avec le cas où les limitations prévues par le traité ne s'appliquent pas, mais où le gouvernement cherche néanmoins à limiter le droit issu du traité. En pareil cas, il faut satisfaire au critère énoncé dans l'arrêt *Sparrow* pour que l'atteinte soit permise sur le plan constitutionnel. [par. 21]

Le juge Rothstein a également conclu que la ministre n'était tenue à aucune obligation de consulter les Mikisew au sujet de la route, bien qu'il soit de « bonne pratique » de le faire (par. 24). (Cette décision a été rendue avant que notre Cour se prononce dans les affaires *Nation Haïda c.*

[2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.)

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

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

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other

Colombie-Britannique (Ministre des Forêts), [2004] 3 R.C.S. 511, 2004 CSC 73, et *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, [2004] 3 R.C.S. 550, 2004 CSC 74.)

23 En dissidence, la juge Sharlow a souscrit à l'opinion de la juge de première instance selon laquelle l'approbation de la route d'hiver constituait une atteinte *prima facie* aux droits issus du Traité nº 8 et que l'atteinte n'avait pas été justifiée selon le critère énoncé dans l'arrêt *Sparrow*. L'obligation de fiduciaire de la Couronne doit être prise en compte. L'omission du personnel de la ministre travaillant pour Parcs Canada de procéder à une réelle consultation a été fatale à la tentative de justification de la Couronne. Elle a écrit ce qui suit :

> Dans ce cas-ci, rien ne montre que la ministre ait de bonne foi fait des efforts pour comprendre ou examiner les préoccupations que la Première nation crie Mikisew entretenait au sujet de l'effet possible de la route sur l'exercice du droit de chasse et de piégeage qui lui était reconnu par le Traité nº 8. À mon avis, il importe de noter que l'on a informé la Première nation crie Mikisew du nouveau tracé du corridor routier destiné à éviter la réserve de Peace Point qu'une fois qu'il a été conclu que ce nouveau tracé était réalisable et raisonnable, en ce qui concerne les répercussions sur l'environnement, et que la route a été approuvée. On peut en inférer que les représentants responsables de la Couronne croyaient que, dans la mesure où la route d'hiver ne traversait pas la réserve de Peace Point, il était possible de ne faire aucun cas des autres objections soulevées par la Première nation crie Mikisew. Cela est bien loin d'indiquer une consultation réelle, mais indique plutôt que l'on a fait aucun cas des préoccupations qu'entretenait la Première nation crie Mikisew au sujet de l'atteinte aux droits qui lui étaient reconnus par le Traité nº 8. [par. 152]

La juge Sharlow aurait rejeté l'appel.

IV. Analyse

24 Les traités numérotés conclus après la Confédération visaient à permettre la colonisation et le développement de l'Ouest et du Nord-Ouest canadiens. Le Traité nº 8 lui-même précise que [TRADUCTION] « les dits sauvages ont été notifiés et informés par les dits commissaires de Sa Majesté que c'est le désir de Sa Majesté d'ouvrir à

purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

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 peoples. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

la colonisation, à l'immigration, au commerce, aux voyages, aux opérations minières et forestières et à telles autres fins que Sa Majesté pourra trouver convenables ». Cet énoncé de l'objet se reflète dans une limitation corrélative aux droits de chasse, de pêche et de piégeage issus du Traité nº 8 visant à exclure tels [TRADUCTION] « terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ». Les « autres objets » seraient au moins aussi généraux que les fins mentionnées dans le préambule susmentionné, y compris les « voyages ».

On a donc pu observer, dès le départ, qu'il existait une tension entre l'exigence essentielle posée par les premières nations voulant qu'elles demeurent libres de vivre de la terre autant après qu'avant la signature du traité et le désir de la Couronne d'augmenter le nombre de non autochtones s'établissant dans le territoire cédé. Comme les commissaires l'ont reconnu au début des négociations du Traité nº 8 au Petit lac des Esclaves en juin 1899, ces rapports sont apparus d'entrée de jeu comme des rapports permanents qu'il serait difficile de gérer :

> [TRADUCTION] L'homme blanc viendra peupler cette partie du pays et nous venons avant lui pour vous expliquer comment les choses doivent se passer entre vous et pour éviter tout problème.
>
> (C. Mair, *Through the Mackenzie Basin : A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, p. 61)

Comme le juge Cory l'a expliqué dans l'arrêt *Badger*, par. 57, « [l]es Indiens comprenaient que des terres seraient prises pour y établir des exploitations agricoles ou pour y faire de la prospection et de l'exploitation minières, et qu'ils ne seraient pas autorisés à y chasser ou à tirer sur les animaux de ferme et les bâtiments des colons. »

Les droits de chasse, de pêche et de piégeage ne servaient pas que les intérêts des peuples des premières nations. Comme l'ont reconnu les commissaires eux-mêmes dans leur rapport sur le Traité nº 8 en date du 22 septembre 1899, la Couronne avait intérêt à laisser les peuples autochtones vivre de la terre :

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

[TRADUCTION] Nous leur fîmes comprendre que le gouvernement ne pouvait entreprendre de faire vivre les sauvages dans l'oisiveté, qu'ils auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie, et qu'on espérait que les sauvages s'en serviraient.

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

27 Aucune des parties signataires ne s'attendait donc en 1899 que le Traité nº 8 constitue un plan définitif d'utilisation des terres. Ce traité marquait l'aube d'une période de transition. Il fallait, comme l'ont souligné les commissaires, [TRADUCTION] « expliquer comment les choses [devaient] se passer » à l'avenir [TRADUCTION] « pour éviter tout problème » (Mair, p. 61).

A. *Interpretation of the Treaty*

A. *Interprétation du traité*

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

L'interprétation du traité « doit être réaliste et refléter l'intention des deux parties et non seulement celle [de la première nation] » (*Sioui*, p. 1069). Comme une majorité de notre Cour l'a affirmé dans l'arrêt *R. c. Marshall*, [1999] 3 R.C.S. 456, par. 14 :

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

> Les parties indiennes n'ont à toutes fins pratiques pas eu la possibilité de créer leurs propres compte-rendus écrits des négociations. Certaines présomptions sont donc appliquées relativement à l'approche suivie par la Couronne dans la conclusion des traités (conduite honorable), présomptions dont notre Cour tient compte dans son approche en matière d'interprétation des traités (souplesse) pour statuer sur l'existence d'un traité [. . .] le caractère exhaustif de tout écrit [. . .] et l'interprétation des conditions du traité, une fois qu'il a été conclu à leur existence. En bout de ligne, la Cour a l'obligation « de choisir, parmi les interprétations de l'intention *commune* [au moment de la conclusion du traité] qui s'offrent à [elle], celle qui concilie le mieux » les intérêts [de la première nation] et ceux de la Couronne britannique. [Souligné dans l'original; références omises.]

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

Voir également *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43, la juge en chef McLachlin, par. 22-24, et le juge LeBel, par. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First

La ministre a donc raison d'insister sur le fait que la disposition régissant la chasse, la pêche et le piégeage ne peut être dissociée du traité dans son ensemble, mais doit être interprétée en fonction de son objectif sous-jacent, visé tant par la Couronne

Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

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

30 In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it".

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

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River*

que par les peuples des premières nations. Comme l'a fait remarquer le juge Cory dans l'arrêt *Badger*, dans ce contexte

> le texte d'un traité ne doit pas être interprété suivant son sens strictement formaliste, ni se voir appliquer les règles rigides d'interprétation modernes. Il faut plutôt lui donner le sens que lui auraient naturellement donné les Indiens à l'époque de sa signature. [par. 52]

Dans le cas du Traité n° 8, toutes les parties signataires envisageaient que « de temps à autre » des terres cédées seraient « prises » de l'ensemble des terres sur lesquelles les premières nations avaient des droits de chasse, de pêche et de piégeage issus du traité et seraient transférées à l'ensemble des terres sur lesquelles elles n'avaient pas un tel droit. Les terres visées par le Traité n° 8 se trouvent dans le nord du Canada et ne se prêtent pas, pour la plupart, à l'agriculture. Les commissaires qui ont négocié le Traité n° 8 pouvaient donc, comme je l'ai déjà mentionné, assurer aux premières nations qu'elles [TRADUCTION] « auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie ».

Je suis d'accord avec le juge Rothstein pour dire que les « prises » effectuées subséquemment par la Couronne ne constituaient pas toutes une atteinte au Traité n° 8 devant être justifiée conformément au critère énoncé dans l'arrêt *Sparrow*. Dans cet arrêt, on s'en souviendra, la réglementation sur les pêches du gouvernement fédéral portait atteinte au droit de pêche autochtone et devait être strictement justifiée. La situation n'est pas la même en l'espèce où les droits autochtones ont été cédés et sont éteints, et où les droits issus du Traité n° 8 se limitent expressément aux terrains qui n'ont pas [TRADUCTION] « de temps à autre [. . .] [été] requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets » (je souligne). Le libellé du traité ne peut annoncer plus clairement des changements à venir. Néanmoins, la Couronne était et est encore censée gérer le changement de façon honorable.

Il s'ensuit que je ne peux souscrire à la démarche axée sur le critère énoncé dans *Sparrow* retenue en l'espèce par la juge de première instance, qui s'est

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

fondée à cet égard sur l'arrêt *Halfway River First Nation c. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. Dans cette affaire, les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont conclu que le droit du gouvernement de prendre des terres était [TRADUCTION] « limité de par sa nature même » (par. 138) et [TRADUCTION] « que *toute* entrave au droit de chasse constitu[ait] une atteinte *prima facie* au droit issu d'un traité des Indiens protégé par l'art. 35 de la *Loi constitutionnelle de 1982* » (par. 144 (en italique dans l'original)) qui devait être justifiée selon le critère énoncé dans l'arrêt *Sparrow*. Les Mikisew appuient fortement le critère appliqué dans l'arrêt *Halfway River First Nation*, mais en toute déférence, je ne puis accepter leur interprétation dans la mesure où ils affirment que cet arrêt a fixé en 1899 les limites géographiques du droit de chasse prévu au Traité n° 8, et que tout empiètement sur ces limites géographiques après 1899 exige une justification comme celle requise par l'arrêt *Sparrow*. L'argument des Mikisew suppose que l'on promettait, au Traité n° 8, le maintien des modes d'utilisation des terres établis au XIX^e^ siècle. Tel n'est pas le cas, comme l'indiquent clairement tant le contexte historique dans lequel le Traité n° 8 a été conclu que la période de transition qu'il annonçait.

B. *The Process of Treaty Implementation*

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

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp

B. *Le processus de mise en œuvre du traité*

33 Tant le contexte historique que les inévitables tensions sous-jacentes à la mise en œuvre du Traité n° 8 commandent un *processus* par lequel des terres peuvent être transférées d'une catégorie (celle des terres sur lesquelles les premières nations conservent des droits de chasse, de pêche et de piégeage) à l'autre (celle des terres sur lesquelles elles n'ont pas ces droits). Le contenu du processus est dicté par l'obligation de la Couronne d'agir honorablement. Même si aucun traité n'était en cause dans l'affaire *Nation Haïda*, la juge en chef McLachlin a souligné ce qui suit aux par. 19 et 35 :

L'honneur de la Couronne imprègne également les processus de négociation et d'interprétation des traités. Lorsqu'elle conclut et applique un traité, la Couronne doit agir avec honneur et intégrité, et éviter

dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

. . .

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

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

C. *The Mikisew Legal Submission*

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As

la moindre apparence de « manœuvres malhonnêtes » (*Badger*, par. 41). Ainsi, dans *Marshall*, précité, par. 4, les juges majoritaires de la Cour ont justifié leur interprétation du traité en déclarant que « rien de moins ne saurait protéger l'honneur et l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié . . . ».

. . .

Mais à quel moment, précisément, l'obligation de consulter prend-elle naissance? L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci.

Dans le cas d'un traité, la Couronne, en tant que partie, a toujours connaissance de son contenu. La question dans chaque cas consiste donc à déterminer la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur ces droits de manière à rendre applicable l'obligation de consulter. Le critère retenu dans les arrêts *Nation Haïda* et *Taku River* est peu rigoureux. La souplesse ne réside pas tant dans le fait que l'obligation devient applicable (on envisage des mesures « susceptibles d'avoir un effet préjudiciable » sur un droit) que dans le contenu variable de l'obligation une fois que celle-ci s'applique. Au minimum, « les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis » (*Nation Haïda*, par. 43). Les Mikisew affirment que l'on n'a pas respecté même le contenu minimum de l'obligation en l'espèce.

C. *L'argument juridique des Mikisew*

Les appelants, les Mikisew, ont essentiellement rappelé à la Cour ce qu'elle a dit dans les arrêts *Nation Haïda* et *Taku River*. La preuve en l'espèce, affirment-ils, est plus solide. Dans ces affaires, contrairement au présent pourvoi, l'intérêt autochtone sur les terres était revendiqué mais n'était pas encore prouvé. En l'espèce, les intérêts des

in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in *Haida Nation* and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a "good practice" (para. 24).

Autochtones sont protégés par le Traité nº 8. Ces intérêts constituent un fait juridique établi. Comme dans l'affaire *Nation Haïda*, la juge de première instance a estimé que le droit des Autochtones était menacé par le développement projeté. Si on a conclu à l'existence d'une obligation de consultation dans les affaires *Nation Haïda* et *Taku River*, les Mikisew soutiennent qu'à plus forte raison, cette obligation doit exister en l'espèce, et que les juges majoritaires de la Cour d'appel fédérale ont eu bien tort de considérer la consultation entre les gouvernements et les peuples autochtones comme rien de plus qu'une « bonne pratique » (par. 24).

D. *The Minister's Response*

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.

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

D. *La réponse de la ministre*

36 La ministre intimée tente d'établir une distinction entre la présente affaire et les affaires *Nation Haïda* et *Taku River*. Pour justifier l'approbation qu'elle a donnée au projet de route d'hiver, son avocat avance trois propositions générales.

1. En « prenant » les 23 kilomètres carrés à des fins de construction de la route d'hiver, la Couronne ne faisait que ce que le Traité nº 8 l'autorisait à faire. La Couronne, comme les premières nations, a des droits en vertu du Traité nº 8. L'exercice par la Couronne de *son* droit issu du traité de « prendre » des terres ne constitue pas une violation du traité, mais une exécution de celui-ci.

2. La Couronne a procédé à de vastes consultations auprès des premières nations au moment de la négociation du Traité nº 8 en 1899. Quelle que soit la nature de l'obligation d'accommodement envers les premières nations, elle s'est acquittée de cette obligation à ce moment-là. Les modalités du traité n'exigent pas que l'on procède à de nouvelles consultations chaque fois qu'une « prise » est effectuée.

3. S'il fallait tenir d'autres consultations, le processus suivi en l'espèce par la ministre, par l'intermédiaire de Parcs Canada, était suffisant.

37 Pour les motifs qui suivent, j'estime que chacune de ces propositions doit être rejetée.

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

38 The majority judgment in the Federal Court of Appeal held that "[w]ith the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt" (para. 18).

39 The "Crown rights" argument was initially put forward in the Federal Court of Appeal by the Attorney General of Alberta as an intervener. The respondent Minister advised the Federal Court of Appeal that, while she did not dispute the argument, "[she] was simply not relying on it" (para. 3). As a preliminary objection, the Mikisew say that an intervener is not permitted "to widen or add to the points in issue": *R. v. Morgentaler*, [1993] 1 S.C.R. 462, at p. 463. Therefore it was not open to the Federal Court of Appeal (or this Court) to decide the case on this basis.

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

40 This branch of the Mikisew argument is, with respect, misconceived. In their application for judicial review, the Mikisew argued that the Minister's approval of the winter road infringed Treaty 8. The infringement issue has been central to the proceedings. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal

(1) En « prenant » des terres pour construire la route d'hiver, la Couronne ne faisait que ce que le traité l'autorisait à faire

La Cour d'appel fédérale a conclu à la majorité qu'« [à] l'exception des cas dans lesquels la Couronne a pris des terres de mauvaise foi ou a pris tant de terres qu'il ne reste aucun droit réel de chasse, la prise de terres dans un but expressément prévu dans le traité lui-même ou dans un but nécessairement implicite ne peut pas être considérée comme une atteinte au droit de chasse issu du traité » (par. 18).

L'argument fondé sur les « droits de la Couronne » a été présenté pour la première fois devant la Cour d'appel fédérale par le procureur général de l'Alberta qui agissait à titre d'intervenant. La ministre intimée a informé la Cour d'appel fédérale que, même si elle ne contestait pas cet argument, « [elle] ne se fondait tout simplement pas sur cette question » (par. 3). Soulevant une objection préliminaire, les Mikisew affirment qu'il n'est pas permis à un intervenant « d'élargir la portée des questions en litige ou d'y ajouter quoi que ce soit » : *R. c. Morgentaler*, [1993] 1 R.C.S. 462, p. 463. Il n'était donc pas loisible à la Cour d'appel fédérale (ou à notre Cour) de trancher l'affaire en se fondant sur cet argument.

a) *Objection préliminaire : le procureur général de l'Alberta a-t-il outrepassé le rôle d'un intervenant?*

En toute déférence, ce volet de l'argument des Mikisew est mal fondé. Dans leur demande de contrôle judiciaire, les Mikisew ont fait valoir que l'approbation ministérielle de la route d'hiver violait le Traité n° 8. La question de la violation est au cœur de l'instance. Un intervenant peut toujours présenter un argument juridique à l'appui de ce qu'il prétend être la bonne conclusion juridique à l'égard d'une question dont la Cour est régulièrement saisie pourvu que son argument juridique ne fasse pas appel à des faits additionnels qui n'ont pas été prouvés au procès, ou qu'il ne soulève pas un argument qui est par ailleurs injuste pour l'une des parties. L'intervenant n'est pas plus mal placé

argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:

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

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

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

qu'une partie qui se rend tardivement compte qu'elle aurait dû soulever un argument juridique plus tôt dans l'instance mais qui ne l'a pas fait, comme ce fut le cas dans *Lamb c. Kincaid* (1907), 38 R.C.S. 516, où le juge Duff a affirmé ce qui suit, à la p. 539 :

> [TRADUCTION] Selon moi, un tribunal d'appel ne devrait pas recevoir un tel argument soulevé pour la première fois en appel, à moins qu'il ne soit clair que, même si la question avait été soulevée en temps opportun, elle n'aurait pas été éclaircie davantage.

Voir également *Athey c. Leonati*, [1996] 3 R.C.S. 458, par. 51-52.

41 Même en admettant que les Mikisew puissent à juste titre affirmer que le procureur général de l'Alberta formule l'argument de l'absence de violation d'une manière différente de celle employée par la ministre fédérale en première instance, il reste que les Mikisew n'ont établi aucun préjudice. Si l'argument avait été formulé de la même manière au procès, en quoi aurait-il pu être « éclairci davantage » par des éléments de preuve additionnels? Le dossier historique a été étudié à fond au procès. À ce stade-ci, la question relève des règles d'interprétation des traités, non des règles de preuve. Elle est donc visée par la règle énoncée dans l'arrêt *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19, selon laquelle « [i]l est loisible à la Cour, dans le cadre d'un pourvoi, d'examiner une nouvelle question de droit dans les cas où elle peut le faire sans qu'il en résulte de préjudice d'ordre procédural pour la partie adverse et où son refus de le faire risquerait d'entraîner une injustice » (par. 33). En l'espèce, le procureur général de l'Alberta a pris le dossier factuel dans l'état où il se trouvait. La question de la violation du traité est au cœur du litige depuis le début. L'argument juridique de l'Alberta n'est pas de nature à prendre les Mikisew par surprise. Dans ces circonstances, on ne saurait tolérer que les tribunaux soient empêchés de donner effet à une analyse juridique correcte simplement parce qu'elle a été présentée un peu tard et par un intervenant plutôt que par une partie. Fermer les yeux sur l'argument « risquerait d'entraîner une injustice ».

(b) *The Content of Treaty 8*

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

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

43 While *Badger* noted the "geographic limitation" to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which "from time to time" land would be "taken up" and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to "regulations as may from time to time be made by the Government". The Alberta licensing scheme denied to "holders of treaty rights as modified by the [*Natural Resources Transfer Agreement, 1930*] the very means of exercising those rights" (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement, 1930* is not at issue in this case as the Mikisew reserve is vested in Her

b) *Le contenu du Traité n^o 8*

La disposition du Traité n^o 8 qui traite de « la chasse au fusil, de la chasse au piège et de la pêche » a été examinée en profondeur par notre Cour dans *Badger*. Dans cette affaire, le juge Cory a signalé que « même suivant les termes du Traité n^o 8, le droit des Indiens de chasser pour se nourrir était circonscrit par des limites géographiques et des mesures spécifiques de réglementation gouvernementale » (par. 37). Les membres de la première nation, a-t-il ajouté, « comprenaient que des terres étaient "requises ou prises" si elles étaient utilisées à des fins [visibles] incompatibles avec l'exercice du droit de chasse » (par. 53).

> [I]l ressort des promesses verbales faites par les représentants de la Couronne et de l'histoire orale des Indiens que ceux-ci comprenaient que des terres seraient prises et occupées d'une manière qui les empêcherait d'y chasser, lorsqu'elles feraient l'objet d'une utilisation visible et incompatible avec la pratique de la chasse. Pour ce qui est de la jurisprudence, il est évident que les tribunaux ont souscrit à cette interprétation et conclu que la question de savoir si une terre est oui ou non prise ou occupée est une question de fait, qui doit être tranchée au cas par cas. [par. 58]

Bien qu'il soit fait état, dans l'arrêt *Badger*, des « limites géographiques » circonscrivant les droits de chasse, de pêche et de piégeage, on n'y a pas traité (puisque cela n'était pas nécessaire) du processus par lequel « de temps à autre » des terres seraient « prises » et donc soustraites à l'exercice de ces droits. Selon la conclusion précisément tirée dans l'arrêt *Badger*, le régime de délivrance de permis de l'Alberta que l'on cherchait à imposer à tous les chasseurs autochtones se trouvant sur les terres de l'Alberta visées par le Traité n^o 8 violait ce traité, même si le droit issu du traité était expressément subordonné à [TRADUCTION] « tels règlements qui pourront être faits de temps à autre par le gouvernement ». Le régime de délivrance de permis de l'Alberta privait les « personnes qui sont titulaires de droits issus de traité modifiés par la *Convention* [*sur le transfert des ressources naturelles de 1930*] des moyens mêmes d'exercer ces droits » (par. 94). On avait ainsi tenté d'exercer un pouvoir de réglementation qui allait au-delà de ce qu'avaient

Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof".)

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

raisonnablement prévu les signataires du traité en 1899. (Je signale en passant que la *Convention sur le transfert des ressources naturelles de 1930* n'est pas en cause en l'espèce puisque la réserve Mikisew appartient à la Couronne du chef du Canada. Le paragraphe 10 de la Convention prévoit que les réserves créées ultérieurement « seront dans la suite administrées par le Canada de la même manière à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes ».)

44 La Cour d'appel fédérale entendait suivre l'arrêt *Badger* en concluant qu'il n'est porté atteinte aux droits de chasse, de pêche et de piégeage que dans les « cas dans lesquels la Couronne a pris des terres de mauvaise foi ou a pris tant de terres qu'il ne reste aucun droit réel de chasse » (par. 18). En toute déférence, je ne peux souscrire à ce rejet implicite des droits de nature procédurale des Mikisew. À ce stade-ci, la route d'hiver n'est rien de plus qu'un projet de changement d'utilisation. L'utilisation proposée, si elle est mise en œuvre, réduirait le territoire sur lequel les Mikisew peuvent exercer leurs droits issus du Traité n° 8. Essentiellement, il n'y aurait plus du tout de chasse dans le corridor routier de 200 mètres. De façon plus générale, comme l'a conclu la juge de première instance, la route nuirait à l'exercice de ces droits dans la forêt environnante. Comme l'a reconnu Josie Weninger, témoin de Parcs Canada, en contre-interrogatoire :

[TRADUCTION]

Q : Mais dans les faits, les routes modifient les habitudes des orignaux et des autres animaux sauvages dans le parc, et c'est ce que Parcs Canada a constaté auparavant dans le cas d'autres routes, n'est-ce pas?

R : On a constaté que les routes ont des répercussions. Il serait absurde de prétendre le contraire.

Dans la version préliminaire du rapport d'évaluation environnementale, on a reconnu que la route pourrait entraîner une diminution quantitative des récoltes fauniques des Mikisew du fait qu'il y aurait moins d'animaux à fourrure (notamment le pékan, le rat musqué, la martre, le carcajou et le lynx) dans leurs pièges. Deuxièmement, sur le plan qualitatif, la population des espèces d'animaux à fourrure les

include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

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

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

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

plus précieuses ou les plus rares pourrait décliner. Les autres répercussions possibles comprennent la fragmentation des habitats fauniques, la perturbation des habitudes migratoires, le dépérissement de la végétation, l'augmentation du braconnage parce que le territoire est plus accessible par véhicule et l'augmentation du nombre d'animaux tués par suite de collisions. Alors que l'affaire *Nation Haïda* a été tranchée après le prononcé de la décision de la Cour d'appel fédérale en l'espèce, il est manifeste que le projet de route aura un effet préjudiciable sur les droits de chasse et de piégeage existants des Mikisew et que, par conséquent, l'obligation de consultation définie dans *Nation Haïda* devient « applicable ».

La ministre cherche à étendre la portée de la remarque faite par le juge Rothstein en affirmant, au par. 96 de son mémoire, que le critère doit consister à [TRADUCTION] « se demander si, après la prise, il demeure encore raisonnablement possible pour les Indiens de pratiquer, dans l'ensemble de la province, la chasse, la pêche et le piégeage de subsistance autant qu'ils veulent le faire » (je souligne). Cela ne saurait être exact. Cette affirmation donne à penser qu'une interdiction de chasser à Peace Point serait acceptable dès lors qu'une chasse décente peut encore être pratiquée dans le secteur du Traité n° 8 qui se trouve au nord de Jasper, soit à l'autre extrémité de la province à environ 800 kilomètres de distance, ce qui équivaut à se déplacer de Toronto à Québec (809 kilomètres) ou d'Edmonton à Regina (785 kilomètres). Autant demander aux cueilleurs de truffes du sud de la France de tenter leur chance dans les Alpes autrichiennes, ce déplacement couvrant environ la même distance que la traversée de l'Alberta que la ministre considère comme une façon acceptable de tenir les promesses faites dans le Traité n° 8.

Au paragraphe 49 de son mémoire, le procureur général de l'Alberta propose un argument légèrement différent, ajoutant un élément *de minimis* à l'approche fondée sur l'ensemble des terres visées par le traité :

> [TRADUCTION] En l'espèce, les terres qui doivent être prises pour construire la route d'hiver représentent 23 kilomètres carrés des 44 807 kilomètres carrés

Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

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

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

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

qu'occupe le parc national Wood Buffalo et des 840 000 kilomètres carrés visés par le Traité nº 8. Comme l'a dit le juge Rothstein, il ne s'agit pas d'un cas où il ne reste aucun droit réel de chasse.

47 Les arguments du gouvernement fédéral et de l'Alberta ne tiennent tout simplement pas compte de l'importance et des aspects pratiques du territoire traditionnel des premières nations. L'argument de l'Alberta concernant les 23 kilomètres carrés est contraire à l'existence d'un effet préjudiciable sur les terres environnantes à laquelle a conclu la juge de première instance. Qui plus est, pour les peuples autochtones, comme pour les peuples non autochtones, le lieu importe. Une superficie de seulement 23 kilomètres carrés est importante si elle comprend le territoire de chasse ou les lignes de piégeage des demandeurs. Si le Traité nº 8 confère aux Mikisew les droits de chasse, de pêche et de piégeage dans tout le territoire visé par le traité, il n'est pas logique d'un point de vue pratique de dire aux chasseurs et trappeurs Mikisew que, bien que leurs propres territoires de chasse et lignes de piégeage soient maintenant mis en péril, il leur est permis d'envahir les territoires traditionnels d'autres premières nations loin de leur propre terrain (une suggestion qui aurait été encore plus irréalisable en 1899). Comme l'ont fait observer les commissaires du Traité nº 8 dans leur rapport, les négociateurs chipewyans étaient, en 1899, des gens très pratiques :

[TRADUCTION] Les Chipewyans se confinent à poser des questions et à les discuter brièvement. Ils paraissent plus portés à contre-interroger qu'à faire des discours, et le chef au Fort Chipewyan a fait preuve d'une vive intelligence et de beaucoup de sens pratique en présentant les prétentions de sa bande.

Dans *Badger*, on a noté qu'un élément important des négociations du Traité nº 8 tenait aux assurances de *continuité* des modes traditionnels d'activité économique. La continuité respecte les modes d'activité et d'occupation traditionnels. La Couronne a promis aux Indiens que leurs droits de chasse, de pêche et de piégeage leur apporteraient [TRADUCTION] « après le traité les mêmes moyens qu'auparavant » de gagner leur vie. Ce n'est pas honorer cette promesse que d'expédier les Mikisew dans des territoires éloignés de leurs territoires de chasse et de leurs lignes de piégeage traditionnels.

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

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

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

Le juge Rothstein a en fait affirmé ceci au par. 18 :

> À l'exception des cas dans lesquels la Couronne a pris des terres de mauvaise foi ou a pris tant de terres qu'il ne reste aucun droit réel de chasse, la prise de terres dans un but expressément prévu dans le traité lui-même ou dans un but nécessairement implicite ne peut pas être considérée comme une atteinte au droit de chasse issu du traité. [Je souligne.]

Le « droit réel de chasse » n'est pas établi en fonction de toutes les terres visées par le traité (la totalité des 840 000 kilomètres carrés) mais par rapport aux territoires sur lesquels les premières nations avaient l'habitude de chasser, de pêcher et de piéger, et sur lesquels elles le font encore aujourd'hui. S'il advenait que pour une première nation signataire du Traité n° 8 en particulier, il ne reste « aucun droit réel de chasse » sur *ses* territoires traditionnels, l'importance de la promesse verbale qu'ils [TRADUCTION] « auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie » serait clairement remise en question, et la première nation aurait raison de répondre par une action en violation du traité comportant une demande de justification selon le critère énoncé dans l'arrêt *Sparrow*.

(c) *Unilateral Crown Action*

c) *Action unilatérale de la Couronne*

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

L'argument de la ministre renferme un ardent plaidoyer en faveur de l'action unilatérale de la Couronne (une approche du genre « il s'agit de terres cédées et nous pouvons en faire ce que nous voulons ») qui non seulement fait fi des promesses réciproques, tant verbales qu'écrites, faites lors de la signature du traité, mais qui constitue également l'antithèse de la réconciliation et du respect mutuel. Cela est d'autant plus surprenant que la ministre a reconnu, au par. 41 de son mémoire, que [TRADUCTION] « [d]ans la plupart, voire la totalité, des cas, le gouvernement n'est pas en mesure d'apprécier l'effet qu'aura une prise projetée sur l'exercice, par les Indiens, de leurs droits de chasse, de pêche et de piégeage sans procéder à une consultation. »

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

Le procureur général de l'Alberta nie qu'il soit possible d'inférer une obligation de consultation des modalités du Traité n° 8. Selon lui :

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

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

(d) *Honour of the Crown*

The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12, *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

[TRADUCTION] Étant donné qu'une obligation de consultation exigerait de la Couronne qu'elle procède à une consultation réelle de tous les Indiens touchés, c'est-à-dire de tous les nomades dispersés sur un vaste territoire, chaque fois qu'elle entend utiliser une parcelle de terrain ou en modifier l'utilisation, une telle exigence ne s'inscrirait pas dans la gamme des possibilités prévues selon l'intention commune des parties.

Les parties *ont* effectivement prévu une période de transition difficile, et ont tenté d'en atténuer le plus possible les effets, et toute défense fondée sur les inconvénients administratifs découlant de la gestion du processus a été rejetée dans les arrêts *Nation Haïda* et *Taku River*. Nul n'est besoin de répéter en l'espèce ce qui a été dit dans ces arrêts au sujet de l'objectif primordial de réconciliation plutôt que de confrontation.

d) *Honneur de la Couronne*

51 L'obligation de consultation repose sur l'honneur de la Couronne, et il n'est pas nécessaire pour les besoins de l'espèce d'invoquer les obligations de fiduciaire. L'honneur de la Couronne est elle-même une notion fondamentale en matière d'interprétation et d'application des traités que le juge Gwynne de notre Cour avait déjà qualifiée d'*obligation découlant d'un traité* en 1895, soit quatre ans avant la conclusion du Traité n° 8 : *Province of Ontario c. Dominion of Canada* (1895), 25 R.C.S. 434, p. 511-512, le juge Gwynne (dissident). Même si son opinion, voulant que l'obligation découlant d'un traité de verser des rentes aux Indiens crée une fiducie à l'égard des terres provinciales, était minoritaire, les juges majoritaires n'ont rien dit dans cette affaire qui permette de douter que l'honneur de la Couronne garantissait l'exécution de ses obligations envers les Indiens. La Couronne en avait fait sa politique au moins depuis la *Proclamation royale* de 1763, et cette notion ressort clairement des promesses consignées dans le rapport des commissaires. L'honneur de la Couronne existe également en tant que source d'obligation indépendante des traités, bien entendu. Dans les arrêts *Sparrow*, *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, *Nation Haïda* et *Taku River*, l'« honneur de la Couronne » a été invoqué à titre de principe central du règlement des demandes de consultation des Autochtones, et ce, même en l'absence d'un traité.

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

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

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

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

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

55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal

Ce n'est pas comme si les premières nations signataires du Traité n° 8 n'avaient pas payé chèrement leur droit à un comportement honorable de la part de la Couronne; la cession des intérêts autochtones sur un territoire plus grand que la France constitue un prix d'achat très élevé.

(2) La tenue de vastes consultations auprès des premières nations au moment de la négociation du Traité n° 8 en 1899 a-t-elle libéré la Couronne de son obligation de consultation et d'accommodement?

La deuxième réponse générale de la Couronne à la revendication des Mikisew est que ce qui devait être fait a été fait en 1899. La ministre soutient ce qui suit :

> [TRADUCTION] Bien que le gouvernement doive tenir compte des incidences sur le droit issu du traité, il n'existe aucune obligation d'accommodement dans ce contexte. Le traité lui-même constitue l'accommodement aux intérêts autochtones; la prise de terres, telle qu'elle est définie ci-dessus, ne touche aucunement à la capacité fondamentale des Indiens de continuer à chasser, à pêcher et à piéger. Dans la mesure où cette promesse est honorée, le traité n'est pas violé, et aucune obligation d'accommodement distincte ne prend naissance. [Je souligne.]

Cet argument n'est pas fondé. La consultation qui exclurait dès le départ toute forme d'accommodement serait vide de sens. Le processus envisagé ne consiste pas simplement à donner aux Mikisew l'occasion de se défouler avant que la ministre fasse ce qu'elle avait l'intention de faire depuis le début. La conclusion de traités est une étape importante du long processus de réconciliation, mais ce n'est qu'une étape. Ce qui s'est passé à Fort Chipewyan en 1899 ne constituait pas un accomplissement parfait de l'obligation découlant de l'honneur de la Couronne, mais une réitération de celui-ci.

Le traité accorde à la Couronne un droit de « prendre » des terres cédées à des fins de transport régional, mais elle n'en est pas moins tenue de s'informer de l'effet qu'aura son projet sur l'exercice par les Mikisew de leurs droits de chasse et de piégeage, et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter

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

avec les Mikisew « de bonne foi, dans l'intention de tenir compte réellement » de leurs préoccupations (*Delgamuukw*, par. 168). Cela ne signifie pas que le gouvernement doit consulter toutes les premières nations signataires du Traité nº 8 chaque fois qu'il se propose de faire quelque chose sur les terres cédées visées par ce traité, même si l'effet est peu probable ou peu important. L'obligation de consultation, comme il est précisé dans l'arrêt *Nation Haïda*, est vite déclenchée, mais l'effet préjudiciable, comme l'étendue de l'obligation de la Couronne, est une question de degré. En l'espèce, les effets étaient clairs, démontrés et manifestement préjudiciables à l'exercice ininterrompu des droits de chasse et de piégeage des Mikisew sur les terres en question.

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

56 En résumé, les négociations menées en 1899 constituaient la première étape d'un long voyage qui n'est pas à la veille de se terminer. À la lumière des faits de la présente affaire, nous devons ajouter aux deux restrictions inhérentes aux droits de chasse, de pêche et de piégeage que le Traité nº 8 accorde aux Indiens qui ont été dégagées dans l'arrêt *Badger* (limites géographiques et mesures spécifiques de réglementation gouvernementale), une troisième restriction, soit le droit pour la Couronne de prendre des terres aux termes du traité, un droit qui est lui-même assujetti à l'obligation de tenir des consultations et, s'il y a lieu, de trouver des accommodements aux intérêts des premières nations avant de réduire le territoire sur lequel leurs membres peuvent continuer à exercer leurs droits de chasse, de pêche et de piégeage. Comme nous l'avons vu, cette troisième restriction (qui n'était pas en cause dans *Badger*) est tout à fait justifiée par l'historique des négociations qui ont mené à la signature du Traité nº 8 ainsi que par l'honneur de la Couronne.

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

57 Comme je l'ai affirmé au début, l'honneur de la Couronne imprègne chaque traité et l'exécution de chaque obligation prévue au traité. En conséquence, le Traité nº 8 est à l'origine des droits de nature procédurale des Mikisew (p. ex. la consultation) ainsi que de leurs droits substantiels (p. ex. les droits de chasse, de pêche et de piégeage). Si la Couronne avait foncé pour mettre en œuvre le projet de route

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

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

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

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

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433

d'hiver sans consultation adéquate, elle aurait violé ses obligations *procédurales*, outre le fait que les Mikisew auraient peut-être pu établir que la route d'hiver violait en plus les obligations *substantielles* que le traité impose à la Couronne.

Selon l'arrêt *Sparrow*, non seulement les droits protégés par l'art. 35 de la *Loi constitutionnelle de 1982* ne sont pas absolus, mais leur violation peut être justifiée par la Couronne dans certaines circonstances précises. Les droits que le Traité n° 8 confère aux Mikisew sont protégés par l'art. 35. La Couronne ne cherche pas à justifier au sens de l'arrêt *Sparrow* les lacunes de sa consultation en l'espèce. Il reste donc à répondre à la question de savoir si, dans les mesures qu'elle a prises, la Couronne a respecté son obligation de consulter honorablement la Première nation Mikisew.

(3) Le processus suivi en l'espèce par la ministre, par l'intermédiaire de Parcs Canada, était-il suffisant?

Dans les cas où, comme en l'espèce, la Cour est en présence d'une « prise » *projetée*, il n'est pas indiqué (même si on a conclu que la mesure envisagée, *si elle était mise en œuvre*, porterait atteinte aux droits de chasse et de piégeage issus du traité) de passer directement à une analyse fondée sur l'arrêt *Sparrow*. La Cour doit d'abord examiner le *processus* selon lequel la « prise » doit se faire, et se demander si ce processus est compatible avec l'honneur de la Couronne. Dans la négative, la première nation peut obtenir l'annulation de l'ordonnance de la ministre en se fondant sur le motif relatif au processus, peu importe que les faits de l'affaire justifient par ailleurs une conclusion que les droits de chasse, de pêche et de piégeage ont été violés.

Je précise d'entrée de jeu que la construction de la route d'hiver proposée par la ministre est une fin qui lui permettait de « prendre » des terres aux termes du Traité n° 8. Il est évident que les fins [TRADUCTION] « d'établissements, de mine, d'opérations forestières » et de [TRADUCTION] « commerce » nécessitent toutes un transport convenable. Le traité ne définit pas les [TRADUCTION] « autres

(Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

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.]

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

objets » qui permettent de prendre des terres, mais cette expression ne doit pas recevoir une interprétation restrictive : *R. c. Smith*, [1935] 2 W.W.R. 433 (C.A. Sask.), p. 440-441. Quoi qu'il en soit, comme je l'ai déjà mentionné, on parle de « voyages » dans le préambule du Traité n° 8.

61 La question est de savoir si la ministre et son personnel ont tenté de parvenir à la fin autorisée que constituent les besoins en matière de transport régional en respectant l'obligation de consultation de la Couronne. La réponse dépend du contenu de cette obligation, lequel est tributaire des circonstances de l'espèce. Dans l'arrêt *Delgamuukw*, la Cour a examiné l'obligation de consultation et d'accommodement dans le contexte d'une atteinte au titre aborigène (par. 168) :

Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones. [Je souligne.]

62 Dans l'arrêt *Nation Haïda*, la Cour a examiné les types d'obligations qui peuvent découler de différentes situations dans le contexte de revendications non encore prouvées, et la juge en chef McLachlin a utilisé la notion de continuum comme fondement de son analyse (par. 43-45) :

À une extrémité du continuum se trouvent les cas où la revendication de titre est peu solide, le droit ancestral limité ou le risque d'atteinte faible. Dans ces cas, les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis. . .

À l'autre extrémité du continuum on trouve les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une

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

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

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

haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé. Dans de tels cas, il peut s'avérer nécessaire de tenir une consultation approfondie en vue de trouver une solution provisoire acceptable. Quoique les exigences précises puissent varier selon les circonstances, la consultation requise à cette étape pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision. Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. . .

Entre les deux extrémités du continuum décrit précédemment, on rencontrera d'autres situations. Il faut procéder au cas par cas. Il faut également faire preuve de souplesse, car le degré de consultation nécessaire peut varier à mesure que se déroule le processus et que de nouveaux renseignements sont mis au jour. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. . . [Je souligne.]

Comme l'indique l'arrêt *Nation Haïda*, la détermination du contenu de l'obligation de consultation sera fonction du contexte. La spécificité des promesses faites sera une des variables prises en compte. Si, par exemple, un traité exige la fourniture de biens ou le paiement de sommes d'argent par la Couronne, ou si une entente récente sur les revendications territoriales impose aux Autochtones des obligations spécifiques relativement à des ressources données, l'importance de la consultation peut être assez limitée. Si les obligations respectives sont claires, les parties devraient les exécuter. Un autre facteur contextuel sera la gravité de l'incidence qu'auront sur le peuple autochtone les mesures que propose la Couronne. Plus la mesure aura d'incidence, plus la consultation prendra de l'importance. S'il n'y a pas de traité, la solidité de la revendication autochtone sera un autre facteur, comme le signale l'arrêt *Nation Haïda*. L'historique des relations entre la Couronne et une première nation peut aussi être un facteur important. En l'espèce, le facteur contextuel le plus important est le fait que le Traité n° 8 offre un cadre permettant de gérer les changements constants à l'utilisation des terres déjà prévus en 1899 et qui, on le sait

overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation*, at paras. 159-60:

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

maintenant, vont se poursuivre encore longtemps. Dans ce contexte, la consultation est un facteur clé pour parvenir à la réconciliation, l'objectif global du droit moderne des traités et des droits autochtones.

64 L'obligation en l'espèce comporte des éléments informationnels et des éléments de solution. Dans cette affaire, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres *cédées* où les droits de chasse, de pêche et de piégeage des Mikisew sont expressément assujettis à la restriction de la « prise », j'estime que l'obligation de la Couronne se situe plutôt au bas du continuum. La Couronne devait aviser les Mikisew et nouer un dialogue directement avec eux (et non, comme cela semble avoir été le cas en l'espèce, après coup lorsqu'une consultation publique générale a été tenue auprès des utilisateurs du parc). Ce dialogue aurait dû comporter la communication de renseignements sur le projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne devait demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits de chasse, de pêche et de piégeage des Mikisew. Elle n'a pas respecté cette obligation lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Sur ce point, je souscris à l'opinion exprimée par le juge Finch (maintenant Juge en chef de la C.-B.) dans *Halfway River First Nation*, par. 159-160 :

> [TRADUCTION] Ce n'est pas parce qu'on a donné un avis suffisant d'une décision envisagée qu'on a aussi respecté l'exigence de la consultation suffisante.
>
> L'obligation de consultation de la Couronne lui impose le devoir concret de veiller raisonnablement à ce que les Autochtones disposent en temps utile de toute l'information nécessaire pour avoir la possibilité d'exprimer leurs intérêts et leurs préoccupations, et de faire en sorte que leurs observations sont prises en considération avec sérieux et, lorsque c'est possible, sont intégrées d'une façon qui puisse se démontrer dans le plan d'action proposé. [Je souligne.]

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

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

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

> [i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

> . . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a

Il est vrai, comme le prétend la ministre, que les Mikisew ont l'obligation réciproque de faire leur part en matière de consultation, de faire connaître leurs préoccupations, de supporter les efforts du gouvernement en vue de tenir compte de leurs préoccupations et suggestions, et de tenter de trouver une solution mutuellement satisfaisante. En l'espèce, cependant, la consultation n'a jamais atteint ce stade. Elle n'a jamais pris son essor.

Le processus de consultation, s'il avait suivi son cours, n'aurait pas conféré aux Mikisew un droit de veto sur le tracé de la route. Comme on le souligne dans l'arrêt *Nation Haïda*, la consultation n'entraîne pas toujours un accommodement, et l'accommodement ne se traduit pas toujours par une entente. On aurait toutefois peut-être pu apporter au tracé ou à la construction de la route des modifications qui permettraient de répondre, dans une large mesure, aux objections des Mikisew. Nous ne savons pas ce que pourraient être ces modifications et, en l'absence de consultation, la ministre ne peut pas le savoir non plus.

Il ressort clairement des conclusions de fait de la juge de première instance que la Couronne n'a pas réussi à démontrer qu'elle avait « "l'intention de tenir compte réellement des préoccupations (des Autochtones)" [. . .] dans le cadre d'un véritable processus de consultation » (*Nation Haïda*, par. 42). Au contraire, la juge de première instance a estimé que,

> [e]n l'espèce, il aurait donc au moins fallu répondre à la lettre des Mikisews du 10 octobre 2000 et rencontrer ceux-ci pour prendre leurs préoccupations en considération au début de la planification du projet. Lorsque des rencontres ont finalement eu lieu entre Parcs Canada et les Mikisews, la décision était pour ainsi dire prise, et elles ne pouvaient donc se tenir dans l'intention véritable de permettre la prise en compte de leurs préoccupations. [par. 154]

La juge de première instance a également écrit ceci :

> . . . l'honneur de la Couronne, en sa qualité de fiduciaire, ne saurait permettre qu'une décision portant atteinte à

First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

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

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

V. Conclusion

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

Appeal allowed with costs.

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

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

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

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

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

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

des droits issus de traité et jouissant d'une protection constitutionnelle soit prise sans que la Première nation concernée soit consultée. [par. 157]

68 Comme la juge Sharlow, dissidente en Cour d'appel fédérale, je suis de cet avis. Cette dernière a affirmé que les mesures d'atténuation avaient été élaborées par suite d'un processus qui était « fondamentalement vicié » (par. 153).

69 En définitive, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance d'approbation de la ministre et de lui renvoyer le dossier du projet de route d'hiver pour qu'elle prenne une décision conforme aux présents motifs.

V. Conclusion

70 Les Mikisew ont demandé les dépens sur une base avocat-client, mais aucune circonstance exceptionnelle ne justifie cette demande. En conséquence, le pourvoi est accueilli et la décision de la Cour d'appel fédérale est annulée, le tout avec dépens entre parties contre la ministre intimée dans notre Cour et dans la Cour d'appel fédérale. L'ordonnance relative aux dépens rendue par la juge en Section de première instance est maintenue.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Rath & Co., Priddis, Alberta.

Procureur de l'intimée Sheila Copps, ministre du Patrimoine canadien : Procureur général du Canada, Vancouver.

Procureurs de l'intimée Thebacha Road Society : Ackroyd Piasta Roth & Day, Edmonton.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante la Nation crie de Big Island Lake : Woloshyn & Company, Saskatoon.

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

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

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

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

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

Procureurs de l'intervenant Lesser Lake Indian Regional Council : Donovan & Vancouver.

Procureurs de l'intervenante les Premières tions de l'Alberta signataires du Traité nº 8 : Roberts, Victoria.

Procureurs de l'intervenante Treaty 8 Association : Woodward & Co., Victoria.

Procureur de l'intervenante les Premières tions de Blueberry River : Thomas R. Berger Vancouver.

Procureurs de l'intervenante l'Assemblée Premières Nations : Pitblado, Winnipeg.

July 19, 2000

COMPREHENSIVE CLAIMS POLICY AND STATUS OF CLAIMS

ISSUE

What is the federal government's policy for the negotiation of comprehensive claims and the status of claims in Canada?

