Manitoba Clean Environment Commission

IN THE MATTER OF

BIPOLE III TRANSMISSION PROJECT

NOTICE OF MOTION

by Peguis First Nation, participant

Hearing date: Thursday, 16 August 2012

Dawson Law Chambers
700 – 177 Lombard Avenue
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Manitoba Clean Environment Commission

IN THE MATTER OF

BIPOLE III TRANSMISSION PROJECT

NOTICE OF MOTION

The participant Peguis First Nation will make a motion before the panel on Thursday, 16 August 2012, or as soon after that date as the motion can be heard.

THE MOTION IS FOR an order adjourning the start of the Commission's public hearings in connection with the Bipole III Transmission Project for at least 120 days.

THE GROUNDS FOR THE MOTION ARE:

1. The Crown owes a constitutional duty to consult and accommodate Peguis First Nation in connection with, among other matters, the Bipole III Transmission Project.

    a. The duty to consult aims to protect aboriginal and treaty rights from irreversible damage, pending the resolution of their claims.

    b. Peguis First Nation advances a strong claim arising out of treaty, treaty-protected inherent rights and indigenous cultural rights to a significant portion of land that the proposed environmental development would use or affect.

    c. The proposed environmental development could have serious adverse effects upon the land over which Peguis First Nation advances its claim.

2. The Crown has not discharged its duty to consult and accommodate Peguis First Nation, where such consultation would be both meaningful and adequate.

    a. The duty to consult and accommodate arises at the earliest stages of a project and, although the duty is ongoing, the Crown may not discharge its duty as a mere after-thought.

b. A meaningful process would ensure that Peguis First Nation both understands the technical information relating to the proposed environmental development and is able to respond to that information.

c. An adequate process reflects the "Consultation and Accommodation Policy" that Peguis First Nation set out in a preliminary 27-page draft dated June 2010, which aims to ensure the meaning exchange of information and which governments have previously respected.

d. Whether directly or through some sort of procedural delegation to a third party, including the proponent, the Crown has not engaged in a meaningful and adequate consultative process.

3. The Commission has the authority and obligation to consider both whether any consultation has taken place and whether such consultation has been meaningful and adequate.

4. The Commission has a further and separate obligation to consider the adverse impacts upon treaty and aboriginal rights, especially because

a. the Crown will entirely or partially rely upon the record of the Commission's hearing to inform its decisions relating to any duty to consult and accommodate; and,

b. the Commission's hearing is part of the process by which the Crown would fulfil its duty to consult.

This is not to say that the Commission itself has a duty to consult. The above-described obligation merely reflects the significant and central role that the Commission plays in the assessment of major environmental assessments.

5. Like any attempt by the Crown to engage in consultations with Peguis First Nation, the hearing process before the Commission has not afforded the First Nation with a meaningful and adequate means by way to participate.

a. The environmental impact statement is necessarily a complex and technical document that Peguis First Nation cannot reasonably understand, challenge, and assess without expert assistance. Without adequate funding to engage such expert assistance, the First Nation has been unable to participate in the hearing process in a meaningful way.

b. The same environment impact statement is incomplete and arguably does not meet the minimum standard that such a document must exhibit when filed. Within the meaning of the Terms of Reference giving rise to the instant proceedings, no

environment impact statement is before the Commission, only an insufficient document that purports to be an EIS.

c. Although subject to the procedural rules that the Commission adopts, no consideration in this proceeding has been given to the consultative process that Peguis First Nation itself has adopted. The adequacy of any consultation with the First Nation is arguably in doubt.

6. Without doubt, it falls within the Commission's jurisdiction to grant relief where it finds consultation has not been adequate and meaningful.

7. While the issue of consultation could be postponed to the hearing itself, the Commission's decision at that point would be problematic for, and prejudicial to, the proponent, the parties, and even the Commission itself.

a. At the least, it is conceivable that the Commission could diminish its recommendation of the proposed environmental project on the ground that no meaningful and adequate consultation of Peguis First Nation has been undertaken.

b. In the worst case, delay could arise while post-hearing consultations were undertaken or litigation unfolded in the slow way of the courts seeking to set aside the panel's recommendations.

8. It is submitted that an adjournment of the hearing for at least 120 days would be appropriate relief in the circumstances, allowing the Crown time to discharge its duty to consult Peguis First Nation in a meaningful and adequate way and permitting further consideration of the nature and extent of the First Nation's participation in the hearing process.

9. An adjournment also is the relief that would best accord with the Canadian constitutional principle that promotes the reconciliation of aboriginal and treaty rights with the sovereignty of the Crown.

10. For these reasons, the participant Peguis First Nation submits that the Commission should grant its motion for an adjournment of the hearing.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion (see following tabs):

Tab R	Statement of Facts, by Lloyd Stevenson
Tab S	Environment Act
Tab T	Terms of Reference
Tab U	Transcript of pre-hearing conference, 16 July 2012
Tab V	*Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73
Tab W	*Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74

Tab X	*Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage*), 2005 SCC 69
Tab Y	*Brokenhead Ojibway First Nation* v. *Canada (Attorney General)*, 2009 FC 484
Tab Z	*Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43

7 August 2012

Original signed by

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STATEMENT OF FACTS

by Lloyd Stevenson
Peguis First Nation TLE consultation manager

1. I am the Consultation Manager of the Treaty Land Entitlement Implementation Unit, which is a department of the participant Peguis First Nation. Prior to my assignment to that position in 2010, I was the Legal Advisor to Peguis First Nation since 1986. As such, I have knowledge of the facts and matters that I set out here.

About Peguis First Nation

2. The Peguis First Nation is a First Nation, whose primary community is situated in the Interlake area approximately 180 kilometers north of Winnipeg, and it is a signatory to Treaty #1, which it signed on 3 August 1871. The band membership of Peguis First Nation numbers approximately 9,800 members comprised of Ojibway and Cree.