BACKGROUND

A federal policy for the settlement of Aboriginal land claims was established in 1973. The policy divides claims into two broad categories - specific and comprehensive.

Comprehensive land claims are based on the assertion of continuing Aboriginal title to lands and natural resources. The federal policy stipulates that land claims may be negotiated with Aboriginal groups in areas where claims to Aboriginal title have not been addressed by treaty or through other legal means.

The federal government has, however, accepted a limited number of claims for negotiation as comprehensive claims in areas affected by treaties. The claims of the Dene and Metis in Treaties 8 and 11 within the Northwest Territories were accepted for negotiation on the basis that the land provisions of the treaties had not been implemented. Claims from Treaty 8 and Douglas Treaty First Nations in British Columbia have also been accepted for negotiation within the British Columbia Treaty Commission process on the basis that it is necessary to negotiate consistent new relationships with Aboriginal groups in that province, particularly with respect to resource management.

The thrust of the 1973 Comprehensive Claims Policy, which was reaffirmed in 1981, was to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in a settlement agreement. Section 35 of the *Constitution Act, 1982* recognizes and affirms Aboriginal and treaty rights that now exist or that may be acquired by way of land claim agreements.

Significant amendments to the Comprehensive Claims Policy were announced in December 1986, following an extensive period of consultation with Aboriginal and other groups. The revised policy improved the negotiation process, allowed for greater flexibility in land tenure, and provided a clearer definition of the topics for negotiation. These changes have contributed to the achievement of settlements in recent years.

The 1986 Comprehensive Land Claims Policy allows for the retention of Aboriginal rights on land which Aboriginal people will hold following the conclusion of a claim settlement, to the extent that such rights are not inconsistent with the settlement agreement.

Under the Government of Canada's 1995 Inherent Right Policy, self-government arrangements may be negotiated simultaneously with lands and resources as part of comprehensive claims agreements. The Government of Canada is prepared, where the other parties agree, to constitutionally protect certain aspects of self-government agreements as treaty rights within the meaning of section 35 of the *Constitution Act, 1982.* Self-government arrangements may be protected under section 35 as part of comprehensive land claim agreements.

In the provinces, most of the lands and resources that are the subject of comprehensive claim negotiations are under provincial jurisdiction. Moreover, by establishing certainty of title to lands and resources, claims settlements benefit the provinces. It is the position of the federal government that provincial governments must participate in negotiations and contribute to the provision of benefits to Aboriginal groups.

On September 25, 1990, the federal government announced that the process for the negotiation of comprehensive claims would be expanded. The previous six-claim limit on the number of negotiations which could be undertaken at one time was eliminated.

Fourteen claims have been settled, the most recent being those of the seven Yukon First Nations and the Nisga'a Agreement.

In *Gathering Strength*--Canada's Aboriginal Action Plan announced on January 7, 1998, the Government of Canada affirmed that treaties, both historic and modern, will continue to be a key basis for the future relationship between Aboriginal people and the Crown.

A summary of the status of comprehensive land claims settled and those currently in negotiation is attached.

STATUS OF COMPREHENSIVE CLAIMS

SETTLED CLAIMS

Fourteen comprehensive claim agreements have been signed since the announcement of the federal government's claims policy in 1973. These are:

- The James Bay and Northern Quebec Agreement (1975);
- The Northeastern Quebec Agreement (1978);
- The Inuvialuit Final Agreement (1984);
- The Gwich'in Agreement (1992);
- The Nunavut Land Claims Agreement (1993);
- The Sahtu Dene and Metis Agreement (1994);
- The Nisga'a Agreement (2000);

Seven Yukon First Nation Final Agreements based on the Council for Yukon Indians Umbrella Final Agreement (1993) and corresponding Self-Government Agreements for:

- The Vuntut Gwich'in First Nation (1995);
- The First Nation of Nacho Nyak Dun (1995);
- The Teslin Tlingit Council (1995);
- The Champagne and Aishihik First Nations (1995);
- The Little Salmon/Carmacks First Nation (1997); and
- The Selkirk First Nation (1997).
- The Tr'ondëk Hwëch'in First Nation (1998)

DESCRIPTION OF SETTLED CLAIMS

JAMES BAY AND NORTHERN QUEBEC AGREEMENT (QUEBEC)

Area Claimed:	Over 1,165,286 square kilometres of land. This includes the land ceded to Quebec in the boundary extensions of 1898 and 1912 (Nouveau Québec), as well as the offshore islands (NWT).
Current Population:	12,103 Cree and 8,643 Inuit

This was the first settled comprehensive claim. The final agreement was signed in 1975, and came into effect in 1977.

Under the agreement the Cree received 5,544 km^2 and the Inuit 8,151 km^2 in Category I lands, 69,995 km^2 (Cree) and 81,596 km^2 (Inuit) in Category II lands, and over 1 million km^2 in shared Category III lands.

The settlement provided for $135 million (1975 dollars) for the Cree and $90 million (1975 dollars) for the Inuit, which has been paid in full; full harvesting rights over 150,000 square kilometres; participation in an environmental and social protection regime; an income security program for hunters and trappers; and self-government under the *Cree-Naskapi (of Quebec) Act* and the *Kativik Act* (Government of Quebec). Implementation Agreement was signed in 1990 between Canada and the Inuit.

NORTHEASTERN QUEBEC AGREEMENT (QUEBEC)

Area Claimed:	Same as the Cree claimed in the James Bay and Northern Quebec Agreement (JBNQA)
Current Population:	660 Naskapi

This agreement was signed in 1978 and amended the James Bay and Northern Quebec Agreement to integrate the Naskapi.

It provided the Naskapi people with $9 million, as well as settlement lands, rights and benefits equivalent to the JBNQA. Implementation Agreement was signed in 1990 between Canada and the Naskapi.

INUVIALUIT AGREEMENT (N.W.T.)

Settlement area:	435,000 square kilometres in the Mackenzie Delta, Beaufort Sea and Amundsen Gulf area of the Northwest Territories.
Current Population:	2,500 Inuvialuit

The Inuvialuit claim was accepted for negotiation on May 13, 1976, and the final agreement, signed in June 1984, was effective July 1984. The settlement provided the Inuvialuit with approximately 91,000 square kilometres of land (of which 13,000 square kilometres includes mineral rights); and includes a financial component of $152 million (1984 dollars) and a one time payment of $10 million to an economic enhancement fund and $7.5 million to a social development fund. It also includes wildlife harvesting rights, socio-economic initiatives, and participation in wildlife and environmental management.

DENE AND METIS CLAIMS (N.W.T.)

In 1976 and 1977, Canada accepted comprehensive claims from the Dene and Metis of the Mackenzie Valley in the Northwest Territories (NWT). Negotiation of a joint Dene/Metis claim began in 1981. An agreement was initialled by negotiators in April 1990. In July 1990, the Dene and Metis at their assemblies voted not to proceed with ratification of the agreement. The Gwich'in and Sahtu Dene and Metis did not agree with this action and withdrew from the Dene/Metis negotiating group; they requested regional settlements. In November 1990, the government discontinued negotiation of the Dene/Metis claim and authorized the negotiation of separate regional settlements, based on the April 1990 agreement, with any of the five Dene and Metis regions that might request it.

GWICH'IN AGREEMENT (N.W.T.)

Settlement area:	57,000 square kilometres in the Mackenzie Delta Region of the Northwest Territories; and a "primary use area" in the Yukon
Current Population:	approximately 2300

The Gwich'in of the Mackenzie Delta Region were the first Dene and Metis group to negotiate a regional comprehensive claim. Their final agreement was signed on April 22, 1992, and came into effect in December 1992.

The settlement provided the Gwich'in with 16,264 square kilometres of land in the Northwest Territories, 4,299 square kilometres of which includes mineral rights, and 1,554 square kilometres of Tetlit Gwich'in Yukon Land in the Yukon; $75 million (1990$) over 15 years; a share of resource royalties from the Mackenzie Valley; guaranteed wildlife harvesting rights; and participation in decision-making bodies dealing with renewable resources, land use planning, environmental impact and assessment review, and land and water use regulation.

THE NUNAVUT LAND CLAIMS AGREEMENT

Settlement area:	1.9 million square kilometres in Nunavut
Current Population:	19,000 Inuit

This claim represents the largest comprehensive claim settlement in Canada. The settlement provides the Inuit with approximately 351,000 square kilometres of land (of which 37,000 square kilometres includes mineral rights); $1.17 billion ($580 million in 1989 dollars plus interest) in financial benefits over 14 years; a share of resource royalties; guaranteed wildlife harvesting rights; and participation in decision-making bodies dealing with wildlife, land use planning, screening and review of environmental impact of developments and regulation of water use.

A political accord was signed by the federal and territorial governments and the TFN on October 30, 1992. The accord outlines the powers of and timing for the creation of a Nunavut Territorial Government. A referendum dealing with the boundary of the proposed new territory was approved by a majority of residents of the N.W.T. Both the Nunavut Land Claims Agreement Act (Bill C-133) and an Act to divide the N.W.T. and create the Territory of Nunavut (Bill C-132) were passed in June 1993.

On April 30, 1996, Iqaluit was officially declared the future capital of Nunavut. In a plebiscite held on December 11, 1995, residents voted 60.2 percent in favour of Iqualuit as their future capital. On April 1, 1999, the map of Canada changed with the creation of the new territory of Nunavut. The Government of Nunavut will be highly decentralized to respond to the needs of its 28 communities. The people of Nunavut have recently elected its 19 representatives. Paul Okalik has been elected as its first Premier.

SAHTU DENE AND METIS AGREEMENT (N.W.T.)

Settlement area:	280,278 square kilometres in the Mackenzie Valley and Great Bear Lake region of the Northwest Territories
Current Population:	approximately 2,400

The Sahtu Dene and Metis were the second Dene and Metis group to seek a regional comprehensive land claim. Their final agreement was signed on September 6, 1993 and came into effect on June 23, 1994.

The settlement provided the Sahtu Dene and Metis with 41,437 square kilometres of land (of which 1,813 square kilometres includes mineral rights); $75 million (1990$) over 15 years; a share of resource royalties from the Mackenzie Valley; guaranteed wildlife harvesting rights; and participation in decision-making bodies dealing with renewable resources, land use planning, environmental impact assessment and review, and land and water use regulation.

NISGA'A CLAIM (B.C.)

AIP signed	March 22, 1996
Date accepted:	1976
Population:	6,000

Canada began negotiating with the Nisga'a Tribal Council in 1976, well before the establishment of the British Columbia Treaty Commission (BCTC) process. Negotiations continued on a bilateral basis until British Columbia formally joined the process in 1990. In 1991 the three parties signed a framework agreement which identified the topics for substantive negotiation toward the Agreement-in-Principle (AIP). Between 1992 and the present, the parties have conducted over 500 consultation meetings and public events concerning the Nisga'a negotiations.

An AIP was signed on March 22, 1996, forming the basis for the first modern-day treaty in British Columbia. On August 4, 1998, the parties initialled the final agreement. The Agreement calls for a payment to the Nisga'a of $190 million in cash and the establishment of a Nisga'a Central Government with ownership of and self-government over approximately 2000 square kilometres of land in the Nass River Valley. The agreement also outlines the Nisga'a ownership of surface and subsurface resources on Nisga'a lands and spells out entitlements to Nass River salmon stocks and wildlife harvests. The Nisga'a voted in support of ratification of the Nisga'a Final Agreement on November 6 and 7, 1998. The *Nisga'a Final Agreement Act*, was introduced in the

B.C. Legislature on November 30, 1998 and received Royal Assent on April 26, 1999. The Final Agreement was signed by representatives of the Nisga'a Tribal Council and B.C. on April 27, 1999 and by the Minister of Indian Affairs and Northern Development on May 4, 1999. Federal ratifying legislation, Bill C-9, received Royal Assent on April 13, 2000.

COUNCIL FOR YUKON INDIANS (CYI) AGREEMENT (YUKON)

Area claimed:	whole of Yukon Territory
Date accepted:	1973
Population:	approximately 8,000 Indians

On May 29, 1993, the federal government, the Yukon government, and the CYI signed an Umbrella Final Agreement (UFA) and Final Agreements with four Yukon First Nations (YFNs): the Vuntut Gwitchin First Nation; the First Nation of the Nacho Nyak Dun; the Champagne and Aishihik First Nations; and the Teslin Tlingit Council. The UFA establishes the basis for the negotiation of individual settlements with each of the fourteen YFNs. It also provides for the negotiation of self-government Agreements with Yukon First Nations. Self-Government Agreements were also signed with the four First Nations on May 29, 1993.

The Settlement and Self-Government Legislation was introduced into Parliament on May 31, 1994 and received Royal Assent on July 7, 1994. The Surface Rights Legislation received Royal Assent on December 15, 1994. All three acts came into force concurrently on February 14, 1995.

On July 21, 1997, Final and Self-Government Agreements were signed with Little Salmon/Carmacks (LSCFN) and Selkirk First Nations (SFN). The agreements for both LSCFN and SFN came into effect on October 1, 1997.

On July 16, 1998, Final and Self-Government Agreements and Implementation Plans were signed with Tr'ondëk Hwëch'in in Dawson City. The agreements provide the Tr'ondëk Hwëch'in with the ability to retain 2,598 square kilometres of settlement land, of which 1,554 square kilometres includes fee simple ownership of mines and minerals. The Tr'ondëk Hwëch'in will also retain its two reserves as lands within the meaning of Section 91(24) of the *Constitution Act*. The Final Agreement also provides the Tr'ondëk Hwëch'in with cash compensation of $29.3 million (1998 dollars) to be paid out over 15 years through annual installments of $3.192 million. The agreements came into effect on September 15, 1998.

The final agreements provide the seven YFNs (approximately 4,000 beneficiaries) with settlement land of 27,299 square kilometres (approximately 5.6 percent of the land mass of the Yukon), of which 18,130 square kilometres include ownership of mines and minerals. This is their share of the total settlement lands for all YFNs, which will amount to 41,595 square kilometres, of which 25,900 square kilometres includes mines and minerals. The seven YFNs will receive financial benefits of $137,468,620 (1989 dollars) to be paid out in 15 annual installments, as their share of the total $242,673,000 (1989 dollars) for all YFNs. In addition, these YFNs will benefit from rights in the management of national parks and wildlife areas, specific rights for fish and wildlife harvesting, and economic and employment opportunities.

On March 28, 2000 Cabinet ratified a continuation of the current mandate with changes for a two year period to finalize the remaining seven outstanding Yukon First Nation Agreements. The "new" mandate provides an extension of indexation of financial amounts, loan refinancing as of March 31/00 and the ability for the Minister to return for necessary instructions to address the unique governance provisions for Kwanlin Dun and Kaskas, once they are determined. It is hoped that four Agreements may be concluded with the remaining Yukon First Nations within the next year. with some sooner based on current states of completion.

The White River First Nation initialled the Final and Self-Government Agreements on April 16, 1999. They have suspended their ratification vote pending review of the current mandate.

After hearing the renewed federal mandate details in March 2000, Carcross Tagish First Nation suspended its negotiations. Major issues centre around land quantum, loan repayment requirement, and taxation provisions. Carcross Tagish First Nation challenged Canada's interpretation of the Umbrella Final Agreement Section 87 tax exemption termination in Federal Court and was not successful. It has since appealed the decision to the Federal Court of Appeal.

CLAIMS IN NEGOTIATION

DOGRIB TREATY 11 CLAIM (N.W.T.)

Area claimed:	210,000 square kilometres in the North Slave region of the Northwest Territories
Date accepted:	Fall 1992
Population:	3,000

Land claim negotiations started in January 1994. In August 1995, the federal Inherent Right Policy was released - the policy stated that self-government arrangements could be negotiated as part of comprehensive claims agreements. The land claim negotiations were paused while a joint land claim and self-government mandate was sought.

The Dogrib Framework Agreement was signed in August 1996.

The new mandate to negotiate a land claim and self-government AIP was approved in April 1997.

The AIP was signed in Behcho Ko (Rae), NWT, on January 7, 2000.

Target date for the coming into effect of the Dogrib Agreement is January 2002.

Until the Dogrib Agreement comes into effect, two interim agreements are in place. The Interim Land Withdrawal Agreement ensures that no new mining rights can be granted in approximately 13,000 square kilometres of land surrounding the four Dogrib communities. The Interim Measures Agreement provides the Dogrib Treaty 11 Council with representation in the government processes which regulate land and water uses in their traditional territory.

TREATY 8 DENE (N.W.T.)

Treaty 8 Dene (N'dilo, Dettah, Lutsel K'e, and Deninu Kue First Nations) are members of the Akaitcho Territory Tribal Corporation and were formerly part of the Dene-Métis Agreement of April 1990.

From 1992 to 1996, the Akaitcho Dene First Nations (DFN) were pursuing a Treaty Land Entitlement settlement, in part to avoid the extinguishment clause in comprehensive claims settlements. These talks were unsuccessful, and in November 1996, representatives of Akaitcho DFN (including the Chiefs of N'dilo, Dettah, Lutsel K'e, and Deninu Kue First Nations), the Government of the Northwest Territories and the federal government participated in an interest-based exploratory workshop.

A Chief Federal Negotiator was appointed in February 1997 and all three parties began negotiation on a Framework Agreement to guide negotiation of a comprehensive claim and self-government agreement. These negotiations ceased when the Chiefs walked away from the table on May 26, 1999 in protest over having the Government of the Northwest Territories sign the Framework Agreement.

A new Chief Federal Negotiator, John Gill, was appointed in January 2000 to finalize the Framework Agreement and to determine if there is enough common ground to proceed with negotiations. Since the appointment of John Gill, the Framework Agreement has been finalized and will be signed by the three parties on July 25, 2000.

ATIKAMEKW AND MONTAGNAIS CLAIMS (QUEBEC)

Area claimed:	700,000 square kilometres in Quebec and Labrador
Date accepted:	1979
Population:	19,528 (12 communities)

The Atikamekw and Montagnais Claim (AMC) was accepted in 1979 and a Framework Agreement was signed in 1988.

Since 1994, Canada and Quebec have negotiated with three separate groups:
1) l'Assemblée Mamu Pakatatau Mamit; 2) le Conseil Tribal Mamuitun; 3) le Conseil de la Nation Atikamekw.

Three Innu communities are not presently at the negotiation table:
a) Matimekush-Lac John (Schefferville); b) Uashat mak Mani-Utenam (Sept-Iles); and c) Natashquan.

Starting in March, 1999, the negotiations with the Mamuitun Tribal Council and the Mamu Pakatatau Assembly focussed on the development of a Common Approach including the key elements which would serve as a base of negotiation of the Agreement in Principle. These elements included land entitlement, traditional activities, resource sharing, self government, land quantum, taxation provisions and financial quantum.

The acceptance of a Common Approach was announced on July 6, 2000.

On June 13, 2000, the Mamu Pakatatau Assembly presented their Common Approach at a press conference in Ottawa, which has been analysed by Quebec and Canada and should become the object of negotiations and result in a common document amongst the three parties.

A) Other communities:

In March 1999, the Montagnais de Natashquan (population 794) withdrew its mandate from the Assemblée Mamu Pakatatau Mamit.

In September 1998, the Montagnais of Uashat mak Mani-Utenam (population 3,148) temporarily withdrew from the Conseil Tribal Mamuitun to consult their population on future participation in negotiations.

The Montagnais of Matimekush Lac-John have never participated at any negotiation table (population 759).

B) The Atikamekw submitted their proposal in January 1996. On September 11, 1997, a Political Protocol was signed between the governments of Quebec and Canada and the Conseil de la Nation Atikamekw (population 5,224). Tripartite negotiations are presently being pursued on the basis of their AIP proposal with both governments. Since June 1999, negotiators have been working on territory and traditional activities clauses. The objective is to reach an AIP in the year 2001.

MAKIVIK CLAIM - OFFSHORE (N.W.T.) AND LABRADOR (ONSHORE AND OFFSHORE)

Area claimed:	Offshore area adjacent to Quebec and Labrador, and inland northeast Labrador.
Date accepted:	1992 (N.W.T. portion) and 1993 (Labrador portion)
Population:	8,800

In 1974 Canada agreed to negotiate with the Inuit of Northern Quebec, represented by Makivik Corporation, with respect to certain offshore islands along the coast of Quebec in Nunavut. Following the announcement of the 1986 Comprehensive Claims Policy, the claim was considerably revised and accepted again in January, 1992 (Nunavut portion) and June 1993 (Labrador portion). It now includes the offshore islands and offshore areas along the coast of northern Quebec and Labrador, and an inland area in northern Labrador. A framework agreement was signed in August 1993. The government of the Nunavut participates as part of the federal government negotiating team for the N.W.T. portion. In 1998, Parties reached agreement on core issues on the Nunavut portion. In February 1999, Parties started negotiations of the Labrador portion.

However, Makivik filed on October 12, 1999 an action before the Federal Court of Canada with respect to their interests in Labrador. Makivik allege that the Minister breached his constitutional duties towards the Nunavik Inuit by conducting treaty negotiations with them while at the same time advancing the treaty process with the Labrador Inuit Association (LIA) for the same area. Government of Canada is currently assessing the impact of the litigation upon the negotiations in Labrador. In the meantime negotiations continue as usual.

LABRADOR INUIT ASSOCIATION (LIA) CLAIM (NFLD. AND LABRADOR)

Area claimed:	coast line, interior, and offshore of northern Labrador
Date accepted	1978
Population	5,000 Inuit and Native settlers

A framework agreement setting out the scope, process, topics, and parameters for negotiation was signed in November 1990, by the LIA and the Governments of Canada, and Newfoundland and Labrador (Newfoundland).

Although negotiations were discontinued in May 1992, Canada returned to the negotiating table in December 1993, fulfilling a commitment made in the Aboriginal Policy of the Liberal Plan for Canada. In 1994, a major deposit of nickel, copper and cobalt was discovered at Voisey' Bay. This prompted the parties to commence fast-track negotiations in St. John's in September 1996. In October 1997, senior officials and negotiators for each of the three parties met in Ottawa, and a document was initialled which provided the basis for an AIP.

In December 1998, negotiators reached a verbal agreement on all aspects of the AIP. After undergoing a technical review, extensive legal drafting, and the approval by principles for each of the parties, the AIP was initialled by the negotiators on May 10, 1999. The LIA held a ratification vote by its membership on the AIP on July 26, 1999, and voted approximately 80% in support of the initialled AIP. The land selection process has commenced. Once land selection has been completed, first Newfoundland, and then Canada, will take the AIP to their respective cabinets for ratification. Once ratified by all three parties, the AIP will become the basis for final negotiations.

INNU NATION CLAIM (NFLD. AND LABRADOR)

Area claimed:	Central Labrador and Quebec lower north shore
Date accepted:	1978
Population:	1,600 (500 Naskapi, 1,100 Montagnais)

Land Claim:

In 1978 Canada conditionally accepted the Innu land claim for negotiation, subject to the participation of the Newfoundland and Labrador government and the completion of a land use and occupancy study by the Innu. These stipulations were fulfilled in 1991 and formal tripartite negotiations began in July of that year.

On March 29, 1996, a Land Claim Framework Agreement was signed by all parties. In November 1997, the Innu submitted a workplan to fast track negotiations. In early 1998, all parties agreed to an accelerated negotiation process.

Favourable progress towards an AIP was made until January 1999, when negotiations were suspended after the Innu pulled out of discussions on Voisey's Bay and Lower Churchill developments. In an attempt to resolve the deadlock, a meeting occurred between Premier Tobin and Innu representatives in February 1999. As a result of this meeting, the Innu presented Canada and Newfoundland with a list of the ten major land claim issues. Negotiations resumed in April 1999, with a focus on the resolution of these outstanding issues.

More recently, negotiations have centred around cash compensation and land quantum issues. In June 1999, the Innu were presented with Newfoundland's land quantum offer and Canada's cash compensation offer. In June 2000, the Innu provided the provincial and federal governments with a counter-offer. To date, Newfoundland has indicated that the Innu's counter offer is not acceptable. Canada is still reviewing the Innu proposal.

Following the present pace, it is expected that an AIP on land claims will be reached by December 2000, with an anticipated Final Agreement in 2002.

Self-government:

Beginning in May 1996, self-government negotiations were initiated between the Innu Nation, Canada and Newfoundland. These negotiations were undertaken in tandem with the comprehensive land claim negotiations which had begun in 1991. An accelerated negotiation process allowed for the ratification of an Innu Government Framework Agreement on February 11, 1997.

As the Innu were already involved in discussions with Newfoundland regarding the devolution of policing and social services, it was decided that these issues should be the first to be addressed at self-government negotiations. With a commitment by all parties to accelerated negotiations in 1998, many of the key issues within the Administration of Justice and Programs and Services chapters have been addressed and these drafts are near completion.

Following the present pace of negotiations, it is expected that an AIP on self-government will be reached by August 2002 with a Final Agreement expected in 2004.

November 24th 1999 Interim Measures A.I.P.:

On November 24th, 1999, Canada, Newfoundland and Labrador and the Innu signed an Agreement-in-Principle on Interim Measures as a means to provide the Innu with the appropriate tools to address the various issues currently affecting their communities. The Agreement represents a series of interim steps providing the Innu with additional control over programs and services within their communities until the completion of land claims and self-government agreements. It provides for the transfer of provincial Crown lands to Canada, the establishment of aboriginal policing, costs and eventual transfer of control over education and the establishment of appropriate governance arrangements for the Innu.

Since the signing of the AIP, an interdepartmental working group has been established with officials from DIAND (headquarters and Atlantic Region) Solicitor General of Canada, Public Works and Government Services Canada and Natural Resources Canada to develop and review options for implementing the various components of the Agreement.

To date, the process for the transfer of land of both Innu communities (Sheshatshiu and Natuashish) has begun. Land surveys and tenure studies have been completed allowing for the community boundaries to be determined. An Assets Condition Report is underway and will be completed by the end of August. As part of this study an environmental assessment of the community lands will be completed as well.

With regards to policing, Solicitor General Canada, Newfoundland and the Innu Nation have entered into tripartite discussion to develop a First Nation Policing Agreement. This agreement will provide for the creation of policing service providing First Nations officers, will facilitate the establishment of a satellite police facility within the two Innu communities and will provide training of Innu persons to become police officers. This step is recognized by all parties to be a temporary alternative until the establishment of a Innu Nation police service under the self-government agreement.

Tripartite discussions are also being held in relation to education and governance. Canada has proposed approaches to the other Parties for implementing these two major components. To date, no agreement has been reached on an approach which is acceptable to all Parties.

CLAIMS IN BRITISH COLUMBIA

In British Columbia (B.C.), the majority of First Nations have never signed or adhered to treaties. As a result, governments established a tripartite British Columbia Claims Task Force to make recommendations on resolving outstanding claims. The Claims Task Force Report, released on July 3, 1991, contained 19 recommendations on how to negotiate the settlement on the land question in B.C. A key recommendation was to establish an arm's-length British Columbia Treaty Commission (BCTC) to facilitate and monitor treaty negotiations and to allocate negotiation funding to B.C. Aboriginal groups.

On September 21, 1992, the Government of Canada, the Province of British Columbia and the First Nations Summit formally supported the establishment of the BCTC by signing the BCTC Agreement. The BCTC was established on an interim basis by provincial and federal Orders-in-Council on April 13 and 14, 1993 respectively, and by Resolution of the Summit on April 5, 1993. On October 19, 1995 the federal government introduced the BCTC legislation. Bill C107 received Royal Assent on December 15, 1995.

The BCTC consists of five Commissioners: two nominated by the Summit; one nominated by each of the federal and provincial governments; and a Chief Commissioner chosen by all three Principals. The current Chief Commissioner is Mr. Miles Richardson of the Haida Nation.

The BCTC is the "Keeper of the Process". Its main functions are to assess the readiness of parties to begin negotiations, allocate negotiation funding to Aboriginal groups, assist parties to obtain dispute resolution services at the request of all parties, and monitor and report on the status of negotiations. The BCTC has also played a useful role in reporting to the Principals on the impediments to the process. The treaty negotiation process is open to all B.C. First Nations.

On June 21, 1993, Canada and B.C. signed a Memorandum of Understanding on the sharing of costs as well as roles and responsibilities for treaty settlements. This provides a substantive basis for beginning new treaty negotiations in B.C. On June 29, 1993, the two governments created a cross-sectoral structure for joint third-party consultation: the Treaty Negotiation Advisory Committee (TNAC). The role of the TNAC is to provide policy and negotiating advice to governments on treaty-related matters that may directly affect third parties.

The BCTC opened its doors in December 1993. To date, fifty-one First Nations (126 Indian bands), representing 70 percent of B.C.'s Aboriginal population, are negotiating treaties. Of these, three are in early stages of negotiations, 10 are negotiating a framework agreement, and 37 are negotiating an AIP. One table, Gitxsan Hereditary Chiefs, remains in suspension.

40 First Nations have signed Framework Agreements. Of these, thirty-nine are currently involved in AIP (Stage 4) negotiations. The Sechelt First Nation signed an Agreement in Principle with Canada and British Columbia on April 16, 1999, and the parties began negotiations on a Final Agreement shortly thereafter. In the past year, federal and provincial negotiators have made AIP offers to five to five First Nations (Sliammon, Gitanyow, Snuneymuxw, Ditidaht/Pacheedaht, In-SHUCK-ch N'Quat'qua.) Several more offers are likely to be made before the end of the current fiscal year. The Nisga'a Final Agreement, which came into effect on May 11, 2000, is the first modern treaty in B.C. and the first treaty in Canada to incorporate both land claims and constitutionally-protected self-government provisions.

Claims in British Columbia represent slightly more than half of the total number of claims (both comprehensive and self-government) currently being negotiated across the country.

CREES OF QUEBEC OFFSHORE ISLANDS CLAIM (N.W.T.)

In November 1974, Canada agreed to negotiate with the Crees of Quebec, as represented by the Grand Council of the Crees of Quebec (GCCQ), respecting the islands along the Quebec shore in James Bay and Hudson Bay. In July 1995 the five James Bay Cree Chiefs involved in this claim and the Grand Chief formally requested that negotiations begin. Preliminary discussions to set out the basis and the process continuing the negotiations regarding the offshore in Hudson Bay and James Bay area are taking place between Government and the Cree on regular basis. The Government of Nunavut is also involved in these negotiations.

OTHER CLAIMS

ALGONQUINS OF EASTERN ONTARIO LAND CLAIM (Algonquins of Pikwakanagan (Golden Lake) Ontario)

Area claimed:	34,000 square kilometres on the Ontario side of the Ottawa River Watershed.
Date accepted:	1992 (Ontario began negotiations in 1991)
Population:	approximately 3,500

The Algonquins of Pikwakanagan claim an area covered by an existing treaty, but have never signed or benefited from a treaty with the Crown. Canada joined negotiations already underway between Ontario and the Algonquins in December 1992, after having reached an understanding with the Province on cost-sharing.

In August 1994, the negotiators for Canada, Ontario and the Algonquins of Eastern Ontario signed a framework for negotiations.

On October 23, 1997 the Minister appointed Jean-Yves Assiniwi as the Chief Federal Negotiator for the Algonquins of Eastern Ontario Claim. A new Ontario Chief Negotiator, Brian Crane, was appointed by the province in February 1998.

Negotiations continue on a monthly basis on substantial issues that would form the basis of a settlement.

OTHER PROCESSES

SOUTH SLAVE MÉTIS TRIBAL COUNCIL (N.W.T.)

On November 7, 1990, Canada announced that it would negotiate regional claims with the Dene and Métis of the five regions in the Mackenzie Valley on the basis of the April 9, 1990 agreement which was initialled but not accepted by the Dene/Métis leadership.

When the Treaty 8 Dene decided to pursue Treaty Land Entitlement, this left some of the Métis who were originally included under the 1990 Dene/Métis Final Agreement without a means to address their interests.

On March 18, 1994 former Minister Irwin advised the Métis Nation -NWT (MNNWT) that he proposed to explore current options available to address their concerns and to discuss the establishment of a process that would eventually lead to the resolution of their concerns .

Exploratory discussions on a Métis process to address the issues of land and economic benefits and program and services began with the MNNWT in the spring of 1994. At the request of the MNNWT, the exploratory discussions focussed on the South Slave Métis Tribal Council (SSMTC). A framework agreement providing for the negotiation of a land and resources package and then self-government negotiations was initialled by the negotiators for the SSMTC, Government of the Northwest Territories (GNWT) and Canada in January 1996 and signed on August 29, 1996. Formal negotiations toward an agreement-in-principle began in May 1997.

The SSMTC, the GNWT and the federal government have initialled chapters on Eligibility and Enrollment and Ratification.

A new Chief Federal Negotiator, Delia Opekokew, was appointed in March 2000 and the SSMTC negotiations have recommenced.

SALT RIVER FIRST NATION (N.W.T.)

The Salt River First Nation had decided to negotiate independently of the other members of the NWT Treaty No. 8 Tribal Council and is currently pursuing a Treaty Land Entitlement (TLE) settlement. The SRFN officially presented their Treaty Land Entitlement and compensation package to DIAND on June 23, 1999, and negotiations are continuing.

DEH CHO FIRST NATIONS (N.W.T.)

Canada and the Deh Cho First Nations have agreed to enter into formal discussions based on a two-staged approach. The first stage will see the negotiations of interim measures, framework, and funding agreements. The second stage will encompass negotiations on a land, resources and self-government agreement. First stage discussions began in September 1999 and are set to conclude in the Summer of 2000.

THE MANITOBA DENE NEGOTIATIONS NORTH OF 60^0

Area claimed:	Lands and harvesting rights North of 60^0, North of Manitoba (lands included in the Nunavut Settlement Area)
Date accepted	1999
Population	1400 Dene

The Sayisi Dene First Nation and the Northlands Dene First Nation of Manitoba have brought separate actions alleging treaty and/or Aboriginal rights to areas of the Nunavut settlement lands and in the Northwest Territories (N.W.T.). They claim that Canada breached its fiduciary duty by negotiating and concluding an agreement with Nunavut Tunngavik Inc. while excluding the Manitoba Dene and ignoring their treaty interests north of 60^0.

On June 25, 1999 the Dene agreed to abey their litigations and on July 12, 1999, Canada and Manitoba Dene signed an agreement in the form of an MOU to allow discussions to begin to achieve an out of court settlement. Discussions are now ongoing on a regular basis.

Other groups such as the Nunavut Government, Inuit and other affected Aboriginal groups will be involved in the consideration of the matters under discussions.

CLAIMS AWAITING A DECISION RE: ACCEPTANCE OR REJECTION

QUEBEC ALGONQUIN CLAIM (QUEBEC)

In 1989, a number of Quebec Algonquin bands submitted a formal comprehensive claim to lands comprising the Ottawa River watershed. Considerable research has been undertaken by various groups within the Quebec Algonquins to document their claims to continuing Aboriginal rights. The federal government is awaiting the results of this research. The Kitigan Zibi claim submission has been reviewed by the Department of Justice to identify the legal issues specific to this claim and other potential Algonquin claims.

The Algonquins are not currently engaged in comprehensive land claim negotiations. In February 2000, Minister Nault met with all the Algonquins Chiefs and proposed a scoping out exercise to determine if sufficient common ground exist to justify the beginning of negotiation with potential for success within a reasonably time frame

The Department of Indian Affairs and Northern Development is waiting for a response to the Ministers proposal from the First Nations. Quebec has confirmed its willingness to participate in such an exercise.

LABRADOR METIS NATION (LMN) (NFLD. AND LABRADOR)

In November 1991, the Labrador Metis Association (now the Labrador Metis Nation) submitted a comprehensive land claim to all southern Labrador. The Minister indicated that further documentation was required to substantiate certain comprehensive land claims acceptance criteria. In March 1996, supplemental research submitted for the Aboriginal title claim of the Inuit/Metis of South and Central Labrador was provided in support of the claim. The Department of Justice (DOJ) completed its assessment of the claims submission and provided a legal opinion in May 1998. It is the preliminary federal position that the LMN claim cannot be accepted for negotiation under the Comprehensive Land Claims Policy. Should the LMN submit further documentation that may have an impact on the preliminary position, the information will be considered in the formation of a final decision.

NASKAPI OF QUEBEC (SCHEFFERVILLE) COMPREHENSIVE LAND CLAIM (NFLD. AND LABRADOR)

In August 1995, the Naskapi of Quebec (Schefferville) formally submitted a comprehensive land claim to a large section of Labrador. The Claims and Historical Research Centre met with the Band in October 1996 and indicated that further documentation was required to substantiate certain comprehensive land claims acceptance criteria. Additional information has been requested from the Naskapi.

MIAWPUKEK MI'KAMAWEY MAWI'OMI (CONNE RIVER MIKMAQ BAND OF NEWFOUNDLAND) (NFLD. AND LABRADOR)

In September 1996, the Miawpukek Mi'kamawey Mawi'omi (Conne River Mi'kmaq Band of Newfoundland) submitted a comprehensive land claim to south-central Newfoundland. The claim was reviewed by the Claims and Historical Research Centre for completeness. Further information has been requested to document current use and occupancy.

The Grand Council of the Crees (of Quebec) and the Cree Regional Authority *Appellants*

v.

The Attorney General of Canada, the Attorney General of Quebec, Hydro-Québec and the National Energy Board *Respondents*

and

Sierra Legal Defence Fund, Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and Sierra Club of Canada *Interveners*

INDEXED AS: QUEBEC (ATTORNEY GENERAL) *v.* CANADA (NATIONAL ENERGY BOARD)

File No.: 22705.

1993: October 13; 1994: February 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Public utilities — Electricity — Licences — National Energy Board granting licences for export of electrical power to U.S. — Licences granted subject to environmental assessments of future generating facilities — Whether Board erred in granting licences — National Energy Board Act, R.S.C., 1985, c. N-7 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Following lengthy public hearings at which the appellants made numerous submissions, the National Energy Board granted Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. At the time the licence applications were filed, the Board was required to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements and that the price to be charged by the power authority was just and reasonable in relation to the public interest. After the

Le Grand conseil des Cris (du Québec) et l'Administration régionale crie *Appelants*

c.

Le procureur général du Canada, le procureur général du Québec, Hydro-Québec et l'Office national de l'énergie *Intimés*

et

Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, Survie culturelle (Canada), les Ami(e)s de la Terre et Sierra Club of Canada *Intervenants*

RÉPERTORIÉ: QUÉBEC (PROCUREUR GÉNÉRAL) *c.* CANADA (OFFICE NATIONAL DE L'ÉNERGIE)

N° du greffe: 22705.

1993: 13 octobre; 1994: 24 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Services publics — Électricité — Licences — Délivrance par l'Office national de l'énergie de licences d'exportation d'électricité à destination des États-Unis — Licences assujetties aux évaluations environnementales des futures installations de production — L'Office a-t-il commis une erreur en délivrant les licences? — Loi sur l'Office national de l'énergie, L.R.C. (1985), ch. N-7 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Après de longues audiences publiques au cours desquelles les appelants ont présenté de nombreux arguments, l'Office national de l'énergie a délivré à Hydro-Québec des licences d'exportation d'électricité à destination des États de New York et du Vermont. Au moment du dépôt des demandes de licences, l'Office devait s'assurer que l'électricité à exporter n'était pas requise pour satisfaire aux besoins normalement prévisibles du Canada à l'époque en cause et que le prix à demander par la société d'électricité était juste et raison-

hearings but prior to the Board's ruling, these two explicit criteria were removed from the *National Energy Board Act*, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. In evaluating the environmental impact of the applications, the Board considered itself bound by both its own Act as amended and the *Environmental Assessment and Review Process Guidelines Order*. The licences were granted subject to two conditions relating to the successful completion of environmental assessments of future generating facilities. The Federal Court of Appeal rejected the appellants' argument that the Board erred in several respects in granting the licences, but allowed the appeal by Hydro-Québec and the Attorney General of Quebec, concluding that the Board had exceeded its jurisdiction in imposing the environmental assessment conditions. It severed these two conditions and allowed the licences to stand. This appeal is to determine (1) whether the Board properly conducted the required social cost-benefit review; (2) whether the Board's failure to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness; (3) whether the Board owed the appellants a fiduciary duty in the exercise of its decision-making power, and, if so, whether the requirements of this duty were fulfilled; (4) whether the Board's decision affects the appellants' aboriginal rights; and (5) whether the Board failed to follow the requirements of its own Act and of the Guidelines Order in conducting its environmental impact assessment.

Held: The appeal should be allowed and the order of the Board restored.

Hydro-Québec provided evidence on which the Board could reasonably conclude that the consideration of cost recoverability was satisfied. The Board did not err in considering relevant to this issue the fact that the export contracts had received the approval of the province. Also, as this was only one of the factors considered, the Board did not improperly delegate its decision-making responsibility. It has not been shown that the Board's discretion to determine what evidence is relevant to its decision was improperly exercised in this case so as to result in inadequate disclosure to the appellants. The Board had sufficient evidence before it to make a valid finding that all costs would be recovered, and the appellants were given access to all the material before the Board. While there is a fiduciary relationship between

nable par rapport à l'intérêt public. Après les audiences, mais avant la décision de l'Office, ces deux critères explicites ont été retranchés de la *Loi sur l'Office national de l'énergie*; l'Office doit maintenant tenir compte seulement des facteurs qu'il estime pertinents. Dans le cadre de l'évaluation des incidences environnementales des demandes, l'Office s'est estimé lié par sa propre loi habilitante modifiée et par le *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*. Les licences ont été délivrées sous réserve de deux conditions, qui portaient sur le résultat favorable des évaluations environnementales des futures installations de production. La Cour d'appel fédérale a rejeté l'argument des appelants que l'Office avait commis plusieurs erreurs en délivrant les licences, mais a accueilli celui d'Hydro-Québec et du procureur général du Québec, concluant que l'Office avait excédé sa compétence en imposant les conditions relatives aux évaluations environnementales. Elle a retranché ces deux conditions et a maintenu les licences délivrées. Le présent pourvoi vise à déterminer (1) si l'Office a correctement procédé à l'analyse de rentabilité sociale nécessaire; (2) si, en n'exigeant pas qu'Hydro-Québec divulgue en totalité les hypothèses et la méthodologie à la base de l'analyse de rentabilité, l'Office a contrevenu aux exigences en matière d'équité procédurale; (3) si l'Office a une obligation fiduciaire, envers les appelants, dans l'exercice de son pouvoir décisionnel et, dans l'affirmative, s'il y a satisfait; (4) si la décision de l'Office touche les droits ancestraux des appelants, et (5) si l'Office a omis de respecter les exigences de sa loi habilitante et du Décret lorsqu'il a procédé à l'évaluation environnementale.

Arrêt: Le pourvoi est accueilli et l'ordonnance de l'Office est rétablie.

Hydro-Québec a fourni des éléments de preuve permettant à l'Office de raisonnablement conclure que le facteur de la récupération des coûts avait été respecté. L'Office n'a pas commis d'erreur en considérant comme pertinent, relativement à cette question, le fait que la province avait autorisé les contrats d'exportation. En outre, comme il ne s'agissait que de l'un des facteurs considérés, l'Office n'a pas délégué de façon illégitime son pouvoir décisionnel. On n'a pas démontré que le pouvoir discrétionnaire de l'Office de déterminer la preuve qui est pertinente relativement à sa décision a été exercé illégitimement de façon à entraîner une divulgation insuffisante aux appelants. L'Office disposait d'une preuve suffisante pour conclure validement qu'il y aurait récupération de tous les coûts, et les appelants ont eu

the federal Crown and the aboriginal peoples of Canada, the function of the Board in deciding whether to grant an export licence is quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it. The fiduciary relationship between the Crown and the appellants thus does not impose a duty on the Board to make its decisions in the appellants' best interests, or to change its hearing process so as to impose superadded requirements of disclosure. Moreover, even assuming that the Board should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, the Board's actions in this case would have met the requirements of such a duty. The appellants had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by Hydro-Québec. On the issue of whether the Board's decision will have a negative impact on the appellants' aboriginal rights, it is not possible to evaluate realistically the impact of the Board's decision on the appellants' rights without reference to the James Bay Agreement, on which the appellants disavowed reliance. Moreover, even assuming that the Board's decision is one that has, *prima facie*, an impact on the appellants' aboriginal rights, and that for the Board to justify its interference it must at the very least conduct a rigorous, thorough, and proper cost-benefit review, the review carried out in this case was not wanting in this respect.

The Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. Even though the Board found that the new facilities contemplated would have to be built in any event to supply increasing domestic needs, if the construction of new facilities is required to serve the demands of the export contract, among other needs, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power. In defining the

accès à tous les documents déposés devant l'Office. Bien qu'il existe des rapports fiduciaires entre l'État fédéral et les peuples autochtones du Canada, l'Office, lorsqu'il décide de délivrer une licence d'exportation, remplit une fonction quasi judiciaire, qui est en soi incompatible avec l'exigence voulant qu'il existe des rapports d'une extrême bonne foi entre l'Office et une partie qui comparaît devant lui. Les rapports fiduciaires entre l'État et les appelants n'imposent pas à l'Office une obligation de prendre des décisions dans l'intérêt des appelants, ou encore de modifier son processus d'audience de façon à imposer des exigences additionnelles de divulgation. En outre, même si l'on suppose que l'Office aurait dû tenir compte de l'existence de rapports fiduciaires entre l'État et les appelants, les mesures qu'il a prises auraient permis de satisfaire aux exigences d'une telle obligation. Les appelants ont eu accès à tous les éléments de preuve déposés devant l'Office, ils ont pu présenter des arguments et une réplique et ils ont également eu le droit de contre-interroger les témoins assignés par Hydro-Québec. Quant à savoir si la décision de l'Office aura une incidence négative sur les droits ancestraux des appelants, on ne peut établir d'une façon réaliste l'incidence de la décision de l'Office sur les droits des appelants sans examiner la Convention de la Baie James, dont les appelants n'ont pas voulu se servir. En outre, même en supposant que la décision de l'Office a, à première vue, une incidence sur les droits ancestraux des appelants, et que ceux-ci ont raison de soutenir que, pour justifier son intervention, l'Office doit, à tout le moins, procéder à une analyse de rentabilité rigoureuse, approfondie et appropriée, l'analyse effectuée en l'espèce n'était pas déficiente sur ce point.

L'Office n'a pas excédé sa compétence en vertu de la *Loi sur l'Office national de l'énergie* en tenant compte des effets sur l'environnement de la construction des futures installations de production dans la mesure où ils se rapportent aux exportations proposées, domaine de compétence fédérale. La Cour d'appel a commis une erreur en limitant l'examen de l'Office sur les incidences environnementales aux effets sur l'environnement du transport d'électricité par une ligne de fil métallique au-delà de la frontière. Bien que l'Office ait conclu qu'il faudrait de toute façon procéder à la construction des nouvelles installations pour répondre à l'accroissement de la demande intérieure, les effets sur l'environnement de la construction de ces installations ont un lien avec l'exportation si la construction de nouvelles installations est nécessaire, entre autres, pour répondre à la demande créée par un contrat d'exportation. Dans ces circonstances, il devient alors approprié pour l'Office de

jurisdictional limits of the Board, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern, but the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. The Board met its obligations under the Guidelines Order in attaching to the licence the two impugned conditions. Having concluded that the environmental effects of the construction and operation of the planned facilities were unknown, the Board was required by s. 12(*d*) of the Order to see either that the proposal was subjected to further study and subsequent rescreening, or that it was submitted to a public review. The conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the Guidelines Order, but rather are an attempt to avoid the duplication warned against in the Order, while continuing the Board's jurisdiction over this matter.

tenir compte de la source de l'énergie électrique à exporter et des coûts environnementaux associés à la production de cette énergie. En définissant les limites de la compétence de l'Office, notre Cour doit s'assurer que l'exercice des pouvoirs de l'Office se limite vraiment aux questions d'intérêt fédéral. Cependant, il ne faut pas circonscrire l'étendue de l'examen à effectuer à un tel point que la fonction de l'Office devienne dénuée de sens ou privée d'efficacité. L'Office a respecté ses obligations en vertu du Décret en assortissant la licence des deux conditions contestées. Lorsqu'elle a conclu que les effets sur l'environnement de la construction et du fonctionnement des installations prévues étaient inconnus, l'Office était tenu, en vertu de l'al. 12*d*) du Décret de veiller à ce que la proposition soit soumise à d'autres études suivies d'un autre examen ou qu'elle fasse l'objet d'un examen public. L'Office a, pour l'essentiel, satisfait à cette obligation en imposant les conditions. Celles-ci ne constituent pas une délégation erronée de la responsabilité de l'Office en vertu du Décret, mais tentent plutôt d'éviter le double emploi dont le Décret fait mention, tout en préservant la compétence de l'Office sur cette question.

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Hydro-Québec Act, R.S.Q., c. H-5, s. 24.
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Loi sur l'Office national de l'énergie, L.R.C. (1985), ch. N-7 [mod. 1990, ch. 7], art. 2, 22(1), 24, 118, 119.02, 119.03, 119.06(2), 119.07, 119.08, 119.09, 119.093.
Loi sur le règlement des revendications des autochtones de la Baie James et du Nord québécois, S.C. 1976-77, ch. 32.
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APPEAL from a judgment of the Federal Court of Appeal, [1991] 3 F.C. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, severing conditions from licences granted by the National Energy Board, [1991] 2 C.N.L.R. 70, and allowing the licences to stand. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1991] 3 C.F. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, qui a retranché certaines conditions des licences délivrées par l'Office national de l'énergie, [1991] 2 C.N.L.R. 70, et déclaré les licences par ailleurs valides. Pourvoi accueilli.

Robert Mainville, *Peter W. Hutchins* and *Johanne Mainville*, for the appellants.

Robert Mainville, *Peter W. Hutchins* et *Johanne Mainville*, pour les appelants.

Jean-Marc Aubry, *Q.C.*, and *René LeBlanc*, for the respondent the Attorney General of Canada.

Jean-Marc Aubry, *c.r.*, et *René LeBlanc*, pour l'intimé le procureur général du Canada.

Pierre Lachance and *Jean Robitaille*, for the respondent the Attorney General of Quebec.

Pierre Lachance et *Jean Robitaille*, pour l'intimé le procureur général du Québec.

Pierre Bienvenu, *Jean G. Bertrand* and *Bernard Roy*, for the respondent Hydro-Québec.

Pierre Bienvenu, *Jean G. Bertrand* et *Bernard Roy*, pour l'intimée Hydro-Québec.

Judith B. Hanebury, for the respondent the National Energy Board.

Gregory J. McDade and *Stewart A. G. Elgie*, for the interveners.

The judgment of the Court was delivered by

IACOBUCCI J. — This appeal arises from the decision of the respondent National Energy Board ("the Board") to grant to the respondent Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. This decision followed lengthy public hearings at which the Grand Council of the Crees (of Quebec) and the Cree Regional Authority ("the appellants"), along with other concerned groups, made numerous submissions.

The Attorneys General of Quebec and of Canada appeared as respondents to this appeal, as did the Board. The Court also heard the joint submissions of the Sierra Legal Defence Fund, the Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and the Sierra Club of Canada ("the interveners").

The appellants argued before the Federal Court of Appeal that the Board erred in several respects in granting the licences. The respondents Hydro-Québec and the Attorney General of Quebec claimed that the Board erred in making the granting of the licences conditional on the successful completion of environmental assessments of the power generation facilities contemplated by Hydro-Québec for future construction. The Federal Court of Appeal rejected the argument of the appellants, and concluded that the Board had erred in imposing the conditions impugned by the respondents. The Court of Appeal severed these conditions, and allowed the licences to stand. The appellants now appeal to this Court.

Judith B. Hanebury, pour l'intimé l'Office national de l'énergie.

Gregory J. McDade et *Stewart A. G. Elgie*, pour les intervenants.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi contre la décision de l'intimé l'Office national de l'énergie («l'Office») de délivrer à l'intimée Hydro-Québec des licences d'exportation d'électricité à destination des États de New York et du Vermont. Cette décision a été prise après de longues audiences publiques au cours desquelles le Grand conseil des Cris, l'Administration régionale crie («les appelants») ainsi que d'autres groupes intéressés ont présenté de nombreux arguments.

Le procureur général du Québec, celui du Canada et l'Office ont comparu comme intimés dans le cadre du présent pourvoi. Notre Cour a également entendu le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, Survie culturelle (Canada), les Ami(e)s de la Terre et le Sierra Club of Canada («les intervenants»).

Les appelants ont soutenu devant la Cour d'appel fédérale que l'Office avait commis plusieurs erreurs en délivrant les licences. Les intimés Hydro-Québec et le procureur général du Québec ont affirmé que l'Office avait commis une erreur en assujettissant la délivrance des licences au résultat favorable des évaluations environnementales des futures installations de production d'électricité envisagées par Hydro-Québec. La Cour d'appel fédérale a rejeté l'argument des appelants et a conclu que l'Office avait commis une erreur en imposant les conditions contestées par les intimés. La Cour d'appel a retranché ces conditions et déclaré que les licences étaient par ailleurs valides. Les appelants se pourvoient maintenant devant notre Cour.

I. Facts

On July 28, 1989, Hydro-Québec applied to the Board for licences to export blocks of power to New York and Vermont. These applications involved nine blocks of power which were to be provided over periods ranging from five to twenty-two years, pursuant to two agreements signed with the U.S. power companies that covered a total of 1 450 MW of power and were projected to generate nearly $25 billion in income for Hydro-Québec. The purpose of the export was to raise sufficient revenue such that Hydro-Québec would be able to implement its development plan for expansion to meet the constantly rising demand for the provision of electrical services within the province.

The Board held public hearings during the months of February and March of 1990 on the application for licences for export. A number of interested parties, including the appellants, took part. At the time the applications were filed, the Board was required by s. 118 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements at the relevant times, and that the price to be charged by the power authority was just and reasonable. After the hearings but prior to the Board's ruling, s. 118 was modified by the *Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof*, S.C. 1990, c. 7 ("Bill C-23"). These two explicit criteria were removed from the statute, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. The parties made submissions before the Board on the effect of these amendments.

On September 27, 1990, the Board granted the export licences, subject to a list of conditions. The appellants appealed the Board's decision to grant the licences to the Federal Court of Appeal. The respondents Hydro-Québec and the Attorney General of Quebec also appealed the decision of the Board, challenging the validity of the imposition of two of the conditions to the licences, which related to environmental assessment of future gen-

I. Les faits

Le 28 juillet 1989, Hydro-Québec s'adressait à l'Office pour obtenir des licences d'exportation de blocs de puissance à destination de New York et du Vermont. Il s'agissait de neuf blocs de puissance qui devaient être fournis durant des périodes variant de cinq à vingt-deux ans, conformément à deux ententes signées avec des sociétés d'électricité américaines, portant sur une quantité totale de 1 450 MW et qui devaient rapporter près de 25 milliards de dollars à Hydro-Québec. Celle-ci visait à tirer de ces exportations suffisamment de revenus pour mettre en œuvre son plan de développement dans le but de satisfaire à la demande sans cesse croissante de services d'électricité dans la province.

L'Office a tenu des audiences publiques au cours de février et mars 1990 relativement à la demande de licences d'exportation. Un certain nombre de parties intéressées, dont les appelants, y ont pris part. Au moment du dépôt des demandes de licences, l'Office devait, en vertu de l'art. 118 de la *Loi sur l'Office national de l'énergie*, L.R.C. (1985), ch. N-7, s'assurer que l'électricité à exporter n'était pas requise pour satisfaire aux besoins normalement prévisibles du Canada à l'époque en cause, et que le prix à demander par la société d'électricité était juste et raisonnable. Après les audiences, mais avant la décision de l'Office, l'art. 118 a été modifié par la *Loi modifiant la Loi sur l'Office national de l'énergie et abrogeant certaines lois en conséquence*, L.C. 1990, ch. 7 («Projet de loi C-23»). Ces deux critères explicites ont été retranchés de la Loi; maintenant, l'Office doit seulement tenir compte des facteurs qu'il estime pertinents. Les parties ont présenté à l'Office des arguments quant à l'effet de ces modifications.

Le 27 septembre 1990, l'Office a délivré les licences d'exportation, sous réserve d'une liste de conditions. Les appelants ont interjeté appel contre la décision de l'Office devant la Cour d'appel fédérale. Les intimés Hydro-Québec et le procureur général du Québec ont également interjeté appel contre la décision de l'Office, contestant la validité de deux des conditions des licences, qui portaient sur l'évaluation environnementale des

erating facilities. The Federal Court of Appeal unanimously dismissed the appellants' appeal and allowed the appeal of Hydro-Québec and the Attorney General of Quebec. The Court of Appeal severed the two conditions but otherwise allowed the licences to stand.

II. Relevant Statutory Provisions

National Energy Board Act, R.S.C., 1985, c. N-7 (as amended by S.C. 1990, c. 7):

2. In this Act,

. . .

"export" means, with reference to

(*a*) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,

. . .

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

24. (1). . . hearings before the Board with respect to the issuance, revocation or suspension of certificates or of licences for the exportation of gas or electricity or the importation of gas or for leave to abandon the operation of a pipeline shall be public.

119.02 No person shall export any electricity except under and in accordance with a permit issued under section 119.03 or a licence issued under section 119.08.

119.03 (1) Except in the case of an application designated by order of the Governor in Council under section 119.07, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the exportation of electricity.

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

119.06 (1) The Board may make a recommendation to the Minister, which it shall make public, that an application for exportation of electricity be designated by order of the Governor in Council under section 119.07, and may delay issuing a permit during such

II. Les dispositions législatives pertinentes

Loi sur l'Office national de l'énergie, L.R.C. (1985), ch. N-7 (mod. par L.C. 1990, ch. 7):

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

«exportation»

a) Dans le cas de l'électricité, le fait de transporter de l'électricité produite au Canada à l'extérieur du pays par une ligne de fil métallique ou un autre conducteur;

. . .

22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

24. (1) . . . doivent faire l'objet d'audiences publiques les cas de délivrance, d'annulation ou de suspension de certificats ou de licences concernant l'exportation de gaz ou d'électricité ou l'importation de gaz, ainsi que les demandes de cessation d'exploitation d'un pipeline.

119.02 Il est interdit d'exporter de l'électricité sans un permis ou une licence, respectivement délivré en application des articles 119.03 ou 119.08, ou en contravention avec l'un ou l'autre de ces titres.

119.03 (1) Sauf si un décret a été pris au titre de l'article 119.07, l'Office délivre, sur demande et sans audience publique, les permis autorisant l'exportation d'électricité.

(2) Sont annexés à la demande les renseignements prévus par règlement et liés à celle-ci.

119.06 (1) L'Office peut suggérer, par recommandation qu'il doit rendre publique, au ministre la prise d'un décret au titre de l'article 119.07 visant une demande

period as is necessary for the purpose of making such an order.

(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

. . .

(*b*) the impact of the exportation on the environment;

. . .

(*d*) such considerations as may be specified in the regulations.

119.07 (1) The Governor in Council may make orders

(*a*) designating an application for exportation of electricity as an application in respect of which section 119.08 applies; and

(*b*) revoking any permit issued in respect of the exportation.

. . .

(3) Where an order is made under subsection (1),

(*a*) no permit shall be issued in respect of the application; and

(*b*) any application in respect of the exportation shall be dealt with as an application for a licence.

119.08 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a licence for the exportation of electricity in relation to which an order made under section 119.07 is in force.

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

119.09 (1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.

(2) The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.

d'exportation d'électricité et surseoir à la délivrance de permis pour la durée nécessaire à la prise du décret.

(2) Pour déterminer s'il y a lieu de procéder à la recommandation, l'Office tente d'éviter le dédoublement des mesures prises au sujet de l'exportation d'électricité par le demandeur et le gouvernement de la province exportatrice et tient compte de tous les facteurs qu'il estime pertinents et notamment:

. . .

b) des conséquences de l'exportation sur l'environnement;

. . .

d) de tout autre facteur qui peut être prévu par règlement.

119.07 (1) Le gouverneur en conseil peut, par décret:

a) préciser que la demande d'exportation est assujettie à l'obtention de la licence visée à l'article 119.08;

b) annuler tout permis relatif à cette exportation.

. . .

(3) Le décret emporte l'impossibilité de délivrer tout permis relatif à la demande et l'assimilation de toute demande la visant à une demande de licence.

119.08 (1) Sous réserve de l'agrément du gouverneur en conseil et de l'article 24, l'Office peut délivrer une licence pour l'exportation de l'électricité visée par le décret.

(2) L'Office tient compte de tous les facteurs qui lui semblent pertinents.

119.09 (1) L'Office peut assortir le permis des conditions, en ce qui touche les données prévues par règlement, qu'il juge souhaitables dans l'intérêt public.

(2) L'Office peut assujettir la licence aux conditions qu'il juge souhaitables.

119.093 (1) The Board may revoke or suspend a permit or licence issued in respect of the exportation of electricity

. . .

(*b*) where a holder of the permit or licence has contravened or failed to comply with a term or condition of the permit or licence.

National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056:

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

. . .

(*y*) evidence that the applicant has obtained any licence, permit or other form of approval required under any law of Canada or a province respecting the electric power proposed to be exported;

(*z*) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas, and

(iii) would not result in prices in the country to which the power is exported being materially less than the least cost alternative for power and energy at the same location within that country; and

(*aa*) evidence on any environmental impact that would result from the generation of the power for export.

15. Every licence for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the gener-

119.093 (1) L'Office peut annuler ou suspendre un permis ou une licence délivré pour l'exportation d'électricité [. . .] soit en cas de contravention par celui-ci aux conditions de son titre.

Règlement sur l'Office national de l'énergie (Partie VI), C.R.C. 1978, ch. 1056:

6. (1) Tout requérant d'une licence pour l'exportation de force motrice doit fournir à l'Office les renseignements exigés par ce dernier.

(2) Sans restreindre la portée générale du paragraphe (1), les renseignements que tout requérant décrit au paragraphe (1) est tenu de fournir doivent, sauf autorisation contraire de l'Office, comprendre

. . .

y) une preuve que le requérant a obtenu une licence, un permis ou une autre forme d'autorisation exigés par une loi du Canada ou d'une province à l'égard de la puissance électrique dont l'exportation est projetée;

z) une preuve démontrant que le prix que doit exiger le requérant pour la puissance et l'énergie électriques destinées par lui à l'exportation est juste et raisonnable par rapport à l'intérêt public et, en particulier, que le prix d'exportation

(i) permettra la récupération d'une bonne proportion des coûts assumés au Canada,

(ii) ne sera pas inférieur au prix exigé des Canadiens pour un service équivalent dans des régions connexes, et

(iii) n'entraînerait pas, dans le pays auquel la puissance est destinée, des prix qui soient sensiblement inférieurs à ceux de l'autre source la plus économique d'alimentation en puissance et en énergie qui existe au même endroit dans ce pays; et

aa) un témoignage quant aux répercussions que pourrait avoir sur l'environnement la production de la puissance destinée à l'exportation.

15. Toute licence d'exportation de puissance et d'énergie électriques est assujettie aux termes et conditions que l'Office peut prescrire, y compris, sans res-

ality of the foregoing, is subject to every statement set out by the Board in the licence respecting

. . .

(*m*) the requirements for environmental protection.

Environmental Assessment and Review Process Guidelines Order, SOR/84-467:

2. In these Guidelines,

. . .

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

4. (1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(*a*) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and

(*b*) the concerns of the public regarding the proposal and its potential environmental effects.

5. (1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

. . .

treindre la portée générale de ce qui précède, toute stipulation dans ladite licence concernant

. . .

m) les exigences relatives à la protection de l'environnement.

Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

. . .

«proposition» S'entend en outre de toute entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions.

3. Le processus est une méthode d'auto-évaluation selon laquelle le ministère responsable examine, le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables, les répercussions environnementales de toutes les propositions à l'égard desquelles il exerce le pouvoir de décision.

4. (1) Lors de l'examen d'une proposition selon l'article 3, le ministère responsable étudie:

a) les effets possibles de la proposition sur l'environnement ainsi que les répercussions sociales directement liées à ces effets, tant à l'intérieur qu'à l'extérieur du territoire canadien; et

b) les préoccupations du public qui concernent la proposition et ses effets possibles sur l'environnement.

5. (1) Si, indépendamment du processus, le ministère responsable soumet une proposition à un règlement sur l'environnement, il doit veiller à ce que les examens publics ne fassent pas double emploi.

(2) Pour éviter la situation de double emploi visée au paragraphe (1), le ministère responsable doit se servir du processus d'examen public comme instrument de travail au cours des premières étapes du développement d'une proposition plutôt que comme mécanisme réglementaire, et rendre les résultats de l'examen public disponibles aux fins des délibérations de nature réglementaire portant sur la proposition.

6. Les présentes lignes directrices s'appliquent aux propositions

. . .

(*b*) that may have an environmental effect on an area of federal responsibility

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal.

(2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

(*a*) the proposal is of a type identified by the list described under paragraph 11(*a*) [one that would not produce any adverse environmental effects], in which case the proposal may automatically proceed;

(*b*) the proposal is of a type identified by the list under paragraph 11(*b*) [one that would produce significant adverse environmental effects], in which case the proposal shall be referred to the Minister for public review by a Panel;

(*c*) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

(*d*) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(*e*) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or

b) pouvant avoir des répercussions environnementales sur une question de compétence fédérale;

8. Lorsqu'une commission ou un organisme fédéral ou un organisme de réglementation exerce un pouvoir de réglementation à l'égard d'une proposition, les présentes lignes directrices ne s'appliquent à la commission ou à l'organisme que si aucun obstacle juridique ne l'empêche ou s'il n'en découle pas de chevauchement des responsabilités.

10. (1) Le ministère responsable s'assure que chaque proposition à l'égard de laquelle il exerce le pouvoir de décision est soumise à un examen préalable ou à une évaluation initiale, afin de déterminer la nature et l'étendue des effets néfastes qu'elle peut avoir sur l'environnement.

(2) Les décisions qui font suite à l'examen préalable ou à l'évaluation initiale visés au paragraphe (1) sont prises par le ministère responsable et ne peuvent être déléguées à nul autre organisme.

12. Le ministère responsable examine ou évalue chaque proposition à l'égard de laquelle il exerce le pouvoir de décision, afin de déterminer:

a) si la proposition est d'un type compris dans la liste visée à l'alinéa 11*a*) [c.-à-d., qui ne produirait aucun effet néfaste sur l'environnement], auquel cas elle est réalisée telle que prévue;

b) la proposition est d'un type compris dans la liste visée à l'alinéa 11*b*) [c.-à-d., qui produirait des effets néfastes sur l'environnement], auquel cas elle est soumise au Ministre pour qu'un examen public soit mené par une commission;

c) si les effets néfastes que la proposition peut avoir sur l'environnement sont minimes ou peuvent être atténués par l'application de mesures techniques connues, auquel cas la proposition est réalisée telle que prévue ou à l'aide de ces mesures, selon le cas;

d) si les effets néfastes que la proposition peut avoir sur l'environnement sont inconnus, auquel cas la proposition est soumise à d'autres études suivies d'un autre examen ou évaluation initiale, ou est soumise au Ministre pour qu'un examen public soit mené par une commission;

e) si, selon les critères établis par le Bureau, de concert avec le ministère responsable, les effets néfastes que la proposition peut avoir sur l'environnement sont importants, auquel cas la proposition est soumise au Ministre pour qu'un examen public soit mené par une commission; ou

(*f*) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

III. Judgments Below

A. *National Energy Board*, Decision No. EH-3-89, August 1990 (Fredette, Gilmour and Bélanger, members)

The Board wrote lengthy reasons for its decision, which set out in some detail the status of the applicant, Hydro-Québec, the nature of the licences for which Hydro-Québec was applying, and the evidence of the applicant as it related to surplus, price, and fair market access, the three criteria expressly set out in the former provisions of the *National Energy Board Act*. The Board also considered the nature of the export markets, the reliability of the system proposed for implementing the export contracts, and the environmental impact of the exports for which the applications were made.

The Board noted that, were the licences to be granted, sufficient power could be generated to service the contracts by the combined use of the existing facilities of Hydro-Québec as well as those contemplated by its development plan. In other words, the exports did not require the use of facilities other than those existing, or already planned. However, the Board found that some of the facilities contemplated by the development plan for future construction would need to be built earlier than if no power were to be exported. The Board then examined the submissions of the various interveners, along with those of the appellants, as to the advisability of granting the licences.

In its disposition of the application, the Board noted that the amendments to the *National Energy Board Act* had removed the express requirement that the Board satisfy itself that the power to be exported was surplus to reasonably foreseeable Canadian requirements, and that the price to be charged was just and reasonable in the public interest. Nonetheless, there was nothing in the

f) si les effets néfastes que la proposition peut avoir sur l'environnement sont inacceptables, auquel cas la proposition est soit annulée, soit modifiée et soumise à un nouvel examen ou évaluation initiale.

III. Les juridictions inférieures

A. *L'Office national de l'énergie*, Décision nº EH-3-89, août 1990 (les membres Fredette, Gilmour et Bélanger)

L'Office a longuement étayé sa décision dans laquelle il décrit en détail la situation de la requérante, Hydro-Québec, la nature des licences demandées par celle-ci et son témoignage relativement à l'excédent, au prix et à l'accès équitable au marché, les trois critères expressément mentionnés dans l'ancienne disposition de la *Loi sur l'Office national de l'énergie*. L'Office a également examiné la nature des marchés d'exportation, la fiabilité du système proposé de mise en œuvre des contrats d'exportation et les incidences environnementales des exportations visées par les demandes de licence.

L'Office a fait remarquer qu'Hydro-Québec pourrait, dans l'éventualité où les licences seraient délivrées, produire suffisamment d'électricité pour satisfaire aux contrats en utilisant à la fois ses installations actuelles et celles envisagées dans son plan de développement. En d'autres mots, les exportations ne nécessitaient que l'utilisation des installations existantes ou déjà prévues. Toutefois, l'Office a conclu que certaines des installations envisagées dans le plan de développement devraient être construites plus tôt que dans le cas où il n'y aurait pas d'exportation d'électricité. L'Office a ensuite examiné les arguments des divers intervenants ainsi que ceux des appelants quant à l'opportunité de la délivrance de licences.

Dans sa décision, l'Office a indiqué que les modifications de la *Loi sur l'Office national de l'énergie* ont éliminé l'obligation explicite qu'il avait de s'assurer que l'électricité à exporter était excédentaire par rapport aux besoins d'utilisation raisonnablement prévisibles au Canada et que le prix devant être exigé était juste et raisonnable en fonction de l'intérêt public. Néanmoins, la Loi

amended Act which would preclude the Board from taking these factors into account. The Board therefore explicitly considered the issues of cost recovery and whether pricing was competitive to rates charged within Canada. On the issue of cost recovery, the Board concluded (at p. 30):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than $24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable.

The Board was accordingly persuaded that the export price charged would provide for recovery of the applicable costs incurred in Canada.

In evaluating the environmental impact of the application, the Board considered itself bound by both its own Act and by the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 ("the *EARP Guidelines Order*"). The Board held (at pp. 37-38):

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

The Board granted the applications subject to everal conditions. In particular, in order to satisfy self that the electricity to be exported would originate from facilities that had been subjected to the

modifiée n'empêche aucunement l'Office de tenir compte de ces facteurs. L'Office a en conséquence explicitement examiné s'il devait y avoir récupération des coûts et si les prix fixés étaient concurrentiels à ceux exigés au Canada. Sur la question de la récupération des coûts, l'Office a conclu (à la p. 30):

L'Office constate qu'Hydro-Québec a fourni l'information quant à l'importance des revenus qu'elle tirerait des ventes à l'exportation, lesquels seraient de l'ordre de 24 milliards de dollars [. . .]. En outre, Hydro-Québec a fourni les renseignements concernant la méthodologie utilisée pour effectuer les études de rentabilité de même que les différentes hypothèses économiques, financières et autres qui sous-tendent ces études. L'Office a examiné ces renseignements et juge que la méthodologie et les hypothèses utilisées sont raisonnables.

L'Office était en conséquence convaincu que les prix à l'exportation permettraient de récupérer les coûts applicables assumés au Canada.

Dans le cadre de l'évaluation des incidences environnementales de la demande, l'Office s'est estimé lié par sa propre loi habilitante et par le *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*, DORS/84-467 («*Décret sur le PEEE*»). Il a conclu (aux pp. 37 et 38):

L'Office reconnaît que lorsque des services d'électricité négocient entre eux des contrats garantis à long terme, il peut y avoir des circonstances où de telles ententes impliquent de la puissance devant venir d'installations de production qui seront construites à une date ultérieure et pour lesquelles les évaluations environnementales nécessaires ne sont pas encore complétées au moment où les demandes d'exportation sont déposées. Les contrats visant les projets d'exportation présentement devant l'Office ont été négociés sur cette base. Néanmoins, pour arriver à prendre une décision sur les demandes d'Hydro-Québec et à respecter ses obligations en vertu de la Loi et du *Décret sur le PEEE*, l'Office doit tenir compte des répercussions environnementales résultant de la construction de nouvelles installations.

L'Office a accueilli les demandes sous réserve de plusieurs conditions. En particulier, pour s'assurer que l'électricité devant être exportée proviendrait d'installations ayant fait l'objet des évalua-

appropriate environmental reviews, the Board attached to the licence the following two conditions:

10. This licence remains valid to the extent that

(a) any production facility required by Hydro-Québec to supply the exports authorized herein, for which construction had not yet been authorized pursuant to the evidence presented to the Board at the EH-3-89 hearing that ended on 5 March 1990, will have been subjected, prior to its construction, to the appropriate environmental assessment and review procedures as well as to the applicable environmental standards and guidelines in accordance with federal government laws and regulations.

(b) Hydro-Québec, following any of the environmental assessment and review procedures mentioned in subcondition (a), will have filed with the Board

i) a summary of all environmental impact assessments and reports on the conclusions and recommendations arising from the said assessment and review procedures;

ii) governmental authorizations received; and

iii) a statement of the measures that Hydro-Québec intends to take to minimize the negative environmental impacts.

11. The generation of thermal energy to be exported hereunder shall not contravene relevant federal environmental standards or guidelines.

tions environnementales appropriées, il a assujetti la licence aux deux conditions suivantes:

10. La présente licence ne demeure valide que dans la mesure où

a) toute installation de production requise par Hydro-Québec pour alimenter les exportations autorisées par la présente et dont la construction n'était pas encore autorisée conformément à la preuve faite devant l'Office lors de l'audience EH-3-89 terminée le 5 mars 1990, aura été soumise, préalablement à sa construction, aux évaluations et examens en matière d'environnement ainsi qu'aux normes environnementales applicables en vertu des lois et règlements du gouvernement fédéral.

b) Hydro-Québec, suite à tout processus d'évaluation et d'examen en matière d'environnement, mentionné à la sous-modalité a), aura déposé auprès de l'Office

i) un sommaire de toutes les évaluations environnementales et de tous les rapports faisant état des conclusions et des recommandations de ces études et rapports;

ii) les autorisations gouvernementales reçues; et

iii) un énoncé des mesures qu'Hydro-Québec entend prendre pour atténuer les impacts environnementaux défavorables.

11. La production de l'énergie thermique qui sera exportée en vertu de la présente ne doit pas contrevenir aux normes ni aux lignes directrices fédérales pertinentes en matière d'environnement.

B. *Federal Court of Appeal*, [1991] 3 F.C. 443 (Pratte, Marceau and Desjardins JJ.A.)

Writing for the Federal Court of Appeal, Marceau J.A. dealt first with the validity of conditions 10 and 11 to the licence. He noted that the Board had imposed those conditions so as to meet its perceived mandate under the *EARP Guidelines Order*. In his view, this raised the questions of the application of this Order to the Board, and to Hydro-Québec as an agent of the Crown in right of the Province, as well as the question of the constitutional validity of the Order itself.

B. *La Cour d'appel fédérale*, [1991] 3 C.F. 443 (les juges Pratte, Marceau et Desjardins)

S'exprimant au nom de la Cour d'appel fédérale, le juge Marceau a tout d'abord examiné la validité des conditions 10 et 11 de la licence. Il a fait remarquer que l'Office avait imposé ces conditions parce qu'il s'est estimé lié par le *Décret sur le PEEE*. À son avis, ceci a soulevé les questions de l'application de ce Décret à l'Office et à Hydro-Québec en tant que mandataire de la Couronne du chef de la province ainsi que la question de la validité constitutionnelle du Décret même.

However, Marceau J.A. held that he did not have to deal with these concerns, since it was clear that, in this case, the imposition by the Board of the conditions to the licence emanated from its concerns as to the potential effects of the eventual construction of the production facilities planned to meet the increased demand for electrical power. Marceau J.A. held that the Board had no jurisdiction to make the granting of a licence to export certain goods subject to conditions which pertained to their production. He stated (at pp. 450-51):

The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. Section 2 of the Act defines what is meant by export (in French "*exportation*") in the case of electricity:

2. . .

"export" means, with reference to

(a) power, to send from Canada by a line of wire or other conductor power produced in Canada. . .

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. . . . However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

Marceau J.A. held that the Board had therefore exceeded its jurisdiction in affixing to the licence conditions 10 and 11. That did not mean, however, that the entire decision was vitiated. Marceau J.A.

Toutefois, le juge Marceau a conclu qu'il n'avait pas à examiner ces questions puisque, de toute évidence, l'Office avait assujetti la licence à des conditions parce qu'il était préoccupé des effets possibles de l'éventuelle construction d'installations de production prévues pour répondre à la demande accrue d'électricité. Le juge Marceau a conclu que l'Office n'avait pas compétence pour assujettir la délivrance d'une licence d'exportation de certains biens à des conditions relatives à la production de ces biens. Il a affirmé, aux pp. 450 et 451:

Les facteurs qui peuvent être pertinents dans l'examen d'une demande d'autorisation d'exporter de l'électricité et les conditions auxquelles l'Office peut assujettir son autorisation ne peuvent évidemment se rapporter à autre chose qu'à l'exportation de l'électricité. Or, l'article 2 de la Loi définit ce qu'il faut entendre par exportation (en anglais «*export*») dans le cas d'électricité:

2. . .

«exportation»

a) Dans le cas de l'électricité, le fait de transporter de l'électricité produite au Canada à l'extérieur du pays par une ligne de fil métallique ou un autre conducteur. . .

Il me paraît clair que l'exportation, telle que l'entend la Loi dans le cas de l'électricité, ne couvre pas la production elle-même, et ce n'est que rationnel qu'il en soit ainsi. Bien sûr, celui qui veut exporter un bien doit le produire ou se le procurer ailleurs, mais quand il le produit ou se le procure ailleurs il ne l'exporte pas, et quand il l'exporte il ne le produit pas.

Personne, je pense, ne songerait un moment à contester qu'en considérant une demande d'autorisation d'exporter de l'électricité, l'Office soit tenu de s'inquiéter des conséquences environnementales, puisqu'il y va de l'intérêt public. [. . .] Mais ce sont les conséquences environnementales de l'exportation dont il peut uniquement s'agir, soit les conséquences sur l'environnement du «fait de transporter de l'électricité produite au Canada à l'extérieur du pays».

Le juge Marceau a statué que l'Office avait en conséquence clairement excédé sa compétence en imposant les conditions 10 et 11. Toutefois, cela ne voulait pas dire pour autant que l'ensemble de la

found the two sections to be severable from the remainder of the licence.

Marceau J.A. then considered the contention of the appellants that the Board erred in its decision to grant the licences. The appellants argued that the Board erred in taking into account the amendments to the *National Energy Board Act* which came into force while its decision was reserved. In the version of the Act in force at the time of the application, and at the time of the subsequent hearing, applicants for licences were required to satisfy the Board that the export price charged would recover the appropriate share of the costs incurred in Canada. This condition was deleted from the version of the Act in force at the time that the decision was rendered. The appellants argued that, in following the new provisions, the Board applied the requirement of cost recovery incorrectly.

Marceau J.A. noted that the new Act was designed to deregulate and simplify the licence application process. The express requirement of cost recovery had been deleted. The new provisions simply required the Board to take into consideration all factors which appeared to it to be relevant. Marceau J.A. held that the Board was correct in considering itself bound by the new provisions of the Act. Nonetheless, he found that, even if he was incorrect in so concluding, the argument of the appellants did not lead anywhere. The Board chose, despite the amendments, to analyze the application in light of the former price criteria.

The appellants argued in the alternative that, if the Board did consider the issue of cost recovery, it could not have concluded that this requirement was met, since there was no direct evidence before the Board on this point. Marceau J.A. agreed that the evidence on this point was not direct in all respects. In particular, the financial data relating to proposed production facilities was reviewed by an accountant, who then testified as to its veracity. He held, however, that nothing required the Board to decide this point on direct evidence. There was

décision était viciée. Il a conclu que les deux conditions pouvaient être retranchées du reste de la licence.

Le juge Marceau a ensuite examiné l'argument des appelants selon lequel l'Office aurait commis une erreur en délivrant les licences. Les appelants ont soutenu que l'Office a commis une erreur en tenant compte des modifications apportées à la *Loi sur l'Office national de l'énergie*, entrées en vigueur au cours de la prise en délibéré. Dans la version de la Loi en vigueur à l'époque de la demande, et au moment de l'audition subséquente, les demandeurs de licences devaient convaincre l'Office que le prix à l'exportation allait permettre de récupérer une bonne proportion des coûts assumés au Canada. Cette condition a été retranchée dans la version de la Loi en vigueur à l'époque de la décision. Les appelants ont soutenu que l'Office, en appliquant la nouvelle disposition, a incorrectement appliqué l'exigence en matière de récupération des coûts.

Le juge Marceau a précisé que la nouvelle Loi visait la déréglementation et la simplification du processus de demande de licences. On y a supprimé l'exigence explicite de récupération des coûts. Les nouvelles dispositions exigent simplement que l'Office tienne compte de tous les facteurs qui lui semblent pertinents. Le juge Marceau a affirmé que l'Office avait eu raison de se considérer lié par les nouvelles dispositions. Néanmoins, il a ajouté que, même s'il avait tort de tirer cette conclusion, l'argument des appelants ne pourrait conduire nulle part. L'Office a choisi, malgré les modifications, d'analyser la demande par rapport aux anciens critères relatifs au prix.

Subsidiairement, les appelants ont soutenu que l'Office, même s'il avait examiné la question de la récupération des coûts, ne pouvait conclure que cette exigence avait été respectée parce qu'il n'avait de cela aucune preuve directe devant lui. Le juge Marceau a reconnu que la preuve n'était pas directe en tous points. Tout particulièrement, les données financières sur les installations de production proposées ont été examinées par un comptable qui a ensuite témoigné de leur exactitude. Cependant, le juge Marceau a conclu que rien

persuasive indirect evidence before it. To reevaluate the weight of this evidence was not a task for the courts, since appeals from decisions of the Board were limited by s. 22 of the *National Energy Board Act* to questions of law or jurisdiction.

IV. Issues on Appeal

Although the parties to this appeal have made numerous specific allegations of error on the part of the Board and of the Court of Appeal, discussed individually below, the issues in this appeal can be reduced to the following three questions:

1. Did the Federal Court of Appeal err in holding that the National Energy Board acted within its jurisdiction in granting the export licences to the respondent Hydro-Québec?
2. Did the Federal Court of Appeal err in holding that the National Energy Board erred in the exercise of its jurisdiction in its imposition of conditions 10 and 11 of the licences?
3. If the Federal Court of Appeal was not in error with respect to these two findings, did it nonetheless err in holding that conditions 10 and 11 were severable from the rest of the licences?

V. Analysis

The appellants challenge on a number of grounds the validity of the decision of the Board to grant the export licences. First, the appellants argue that the Board did not properly conduct the required social cost-benefit review. Second, they argue that the failure of the Board to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness by depriving the appellants of the opportunity for full participation in the review process. Third, the appellants argue that the Board owed them a fiduciary duty in the exercise of its deci-

n'oblige l'Office à se fonder sur une preuve directe pour prendre une décision sur cette question. L'Office avait devant lui des éléments de preuve indirects convaincants. Il ne relevait pas des tribunaux de réévaluer le poids de cette preuve puisqu'un appel interjeté en vertu de l'art. 22 de la *Loi sur l'Office national de l'énergie* ne peut porter que sur des questions de droit et de compétence.

IV. Les questions en litige

Bien que les parties en l'espèce aient spécifiquement soulevé de nombreuses erreurs que l'Office et la Cour d'appel auraient commises, qui seront examinées séparément plus loin, trois questions se dégagent du présent pourvoi:

1. La Cour d'appel fédérale a-t-elle commis une erreur en statuant que l'Office national de l'énergie a agi dans les limites de sa compétence en délivrant les licences d'exportation à l'intimée Hydro-Québec?
2. La Cour d'appel fédérale a-t-elle commis une erreur en statuant que l'Office national de l'énergie a commis une erreur dans l'exercice de sa compétence en imposant les conditions 10 et 11 des licences?
3. Si la Cour d'appel fédérale n'a pas commis d'erreur relativement à ces deux conclusions, en a-t-elle néanmoins commis une en statuant que les conditions 10 et 11 pouvaient être retranchées du reste des licences?

V. Analyse

Les appelants contestent pour un certain nombre de motifs la décision de l'Office de délivrer les licences d'exportation. Premièrement, l'Office n'aurait pas correctement procédé à l'analyse de rentabilité sociale nécessaire. Deuxièmement, en n'exigeant pas qu'Hydro-Québec divulgue en totalité les hypothèses et la méthodologie à la base de l'analyse de rentabilité, l'Office aurait contrevenu aux exigences en matière d'équité procédurale en privant les appelants de la possibilité de participer pleinement au processus d'examen. Troisièmement, l'Office aurait, envers eux, dans l'exercice de son pouvoir décisionnel, une obligation fidu-

sion-making power, and that the requirements of this duty were not fulfilled. Fourth, the appellants assert that the decision of the Board affects their aboriginal rights, and that the Board is therefore required to meet the justification test set out by this Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Finally, the appellants submit that the Board failed to follow the requirements of its own Act and of the *EARP Guidelines Order* in conducting its environmental impact assessment. I will consider each of these arguments in turn.

A. *Social Cost-Benefit Review*

The appellants argue that the Board was required to carry out a social cost-benefit review which would consider all direct and indirect costs, including economic and social costs, arising from the exports for which the licences were sought. The appellants claim that, in relying on solely the indirect evidence of Hydro-Québec and the fact that the proposal had been approved by the government of Quebec, the Board failed to carry out this review properly. The duty to carry out such a review is ostensibly found in the *National Energy Board Part VI Regulations*, s. 6(2)(z)(i), which states:

> 6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.
>
> (2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include
>
> . . .
>
> (z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price
>
> (i) would recover its appropriate share of the costs incurred in Canada,

It appears that both the *Canadian Electricity Policy*, September 1988, and the Board's own internal report, entitled *The Regulation of Electricity Exports*, June 1987, interpret this requirement

ciaire et n'y aurait pas satisfait. Quatrièmement, la décision de l'Office toucherait leurs droits ancestraux et l'Office serait de ce fait tenu de satisfaire au critère de justification formulé par notre Cour dans l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075. Enfin, l'Office aurait omis de respecter les exigences de sa loi habilitante et du *Décret sur le PEEE* lorsqu'il a procédé à l'évaluation environnementale. J'examinerai maintenant chacun de ces arguments séparément.

A. *L'analyse de rentabilité sociale*

Les appelants soutiennent que l'Office était tenu de procéder à une analyse de rentabilité sociale devant tenir compte de tous les coûts directs et indirects (y compris des coûts économiques et sociaux) des exportations visées par les demandes de licences. À leur avis, en se fondant seulement sur les éléments de preuve indirects présentés par Hydro-Québec et sur l'approbation de la proposition par le gouvernement du Québec, l'Office n'aurait pas correctement procédé à cette analyse. L'obligation de procéder à une telle analyse ressort clairement du sous-al. 6(2)z)(i) du *Règlement sur l'Office national de l'énergie (Partie VI)*:

> 6. (1) Tout requérant d'une licence pour l'exportation de force motrice doit fournir à l'Office les renseignements exigés par ce dernier.
>
> (2) Sans restreindre la portée générale du paragraphe (1), les renseignements que tout requérant décrit au paragraphe (1) est tenu de fournir doivent, sauf autorisation contraire de l'Office, comprendre
>
> . . .
>
> z) une preuve démontrant que le prix que doit exiger le requérant pour la puissance et l'énergie électriques destinées par lui à l'exportation est juste et raisonnable par rapport à l'intérêt public et, en particulier, que le prix d'exportation
>
> (i) permettra la récupération d'une bonne proportion des coûts assumés au Canada,

D'après *La Politique canadienne de l'électricité*, septembre 1988, et le rapport interne de l'Office intitulé: *Réglementation fédérale des exportations d'électricité*, paru en juin 1987, l'exigence en

to mean that all direct and indirect costs, including environmental, land use, and economic costs ("social costs"), should be considered. However, I need express no opinion on the correctness of these interpretations or on whether the requirement in the regulations that the applicant for a licence furnish such evidence also means that the Board is required to consider it, especially in light of s. 119.08(2) of the Act, which gives the Board the discretion to determine which considerations are relevant to its decision, and of the terms of s. 6(2) itself, which gives the Board the authority to dispense with proof of any of the items specifically enumerated thereafter. In this case, it is clear that the Board considered that evidence of the nature and recoverability of such costs was relevant to its decision (reasons of the Board, at p. 29).

While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

However, in this appeal, it cannot be said that the Board was without evidence on which it could reasonably have concluded that the consideration of cost recoverability was satisfied. The Board, in its decision, summarized the evidence given by Hydro-Québec on this point as follows (at p. 13):

> Hydro-Québec did not supply the Board with copies of the cost-benefit analyses for the advancement of facilities required to meet its obligations under the two contracts. Nevertheless it did provide information on the methodology, assumptions and the revenues used in the

question signifierait qu'il y a lieu de tenir compte de tous les coûts directs et indirects, y compris les coûts environnementaux, l'utilisation des terres et les coûts économiques (les «coûts sociaux»). Cependant, je n'ai pas à déterminer si cette interprétation est correcte ou si l'exigence réglementaire imposée au demandeur de fournir ce genre de preuve signifie aussi que l'Office doit en tenir compte, particulièrement en raison du par. 119.08(2) de la Loi, qui lui donne le pouvoir discrétionnaire de déterminer quels facteurs sont pertinents relativement à sa décision et du libellé même du par. 6(2), qui lui donne le pouvoir de ne pas exiger la preuve des éléments qui y sont ensuite énumérés. En l'espèce, il est clair que l'Office a jugé que la preuve de la nature et de la récupération possible des coûts était pertinente relativement à sa décision (motifs de l'Office, à la p. 29).

Bien que les intimés aient raison de soutenir qu'il y a lieu de faire preuve de retenue judiciaire à l'égard de l'appréciation de la preuve faite par l'Office dans l'exercice de son pouvoir discrétionnaire, ce principe ne peut être invoqué pour valider une décision non fondée sur la preuve ou fondée sur des facteurs non pertinents. Lorsque l'Office décide qu'un facteur particulier est pertinent pour les fins de sa décision, il doit exister certains éléments de preuve qui appuient la conclusion sur ce point. L'Office ne doit pas agir de façon déraisonnable dans l'examen des éléments de preuve qu'il demande pour rendre sa décision: *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722.

Cependant, en l'espèce, on peut affirmer que l'Office disposait d'éléments de preuve lui permettant de raisonnablement conclure que le facteur de la récupération des coûts avait été respecté. Dans sa décision, l'Office a résumé ainsi les éléments de preuve présentés par Hydro-Québec sur ce point (à la p. 13):

> Hydro-Québec n'a pas remis à l'Office une copie des analyses des coûts de devancement des installations nécessaires pour remplir les obligations des deux contrats. Néanmoins, elle a fourni les renseignements concernant la méthodologie, les hypothèses et les revenus

private and social cost-benefit analyses. It also underlined that the costs and benefits associated with the environmental impacts of the advancement of production facilities had been considered, including the funds necessary to compensate, if required, the economic losses resulting from impacts on forests, trapping regions or even agricultural lands.

The Applicant provided additional proof to demonstrate that the export price would allow recovery of the appropriate costs in Canada while maintaining the confidentiality of certain of its financial information. To that end, Hydro-Québec hired a chartered accountant whose mandate was to undertake verification of the accuracy of the assessment. . . .

The accountant testified before the Board and was cross-examined by the appellants.

It is, of course, insufficient for Hydro-Québec to ask the Board simply to accept a bare assertion that all costs will be recovered. However, that is not what happened in this case. Hydro-Québec provided evidence on which the Board could reasonably conclude that the requirement in s. 6(2)(z)(i) was met. This is evident from the conclusions of the Board, which state (at pp. 30-31):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than $24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable. . . .The fact that the provincial government has concurred with Hydro-Québec by approving the export contracts. . . suggests to the Board that the exports are projected to yield net benefits to Québec.

Interveners raised concerns with regard to potential adverse environmental impacts outside of Québec but any specific costs that might be associated with such impacts were not identified. There were no other identified costs. . . .

Finally, the Board is convinced that the parties to these contracts have negotiated at arm's length and under free

utilisés pour effectuer les études de rentabilité privée et sociale. Elle a aussi souligné que les coûts et bénéfices des impacts environnementaux associés au devancement des équipements de production ont été considérés, y compris les montants nécessaires pour indemniser, s'il y a lieu, ceux qui subiront des pertes économiques associées à la modification des forêts, des zones de trappage ou encore des terres agricoles.

Le demandeur a fourni une preuve additionnelle visant à démontrer que les prix à l'exportation permettraient la récupération de la proportion adéquate des coûts assumés au Canada, tout en respectant le caractère confidentiel de certaines données financières. À cette fin, Hydro-Québec a confié à un comptable agréé le mandat de faire une vérification comptable. . .

Le comptable a témoigné devant l'Office et a été contre-interrogé par les appelants.

Il ne suffit pas, bien entendu, qu'Hydro-Québec demande simplement à l'Office d'accepter une simple affirmation qu'il y aura récupération de tous les coûts. Cependant, ce n'est pas ce qui s'est passé en l'espèce. Hydro-Québec a fourni des éléments de preuve à partir desquels l'Office pouvait raisonnablement conclure que l'exigence visée au sous-al. 6(2)z)(i) était satisfaite. Cela ressort des conclusions de l'Office (aux pp. 30 et 31):

L'Office constate qu'Hydro-Québec a fourni l'information quant à l'importance des revenus qu'elle tirerait des ventes à l'exportation, lesquels seraient de l'ordre de 24 milliards de dollars [. . .]. En outre, Hydro-Québec a fourni les renseignements concernant la méthodologie utilisée pour effectuer les études de rentabilité de même que les différentes hypothèses économiques, financières et autres qui sous-tendent ces études. L'Office a examiné ces renseignements et juge que la méthodologie et les hypothèses utilisées sont raisonnables. [. . .] Le fait que le gouvernement provincial a donné son accord à Hydro-Québec [. . .] indique à l'Office qu'il est prévu que les projets d'exportation vont se traduire en un bénéfice net pour le Québec.

Les intervenants ont fait part de leur inquiétude concernant les effets négatifs que ces projets pourraient avoir sur l'environnement hors du Québec, sans toutefois y associer des coûts spécifiques. Quant aux coûts des autres effets négatifs possibles [. . .], cette question n'a pas été soulevée. [. . .]

Finalement, l'Office est convaincu qu'il s'agit de contrats négociés entre deux parties indépendantes dans un

market conditions. The Board thus has no reason to believe that there would not be net benefits accruing from the proposed exports.

The interveners argued that the final sentence in this passage shows that the Board made its decision in the absence of positive evidence on cost recovery. When the sentence is read in context, however, it indicates rather that the Board was satisfied on the evidence before it that the relevant costs would be recovered. The Board cannot simply rely on the conclusions of the respondent as to cost recovery without evaluating their validity, but that does not appear to have been the situation here. Moreover, a prohibition on the reliance on the unsubstantiated affirmations of the applicant should not be transformed into a duty on the Board to conduct its own independent analysis where such an undertaking is unnecessary.

The Board did consider relevant to the issue of cost recovery, in addition to the evidence presented by Hydro-Québec, the fact that the export contracts had received the approval of the province. Evidence of such approval is expressly referred to in s. 6(2)(*y*) of the *Part VI Regulations* as a factor which the Board may wish to consider. The appellants contend, however, that this approval is irrelevant to the s. 6(2)(z)(i) cost-benefit analysis, as the orders-in-council pursuant to the *Hydro-Québec Act*, R.S.Q., c. H-5, under which provincial approval was given, require only that the contracts be consistent with sound financial management, not that they be in the public interest. Section 24 of the *Hydro-Québec Act* requires Hydro-Québec to maintain the rates charged for power at a sufficient level to defray operating expenditures and interest on its debt. In my view, sound financial management of a public utility is part of the public interest. While such a factor is obviously only one of the many relevant considerations in such a determination, it cannot be said that evidence of governmental approval is wholly irrelevant in the context of cost recovery, such that the Board committed a jurisdictional error in considering it.

marché de libre concurrence. Par conséquent, l'Office n'a pas lieu de croire que ces projets d'exportations ne rapporteraient pas de bénéfices nets.