3. The history of Peguis First Nation is well-documented. The current Reserve is named after the famous Chief Peguis, who began the settlement in the late 1700's at what was later known as St Peter's, Manitoba, which is just north of

today's City of Selkirk. Chief Peguis is especially recognized for the assistance and support that he started in 1812 to provide to the struggling Lord Selkirk settlers, with whom he signed a treaty in 1817. The son of Chief Peguis, Chief Henry Price, later signed Treaty 1 in 1871 on behalf of what was then called the St Peter's Band and which is today known as Peguis First Nation.

Peguis land entitlements and related rights

4. The Peguis First Nation Reserves of today include 9 parcels of land, 7 of which are in the area of the City of Selkirk, Manitoba. The land entitlements and related rights go well beyond simply the main reserve that is located north of Fisher Branch, Manitoba.

5. As a result of a questionable surrender of land in 1907, the settlement at St Peter's was moved north to the present location of Peguis First Nation. The First Nation has since received compensation for this illegal surrender. After years of negotiation, Peguis First Nation settled a Treaty Land Entitlement Agreement on 29 April 2008 with the Province of Manitoba and the Government of Canada for an additional 166,794 acres of land, which is be comprised of provincial Crown lands and private lands.

6. It is a term of the Treaty Land Entitlement Agreement that Peguis First Nation may select Crown land both within and outside of the treaty area. To give

effect to that selection process, the Province of Manitoba agreed to a "Notice Area", so that it would inform Peguis First Nation before it disposed of any Crown lands falling within the Notice Area. Extending over a vast tract, the Notice Area runs south from the main reserve north of Fisher Branch, Manitoba, all the way to the City of Winnipeg, including the east and west sides of the City. I attach as Exhibit A a map that shows the Notice Area, as well as other lands over with Peguis First Nation holds or asserts rights and interests.

7. Quite apart from Crown lands within the Notice Area, Peguis First Nation still asserts its rights over land located within the area dealt with under the 1871 Treaty 1, which covers most of the southern portion of Manitoba.

8. In addition, Peguis First Nation asserts rights to its traditional territory, which goes beyond the boundaries that Treaty 1 addresses.

Obligations of the Crown

9. Arising out of Treaty 1 and the Canadian Constitution, the Crown has inherent and constitutional obligations that it owes to Peguis First Nation.

10. Arising out of the Treaty Land Entitlement Agreement, the Crown has additional obligations that it owes to Peguis First Nation. That agreement requires the availability and protection of lands within the Notice Area.

11. In relation to the Bipole III Transmission Project which transects and expands through, over, and adjacent to lands to which Peguis First Nation asserts legitimate rights and interests, the Crown has acknowledged that it is under obligations to identify and address the adverse impacts that will affect Peguis First Nation by reason of the proposed development.

12. Such adverse effects include:

a. The short- and long-term disruption arising out of construction;

b. The prospect of disturbance to burial places and sites of archaeological significance, especially in the vicinities where Bipole III's Riel Converter Station and its southern ground electrode are planned;

c. The consequences of building a transmission line corridor, which requires construction roads and later effectively creates an ATV access road along the transmission line, allowing penetration into areas that were historically secluded, resulting in impacts upon aboriginal hunting and spiritual uses of secluded areas; and,

d. Concerns about resulting electromagnetic frequencies upon humans and wildlife around the transmission line;

e. Spoilage of land and water that could result over a wide area if insulating oil spilt from a converter station.

13. However, the Crown has done nothing more than hold preliminary discussions with Peguis First Nation, and the purpose of those discussions was only to prepare for consultations and attempt to settle the funding of the Peguis participation in the community review and consultation process. As of this date, no consultations have taken place, and it is patently incorrect to state that the Crown or any other party is engaged with, or has otherwise involved, Peguis First Nations in consultations.

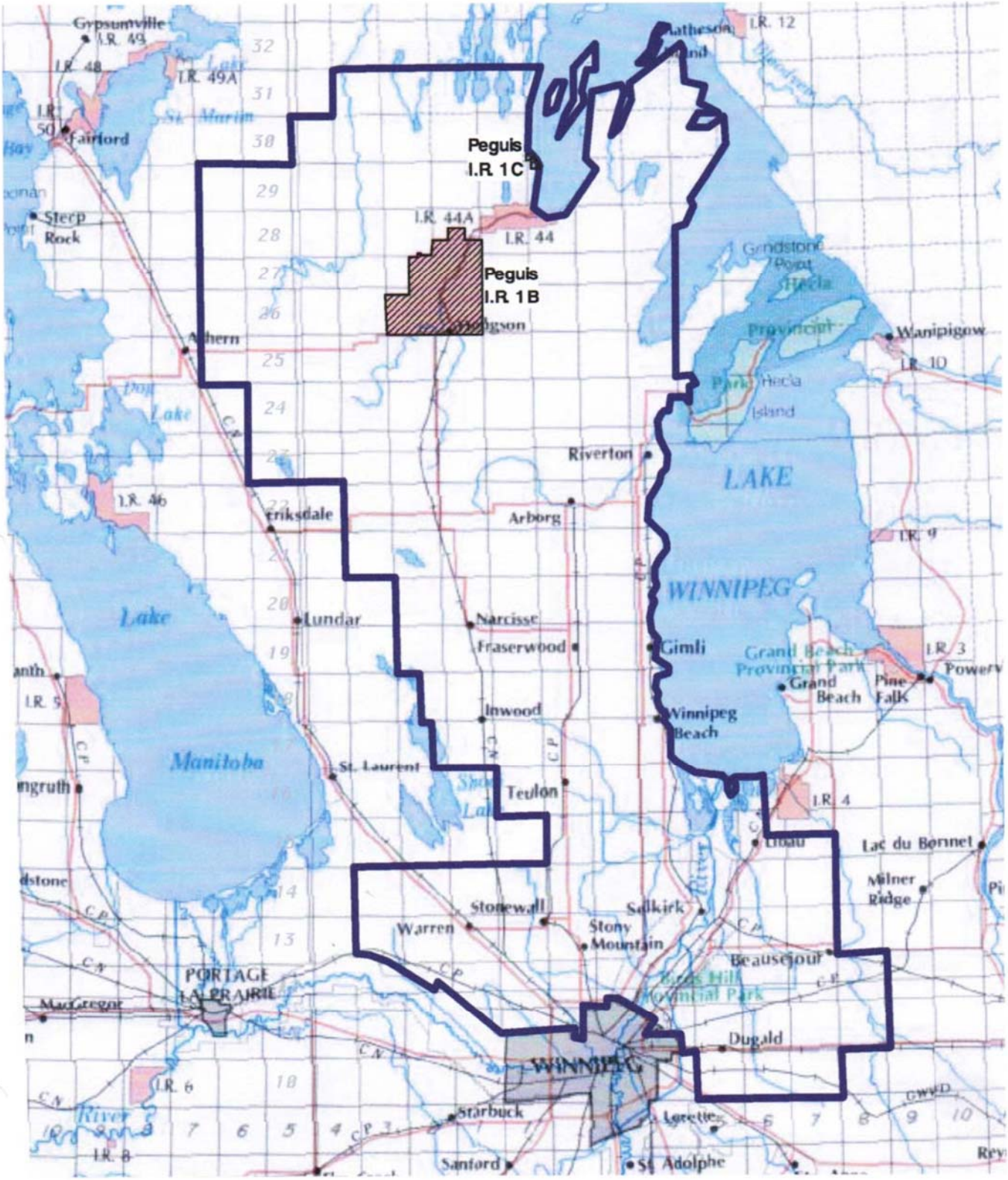
14. Moreover, the Crown has ignored the consultation protocol that Peguis First Nation itself has developed, published, and provided to the Manitoba Government as a tool that would facilitate consultations with Peguis First Nation.

05 August 2012

Exhibit A

Notice Area

Map of Notice Area



CHAPTER E125

THE ENVIRONMENT ACT

(Assented to July 17, 1987)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Intent and purposes

1(1) The intent of this Act is to develop and maintain an environmental protection and management system in Manitoba which will ensure that the environment is protected and maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations, and in this regard, this Act

(a) is complementary to, and support for, existing and future provincial planning and policy mechanisms;

(b) provides for the environmental assessment of projects which are likely to have significant effects on the environment;

(c) provides for the recognition and utilization of existing effective review processes that adequately address environmental issues;

CHAPITRE E125

LOI SUR L'ENVIRONNEMENT

(Sanctionnée le 17 juillet 1987)

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Objet de la Loi

1(1) La présente loi a pour objet l'élaboration et l'observation au Manitoba d'un système de protection et de gestion en matière d'environnement qui puisse assurer une qualité de vie d'un niveau supérieur, notamment quant aux loisirs et sur les plans social et économique pour les générations présentes et à venir. À cette fin, la présente loi :

a) vient compléter et appuyer la planification provinciale et le processus afférent aux politiques provinciales, actuels et futurs;

b) prévoit l'évaluation des projets qui sont susceptibles d'avoir des effets importants sur l'environnement;

c) prévoit l'approbation et l'utilisation des procédés d'examen actuels qui touchent les questions environnementales de façon efficace;

(d) provides for public consultation in environmental decision making while recognizing the responsibility of elected government including municipal governments as decision makers; and

(e) prohibits the unauthorized release of pollutants having a significant adverse effect on the environment.

Definitions
1(2) In this Act,

"abatement project" means a project for the abatement of an undesirable environmental condition affecting premises by

(a) the removal and relocation of the development causing the condition; or

(b) the removal and relocation of the premises affected by the condition; (« opération de dépollution »)

"adverse effect" means impairment of or damage to the environment, including a negative effect on human health or safety; (« effet nocif »)

"air" means the atmosphere, but does not include the atmosphere within a mine or within a building other than any building designated by the minister; (« air »)

"alter" means to change a development or a proposal or to close, shut down or terminate a development where the alteration causes or is likely to cause a significant change in the effects of the development on the environment; (« changer »)

"analyst" means a government employee so appointed by the minister; (« analyste »)

"assessment" means an evaluation of a proposal to ensure that appropriate environmental management practices are incorporated into all components of the life cycle of a development; (« évaluation »)

"class 1 development" means any development that is consistent with the examples or the criteria or both set out in the regulations for class 1 developments, and the effects of which are primarily the release of pollutants; (« exploitation de catégorie 1 »)

d) prévoit la consultation du public relativement au processus de prise de décision en matière d'environnement tout en reconnaissant la responsabilité du gouvernement au pouvoir, y compris les gouvernements municipaux, à titre de décideur;

e) interdit l'émission non autorisée de polluants qui ont des effets nocifs importants sur l'environnement.

Définitions
1(2) Les définitions qui suivent s'appliquent à la présente loi.