D'après les intervenants, la dernière phrase de ce passage laisse entendre que l'Office a pris sa décision sans aucune preuve positive de la récupération des coûts. Toutefois, lorsqu'on la lit dans son contexte, cette phrase indique plutôt que l'Office était convaincu, à partir de la preuve, qu'il y aurait récupération des coûts pertinents. L'Office ne peut pas simplement se fier aux conclusions de l'intimé quant à la récupération des coûts sans en évaluer la validité, mais ce ne semble pas être ce qui s'est produit en l'espèce. En outre, l'interdiction de se fier à des affirmations non corroborées du demandeur ne devrait pas devenir pour l'Office une obligation de procéder à sa propre analyse dans les cas où cela n'est pas nécessaire.

Outre les éléments de preuve présentés par Hydro-Québec, l'Office a considéré comme pertinent, relativement à la question de la récupération des coûts, le fait que la province avait autorisé les contrats d'exportation. La preuve d'une telle autorisation est explicitement mentionnée à l'al. 6(2)*y*) du *Règlement (Partie VI)* comme facteur dont l'Office peut tenir compte. Toutefois, les appelants soutiennent que cette autorisation n'a aucun rapport avec l'analyse de rentabilité visée au sous-al. 6(2)z)(i), puisque les décrets pris conformément à la *Loi sur l'Hydro-Québec*, L.R.Q., ch. H-5, en vertu desquels l'autorisation de la province a été donnée, exigent seulement que les contrats soient compatibles avec les bonnes pratiques de gestion financière, et non qu'ils soient dans l'intérêt public. L'article 24 de la *Loi sur l'Hydro-Québec* exige qu'Hydro-Québec maintienne ses taux d'énergie à un niveau suffisant pour couvrir les frais d'exploitation et l'intérêt du capital engagé. À mon avis, les bonnes pratiques de gestion financière d'une entreprise de service public font partie de l'intérêt public. Bien que la preuve d'une autorisation gouvernementale constitue un facteur parmi tant d'autres à considérer, on ne peut affirmer que cette preuve n'a aucun rapport avec la récupération des coûts et que l'Office, en l'examinant, a commis une erreur dans l'exercice de sa compétence.

I also reject the appellants' argument that the mere fact that all contracts in Quebec require such approval renders consideration of this factor by the Board an improper delegation of its decision-making power. The Board must, of course, make its own decision as to whether the cost-benefit requirement is satisfied. It cannot delegate that responsibility to the Government of Quebec or to any other body. In this case, for such a delegation to have occurred, the Board would have had to treat the mere existence of government approval as sufficient in and of itself to satisfy the cost-benefit requirement, without any independent consideration of the issue. But that was not the case here. Therefore, it cannot be said that there was any jurisdictional error committed by the Board in this aspect of its decision.

Je rejette également l'argument des appelants que le simple fait que tous les contrats en la matière doivent être ainsi autorisés au Québec a pour effet que l'examen de ce facteur par l'Office devient une délégation incorrecte de son pouvoir décisionnel. Il va sans dire que l'Office doit prendre sa propre décision quant à savoir si l'on a satisfait à l'exigence relative à l'analyse de rentabilité. Il ne peut déléguer cette responsabilité au gouvernement du Québec ni à aucun autre organisme. Pour qu'il y ait eu une telle délégation en l'espèce, il aurait fallu que l'Office considère que la simple existence d'une autorisation gouvernementale suffit en soi pour satisfaire à l'exigence de l'analyse de rentabilité, sans examen distinct de la question. Toutefois, tel n'a pas été le cas en l'espèce. En conséquence, on ne peut soutenir que l'Office a commis une erreur dans l'exercice de sa compétence relativement à cet aspect de sa décision.

B. *Opportunity for Fair Participation in the Review Process*

Given my conclusions on the nature and scope of the cost-benefit review undertaken by the Board, the appellants' arguments relating to procedural fairness can be dispensed with rather simply. The appellants argue that the Board breached the requirements of procedural fairness in failing to require disclosure to the appellants by Hydro-Québec of all information pertinent to the issue of cost recovery. In particular, they point to the failure of the Board to require Hydro-Québec to reveal in full the assumptions and methodologies on which its cost-benefit analysis was based.

In general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision-maker of sufficient information to permit meaningful participation in the hearing process: *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621 (C.A.), at pp. 624-25. The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular with the type of decision to be

B. *La possibilité de participer de façon équitable au processus d'examen*

Vu mes conclusions sur la nature et l'étendue de l'analyse de rentabilité effectuée par l'Office, les arguments des appelants relatifs à l'équité procédurale peuvent être écartés de façon plutôt succincte. À leur avis, l'Office aurait contrevenu aux exigences en matière d'équité procédurale en n'exigeant pas d'Hydro-Québec qu'elle divulgue aux appelants tous les renseignements se rapportant à la question de la récupération des coûts. Ils font tout particulièrement ressortir que l'Office n'a pas exigé d'Hydro-Québec qu'elle révèle de façon exhaustive les hypothèses et la méthodologie à la base de l'analyse de rentabilité.

En général, les exigences en matière d'équité procédurale comportent le droit de l'intéressé à la divulgation par le décideur administratif de suffisamment de renseignements pour lui permettre de véritablement participer au processus d'audition: voir *In re le Conseil de la Radio-Télévision canadienne et in re la London Cable TV Ltd.*, [1976] 2 C.F. 621 (C.A.), aux pp. 624 et 625. L'étendue de la divulgation requise pour satisfaire aux règles de justice naturelle variera en fonction des faits, plus

made, and the nature of the hearing to which the affected parties are entitled.

The issue in this case, then, is not the sufficiency of the disclosure made by Hydro-Québec. That relates to the question, discussed above, of whether there was evidence before the decision-maker on which it could reasonably have reached the decision which it did: *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219, at p. 223, *per* Rand J. Rather, the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation in the hearing, such that they were treated fairly in all the circumstances: *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at pp. 630-31; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 654; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at p. 226, *per* McLachlin J. (dissenting on another ground).

In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure to the appellants. As noted above, the Board had sufficient evidence before it to make a valid finding that all costs would be recovered. The appellants were given access to all the material that was before the Board. The Board specifically found that the appellants themselves presented no evidence of added social costs, and did not call into question the veracity of Hydro-Québec's report. Therefore, it cannot be said that, on this basis, the Board erred in its decision to grant the licences.

C. *Fiduciary Duty*

The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making

particulièrement du type de décision à prendre et de la nature de l'audition à laquelle ont droit les parties concernées.

La question en litige n'est pas de savoir si les faits divulgués par Hydro-Québec étaient suffisants. Cette question se rattache en fait à celle de savoir, comme nous l'avons déjà analysé, si le décideur avait devant lui des éléments de preuve à partir desquels il pouvait raisonnablement prendre la décision qu'il a prise: *Parke, Davis & Co. c. Fine Chemicals of Canada Ltd.*, [1959] R.C.S. 219, à la p. 223, le juge Rand. La question est plutôt de savoir si l'Office a fait aux appelants une divulgation suffisante pour leur permettre de véritablement participer à l'audition, leur accordant ainsi un traitement équitable dans toutes les circonstances: *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, aux pp. 630 et 631; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, à la p. 654; *Lakeside Colony of Hutterian Brethren c. Hofer*, [1992] 3 R.C.S. 165, à la p. 226, le juge McLachlin (dissidente pour un autre motif).

Dans l'exercice de sa fonction décisionnelle, l'Office a le pouvoir discrétionnaire de déterminer la preuve qui est pertinente relativement à sa décision. On n'a pas démontré en l'espèce que ce pouvoir a été exercé illégitimement de façon à entraîner une divulgation insuffisante aux appelants. Comme je l'ai déjà signalé, l'Office disposait d'une preuve suffisante pour conclure validement qu'il y aurait récupération de tous les coûts. Les appelants ont eu accès à tous les documents déposés devant l'Office. Ce dernier a tout particulièrement fait remarquer que les appelants n'avaient pas présenté de preuve de l'existence de coûts sociaux additionnels et qu'ils n'ont pas mis en doute la véracité du rapport d'Hydro-Québec. En conséquence, on ne peut affirmer pour ce motif que l'Office a commis une erreur dans sa décision de délivrer les licences.

C. *L'obligation fiduciaire*

Les appelants soutiennent que l'Office a à leur égard, compte tenu de leur statut d'autochtones, une obligation fiduciaire dont il devrait tenir

process used in considering applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this Court in *R. v. Sparrow*, *supra*, extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of govern-

compte dans l'examen des demandes de licences d'exportation. Selon les appelants, l'obligation fiduciaire de l'État envers les peuples autochtones, comme notre Cour l'a reconnu dans l'arrêt *R. c. Sparrow*, précité, existe aussi pour l'Office, à titre de mandataire du gouvernement et de création du législateur, dans l'exercice des pouvoirs qui lui ont été délégués. Cette obligation existe chaque fois qu'une décision prise conformément à un processus de réglementation fédérale est susceptible de toucher les droits ancestraux des peuples autochtones.

Les appelants soutiennent qu'il s'agit d'une double obligation: celle d'assurer une participation complète et équitable des appelants à l'audience et celle de tenir compte, dans le cadre du processus décisionnel, de ce qui est dans l'intérêt des appelants. Les appelants affirment que cette obligation comporte des droits qui outrepassent ceux créés par les règles de justice naturelle et que l'Office aurait dû, tout au moins, exiger que soient divulgués aux appelants tous les renseignements nécessaires à l'établissement de leur défense. Par contre, les intimés contestent que cette obligation existe et soutiennent, advenant qu'elle existe, que l'Office ne s'en est pas acquitté.

Il est maintenant bien établi qu'il existe des rapports fiduciaires entre l'État fédéral et les peuples autochtones du Canada: voir l'arrêt *Guerin c. La Reine*, [1984] 2 R.C.S. 335. Néanmoins, il faut se rappeler qu'il n'y a pas une obligation fiduciaire pour chaque aspect des rapports entre fiduciaire et bénéficiaire: voir l'arrêt *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574. La nature des rapports entre les parties définit l'étendue, voire les limites, des obligations imposées. Les cours de justice doivent veiller à ne pas porter atteinte à l'indépendance des tribunaux quasi judiciaires et des organismes décisionnels en leur imposant des obligations fiduciaires exigeant d'eux qu'ils prennent des décisions comme s'ils avaient une obligation fiduciaire.

Lors des plaidoiries, les avocats des appelants ont reconnu que l'on ne pouvait soutenir que les cours de justice, en tant que création du gouverne-

ment, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 385. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver A922935, unreported, and *Dick v. The Queen*, F.C.T.D., June 3, 1992, Ottawa T-951-89, unreported. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduci-

ment, avaient une telle obligation dans l'exercice de leurs fonctions judiciaires. À mon avis, les facteurs qui servent à déterminer si une telle obligation régit le processus décisionnel de l'Office en matière de délivrance de licences d'exportation diffèrent peu de ceux qui sont appliqués aux cours de justice. L'Office remplit à cet égard une fonction quasi judiciaire: *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 385. Bien que cette caractérisation ne soit peut-être pas assortie de toutes les exigences de nature procédurale et autres applicables à une cour de justice, elle est en soi incompatible avec l'exigence voulant qu'il existe des rapports d'une extrême bonne foi entre l'Office et une partie qui comparaît devant lui.

C'est pour ce motif que je ne trouve pas utile les décisions que les appelants m'ont citées à titre indicatif de l'évolution de la tendance: *Gitludahl c. Minister of Forests*, C.S.C.-B., le 13 août 1992, Vancouver A922935, inédit, et *Dick c. La Reine*, C.F. 1re inst., le 3 juin 1992, Ottawa, T-951-89, inédit. Ces décisions portaient, respectivement, sur le pouvoir de décision du ministre des Forêts et la conduite de l'État lorsqu'il se trouve partie adverse dans un litige avec les peuples autochtones. Les facteurs susceptibles d'entraîner l'application d'une obligation fiduciaire dans ces contextes sont fort différents de ceux soulevés dans le contexte d'une demande de licence présentée à un organisme décisionnel indépendant sans lien de dépendance avec le gouvernement.

En conséquence, je conclus que les rapports fiduciaires entre l'État et les appelants n'imposent pas à l'Office une obligation de prendre des décisions dans l'intérêt des appelants, ou encore de modifier son processus d'audience de façon à imposer des exigences additionnelles de divulgation. Lorsque l'on définit ainsi l'obligation fiduciaire, elle n'incombe pas davantage à ces tribunaux qu'aux cours de justice. Ainsi, l'Office n'avait aucune obligation de cette nature dans l'exercice de son pouvoir décisionnel.

En outre, même si notre Cour devait supposer que l'Office, dans le cadre de son analyse, aurait dû tenir compte de l'existence de rapports fidu-

ary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec. This argument must therefore fail for the same reasons as the arguments relating to the nature of the review conducted by the Board.

D. *Aboriginal Rights*

This Court, in *R. v. Sparrow*, *supra*, recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow*.

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).

The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement, incorporated in the *James Bay and*

ciaires entre l'État et les appelants, je suis convaincu, pour les motifs que j'ai mentionnés relativement à la procédure suivie par l'Office, que les mesures qu'il a prises auraient permis de satisfaire aux exigences d'une telle obligation. Rien n'indique que les appelants n'ont pas eu pleinement l'occasion d'être entendus. Ils ont eu accès à tous les éléments de preuve déposés devant l'Office, ont pu présenter des arguments et une réplique et ont également eu le droit de contre-interroger les témoins assignés par l'intimée Hydro-Québec. Cet argument doit, en conséquence, échouer pour les mêmes motifs que les arguments relatifs à la nature de l'examen réalisé par l'Office.

D. *Les droits ancestraux*

Dans l'arrêt *R. c. Sparrow*, précité, notre Cour a reconnu la relation qui existe entre la reconnaissance et la confirmation des droits ancestraux inscrits au par. 35(1) de la *Loi constitutionnelle de 1982* d'une part, et les rapports fiduciaires traditionnels entre l'État et les peuples autochtones. Ce sont ces rapports qui indiquent que l'exercice du pouvoir souverain peut être restreint lorsqu'il constitue une atteinte injustifiable aux droits ancestraux. En l'espèce, les appelants soutiennent que la décision de l'Office de délivrer les licences aura une incidence négative sur leurs droits ancestraux et que l'Office était tenu de satisfaire au critère de la justification formulée dans l'arrêt *Sparrow*.

De toute évidence, l'Office doit exercer son pouvoir décisionnel, y compris celui d'interpréter et d'appliquer sa loi habilitante, conformément aux principes de la Constitution, y compris le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, il faut tout d'abord déterminer si la décision prise par l'Office, en vertu du par. 119.08(1) de la *Loi sur l'Office national de l'énergie*, pourrait avoir pour effet de porter atteinte aux droits ancestraux existants des appelants de façon à équivaloir à première vue à une violation du par. 35(1).

Les intimés sont d'avis qu'elle ne le pourrait pas. Ils soutiennent que les appelants, en adhérant à la Convention de la Baie James et du Nord québécois, incorporée dans la *Loi sur le règlement des*

Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32 ("the *James Bay Act*"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no *prima facie* infringement results from the decision of the Board.

revendications des autochtones de la Baie James et du Nord québécois, S.C. 1976-77, ch. 32 («*Loi sur la Baie James*»), ont cédé tous leurs droits ancestraux et y ont renoncé, sauf dans la mesure prévue dans la Convention. Puisqu'en soi la délivrance d'une licence ne nécessite ni ne permet la construction des nouvelles installations de production qui, selon les appelants, empiéteront sur leurs droits et que la Convention prévoit un processus d'examen en commun lorsqu'il s'agit d'autoriser une telle construction, Hydro-Québec et le procureur général du Québec soutiennent que la décision de l'Office ne présente pas d'atteinte à première vue.

The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

Pour évaluer ces arguments opposés, il est nécessaire d'examiner et d'interpréter la Convention incorporée dans la *Loi sur la Baie James*. Toutefois, les appelants ont demandé que cette question soit tranchée sans renvoi à la Convention ou à la Loi, puisqu'il existe entre les parties d'autres procédures judiciaires relativement à l'interprétation et à l'application du document en question. C'est pourquoi les appelants ne se sont pas servis de ce document pour faire valoir qu'il y aurait eu violation de leurs droits ancestraux.

In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

À mon avis, on ne peut établir d'une façon réaliste l'incidence de la décision de l'Office sur les droits des appelants sans examiner la *Loi sur la Baie James*. Les intimés soutiennent que les droits des appelants se limitent à ceux mentionnés dans ce document. La validité de cet argument ne peut être vérifiée sans une interprétation des dispositions de la Convention.

Moreover, even assuming that the decision of the Board is one that has, *prima facie*, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

En outre, même en supposant que la décision de l'Office a, à première vue, une incidence sur les droits ancestraux des appelants, et que ceux-ci ont raison de soutenir que, pour justifier son intervention, l'Office doit, à tout le moins, procéder à une analyse de rentabilité rigoureuse, approfondie et appropriée, je suis d'avis, pour les motifs que j'ai exprimés, que l'analyse effectuée en l'espèce n'était pas déficiente sur ce point.

E. *Environmental Impact Assessment*

Given that the social cost-benefit analysis appears to have been reasonable, the sole remaining ground on which the decision of the Board can be impugned relates to the environmental impact assessment carried out by the Board. It must be determined both whether the Board followed the procedures for such an assessment set out in the *National Energy Board Act* and in the *EARP Guidelines Order*, and whether the imposition of conditions 10 and 11 was a valid mechanism for fulfilling these requirements. If it is found that the conditions imposed by the Board caused it to exceed, or alternately to fail to exercise, its jurisdiction, it must also be determined whether the conditions are severable, and the order of the Board nonetheless remains valid.

(a) The *National Energy Board Act*

It is clear, and indeed it does not appear to have been seriously contested by the parties that, while the Board in making its decision was bound by the Act as amended, it was nonetheless entitled to require evidence of the factors listed in the former Act, since s. 119.08(2) of the amended Act gives to the Board the mandate to consider any matters which it deems relevant in the circumstances.

The proper interpretation of the scope of the Board's inquiry is found by looking at the procedural framework created by the Act as a whole. The procedure for the issuing of permits for the export of electricity is set out in Division II of Part VI of the Act. In the version of the Act in force at the time that the initial application was made by Hydro-Québec, each applicant was required to apply for a licence, and the factors which the Board was to consider in its determination whether to grant the licence were explicitly listed.

By the terms of the Act as amended by Bill C-23, the Board is in general now required, on application and without a public hearing, to issue permits for export (s. 119.03). However, the Board may recommend to the Minister that the granting be delayed and that an inquiry be held. Section

E. *L'évaluation environnementale*

Puisque l'analyse de rentabilité sociale paraît avoir été raisonnable, l'évaluation environnementale effectuée par l'Office représente le dernier moyen d'attaquer la décision qu'il a prise. Il faut déterminer à la fois si l'Office a suivi les modalités prévues dans la *Loi sur l'Office national de l'énergie* et dans le *Décret sur le PEEE* et si l'imposition des conditions 10 et 11 constituait une façon valide de satisfaire à ces exigences. Si l'on estime que l'Office, en imposant ces conditions, a excédé, ou subsidiairement a omis d'exercer, sa compétence, il faudra ensuite déterminer si ces conditions peuvent être retranchées et si l'ordonnance de l'Office demeure par ailleurs valide.

a) La *Loi sur l'Office national de l'énergie*

Il est évident, et cela ne semble pas avoir été sérieusement contesté par les parties, que l'Office était lié par la Loi modifiée et qu'il avait néanmoins le droit d'exiger une preuve des facteurs énumérés dans l'ancienne loi puisque le par. 119.08(2) de la Loi modifiée lui donne le mandat d'examiner tous les facteurs qui lui semblent pertinents dans les circonstances.

L'interprétation qu'il faut donner à la portée de l'examen de l'Office nécessite l'analyse de la procédure créée par l'ensemble de la Loi. La procédure de délivrance des permis d'exportation d'électricité est prévue à la Section II de la Partie VI de la Loi. Dans la version de la Loi en vigueur à l'époque de la demande initiale d'Hydro-Québec, tout requérant devait présenter une demande de licence, et les facteurs que l'Office devait prendre en considération étaient explicitement énumérés.

D'après le libellé de la Loi, modifiée par le Projet de loi C-23, l'Office est maintenant en général tenu de délivrer, sur demande et sans audience publique, les permis autorisant l'exportation (art. 119.03). Toutefois, l'Office peut suggérer par recommandation au ministre de surseoir à la déli-

119.06(2) provides that, in determining whether to make such a recommendation

> . . . the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including
>
> . . .
>
> (*b*) the impact of the exportation on the environment;
>
> . . .
>
> (*d*) such considerations as may be specified in the regulations.

If the Minister accepts this recommendation, the application is designated as one to which s. 119.08 applies, and a licence is required rather than a permit. The enumerated factors which the Board was required to take into account at this stage, in considering whether a licence should be granted, were eliminated by the amendments to the Act. Now, the section simply provides:

> **119.08** . . .
>
> (2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

Section 6 of the *Part VI Regulations* governs the information that must be furnished to the Board in an application for a licence. The section gives the Board the power both to request any information that it might require, and to dispense with the provision of any evidence that it deems unnecessary. However, s. 6(2) nonetheless sets out a long list of factors that must be furnished by the applicant unless the Board otherwise authorizes. The subsections relevant to this appeal are ss. 6(2)(z) and 6(2)(*aa*), which require:

> (z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price
>
> (i) would recover its appropriate share of the costs incurred in Canada,

vrance de permis et de tenir une telle audience. Le paragraphe 119.06(2) prévoit que, pour déterminer s'il y a lieu de procéder à la recommandation

> . . . l'Office tente d'éviter le dédoublement des mesures prises au sujet de l'exportation d'électricité par le demandeur et le gouvernement de la province exportatrice et tient compte de tous les facteurs qu'il estime pertinents et notamment:
>
> . . .
>
> *b*) des conséquences de l'exportation sur l'environnement;
>
> . . .
>
> *d*) de tout autre facteur qui peut être prévu par règlement.

Si le ministre accepte la recommandation, la demande devient alors une demande à laquelle s'applique l'art. 119.08, et une licence, plutôt qu'un permis, sera alors exigée. Les modifications apportées à la Loi ont eu pour effet d'éliminer les facteurs énumérés dont l'Office devait tenir compte à cette étape, relativement à la délivrance d'une licence. L'article prévoit maintenant:

> **119.08** . . .
>
> (2) L'Office tient compte de tous les facteurs qui lui semblent pertinents.

L'article 6 du *Règlement (Partie VI)* prévoit les renseignements qui doivent être fournis à l'Office par le demandeur d'une licence. En vertu de cette disposition, l'Office peut demander les renseignements dont il peut avoir besoin ou ne pas exiger la présentation d'éléments de preuve qu'il juge inutiles. Cependant, le par. 6(2) dresse néanmoins une longue liste de renseignements que le requérant doit fournir à l'Office, sauf autorisation contraire de celui-ci. Les dispositions pertinentes sont les al. 6(2)z) et 6(2)*aa*):

> z) une preuve démontrant que le prix que doit exiger le requérant pour la puissance et l'énergie électriques destinées par lui à l'exportation est juste et raisonnable par rapport à l'intérêt public et, en particulier, que le prix d'exportation
>
> (i) permettra la récupération d'une bonne proportion des coûts assumés au Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas. . .

(*aa*) evidence on any environmental impact that would result from the generation of the power for export.

In this case, the Board considered the environmental effects of the actual transmission of the electricity to the United States, and the resulting effects on the U.S. environment, and found them to be either neutral or beneficial. The real area of concern for negative environmental impact, as raised by the appellants and other parties appearing at the public hearing, was the future construction of production facilities, as contemplated by the development plan, to meet increased needs for power. The Board specifically found that these planned facilities would have to be built to meet the projected increase in the domestic demand for electrical power even if the licences were not approved. The Board also found that, if the licences were granted, the construction of some of these contemplated facilities would take place earlier than would otherwise be necessary. Finally, the Board held that the additional environmental effects occurring solely as a result of the acceleration of construction would be negligible.

However, the Board found that the potential environmental effects of the actual construction of these future facilities were not known with certainty. It therefore imposed conditions 10 and 11 to the licences, which require compliance with federal standards, and successful completion of existing review processes. In this appeal, the prime dispute in the area of environmental impact is whether the Board was entitled to consider, as relevant to its decision to grant the licences sought, the environmental impact of the construction by Hydro-Québec of these future facilities.

The Court of Appeal in this case found that, in deciding whether to grant a licence, the Board was limited solely to the consideration of the environmental effects of export as that term is defined in

(ii) ne sera pas inférieur au prix exigé des Canadiens pour un service équivalent dans des régions connexes . . .

aa) un témoignage quant aux répercussions que pourrait avoir sur l'environnement la production de la puissance destinée à l'exportation.

En l'espèce, l'Office a examiné les effets sur l'environnement du transport même d'électricité aux États-Unis, ainsi que ses effets sur l'environnement américain, et les a considérés comme neutres ou avantageux. Comme l'ont indiqué les appelants et les autres parties qui ont comparu lors des audiences publiques, la véritable préoccupation avait trait aux incidences environnementales négatives des futures installations de production, prévues dans le plan de développement et destinées à satisfaire à la demande accrue d'électricité. L'Office a spécifiquement reconnu que ces installations devraient être construites pour répondre à l'accroissement prévu de la demande intérieure d'électricité, même si les licences n'étaient pas accordées. L'Office a également conclu que, advenant la délivrance des licences, la construction de certaines des installations envisagées aurait lieu plus tôt qu'il ne serait autrement nécessaire. Enfin, l'Office a statué que les effets additionnels sur l'environnement liés seulement au devancement de la construction des installations seraient négligeables.

Toutefois, l'Office a conclu que les effets sur l'environnement de la construction même des futures installations n'étaient pas vraiment connus. C'est pourquoi il a imposé les conditions 10 et 11 des licences pour exiger le respect des normes fédérales ainsi que l'accomplissement des processus d'examen déjà en place. En l'espèce, le principal point en litige en ce qui concerne les incidences environnementales est de savoir si l'Office avait le droit de considérer comme pertinentes, relativement à sa décision de délivrer les licences demandées, les incidences de la construction des futures installations par Hydro-Québec.

La Cour d'appel en l'espèce a conclu que l'Office, dans sa décision de délivrer une licence, devait seulement examiner les effets des exportations sur l'environnement, au sens de la *Loi sur*

the *National Energy Board Act*. As noted above, s. 2 of the Act provides:

"export" means, with reference to

(*a*) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada, ...

As mentioned above, the Court of Appeal (at pp. 450-51) interpreted the section to mean that

. . . the Board's jurisdiction still is and has always been the granting of leave to export electricity. The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. . . .

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. The Board's function in this respect is in any case confirmed in several enactments. However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

The Board is specifically permitted by s. 119.06(2) of the *National Energy Board Act* to take into consideration, in its decision whether to recommend to the Minister that the matter proceed by way of a licence application with a public review rather than by the issuance of a permit, both the environmental effects of the exportation of the electricity, and, as specified in the Regulations, the effects on the environment of the generation of the power for export. Once a licence application review process is instituted, s. 119.08(2) of the Act gives to the Board the power to consider all factors

l'Office national de l'énergie. L'article 2 de cette loi dispose:

«exportation»

a) Dans le cas de l'électricité, le fait de transporter de l'électricité produite au Canada à l'extérieur du pays par une ligne de fil métallique ou un autre conducteur;

Comme il a déjà été mentionné, la Cour d'appel a interprété ainsi cette disposition (aux pp. 450 et 451)

. . . ce sur quoi porte la juridiction de l'Office est encore et a toujours été l'autorisation d'exporter de l'électricité. Les facteurs qui peuvent être pertinents dans l'examen d'une demande d'autorisation d'exporter de l'électricité et les conditions auxquelles l'Office peut assujettir son autorisation ne peuvent évidemment se rapporter à autre chose qu'à l'exportation de l'électricité. . .

Il me paraît clair que l'exportation, telle que l'entend la Loi dans le cas de l'électricité, ne couvre pas la production elle-même, et ce n'est que rationnel qu'il en soit ainsi. Bien sûr, celui qui veut exporter un bien doit le produire ou se le procurer ailleurs, mais quant il le produit ou se le procure ailleurs il ne l'exporte pas, et quand il l'exporte il ne le produit pas.

Personne, je pense, ne songerait un moment à contester qu'en considérant une demande d'autorisation d'exporter de l'électricité, l'Office soit tenu de s'inquiéter des conséquences environnementales, puisqu'il y va de l'intérêt public. Le mandat de l'Office à cet égard est d'ailleurs confirmé dans plusieurs textes. Mais ce sont les conséquences environnementales de l'exportation dont il peut uniquement s'agir, soit les conséquences sur l'environnement du «fait de transporter de l'électricité produite au Canada à l'extérieur du pays».

Le paragraphe 119.06(2) de la *Loi sur l'Office national de l'énergie* autorise expressément l'Office à tenir compte des effets de l'exportation d'électricité sur l'environnement et, comme le prévoit le Règlement, des effets sur l'environnement de la production de l'électricité destinée à l'exportation, lorsqu'il détermine s'il y a lieu de recommander au ministre d'exiger le dépôt d'une demande de licence, avec audience publique, plutôt que de procéder par délivrance d'un permis. Une fois commencé le processus d'examen d'une demande de licence, le par. 119.08(2) de la Loi

which appear to it to be relevant. In my opinion, given that the Board is permitted at the earlier stage to take such factors into account, it would be inconsistent to prohibit the Board from having regard to such factors at this later stage, although such concerns continue to be relevant.

I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought.

However, such a task is particularly difficult in this case, given the Board's finding that, although existing facilities were not sufficient to service the contracts, the new facilities contemplated would have to be built in any event to supply increasing domestic needs. The approval of the application for the licences would therefore simply have the effect of accelerating construction of these facilities, and the environmental effects of the acceleration alone were found not to be significant. Nevertheless, in my opinion, the Board did not err in giving some weight to the environmental effects of the construction of the planned facilities. To say that such effects cannot be considered unless the Board finds that, but for the export contracts, the facilities would not be constructed, is to create a situation in which the construction of a generating facility may be contemplated solely for the purpose of fulfilling the demands of a number of

accorde à l'Office le pouvoir de tenir compte de tous les facteurs qui lui semblent pertinents. À mon avis, puisque l'Office peut, à l'étape préliminaire tenir compte des facteurs qu'il juge pertinents, il serait illogique d'interdire à l'Office d'en tenir compte à l'étape ultérieure, même si ces préoccupations continuent d'être pertinentes.

Je suis d'avis que la Cour d'appel a commis une erreur en limitant l'examen de l'Office sur les incidences environnementales aux effets sur l'environnement du transport d'électricité par une ligne de fil métallique au-delà de la frontière. Limiter l'examen aux effets résultant du transport physique même constitue une interprétation indûment restrictive de l'activité envisagée. Le processus de réglementation détaillé qui a été constitué fait bien ressortir le caractère restrictif de cette interprétation. Je serais fort étonné qu'un processus si détaillé soit créé aux fins d'un examen si restrictif. Comme la Cour d'appel l'a reconnu, l'électricité à fournir dans le cadre du contrat d'exportation doit être produite par les installations actuelles ou nécessitera la construction de nouvelles installations. En fin de compte, il convient que l'Office tienne compte, dans son processus décisionnel, de l'ensemble des coûts environnementaux de la délivrance d'une licence.

Toutefois, cette tâche est particulièrement difficile en l'espèce puisque l'Office a conclu que les installations existantes ne permettaient pas de répondre à la demande prévue dans les contrats, mais qu'il faudrait de toute façon procéder à la construction des nouvelles installations pour répondre à l'accroissement de la demande intérieure. L'approbation de la demande de licences aurait alors simplement pour effet de devancer la construction de ces installations, et l'on a considéré comme négligeables les effets sur l'environnement attribuables au seul devancement des travaux. Néanmoins, à mon avis, l'Office n'a pas commis d'erreur en accordant un certain poids aux effets sur l'environnement de la construction des installations prévues. Soutenir que l'Office ne peut tenir compte de ces effets, sauf s'il conclut que la construction de ces installations ne serait pas nécessaire en l'absence des contrats d'exportation,

export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

The respondents expressed concern that giving such a scope to the inquiry of the Board might then bring into its contemplation areas which are more properly the subject of provincial regulation and control. I hasten to add that no constitutional question was raised in this appeal, and I expressly refrain from making any determinations relating to the interpretation of the provisions of the *Constitution Act, 1867*. However, it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these concerns. Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the *Constitution Act, 1867*, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. In this regard, I find helpful the reasons of this Court in *Friends of the*

crée une situation où la construction d'une centrale électrique pourrait être envisagée seulement en réponse à la demande résultant d'un certain nombre de contrats d'exportation, mais que, parce que l'on ne peut dire qu'un contrat d'exportation particulier est la cause de la construction de la centrale, on n'aura jamais à tenir compte de ses effets sur l'environnement.

Il vaut mieux se demander simplement si la construction de nouvelles installations est nécessaire, entre autres, pour répondre à la demande créée par un contrat d'exportation. Dans l'affirmative, les effets sur l'environnement de la construction de ces installations ont un lien avec l'exportation. Dans ces circonstances, il devient alors approprié pour l'Office de tenir compte de la source de l'énergie électrique à exporter et des coûts environnementaux associés à la production de cette énergie.

Les intimés craignent que l'on amène ainsi l'Office à examiner des domaines qui relèvent davantage de la réglementation et du contrôle des provinces. Je m'empresse d'ajouter que le présent pourvoi ne soulève aucune question constitutionnelle, et je m'abstiens explicitement de me prononcer sur l'interprétation des dispositions de la *Loi constitutionnelle de 1867*. Cependant, dans la détermination des limites de la compétence de l'Office, il importe néanmoins de tenir compte des craintes exprimées. De toute évidence, bien que les questions d'exportation relèvent clairement de la compétence fédérale en matière de réglementation des échanges et du commerce, conformément au par. 91(2) de la *Loi constitutionnelle de 1867*, on ne saurait nier qu'un projet d'exportation peut avoir des ramifications sur le fonctionnement des entreprises provinciales ou sur d'autres questions de compétence provinciale.

En définissant les limites de la compétence de l'Office, notre Cour doit s'assurer que l'exercice des pouvoirs de l'Office se limite vraiment aux questions d'intérêt fédéral. Cependant, il ne faut pas non plus circonscrire l'étendue de l'examen à effectuer à un tel point que la fonction de l'Office devienne dénuée de sens ou privée d'efficacité. À cet égard, je trouve utiles les motifs de notre Cour

Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, a decision released after the Federal Court of Appeal had rendered judgment in this case.

In *Oldman River* this Court considered, among other issues, the constitutional validity of the *EARP Guidelines Order*. La Forest J., for the majority, concluded, in words I find apposite to this appeal (at p. 64):

> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

Therefore (at p. 65):

> . . . the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.

As noted earlier, the *vires* of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.

dans l'arrêt *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, rendu après le jugement de la Cour d'appel fédérale en l'espèce.

Dans l'arrêt *Oldman River*, notre Cour a notamment examiné la constitutionnalité du *Décret sur le PEEE*. Le juge La Forest, s'exprimant au nom de la majorité, a conclu en des termes que j'estime fort pertinents pour les fins du présent pourvoi à la p. 64:

> Il faut reconnaître que l'environnement n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867* et que c'est, au sens constitutionnel, une matière obscure qui ne peut être facilement classée dans le partage actuel des compétences, sans un grand chevauchement et une grande incertitude.

En conséquence (à la p. 65):

> . . . on peut plus facilement trouver la solution applicable à l'espèce en examinant tout d'abord l'énumération des pouvoirs dans la *Loi constitutionnelle de 1867* et en analysant comment ils peuvent être utilisés pour répondre aux problèmes environnementaux ou pour les éviter. On pourra alors se rendre compte que, dans l'exercice de leurs pouvoirs respectifs, les deux paliers de gouvernement peuvent toucher l'environnement, tant par leur action que leur inaction.

Comme je l'ai déjà fait remarquer, la validité de la *Loi sur l'Office national de l'énergie* n'est pas contestée dans le présent pourvoi. En appliquant la Loi, l'Office peut tenir compte des effets sur l'environnement à l'intérieur d'une province s'il les considère pertinents aux fins de sa décision de délivrer une licence d'exportation, matière de compétence fédérale. La province peut, quant à elle, examiner les effets sur l'environnement des aspects d'un projet donné qui relèvent de la réglementation provinciale. Cette coexistence de responsabilité n'est ni inhabituelle ni impossible. Il y a, bien entendu, lieu de minimiser le double emploi de directives et les contradictions entre ces dernières, et c'est précisément le problème que le *Décret sur le PEEE*, tout particulièrement ses art. 5 et 6, cherche à éviter, et que l'Office a tenté de réduire en imposant les conditions 10 et 11 de la licence.

It is also worth noting that the Board is the forum in which the environmental impact attributable solely to the export, that is, to the impact of the increase in power output needed to service the export contracts, will be considered. A focused assessment of these effects may be lost if subsumed in a comprehensive evaluation by the province of the environmental effects of the projects in their totality. In this way, both levels of government have a unique sphere in which to contribute to environmental impact assessment.

I conclude, therefore, that the Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Board is permitted by s. 15 of the Regulations to the Act to attach conditions to the licences which it grants, including conditions relating to environmental protection: s. 15(*m*). The only issue that remains, then, is whether in imposing conditions 10 and 11, the Board failed to meet its obligations under the *EARP Guidelines Order*.

(b) The *EARP Guidelines Order* and the Validity of Conditions 10 and 11

That the *EARP Guidelines Order* applied to the Board in its decision whether to grant the export licences does not appear to be in serious dispute. The *EARP Guidelines Order* applies to all "initiating department[s]", defined in s. 2 as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal". "Proposal" is also defined in s. 2, as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility".

The key feature to be extracted from these somewhat circular definitions is that the application of the *EARP Guidelines Order* to the Board relates to the aspect of Hydro-Québec's undertakings for which it has decision-making authority, that is, the decision to grant a licence permitting

Il convient également de signaler que l'Office est la tribune où seront examinés les effets sur l'environnement attribuables seulement à l'exportation, c'est-à-dire les effets de l'augmentation d'électricité produite pour respecter les contrats d'exportation. Une évaluation centrée sur ces effets peut s'avérer inutile si elle est subsumée sous une évaluation globale par la province des effets sur l'environnement de l'ensemble des projets. De cette façon, les deux paliers de gouvernement ont chacun leur domaine dans lequel ils peuvent contribuer à l'évaluation environnementale.

En conséquence, je conclus que l'Office n'a pas excédé sa compétence en vertu de la *Loi sur l'Office national de l'énergie* en tenant compte des effets sur l'environnement de la construction des futures installations de production dans la mesure où ils se rapportent aux exportations proposées, domaine de compétence fédérale. L'article 15 du Règlement permet à l'Office d'assortir les licences qu'il délivre de conditions, notamment en ce qui concerne la protection de l'environnement: al. 15*m*). Il reste maintenant à savoir si l'Office, en imposant les conditions 10 et 11, a omis de respecter ses obligations en vertu du *Décret sur le PEEE*.

b) Le *Décret sur le PEEE* et la validité des conditions 10 et 11

On ne paraît pas contester sérieusement que le *Décret sur le PEEE* est applicable à l'Office lorsqu'il décide de délivrer une licence d'exportation. Le *Décret sur le PEEE* s'applique à tout «ministère responsable», que l'art. 2 définit de la façon suivante: «Ministère qui, au nom du gouvernement du Canada, exerce le pouvoir de décision à l'égard d'une proposition.» L'article 2 donne la définition suivante du terme «proposition» «S'entend en outre de toute entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions».

Le principal élément qui se dégage de ces définitions plutôt circulaires est que le *Décret sur le PEEE* s'applique à l'Office pour ce qui est de l'aspect des entreprises d'Hydro-Québec à l'égard desquelles il a un pouvoir décisionnel, c'est-à-dire la décision de délivrer une licence d'exportation. On

export. That does not artificially limit the scope of the inquiry to the environmental ramifications of the transmission of power by a line of wire, but it equally does not permit a wholesale review of the entire operational plan of Hydro-Québec. Section 6(*b*) of the *EARP Guidelines Order* makes it clear that "[t]hese Guidelines shall apply to any proposal . . . that may have an environmental effect on an area of federal responsibility". As will be evident from the reasons which follow, I am of the view that the Board in its decision struck an appropriate balance between these two extremes.

The main goal of the Process created by the *EARP Guidelines Order* is that "the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel" (s. 3). The overarching purpose of the *EARP Guidelines Order* is to avoid, in situations in which multiple regulatory steps impinge on an undertaking or proposal, disregard for the fundamentally important matter of the protection of the environment.

The *EARP Guidelines Order* also notes explicitly, as mentioned above, that duplication in review is to be avoided (ss. 5(1) and 8), although the initiating department is prohibited from delegating its task of environmental screening or initial assessment to any other body: s. 10(2). The Board in this case was therefore required by s. 12 of the *EARP Guidelines Order* to determine whether the export proposal would not produce any adverse environmental effects, would produce significant adverse environmental effects, would produce effects which were insignificant or mitigable with known technology, or would produce effects which were unknown. In the words of the Board (at pp. 34-35):

> In conducting a screening of electricity export proposals, the Board examines the potential environmental and corresponding social effects in and outside of Canada,

ne se trouve pas ainsi à limiter artificiellement l'étendue de l'examen aux répercussions environnementales du transport d'électricité par une ligne de fil métallique, ni d'ailleurs à autoriser un examen de l'ensemble du plan opérationnel d'Hydro-Québec. L'alinéa 6*b*) du *Décret sur le PEEE* précise clairement que «[l]es présentes lignes directrices s'appliquent aux propositions [. . .] pouvant avoir des répercussions environnementales sur une question de compétence fédérale». On se rendra compte dans les motifs qui suivent que je suis d'avis que l'Office a, dans sa décision, établi un équilibre approprié entre ces deux extrêmes.

Le processus créé par le *Décret sur le PEEE* vise principalement à ce que «le ministère responsable examine, le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables, les répercussions environnementales de toutes les propositions à l'égard desquelles il exerce le pouvoir de décision» (art. 3). Le *Décret sur le PEEE* vise avant tout à éviter que l'on fasse abstraction de la question fondamentalement importante de la protection de l'environnement, dans les cas où de multiples paliers de réglementation touchent une entreprise ou une proposition.

En outre, le *Décret sur le PEEE* précise explicitement, comme je l'ai déjà mentionné, qu'il faut veiller à ce que les examens ne fassent pas double emploi (par. 5(1) et art. 8); toutefois, il est interdit au ministère responsable de déléguer à un autre organisme l'examen préalable ou l'évaluation initiale: par. 10(2). En l'espèce, l'Office était tenu en vertu de l'art. 12 du *Décret sur le PEEE* de déterminer si la proposition n'aurait aucun effet néfaste sur l'environnement, aurait des effets néfastes importants sur l'environnement, était susceptible d'avoir sur l'environnement des effets minimes ou pouvant être atténués par l'application de mesures techniques connues, ou si les effets qu'elle pouvait avoir sur l'environnement étaient inconnus. Selon l'Office (aux pp. 34 et 35):

> En faisant cette première évaluation, l'Office étudie les effets possibles sur l'environnement et les répercussions sociales correspondantes causés par la production, le

of the production, transmission, and end use of the electricity proposed to be exported. The purpose of such a screening is to enable the Board to reach one of the conclusions required in section 12 of the *EARP Guidelines Order*.

The Board noted that Hydro-Québec had provided information that approval of the export arrangements would mean that the facilities contemplated by its general development plan would be built two to six years earlier than anticipated. Hydro-Québec took the position that the effect of permitting the exports on the environmental impact of the implementation of the plan would be insignificant. As a result, it did not provide information on the overall impact of the construction and operation of the planned facilities. The Board noted (at pp. 37-38):

Hydro-Québec argued only that the early construction and operation of facilities to serve the exports would not result in significant environmental impacts and consequently it provided no evidence on this point. Specifically, Hydro-Québec did not provide a comprehensive environmental assessment of the impact of the construction and operation of facilities required to support the proposed exports. In this regard, the Board is of the view that the issue of environmental impact does not hinge on whether or not it should consider the impact of the construction and operation of facilities or only the impact of their advancement. Sufficient evidence was provided indicating that major hydro-electric facilities such as those required to meet the proposed exports do have environmental effects. Hydro-Québec itself did not deny this. The issue rather is whether, on balance, the environmental consequences are acceptable or mitigable. This, the Board does not know at this time.

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and

transport et l'utilisation finale de l'électricité qui serait exportée, tant à l'intérieur qu'à l'extérieur du Canada. Une telle évaluation initiale a pour but de permettre à l'Office d'arriver à l'une des conclusions prévues à l'article 12 du *Décret sur le PEEE*.

L'Office a fait remarquer que, d'après les renseignements fournis par Hydro-Québec, l'approbation des modalités d'exportation signifierait que les installations envisagées dans le plan général de développement devraient être construites de deux à six ans plus tôt que prévu. D'après Hydro-Québec, l'effet des exportations sur les incidences environnementales de la mise en oeuvre du plan serait peu important. C'est pourquoi elle n'a pas fourni de renseignements sur l'incidence générale de la construction et du fonctionnement des installations prévues. L'Office a fait remarquer (aux pp. 37 et 38):

Hydro-Québec a maintenu que seul le devancement de la construction des installations qui serviraient à alimenter les exportations ne causeraient (*sic*) pas d'impact environnemental important et par conséquent elle n'a pas fourni de preuve à l'appui de cet argument. Précisément, Hydro-Québec n'a pas produit d'études exhaustives des incidences environnementales de la construction et de l'exploitation des installations nécessaires pour satisfaire aux exportations proposées. À cet égard, l'Office est d'avis que la question des répercussions environnementales ne tient pas au fait de savoir si, oui ou non, il doit considérer l'impact de la construction et de l'exploitation des installations ou seulement l'impact de leur devancement. Une preuve suffisante a été déposée à l'effet que les grandes installations hydroélectriques, telles celles qui seront nécessaires pour alimenter les exportations proposées, auront des impacts environnementaux. Ce qu'Hydro-Québec n'a pas nié. La question est plutôt de savoir si les répercussions environnementales sont acceptables ou atténuables. C'est ce que l'Office ne sait pas pour le moment.

L'Office reconnaît que lorsque des services d'électricité négocient entre eux des contrats garantis à long terme, il peut y avoir des circonstances où de telles ententes impliquent de la puissance devant venir d'installations de production qui seront construites à une date ultérieure et pour lesquelles les évaluations environnementales nécessaires ne sont pas encore complétées au moment où les demandes d'exportation sont déposées. Les contrats visant les projets d'exportation présentement devant l'Office ont été négociés sur cette base. Néan-

at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

However, it was apparent that all the facilities in issue would be subject at later dates either to provincial review under the James Bay Agreement or to review by other federal departments under the *EARP Guidelines Order* or other enactments. Therefore, the Board held (at pp. 39-40):

The Board is also of the view that, to the extent that Hydro-Québec's future facilities are subjected to the *EARP Guidelines Order* review process, or any equivalent review process, and are subsequently accepted for construction, the environmental and social impacts of these projects, as well as the related public concerns, will have been adequately addressed. . . . The Board is therefore satisfied that to the extent that such reviews take place and the facilities are accepted for construction, then the environmental impact of the construction and operation of the facilities required to support the proposed exports will be known and mitigable with known technology.

In order to satisfy itself that these reviews would be carried out, the Board attached conditions 10 and 11 to the licences.

The respondents challenge the validity of conditions 10 and 11 on the grounds that the jurisdiction of the Board in considering an application for an export licence does not extend to the environmental effects of the construction and operation of facilities which will generate the power to be exported. As noted above, I am of the view that the jurisdiction of the Board can properly encompass such a review. The appellants, however, also challenge the validity of these conditions. They argue that to approve the Board's transfer of the responsibility for environmental review to these future processes is to permit the Board to avoid its responsibilities under the *EARP Guidelines Order*.

The conclusion of the Board in this case appears to have been, not surprisingly, that the environ-

moins, pour arriver à prendre une décision sur les demandes d'Hydro-Québec et à respecter ses obligations en vertu de la Loi et du *Décret sur le PEEE*, l'Office doit tenir compte des répercussions environnementales résultant de la construction de nouvelles installations.