« agent de l'environnement » Personne ou catégorie de personnes nommée en vertu du paragraphe 3(2). ("environment officer")

« air » L'atmosphère, à l'exclusion de celle qui se trouve à l'intérieur des mines ou à l'intérieur des bâtiments autres que ceux qui sont désignés par le ministre. ("air")

« analyste » Fonctionnaire nommé par le ministre à titre d'analyste. ("analyst")

« bien-fonds » S'entend en outre du sol, de la terre et du terrain. ("land")

« changer » Apporter une modification à une exploitation ou à un projet, ou fermer une exploitation ou y mettre fin, lorsque cela cause ou est susceptible de causer un changement important dans les effets de cette exploitation sur l'environnement. ("alter")

« Commission » La Commission de protection de l'environnement créée sous le régime de la présente loi. ("commission")

« Conseil interministériel d'aménagement » Le conseil nommé en vertu de la *Loi sur l'aménagement du territoire*. ("Interdepartmental Planning Board")

« corporation » Personne morale constituée en corporation avant ou après l'entrée en vigueur de la présente loi et exerçant un commerce ou une industrie au Manitoba. ("corporation")

Department
2(1) The aims and objectives of the department are to protect the quality of the environment and environmental health of present and future generations of Manitobans and to provide the opportunity for all citizens to exercise influence over the quality of their living environment.

Functions of the department
2(2) Without limiting the generality of subsection (1), departmental functions include

(a) the administration and enforcement of this Act, the regulations, licences and orders made hereunder;

(b) the administration and enforcement of any other Acts and regulations as determined by the Lieutenant Governor in Council;

(c) the development and implementation of standards and objectives for environmental quality of Manitoba in consultation with other government departments and the public;

(d) the establishment and maintenance of an effective method of public involvement in environmental decision making;

(e) research, monitoring, studies and investigations related to the acquisition of knowledge, data or technological understanding necessary to perform its mandate;

(f) the provision of technical, analytical services; and

(g) the development of environmental management strategies and policies for the protection, maintenance, enhancement and restoration of environmental quality in Manitoba.

Environmental awareness programs
2(3) For the purposes of increasing environmental awareness in Manitoba, the minister may

(a) cause the preparation and production of informational material respecting the environment of the province and make the material available to the public;

Ministère
2(1) Le ministère a pour mission de préserver la qualité de l'environnement et la salubrité de l'environnement pour les générations de manitobains présentes et à venir et de donner l'occasion à tous et chacun de jouer un rôle quant à la qualité de l'environnement.

Fonctions du ministère
2(2) Sans préjudice de la portée générale du paragraphe (1), le ministère est notamment responsable de :

a) l'administration et de l'application de la présente loi et des règlements ainsi que des ordres donnés, des arrêtés pris et des licences délivrées sous leur régime;

b) l'administration et de l'application d'autres lois de la Législature et de règlements, selon ce que le lieutenant-gouverneur en conseil détermine;

c) l'élaboration et de l'implantation de normes et d'objectifs en ce qui a trait à la qualité de l'environnement du Manitoba, après avoir consulté les autres ministères du gouvernement et le public;

d) l'élaboration et le maintien d'une méthode efficace quant à la participation du public au processus de prise de décisions reliées à l'environnement;

e) la recherche, la surveillance, les études et les enquêtes en ce qui concerne l'acquisition de connaissances ou de données ou la compréhension de la technologie nécessaires à l'accomplissement de son mandat;

f) la prestation de services techniques et analytiques;

g) l'élaboration de stratégies et de politiques en matière de gestion de l'environnement en vue de la protection, du maintien, de l'amélioration et de la restauration de la qualité de l'environnement au Manitoba.

Sensibilisation du public
2(3) Afin de sensibiliser davantage le public aux questions touchant l'environnement, le ministre peut :

a) faire rédiger et imprimer de la documentation portant sur l'environnement de la province et mettre cette documentation à la disposition du public;

(b) undertake, or by means of grants or other assistance, support and encourage the development of educational programs or courses in the public education system, or educational programs for the public at large, respecting environmental management.

Appointment of director
3(1) The minister shall appoint a director for the purposes of this Act and the regulations.

Environment officer
3(2) The minister may appoint a person or the members of a class of persons as environment officers for the purpose of this Act and the regulations, any provision of this Act or a regulation or any provision of a regulation.

Appointment of environmental mediator
3(3) The minister may, where the minister deems it advisable, and where the conflicting parties concur, appoint an environmental mediator acceptable to the parties to mediate between persons involved in an environmental conflict, and the mediator so appointed shall, within six weeks after completion of the mediation, report to the minister the results of the mediation.

S.M. 1993, c. 26, s. 3.

4 Repealed.

S.M. 1997, c. 61, s. 21.

Advisory committees
5 The minister may establish and appoint members of such advisory committees as the minister considers desirable for the purpose of providing advice and assistance in carrying out the objects and purposes of this Act.

Clean Environment Commission
6(1) There shall be a Clean Environment Commission with a minimum of 10 members appointed by the Lieutenant Governor in Council for such terms and remuneration as may be specified by the Lieutenant Governor in Council, for the purposes of

(a) providing advice and recommendations to the minister;

b) mettre sur pied des programmes ou des cours éducatifs destinés au système d'enseignement public ou au public en général, portant sur la gestion de l'environnement ou, au moyen de subventions ou de quelque autre assistance, encourager la mise sur pied de tels programmes ou cours.

Nomination du directeur
3(1) Le ministre nomme un directeur pour l'application de la présente loi et des règlements.

Agent de l'environnement
3(2) Pour l'application de la présente loi, de l'ensemble ou de l'un de ses règlements, d'une disposition de la présente loi ou d'une disposition d'un de ses règlements, le ministre peut nommer agent de l'environnement une personne ou une catégorie de personnes.

Nomination d'un médiateur de l'environnement
3(3) Le ministre peut, s'il le juge à propos et avec l'accord des parties au litige, nommer un médiateur de l'environnement jugé acceptable par ces parties aux fins de médiation entre les personnes mêlées à un conflit relatif à l'environnement. Le médiateur ainsi nommé fait rapport au ministre des résultats de sa médiation dans les six semaines qui suivent la fin de sa médiation.

L.M. 1993, c. 26, art. 3.

4 Abrogé.

L.M. 1997, c. 61, art. 21.

Constitution de comités consultatifs
5 Le ministre peut constituer les comités consultatifs qu'il estime souhaitables afin qu'ils procurent leurs conseils et leur aide à l'occasion de la réalisation des objectifs des dispositions de la présente loi. Il peut également nommer les membres de ces comités.

Commission de protection de l'environnement
6(1) Est constituée la Commission de protection de l'environnement, composée d'au moins 10 membres. Le lieutenant-gouverneur en conseil nomme ses membres et fixe la durée de leur mandat et leur rémunération. La Commission a pour mission :

a) de fournir des conseils et de faire des recommandations au ministre;

(b) developing and maintaining public participation in environmental matters; and

(c) carrying out functions that it is required or permitted to carry out under *The Contaminated Sites Remediation Act* and *The Drinking Water Safety Act*.

b) de favoriser et de maintenir la participation du public à l'égard des questions liées à l'environnement;

c) de s'acquitter des fonctions qu'elle peut ou doit exercer en vertu de la *Loi sur l'assainissement des lieux contaminés* et de la *Loi sur la qualité de l'eau potable*.

Chairperson
6(2) In addition to the members appointed pursuant to subsection (1), the Lieutenant Governor in Council shall appoint, and fix the remuneration of a full time chairperson of the commission who shall report to the minister.

Président
6(2) En plus des membres qu'il nomme conformément au paragraphe (1), le lieutenant-gouverneur en conseil nomme un président de la Commission et fixe sa rémunération. Le président occupe son poste à plein temps et rend compte au ministre.

Investigation into environmental matters
6(3) The commission may on its own volition conduct an investigation into any environmental matter, except a matter involving the gathering of evidence to determine whether or not a specific proponent is complying with the provisions of this Act and the regulations, and advise and make recommendations thereon to the minister.

Enquête de la Commission
6(3) La Commission peut de sa propre initiative procéder à une enquête en matière d'environnement, sauf à l'égard d'une question portant sur la récolte des éléments de preuve en vue de déterminer si un promoteur particulier se conforme ou non aux dispositions de la présente loi ou des règlements, et fournir des conseils et des recommandations au ministre à cet égard.

Public meetings and hearings
6(4) The commission may hold public meetings or public hearings for the purposes of its functions of gathering or disseminating information, or gathering evidence or information from the public.

Réunions et audiences publiques
6(4) Aux fins d'exécution de son mandat, la Commission peut tenir des réunions ou des audiences publiques en vue de recueillir ou de fournir des renseignements ou de recueillir des témoignages et des renseignements du public.

Specific duties of Commission
6(5) When requested by the minister, the commission must do one or more of the following in accordance with any terms of reference specified by the minister:

(a) provide advice and recommendations to the minister;

(b) conduct public meetings or hearings and provide advice and recommendations to the minister;

(c) conduct investigations into specific environmental concerns and report back to the minister;

(d) act as a mediator between two or more parties to an environmental dispute and report back to the minister.

Obligations de la Commission
6(5) À la demande du ministre et selon le mandat qu'il précise, la Commission prend l'une ou plusieurs des mesures suivantes :

a) lui fournit des conseils et des recommandations;

b) tient des réunions ou des audiences publiques et fournit des conseils et des recommandations au ministre;

c) procède à des enquêtes à l'égard de questions précises portant sur l'environnement et en fait rapport au ministre;

d) agit à titre de médiateur entre plusieurs parties à un différend portant sur l'environnement et rend compte de sa médiation au ministre.

Tabling of report
6(11) Upon receipt of the report pursuant to subsection (10), the minister shall, if the Legislature is then in session, lay it before the Legislature forthwith, and if the Legislature is not then in session release the report to the members of the Legislature and to the public within six weeks of the minister's receipt of it.

S.M. 1989-90, c. 90, s. 15; S.M. 1992, c. 23, s. 2; S.M. 1993, c. 48, s. 13; S.M. 1996, c. 40, s. 67; S.M. 2002, c. 36, s. 40; S.M. 2009, c. 25, s. 3.

Notice to hold public hearings
7(1) Upon receipt of a proposal and a request from the minister to hold public meetings or hearings respecting a proposed development, the commission shall notify the proponent and shall by advertisement in such newspaper or other media as the commission deems fit, give notice of the proposal, its intentions to hold meetings or hearings, and the dates, times and location of such meeting or hearings, and the date for receipt of notice for presentation of a submission.

Representations to Commission
7(2) Any person who wishes to make representation to the commission at a hearing shall, not later than the date set out in the notice, in writing so notify the commission.

Commission to submit recommendations to minister
7(3) Unless otherwise specified by the minister, not later than 90 days from the date of completion of meetings or hearings requested by the minister, the chairperson shall forward a report to the minister outlining the terms of reference, the process, the dates and locations of the meetings or hearings that were held, a summary of the public response and opinions, and the advice and recommendations of the commission.

Commission may add members
7(4) Notwithstanding subsection 6(1), for the purpose of conducting certain specific hearings, meetings or investigations, the commission, with the approval of the minister, may add qualified persons to the commission to assist and advise the commission in conducting the hearings, meetings or investigations; and the members so added have all the powers of the commissioners with respect to those hearings, meetings or investigations.

Dépôt du rapport
6(11) Le ministre dépose sans délai un exemplaire du rapport qu'il reçoit en vertu du paragraphe (10) devant la Législature ou, si celle-ci ne siège pas, met le rapport à la disposition des membres de la Législature et du public dans les six semaines qui suivent sa réception.

L.M. 1989-90, c. 90, art. 15; L.M. 1992, c. 23, art. 2; L.M. 1993, c. 48, art. 13; L.M. 1996, c. 40, art. 67; L.M. 2002, c. 36, art. 40; L.M. 2009, c. 25, art. 3.