Cependant, il était évident que toutes les installations en cause seraient ultérieurement soumises soit au processus d'évaluation provincial en vertu de la Convention de la Baie James, soit à une évaluation effectuée par d'autres ministères fédéraux en vertu du *Décret sur le PEEE* ou d'autres textes législatifs. En conséquence, l'Office a statué (aux pp. 39 et 40):

L'Office est d'opinion que dans la mesure où les projets d'équipement d'Hydro-Québec se réaliseront conformément au processus d'évaluation du *Décret sur le PEEE* ou à un processus équivalent, les impacts environnementaux et sociaux de ces projets et les préoccupations du public auront fait l'objet d'examen public adéquat. [. . .] L'Office est donc convaincu que dans la mesure où ces examens se feront et où la construction des installations sera autorisée, l'impact environnemental de la construction et de l'exploitation des installations nécessaires pour satisfaire aux projets d'exportation sera alors connu et pourra être atténué par l'application de mesures techniques connues.

Pour s'assurer de la réalisation de ces examens, l'Office a rattaché les conditions 10 et 11 aux licences.

Les intimés contestent la validité des conditions 10 et 11 au motif que l'Office, lorsqu'il examine une demande de licence d'exportation, n'a pas la compétence d'examiner les effets sur l'environnement de la construction et du fonctionnement des installations de production de l'électricité destinée à l'exportation. Comme je l'ai déjà mentionné, je suis d'avis que la compétence de l'Office englobe un tel examen. Cependant, les appelants contestent également la validité de ces conditions. À leur avis, si l'on approuve le transfert à ces processus futurs de la responsabilité qu'il possède en matière d'examen environnemental, on autorise l'Office à se dégager des responsabilités que lui impose le *Décret sur le PEEE*.

Il n'est donc pas étonnant que l'Office paraisse avoir conclu que les effets sur l'environnement de

mental effects of the construction and operation of the planned facilities were unknown. The Board is therefore required by s. 12(*d*) of the *EARP Guidelines Order* to see either that the proposal is subjected to further study and subsequent rescreening, or that it is submitted to a public review. In my view, the conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the *EARP Guidelines Order*. Rather, they are an attempt to avoid the duplication warned against in the Order, while continuing the jurisdiction of the Board over this matter.

In the same way that the *EARP Guidelines Order* does not require an initiating department to wait for the results of a public review before proceeding with a proposal (see *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.)), it does not require the Board to suspend its decision-making until the environmental assessment of all future generating facilities is completed. In this appeal, it is presently unclear exactly when and to what extent these contemplated facilities will be used to fulfil the requirements of the export contracts. This will not be known with certainty until those portions of the contract arise for completion. It is not unreasonable for the Board to exert some control over the timing of this process, while at the same time waiting for the results of environmental reviews which will be tailored to the specifications of the facilities as they are actually constructed.

This case appears to me to be just such a situation where the nature of the proposal means that the flexibility of the process set out in the *EARP Guidelines Order* is helpful. In this regard, I adopt the words of Reed J. of the Trial Division of the Federal Court in *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, where she stated (at p. 264):

la construction et du fonctionnement des installations prévues étaient inconnus. Dans un tel cas, l'Office est tenu, en vertu de l'al. 12*d*) du *Décret sur le PEEE*, de veiller à ce qu'une telle proposition soit soumise à d'autres études suivies d'un autre examen ou qu'elle fasse l'objet d'un examen public. À mon avis, l'Office a, pour l'essentiel, satisfait à cette obligation en imposant les conditions. Celles-ci ne constituent pas une délégation erronée de la responsabilité de l'Office en vertu du *Décret sur le PEEE*. Elles tentent plutôt d'éviter le double emploi dont fait mention le Décret, tout en préservant la compétence de l'Office sur cette question.

Tout comme il n'exige pas d'un ministère responsable qu'il attende les résultats d'un examen public avant d'entreprendre un projet (voir l'arrêt *Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement)* (1989), 4 C.E.L.R. (N.S.) 201 (C.F. 1re inst.), conf. par [1991] 1 C.F. 641 (C.A.)), le *Décret sur le PEEE* n'exige pas qu'il suspende l'exercice de son pouvoir décisionnel jusqu'à ce que soit terminée l'évaluation environnementale de toutes les futures installations de production. En l'espèce, on ne sait pas exactement quand et dans quelle mesure les installations envisagées seront utilisées pour satisfaire aux exigences des contrats d'exportation. Il faudra attendre au moment de la réalisation de ces portions du contrat pour savoir exactement à quoi s'en tenir. Il est raisonnable que l'Office exerce un certain contrôle sur l'ordonnancement du processus, tout en attendant les résultats des évaluations environnementales qui seront réalisées en fonction des devis des installations au moment où elles seront construites.

Le présent pourvoi me semble être précisément un cas où, compte tenu de la nature de la proposition, la souplesse du processus prévu dans le *Décret sur le PEEE* est utile. Sur ce point, je fais miens les propos du juge Reed de la Section de première instance de la Cour fédérale dans la décision *Friends of the Island Inc. c. Canada (Ministre des Travaux publics)*, [1993] 2 C.F. 229, dans laquelle elle affirme, à la p. 264:

It is not disputed that it is preferable to identify potential environmental concerns relating to a project before private sector developers (or public sector developers for that matter) proceed to a final design. It is also desirable to use the process as a planning tool and to avoid duplication. I am not convinced however that it is useful to consider whether the Guidelines Order requires the assessment of [a] proposal at the concept stage or at a more specific design stage. What is required may very well depend on the type of project being reviewed. What does seem clear is that the assessment is required to take place at a stage when the environmental implications can be fully considered (s. 3) and when it can be determined whether there may be any potentially adverse environmental effects (s. 10(1)). [Emphasis in original.]

Tous s'accordent pour dire qu'il est préférable de cerner les effets sur l'environnement que peut avoir un projet avant que les promoteurs du secteur privé (ou du secteur public, quant à cela) ne dressent les plans définitifs. Il est également souhaitable d'utiliser le processus comme instrument de travail au cours de l'étape de la planification et d'éviter le double emploi. Je ne suis cependant pas convaincue qu'il soit utile de décider si le Décret sur les lignes directrices exige l'évaluation de la proposition au stade conceptuel ou durant une autre étape de conception plus détaillée. Ce qui est exigé peut très bien dépendre du type de projet examiné. Ce qui semble clair, c'est que l'évaluation doit être faite durant une étape où les répercussions environnementales peuvent être examinées (art. 3) et où il est possible de déterminer la nature et l'étendue des effets néfastes que la proposition peut avoir sur l'environnement (par. 10(1)).

The Board retains the power, through s. 119.093(1) of the *National Energy Board Act*, to revoke the licences if the conditions are not fulfilled. The conditions relate to contemplated environmental review and regulation in the federal sphere. By proceeding in this way, the full environmental effects of the proposals are known to the Board before the construction is to proceed, and before the decision to grant the licences is irrevocable. At the same time, duplication is minimized and Hydro-Québec is not required to provide concrete evidence of the effects of proposals for future construction still some years away. The Board has thus fulfilled its mandate under the *EARP Guidelines Order* in a manner which, I would add, is not unreasonable in the circumstances.

L'Office conserve, en vertu du par. 119.093(1) de la *Loi sur l'Office national de l'énergie*, le pouvoir d'annuler une licence en cas de contravention aux conditions qu'elle renferme. Les conditions ont trait à l'évaluation et à la réglementation de nature environnementale dans la sphère fédérale. En procédant ainsi, l'Office est au courant de tous les effets des propositions sur l'environnement avant le début des travaux de construction et avant que la décision de délivrer les licences ne devienne irrévocable. Il se trouve en même temps à minimiser le double emploi; en outre, Hydro-Québec n'aura pas, avant plusieurs années, à fournir de preuve tangible quant aux effets des projets de construction. L'Office a en conséquence rempli le mandat que lui confie le *Décret sur le PEEE* d'une façon qui est, je tiens à le préciser, raisonnable dans les circonstances.

VI. Conclusion and Disposition

At issue in this appeal are jurisdictional facts. While it is the proper function of this Court to determine whether the Board erred in the exercise of its jurisdiction, this Court will not interfere with the factual findings of the Board on which it bases that exercise, where there is some evidence to support its findings. I conclude that the appellants were given a full and fair opportunity to be heard before the Board, and that the Board had sufficient evidence to reach the conclusions which it did. In particular, I find that the order as set out by the

VI. Conclusion et dispositif

La question en litige porte sur des faits attributifs de compétence. Bien qu'il appartienne à notre Cour de déterminer si l'Office a commis une erreur dans l'exercice de sa compétence, elle ne modifiera pas les conclusions de fait sur lesquelles il s'est fondé s'il existe certains éléments de preuve à l'appui. Je conclus que les appelants ont eu pleinement et équitablement la possibilité d'être entendus par l'Office, et que celui-ci avait suffisamment d'éléments de preuve pour conclure comme il l'a fait. Plus particulièrement, j'estime que l'ordon-

Board neither exceeded nor avoided the scope of the Board's review in the area of the environmental impact of the proposed exports.

The reinstatement of the order as made by the Board is not the result sought by either the appellants or the respondents Hydro-Québec and the Attorney General of Quebec. This does not mean, however, that such a result is beyond the jurisdiction of this Court. Both the appellants and the respondents appealed the decision of the Board to the Federal Court of Appeal. These appeals were consolidated, and the court ruled that the appeal of the present appellants should be dismissed, and the appeal of the respondents allowed. It is this decision, *in toto*, that the appellants appeal to this Court.

I am of the view that the Court of Appeal erred in allowing the appeal of the respondents, and that it should have dismissed both appeals. This Court has jurisdiction to make the order that the court below should have made. Accordingly, the appeal is allowed, the judgment of the Federal Court of Appeal is set aside, and the order of the Board restored. Given the nature of the result, each party will bear its own costs here and in the court below.

Appeal allowed.

Solicitors for the appellants: Robert Mainville & Associés, Montréal.

Solicitor for the respondent the Attorney General of Canada: Jean-Marc Aubry, Ottawa.

Solicitors for the respondent the Attorney General of Quebec: Pierre Lachance and Jean Bouchard, Ste-Foy.

Solicitors for the respondent Hydro-Québec: Ogilvy Renault, Montréal.

Solicitor for the respondent the National Energy Board: Judith B. Hanebury, Calgary.

nance rendue par l'Office n'outrepassait ni ne contournait la portée de l'examen en matière d'incidences environnementales des exportations proposées.

Ni les appelants ni les intimés Hydro-Québec et le procureur général du Québec n'ont demandé le rétablissement de l'ordonnance rendue par l'Office. Cela ne signifie toutefois pas que notre Cour n'a pas compétence pour ordonner son rétablissement. Les appelants et les intimés ont interjeté appel contre la décision de l'Office devant la Cour fédérale du Canada. Ces appels ont été fusionnés, et la cour a statué que l'appel des appelants actuels devrait être rejeté et celui des intimés accueilli. C'est contre cette décision, dans sa totalité, que les appelants ont interjeté appel devant notre Cour.

Je suis d'avis que la Cour d'appel a commis une erreur en accueillant l'appel des intimés et qu'elle aurait dû rejeter les deux appels. Notre Cour a compétence pour rendre l'ordonnance que le tribunal de juridiction inférieure aurait dû rendre. En conséquence, le pourvoi est accueilli, le jugement de la Cour d'appel fédérale est annulé et l'ordonnance de l'Office est rétablie. Compte tenu de la nature de la décision, chacune des parties assumera ses dépens dans toutes les cours.

Pourvoi accueilli.

Procureurs des appelants: Robert Mainville & Associés, Montréal.

Procureur de l'intimé le procureur général du Canada: Jean-Marc Aubry, Ottawa.

Procureurs de l'intimé le procureur général du Québec: Pierre Lachance et Jean Bouchard, Ste-Foy.

Procureurs de l'intimée Hydro-Québec: Ogilvy Renault, Montréal.

Procureur de l'intimé l'Office national de l'énergie: Judith B. Hanebury, Calgary.

Solicitor for the interveners: Gregory J. McDade, Vancouver.

Procureur des intervenants: Gregory J. McDade, Vancouver.

tion. I have concluded that this is not an appropriate case to suspend the declaration of invalidity.

VIII Disposition

239 Accordingly, this Court declares that:

(a) Sections 13(1) and (2),14(1) and (2), and 16(1) of the Parks Regulation Bylaw No. 07-059 and ss. 73(1) and 74(1) of the Streets and Traffic Bylaw No. 92-84 violate s. 7 of the *Canadian Charter of Rights and Freedoms* in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, and are not saved by s. 1 of the *Charter*.

(b) Sections 13(1) and (2),14(1) and (2), and 16(1) of the Parks Regulation Bylaw No. 07-059 and ss. 73(1) and 74(1) of the Streets and Traffic Bylaw No. 92-84 are of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.

240 In light of the conclusion that I have reached with respect to s.7, I have not addressed s. 12 of the *Charter*.

241 The parties are at liberty to make further submissions with respect to the issue of costs.

Counterclaim allowed.

[Indexed as: **Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)**]

The Carrier Sekani Tribal Council (Appellant / Applicant / Intervenor) and The British Columbia Utilities Commission and British Columbia Hydro and Power Authority and Alcan Inc. and The Attorney General of British Columbia (Respondents / Respondents)

British Columbia Court of Appeal

Donald, Huddart, Bauman JJ.A.

Heard: November 24-25, 2008

Judgment: February 18, 2009

Docket: Vancouver CA035715, CA035791, 2009 BCCA 67

G.J. McDade, Q.C. for Appellant

C.W. Sanderson, Q.C., K.B. Bergner for Respondent, British Columbia Hydro and Power Authority

D.W. Bursey, R.D.W. Dalziel for Respondent, Rio Tinto Alcan Inc.

P.E. Yearwood, J.J. Oliphant for Respondent, Attorney General of British Columbia

Aboriginal law — Constitutional issues — Miscellaneous — Provincial hydro and power authority (BCH) decided to buy electricity from A Inc. which was surplus to A Inc.'s smelter requirements, in accordance with energy purchase agreement (EPA) made in 2007 — BCH needed approval of provincial utilities commission for EPA to be enforceable pursuant to s. 71 of Utilities Commission Act (UCA) — Tribal council (CSTC) sought to be heard in s. 71 proceeding on issue of whether Crown had fulfilled duty to consult and if necessary accommodate aboriginal interests before BCH entered into EPA — Commission reconsidered issue of impact of water flows arising from EPA and dismissed CSTC's reconsideration motion by concluding that EPA had no impact on volume, timing or source of water released into rivers in question — Commission determined that since there were no new physical impacts created by EPA, duty to consult was not triggered and therefore it did not have to address question as to whether BCH had duty to consult — CSTC appealed — Appeal allowed — It could be inferred from UCA that commission had authority to decide relevant questions of law including whether Crown had duty to consult and whether it had fulfilled duty — Appropriate forum for enforcement of duty to consult is in first instance tribunal with jurisdiction over subject matter, and in this case that was commission in relation to EPA — Also, commission had skill, expertise and resources to hear and decide consultation issue — Furthermore, honour of Crown obliged commission to do so, since as body to which powers have been delegated by Crown, it must not deny CSTC timely access to decision-maker with authority over subject matter — Fault of commission was in not entertaining issue of consultation within scope of full hearing when circumstances demanded inquiry — Accordingly, proceeding was to be re-opened for sole purpose of determining whether duty to consult,

and if necessary, accommodate CSTC existed and if so, whether duty had been met in respect of filing of EPA.

Public law — Public authorities — Provincial boards and commissions — Miscellaneous — Provincial hydro and power authority (BCH) decided to buy electricity from A Inc. which was surplus to A Inc.'s smelter requirements, in accordance with energy purchase agreement (EPA) made in 2007 — BCH needed approval of provincial utilities commission for EPA to be enforceable pursuant to s. 71 of Utilities Commission Act (UCA) — Tribal council (CSTC) sought to be heard in s. 71 proceeding on issue of whether Crown had fulfilled duty to consult and if necessary accommodate aboriginal interests before BCH entered into EPA — Commission reconsidered issue of impact of water flows arising from EPA and dismissed CSTC's reconsideration motion by concluding that EPA had no impact on volume, timing or source of water released into rivers in question — Commission determined that since there were no new physical impacts created by EPA, duty to consult was not triggered and therefore it did not have to address question as to whether BCH had duty to consult — CSTC appealed — Appeal allowed — It could be inferred from UCA that commission had authority to decide relevant questions of law including whether Crown had duty to consult and whether it had fulfilled duty — Appropriate forum for enforcement of duty to consult is in first instance tribunal with jurisdiction over subject matter, and in this case that was commission in relation to EPA — Also, commission had skill, expertise and resources to hear and decide consultation issue — Furthermore, honour of Crown obliged commission to do so, since as body to which powers have been delegated by Crown, it must not deny CSTC timely access to decision-maker with authority over subject matter — Fault of commission was in not entertaining issue of consultation within scope of full hearing when circumstances demanded inquiry — Accordingly, proceeding was to be re-opened for sole purpose of determining whether duty to consult, and if necessary, accommodate CSTC existed and if so, whether duty had been met in respect of filing of EPA.

Cases considered by *Donald J.A.*:

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4 (S.C.C.) — considered

British Columbia Hydro & Power Authority, Re (November 29, 2007), Doc. L-95-07 (B.C. Utilities Comm.) — referred to

British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission) (1996), 36 Admin. L.R. (2d) 249, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 271, 117 W.A.C. 271, 1996 CarswellBC 352, [1996] B.C.J. No. 379 (B.C. C.A.) — considered

British Columbia Transmission Corp., Re (2006), 2006 CarswellBC 3694 (B.C. Utilities Comm.) — referred to

British Columbia Transmission Corp., Re (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.) — referred to

Dene Tha' First Nation v. Alberta (Energy & Utilities Board) (2005), 2005 ABCA 68, 2005 CarswellAlta 203, 12 C.E.L.R. (3d) 19, 363 A.R. 234, 343 W.A.C. 234, 45 Alta. L.R. (4th) 213, [2005] A.J. No. 158 (Alta. C.A.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419, [2004] S.C.J. No. 70, REJB 2004-80383 (S.C.C.) — considered

Kwikwetlem First Nation v. British Columbia (Utilities Commission) (2009), 2009 BCCA 68, 2009 CarswellBC 341, 76 R.P.R. (4th) 213 (B.C. C.A.) — referred to

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223, [2005] S.C.J. No. 71 (S.C.C.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65, [2008] S.C.J. No. 9, [2008] A.C.S. No. 9 (S.C.C.) — followed

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch) (2001), 2001 SCC 52, 2001 CarswellBC 1877, 2001 CarswellBC 1878, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 155 B.C.A.C. 193, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 254 W.A.C. 193, [2001] 10 W.W.R. 1, 34 Admin. L.R. (3d) 1, 204 D.L.R. (4th) 33, 274 N.R. 116, 93 B.C.L.R. (3d) 1, [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, REJB 2001-25683 (S.C.C.) — considered

Paul v. British Columbia (Forest Appeals Commission) (2003), 2003 CarswellBC 2432, 2003 CarswellBC 2433, 2003 SCC 55, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, 18 B.C.L.R. (4th) 207, [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161, [2003] S.C.J. No. 34, REJB 2003-48213 (S.C.C.) — followed

Quebec (Attorney General) v. Canada (National Energy Board) (1994), (sub nom. *Québec (Procureur général) v. Office national de l'énergie*) 163 N.R. 241, [1994] 3 C.N.L.R. 49, 1994 CarswellNat 8, 1994 CarswellNat 1496, 112 D.L.R. (4th) 129, [1994] 1 S.C.R. 159, 14 C.E.L.R. (N.S.) 1, 20 Admin. L.R. (2d) 79, EYB 1994-67299, [1994] S.C.J. No. 13 (S.C.C.) — considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

Pt. II — referred to

s. 35 — considered

s. 35.1 [en. SI/84-102] — referred to

Hydro and Power Authority Act, R.S.B.C. 1996, c. 212
s. 3 — considered
s. 4 — considered
s. 5 — considered
s. 12(1)(m) — considered
Utilities Commission Act, S.B.C. 1980, c. 60
Generally — referred to
Utilities Commission Act, R.S.B.C. 1996, c. 473
Generally — referred to
s. 3 — considered
s. 5(0.1) "minister" [en. 2008, c. 13, s. 4(a)] — considered
s. 71 — considered
s. 71(2.1)(a) — considered
s. 79 — considered
s. 99 — considered
s. 101 — considered
s. 105 — considered

APPEAL by tribal council from decision of British Columbia Utilities Commission dismissing council's reconsideration motion on issue as to whether Crown fulfilled its duty to consult before hydro and power authority entered into Energy Purchase Agreement.

Donald J.A.:

Introduction

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

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

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

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

5 The appellant's interest (asserted both in a pending action for Aboriginal title and within the treaty process) is in the water and related resources east of

the discharge of the Nechako Reservoir created by Alcan in the early 1950s to drive its generators in Kemano for use at the Kitimat aluminum smelter.

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

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

8 The Commission addressed the reconsideration in two phases. At Phase I, the Commission "concluded that the CSTC [Carrier Sekani Tribal Council] established a prima facie case sufficient to warrant a reconsideration of the Scoping Order", and that the ground for reconsideration was "the impacts on the water flows arising from the 2007 EPA": Reasons for Decision, "Impacts on Water Flows", [*British Columbia Hydro & Power Authority, Re* (November 29, 2007), Doc. L-95-07 (B.C. Utilities Comm.)]. Within Phase I, the Commission conducted a fact-finding hearing into water flow impacts and concluded as follows:

> The Commission Panel accepts the submissions of counsel for BC Hydro regarding the determinations that should be made at this time in the proceeding. The Commission Panel concludes as a matter of fact that:
>
> a) the 2007 EPA will have no impact on the volume, timing or source of water flows into the Nechako River;
>
> b) the 2007 EPA will not change the volume of water to be released into the Kemano River; and
>
> c) the 2007 EPA may cause reservoir elevations to vary approximately one or two inches which will be an imperceptible change in the water levels of the Nechako Reservoir. This change to reservoir levels will not affect water flows other than the timing of releases to the Kemano River.

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

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

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

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

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

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

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

14 There is an institutional dimension to this error. The Commission has demonstrated in several cases an aversion to assessing the adequacy of consultation. In three other decisions, the Commission deferred the consultation question to the environmental assessment process: *British Columbia Transmission Corp., Re* [2006 CarswellBC 3694 (B.C. Utilities Comm.)], B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06; *British Columbia Hydro & Power Authority, Re*, (July 12, 2007), Doc. C-8-07, (B.C. Utilities Comm.); *British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.), First Nations Scoping Issue. (The appeal from the last decision (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)* [2009 CarswellBC 341 (B.C. C.A.)], CA035864) was heard together with the appeal in the present case.)

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

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

Factual Background

17 I have said that the infringement, if such it is, associated with the Alcan/Kemano Power Project is on a massive scale. The project involved reversing the flow of a river and the creation of a watershed that discharges west into a long tunnel through a mountain down to sea level at Kemano where it drives the generators at the power station and then flows into the Kemano River. To the east the watershed discharges into the Nechako River which eventually joins the Fraser River at Prince George. The westerly diversion is manmade. The natural water flows into the Nechako River system were altered by the project with implications for fish and wildlife, especially salmon. Alcan holds a water licence in perpetuity for the reservoir. It is obliged by the licence and an agreement made in 1987 settling litigation involving the Provincial and Federal Governments to maintain water flows that meet specifications for migratory fish.

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

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

20 Alcan has been selling its excess power since the beginning of its operations, at first directly to neighbouring industries and communities, and later to those customers through the B.C. Hydro grid and to B.C. Hydro for general distribution, and to Powerex Corporation (B.C. Hydro's exporting affiliate).

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

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

> 18. There are many aspects of the EPA which demonstrate that it is an important decision in relation to the infringements of the Intervenor's rights and title, within the context set out by recent caselaw. This decision:
>
> (a) Approves an EPA that will confirm and mandate extended electricity sales for a very long time — to 2034;
>
> (b) Approves the sale to BC Hydro of all electricity which is surplus to Alcan's power needs — and therefore authorizes the sale of power resulting from diversions of water that are causing existing impacts and infringements;
>
> (c) Removes or affects the flexibility to release additional water, because that power is now the subject of an agreement with BC Hydro;
>
> (d) Changes the 'operator' — by creating a "Joint Operating Committee" (s.4.13), by authorizing B.C. Hydro to 'jointly develop' the reservoir operating model (s.4.17), and by requiring B.C. Hydro approval for any amendments to operating agreements "which constrain the availability of Kemano to generate electricity" (App.1, 70 "Operating Constraints");
>
> (e) Changes in objective — this agreement confirms that power will now be devoted to long-term 'capacity' for B.C. Hydro (Even if there had been a 'compelling social objective' to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new 'objective' requires further consultation.);
>
> (f) Creates added incentives to maximize power sales (rather than release water for conservation);
>
> (g) Provides incentives to Alcan to 'optimize' efficiency of their operations (meaning additional power sales);
>
> (h) Encourages sales (i.e. diversion of water) through financial incentives in the most significant low water months (January to March);
>
> (i) Affects the complexity required for proper environmental management — e.g. temperature, variable flows, timing, over-spills etc. — in order to accommodate BC Hydro sales;
>
> (j) Approves an agreement that contains no positive conditions protecting fish and First Nations rights and which will preclude (by financial disincentives) those conditions from being added later;
>
> (k) Fails to include First Nations in any way in management decisions.
>
> 19. If, despite the jurisprudence pointing to the contrary, the BC Utilities Commission is not prepared to examine the impacts of existing operations, and instead views the EPA solely as a financial model, there are nevertheless clear impacts on the Intervenor's interests arising from this agreement:
>
> (a) Increases the cost of compensation to Alcan;
>
> (b) Any change to the 1987 Settlement Agreement flows will be more difficult to achieve;
>
> (c) Additional sales (and therefore diversions) may well occur (evidence of other purchasers — under all conditions and at all times of the year — is speculative).
>
> [Emphasis in original.]

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

> There may be steps contemplated by the Crown that have no new impacts that would nevertheless trigger the duty to consult because of a historical, continuing infringement. However, a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing would not be a jurisdictional error. That is, it is the combination of no new physical impacts together with the limited scope of a section 71 review that answers the principal question — there is no jurisdictional error in this Decision. Alcan states: "The Crown's fiduciary duty arises in specific situations, in particular, when the Crown assumes discretionary control over specific Aboriginal interests" (Alcan Submission, para. 5.3). The decision to accept or declare unenforceable the 2007 EPA under section 71 of the Act does not affect underlying water resources or any CSTC aboriginal interests there may be in that resource (Alcan Submissions, para. 5.5).
>
> The CSTC submits:
>
> > "The 2007 EPA will also constitute a significant change in use (from power produced for aluminum smelting purposes to power for general provincial consumption) which, if approved by the BCUC, will amount to approval by the Crown of that change in use — without consultation" (CSTC Submission, para. A6).
>
> The 2007 EPA may change the use of power in the sense suggested by the CSTC. However, such change in the use of the power could be effected by Alcan without the 2007 EPA and by means that are beyond the authority of the Commission. Nevertheless, the important question is whether or not there is a change in water flows, not whether or not there is a change in use of power. And, as found by the Commission in Letter No. L-95-07, water flows will not change.

Relevant Enactments

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

> 71.(1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must
>
> (a) file a copy of the contract with the commission under rules and within the time it specifies, and
>
> (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.
>
> (1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.
>
> (2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.
>
> (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
>
> (a) the government's energy objectives,
>
> (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
>
> (c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,
>
> (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
>
> (e) the quantity of the energy to be supplied under the contract,
>
> (f) the availability of supplies of the energy referred to in paragraph (e),
>
> (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
>
> (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).
>
> (2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
>
> (2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.

> (2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.
>
> (2.5) In considering the public interest under subsection (2.4), the commission must consider
>
> (a) the government's energy objectives,
>
> (b) the most recent long-term resource plan filed by the public utility under section 44.1,
>
> (c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and
>
> (d) the interests of persons in British Columbia who receive or may receive service from the public utility.
>
> (2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract
>
> (a) entered into exclusively on the terms and conditions, and
>
> (b) as a result of the process
>
> referred to in subsection (2.3).
>
> (3) If subsection (2) applies, the commission may
>
> (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
>
> (b) make any other order it considers advisable in the circumstances.
>
> (4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.
>
> (5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

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

> 3(1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.

(2) The commission must comply with a direction issued under subsection (1), despite

(a) any other provision of

(i) this Act, except subsection (3) of this section, or

(ii) the regulations, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

. . . . .

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

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

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

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

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

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

(a) by March 31, 2009, and

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

unless otherwise ordered by the Lieutenant Governor in Council.

(6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).

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

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

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

. . . . .

71 ...

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

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

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

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

. . . . .

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

. . . . .

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

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

(3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

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

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

. . . . .

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

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

3(1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

(2) The Minister of Finance is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

4(1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.

(2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.

(3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.

5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may

(a) exercise the powers conferred on them under this Act,

(b) exercise the powers of the authority on behalf of the authority, and

(c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

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

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

. . . . .

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

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

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

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

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

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

Issues

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

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

a) That the failure of the Crown to consult and, if necessary, accommodate the member tribes of the CSTC was not relevant to the proceeding;

b) to refuse to allow evidence or cross-examination on the on-going existing impacts of the operations of the Nechako reservoir and the Kemano Project on the aboriginal rights and title of the member tribes of the CSTC; and

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

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

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

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

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

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

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

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

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

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

> BC Hydro submits that the primary issue on appeal is as follows:
>
> 1. Did the review conducted by the BCUC in respect of the 2007 EPA pursuant to s. 71 of the UCA amount to the Crown contemplating conduct that might adversely affect the CSTC's aboriginal interests so as to give rise to the duty to consult with the CSTC?
>
> 2. If and only if the primary question is answered in the affirmative, then BC Hydro submits that there is a secondary issue on appeal as follows:
>
> > If the answer to question 1 is yes, does the UCA empower and require the Commission to adjudicate a dispute between the Crown and the CSTC regarding the sufficiency of consultation to discharge the Crown's obligation in respect of the original authorization, construction and operation of the Nechako Reservoir before the BCUC can exercise its jurisdiction under s. 71?
>
> 3. If and only if the secondary question is answered in the affirmative, then BC Hydro submits that there is a third issue on appeal as follows:
>
> > If the answer to both questions 1 and 2 is yes, what remedy is appropriate?

34 I will analyze the issues according to this framework:

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

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

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

Discussion

A. The Power and Duty to Decide

1. The Power

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

(a) As a quasi-judicial tribunal with authority to decide questions of law, the Commission is competent to decide relevant constitutional questions, including whether the Crown has discharged a duty to consult.

(b) Section 71 of the *Utilities Commission Act* mandates review of the enforceability of an energy purchase agreement according to factors which include the public interest. This agreement engages the honour of the Crown in its dealings with Aboriginal peoples.

(c) The Commission has the capacity to address the adequacy of consultation.

(a) Competency

36 The Commission has not explicitly declared that it has no jurisdiction to decide a consultation issue. But since the Commission has shown a disinclination to grapple with the issue, and the proponents of the EPA have questioned whether it lies within the Commission's statutory mandate, I think the court should settle the point.

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

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

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

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

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

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

(b) Construction of Section 71

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

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

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

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> [29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.
>
> [Emphasis added.]

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

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

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

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

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

(c) Capacity to decide

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

> 88. ... to accept the CSTC's invitation [to entertain the consultation issue] would mire the Commission in complex questions of fact and law to which its mandate, statutory powers and remedies are ill-suited.
>
> 89. In the end, the argument comes full circle: the CSTC are seeking redress for their grievances in the wrong forum.

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

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

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

2. The Duty to Decide

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

52 The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 35:

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

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

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

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

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result

> that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

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

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

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

56 No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.

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

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

58 In this part, I identify the appropriate standard of review and apply the standard to the decision under appeal. I conclude that (1) the standard is reasonableness; (2) the Commission set an unreasonably high threshold for the appellant to meet; and (3) it took too narrow a view of the Aboriginal interests asserted.

1. Standard of Review

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

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

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

will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

2. Reasoning Error

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

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

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

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

63 Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The process deprived the appellant the opportunity to develop a case for the non-physical impacts listed in their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least *participate* in the infringement.

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

65 Finally, the consultation duty is not a concept that lends itself to hard-edged tests. The trigger formula in *Haida* is to be applied within the proceeding, not on a threshold inquiry. The duty is to discuss, not necessarily to agree or to make compromises. It is to be open to accommodation, if necessary. The discussion

itself has intrinsic value as a tool of reconciliation. It is not always possible to say in advance that consultation would be either productive or futile — the Crown may be influenced by the Aboriginal perspective in the way it carries out a project. At the very least, the First Nation will have had a chance to put its views forward.

66 In reviewing the history of the duty to consult, the Court in *Haida* said, at para. 24:

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

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

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

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

Remedy

69 As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for consideration. The order I would make is in terms similar to those suggested by B.C. Hydro in the event the appeal is allowed:

> THAT the proceeding identified as "Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electric-

ity Purchase Agreement with RTA as an Energy Supply Contract Pursuant to section 71" be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.

Huddart J.A.:

I agree.

Bauman J.A.:

I agree.

Appeal allowed.

[Indexed as: **R. v. Kemash**]

HER MAJESTY THE QUEEN (Respondent) and RYAN MATTHEW PAUL KEMASH (Accused / Appellant)

Manitoba Court of Appeal

F.M. Steel, B.M. Hamilton, A.D. MacInnes JJ.A.

Heard: January 22, 2009

Judgment: March 5, 2009

Docket: AR 08-30-06954, 2009 MBCA 15

R.T. Amy for Appellant

R.S. Johnston for Respondent

Evidence — Examination of witnesses — Refreshing memory — Miscellaneous — Past memory — Accused charged with, inter alia, discharging firearm with intent to injure — Crown's evidence relied heavily upon witness with serious memory problems — Witness had given multiple statements to police and others prior to trial — At trial, witness was shown tapes and read transcripts of her past statements — Tapes and transcripts were adduced without any Canada Evidence Act application — Tapes and transcripts were allegedly used as past memory refreshed — Accused was convicted and appealed from conviction — Appeal allowed; new trial ordered — In effect, witness was being presented with prior consistent statements for introduction as proof of their contents — Past consistent statements are generally inadmissible and required at minimum Act application in order to be properly adduced — Accused accordingly did not receive fair trial and conviction was properly quashed.

Cases considered by *A.D. MacInnes J.A.*:

R. v. B. (D.C.) (1994), [1994] 7 W.W.R. 727, 95 Man. R. (2d) 220, 70 W.A.C. 220, 32 C.R. (4th) 91, 91 C.C.C. (3d) 357, 1994 CarswellMan 150, [1994] M.J. No. 403 (Man. C.A.) — referred to

R. v. B. (K.G.) (1993), 19 C.R. (4th) 1, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 148 N.R. 241, 79 C.C.C. (3d) 257, 1993 CarswellOnt 76, 1993 CarswellOnt 975, EYB 1993-67493, [1993] S.C.J. No. 22 (S.C.C.) — referred to

R. v. D. (L.E.) (1989), 50 C.C.C. (3d) 142, [1989] 2 S.C.R. 111, 39 B.C.L.R. (2d) 273, 71 C.R. (3d) 1, [1989] 6 W.W.R. 501, 97 N.R. 321, 1989 CarswellBC 165, 1989 CarswellBC 712, EYB 1989-66988 (S.C.C.) — referred to

R. v. Fliss (2002), 163 B.C.A.C. 1, 267 W.A.C. 1, [2002] 1 S.C.R. 535, 2002 SCC 16, 2002 CarswellBC 191, 2002 CarswellBC 192, 99 B.C.L.R. (3d) 1, 283 N.R. 120, 161 C.C.C. (3d) 225, 49 C.R. (5th) 395, [2002] 4 W.W.R. 395, 209 D.L.R. (4th) 347, 91 C.R.R. (2d) 189, [2002] S.C.J. No. 15, REJB 2002-28007 (S.C.C.) — considered

R. v. Kienapple (1974), 1974 CarswellOnt 238F, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 1974 CarswellOnt 8, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322, [1974] S.C.J. No. 76 (S.C.C.) — referred to

[Indexed as: **Kwikwetlem First Nation v. British Columbia (Utilities Commission)**]

In the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Project

The Kwikwetlem First Nation (Appellant / Applicant / Intervenor) and British Columbia Transmission Corporation, British Columbia Hydro and Power Authority, and British Columbia Utilities Commission (Respondents)

In the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior To Lower Mainland Project

Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band (Appellants / Applicants / Intervenors) and British Columbia Utilities Commission, British Columbia Transmission Corporation, and British Columbia Hydro and Power Authority (Respondents)

British Columbia Court of Appeal

Donald, Huddart, Bauman JJ.A.

Heard: November 26-27, 2008

Judgment: February 18, 2009

Docket: Vancouver CA035864, CA035928, 2009 BCCA 68

G.J. McDade, Q.C. for Appellant, Kwikwetlem First Nation

T. Howard, B.C. Stadfeld for Appellants, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band

K.B. Bergner, A. Bespflug for Respondent, British Columbia Hydro and Power Authority

A.W. Carpenter for Respondent, British Columbia Transmission Corporation

Public law — Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Miscellaneous — Duty to consult — First Nations intervenor made application for certificate of public convenience and necessity ("CPCN") for transmission line project proposed by respondent, British Columbia Transmission Corporation ("BCTC") — First Nations intervenor appealed decision of British Columbia Utilities Commission ("Commission") — Appeal allowed — Order was made that Commission reconsider scoping decision — Duty to consult with regard to CPCN process was acknowledged — Commission had obligation to inquire into adequacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide was whether consultation efforts up to point of decision were adequate.

quacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide was whether consultation efforts up to point of decision were adequate.

Aboriginal law — Reserves and real property — Fiduciary duty — Duty to consult — First Nations intervenor made application for certificate of public convenience and necessity ("CPCN") for transmission line project proposed by respondent, British Columbia Transmission Corporation ("BCTC") — First Nations intervenor appealed decision of British Columbia Utilities Commission ("Commission") — Appeal allowed — Order was made that Commission reconsider scoping decision — Duty to consult with regard to CPCN process was acknowledged — Commission had obligation to inquire into adequacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide was whether consultation efforts up to point of decision were adequate.

Cases considered by *Huddart J.A.*:

British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission) (1996), 36 Admin. L.R. (2d) 249, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 271, 117 W.A.C. 271, 1996 CarswellBC 352, [1996] B.C.J. No. 379 (B.C. C.A.) — referred to

British Columbia Transmission Corp., Re (2006), 2006 CarswellBC 3694 (B.C. Utilities Comm.) — considered

British Columbia Transmission Corp., Re (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.) — considered

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2009), 2009 CarswellBC 340, 2009 BCCA 67, 76 R.P.R. (4th) 159 (B.C. C.A.) — followed

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419, [2004] S.C.J. No. 70, REJB 2004-80383 (S.C.C.) — considered

Kwikwetlem First Nation v. British Columbia Transmission Corp. (2008), 2008 CarswellBC 958, 2008 BCCA 208 (B.C. C.A. [In Chambers]) — considered

Osoyoos Indian Band v. Oliver (Town) (2001), 95 B.C.L.R. (3d) 22, [2002] 1 W.W.R. 23, 2001 SCC 85, 2001 CarswellBC 2703, 2001 CarswellBC 2704, 45 R.P.R. (3d) 1, 278 N.R. 201, 75 L.C.R. 1, [2002] 1 C.N.L.R. 271, 206 D.L.R. (4th) 385, [2001] 3 S.C.R. 746, 160 B.C.A.C. 171, 261 W.A.C. 171, [2001] S.C.J. No. 82, REJB 2001-27059 (S.C.C.) — referred to

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v.*

Tulsequah Chief Mine Project (Project Assessment Director)) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)* [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403, [2004] S.C.J. No. 69, REJB 2004-80382 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, S.B.C. 2002, c. 57
Generally — referred to
Environmental Assessment Act, R.S.B.C. 1996, c. 119
Generally — referred to
Environmental Assessment Act, S.B.C. 2002, c. 43
Generally — referred to
s. 8(1)(a) — considered
s. 8(1)(c) — considered
s. 9 — referred to
s. 9(1)(a) — considered
s. 9(1)(c) — considered
s. 9(2) — considered
s. 10(1)(c) — considered
s. 11 — referred to
s. 11(1) — considered
s. 11(2)(f) — considered
s. 11(2)(g) — considered
s. 11(3) — considered
s. 16 — considered
s. 17 — referred to
s. 17(1) — considered
s. 17(2)(a) — considered
s. 17(2)(b) — considered
s. 17(2)(c) — considered
s. 17(3) — considered
s. 17(4) — considered
s. 30 — considered
s. 50(2)(e) — considered
Hydro and Power Authority Act, R.S.B.C. 1996, c. 212
Generally — referred to
Transmission Corporation Act, S.B.C. 2003, c. 44
Generally — referred to
Utilities Commission Act, R.S.B.C. 1996, c. 473
Generally — referred to
s. 45 — referred to
s. 45(1) — considered
s. 45(3) — considered
s. 45(6) — considered

s. 45(7) — considered
s. 45(8) — considered
s. 45(9) — considered
s. 46(1) — considered
s. 46(3) — considered
s. 46(3.1) [en. 2008, c. 13, s. 9(b)] — considered
s. 46(3.2) [en. 2008, c. 13, s. 9(b)] — considered
s. 71 — referred to
s. 99 — considered
s. 101 — pursuant to
s. 101(1) — considered
s. 101(5) — considered

Regulations considered:

Environmental Assessment Act, S.B.C. 2002, c. 43
Concurrent Approval Regulation, B.C. Reg. 371/2002
s. 3(2)(a) — referred to

APPEAL by First Nations intervenor from decision of British Columbia Utilities Commission.

Huddart J.A.:

1 This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

2 The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

3 The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The re-

spondents agree the ILM Project has the potential to affect Aboriginal interests, including title, requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

4 The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

5 The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

6 The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.), First Nations Scoping Issue (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

7 The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *British Columbia Transmission Corp., Re* [2006 CarswellBC 3694 (B.C. Utilities Comm.)], B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("*VITR*") and *British Columbia Hydro & Power Authority, Re* (July 12, 2007), Doc. C-8-07, (B.C. Utilities Comm.) ("*Revelstoke*"). It is the reasoning in *VITR*, amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

8 As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (B.C. C.A.) at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

9 The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin. L.R. (2d) 249 (B.C. C.A.), at paras. 46 and 48.)

10 BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

11 It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower is-

sue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

12 In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2008 BCCA 208 (B.C. C.A. [In Chambers]). It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

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

13 The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

14 As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

15 I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's

duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

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

. . . . .

(3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

. . . . .

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

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

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

(9) In giving its approval, the commission

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

(b) may impose conditions about

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

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46.(1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

. . . . .

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege

granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

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

(c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

. . . . .

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

. . . . .

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

. . . . .

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

16 The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

> The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.
>
> CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

> **2. Project Description**
>
> . . . . .
>
> (iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;
>
> . . . . .
>
> **3. Project Justification**
>
> . . . . .
>
> (ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;
>
> (iii) a statement identifying any significant risks to successful completion of the project;
>
> . . . . .
>
> **4. Public Consultation**
>
> (i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.
>
> . . . . .
>
> **6. Other Applications and Approvals**
>
> (i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and
>
> (ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

Environmental Assessment Act

8.(1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project,

. . . . .

unless

(c) the person first obtains an environmental assessment certificate for the project, or

. . . . .

9.(1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project,

. . . . .

unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

. . . . .

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10.(1) The executive director by order

. . . . .

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

. . . . .

11.(1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

. . . . .

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations

are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

. . . . .

16.(1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

. . . . .

17.(1) On completion of an assessment of a reviewable project ... the executive director ... must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director ...,

(b) the recommendations, if any, of the executive director, ..., and

(c) reasons for the recommendations, if any, of the executive director, ...

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

. . . . .

30.(1) At any time during the assessment of a reviewable project under this Act, and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate ..., the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

(a) is being or will be conducted by any of the following or any combination of the following:

(i) the government of British Columbia, including any agency, board or commission of British Columbia;

(ii) the government of Canada;

(iii) a municipality or regional district in British Columbia;

(iv) a jurisdiction bordering on British Columbia;

(v) another organization, and

(b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.

(2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

17 The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18, "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

18 The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

19 The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

20 The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

21 This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

22 BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

23 Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal

groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

24 In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

25 In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

> 4.1 The scope of assessment for the Project will include consideration of the potential for:
>
> > 4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,
> >
> > 4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

26 In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

27 The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

28 The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

29 On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

> In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

30 In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

31 On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

32 At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

33 Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

34 On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the

intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

The Scoping Decision

35 The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

36 The Commission Secretary explained (at p. 2-3):

> In both the VITR Decision and the Revelstoke Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the VITR Decision:
>
> > The government has legislated regulatory approvals that must be obtained before VITR proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for VITR. Given the Section 11 Procedural Order and the Terms of Reference for VITR, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of VITR, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).
>
> In the *Revelstoke* Unit 5 Decision, the Commission Panel said:
>
> > The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).
>
> In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order ... and the draft Terms of Reference ... the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.
>
> Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

37 In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 51 (also quoted at p. 47 of the *VITR* decision):

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

38 To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

> The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. ... [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

39 The Commission summarized its analysis (at p. 5):

> ... The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only

> after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

40 The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

41 After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *British Columbia Transmission Corp., Re* (August 5, 2008), Doc. C-4-08, (B.C. Utilities Comm.) (the "CPCN decision"). At page 96 of those reasons, it concluded:

> The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

42 The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

> ... although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

43 From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

44 On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although

Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

Discussion

45 The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

46 The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *BC Gas Utility Ltd., Re*, (May 21, 1999), Doc. G-51-99, (B.C. Utilities Comm.)). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

47 At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking, BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg.

371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

48 BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

49 On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

50 The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

51 Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.). The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

52 BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

53 The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations.

The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

54 It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

55 As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

56 Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

57 The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act*

does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act*.

58 Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

59 By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

60 In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

61 This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

62 The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during

the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

63 The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

64 If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

65 Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

Summary

66 BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

67 When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices — accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new

line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746 (S.C.C.), at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

68 Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida*, at paras. 46-47.

69 The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

70 If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

71 For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

Donald J.A.:

I agree.

Bauman J.A.:

I agree.

Appeal allowed.

[Indexed as: **Moss Estate (Trustee of) v. Moss**]

KEITH G. COLLINS LTD., as Trustee of the Estate of Danny Moss, a Bankrupt (Plaintiff) and DANNY MOSS and CARRIE MOSS (Defendants)

CARRIE MOSS (Plaintiff) and BMO NESBITT BURNS INC. (Defendant)

Manitoba Court of Queen's Bench

Clearwater J.

Judgment: January 30, 2009*

Docket: Winnipeg Centre BK 97-01-49147, CI 00-01-17835, 2009 MBQB 21

Richard W, Schwartz, Alfred Thiessen for Plaintiff, Keith G. Collins Ltd., as Trustee of the Estate of Danny Moss, a Bankrupt

J. Edward (Ted) Crane for Defendants, Danny Moss, Carrie Moss, Plaintiff, Carrie Moss

David J. Kroft, Andrew P. Loewen for Defendant, BMO Nesbitt Burns Inc.

Bankruptcy and insolvency — Property of bankrupt — Miscellaneous issues — Following investigations by Canada Revenue Agency ("CRA") dating back to late 1980s and early 1990s and subsequent audits, D and R were reassessed by CRA for income tax, penalties, and interest — They appealed assessments and appeals were heard and decided by Tax Court of Canada in 1999 — By then D filed assignment in bankruptcy and R made at least one of her two unsuccessful attempts to declare bankruptcy — D remained undischarged bankrupt — Trustee and bank brought actions asserting that life insurance proceeds from six policies of insurance on life of D's mother, E, that was paid to C as beneficiary following E's death, were property of D, and that amounts should be repaid to trustee for distribution to creditors — Trustee and bank alleged six change of beneficiary forms executed by E and forwarded to and acted upon by insurers following E's death were void and were not signed by E as required by law — Action dismissed — D did not fraudulently affix E's signature to forms — D was authorized by E to sign her name to six change of beneficiary forms by virtue of general power of attorney he held — D had been signing E's name on numerous documents over years — E relied on D to advise and assist her with her affairs and to look after her over years, particularly in her latter years — E was aware of acquisition of policies and was aware of family's subsequent financial difficulties — D was acting as E's agent — Proceeds of policies were not property of bankrupt and were not available for distribution to D's creditors — D had no interest in policies at any time subsequent to delivery of change of beneficiary forms to

*Reconsideration refused at *Moss Estate (Trustee of) v. Moss* (2009), 2009 CarswellMan 366, 2009 MBQB 197, [2009] 9 W.W.R. 156 (Man. Q.B.).