Avis d'audience
7(1) Sur réception d'un projet, accompagné d'une demande du ministre en vue de la tenue de réunions ou d'audiences publiques portant sur une exploitation projetée, la Commission avise le promoteur et, par voie d'annonce dans un journal ou dans les autres médias qu'elle juge utiles, porte à la connaissance du public le projet, son intention de tenir des réunions ou des audiences publiques, les date, heure et lieu de celles-ci ainsi que la date limite d'envoi d'un avis d'intervention.

Avis d'intervention
7(2) Quiconque désire présenter des observations à la Commission lors d'une audience doit l'en aviser au plus tard à la date fixée dans l'avis.

Recommandations de la Commission au ministre
7(3) Sauf indication contraire du ministre, le président transmet à celui-ci, dans les 90 jours qui suivent la fin des réunions ou des audiences tenues à sa demande, un rapport indiquant le mandat, la procédure, les dates et les emplacements des réunions ou des audiences, ainsi qu'un résumé des réponses et des observations du public, et les avis et les recommandations de la Commission.

Services d'autres membres pour la tenue d'audiences
7(4) Par dérogation au paragraphe 6(1), aux fins de la tenue de certaines réunions, audiences ou enquêtes, la Commission peut, avec l'approbation du ministre, faire appel aux services de personnes compétentes pour l'aider et lui fournir des conseils. Ces membres ont tous les pouvoirs des membres de la Commission à l'égard de ces réunions, audiences ou enquêtes.

Terms of Reference
Clean Environment Commission
Manitoba Hydro Bipole III Transmission Line Project:
A Major Reliability Initiative (the Project)

Background

On December 14, 2009, Manitoba Conservation, Environmental Assessment and Licensing Branch (EALB), received an Environment Act Proposal and Draft Environmental Assessment Scoping Document from Manitoba Hydro respecting the proposed Bipole III transmission line project. The scoping document is for the Environmental Impact Statement (EIS) and it was finalized in June 2010 following a public and Technical Advisory Committee (TAC) review.

As authorized under *The Environment Act* (the Act), the Minister of Conservation has decided that the assessment of this project will include a review by the Clean Environment Commission (the Commission).

To date, no federal triggers have been identified for the project and as such, a federal regulatory decision will likely not be required. However, Manitoba will seek expert advice from federal agencies in accordance with the Canada/Manitoba Agreement on Environmental Assessment Cooperation.

Terms of Reference

Pursuant to Section 6 (5.1) of the Act, the Minister has determined that the Terms of Reference the Commission is to follow in carrying out its duties are:

- To review and evaluate the Environmental Impact Statement (EIS) and the proponent's public consultation summary;
- To hold public hearings to provide an opportunity for the Commission to consider stakeholder and public input as part of their project assessment. The locations of hearings must include Winnipeg, but other locations also should be considered along the proposed route to allow easier access to those members of the public that do not live in Winnipeg but may be affected by the project; and,
- To prepare and file a report with the Minister of Conservation outlining the results of the Commission's review and providing recommendations for the Minister's consideration. The report should be filed within ninety (90) days from the date of completion of hearings as per Section 7(3) of the Act.

Mandate of the Hearings

The Commission shall conduct the hearings in general accordance with its Process Guidelines Respecting Public Hearings. The Commission may, at any time, request that the Minister of Conservation review or clarify these Terms of Reference.

Hearings should be located in areas that will allow reasonable access to potential stakeholders.

The Commission shall, within the mandate of the hearing and the Terms of Reference provided by the Minister as noted above, provide a report recommending:

- Whether an Environment Act licence should be issued to Manitoba Hydro for the Bipole III Project.

Should the Commission recommend the issuance of an Environment Act licence for the Bipole III Project, then appropriate recommendations should be provided within the scope of the Terms of Reference:

- Measures proposed to mitigate any potential adverse environmental, socio-economic and cultural effects resulting from the Bipole III Project, and, where appropriate manage residual effects; and
- Future monitoring that may be recommended in relation to the Bipole III Project.

The Commission's recommendation shall incorporate, where appropriate, the Principles of Sustainable Development and Guidelines for Sustainable Development as contained in *Sustainable Development Strategy for Manitoba.*

December 5, 2011

Terms of Reference
Clean Environment Commission
Manitoba Hydro Bipole III Transmission Line Project:
A Major Reliability Initiative (the Project)

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December 5, 2011

entitle or enable my client to test the evidence in a meaningful way and participate in the process.

Mr. Chairman, you wrote back indicating that it was the view of, well, I assume the Commission, that no such duty existed. There are alternate arguments. And perhaps to the extent that you are prepared to answer this question, I can simply move along and not even have to bring a motion. So with your permission, I will put the question and of course, you, Mr. Chairman, may choose simply not to answer it.

I have your point with respect to the Commission and the duty to consult, but may I ask, will the Commission take into account when it gives advice and recommendations to the Minister whether or not participants such as Aboriginal groups have had their duty to be consulted and accommodated discharged by the Province or the Crown? And to the extent that the answer to that is yes, one show stopping motion may be unnecessary.

THE CHAIRMAN: I would think that the answer will be yes.

MR. DAWSON: Thank you. And I

consultation process that's been undertaken by Manitoba Conservation, as well as the information generated, gathered, tested through the CEC process.

THE CHAIRMAN: Well, that's correct. I mean, the Minister, or the Crown in concluding its duty to consult process will certainly look at the recommendations and conclusions that come out of the CEC hearings, as you've stated.

MR. MADDEN: Okay.

THE CHAIRMAN: It is not something that we are going to ignore by any stretch, but it is not a major task of the CEC in these hearings.

MR. MADDEN: But you aren't going to exclude us raising issues around the potential impact of the project on rights, way of life, outstanding claims of Aboriginal people?

THE CHAIRMAN: I can't give you a definitive answer on that today.

MR. MADDEN: Okay.

THE CHAIRMAN: Any other comments, Mr. Madden?

MR. MADDEN: No.

THE CHAIRMAN: Anyone else wish to comment on that matter right now?

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

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

v.

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

and between

Weyerhaeuser Company Limited *Appellant*

v.

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

and

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

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

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

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

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

petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

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

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

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

adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

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

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

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject

to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

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

Cases Cited

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; **referred to:** *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and*

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

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

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

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81,

the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

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

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

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

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty

claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

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

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

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

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty

to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

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

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

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

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

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

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

resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

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

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

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development *Appellants*

v.

Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd., and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd. *Respondents*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit, and Union of British Columbia Indian Chiefs *Interveners*

Indexed as: Taku River Tlingit First Nation *v.* British Columbia (Project Assessment Director)

Neutral citation: 2004 SCC 74.

File No.: 29146.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation ("TRTFN"), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company's plan to build a road through a portion of the TRTFN's traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN.

Held: The appeal should be allowed.

The Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*. The duty to consult varies with the circumstances. It arises when a Crown actor has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This in turn may lead to a duty to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's title and rights claims and knew that the decision to reopen the mine had the potential to adversely affect the substance of the TRTFN's claims. The TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process. While the proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation. It is impossible, however, to provide a prospective checklist of the level of consultation required.

In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate. The TRTFN was part of the Project Committee, participating fully in the environmental review process. Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN. Finally, it is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate the TRTFN.

Cases Cited

Applied: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35(1).

Environmental Assessment Act, R.S.B.C. 1996, c. 119 [rep. 2002, c. 43, s. 58], ss. 2, 7, 9, 10, 14 to 18, 19(1), 21, 22, 23, 29, 30(1).

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.

Mine Development Assessment Act, S.B.C. 1990, c. 55.

claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

31 The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km^2 area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report (R.R., vol. I, at pp. 175, 187, 190 and 200) and Staples Addendum Report (A.R., vol. IV, at pp. 595-600, 604-5 and 629). The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

32 In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the

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

Mikisew Cree First Nation *Appellant*

v.

Sheila Copps, Minister of Canadian Heritage, and Thebacha Road Society *Respondents*

and

Attorney General for Saskatchewan, Attorney General of Alberta, Big Island Lake Cree Nation, Lesser Slave Lake Indian Regional Council, Treaty 8 First Nations of Alberta, Treaty 8 Tribal Association, Blueberry River First Nations and Assembly of First Nations *Interveners*

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

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

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

on appeal from the federal court of appeal

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

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

Appeal — Role of intervener — New argument.

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

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around

the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

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

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

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is

not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [33-34] [59]

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

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

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the "taking up" limitation, the content of the Crown's duty of consultation in this case lies

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

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

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

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), [2004] 3 S.C.R. 550,

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

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

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

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

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

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

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

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

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

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

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

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

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

Federal Court | Cour fédérale

Date: 20090512

Dockets: T-225-08
T-921-08
T-925-08

Citation: 2009 FC 484

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-225-08

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION, PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

Applicants

and

THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
TRANSCANADA KEYSTONE PIPELINE GP LTD.

Respondents

Docket: T-921-08

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION,

PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
ENBRIDGE PIPELINES INC.**

Respondents

T-925-08

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION, PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and**

ENBRIDGE PIPELINES INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are the seven First Nations who are the successors to those Ojibway First Nations who entered into what is known as Treaty One with the federal Crown on August 3, 1871[1]. They are today organized collectively as the Treaty One First Nations and they assert

[1] Treaty One was the first of several treaties entered into from 1871 to 1877 between the federal Crown and the First Nations peoples who then occupied much of the lands of the southern prairies and the south-western corner of what is now Ontario.

treaty, treaty-protected inherent rights and indigenous cultural rights over a wide expanse of land in southern Manitoba. By these applications the Treaty One First Nations seek declaratory and other prerogative relief against the Respondents in connection with three decisions of the Governor in Council (GIC) to approve the issuance by the National Energy Board (NEB) of Certificates of Public Convenience and Necessity for the construction respectively of the Keystone Pipeline Project, the Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project (collectively, "the Pipeline Projects"). All of the Pipeline Projects involve the use or taking up of land in southern Manitoba for pipeline construction by the corporate Respondents. Because the material facts and the legal principles that apply are the same for all three of the decisions under review, it is appropriate to issue a single set of reasons.

I. Regulatory Background

The Keystone Pipeline Project

[2] On December 12, 2006 TransCanada Keystone Pipeline GP Ltd. (Keystone) applied to the NEB for approvals related to the construction and operation of the Keystone Pipeline Project (the Keystone Project).

[3] The Keystone Project consists of a 1235 kilometer pipeline running from Hardisty, Alberta to a location near Haskett, Manitoba on the Canada-United States border. In Manitoba all new pipeline construction is on privately owned land with the balance of 258 kilometers running over existing rights-of-way (including 4 kilometers on leased Crown land and 2 kilometers on unoccupied Crown land). The width of the permanent easement in Manitoba is 20 metres and the pipeline is buried.

Was a Duty to Consult Engaged and, if so, Was that Obligation Fulfilled?