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2001 FCT 1426 (CanLII)

Date: 2001-12-20
Docket: T-1141-01
Parallel citations: [2002] 1 C.N.L.R. 169 • 214 F.T.R. 48
URL: http://www.canlii.org/en/ca/fct/doc/2001/2001fct1426/2001fct1426.html
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date: 20011220

Docket: T-1141-01

Neutral Citation: 2001 FCT 1426

BETWEEN:

MIKISEW CREE FIRST NATION

Applicant

- and -

SHEILA COPPS, MINISTER OF CANADIAN HERITAGE, and

THE THEBACHA ROAD SOCIETY

Respondents

REASONS FOR ORDER

HANSEN J.

INTRODUCTION

[1] This is an application for judicial review of the decision to approve construction of a winter road through Wood Buffalo National Park ("WBNP") ("Park") for a purpose not related to park management.

[2] On May 25, 2001, Parks Canada announced its determination pursuant to the *Canadian Environmental Assessment Act*, 1992, c.37 that construction of the winter road in WBNP would not cause significant environmental impacts, provided certain mitigation measures were implemented. Accordingly, the road was approved.

[3] The Mikisew Cree First Nation ("Mikisew") and its members claim treaty rights to hunt, trap, fish and carry out their traditional mode of life in the area encompassed by WBNP. Members of the Band contend their treaty rights will be impacted by the construction of the road.

[4] Mikisew claims the Minister's decision to approve the road was made without adequate consultation with the Band or its members, notwithstanding the fact Mikisew had clearly indicated to representatives of the Minister that

Mikisew's treaty rights would be affected. The Minister takes the position that Mikisew's treaty rights in WBNP have been extinguished, therefore, consultation is not required. Alternatively, the Minister's position is that any infringement of Mikisew's rights caused by the operation or construction of the winter road can withstand scrutiny under the test articulated in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075.

Background

[5] The Mikisew Cree First Nation is an Indian Band as defined by the *Indian Act*, R.S.C. 1985, c. I-5, as amended, whose reserve lands are situated both near and within WBNP. Mikisew is a Treaty No. 8 First Nation; its ancestors, the Cree Indians of Fort Chipewyan, were signatories to Treaty No. 8 on June 21, 1899 at Fort Chipewyan.

[6] The respondent, the Thebacha Road Society ("Thebacha"), is the proponent of the road project. Thebacha is a non-profit organization registered in both the Northwest Territories ("NWT") and the Province of Alberta.

[7] WBNP is managed and protected under the *Canada National Parks Act*, 2000, c.32. It is located in northern Alberta and southern NWT. The Park has been designated a UNESCO world heritage site. The largest national park in Canada, WBNP covers 44,807 square kilometres of land that traverses the border between Alberta and the NWT. It contains the last remaining natural nesting area for the endangered whooping crane, the largest free -roaming, self-regulating bison herd in the world, unique gypsum-karst landforms and undisturbed natural boreal forests.

[8] First Nations people have inhabited WBNP for over 8,000 years. Today, subsistence hunting, trapping and fishing and commercial trapping still take place within the Park. The Park was established in 1922 to protect the last remaining herds of wood bison in northern Canada. Since 1949, resource harvesting within the Park has been governed by specific game regulations.

[9] In 1986, Mikisew (as represented by the Chief and Council of the Cree Band of Fort Chipewyan) and Canada (as represented by the Minister of Indian Affairs and Northern Development) entered into an agreement entitled the Treaty Land Entitlement Agreement ("TLEA"). In acknowledgement of the fact that the Crown had not fulfilled her obligations with regard to certain undertakings made in Treaty No.8, specifically the setting aside of sufficient reserve lands, the Crown undertakes to satisfy those obligations in this agreement. The Crown also agrees to provide cash compensation, some training and employment opportunities, and to share wildlife management responsibilities with the Band. As consideration, the Band undertakes to release the Crown from all obligations arising out of the specific section of Treaty No. 8 that deals with provision of reserve lands.

[10] On May 25, 2001, the respondent Minister of Canadian Heritage ("the Minister") made a decision authorizing Thebacha to construct a winter road through WBNP. The proposed winter road is 118 kilometres long and would connect two communities in WBNP: Peace Point and Garden River. Peace Point is a Mikisew reserve and Garden River is a settlement of the Little Red River Cree First Nation. The proposed road follows an abandoned right-of-way that was cleared for a winter road in 1958, but was only operational until 1960. The proposed road would have a right-of-way width of 10 metres, a width sufficient for two vehicles to meet and pass. Vehicle use would be restricted to pick-up trucks, cars and vans and the posted speed limits would range from 10 to 40 kilometres per hour.

[11] Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, the establishment of the winter road would result in the creation of 200 metre wide road corridor in which the use of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

[12] There are approximately 14 Mikisew trappers residing in trapping area 1209, the area the proposed road would traverse. In addition, other Mikisew trappers who do not live in trapping area 1209 may still trap in that area. Further, there could be as many as 100 or more Mikisew hunters who hunt in the vicinity of the proposed road, although the Minister argues that the number of trappers and hunters potentially affected is significantly less.

[13] In addition to the alleged interference with its trapping and hunting rights, Mikisew submits the road would result in fragmentation of habitat, loss of vegetation, erosion, increased poaching, increased wildlife mortality due to vehicle collisions, increased risk to sensitive and unique karst landforms and the introduction of foreign invasive plant species brought in on the wheels of vehicles and the buckets of graders and back-hoes.

[14] Construction of a road along the route in question was accepted in principle in the *WBNP Management Plan*, issued in 1984. The route has been referred to as the Peace River Road route because of its proximity to the Peace River. The road currently proposed originated at meetings in August 1999 at Fort Smith, NWT between the Minister and supporters of the Peace River Road. The supporters of the project, led by Richard Power, formed Thebacha. They subsequently submitted a proposal to Parks Canada for re-establishment of a winter road along the right of way of the Peace River Road route.

[15] Parks Canada developed *Terms of Reference* for the environmental assessment of the winter road project. The *Terms of Reference* were given to Mikisew on January 19, 2000 along with the timelines for the assessment. As well, Mikisew was advised there would be a public review following the initial assessment by an outside consultant.

[16] An *Environmental Assessment Report* was completed by an independent agency, Westworth Associates Environmental Ltd.("Westworth"), in April 2000. The report noted the winter road would likely result in some fragmentation of habitat. Copies of this report were sent to Mikisew Chief George Poitras in the summer of 2000, but the applicant did not respond to this report during the 64 day period of public consultation.

[17] Following deliberations by the Chief and Council, in a letter dated October 10, 2000 Mikisew informed Josie Weninger, the Park Superintendent, that it did not consent to the construction of the road. The proposed route for the road would travel through its Peace Point Reserve. Further, Mikisew raised concerns about unresolved issues surrounding its role in the management of the Park, the subject of ongoing litigation, and identified the serious concerns of Mikisew trappers and their commitment to conservation of their traditional lands.

[18] Mikisew sent a letter to the Minister of Canadian Heritage, Sheila Copps, on January 29, 2001, expressing Mikisew's concerns with the proposed road through the Peace Point Reserve and with Parks Canada's failure to consult with Mikisew. As Mikisew had been informed that construction was to commence almost immediately, it invited Minister Copps, Minister of Indian Affairs Robert Nault, and Parks Canada CEO Tom Lee, to meet with Mikisew over the next week to discuss Mikisew's concerns, emphasizing the urgency of the situation.

[19] An alternative route, avoiding the Mikisew reserve, was chosen by Parks Canada and Thebacha. In March 2001, Parks Canada had Westworth complete a field inspection and biophysical resource assessment on the realignment. Mikisew was never consulted by Westworth in relation to these assessments.

[20] On May 25, 2001, a notice entitled "Parks Canada Determination Regarding the Thebacha Road Society Proposal to Reopen a Winter Snow Road in Wood Buffalo National Park" was posted to the WBNP website. The following appeared under the heading Finding and Determination:

Parks Canada and it's co-Responsible Authority HRDC have found the proposed reopening of the Garden River to Peace Point winter snow road is not in contradiction with Parks Canada plans and policy, (or other federal laws and regulations). It is determined that, taking into account the implementation of the Thebacha Road Society's mitigation measures, the project (construction, maintenance and operation of a winter snow road) is not likely to cause significant adverse environmental effects.

Subject to the implementation of the mitigating measures, including adaptive management and environmental management strategies, the winter snow road project is approved and can proceed.

The decision is attributed to the "Director General, Western and Northern Parks Canada Agency".

[21] A *Construction and Operating Services Agreement* was signed on July 3, 2001. It is anticipated by the respondent Thebacha that four permits will be issued under the *National Park Fire Protection Regulations* and the *National Park General Regulations*. These permits would give effect to the Agreement and provide mechanisms for the implementation of mitigation measures.

History of the Case

[22] On June 18, 2001, the Canadian Parks and Wilderness Society ("CPAWS") challenged the Minister's decision to approve the road by filing an application for judicial review in the Federal Court of Canada (File No. T-1066-01). The CPAWS application was based on administrative law grounds relating to the applicable framework of federal environmental legislation and regulations. The CPAWS application was heard by Gibson J. on September 27, 2001 in Vancouver. The application was dismissed by Order dated October 16, 2001.

[23] On June 25, 2001, Mikisew filed this application for judicial review. Mikisew's application relies on the same grounds contained in the CPAWS application but also relies on additional grounds specific to Mikisew. These include constitutional law principles relating to the Minister's fiduciary duty pursuant to s. 35(1) of the *Constitution Act, 1982*. In particular, Mikisew claims the Minister's decision was made without adequate consultation. Mikisew submits this breach of the Crown's fiduciary duty constitutes an unjustifiable infringement of Mikisew's constitutionally protected treaty rights.

[24] In early August 2001, Mikisew brought a motion for consolidation of these two judicial review applications pursuant to Rule 105(*a*) of the *Federal Court Rules, 1998.* The Minister subsequently brought a motion to have this judicial review application converted to an action. By Order dated August 13, 2001, I adjourned the motion for consolidation until the hearing of the Minister's motion for conversion.

[25] On August 27, 2001, when the motions were heard, the parties had reached an agreement. On consent, Dawson J. dismissed the motions for consolidation and conversion and ordered that the within matter would proceed on an expedited basis. Dawson J. also granted an interlocutory injunction preventing the commencement of construction on the road project until "this Court has finally adjudicated upon the within application for judicial review".

[26] Oral argument on this application was heard on October 26, 2001. Counsel for Mikisew presented evidence on the environmental law issues that was not before Gibson J. in the CPAWS application. This situation arose because counsel for the Minister elected not to file the affidavit of Josie Weninger, Park Superintendent, on the CPAWS application, but has filed it in this application.

Relief Sought

The applicant Mikisew seeks:

- an order reviewing and setting aside the decision of the Minister authorizing Thebacha Road Society to construct a winter snow road through WBNP;

- a declaration that the Minister has a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road and the extent of that consultation to this date has been insufficient;

- an order of *mandamus* compelling the Minister to consult with Mikisew with respect to the scope, nature and extent of the impact the road may have on the exercise of Mikisew's treaty rights;

- an order prohibiting the Minister from making any further decisions with respect to the construction of the road until after the completion of the consultation process mandated by this Honourable Court;

- an order for costs; and

- such further and other relief as this Honourable Court deems just.

ISSUES

[27] The applicant framed the issues as follows:

1. Was the Minister's authorization of the proposed winter road through WBNP *ultra vires* the *Canada National Parks Act* and associated regulations ?

2. Did the information gaps in the environmental assessment prevent the Minister from making a proper determination under either the *Canada National Parks Act* or the *Canadian Environmental Assessment Act* regarding the approval of the road ?

3. Did the Minister breach principles of natural justice and administrative fairness in approving the road by:

1) failing to respect the applicant's right to be heard;

2) breaching the doctrine of legitimate expectations;

3) exhibiting bias, making her decision in bad faith or conducting herself in a manner that raises a reasonable apprehension of bias or pre-determination; or

4) failing to consider all relevant information in making her decision?

4. In approving the road, did the Minister fail to conduct herself in accordance with her fiduciary and constitutional duties to Mikisew in breach of subsection 35(1) of the *Constitution Act, 1982* ?

[28] In light of the decision of Gibson J. on the CPAWS application, the applicant focussed the bulk of its arguments on the fourth issue. Therefore, I will begin my analysis with the discussion of the aboriginal and constitutional law issues.

ANALYSIS

In approving the road, did the Minister fail to conduct herself in accordance with her fiduciary and constitutional duties to Mikisew in breach of subsection 35(1) of the *Constitution Act, 1982* ?

[29] Subsection 35(1) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, reads as follows:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35.(1) Les droits existants - ancestraux ou issus de traités - des peuples autochtones du Canada sont reconnus et confirmés.

[30] The Supreme Court of Canada, in *Sparrow, supra*, at 1111-1119, sets out the now well-established test the Crown must meet when taking actions under their jurisdiction that impact on treaty or aboriginal rights. The following three questions form the framework for the analysis:

1) Is there an existing aboriginal or treaty right?

2) Has there been a *prima facie* infringement of the right?

3) Can the infringement be justified?

a) Is there a "compelling and substantial" objective?

b) Were the Crown's actions consistent with its fiduciary duty toward aboriginal people?

1. Is there an existing treaty right?

[31] The *Sparrow* analysis begins with the question of whether the First Nation can prove the existence of a treaty right.

[32] Chief George Poitras attests Mikisew have historic and constitutionally protected rights to hunt, trap, and fish and to use the land to pursue a traditional lifestyle. Furthermore, these rights extend to the land encompassed by WBNP. Mikisew submits its right to hunt, fish and trap is historically based in Treaty No.8. It states:

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

The principles of treaty interpretation

[33] In *R. v. Badger,* 1996 CanLII 236 (S.C.C.), [1996] 2 C.N.L.R. 77 at paragraph 41, Cory J., writing for the majority, set out the principles to be applied in treaty interpretation:

... First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. ... Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. ... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. ... Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. [Citations omitted.]

[34] The Minister relies on *R. v. Marshall* 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456 at page 467 where Binnie J., for the majority stated:

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...

And further, the Minister refers to page 474:

"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 ... the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement ... 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...

[Citations omitted]

[35] The Minister's position is that the Court should not favour one or the other party's interpretation of the treaty, but rather attempt to ascertain the common intention or mutual understanding of the parties at the time the treaty was made.

[36] The intentions of the parties in entering into the treaty can be adduced from a consideration of extrinsic evidence. The Minister points out that recent decisions of the Supreme Court of Canada in *R. v. Sundown*, 1999 CanLII 673 (S.C.C.), [1999] 1 S.C.R. 393, and *Badger, supra,* have held that extrinsic evidence of the historical and cultural context of a treaty may be received. Specifically, the Minister asks the Court to have reference to the historical record, the objectives of the government and the First Nations, and the political and economic context to determine the terms of Treaty No. 8. I agree that extrinsic evidence, to the extent that it can provide information about how the parties understood the terms of the agreement, can be valuable in giving content to the treaty.

The Crown's Intention

[37] According to the Minister, the Crown's intention in entering into the numbered treaties on the prairies is clear. In the Minister's view, this intention has been acknowledged by the Courts and is found in the Orders in Council establishing the Treaty Commissions, the report of the Treaty Commissioners and the treaty itself. The Minister points to the Supreme Court of Canada in *Badger, supra,* at paragraph 39, where the Court stated:

Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8 made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments ...

[38] The Minister submits the very purpose of the numbered treaties was to obtain ownership to the lands for the purpose of their "taking up". This is confirmed, in the Minister's view, by the Supreme Court of Canada's comments with respect to Treaty No.6 in *R v. Horse,* 1988 CanLII 91 (S.C.C.), [1988] 1 S.C.R. 187 at 198:

The ultimate objective of this treaty was for the Government to obtain ownership of the lands it covered and to open the surrendered lands to settlement...

[39] While I agree that the Court in *Horse, supra*, found that the intention of the Crown was to obtain ownership of the lands, the Court did not go so far as to say that the purpose of entering into the treaty was for the "taking up" of lands. The Minister's interpretation, in my view, cannot be reconciled with the text of the treaty. The treaty sets out that the First Nations will be able to pursue their traditional ways of life "throughout the tract surrendered", subject to regulations, and **except** in "such tracts as may be required or taken up **from time to time** for settlement, mining, lumbering, trading or other purposes". The treaty makes it clear that the "taking up" of land will be the exception, not the rule. The "taking up" of land will happen gradually, perhaps temporarily, and deliberately. It clearly was not intended to occur automatically on all the land surrendered. The First Nations ceded **title** to the entire tract of land, but they surrendered **use** only in specific tracts as required by the Crown for other purposes.

The First Nations' Intention

[40] Mikisew submits it is evident from the historical accounts of the treaty negotiations that the First Nations signatories were greatly concerned about the restriction of their hunting and trapping activities. The applicant relies on the *Report of the Treaty Commissioners*, submitted to the Crown in 1899:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges.

We pointed out that...the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them.

...

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

[affidavit of Chief George Poitras, Exhibit "A", applicant's emphasis].

[41] The affidavit of Bishop Gabriel Breynat, sworn November 26, 1937, may also be relevant to understanding the agreement reached in Treaty No.8. The affidavit discloses numerous oral promises made to Mikisew's ancestors by the Crown, and indicates that the Crown told Mikisew's ancestors that those promises would be honoured even though they did not make it into the text of the treaty. Among the oral promises alleged to have been made by the Crown is the promise that Mikisew's traditional means of living would not be interfered with, and the "guarantee" that Mikisew would not be prevented from hunting and fishing as their ancestors had done.

[42] The Minister's submission is that very little weight should be given to the affidavit of Bishop Gabriel Breynat on account of evidentiary and substantive difficulties.

[43] The Minister submits the evidentiary difficulties associated with the affidavit are as follows:

i) The affidavit is not filed in any particular action;

ii) The applicant has not adduced any evidence about the purpose or purposes for which this affidavit was created.

[44] The Minister's substantive difficulties associated with the affidavit are as follows:

i) Bishop Gabriel Breynat purports to have been an interpreter for Treaty No. 8 but, his name is not listed as such within the text of the treaty;

ii) The affidavit was sworn 38 years after the signing of Treaty No. 8 at a point when Bishop Gabriel Breynat was 70 years old;

iii) The Treaty Commissioners were English speaking but the first language of Bishop Gabriel Breynat was French; and

iv) Bishop Gabriel Breynat is now deceased thus preventing any opportunity to test his evidence.

[45] The Minister submits that use of the Breynat affidavit in the interpretation of Treaty No. 8 would have the Court violate several principles of treaty interpretation. In the Minister's view, reading an absolute guarantee of the right to hunt and trap into the treaty would be effectively adding to its terms, would exceed what is possible on the language, and would not reflect Canada's intentions in relation to the treaty making process.

[46] The Minister's argument based on the fact that Bishop Breynat's first language was French is without merit. Bishop Breynat is noted as an interpreter for Treaty No.11, clearly indicating his fluency in English (the language spoken by the Treaty Commissioners) and the relevant First Nations languages. The fact that French is the Bishop's first language does not support the conclusion that Bishop Breynat may have been mistaken in his interpretation of the events surrounding the signing of Treaty No. 8.

[47] In *Halfway River First Nation v. British Columbia (Ministry of Forests),* [1999] B.C.J. No. 1880 the Breynat affidavit was found to be inadmissable because it was not properly proven. The applicant in that case failed

to prove that the affidavit was produced from secure custody. However, the Court did note that there was no indication of suspicious circumstances in the swearing of the affidavit and proceeded to find a Treaty No. 8 right to hunt and trap notwithstanding the finding that the Breynat affidavit was inadmissible.

[48] In this case, the Breynat affidavit has been produced from secure custody and its authenticity has been verified. In my view, however, the oral promises spoken to in Bishop Breynat's affidavit simply corroborate other evidence, such as the *Report of the Treaty Commissioners*, that is not objected to by the Crown. Therefore, it is not necessary to resort to the evidence found in the Bishop's affidavit in order to determine that the intention of the First Nation, in entering into the treaty, was to maintain their traditional mode of living, including hunting, trapping and fishing, throughout their traditional lands.

[49] The text of Treaty No. 8 is a record of the oral exchange of solemn promises between the Crown and the First Nations. As such, and because it is written in English, the text is necessarily a reflection of the Crown's perspective of the agreement that was struck. Even so, the text explicitly grants the First Nations the right to continue hunting and trapping as they had always done, throughout the tract surrendered, subject to conservation and limited geographic restrictions.

[50] Oral promises made at the time the treaty was concluded give rise to rights under the treaty. The Courts must hold these promises in high regard if the honour of the Crown is to be upheld. Given the strenuous judicial calls for generous interpretations, and for ambiguities to be resolved in favour of the First Nations, it is my opinion that there is ample evidence, even without according any weight to the Breynat affidavit, on which to base the finding that a constitutionally protected treaty right to hunt and trap in WBNP arose out of the signing of Treaty No. 8. Next, I must consider whether that right has been extinguished.

Extinguishment

[51] In this section, I will consider whether the treaty right to hunt and trap in WBNP has been extinguished; either by statute, through the "taking up" of lands, through "visible incompatible use" or by regulation.

[52] Treaty rights are protected from extinguishment by the principle that the Crown must produce evidence of a "clear and plain intention" to extinguish the treaty right at issue. Cory J. in the majority judgment of the Supreme Court of Canada in *Badger, supra,* at paragraph 41, explains:

... the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.

Extinguishment by statute

[53] The Minister maintains the creation of WBNP by Order in Council in April 1922 (P.C. No. 2498), had the effect of "overriding any treaty rights to the Park lands which may have been previously enjoyed" by Mikisew. Additionally, the Minister claims that a series of statutory instruments enacted for conservation purposes demonstrate a "clear and plain" intention to "suspend the treaty right to hunt and trap" within the boundaries of WBNP.

[54] The *Regulations Respecting Game in Dominion Parks*, Order in Council, December 1, 1919 (P.C. No. 2415) prohibited all hunting and trapping within the Park. However, a subsequent Order in Council dated April 30, 1926 enacted a permit scheme allowing persons who had hunted and trapped in WBNP prior to its establishment to continue their vocations.

[55] The applicant submitted a 1923 Public Notice of the Department of the Interior, produced from the secure custody of the National Archives of Canada, as evidence of the continued exercise of the treaty right, despite the establishment of the National Park. It states:

It is unlawful for any person other than *bona fide* natives, being Treaty Indians, to hunt or trap wild animals or birds within the boundaries of the Wood Buffalo Park. Any person violating this regulation will be prosecuted.

Treaty Indians must, however, conform to Park regulations with respect to closed seasons.

O.S. Finnie, Director

[56] This evidence simply confirms a fact that has been all but conceded by the Minister. Since WBNP was designated as a national park in 1922, hunting and trapping in the Park by First Nations has continued.

[57] I do not find a clear and plain intention to extinguish Mikisew's right to trap and hunt in the Park in either the establishment of WBNP or in the temporary regulation of that right for conservation purposes.

Have the lands been "taken up"?

[58] The plain language of Treaty No. 8 reveals only two limitations on the right to hunt and trap. Cory J. in *Badger, supra*, describes the limitations on the rights as follows at paragraph 40:

Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered ... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.

[59] Cory J. in *Badger, supra,* at paragraph 41, held that "any limitations that restrict the rights of Indians under treaties must be narrowly construed". Therefore, the provisions of Treaty No. 8 purporting to allow the "taking up" of lands (for various purposes) must be interpreted in a manner that honours the oral agreement. Since the "taking up" of lands by the Crown would effect an extinguishment of the treaty right in the area taken up, the "taking up" of lands may also only be effected by strict proof of a "clear and plain intention".

[60] The respondent Minister submits the Courts in *R. v. Rider* (1968), 70 D.L.R. (2d) 77 (Alberta Magistrates Court) and *R.* v. *Norn,* reflex, [1991] 3 C.N.L.R. 135 (Alberta Provincial Court) at page 141, determined that national parks constitute lands "taken up for other purposes" within the meaning of Treaty No. 8. Therefore, the Minister's position is that since the land has already been "taken up", Mikisew can no longer claim treaty rights on that land. However, the Court in *Norn,* found that although the land was "taken up" for other purposes, the treaty right to hunt and trap was not extinguished. The Minister also acknowledges that the decision in *Norn* is somewhat of an anomaly, given the substantial authority to the contrary. Further, the Minister submits that the comments on treaty rights may be considered *obiter dicta*, given that the Court found justifiable infringement in any event.

[61] The Supreme Court of Canada decision in *Badger* makes my consideration of these two cases unnecessary. In *Badger,* the Court held that whether the land has been "taken up" is a question of fact to be determined on a case-by-case basis. It turns on a determination of whether the lands in question have been put to a visible use that is incompatible with the exercise of the specific treaty rights claimed.

[62] This test was articulated at paragraph 54 of the *Badger, supra,* decision:

An interpretation of the treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the *Alberta Wildlife Act* itself.

[63] The Court emphasized that the oral promises made by the Crown during treaty negotiations supported the "visible and incompatible land use" interpretation of the term. The Court concluded at paragraph 58:

Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted

this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis.

[64] The applicant submits that the threshold for establishing a visible and incompatible land use is high. The applicant points to *Halfway River, supra,* where a majority of the British Columbia Court of Appeal held that the granting of a logging permit over the traditional hunting territory of the Halfway River First Nation did not constitute a "taking up" of land under Treaty No. 8. The Court found that even though the activity in question constituted a "shared use" of the land, nevertheless, it was an infringement of the treaty right to hunt. Huddart J.A., in a concurring opinion, stated at paragraphs 172, 173 and 176:

I agree with Mr. Justice Finch that the District Manager's decision must be reviewed "in the context of the competing rights created by Treaty 8". On the facts as the District Manager found them, however, this is not a case of "visible incompatible uses" such as would give rise to the "geographical limitation" on the right to hunt as Cory J. discussed in *Badger, supra*.

I do not think that the District Manager for a moment thought that he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or extinguish the hunting right over a particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use ...

...

Nevertheless, a shared use decision may be scrutinized to ensure compliance with the various obligations on the District Manger, including his obligation to "act constitutionally", as I recall Crown counsel putting it in oral argument. Counsel agreed Sparrow provided the guidelines for that scrutinization on judicial review if a treaty right was engaged ...

Does use as a national park constitute a "visible and incompatible" use?

[65] To re-iterate, the test asks whether the use of the land as a national park is a visible use that is incompatible with the exercise of the right to trap and hunt by the First Nation.

[66] The Minister submits that national parks were established to protect the ecological integrity of a particular representative example of the Canadian landscape as well as to protect and preserve flora and fauna within that area. WBNP, in addition, has its own particular purpose. As set out within its enabling Order in Council, the stated purpose of the Park was to act as a preserve for the last remaining free roaming herd of wood bison. The Minister submits that its modern purpose has become the protection of the habitat of endangered migratory whooping cranes (whose nesting sites, the Minister adds, are remote from the road in issue), and the protection of a large boreal environment in pristine condition.

[67] The Minister concludes that treaty rights to hunt and trap within the borders of WBNP are incompatible with the purpose of the Park. The Minister feels that preservation of the Park's ecology and wildlife would be compromised if all Treaty No. 8 Indians were able to hunt and trap in the Park.

[68] The applicant relies on the holdings of the Supreme Court of Canada in *Badger, supra,* and *R. v. Sundown*, 1999 CanLII 673 (S.C.C.), [1999] 1 S.C.R. 393 for the proposition that the exercise of First Nations treaty rights is not incompatible with the creation of the Park. In these cases, not only was there no clear and plain intention to extinguish the treaty right found, but the establishment of a park did not constitute a "taking up" of land for an incompatible purpose.

[69] The Court in *Sundown, supra,* at page 414, established that "the creation of a park is not necessarily incompatible with the exercise of hunting rights unless, perhaps, the park operates as a wildlife sanctuary that prohibits all hunting". In upholding the hunting rights of First Nations in Meadow Lake Provincial Park, the Court unanimously concluded:

... For example, if the park were turned into a game preserve and all hunting was prohibited, the treaty right to hunt might be entirely incompatible with the Crown's use of the land. See in this respect *R. v. Smith*, reflex, [1935] 2 W.W.R. 433 (Sask. C.A.). This position accords well with *Myran v. The Queen*, 1975 CanLII 157 (S.C.C.), [1976] 2 S.C.R. 137, which held that there was no inconsistency in principle between a treaty right to hunt and the statutory requirement that the right be exercised in a manner that ensured the safety of the hunter and of others.

[70] The applicant submits that the purpose of WBNP cannot be incompatible with hunting. The applicant points to the *Wood Buffalo National Park Game Regulations*, SOR/78-830 which allows both natives and non-natives to hunt in the Park during open season as long as they have a permit. The applicant argues that there are no provisions in the Regulations that prohibit hunting by First Nations, and suggests that the Crown has recognized the treaty right to hunt in the Park since the Park's inception. The trial judge in *Norn, supra,* at page 139, considered the history of the Park and provided the background as follows:

It is important to consider this case in its historical context. Treaty No. 8 was executed by the parties in 1899. National parks were in existence and hunting within the parks was governed by regulations. At the time that Wood Buffalo National Park was created in 1922 the regulations prohibited hunting in all Dominion parks. The Wood Buffalo National Park was created to preserve and safeguard the Wood-bison, also known as Wood-buffalo, within their original habitat. The government was concerned that if such a reserve was not set aside the only remaining herd of buffalo in their native and wild state would become extinct. Pursuant to the provisions of s.18 of *The Dominion Forest Reserves and Parks Act,* and by Order in Council, dated the 18th day of December, 1922, part of the Treaty 8 land was designated as the National Park. The previously amended regulations, dated the 1st day of December 1919, were further amended by Order in Council, dated the 30th day of April 1926, to allow hunting within Wood Buffalo National Park by permit of those treaty Indians, who, previous to the establishment of the Park, had hunted in the area. Since 1926 the regulations have been amended and varied from time to time but a permit is still required for hunting within the Park [applicant's emphasis]

[71] In cross-examination, Josie Weninger, Park Superintendent, admitted that hunting and trapping in WBNP is not inconsistent with Parks Canada's regulatory regime (Cross-examination of Josie Weninger, October 1, 2001, page 1, lines 13 to 24). The applicant argues that this clearly points to the conclusion that the Crown has neither expressed a clear and plain intent to extinguish the right to hunt in the Park, nor has it "taken up" the land for a use incompatible with the right to hunt. In fact, the applicant submits that the situation would be more accurately described, as in *Halfway River,* as a "shared use" of the land.

[72] Finally, the applicant submits that the 1986 Treaty Land Entitlement Agreement ("TLEA") provides further evidence of Mikisew's existing treaty rights in WBNP. The applicant claims that the TLEA has great significance. First, it is a recognition by Canada that Mikisew has rights under Treaty No. 8, including rights within WBNP; and second, it recognizes that the exercise of Mikisew's treaty rights in WBNP is not an "incompatible use". While the "harvesting rights" guaranteed in Schedule 6 of the TLEA apply to the "traditional lands" of Mikisew and not the land to be traversed by the road in issue, they nevertheless are still within Park boundaries and, therefore, point to the conclusion that hunting and trapping by Mikisew is not incompatible with the use of the land as a national park.

[73] In my view, the lands of WBNP have not been "taken up" in a manner that is incompatible with a regulated right to hunt and trap by Mikisew. The Minister is defending a decision to build a road through this Park. Part of the Minister's strategy, as will be seen in the next section, includes pointing to the relatively few number of Mikisew hunters who will be affected by the road. At the same time, the Minister wishes to argue on this point that a treaty right to hunt and trap in the Park (exercised by the "few" Mikisew hunters) would be incompatible with the "modern purpose" of the Park which is to protect the habitat of endangered migratory whooping cranes and the protection of a large boreal environment in pristine condition.

[74] The Minister's appeals to 'ecological integrity' in this context are without merit. That is not to say hunting and trapping could never be found to be incompatible with the use of land as a national park. WBNP is a unique park; it is a vast and isolated wilderness. The exercise of hunting and trapping rights by Mikisew has

coexisted with the use of the land as a national park since its inception. The following appears on the WBNP website maintained by Parks Canada:

Subsistence hunting, fishing and trapping still occur in Wood Buffalo National Park, as they have for centuries, and commercial trapping continues as a legacy of the fur trade. Traditional use of certain park resources by local Aboriginal groups is considered an important part of the park's cultural history. (http://parkscanada.pch.gc.ca/)

[75] As noted earlier, in *Badger, supra,* the Court held that whether the land has been "taken up" by the Crown is a question of fact to be determined on a case-by-case basis. On the facts before me, I am satisfied that the exercise of a right to trap and hunt is not incompatible with the use of land as a national park, particularly with respect to a park that is as large and as remote as WBNP.

Does regulation of the treaty right result in partial extinguishment?

[76] The Minister notes that s.35(1) of the *Constitution Act* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". The Minister submits that in relation to the meaning of the term "existing" the Supreme Court of Canada has stated in *Sparrow, supra*, at page 1091:

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. A number of courts have taken the position that "existing" means "being in actuality in 1982". [Citations omitted]

[77] I agree that the issue is whether prior to 1982 treaty Indians had a right to enter WBNP for the purposes of hunting and trapping or whether that particular right had been extinguished. It is the Minister's position that prior to 1982 there is little doubt that federal law could extinguish and/or alter treaty rights. As the Supreme Court of Canada noted in *Marshall, supra,* at page 496:

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 CanLII 62 (S.C.C.), [1964] S.C.R. 642 and *R. v. George*, 1966 CanLII 2 (S.C.C.), [1966] S.C.R. 267...

[78] The Minister submits the issue of a "regulated" treaty right must be addressed. According to the Minister, the Supreme Court of Canada in both *Sparrow, supra*, and *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723 concluded that regulation of First Nations' fishing did not amount to extinguishment because, although the activity was regulated, it was, nonetheless permitted. In the Minister's view, the important distinction is between that which was regulated but nonetheless permitted versus that which was not permitted.

[79] The Minister urges that the limited privilege to hunt and trap within the Park be appropriately characterized. In her view, the current hunting and trapping privileges enjoyed by some members of Mikisew is not a regulated Treaty No. 8 right. Instead, there is a strict prohibition on hunting and trapping in relation to which there is a limited exception which allows only a small definable group the privilege.

[80] In my opinion, the case law does not support the Minister's distinction between a right that is "regulated" and one that is "not permitted". In *Gladstone, supra,* the aboriginal right to sell herring was not extinguished by extensive regulation that included, at various times, a complete prohibition on the trade.

[81] In *Sparrow, supra,* at page 1092, the Court specifically rejected the view that regulation results in a partial extinguishment. The Court held that the right, provided it had not been extinguished by a clear and plain intention prior to 1982, could be considered to exist in its unregulated form. The word "existing" simply means to exclude those rights validly extinguished prior to the *Constitution Act, 1982*.

Conclusion

[82] The Crown's ability to declare that lands have been "taken up" for other purposes prior to the constitutionalization of treaty rights in 1982 is limited by the principles of treaty interpretation. Going back to *Badger, supra*, at paragraph 41, the Court held that "... any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed..." Therefore, the conclusion that a geographic limitation on the exercise of treaty rights (the "taking up" of land by the Crown) has been achieved, must not be arrived at lightly.

[83] I agree with the applicant's submissions that the treaty rights that existed in 1899 received constitutional protection in 1982 as "existing treaty rights", subject only to the Crown's right to take up land and a consideration of any evidence of a clear and plain intent to extinguish the rights prior to 1982. The Crown has failed to discharge the onus to provide evidence of a "clear and plain intention" to extinguish the treaty rights. Accordingly, this constitutional protection requires any infringement of these rights to be justified in accordance with the *Sparrow* test.

[84] As an aside, the respondent also advanced the following proposition in these proceedings: the road approval itself amounts to a "taking up" of land by the Crown. Here, the Minister argues that the First Nations people appreciated there would be encroachment on the lands, therefore, this "taking up" of the road corridor by the Crown would not require justification according to the *Sparrow* analysis. The applicant responds that the "taking up" of lands is not expressly authorized by the treaty - the treaty simply limits the exercise of treaty rights on the land that is taken up. Therefore, in the applicant's view, the taking up of lands is an exercise of Crown authority, subject to the Constitution, and must be justified according to the test in *Sparrow*.

[85] The approach of the Crown forwarded here would render the 1982 constitutionalization of the treaty rights meaningless. It is clear that post-1982, the Crown can not unilaterally defeat treaty rights. This position taken by the Minister cannot be reconciled with the honour and integrity of the Crown as a fiduciary. Finch J. concluded in *Halfway River, supra,* at paragraph 136 that it is "... unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt... ".

[86] Whether the road approval is characterized as a "taking up" of land or as the imposition of a "shared use", if it is found to constitute a *prima facie* infringement on the treaty rights of Mikisew, it will have to be justified according to the *Sparrow* analysis.

2. Has there been a *prima facie* infringement of the treaty right?

[87] The applicant submits there is a low threshold for establishing a *prima facie* infringement under the *Sparrow* test. The applicant relies on the following statement by the Supreme Court of Canada in *Gladstone, supra*, at page 810:

Although I agree with the analysis of the Chief Justice on this issue, I want to emphasize that the burden to demonstrate that legislation infringes upon an existing aboriginal right, which is borne by the claimant, is fairly low ... Therefore, the aboriginal right claimant does not even have to prove on the balance of probability that the impugned legislation constitutes an infringement, and surely not that it "clearly impinges" upon the right, as the Chief Justice seems to suggest. The only thing that the claimant must show is that, on its face, the legislation comes into conflict with a recognized aboriginal right, either because of its object or its effects...

[88] Mikisew submits the construction of the road constitutes a *prima facie* impact on the exercise of their treaty rights. The applicant notes that all of Mikisew's reserve lands are situated close to WBNP and their Peace Point reserve is located wholly within the Park. Peace Point serves as the east terminus of the proposed road.

[89] The applicant submits the evidence of the proposed road's impact on Mikisew's rights is overwhelming. When Parks Canada's witness, Josie Weninger, was asked during cross-examination about the potential impact of the road on moose, the following exchange took place:

Q: And specifically we don't know what impact the road is going to have on moose, as an example, correct?

A: I would say that's correct. Without going down on the ground though, it's difficult to see what impact there would be on moose.

Q: So then, as an example, given that you don't know what the impact of the road is going to be on moose, how is it that you're able to determine how somebody should be able to be compensated, as an example, for the loss of moose arising from the construction of this road?

A: We do have information on impact of road on moose. We know, for example, that you're not likely to find a lot of hunting of moose on the road because the moose will avoid it.

Q: So then on the basis of that answer, at least in the area of at least with regard to moose specifically then, it's been your experience in other areas of the Park that roads do in fact harass moose out of the areas where roads are constructed, correct?

A: I would say they avoid them. I'm not sure I would say it harasses them out because we do have other incidents, as you're probably aware of, some hunting on roadway.

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.

[Cross-examination of Josie Weninger, October l, 2001, page 13, line 10 to page 14, line 11, Application Record at 265-266]

[90] In response to this evidence of infringement, the Crown submits "the system of hunting permits within the Park does not restrict a hunter to any particular territory". Therefore, in the Minister's view, a hunter with a valid permit is free to hunt anywhere within the boundaries of the Park. In the event the road causes a change in the movement patterns of moose, the Minister argues that such a change could be easily accommodated by the similar movement of a hunter.

[91] The impact the road would have on the environment in the Park is set out in the affidavit of former park warden, Jacques Saquet. Projected impacts include: fragmentation of wildlife habitat and disruption of migration patterns, loss of vegetation, erosion of sandy soils, increased poaching because of facilitated access, increased wildlife mortality due to vehicle collisions, increased risk to sensitive and unique karst landforms, and the introduction of foreign invasive plant species.

[92] The applicant argues that any impact on the environment would have a corresponding impact on Mikisew's rights to hunt and trap in the Park due to Mikisew's reliance on the stability of the wildlife and furbearer populations. For example, the fisher is an economically important species for trappers in WBNP (Draft Environmental Assessment Report, section 5.4.3.3). The fisher is a vulnerable species that thrives in undisturbed wilderness; it makes up a significantly higher proportion of the furbearer catch inside the Park than it does outside (Draft Environmental Assessment Report, Table 16). The Environmental Assessment was unable to predict the impact of the road on the fisher populations or the populations of other important furbearers such as muskrat, marten, wolverine and lynx. However, it did note that increases in trapping pressure, as would be expected with increased access, have been found in the past to cause significant decreases in marten populations and a local extinction of fishers (Draft Environmental Assessment Report 6.4.7.3.).

[93] In terms of wildlife, the analysis in the Environmental Assessment Report discloses a significant potential impact on traditional hunting activities as well. Moose is the focus of much of the subsistence hunting in the Park by the traditional users (Draft Environmental Assessment Report 5.4.3.6). The road will increase access into previously isolated regions, which is likely to result in increased mortality of moose due to more intensive hunting, poaching and predation. As a result of an increase in wolf occurrence along the right-of-way, moose, drawn to roadways for preferred foraging opportunities, may fall prey to wolves more often.

[94] The applicant also notes it is important to recognize that the impact of the road on hunting will be increased by the prohibition on the use of firearms within 100 metres of either side of the centre line of the road, as required by section 36(5) of the *Wood Buffalo National Park Game Regulations*. As a result of these Regulations, hunting will be prohibited over approximately 23 square kilometres of land.

[95] Based on the foregoing, Mikisew submits it has clearly established a *prima facie* impact on its treaty rights triggering the Crown's obligation to justify that impact in accordance with the requirements set out in the *Sparrow* test.

[96] The Minister acknowledges that one of the risks associated with the proposed winter road is the potential increase in unauthorized hunting. The Minister notes, however, that poaching is only anticipated during those winter months when the road will be open and accessible. Mikisew's reply is that once the right-of-way is cleared, access to all terrain vehicles will be facilitated throughout the year. This point is well taken.

[97] Finally, while the Minister agrees with the applicant's submission that the road will cause a prohibition of hunting over an area of approximately 23 square kilometres, the Crown urges that it must be considered in the context of a Park which encompasses 44,807 square kilometres.

[98] In my opinion, the applicant has demonstrated the following impacts on its right to trap and hunt in WBNP:

i) **a geographical limitation**

Within the road corridor, Mikisew hunters will be prohibited by regulation from exercising their right to hunt. The ability to carry on traditional hunting activities in proximity to the reserve lands is important to the exercise of the hunting right. Further, trapping will also be disrupted. Many of the Mikisew traplines are located close to the existing right-of-way, presumably for ease of access. In fact, the proposed route passes through Mikisew's designated registered trapping area and passes within one kilometre of a Mikisew trapping cabin. To the extent that traplines will have to be re-located, Mikisew's right to trap is clearly impacted.

ii) **potential adverse economic consequences**

First, the Draft Environmental Assessment Report states the road could potentially result in a diminuation in quantity of "catch"for Mikisew; fewer furbearers will be caught in their traps. Second, the same report identifies a potential change in the composition of the "catch"; the more lucrative or rare species of furbearers may decline in population.

iii) **potential cultural consequences**

Subsistence hunting and trapping by traditional users of the Park's resources has been in decline for many years. Opening up this remote wilderness to vehicle traffic could potentially exacerbate the challenges facing First Nations struggling to maintain their culture. For example, if the moose population is adversely affected by increased poaching or predation pressures caused by the road, Mikisew will be forced to change their hunting strategies. This may simply be one more incentive to abandon a traditional lifestyle and turn to other modes of living. Further, Mikisew argues that keeping the land around the reserve in its natural condition and maintaining their hunting and trapping traditions is important to their ability to pass their skills on to the next generation of Mikisew.

<u>The test for *prima facie* infringement</u>

[99] The Minister proposes that even if the Court concludes there may be some evidence of an infringement, to be consistent with the *Sparrow* principles outlined above, the evidence must be scrutinized by a further three part test: (i) is the limitation reasonable; (ii) does it impose undue hardship; and (iii) does it deny the right holders the preferred means of exercising their rights?

[100] The relevant passage from *Sparrow, supra,* at page 1112 reads:

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...

[101] The applicant's position is that the three considerations or questions listed in *Sparrow* do not constitute a three-part test. In fact, strictly speaking none of them would have to be met in order to find a *prima facie* infringement. The applicant cites from *Sparrow, supra,* at page 1111 as follows:

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1)...

[102] From this, the applicant maintains it is clear that the Supreme Court of Canada did not intend to establish a three-part test nor did they intend to require that all three elements named by the respondent be met. The applicant argues that if the proposed road has the effect of interfering with their treaty rights to trap and hunt, then a *prima facie* infringement is established and the inquiry goes no further. The applicant states that its interpretation gains support from the following sentence in *Sparrow, supra,* at page 1112 which follows the discussion of the three questions to be considered:

... In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food...

[103] The applicant interprets this comment as an indication that the Court in *Sparrow* did not intend to impose a three-part test, but a list of considerations. In the applicant's view, the Court in *Sparrow* acknowledged that, in the end, the question is simply "is there an adverse impact?"

[104] The Supreme Court of Canada in *Gladstone, supra,* at page 57 indicated that there is not a stringent three-part test to be passed. Lamer C.J. writing for the majority, explained that the questions of reasonableness, undue hardship and preferred means are merely factors to be taken into account. Infringement, in his analysis, is best viewed as any real interference with or diminuation of the right. The applicant points to the decision in *R. v. Breaker*, reflex, [2001] 3 C.N.L.R. 213 (Alta P.C.), where Cioni J. held that the act of establishing a road corridor was, in itself, a *prima facie* interference with the right to hunt within that area. McLachlin J. (as she then was) clarified the test in *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507 at pages 656-657. McLachlin J. was in dissent but her views on this point were not contested:

The test for *prima facie* infringement prescribed by *Sparrow* is "whether the legislation in question has the effect of interfering with an existing aboriginal right" (p. 1111). If it has this effect, the *prima facie* infringement is made out. Having set out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising that right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the *prima facie* right; as the Chief Justice notes in *Gladstone* (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a *prima facie* violation. In any event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a *prima facie* infringement.

[105] It is clear the onus of proving a *prima facie* infringement lies with the applicant. In *Sparrow*, the Court asks whether there would be an adverse impact on the exercise of the right. The Court then asks whether the restriction "unnecessarily" infringes the exercise of the right. I agree that this part of the analysis seems to blur with the justification branch of the *Sparrow* test. The Minister is correct that the Court in *Sparrow* mentioned the three considerations as part of the analysis under the determination of a *prima facie* infringement, however, the case law since *Sparrow* has not focussed on those factors. In my opinion, the applicant's position reflects recent judicial interpretation (See for example *Gladstone, supra,* at page 757 and *R* v. *Coté*, 1996 CanLII 170 (S.C.C.), [1996] 3 S.C.R. 139 at page 186).

[106] Accordingly, it is not necessary to consider the three questions explored by the Minister since I am satisfied the applicant has made out an adverse impact on the exercise of its treaty rights. It is not appropriate, at this stage, to consider whether the rights have been **unnecessarily** impacted. This issue is more properly addressed within the justification analysis. In conclusion, I find the applicant has met the *prima facie* infringement branch of the *Sparrow* test.

3. Can the infringement be justified?

[107] Once a *prima facie* impact has been established, the onus shifts to the Crown to demonstrate that the impact is justifiable. As noted in *Sparrow, supra*, at page 1121:

... If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation...

[108] Justification requires the Crown to meet a two-stage test. The infringement must be related to a compelling and substantial government objective and it must be consistent with the Crown's role as a fiduciary.

a. Is there a compelling and substantial objective?

[109] The Supreme Court of Canada in *Sparrow, supra,* at page 1113, held that the first consideration under the justification analysis is whether or not there is a valid legislative objective at issue:

If a *prima facie* interference is found the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s.35 (1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s.35(l) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

[110] Mikisew submits that when, as in this case, it is the decision of a government official as opposed to the enactment of legislation that is at issue, the pertinent question to ask is whether there is a valid and substantial objective supporting the decision. Here, the applicant argues, the question is: "Was there a compelling and substantial objective behind the approval of the construction of the road to the detriment of Mikisew's treaty rights, or can the objective be met elsewhere?"

[111] The applicant argues the evidence makes it obvious that the objective behind authorizing the construction of the road was mere convenience, to facilitate travel between the communities in and around the Park. The applicant submits the objective was not related to safety, emergency, economic or other important public purposes. Indeed, the applicant argues that by Parks Canada's own acknowledgment the road was not considered to be for park purposes. Such an objective is not, in Mikisew's submission, sufficiently compelling and substantial to justify the infringement of constitutionally protected treaty rights.

[112] The Minister relies on the document produced by Parks Canada in announcing their decision to support their assertion of a valid legislative objective:

... Neither the former, nor the revised *National Parks Act*, provide any specific guidance for winter snow roads as part of a regional transportation and community access system. Also, Parks Canada does not have a general nor a specific policy applicable to the reopening of a former winter snow road in Wood Buffalo National Park. This is not an unusual situation as national policy guidelines and regulatory statutes seldom are formed to deal with circumstances unique to a specific location. Winter snow roads are a long-standing and wide-spread method of access in large areas of northern Canada, including in the vicinity of Wood Buffalo National Park. Parks Canada has a recognized responsibility to consider traditional and historic patterns of travel, regional transportation and

social construct in relation to its national parks, particularly in remote and sparsely populated territory. Consequently it is concluded that although the proposed winter snow road is not needed for operational Parks purposes, it is acceptable to consider reopening this winter snow road for the social and transportation needs of local residents, subject to acceptable potential adverse environmental effects.

[affidavit of Josie Weninger, Exhibit "E" at page 3, Minister's emphasis)]

[113] The Minister also relies on the evidence of Richard Power, Project Coordinator for Thebacha. In his view, WBNP creates a geographic barrier that isolates the surrounding communities. The Minister submits there is little opportunity for local residents to visit with friends and family in the winter months due to the lack of access through the Park. The Minister argues it was with the objective of connecting these isolated First Nations that it approved the construction of the winter road.

[114] Further, the Minister submits the winter road is important for the individuals who reside in Fort Smith, including members of Salt River First Nation, Smith's Landing First Nation, Little Red River Cree First Nation and the Fort Smith Metis Council. It will allow them to access important services and maintain social and family networks.

[115] I accept the Minister's assertion that the winter road proposal was adopted, not for mere convenience purposes, but to fulfill the legislative objective of meeting regional transportation needs. However, I am persuaded by the applicant's argument that this purpose is not sufficiently "compelling and substantial" to justify the infringement of constitutionally protected treaty rights. For example, the objective is not aimed at safe-guarding s. 35(1) rights by conserving or managing a natural resource as noted in *Sparrow* to be a valid legislative objective. It is not aimed at preventing harm to the local population or to aboriginal peoples themselves. McLachlin J. in *Van der Peet* calls these "compelling objectives, relating to the fundamental conditions of the responsible exercise of the right".

[116] McLachlin J. in her dissenting judgment in *Van der Peet*, expresses strong disagreement with the holding of the Chief Justice in *Gladstone, supra,* on the issue of the justification test. In a principled analysis, she notes that the Chief Justice interpreted the first requirement of the *Sparrow* test for justification, a compelling and substantial objective, as one that could be met by any goal intending to further the good of the community as a whole, taking into account aboriginal and non-aboriginal interests. The objectives of actions that infringe constitutionally protected rights, in her view, must be ones that preserve the "civilised exercise of the right". Allowable limitations would not negate the right, but limit its exercise. She continues at page 661:

... The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

[117] In *Delgamuukw v. British Columbia,* 1997 CanLII 302 (S.C.C.), [1998] 1 C.N.L.R. 14, a year later, however, the majority at paragraph 161 commented that:

... legitimate government objectives also include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (para 75). By contrast, measures enacted for relatively unimportant reasons, such as sport fishing without a significant economic component (*Adams, supra*) would fail this aspect of the test of justification.

[118] In my view, the majority judgments in *Gladstone* and *Delgamuukw* have had the effect of weakening the justification test as set out in *Sparrow*. The Court in *Sparrow* held that general public interest objectives would be insufficient to meet the test but did not articulate which government objectives would prove to be compelling and

substantial. Subsequent judicial interpretation, as described above, has allowed public interest objectives to creep into the analysis.

[119] The Supreme Court of Canada in *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 4 C.N.L.R. 1 at pages 22 -23 commented on the issue of defining compelling and substantial objectives:

As with limitations of the rights enshrined in the *Charter*, limits on the Aboriginal rights protected by s. 35(1) must be informed by the same purposes which underlie the decision to entrench those rights in the Constitution to be justifiable: *Gladstone, supra*, at para. 71. Those purposes are the recognition of the prior occupation of North America by Aboriginal peoples, and the reconciliation of prior occupation by aboriginal peoples with the assertion of Crown sovereignty: *Van der Peet*, at para. 39, *Gladstone*, at para. 72. Measures which are aimed at conservation clearly accord with both these purposes, and can therefore serve to limit aboriginal rights, as occurred in *Sparrow*.

I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of Aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct Aboriginal cultures. Nor is it aimed at the reconciliation of Aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone*, at para. 74) to warrant the limitation of aboriginal rights.

[Emphasis added]

[120] While in *Adams* the Court found that the promotion of sport fishing, on the facts of the case, did not constitute a compelling and substantial objective, they did leave the door open for an economic rationale for justification. Further, Lamer C.J. returned to the notion of "reconciliation", a theme running through the cases from *Gladstone* to*Delgamuukw*. In Lamer C.J.'s view, attention must be drawn to the fact that "... Aboriginal societies exist within, and are a part of, a broader social, political and economic community..." (*Gladstone* at page 97). This concept of reconciliation was elevated in these cases to one of the central purposes of s. 35(1). However, the Supreme Court of Canada's recent decision in *Marshall, supra*, may signal an end to the "reconciliation" approach.

[121] Writing for the majority in *Marshall*, Binnie J.'s approach to s. 35(1) focusses on upholding the honour of the Crown. The decision makes no mention of "reconciliation" as a purpose underlying s. 35(1). The focus is not on accommodating economic and non-native interests with aboriginal rights, but on the obligations and responsibility of the Crown toward First Nations.

[122] Having regard to Binnie J.'s approach in *Marshall* and considering the direction in *Adams* to judge an objective by asking whether it is "informed by the same purposes" as the provision which provides constitutional protection for the rights, I find that an enhanced regional transportation network for the communities surrounding the Park is not a compelling and substantial objective. Allowing the social and economic interests of other communities to justify diminishing Mikisew's right to trap and hunt cannot be said to be in recognition of the prior occupation of this land by Mikisew.

[123] However, in the event that I am wrong and the objective of meeting regional transportation needs does constitute a compelling and substantial objective, I will proceed with the *Sparrow* analysis to determine whether this legislative objective can be justified in its infringement of a treaty right.

b. Were the Crown's actions consistent with its fiduciary duty toward aboriginal people?

[124] Once a valid objective is found, an infringement can only be justified if it is consistent with the fiduciary relationship existing between the Crown and the First Nation. The Court in *Sparrow* explained the second part of the test as follows:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra.* That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

(*Sparrow, supra*, at page 1114)

[125] The applicant submits the Minister's authorization of the road was not carried out in a manner that demonstrated any regard for Mikisew's treaty rights. Accordingly, it constitutes a breach of the fiduciary duty owing to a First Nation by the Crown.

[126] The Court in *Sparrow* set out further questions to be addressed in assessing whether or not the Crown's actions were consistent with its fiduciary duty owing to First Nations. Depending on the circumstances of the inquiry, these questions include: whether the treaty right has been given adequate priority in relation to other rights; whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the First Nation in question has been consulted.

[127] How each of these considerations fits into the scheme of the *Sparrow* analysis is somewhat unsettled. Lamer C.J. in *Delgamuukw, supra,* remarked as follows at page 76:

The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the "legal and factual context" of each appeal (*Gladstone, supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and Aboriginal peoples demands that Aboriginal interests be placed first. However, the fiduciary duty does not demand that Aboriginal rights always be given priority. As was said in *Sparrow, supra*, at pp. 1114-15 [S.C.R.; page 184 C.N.L.R.]:

The nature of the constitutional protection afforded by s. 35(1) *in this context* demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis added.]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119 [S.C.R.; p. 187 C.N.L.R.]):

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

*Sparrow*did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the Aboriginal right at issue.

[128] Having regard to the factual context of the case before me, the analysis in this section will focus on the adequacy of the Minister's consultation with Mikisew. It is also necessary to touch on the issues of priority, minimal infringement and compensation. In exploring each of these issues, the central focus of the analysis is whether the actions of the Crown are consistent with its role as a fiduciary.

(i) Has the aboriginal group in question been meaningfully consulted by the Crown?

[129] The applicant submits that in authorizing the construction of the road without adequate consultation with Mikisew as required by s. 35(l) of the *Constitution Act, 1982*, the Minister has failed to meet the duties imposed on her. Accordingly, her decision is not justified.

[130] First Nations consultation has been a necessary ingredient in the justification analysis since *Sparrow*. Both parties rely on the statements of Lamer C.J. in *Delgamuukw, supra,* at page 79 for articulation of the duty to consult:

There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, in the same way that the Crown's failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some case 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]

[131] Mikisew points to the B.C. Court of Appeal decision in *Halfway River, supra*, at page 44, where the Crown's fiduciary obligation to consult with First Nations prior to making decisions that impact treaty rights was also at issue. The Court affirmed the obligation to consult, and elaborated on its content as follows:

... 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.(Citations omitted)

[Emphasis added]

[132] The applicant further submits the Crown's fiduciary obligation to consult with First Nations was affirmed in the case of *R. v. Noel*, [1999] 4 C.N.L.R. 78 in which the Court considered the Territorial government's establishment of a hunting corridor. The applicant submits that the Court held that, even under time constraints, the Territorial government was not entitled to overlook the rights of First Nations. The Court concluded, at page 95, that the government had to take First Nations' constitutional rights seriously and conduct proper consultation:

... Consultation must require the government to carry out meaningful and reasonable discussions with the representatives of Aboriginal people involved. The fact that the time frame for action was short does not justify the government to push forward with the proposed regulation without proper consultation.

[133] In the case of *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, 1998 CanLII 9086 (F.C.), [1998] 4 C.N.L.R. 68, the Federal Court of Canada Trial Division held that the Governments of Canada, Newfoundland and Labrador, could not proceed with the establishment of a national park in territory which is subject to a comprehensive land claim until "adequate, meaningful consultations" with the Inuit had been carried out. The applicant notes that even though the Court found the establishment of the national park would only minimally impact the Inuit's rights and use of the land, it nevertheless held that the Crown had a duty to carry out meaningful consultation with the Inuit. Richard A.C.J. (as he then was) stated as follows at pages 98-99:

The fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal rights is justified.

The nature and scope of the duty will vary with the circumstances. Even where 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 rights and lands are at issue.

Any negotiations should also include other Aboriginal nations which have a stake in the territory claimed. The Crown is under a moral, if not a legal, duty to enter into and conduct these negotiations in good faith.

[134] Mikisew argues that "unilateral actions" that infringe upon treaty rights reflect adversely on the honour of the Crown. In the applicant's view, the Crown cannot be seen to have acted honourably as a fiduciary toward its beneficiaries in the exercise of its discretionary powers because it did not consult with Mikisew prior to making a decision which constituted a *prima facie* impact on their treaty rights.

[135] Mikisew submits the Minister failed to fulfill the Crown's fiduciary obligation to consult with them in good faith and with the intention of substantially addressing their concerns. They argue any consultation that took place falls far short of the nature and level required by the Constitution.

[136] The Minister relies on the decision of *Liidlii Kue First Nation* v. *The Attorney General of Canada*, [2000] F.C.J. No. 1176 (Q.L.). Here, Reed J. considered the content of the duty to consult and commented at paragraph 62: "Another factor relevant to the nature and scope of the required consultation will be the nature of the prospective infringement".

[137] The Minister also refers to *Halfway River, supra,* where Finch J. offered a survey of the existing case law at paragraph 160:

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

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

[138] Therefore, the Minister's position is that since the content of the duty to consult is largely based on the extent of the infringement of the right, and the infringement in this case can be characterized as minimal, then the duty to consult in this case is a low one.

Evidence of Consultation

[139] The applicant submits the failure of the Minister to consult Mikisew in the decision-making process speaks for itself. The communications between Parks Canada, Thebacha and Mikisew concerning the road initiative are set out below. Since the issue of adequate consultation is critical to this application, I have drawn at length from the evidence presented regarding consultation:

Chronology of Communications

Summer 1999	Mikisew was approached by Thebacha and was informed of their desire to construct a winter road from Peace Point to Garden River. The proposed road would cross a 0.8 km long section of Mikisew's Peace Point Reserve at the east end to connect with the existing park loop road. Thebacha asked Mikisew to support the road. Mikisew advised that it would have to explore the proposal in detail and consider whether the road would be in their membership's best interests.
January 19, 2000	Parks Canada e-mailed Chief Poitras and provided him with a copy of the Terms of Reference for the environmental assessment. Chief Poitras was also advised at this time of the timelines relating to the assessment and the subsequent public review period.

July 20, 2000	A meeting was held between Josie Weninger and Chief Poitras at which Parks Canada provided the Chief with more information regarding the status of the proposed road project.
July 25, 2000	An Open House was held by Parks Canada at Fort Chipewyan. Two Mikisew trappers attended.
August 2000	Chief Poitras was provided with copies of the Environmental Assessment Report.
August 3, 2000	A meeting was held between Josie Weninger and Chief Poitras at which Parks Canada gave Chief Poitras an update on the status of the road proposal.
August 16, 2000	A letter was sent to Richard Power of Thebacha by Lawrence Vermillion, a Mikisew trapper, with a copy to Josie Weninger. The letter outlined the concerns of seven Mikisew trappers who trap in the area of the proposed road. Among the concerns raised were impacts on the furbearers, increased vandalism and poaching, and possible compensation.
October 10, 2000	Mikisew informed Josie Weninger by letter that it did not consent to the construction of the road through its Peace Point Reserve for a number of reasons. In particular, Mikisew raised concerns about unresolved issues surrounding its role in the management of the Park, which was the subject of litigation, and identified the concerns of Mikisew trappers and their commitment to conservation of park lands.
January 19, 2001	Chief George Poitras was making a trip to Fort Smith and planned a meeting with Josie Weninger. Ms. Weninger took ill and Chief and Council met with Senior Policy Advisor Don Aubrey instead. They discussed a number of issues at the meeting, but most significantly Mikisew learned that Parks Canada and Thebacha had been engaged in ongoing discussions concerning the road initiative, and that the road was very near approval. Chief Poitras asked Don Aubrey to have Ms. Weninger call him immediately upon her return to work to discuss the decision-making process and specifically, to discuss Mikisew's exclusion from it.
January 25, 2001	Chief Poitras spoke with Richard Power. Mr. Power denied having knowledge of Mikisew's concerns with the road, as set out in the letter of October 10, 2000, and asked that Mikisew forward him a copy. Mr. Power advised the Chief that Parks Canada had led Thebacha to believe that Mikisew had no objection to the road going through the reserve, and that he had just been informed for the first time by Tom Lee, CEO of Parks Canada, that Mikisew did not support the road. He also advised the Chief that Lee told him Thebacha had to work things out with Mikisew before Parks Canada would approve the road.
January 29, 2001	Mikisew Chief and Council met with Thebacha representatives. Thebacha sought Mikisew's support, but Chief and Council explained they were extremely frustrated by the manner in which Parks Canada had been handling the process. Chief and Council circulated a letter they had just sent to Sheila Copps, Minister of Canadian Heritage, and told the Thebacha representatives they would have to wait to hear from the Minister with regard to their concerns before they could give Thebacha an answer. Thebacha also committed to lobby their MLA and MP to impress on the Minister the urgency of meeting with Mikisew on the road initiative.
January 29, 2001	Mikisew sent the letter to Minister Copps expressing their concerns with the proposed road through the Peace Point Reserve and with Parks Canada's failure to consult with Mikisew. As Mikisew had been informed that construction was to commence almost immediately, it invited Minister Copps, Minister of Indian Affairs Robert Nault and CEO Tom Lee of Parks Canada to meet with Mikisew over the next week to discuss Mikisew's concerns, emphasizing the urgency of the situation.

February 2, 2001 — Chief Poitras spoke to Josie Weninger. She advised him that Thebacha was working on a proposal for an alternative route. The parties defer as to the content of the discussion. The Minister submits that traplines were discussed. Mikisew submits that Chief Poitras asked to be involved in any deliberations on an alternative route, but Ms. Weninger was very vague with regard to what the route was and where the process was going from there.

February 5, 2001 — Chief Poitras contacted Richard Power and informed him that Mikisew was still waiting to hear from the Minister, and its position on the road had not changed. Chief Poitras confirmed the conversation in a letter dated February 5, 2001.

February 5, 2001 — Chief Poitras also spoke with Josie Weninger and again asked her about the alternative route. She advised him that they were still looking at two possible routes and also notified him about her research into *ex gratia* payments to individual trappers.

February 5, 2001 — Chief Poitras met with the Peace Point trappers. They advised him that they had also expressed their concerns to Josie Weninger. They had told her that they were greatly concerned about the impact the road would have on their traplines, and that offering compensation did not solve the issue because once the nature of the land was changed, the damage could not be undone.

February 9, 2001 — Mikisew received a standard-form response letter from the Minister's office stating that its correspondence "will be given every consideration".

March 2001 — Parks Canada and Westworth Associates Environmental Ltd. completed the field inspection and biophysical resource assessment on the realignment. Mikisew was never informed that the route for the realignment had been chosen or consulted by Westworth in relation to these assessments.

March/April 2001 — Chief Poitras spoke on the telephone several times with Josie Weninger and Gaby Fortin, Director General West of Parks Canada, attempting to arrange a meeting with Parks Canada to address Mikisew's concerns. It was extremely difficult to get a meeting arranged, for both parties, and a number of phone calls went back and forth.

April 27, 2001 — Chief Poitras finally met with Gaby Fortin from Parks Canada in Calgary. At that meeting the Chief learned the route of the realignment, discovering that the realignment would track the Peace Point Reserve by extending 10 metres from the Reserve boundary for 2.5 kilometres before joining the Park Loop Road north of the Reserve. The Chief asked that someone meet with Mikisew's Council to make a full presentation on the realignment, and was informed that it could not be done until after the formal announcement of the approval. The Chief strongly disagreed and was promised that a presentation would take place in Mikisew's Council Chambers on May 2, 2001. Chief Poitras attested that Parks Canada made it very clear him that the decision had already been made to approve the realignment.

April 30, 2001 — In response, Gaby Fortin of Parks Canada sent Mikisew a letter apologizing for excluding Mikisew from the consultation process. The letter stated 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 MCFN. It was never Parks Canada's intention to exclude you from the process nor to place the MCFN in a negative light in the community."

May 2, 2001 — A meeting was held between Josie Weninger, Gaby Fortin, Mikisew Chief and Council. They discussed Mikisew's January 2001 letter to Minister Copps setting out Mikisew's concerns, and Chief and Council emphasized Mikisew's dissatisfaction with being excluded from the road proposal process.

May 17, 2001	Mikisew sent Minister Copps another letter informing her of its concerns with the realignment. Mikisew expressed their disappointment and concern over Parks Canada's failure to consult, particularly in light of the fact that Parks Canada was aware, at least as of October 2000, that Mikisew had substantial concerns with regard to the proposed road.
May 25, 2001	A News Release was posted to the Parks Canada website announcing the approval of the winter road.
May 25, 2001	The CEO of Parks Canada, Tom Lee, issued a message to all staff announcing the approval of the road and indicating that Parks Canada would not consider an all-weather road proposal.
May 25, 2001	Gaby Fortin called Chief Poitras to inform him of the decision.
May 25, 2001	Tom Lee sent a letter to Chief Poitras as a formal response to the May 17, 2001 letter to Minister Copps. The letter indicated that Parks Canada recognized that the consultation process had not been adequately conducted, but pointed out that there had been meetings and discussions between Mikisew and Parks Canada.

[140] I will explore several issues raised by this evidence in the course of characterizing the extent of consultation that occurred in this case.

Public consultation versus "First Nations" consultation

[141] Many of the communications relied on by the Minister to demonstrate their consultation efforts are instances of Mikisew being provided with standard information on the proposed road, prior to Mikisew formally notifying Parks Canada of their specific concerns with the road. This communication was of the same form and substance as the communication being distributed to all interested stakeholders. In my view, taken alone, it does not constitute First Nations consultation as required by s. 35(1) of the *Constitution Act, 1982*.

[142] For example, the Minister stresses that Parks Canada provided Mikisew with the *Terms of Reference* for the environmental assessment on January 19, 2000. Also, Mikisew was advised of the open house sessions which took place over the summer of 2000. The Minister argues that the first formal response from Mikisew did not come until October 10, 2000, some two months after the public comment period had lapsed.

[143] Mikisew maintains that the reason for the delay in submitting its position to Parks Canada was to allow the First Nation to go through a diligence process of identifying concerns and issues. Chief Poitras also explained that the Mikisew did not formally participate in the open houses, because, as he stated, "... an open house is not a forum for us to be consulted adequately" (cross-examination, on affidavit of Chief Poitras, page 14, lines 22-23). Mikisew asserts that the infringement of their constitutionally protected treaty rights is a matter that cannot be adequately addressed at public forums meant to engage all stakeholders.

[144] The Minister maintains that Mikisew did not communicate its concerns about the forum for consultation to Parks Canada. Therefore, the Minister argues that Mikisew cannot be heard to complain about the process of consultation in the face of its failure to participate in the open house process, its failure to advise Parks Canada about their concerns with the open house process, and its refusal to cooperate in the process because of on-going litigation. In essence, the Minister's submissions express the sentiment that it was up to Mikisew to avail itself of the consultation process and if they failed to do so, except on their own terms, then the Minister is relieved of her duty to consult.

The failure of Parks Canada to respond to the October 10, 2000 letter

[145] The applicant submits that Ms. Weninger's account of Parks Canada communications with Mikisew glosses over the fact that almost four months passed between Mikisew's October 10, 2000 notification of their concerns and the actual meeting taking place where the matter was discussed with Mikisew. In the interim, the applicant complains that Parks Canada continued to work towards the approval of the road, essentially ignoring Mikisew's concerns. Specifically, Mikisew never received a response to its October 10, 200 letter and was shocked to learn almost four months later that the project had been proceeding as planned and was nearing approval. In cross -examination, Ms. Weninger confirms this version of events and states that Parks Canada's failure to respond to the letter was "not good communication"(cross-examination on affidavit of Josie Weninger, page 19 at line 15).

[146] The applicant also maintains that Parks Canada had received information about the concerns of Mikisew trappers in the August 16, 2000 letter from Lawrence Vermillion. This letter detailed the specific issues with the proposed road that were most pertinent to the trappers. While the October 10, 2000 letter from Mikisew did not provide extensive details regarding the specific concerns of the trappers, it must be viewed in light of the fact that Mikisew's communication was based on its understanding that Parks Canada was already aware of the reasons for the trappers' objection to the road.

[147] The applicant submits the most telling evidence of Parks Canada's poor handling of the consultation process is the correspondence of April 30, 2001 to Mikisew from Gaby Fortin and of May 25, 2001 to Mikisew from Tom Lee. In the applicant's view, both Crown officials clearly admitted the Crown's failure to properly consult with Mikisew. The letters note that it was "never Parks Canada's intent to exclude you from the process", and "Parks Canada recognizes that the consultation process did not unfold in the early stages in the way it was intended to" (affidavit of Chief George Poitras, Exhibits "N" and "P").

[148] The Minister disputes that the April 30, 2001 letter from Gaby Fortin represents an acknowledgment by Parks Canada of the Crown's failure to consult. The Minister notes that when Chief Poitras was communicating Mikisew's surprise and concern over being notified at the "eleventh hour" that the road was near approval, he told Mr. Fortin that Mikisew was being "perceived as a bad guy" for stalling the approval process. The Minister submits that the letter should be construed as an apology for the way the consultation unfolded, in that it resulted in a negative public perception of the Mikisew, but not as an apology for the failure to consult.

[149] The applicant disputes Tom Lee's statement in his May 25, 2001 letter, that the recent meeting occurred "at the request of Parks Canada to ensure the views of the Mikisew Cree First Nation were heard prior to any decision being made". The applicant submits this statement is simply incorrect. The applicant's position is that the meeting held on May 2, 2001 came about only due to the persistent demands of Mikisew. Further, the applicant submits that Mikisew was clearly informed at that meeting that the decision to approve the road had already been made.

[150] The applicant submits that the discussions and meetings referred to by Mr. Lee do not constitute adequate consultation. The applicant admits that the discussions with Ms. Weninger may have involved discussions about the proposed road, but argues that she was always vague on the realignment. Furthermore, the applicant submits that when Mikisew eventually did meet with Parks Canada, the decision to approve the realignment had already been made.

Defining the duty of "First Nations consultation"

[151] The cases raised by the parties reveal a tension in the law. The Court in *Nunavik Inuit, supra,* held that even where the standard for consultation is minimal, the consultation must be conducted in good faith, and with the intention of substantially addressing the concerns of the First Nation. The Court characterizes the duty as a "moral, if not a legal duty". On the other hand, the Minister points to *Halfway River, supra*, which emphasizes the reciprocal duty on the First Nation to participate, and to not frustrate the consultation process.

[152] At the core of this dispute are conflicting perceptions of the status of the applicant. Mikisew, asserting treaty rights, argues that "First Nations consultation" must be separate and distinct from the processes offered to other stakeholders. This is the justification offered for their lack of participation in open houses and public comment

periods. The Minister and Thebacha, on the other hand, take the position that Mikisew is but one of many stakeholders in this community.

[153] The applicant has asserted interference with a constitutionally protected right. At the very least, Mikisew is entitled to a distinct process if not a more extensive one. This finding would justify Mikisew's failure to adhere to the Minister's timelines for public participation. Mikisew, in my opinion, has not frustrated a "First Nations consultation" process at all. Instead, they have refused to accede to the Minister's expectation that a public consultation process is sufficient to discharge her constitutional duty towards them.

[154] The jurisprudence makes it clear that the consultation must be undertaken with the genuine intention of substantially addressing First Nation concerns. In the present case, at the very least, this 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.

[155] It should be noted that the argument made by the Minister, to the effect that the Mikisew were afforded the same procedural rights as all other stakeholders, effectively impugns the Minister's decision under the "adequate priority" branch of the justification analysis. If Mikisew can be attacked for not having participated in a public forum process in order to secure their rights, it is clear that the Minister did not accord those rights priority over those of other users, as would be expected given their constitutional status under s. 35(1). This will be explored in more detail in the next section.

[156] Thebacha noted in argument that interviews were conducted with some of Mikisew's members during the environmental assessment process. It should be stressed that any consultation undertaken by Thebacha does not relieve the Minister of her duties under s. 35(1). The Crown, as a fiduciary, owes Mikisew a duty to consult. This duty cannot be delegated to interested third parties.

[157] In conclusion, 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. In the justification stage of the *Sparrow* analysis, the onus of proof is on the Crown. The Mikisew do not bear the burden of proving that the Crown did not adequately consult with them. It is for the Crown to demonstrate that they did provide a meaningful First Nations consultation. The Minister has not met this burden.

(ii) Has the treaty right been given adequate priority in relation to other rights?

[158] The Court in *Sparrow, supra,* at pages 1115-1116, assigned first priority to conservation purposes, second priority to treaty and aboriginal rights, third priority to economic interests and fourth priority to recreational interests. Mikisew submits this framework applies to the claims of any user groups with competing claims.

[159] The applicant relies on *Breaker, supra*, in which the Alberta Provincial Court applied the *Sparrow* test to the Crown's establishment of a road corridor wildlife sanctuary. The Court ruled that the road corridor was established in violation of s. 35(1) of the *Constitution Act, 1982*. With respect to First Nations priority, Cioni J. noted as follows at page 279:

As well, Governmental policies that encourage or create competition for the numbers of animals in the Highwood, such as sport hunting and cattle grazing *without consideration to First Nations priority and allocation*, and a balancing thereof with societal common law rights, as referred to in *Gladstone* are, in my view, constitutionally impermissible.

[160] The applicant submits the Minister, by approving the construction of the road, has assigned the interests of one user group, the residents of local communities, priority over the interests of another user group, Mikisew hunters and trappers with constitutionally protected rights. The applicant objects to the fact that convenience of

travel and other societal factors have been given priority over the exercise of constitutionally protected treaty rights. In the applicant's view, this is an exact reversal of the assignment of priority mandated by *Sparrow*.

[161] Characterizing this case as one that pits the interests of a First Nation against those of local residents may be an over-simplification. To be sure, there are First Nations' interests represented both among the supporters and the opponents of this project. However, the applicant does raise an important distinction. The road approval has placed the economic and social interests of one group (admittedly including those of several First Nations) against the constitutionally protected right to trap and hunt and to pursue a traditional lifestyle of the Mikisew. As a fiduciary, the Crown can not be permitted to allow the interests of third parties, or its own interests, to obscure its obligations to First Nations.

[162] The Supreme Court of Canada in *Adams, supra,* held that the Quebec fishery regulations failed to meet the *Sparrow* test for justification. The Court found that the promotion of sport fishing was the major goal of the regulations. However, the Court remarked that even if a valid legislative objective had been shown, the scheme could not stand because it failed to provide the requisite priority to the aboriginal right as laid down by *Sparrow*. In *Gladstone, supra,* it was noted that, at least in a commercial sphere, the priority of constitutionally protected rights is satisfied if the government has taken those rights into account and has allocated the resource in a manner that demonstrates respect for that priority. At the end of the day, this Court must be satisfied that the Minister has taken into account the existence and importance of Mikisew's treaty rights.

[163] Again, this question points to the nature of the consultation that was undertaken. In my opinion, the analysis of priority accords better with cases involving questions of resource allocation, such as fishery or forestry claims. Therefore, given the direction in *Delgamuukw, supra*, to focus on the "articulation of the fiduciary duty" that is most appropriate to deal with the specific issues raised by the facts, in my opinion, the finding of inadequate consultation is sufficient to impugn the Minister's decision and it is not necessary for me to make a determination of whether Mikisew's rights have been afforded the requisite priority in the Minister's decision.

(ii) Has there been as little infringement as possible of the treaty right?

[164] The applicant submits that minimizing impacts on treaty rights in fulfilment of the Crown's fiduciary obligation is required by the *Sparrow* test.

[165] The applicant submits that mitigation measures are to be designed in consultation with the First Nation whose rights are at issue. Mikisew points to *Breaker, supra,* at pages 280-281, in which the Crown was found to have implemented an unconstitutional road corridor wildlife sanctuary. The Court held that the Crown's failure to consider reasonable access to hunting for First Nations was fatal to their decision. According to the applicant, the Crown's decision was set aside because of its failure to consider all other alternatives that could effect the desired conservation goal, such as limiting other uses of the resource including sport hunting, outfitting and guiding, and cattle grazing.

[166] Mikisew submits that a lack of proper consultation prevented the Minister from appreciating the impact the road would have on their treaty rights. Mikisew's concerns extend beyond the direct effects of the road on wildlife, and relate to effects on the exercise of their rights throughout the Park. These effects would include the disruption of trap lines, denning sites and mineral licks; the facilitation of poaching from the road; an increase of vandalism to trap lines and cabin break-ins; and the general opening up of a secluded trapping area to outside interference.

[167] Mikisew submits the Minister did not have sufficient information before her to determine whether there was minimal impairment of the exercise of its treaty rights. The applicant points to the evidence of Parks Canada's own witness, Josie Weninger, who admitted on cross-examination that the information gaps concerning wildlife prevented Parks Canada from knowing if the road would impact Mikisew's rights as little as possible:

Q: So you can't say with any degree of certainty that this project impacts Mikisew trappers as little as possible, correct?

A: We heard from Mikisew that they couldn't even tell us that.

Q: So the answer?

A: The answer is we cannot say with any certainty that this project was designed to impact as little as possible on them, because as you noted earlier, there is an impact - sorry - a gap in terms of furbearers.

[Cross-examination of Josie Weninger, August 24, 2001, page 28, lines 16-25]

[168] The applicant argues that, not only was the Minister not fully informed of the potential impacts of the road, the Minister took no steps to mitigate any possible impacts on Mikisew's treaty rights. Again, the applicant submits this was clearly admitted in the cross-examination of Josie Weninger:

Q: Now in paragraph 23 when you refer to ex gratia payments, was there any other method of addressing the concerns that the trappers addressed? Were there any mitigation measures discussed with the trappers with regard to their concerns regarding vandalism, poaching or encroachment or environmental impact?

A: I believe I said the last time we talked about this that there were not other measures examined, that we only looked at *ex gratia* payments.

[Cross-examination of Josie Weninger, October 1, 2001, page 10, line 27 to page 11, lines 1-80]

[169] The Minister submits that all possible steps were taken to ensure that the construction and operation of the winter snow road would have a minimal consequential effect. The Minister offers the following evidence:

(i) Mikisew was provided with the terms of reference for the environmental assessment;

(ii) An extensive environmental assessment was completed by Westworth;

(iii) A summer reconnaissance environmental assessment was completed by Westworth;

(iv) A series of open houses were held specifically designed to hear concerns and comments about the winter road proposal;

(v) Thebacha was required to undertake extensive mitigation steps to address information gaps and to reduce any potential negative impacts. These steps included notifying Mikisew trappers of the construction schedule so as to minimize interference with their trap lines, requiring that there be gaps in snow berms along trapper trails; and requiring the services of an archaeologist during construction of the road so as to identify any cultural resource sites.

(vi) Parks Canada met with two Mikisew trappers to address their specific concerns; and

(vii) Parks Canada agreed to realign the road so as to accommodate Mikisew's refusal to allow the road to continue on an existing right-of-way through its reserve.

[170] 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.

[171] 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. The following is taken from the cross-examination of Josie Weninger:

Q: ...you talk about two possible alternative routes for the road to avoid the Peace Point Reserve. Was the Chief and Council ever asked what alternative route was their preference?

A: [Not] Unless Westworth Consultants did. We didn't ask them specifically, the formal body.

Q: So you just advised them that there were two possible alternatives?

A: Yes.

Q: And then without input from Mikisew you decided on the alternate route on your own, is that correct?

A: We did tell them that there would be an environmental assessment carried out on the realignment and we would be looking at which one had the least impact.

Q: On what?

A: On trees specifically.

Q: But not necessarily the least impact on the Mikisew, correct?

A: Yes, sorry.

[Cross-examination of Josie Weninger, August 24, 2001, page 31, lines 20-27; page 32, lines 1-11]

[172] The Minister, has not offered any explanation for its failure to involve Mikisew in the process to determine the route of the "realignment". This would have gone a long way toward resolving whether attention was given by Parks Canada to minimizing the infringement of Mikisew's rights. Minimization of the environmental effects, is related to, but not identical to the issue of minimization of the interference with Mikisew's treaty rights. It is the impact of the proposed road on furbearer populations that is most significant to Mikisew.

[173] In my view, only one of the seven measures listed by the respondent Minister speaks directly to the issue of minimizing the impact on Mikisew's treaty rights. The first four measures recount standard procedures mandated by the environmental assessment rules. They may be designed to minimize environmental impacts, but they cannot be said to be steps taken to minimize the effects of the proposed road on the constitutional rights of Mikisew. The sixth measure refers to the meeting where Ms. Weninger discussed the possibility of compensation with two trappers. The final measure refers to the decision to realign the road which, in my opinion, cannot be relied upon by the Minister as a step taken to minimize impact because it arises out of a complete lack of consideration of Mikisew's interests in the first instance.

[174] The mitigation steps listed in the fifth measure are relevant, however, they were not developed in consultation with Mikisew. This leads to the inference, in my view, that the measures were implemented to achieve the appearance of minimizing impact and not necessarily with the genuine intention of minimizing impact. The Minister's decision may have passed this stage of the analysis if Parks Canada had simply asked Mikisew how the effects of the road project on their rights could be minimized. Parks Canada could have responded to Mikisew's objection to the road passing through their reserve by asking: "What would be the most favourable route for the road from your perspective?". I do not accept the Minister's argument that the road comprises a minimal infringement on Mikisew's treaty rights simply because it replaced a more intrusive alignment. The original road flagrantly disregarded not only Mikisew's treaty rights but their rights over their reserve land. The language of *Sparrow* is "as little infringement as possible". While it may not be clear to what extent Parks Canada would have had to modify the proposal to accomodate Mikisew in its implementation, it is clear that Parks Canada would at least have to inquire, in good faith, as to steps that could be taken to reduce the impact of the project on the treaty rights. This inquiry was not undertaken.

(iv) Is fair compensation available?

[175] In *Sparrow, supra,* at page 1119, the Court framed this consideration under the second part of the justification analysis as follows: "... in a situation of expropriation, is fair compensation available?". How the law of

compensation for expropriation should be adapted to deal with the infringement of constitutionally protected rights is a challenge that will undoubtedly engage this Court in the years to come. At the present time, I am not aware of any jurisprudence that applies an analysis of the adequacy of compensation offered for the infringement of a treaty right.

[176] The Minister submits that research conducted by Josie Weninger into the types of payment made in other circumstances where trappers were affected by a project demonstrates a show of good faith by Parks Canada. The Minister also points to discussions between Ms. Weninger and Mikisew trappers directly affected by the road regarding *ex gratia* payments of $5000 as evidence of a willingness to discuss the issue of compensation. As well, the Minister refers to the opinion of Ms. Weninger, found in her affidavit that any loss suffered by the trappers as a result of interference with traplines could be adequately compensated. Therefore, it is the Minister's position that if the construction and operation of the road were to have a negative impact on the trappers any loss could be quantified and compensated.

[177] Mikisew takes the position that an offer of fair compensation is an indicator of the Crown's intention to honour its fiduciary duty to First Nations. However, by the Crown's own admission, there was no offer of fair compensation in the present case. In support of this assertion, Mikisew relies on the following exchange from the cross-examination of Ms. Weninger:

Q: ...did you advise the trappers that by providing the (quote unquote) ex gratia payments that what was intended was a non-legally binding gift wherein Parks Canada wouldn't acknowledge that they had any liability to compensate whatsoever?

A: I do know that there was clarification in the meeting as to what ex gratia meant and I clarified that it was a gift.

Q: That it wasn't intended as compensation or some form of legal payment?

A: I believe I was very careful not to imply that it was compensation.

[cross-examination on affidavit of Josie Weninger, October 1, 2001, page 11, lines 22-27 and page 12, lines 1-6]

[178] Mikisew also notes the evidence of Lawrence Vermillion, a Mikisew trapper, who was present at the meeting where the *ex gratia* payments were discussed. He testified that the trappers with whom the discussions took place were not satisfied the *ex gratia* payments would address their concerns and were of the view that any offer of compensation must be made to all of the trappers in trapping area 1209. Furthermore, Mikisew notes that the discussions did not include any consideration of the impact of the road on Mikisew hunters.

[179] It must be kept in mind that a collective right to trap and hunt is at stake. In my opinion, in order to uphold the honour of the Crown in its dealings with a First Nation, the issue of compensation would have to be explored in good faith, and in a transparent manner that would permit an informed First Nation to consider the conditions under which they would voluntarily agree to the infringement of their treaty rights.

[180] Viewed in this light and on the facts before me, the analysis of compensation under this branch of the justification test points again to the question of consultation. The Minister could not have determined what an offer of fair compensation would be without undertaking an exploration of the issues and concerns and possible impacts on Mikisew associated with this project. I have already concluded that this consultation did not occur. Therefore, without deciding whether the steps the Minister took towards providing compensation to Mikisew trappers would reflect adversely on the honour of the Crown, I find that the analysis under this branch simply underscores the inadequacy of the consultation that took place in this case.

[181] The question of whether the Crown's actions were consistent with its fiduciary duty in this case hinges on consultation. In fact, it is premature to consider the issues of priority, minimal infringement and compensation, given that the consultation that would enable the Crown to satisfy those branches of the test was not undertaken.

CONCLUSION

[182] While the considerations that comprise the second step of the *Sparrow* justification analysis are flexible and should be adapted to allow the Court to focus on the most appropriate consideration in light of the facts before it, if the analysis reveals that the Crown's actions were not consistent with its fiduciary duty towards the First Nation, then the decision is not justified.

[183] In my opinion, a meaningful First Nations' consultation would have gone a long way toward satisfying the fiduciary duty of the Crown and may have saved the decision under the other branches of the justification analysis. In the end, the decision of Parks Canada to approve the winter snow road through WBNP is not a justified infringement of Mikisew's treaty rights because the Minister did not meet her duty to consult with Mikisew.

DISPOSITION

[184] In this case, I have found that Mikisew possess treaty rights to hunt and trap in WBNP. Further, pursuant to the *Sparrow* analysis, I have concluded that the Minister's decision to approve the road infringes on those rights and that the infringement is not justified.

[185] Since I have disposed of this matter on the constitutional grounds raised by the applicant, it is not necessary to consider the environmental and administrative law issues.

[186] For these reasons, the application for judicial review is allowed and the Minister's decision is set aside.

[187] I do not find it necessary to grant the additional relief sought by the applicant. I trust that any future consideration of the winter road project will be undertaken in accordance with these reasons.

[188] At the conclusion of the hearing, the parties requested an opportunity to provide written submission regarding costs. Accordingly, the issue of costs is reserved.

"Dolores M. Hansen"

J.F.C.C.

Ottawa, Ontario

December 20, 2001

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development *Appellants*

v.

Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd., and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd. *Respondents*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit, and Union of British Columbia Indian Chiefs *Interveners*

INDEXED AS: TAKU RIVER TLINGIT FIRST NATION *v.* BRITISH COLUMBIA (PROJECT ASSESSMENT DIRECTOR)

Norm Ringstad, en sa qualité de directeur d'évaluation de projet pour le Projet de la mine Tulsequah Chief, Sheila Wynn, en sa qualité de directrice administrative, Bureau des évaluations environnementales, le ministre de l'Environnement, des Terres et des Parcs, et le ministre de l'Énergie et des Mines et ministre responsable du Développement du Nord *Appelants*

c.

Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River, Redfern Resources Ltd., et Redcorp Ventures Ltd. auparavant connue sous le nom de Redfern Resources Ltd. *Intimés*

et

Procureur général du Canada, procureur général du Québec, procureur général de l'Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Première nation de Doig River, Sommet des Premières nations et Union of British Columbia Indian Chiefs *Intervenants*

RÉPERTORIÉ : PREMIÈRE NATION TLINGIT DE TAKU RIVER *c.* COLOMBIE-BRITANNIQUE (DIRECTEUR D'ÉVALUATION DE PROJET)

Neutral citation: 2004 SCC 74.

File No.: 29146.

2004: March 24; 2004: November 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation ("TRTFN"), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company's plan to build a road through a portion of the TRTFN's traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN.

Held: The appeal should be allowed.

The Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The Crown's honour cannot be interpreted

Référence neutre : 2004 CSC 74.

N° du greffe : 29146.

2004 : 24 mars; 2004 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

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

Couronne — Honneur de la Couronne — Obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations — La Couronne a-t-elle l'obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations avant de prendre une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et titres ancestraux non encore prouvées? — Dans l'affirmative, les mesures de consultation et d'accommodement adoptées par la province avant de délivrer le certificat d'approbation de projet étaient-elles suffisantes pour préserver l'honneur de la Couronne?

Depuis 1994, une entreprise d'exploitation minière demande au gouvernement de la Colombie-Britannique l'autorisation de rouvrir une vieille mine. La Première nation Tlingit de Taku River (« PNTTR »), qui a participé à l'évaluation environnementale effectuée par la province conformément à l'*Environmental Assessment Act*, s'est opposée au projet de l'entreprise de construire une route sur une partie de son territoire traditionnel. La province a octroyé le certificat d'approbation de projet en 1998. Invoquant des moyens fondés sur le droit administratif et sur son titre et ses droits ancestraux, la PNTTR a présenté une demande visant à faire annuler la décision. La juge en son cabinet a conclu que les décideurs n'avaient fait preuve de suffisamment de prudence durant les derniers mois de l'évaluation afin de s'assurer qu'ils avaient bien répondu à l'essentiel des préoccupations de la PNTTR. Elle a annulé la décision et a ordonné le réexamen de la demande. La majorité de la Cour d'appel a confirmé la décision, concluant que la province ne s'était pas acquittée de son obligation de consulter la PNTTR et de trouver des accommodements aux préoccupations de cette dernière.

Arrêt : Le pourvoi est accueilli.

L'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements à leurs préoccupations, même avant que l'existence des droits et titre ancestraux revendiqués n'ait été établie, repose sur le principe de l'honneur de la Couronne, qui découle de l'affirmation de la souveraineté de la

narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*. The duty to consult varies with the circumstances. It arises when a Crown actor has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This in turn may lead to a duty to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's title and rights claims and knew that the decision to reopen the mine had the potential to adversely affect the substance of the TRTFN's claims. The TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process. While the proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation. It is impossible, however, to provide a prospective checklist of the level of consultation required.

In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate. The TRTFN was part of the Project Committee, participating fully in the environmental review process. Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN. Finally, it is expected that, throughout the permitting, approval and licensing process, as well as in the

Couronne face à l'occupation antérieure des terres par les peuples autochtones. Le principe de l'honneur de la Couronne ne peut recevoir une interprétation étroite ou formaliste. Au contraire, il convient de lui donner plein effet afin de promouvoir le processus de conciliation prescrit par le par. 35(1) de la *Loi constitutionnelle de 1982*. L'obligation de consulter varie selon les circonstances. Elle naît lorsqu'un représentant de la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle d'un droit ou titre ancestral et envisage des mesures susceptibles d'avoir un effet préjudiciable sur ce droit ou ce titre. Cette obligation peut, à son tour, donner lieu à l'obligation de trouver des accommodements aux préoccupations des Autochtones. La volonté de répondre aux préoccupations est un élément clé tant à l'étape de la consultation qu'à celle de l'accommodement. L'étendue de l'obligation de consultation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou titre.

En l'espèce, la Couronne avait l'obligation de consulter la PNTTR. La province était au courant des revendications de titre et de droits de la PNTTR et elle savait que la décision de rouvrir la mine pouvait avoir un effet préjudiciable sur le fond de ses revendications. Les revendications de la PNTTR sont relativement solides et à première vue fondées, comme le démontre le fait qu'elles ont été acceptées en vue de la négociation d'un traité. La route proposée n'occupe qu'une petite partie du territoire sur lequel la PNTTR revendique un titre; toutefois, le risque de conséquences négatives sur les revendications est élevé. En ce qui concerne le niveau de consultation que requiert le principe de l'honneur de la Couronne, la PNTTR avait droit à davantage que le minimum prescrit dans les circonstances et elle avait le droit de s'attendre à une volonté de répondre à ses préoccupations qui puisse être qualifiée d'accommodement. Il est cependant impossible de déterminer à l'avance le niveau de consultation requis.

En l'espèce, la province s'est acquittée de son obligation de consultation et d'accommodement en engageant le processus prévu à l'*Environmental Assessment Act*. La PNTTR faisait partie du comité d'examen du projet et elle a participé à part entière à l'examen environnemental. Ses vues ont été exposées aux décideurs et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La province n'avait pas l'obligation de se mettre d'accord avec la PNTTR et le fait qu'elle n'y soit pas parvenue ne constitue pas un manquement à son obligation d'agir de bonne foi avec la PNTTR. Enfin, on s'attend à ce que, à chacune des étapes (permis, licences et

development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate the TRTFN.

Cases Cited

Applied: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35(1).
Environmental Assessment Act, R.S.B.C. 1996, c. 119 [rep. 2002, c. 43, s. 58], ss. 2, 7, 9, 10, 14 to 18, 19(1), 21, 22, 23, 29, 30(1).
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.
Mine Development Assessment Act, S.B.C. 1990, c. 55.

APPEAL from a judgment of the British Columbia Court of Appeal (2002), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19, 163 B.C.A.C. 164, 267 W.A.C. 164, 98 B.C.L.R. (3d) 16, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, 91 C.R.R. (2d) 260, [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, affirming a decision of the British Columbia Supreme Court (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209, [2000] B.C.J. No. 1301 (QL), 2000 BCSC 1001. Appeal allowed.

Paul J. Pearlman, Q.C., and *Kathryn L. Kickbush*, for the appellants.

Arthur C. Pape, *Jean Teillet* and *Richard B. Salter*, for the respondents Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation.

Randy J. Kaardal and *Lisa Hynes*, for the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.