[24] I do not intend nor do I need to determine the validity of the Treaty One First Nations' outstanding treaty claims and on a historical and evidentiary record as limited as this one, it would be inappropriate to do so: see *Ka'a'Gee,* above, at para. 107. Suffice it to say that I do not agree with Enbridge when it states that "Treaty One is clear on its terms that the Aboriginal parties cede all lands except those specifically set aside for reserves". The exercise of treaty interpretation is not constrained by a strict literal approach to the text or by rigid rules of construction. What the Court must look for is the natural common understanding of the parties at the time the treaty was entered into which may well be informed by evidence extraneous to the text: see *Mikisew,* above, at paras. 28-32. From the evidence before me there could well have been an understanding or expectation at the time of signing Treaty One that the First Nations' parties would continue to enjoy full access to unallocated land beyond the confines of the reserves, that additional reserve lands would be later made available and that further large scale immigrant encroachment on those lands was not contemplated. I am proceeding on the assumption, therefore, that the Applicants' claim to additional treaty lands and the right to continued traditional use of those lands within Manitoba is credible. The more significant issue presented by this case concerns the impact of the Pipeline Projects on the interests and claims asserted by the Treaty One First Nations and the extent to which those concerns were adequately addressed through the NEB regulatory processes.

[25] In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia*, 2005 BCSC

1712, 51 B.C.L.R. (4th) 133 at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.

[26] The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB (including, to some extent, the Treaty One First Nations) were well-received and largely resolved.

[27] These regulatory processes appear not to be designed, however, to address the larger issue of unresolved land claims. As already noted in these reasons, the NEB and the corporate Respondents have acknowledged that obvious limitation.

[28] From the perspective of the Treaty One First Nations, the remediation of their project specific concerns may not answer the problem presented by the incremental encroachment of development upon lands which they claim or which they have enjoyed for traditional purposes. While the environmental footprint of any one project might appear quite modest, the eventual cumulative impact of development on the rights and traditional interests of Aboriginal peoples can be quite profound.

they carried out harvesting activity. This, he said, triggered a duty to consult that was higher than the minimum described in *Mikisew*. Up to a point, Justice Blanchard was satisfied that the comprehensive regulatory process was sufficient to fulfill the Crown's duty to consult. It was only when the Crown unilaterally modified the process and made fundamental changes to important recommendations that had come out of the earlier consultations that the duty to consult was found to have been breached.

[42] I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: see *Ahousaht v. Canada*, 2008 FCA 212, [2008] F.C.J. No. 946 at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.

[43] It cannot be seriously disputed that the Pipeline Projects have been built on rights-of-way that are not legally or practically available for the settlement of any outstanding land claims in southern Manitoba. Even the Treaty One First Nations acknowledge that the additional lands they

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

Rio Tinto Alcan Inc. and
British Columbia Hydro and Power Authority *Appellants*

v.

Carrier Sekani Tribal Council *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Alberta,
British Columbia Utilities Commission,
Mikisew Cree First Nation,
Moosomin First Nation,
Nunavut Tunngavik Inc.,
Nlaka'pamux Nation Tribal Council,
Okanagan Nation Alliance,
Upper Nicola Indian Band,
Lakes Division of the Secwepemc Nation,
Assembly of First Nations,
Standing Buffalo Dakota First Nation,
First Nations Summit,
Duncan's First Nation,
Horse Lake First Nation,
Independent Power Producers Association of British Columbia,
Enbridge Pipelines Inc. and
TransCanada Keystone Pipeline GP Ltd. *Interveners*

Indexed as: Rio Tinto Alcan Inc. *v.* Carrier Sekani Tribal Council

2010 SCC 43

File No.: 33132.

2010: May 21; 2010: October 28.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Honour of the Crown — Aboriginal peoples — Aboriginal rights — Right to consultation — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Duty to consult arises when Crown knows of potential Aboriginal claim or right and contemplates conduct that may adversely affect it — Whether Commission reasonably declined to consider adequacy of consultation in context of assessing whether agreement is in public interest — Whether duty to consult arose — What constitutes "adverse effect" — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Administrative law — Boards and tribunals — Jurisdiction — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British

Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Commission empowered to decide questions of law and to determine whether agreement is in public interest — Whether Commission had jurisdiction to discharge Crown's constitutional obligation to consult — Whether Commission had jurisdiction to consider adequacy of consultation — If so, whether it was required to consider adequacy of consultation in determining whether agreement is in public interest — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

In the 1950s, the government of British Columbia authorized the building of a dam and reservoir which altered the amount and timing of water flows in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project.

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements ("EPAs") which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the Commission's approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on

whether a duty to consult the First Nations exists and, if so, whether it had been met. Alcan and BC Hydro appealed.

Held: The appeal should be allowed and the decision of the British Columbia Utilities Commission approving the 2007 EPA should be confirmed.

The Commission did not act unreasonably in approving the 2007 EPA. Governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. The duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation. The duty has both a legal and a constitutional character, and is prospective, fastening on rights yet to be proven. The nature of the duty and the remedy for its breach vary with the situation.

The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This test can be broken down into three elements. First, the Crown must have real or constructive knowledge of a potential Aboriginal claim or right. While the existence of a potential claim is essential, proof that the claim will succeed is not. Second, there must be Crown conduct or a Crown decision. In accordance with the generous, purposive approach that must be brought to the duty to consult, the required decision or conduct is not confined to government exercise of

statutory powers or to decisions or conduct which have an immediate impact on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights. Third, there must be a possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice. Moreover, the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.

Tribunals are confined to the powers conferred on them by their constituent legislation, and the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on them. The legislature may choose to delegate the duty to consult to a tribunal, and it may empower the tribunal to determine whether adequate consultation has taken place.

The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct, often complex, constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation must be expressly or impliedly empowered to do so and its

enabling statute must give it the necessary remedial powers.

The duty to consult is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts. These remedies have proven time-consuming and expensive, are often ineffective, and serve the interest of no one.

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

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

The Commission correctly accepted that it had the power to consider the adequacy of

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

Cases Cited

Followed: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1; *An*

of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

[60] This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

[61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights

and interests and to promote the reconciliation of interests called for in *Haida Nation*.

[62] The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

[63] As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

[64] Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an