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

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

autres autorisations) ainsi que lors de l'élaboration d'une stratégie d'utilisation des terres, la Couronne continue de s'acquitter honorablement de son obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de cette dernière.

Jurisprudence

Arrêt appliqué : *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; **arrêts mentionnés :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010.

Lois et règlements cités

Environmental Assessment Act, R.S.B.C. 1996, ch. 119 [abr. 2002, ch. 43, art. 58], art. 2, 7, 9, 10, 14 à 18, 19(1), 21, 22, 23, 29, 30(1).
Judicial Review Procedure Act, R.S.B.C. 1996, ch. 241.
Loi constitutionnelle de 1982, art. 35(1).
Mine Development Assessment Act, S.B.C. 1990, ch. 55.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2002), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19, 163 B.C.A.C. 164, 267 W.A.C. 164, 98 B.C.L.R. (3d) 16, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, 91 C.R.R. (2d) 260, [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, qui a confirmé une décision de la Cour suprême de la Colombie-Britannique (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209, [2000] B.C.J. No. 1301 (QL), 2000 BCSC 1001. Pourvoi accueilli.

Paul J. Pearlman, *c.r.*, et *Kathryn L. Kickbush*, pour les appelants.

Arthur C. Pape, *Jean Teillet* et *Richard B. Salter*, pour les intimés la Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River.

Randy J. Kaardal et *Lisa Hynes*, pour les intimées Redfern Resources Ltd. et Redcorp Ventures Ltd., auparavant connue sous le nom de Redfern Resources Ltd.

Mitchell Taylor et *Brian McLaughlin*, pour l'intervenant le procureur général du Canada.

Pierre-Christian Labeau, pour l'intervenant le procureur général du Québec.

Kurt J. W. Sandstrom and *Stan Rutwind*, for the intervener the Attorney General of Alberta.

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

Jeffrey R. W. Rath and *Allisun Rana*, for the intervener Doig River First Nation.

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

Robert J. M. Janes and *Dominique Nouvet*, for the intervener Union of British Columbia Indian Chiefs.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 This case raises the issue of the limits of the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation ("TRTFN") participated in a three-and-a-half-year environmental assessment process related to the efforts of Redfern Resources Ltd. ("Redfern") to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the require-

Kurt J. W. Sandstrom et *Stan Rutwind*, pour l'intervenant le procureur général de l'Alberta.

Charles F. Willms et *Kevin G. O'Callaghan*, pour les intervenants Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia et Aggregate Producers Association of British Columbia.

Jeffrey R. W. Rath et *Allisun Rana*, pour l'intervenante la Première nation de Doig River.

Hugh M. G. Braker, c.r., et *Anja Brown*, pour l'intervenant le Sommet des Premières nations.

Robert J. M. Janes et *Dominique Nouvet*, pour l'intervenante Union of British Columbia Indian Chiefs.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

Le présent pourvoi soulève la question des limites de l'obligation de la Couronne de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur des revendications de droits et de titres ancestraux dont le bien-fondé n'a pas encore été établi. La Première nation Tlingit de Taku River (« PNTTR ») a participé à une évaluation environnementale de trois ans et demi menée par suite des démarches entreprises par Redfern Resources Ltd. (« Redfern ») pour rouvrir une vieille mine. Finalement, ni l'évaluation ni son résultat n'ont su satisfaire la PNTTR.

Je conclus que, dans le processus décisionnel relatif à la demande d'approbation de projet de Redfern, la province avait l'obligation de consulter véritablement la PNTTR. Cependant, cette dernière a joué dans l'évaluation environnementale un rôle suffisant pour qu'il soit possible de conclure que la

ments of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

province s'est comportée honorablement et qu'elle s'est acquittée de son obligation. Lorsqu'une véritable consultation a eu lieu, il n'est pas essentiel que les parties parviennent à une entente. L'obligation d'accommodement exige plutôt que les préoccupations des Autochtones soient raisonnablement mises en balance avec l'incidence potentielle de la décision sur ces préoccupations et avec les intérêts sociétaux opposés. L'idée de compromis fait partie intégrante du processus de conciliation. En l'espèce, la province a pris des mesures d'accommodement à l'égard des préoccupations de la PNTTR en adaptant la procédure d'évaluation environnementale et les conditions imposées à Redfern pour que son projet soit approuvé. Par conséquent, j'estime que la province s'est acquittée de son obligation envers la PNTTR.

II. Facts and Decisions Below

The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of northwestern British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

II. Faits et décisions des juridictions inférieures

3 La mine Tulsequah Chief, qui était exploitée dans les années 50 par Cominco Ltd., se trouve dans une région vierge et éloignée du nord-ouest de la Colombie-Britannique, au confluent des rivières Taku et Tulsequah. Depuis 1994, Redfern demande au gouvernement de la Colombie-Britannique l'autorisation de rouvrir la mine. Elle a présenté sa demande d'abord en vertu de la *Mine Development Assessment Act*, S.B.C. 1990, ch. 55, puis en vertu de l'*Environmental Assessment Act*, R.S.B.C. 1996, ch. 119, après la promulgation de celle-ci en 1995. Au cours de l'évaluation environnementale, la question de l'accès à la mine s'est révélée être un point de discorde. La PNTTR, dont des représentants ont participé à l'évaluation en tant que membres du comité responsable du projet, s'est opposée au projet de Redfern de construire, sur une partie de son territoire traditionnel, une route de 160 kilomètres reliant la mine à la ville d'Atlin. Au terme d'un long processus, le ministre de l'Environnement, des Terres et des Parcs et le ministre de l'Énergie et des Mines (« ministres ») ont donné leur aval au projet le 19 mars 1998.

The Redfern proposal was assessed in accordance with British Columbia's *Environmental Assessment Act*. The environmental assessment process is

4 La proposition de Redfern a été évaluée conformément à la loi intitulée *Environmental Assessment Act* (« Loi ») de la Colombie-Britannique.

distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual proposals. The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

(a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,

(b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,

(c) to prevent or mitigate adverse effects of reviewable projects,

(d) to provide an open, accountable and neutrally administered process for the assessment

(i) of reviewable projects, and

. . .

(e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

6 "The proponent of a reviewable project may apply for a project approval certificate" under s. 7 of the Act, providing a "preliminary overview of the reviewable project, including" potential effects and proposed mitigation measures. If the project is accepted for review, "the executive director must establish a project committee" for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the

L'évaluation environnementale est un processus distinct de l'aménagement du territoire et de la négociation des traités, bien que ces deux processus puissent évidemment avoir des répercussions sur l'évaluation des différentes propositions. Les dispositions suivantes de la Loi sont pertinentes en l'espèce.

Les objets de la Loi sont définis ainsi à l'art. 2 :

[TRADUCTION]

a) favoriser la durabilité en protégeant l'environnement et en encourageant une économie saine et le bien-être collectif;

b) fournir en temps utile une évaluation complète et intégrée des conséquences que les projets assujettis à la procédure d'examen peuvent avoir sur l'environnement, l'économie, la société, la culture, le patrimoine et la santé;

c) prévenir ou atténuer les effets négatifs des projets assujettis à la procédure d'examen;

d) fournir un processus ouvert et neutre assorti de mécanismes d'imputabilité pour l'évaluation :

(i) des projets assujettis à la procédure d'examen;

. . .

e) permettre, lors des évaluations effectuées en vertu de la présente loi, la participation du public, des promoteurs, des Premières nations, des municipalités et districts régionaux, du gouvernement et de ses organismes, du gouvernement du Canada et de ses organismes et des ressorts voisins de la Colombie-Britannique.

En vertu de l'art. 7 de la Loi, [TRADUCTION] « [l]e promoteur d'un projet assujetti à la procédure d'examen peut présenter une demande de certificat d'approbation de projet » en fournissant, « à l'égard du projet, un aperçu préliminaire indiquant notamment » ses effets possibles et les mesures d'atténuation envisagées. Si le projet est accepté pour examen, [TRADUCTION] « le directeur administratif forme un comité chargé d'examiner le projet » (par. 9(1)). À cette fin, il invite à participer à la nomination des membres du comité

vicinity of the project" (s. 9(2)(d)). Under s. 9(6), the committee "may determine its own procedure, and provide for the conduct of its meetings".

un certain nombre de groupes, notamment « toute Première nation dont le territoire traditionnel abrite le chantier ou se trouve à proximité de celui-ci » (al. 9(2)d)). Aux termes du par. 9(6), le comité d'examen du projet peut [TRADUCTION] « établir des règles régissant sa procédure et la conduite de ses réunions ».

Redfern's proposal was accepted for review under the former *Mine Development Assessment Act*, and a project committee was established in November 1994. Invited to participate were the TRTFN, the British Columbia, federal, Yukon, United States, and Alaskan governments, as well as the Atlin Advisory Planning Commission. When the *Environmental Assessment Act* was instituted, the Project Committee was formally constituted under s. 9. Working groups and technical sub-committees were formed, including a group to deal with Aboriginal concerns and a group to deal with issues around transportation options. The TRTFN participated in both of these groups. A number of studies were commissioned and provided to the Project Committee during the assessment process.

7 La proposition de Redfern a été acceptée pour examen en vertu de l'ancienne loi intitulée *Mine Development Assessment Act*, et un comité d'examen du projet a été créé en novembre 1994. Ont été invités à faire partie de ce comité la PNTTR, les gouvernements de la Colombie-Britannique, du Canada, du Yukon, des États-Unis et de l'Alaska, ainsi que la commission consultative d'aménagement du territoire d'Atlin. Lorsque l'*Environmental Assessment Act* est entrée en vigueur, le comité d'examen du projet a été officiellement constitué conformément à l'art. 9. Divers groupes de travail et sous-comités techniques ont été formés, notamment un groupe chargé d'examiner les préoccupations des Autochtones et un autre d'étudier les options en matière de transport. La PNTTR a participé à ces deux groupes. Plusieurs études ont été commandées et remises au comité d'examen du projet au cours de l'évaluation.

The project committee becomes the primary engine driving the assessment process. It must act in accordance with the purposes of a project committee, set out in s. 10 as:

8 Le comité d'examen du projet devient le principal moteur du processus d'évaluation. Il doit s'acquitter de son mandat, qui est défini ainsi à l'art. 10 :

(a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and

(b) to analyze and advise the executive director, the minister and the responsible minister as to,

(i) the comments received in response to an invitation for comments under this Act,

(ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,

(iii) the potential effects, and

(iv) the prevention or mitigation of adverse effects.

[TRADUCTION]

a) fournir au directeur administratif, au ministre et au ministre responsable expertise, conseils, analyses et recommandations;

b) conseiller, après analyse, le directeur administratif, le ministre et le ministre responsable à propos :

(i) des commentaires reçus en réponse à l'invitation de donner des commentaires en vertu de la présente loi,

(ii) des conseils et recommandations du comité consultatif public établi pour l'examen de ce projet, le cas échéant,

(iii) des effets possibles du projet,

(iv) de la prévention ou de l'atténuation des effets négatifs.

9 The proponent of the project is required to engage in public consultation and distribution of information about the proposal (ss. 14-18). After the period for receipt of comments has expired, the executive director must either "refer the application to the [Ministers] . . . for a decision . . . or order that a project report be prepared . . . and that the project undergo further review" (s. 19(1)). If a project report is to be prepared, the executive director must prepare draft project report specifications indicating what information, analysis, plans or other records are relevant to an effective assessment, on the recommendation of the project committee (s. 21(a)). Sections 22 and 23 set out a non-exhaustive list of what matters may be included in a project report. These specifications are provided to the proponent (s. 21(b)).

10 In this case, Redfern was required to produce a project report, and draft project report specifications were provided to it. Additional time was granted to allow the executive director and Project Committee to prepare specifications.

11 When the proponent submits a project report, the project committee makes a recommendation to the executive director, whether to accept the report for review or to withhold acceptance if the report does not meet the specifications. Redfern submitted a multiple volume project report in November 1996. A time limit extension was granted to allow extra time to complete the review of the report. In January 1997, the Project Committee concluded that the report was deficient in certain areas, and Redfern was required to address the deficiencies.

12 Through the environmental assessment process, the TRTFN's concerns with the road proposal became apparent. Its concerns crystallized around the potential effect on wildlife and traditional land use, as well as the lack of adequate baseline information by which to measure subsequent effects. It was the TRTFN's position that the road ought not to be approved in the absence of a land use planning strategy and away from the treaty

Le promoteur du projet a l'obligation de mener des consultations publiques relativement à la proposition et de diffuser de l'information à cet égard (art. 14-18). À l'expiration de la période de réception des commentaires, le directeur administratif [TRADUCTION] « renvoie la demande [aux ministres] [. . .] pour décision [. . .] ou il ordonne la préparation d'un rapport de projet [. . .] et la poursuite de l'examen du projet » (par. 19(1)). Dans le cas où un rapport de projet s'impose, le directeur administratif établit les spécifications du rapport de projet en indiquant, selon les recommandations du comité d'examen du projet, les renseignements, analyses, plans ou autres éléments requis pour l'évaluation (al. 21a)). Les articles 22 et 23 dressent une liste non exhaustive des points qui peuvent être inclus dans ce rapport de projet. Les spécifications sont communiquées au promoteur (al. 21b)).

En l'espèce, Redfern devait produire un rapport de projet, et elle a reçu la liste des spécifications requises pour la préparation de ce rapport. Le délai a été prorogé afin que la directrice administrative et le comité responsable aient plus de temps pour établir les spécifications.

Lorsque le promoteur soumet un rapport de projet, le comité recommande au directeur administratif d'accepter le rapport pour examen ou de le refuser s'il ne respecte pas les spécifications. En novembre 1996, Redfern a remis un rapport de projet de plusieurs volumes. Le délai d'examen du rapport a été prorogé pour permettre au comité de terminer son travail. En janvier 1997, le comité d'examen du projet a conclu que le rapport comportait des lacunes et il a été enjoint à Redfern d'y remédier.

Les inquiétudes de la PNTTR au sujet de la route proposée sont ressorties clairement au cours de l'évaluation environnementale. La PNTTR s'inquiétait particulièrement des effets possibles sur la faune et l'utilisation traditionnelle des terres, ainsi que de l'absence de données de base permettant de mesurer les effets ultérieurs du projet. La PNTTR estimait que la construction de la route ne devait pas être approuvée sans une stratégie

negotiation table. The environmental assessment process was unable to address these broader concerns directly, but the project assessment director facilitated the TRTFN's access to other provincial agencies and decision makers. For example, the Province approved funding for wildlife monitoring programs as desired by the TRTFN (the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program). The TRTFN also expressed interest in TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of the use of the access road by third parties. It was informed that these issues were outside the ambit of the certification process and could only be the subject of later negotiation with the government.

d'utilisation du territoire et en dehors du cadre de la négociation des traités. Ces préoccupations plus larges n'ont pu être examinées directement dans l'évaluation environnementale, mais le directeur de l'évaluation du projet a mis la PNTTR en contact avec d'autres organismes et décideurs provinciaux. Par exemple, selon le désir de la PNTTR, la province a approuvé le financement de programmes de surveillance de la faune (évaluation des effets cumulatifs à long terme sur les grizzlis et programme de surveillance des ongulés). La PNTTR a aussi manifesté son intérêt à l'égard des aspects suivants : pouvoir d'approuver les permis pour le projet, partage des recettes et contrôle de l'utilisation de la route d'accès par des tiers. Elle a été informée que ces questions ne relevaient pas du processus de délivrance des certificats et ne pourraient être examinées que lors de négociations ultérieures avec le gouvernement.

While Redfern undertook to address other deficiencies, the Environmental Assessment Office's project assessment director engaged a consultant acceptable to the TRTFN, Mr. Lindsay Staples, to perform traditional land use studies and address issues raised by the TRTFN. Redfern submitted its upgraded report in July 1997, but was requested to await receipt of the Staples Report. The Staples Report, prepared by August 1997, was provided for inclusion in the Project Report. The Project Report was distributed for review in September 1997, with public comments received for a 60-day period thereafter. However, the TRTFN, upon reviewing the Staples Report, voiced additional concerns. In response, the Environmental Assessment Office engaged Staples to prepare an addendum to his report, which was completed in December 1997 and also included in the Project Report from that time forward.

13 Pendant que Redfern s'attachait à remédier à d'autres lacunes, le directeur de l'évaluation du projet, Bureau des évaluations environnementales, a engagé un consultant jugé acceptable par la PNTTR, M. Lindsay Staples, pour effectuer des études sur l'utilisation traditionnelle des terres et examiner les questions soulevées par la PNTTR. En juillet 1997, Redfern a remis son rapport corrigé, mais on lui a demandé d'attendre le rapport Staples. Celui-ci, préparé en août 1997, a été annexé au rapport de projet, lequel a été distribué pour examen en septembre 1997. Le public disposait de 60 jours pour faire part de ses observations. Cependant, après examen du rapport Staples, la PNTTR a exprimé d'autres inquiétudes et le Bureau des évaluations environnementales a demandé à M. Staples de préparer un addenda à son rapport. L'addenda a été terminé en décembre 1997 et figure en annexe du rapport de projet depuis cette date.

Under the Act, the executive director, upon accepting a project report, may refer the application for a project approval certificate to the Ministers for a decision (s. 29). "In making a referral . . . the executive director must take into account the application, the project report and any comments

14 Suivant la Loi, après avoir accepté un rapport de projet, le directeur administratif peut renvoyer la demande de certificat d'approbation de projet aux ministres pour décision (art. 29). [TRADUCTION] « Dans un tel cas [. . .] le directeur administratif doit prendre en considération la demande, le

received about them" (s. 29(1)). "A referral . . . may be accompanied by recommendations of the project committee" (s. 29(4)). There is no requirement under the Act that a project committee prepare a written recommendations report.

15 In this case, the staff of the Environmental Assessment Office prepared a written Project Committee Recommendations Report, the major part of which was provided to committee members for review in early January 1998. The final 18 pages were provided as part of a complete draft on March 3, 1998. The majority of the committee members agreed to refer the application to the Ministers and to recommend approval for the project subject to certain recommendations and conditions. The TRTFN did not agree with the Recommendations Report, and instead prepared a minority report stating their concerns with the process and the proposal.

16 After a referral under s. 29 is made, "the ministers must consider the application and any recommendations of the project committee" (s. 30(1)(a)), in order to either "issue a project approval certificate", "refuse to issue the . . . certificate", or "refer the application to the Environmental Assessment Board for [a] public hearing" (s. 30(1)(b)). Written reasons are required (s. 30(1)(c)).

17 The executive director referred Redfern's application to the Ministers on March 12, 1998. The referral included the Project Committee Recommendations Report, the Project Approval Certificate in the form that it was ultimately signed, and the TRTFN Report (A.R., vol. V, p. 858). In addition, the Recommendations Report explicitly identified TRTFN concerns and points of disagreement throughout, as well as suggested mitigation measures. The Ministers issued the Project Approval Certificate on March 19, 1998, approving the proposal subject to detailed terms and conditions.

rapport de projet et les commentaires reçus à leur sujet » (par. 29(1)). [TRADUCTION] « Le comité d'examen du projet peut joindre des recommandations à la demande déférée aux ministres » (par. 29(4)), mais il n'est pas tenu par la Loi de rédiger un rapport faisant état de ses recommandations.

En l'espèce, le personnel du Bureau des évaluations environnementales a préparé un tel rapport, dont la majeure partie a été remise aux membres du comité pour examen au début de janvier 1998. Les 18 dernières pages ont été remises avec le rapport provisoire complet le 3 mars 1998. La majorité des membres du comité ont convenu de renvoyer la demande aux ministres et de recommander l'approbation du projet, sous réserve de certaines recommandations et conditions. La PNTTR a exprimé son désaccord au sujet du rapport faisant état des recommandations et a préparé son propre rapport minoritaire énonçant ses préoccupations à l'égard du processus et de la proposition.

Lorsqu'une demande leur est déférée en vertu de l'art. 29, [TRADUCTION] « les ministres doivent examiner la demande et les recommandations du comité d'examen du projet » (al. 30(1)a)) et soit « délivrer un certificat d'approbation de projet », soit « refuser la délivrance du certificat . . . », ou encore « renvoyer la demande à la Commission d'évaluation environnementale pour la tenue [d'une] audience publique » (al. 30(1)b)). Leur décision doit être motivée (al. 30(1)c)).

Le 12 mars 1998, la directrice administrative a renvoyé la demande de Redfern aux ministres. La demande était accompagnée du rapport faisant état des recommandations du comité d'examen du projet, de la version du certificat d'approbation qui a finalement été signée, et du rapport de la PNTTR (d.a., vol. V, p. 858). De plus, dans le rapport faisant état des recommandations on mentionne explicitement à plusieurs endroits les préoccupations et les points de désaccord de la PNTTR, ainsi que les mesures d'atténuation proposées. Les ministres ont délivré le certificat d'approbation du projet le 19 mars 1998, avalisant ainsi la proposition sous réserve de conditions détaillées.

Issuance of project approval certification does not constitute a comprehensive "go-ahead" for all aspects of a project. An extensive "permitting" process precedes each aspect of construction, which may involve more detailed substantive and information requirements being placed on the developer. Part 6 of the Project Committee's Recommendations Report summarized the requirements for licences, permits and approvals that would follow project approval in this case. In addition, the Recommendations Report made prospective recommendations about what ought to happen at the permit stage, as a condition of certification. The Report stated that Redfern would develop more detailed baseline information and analysis at the permit stage, with continued TRTFN participation, and that adjustments might be required to the road route in response. The majority also recommended creation of a resource management zone along the access corridor, to be in place until completion of a future land use plan; the use of regulations to control access to the road; and creation of a Joint Management Committee for the road with the TRTFN. It recommended that Redfern's future Special Use Permit application for the road be referred to the proposed Joint Management Committee.

18 Délivrer un certificat d'approbation de projet ne revient pas à donner « le feu vert » pour tous les aspects du projet. Chaque aspect de la construction fait au préalable l'objet d'un long processus d'« autorisation » et peut nécessiter la fourniture par le promoteur de renseignements plus détaillés et plus substantiels. À la partie 6 du rapport faisant état des recommandations, le comité d'examen du projet a résumé les exigences en matière de licences, de permis et d'autorisations qui s'appliqueraient après l'approbation du projet en l'espèce. De plus, ce rapport formulait des recommandations prospectives quant à ce qui devrait se produire à l'étape du certificat, comme condition de sa délivrance. Il prévoyait que Redfern devrait, toujours avec le concours de la PNTTR, préparer à cette étape des analyses et des données de base plus détaillées, lesquelles pourraient donner lieu à une correction du tracé de la route. La majorité des membres a aussi recommandé la création d'une zone de gestion des ressources le long du corridor d'accès et son maintien jusqu'à l'achèvement d'un futur plan d'aménagement du territoire, l'établissement de règlements régissant l'utilisation de la route et la création d'un comité conjoint de gestion de la route avec la PNTTR. Le rapport recommandait que la future demande de Redfern en vue d'obtenir un permis spécial d'utilisation de la route soit présentée au comité conjoint de gestion proposé.

The TRTFN brought a petition in February 1999 under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash the Ministers' decision to issue the Project Approval Certificate on administrative law grounds and on grounds based on its Aboriginal rights and title. Determination of its rights and title was severed from the judicial review proceedings and referred to the trial list, on the Province's application. The chambers judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their decision might infringe Aboriginal rights, and that they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns ((2000), 77 B.C.L.R. (3d) 310,

19 Invoquant des moyens fondés sur le droit administratif et sur son titre et ses droits ancestraux, la PNTTR a présenté, en février 1999, en vertu de la *Judicial Review Procedure Act*, R.S.B.C. 1996, ch. 241, une demande visant à faire annuler la décision des ministres de délivrer le certificat d'approbation du projet. À la demande de la province, la demande de détermination des droits et du titre a été dissociée de la procédure de contrôle judiciaire et a été inscrite pour instruction. La juge Kirkpatrick, en son cabinet, a entendu la demande de contrôle judiciaire et conclu que les ministres auraient dû être conscients de la possibilité que leur décision porte atteinte à des droits ancestraux et qu'ils auraient dû faire preuve de plus de prudence durant les derniers mois de l'évaluation afin de s'assurer qu'ils avaient bien répondu à l'essentiel des

2000 BCSC 1001). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Chief Mine had the potential to adversely affect the substance of the TRTFN's claims.

préoccupations de la PNTTR ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001). La juge a également donné raison à la PNTTR en ce qui concerne les moyens fondés sur le droit administratif. Elle a annulé la décision accordant le certificat d'approbation du projet et elle a ordonné le réexamen de la demande de permis, réexamen à l'égard duquel elle a plus tard donné des directives.

La majorité de la Cour d'appel de la Colombie-Britannique (sous la plume de la juge Rowles) a rejeté l'appel de la province, concluant que celle-ci ne s'était pas acquittée de son obligation de consulter la PNTTR et de trouver des accommodements aux préoccupations de celle-ci ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Dissidente, la juge Southin était d'avis que la consultation avait été adéquate au vu des faits. Tant les juges majoritaires que la juge dissidente semblent conclure que la décision était conforme aux principes du droit administratif. La province s'est pourvue devant la Cour, faisant valoir que, sauf application des principes du droit administratif prévus par la common law, il n'existe pas d'obligation de consultation, tant qu'une revendication de droits ancestraux n'a pas été établie. Elle ajoute que, si une telle obligation existe, les faits démontrent qu'elle a été respectée en l'espèce.

III. Analyse

Dans l'affaire *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73, entendue en même temps que le présent pourvoi, la Cour a confirmé l'existence de l'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements aux préoccupations de ceux-ci même avant que n'ait été tranchée une revendication de droits ou de titre. En l'espèce, la Couronne avait l'obligation de consulter la PNTTR. La province était au courant des revendications en raison de la participation de la PNTTR au processus de négociation de traités, et elle savait que la décision de rouvrir la mine Tulsequah Chief pouvait avoir un effet préjudiciable sur le fond des revendications de la PNTTR.

On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

Selon les principes analysés dans *Haïda*, il ressort de ces faits que l'honneur de la Couronne commandait que celle-ci consulte la PNTTR avant de décider de rouvrir la mine Tulsequah Chief. En l'espèce, la province s'est acquittée de son obligation en engageant le processus prévu à l'*Environmental Assessment Act*. La PNTTR faisait partie du comité d'examen du projet et elle a participé à part entière à l'examen environnemental. Elle a été déçue, trois ans et demi plus tard, de voir celui-ci prendre fin sur ordre du Bureau des évaluations environnementales. Ses vues ont toutefois été exposées aux ministres et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La province avait l'obligation de consulter. Elle l'a fait et elle a pris des mesures d'accommodement à l'égard des préoccupations exprimées. Elle n'avait cependant pas l'obligation de se mettre d'accord avec la PNTTR et le fait qu'elle n'y soit pas parvenue ne constitue pas un manquement à son obligation d'agir de bonne foi avec la PNTTR. 22

A. *Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?*

A. *La province avait-elle l'obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de cette dernière?*

The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

La province plaide que, tant que les droits n'ont pas été fixés dans une décision, une procédure judiciaire ou un traité, elle n'a que l'obligation, prévue par la common law, de « négocier honorablement » avec les peuples autochtones dont les revendications risquent d'être touchées par les décisions gouvernementales. Elle affirme que l'obligation de consulter pourrait prendre naissance une fois les droits établis, par l'effet de ce qu'elle appelle une [TRADUCTION] « obligation fiduciaire de justification ». Subsidiairement, elle soutient qu'une obligation fiduciaire peut naître lorsque la Couronne s'engage à agir uniquement dans le meilleur intérêt d'un peuple autochtone. Elle prétend qu'en dehors de ces situations précises elle n'a aucune obligation envers la PNTTR. 23

The Province's submissions present an impoverished vision of the honour of the Crown and all

Les prétentions de la province donnent une vision étroite de l'honneur de la Couronne et de 24

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

tout ce que ce principe implique. Comme il a été expliqué dans l'arrêt connexe *Haïda*, précité, l'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements à leurs préoccupations, même avant que l'existence des droits et titres ancestraux revendiqués n'ait été établie, repose sur le principe de l'honneur de la Couronne. L'obligation d'agir honorablement découle de l'affirmation de la souveraineté de la Couronne face à l'occupation antérieure des terres par les peuples autochtones. Ce principe a été consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits et titres ancestraux existants des peuples autochtones. Un des objectifs visés par le par. 35(1) est la négociation de règlements équitables des revendications autochtones. Dans toutes ses négociations avec les Autochtones, la Couronne doit agir honorablement, dans le respect de ses relations passées et futures avec le peuple autochtone concerné. Le principe de l'honneur de la Couronne ne peut recevoir une interprétation étroite ou formaliste. Au contraire, il convient de lui donner plein effet afin de promouvoir le processus de conciliation prescrit par le par. 35(1).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key

Comme il a été expliqué dans *Haïda*, les obligations requises pour que soit respecté le principe de l'honneur de la Couronne varient selon les circonstances. La Couronne peut être tenue de consulter les peuples autochtones et de trouver des accommodements aux préoccupations de ceux-ci avant de prendre des décisions : *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1119; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 168. L'obligation de consulter ne prend pas naissance seulement lorsque la revendication autochtone a été établie, pour justifier des violations. Une telle interprétation de l'obligation de consultation nierait l'importance des racines historiques de l'honneur de la Couronne et empêcherait ce principe de jouer son rôle dans la conciliation. Déterminer, avant le règlement définitif d'une revendication, l'ampleur des mesures de consultation et d'accommodement qui sont requises n'est pas une tâche facile, mais il s'agit d'un aspect essentiel du processus imposé par le par. 35(1). L'obligation de consulter naît lorsqu'un représentant de la Couronne a connaissance,

requirement of both consultation and accommodation.

concrètement ou par imputation, de l'existence potentielle d'un titre ou de droits ancestraux et envisage des mesures susceptibles d'avoir un effet préjudiciable sur ces droits ou ce titre. Cette obligation pourrait également obliger le gouvernement à modifier ses plans ou politiques afin de trouver des accommodements aux préoccupations des Autochtones. La volonté de répondre aux préoccupations est un élément clé tant à l'étape de la consultation qu'à celle de l'accommodement.

The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

26 En 1981, le gouvernement fédéral a annoncé la mise en place d'une politique de règlement des revendications territoriales globales devant régir la négociation des revendications territoriales autochtones. En 1983, la PNTTR a présenté sa revendication territoriale au ministre des Affaires indiennes. Cette revendication a été acceptée pour négociation en 1984, sur le fondement de l'utilisation et de l'occupation traditionnelles des terres par la PNTTR. Il n'y a eu aucune négociation en vertu de la politique fédérale. Cependant, la PNTTR a par la suite entamé la négociation de sa revendication territoriale dans le cadre du processus de conclusion de traités établi par la Commission des traités de la Colombie-Britannique en 1993. En 1999, la PNTTR avait déjà signé un protocole d'entente et un accord-cadre et elle négociait un accord de principe. Il est clair que la province connaissait l'existence des revendications de titre et de droits de la PNTTR.

When Redfern applied for project approval, in its efforts to reopen the Tulsequah Chief Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

27 Lorsque Redfern a présenté sa demande d'approbation du projet visant la réouverture de la mine Tulsequah Chief, il était évident que la décision pouvait avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR. Celle-ci revendique le titre ancestral sur une grande partie du nord-ouest de la Colombie-Britannique, territoire qui comprend le secteur où passerait la route d'accès étudiée durant le processus d'approbation. La PNTTR revendique également des droits ancestraux de chasse, de pêche, de cueillette et d'utilisation des terres pour d'autres activités traditionnelles, qui risqueraient d'être touchés si une route traversait cette région. La mesure envisagée était donc susceptible d'avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

B. *What Was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?*

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida*, *supra*, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did

La province était au courant des revendications et envisageait de prendre une décision susceptible d'avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR. L'honneur de la Couronne commandait donc que celle-ci consulte la PNTTR et, au besoin, qu'elle prenne des mesures d'accommodement à l'égard des préoccupations de cette dernière avant de décider d'approuver le projet de Redfern et de fixer les conditions dont son approbation doit être assortie.

B. *Quelle est l'étendue de l'obligation de la province de consulter la PNTTR et de trouver des accommodements aux préoccupations de celle-ci?*

L'étendue de l'obligation de consultation « dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre » (*Haïda*, précité, par. 39). L'obligation varie selon les circonstances, mais elle requiert dans tous les cas que la Couronne consulte véritablement et de bonne foi les Autochtones concernés et qu'elle soit disposée à modifier ses plans à la lumière des données recueillies au cours du processus.

La preuve permet de conclure que, à première vue, la PNTTR détient un titre et des droits ancestraux sur au moins une partie de la région revendiquée. Sa revendication territoriale a été soumise à une procédure exhaustive de validation avant d'être jugée recevable dans le processus fédéral de règlement des revendications territoriales en 1984. Le ministère des Affaires indiennes a engagé une chercheuse pour préparer un rapport sur les revendications de la PNTTR, rapport qui a été examiné à différentes étapes avant que le ministre déclare la revendication valide, sur le fondement de l'utilisation et de l'occupation traditionnelles par la PNTTR des terres et des ressources en question. Pour participer aux négociations de traités sous l'égide de la Commission des traités de la Colombie-Britannique, la PNTTR a dû produire une déclaration d'intention précisant les territoires revendiqués et le fondement de sa demande. Il n'est pas nécessaire qu'un groupe autochtone soit admis à participer au processus de

not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km² area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report (R.R., vol. I, at pp. 175, 187, 190 and 200) and Staples Addendum Report (A.R., vol. IV, at pp. 595-600, 604-5 and 629). The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is

négociation de traités pour que la Couronne ait l'obligation de le consulter. Néanmoins, la revendication de la PNTTR a été acceptée en vue de la négociation d'un traité, par suite d'une décision préliminaire sur sa validité. À l'inverse de l'affaire *Haïda*, les juridictions inférieures n'ont pas en l'espèce procédé à une évaluation préliminaire détaillée des divers aspects des revendications de la PNTTR, revendications qui ont une large portée. Toutefois, l'acceptation de leur revendication de titre en vue de la négociation d'un traité constitue une preuve *prima facie* du bien-fondé de leurs revendications d'un titre et de droits ancestraux.

L'effet négatif que la décision des ministres risque d'avoir sur les revendications de la PNTTR semble relativement grave. La juge en son cabinet a conclu que tous les experts ayant préparé un rapport pour l'examen de la proposition ont reconnu que la PNTTR dépendait de son régime d'utilisation du territoire pour soutenir son économie ainsi que la vie sociale et culturelle de sa communauté (par. 70). La route d'accès proposée ne compte que 160 kilomètres et ne représente donc qu'une faible proportion des 32 000 kilomètres carrés revendiqués par la PNTTR. Cependant, les experts ont signalé que cette route traverserait une zone critique pour l'économie de la PNTTR : voir, par exemple, le rapport Dewhirst (d.i., vol. I, p. 175, 187, 190 et 200) et l'addenda du rapport Staples (d.a., vol. IV, p. 595-600, 604-605 et 629). La PNTTR craint également que la route n'attire d'autres projets. La route proposée pourrait donc avoir une incidence sur sa capacité de continuer d'exercer ses droits ancestraux et pourrait modifier le territoire qui est revendiqué. 31

En résumé, les revendications de la PNTTR sont relativement solides et à première vue fondées, comme le démontre le fait qu'elles ont été acceptées en vue de la négociation d'un traité. La route proposée n'occupe qu'une petite partie du territoire sur lequel la PNTTR revendique un titre; toutefois, le risque de conséquences négatives sur les revendications est élevé. En ce qui concerne le niveau de consultation que requiert le principe de l'honneur de la Couronne, la PNTTR avait droit à davantage que le minimum prescrit, à savoir un avis, la 32

impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

C. *Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?*

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications ("Specifications") detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct

communication d'information et la tenue de discussions en conséquence. Bien qu'il soit impossible de déterminer à l'avance le niveau de consultation requis, il est clair que, dans les circonstances, la PNTTR avait le droit de s'attendre à des consultations plus poussées que le strict minimum et à une volonté de répondre à ses préoccupations qui puisse être qualifiée d'accommodement.

C. *La Couronne s'est-elle acquittée envers la PNTTR de son obligation de consultation et d'accommodement?*

Le processus d'approbation du projet de Redfern a duré trois ans et demi et a dans une large mesure été mené en vertu de l'*Environmental Assessment Act*. Comme il a été expliqué précédemment, la Loi prévoit un processus de collecte d'information et de consultation. Selon la Loi, les peuples autochtones dont le territoire traditionnel abrite le chantier d'un projet assujetti à la procédure d'examen doivent être invités à faire partie du comité d'examen du projet.

Il s'agit en l'espèce de décider si cette obligation a été respectée. Au par. 28 de ses motifs dissidents dans la présente affaire, la juge Southin de la Cour d'appel décrit utilement les événements jusqu'au 1er août 2000. En novembre 1994, la PNTTR a été invitée à faire partie du comité chargé de coordonner l'examen du projet et s'est vu remettre pour examen et commentaires la demande originale qui comportait deux volumes : la juge Southin, par. 39. Elle a participé à part entière en tant que membre du comité d'examen du projet, sauf de février à août 1995, où elle a choisi de se retirer, préférant se concentrer sur les pourparlers au sujet du traité et l'élaboration d'une politique d'utilisation du territoire.

Les spécifications du rapport de projet final (« spécifications ») précisent le nombre de réunions qui ont eu lieu, avant février 1996, entre la PNTTR, le personnel de l'agence d'examen et des représentants de l'entreprise dans les communautés de la PNTTR : la juge Southin, par. 41. De juin 1993 à février 1995, Redfern et la PNTTR se sont rencontrées plusieurs fois pour discuter des activités d'exploration de Redfern ainsi que des inquiétudes et des demandes d'information de la PNTTR. Redfern a

archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

aussi chargé un consultant indépendant d'effectuer, avec le concours de la PNTTR, des études archéologiques et ethnographiques pour déterminer les effets possibles du projet sur le mode de vie traditionnel de celle-ci : la juge Southin, par. 41. Les spécifications montrent que la PNTTR a, tant par écrit que verbalement, demandé à Redfern des renseignements concernant les effets sur la faune, la pêche et la sensibilité du terrain, l'impact de la route d'accès proposée, le transport par chaland et les activités minières : la juge Southin, par. 41.

The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

36 Jusqu'au 26 janvier 1998, la PNTTR a refusé de participer aux travaux du sous-comité chargé d'examiner la question de l'accès à la route. Le Bureau des évaluations environnementales a compris le dilemme de la PNTTR, qui préférait voir ses préoccupations examinées sur une plus grande échelle que ce qui est prévu par la Loi. Elle a été informée que tous ses sujets de préoccupation ne pouvaient pas être examinés à l'étape de la délivrance du certificat ou dans le cadre de l'évaluation environnementale, et on l'a aidée à prendre contact avec les décideurs et les politiciens compétents.

With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

37 Aidée financièrement, la PNTTR a participé à de nombreuses réunions du comité d'examen du projet. Devant les préoccupations de la PNTTR à propos du niveau d'information fourni par Redfern au sujet des effets sur l'utilisation du territoire par les Autochtones, le Bureau des évaluations environnementales a chargé un expert, jugé acceptable par la PNTTR, d'effectuer une étude sur l'utilisation traditionnelle des terres, sous les auspices d'un groupe directeur autochtone. Comme le premier rapport Staples n'a pas su dissiper les inquiétudes de la PNTTR, le Bureau des évaluations environnementales a commandé la préparation d'un addenda à ce rapport. La PNTTR souligne que cet addenda n'était pas mentionné expressément dans le rapport faisant état des recommandations qui a été présenté ultérieurement aux ministres. Il faisait toutefois partie du rapport de projet de Redfern.

While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful consultation. After more than three years,

38 La PNTTR reconnaît avoir participé à la consultation, mais soutient que la clôture rapide de l'évaluation l'a privée du bénéfice d'une véritable consultation. Après plus de trois années ponctuées

numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain "information deficiencies": Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

de nombreuses études et réunions et de prorogations des délais prévus par la Loi, il a été mis fin à l'évaluation au début de 1998. Invoquant sa charge de travail, le Bureau des évaluations environnementales a déclaré, le 26 février, que la consultation devait se terminer le 4 mars. Il a ordonné au comité d'examen du projet d'examiner le rapport faisant état des recommandations et de remettre ses conclusions le 3 mars, soit le jour même où le comité a reçu les 18 dernières pages du rapport. Il est mentionné à l'annexe C du rapport faisant état des recommandations que la PNTTR a exprimé son désaccord au sujet du rapport en raison de certaines [TRADUCTION] « lacunes de l'information » : la juge Southin, par. 46. La PNTTR a donc préparé un rapport minoritaire, qui a été soumis aux ministres avec le rapport majoritaire le 12 mars. Le certificat d'approbation de projet a été délivré peu après.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

Il ne fait pas de doute qu'il y a eu, à la fin, accélération du processus d'approbation du projet. Mais la consultation menée par la province a-t-elle été suffisante malgré tout? Les constatations des juridictions inférieures m'amènent à conclure affirmativement.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

La juge en son cabinet a estimé que l'obligation de consulter a été respectée jusqu'en décembre 1997, parce que la PNTTR participait alors à part entière à l'évaluation (par. 132). Je souscris à son opinion. La province n'était pas tenue de mettre sur pied, pour l'examen des préoccupations de la PNTTR, une procédure spéciale de consultation différente de celle établie par l'*Environmental Assessment Act*, qui requiert expressément la consultation des Autochtones concernés.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of

La Loi autorisait le comité à établir lui-même sa procédure. Il a ainsi décidé de former des groupes de travail et des sous-comités, de commander des études et la préparation d'un rapport faisant état de ses recommandations. La PNTTR a été l'instigatrice des décisions de mettre sur pied un groupe directeur chargé d'étudier les questions autochtones et un sous-comité pour l'examen de la proposition concernant l'accès à la route. Les renseignements et l'analyse demandés à Redfern reflétaient clairement les préoccupations de la PNTTR. À la fin de

statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

l'évaluation, plus d'une prorogation des délais prévus par la Loi avait été accordée et, selon le directeur de l'évaluation du projet, [TRADUCTION] « tous les membres du comité responsable du projet, y compris la PNTTR, avaient formé leur opinion » (par. 82 de l'affidavit de Norman Ringstad (cité au par. 57 de l'arrêt de la Cour d'appel)). Les préoccupations de la PNTTR ont été bien comprises, comme le montrent le rapport faisant état des recommandations et le rapport de projet, et elles ont été analysées en profondeur. La province s'est pleinement acquittée de son obligation de consultation.

As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

42 Comme il a été expliqué dans l'affaire *Haïda*, la consultation peut donner lieu à l'obligation de trouver des accommodements aux préoccupations des Autochtones en adaptant des décisions ou des politiques en conséquence. L'objectif du par. 35(1) de la *Loi constitutionnelle de 1982* est de favoriser la conciliation ultime de l'occupation antérieure du territoire par les Autochtones et la souveraineté de fait de la Couronne. Tant que la question n'est pas réglée, le principe de l'honneur de la Couronne commande que celle-ci mette en balance les intérêts de la société et ceux des peuples autochtones lorsqu'elle prend des décisions susceptibles d'entraîner des répercussions sur les revendications autochtones. Elle peut être appelée à prendre des décisions en cas de désaccord quant au caractère suffisant des mesures adoptées en réponse aux préoccupations exprimées par les Autochtones. Une attitude de pondération et de compromis s'impose alors.

The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

43 En l'espèce, la PNTTR conteste le caractère suffisant des mesures d'accommodement prévues par les conditions dont est assorti le certificat d'approbation de projet. Elle soutient que celui-ci n'aurait pas dû être délivré tant qu'on n'avait pas répondu de façon satisfaisante à ses préoccupations, surtout en ce qui concerne l'établissement de données de base.

With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the

44 En toute déférence, je ne souscris pas à cette opinion. Dans le cadre du processus prévu par la Loi pour la délivrance du certificat d'approbation de projet, les préoccupations de la PNTTR ont fait l'objet de mesures d'accommodement suffisantes. En plus de l'analyse présentée dans le rapport minoritaire, le rapport majoritaire a exposé en détail les

terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its

préoccupations de la PNTTR et a recommandé des mesures d'atténuation, lesquelles ont été intégrées dans les conditions du certificat. Ces mesures prévoyaient notamment qu'il soit ordonné à Redfern d'établir des données de base et comprenaient des recommandations au sujet de la gestion future de la route et sa fermeture.

La délivrance du certificat d'approbation de projet est simplement l'étape du processus qui permet la mise en œuvre du projet. Dans l'affaire *Haïda*, la province a fait valoir que, même s'il n'y avait pas eu du tout de consultation à l'étape en litige, soit celle de la [TRADUCTION] « stratégie », les Haïda avaient la possibilité de se faire entendre ultérieurement, à l'étape des [TRADUCTION] « activités ». La situation est différente en l'espèce, car la PNTTR a été consultée tout au long du processus de délivrance du certificat, et ses préoccupations ont fait l'objet de mesures d'accommodement.

Le comité d'examen du projet a conclu que certaines préoccupations non encore examinées pourraient être étudiées de façon plus efficace à l'étape du permis, dans le contexte plus large de la négociation de traités ou lors de la planification d'une stratégie d'utilisation du territoire. Il ressort clairement du rapport majoritaire et des conditions du certificat que, pour la délivrance des permis subséquents, Redfern devra fournir d'autres renseignements et analyses, et que des consultations et négociations ultérieures avec la PNTTR pourront entraîner la prise de mesures d'accommodement. Par exemple, Redfern devra fournir des données de base plus détaillées à l'étape du permis, ce qui pourrait entraîner un rajustement du tracé de la route. D'autres études socio-économiques seront effectuées. Il a été recommandé de former un groupe conjoint d'aménagement et de répondre aux préoccupations de la PNTTR par la négociation avec la province et par le recours aux pouvoirs de réglementation de celle-ci. Il ne fait donc aucun doute que le comité d'examen du projet, et par voie de conséquence les ministres, ont examiné la question de savoir dans quelle mesure les préoccupations de la PNTTR devaient faire l'objet d'accommodements à ce stade du projet et dans quelles autres instances celle-ci pourrait continuer de participer au processus. On s'attend à ce que, à

honourable duty to consult and, if indicated, accommodate the TRTFN.

IV. Conclusion

In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

Appeal allowed.

Solicitors for the appellants: Fuller Pearlman & McNeil, Victoria.

Solicitors for the respondents Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation: Pape & Salter, Vancouver.

Solicitors for the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.: Blake Cassels & Graydon, Vancouver.

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

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

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

Solicitors for the interveners Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of

chacune des étapes (permis, licences et autres autorisations) ainsi que lors de l'élaboration d'une stratégie d'utilisation du territoire, la Couronne continue de s'acquitter honorablement de son obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de celle-ci.

IV. Conclusion

47 En résumé, je conclus que les mesures de consultation et d'accommodement adoptées par la province avant de délivrer le certificat d'approbation du projet de la mine Tulsequah Chief étaient suffisantes pour préserver l'honneur de la Couronne. Le pourvoi est accueilli. L'autorisation de pourvoi a été accordée à la condition que les appelants paient, sur la base partie-partie, les dépens des intimés PNTTR et Melvin Jack pour la demande d'autorisation de pourvoi et pour le pourvoi, quelle que soit l'issue de la cause. Aucune ordonnance relative aux dépens n'est rendue à l'égard des intimées Redfern Resources Ltd. et Redcorp Ventures Ltd.

Pourvoi accueilli.

Procureurs des appelants : Fuller Pearlman & McNeil, Victoria.

Procureurs des intimés la Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River : Pape & Salter, Vancouver.

Procureurs des intimées Redfern Resources Ltd. et Redcorp Ventures Ltd. auparavant connue sous le nom de Redfern Resources Ltd. : Blake Cassels & Graydon, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Ministère de la Justice, Vancouver.

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général de l'Alberta : Alberta Justice, Edmonton.

Procureurs des intervenants Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of

Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

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

Solicitors for the intervener First Nations Summit: Braker & Company, Port Alberni, British Columbia.

Solicitors for the intervener Union of British Columbia Indian Chiefs: Cook Roberts, Victoria.

Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia et Aggregate Producers Association of British Columbia : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante la Première nation de Doig River : Rath & Company, Priddis, Alberta.

Procureurs de l'intervenant le Sommet des Premières nations : Braker & Company, Port Alberni, Colombie-Britannique.

Procureurs de l'intervenante Union of British Columbia Indian Chiefs : Cook Roberts, Victoria.

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