FINAL WRITTEN STATEMENT

PHASE 2 PROPOSAL – MARY RIVER PROJECT

Book Of Authorities

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114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn *Appellants*

v.

Town of Hudson *Respondent*

and

Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada, Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond, and Fédération interdisciplinaire de l'horticulture ornementale du Québec *Interveners*

INDEXED AS: 114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE) *v.* HUDSON (TOWN)

Neutral citation: 2001 SCC 40.

File No.: 26937.

2000: December 7; 2001: June 28.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law — By-laws — Regulation and restriction of pesticide use — Town adopting by-law restricting use of pesticides within its perimeter to specified locations and enumerated activities — Whether Town had statutory authority to enact by-law — Whether by-law rendered inoperative because of conflict with federal or

114957 Canada Ltée (Spraytech, Société d'arrosage) et Services des espaces verts Ltée/Chemlawn *Appelantes*

c.

Ville de Hudson *Intimée*

et

Fédération canadienne des municipalités, Nature-Action Québec Inc. et Fonds mondial pour la nature (Canada), Toronto Environmental Alliance, Sierra Club du Canada, Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond et la Fédération interdisciplinaire de l'horticulture ornementale du Québec *Intervenants*

RÉPERTORIÉ : 114957 CANADA LTÉE (SPRAYTECH, SOCIÉTÉ D'ARROSAGE) *c.* HUDSON (VILLE)

Référence neutre : 2001 CSC 40.

N° du greffe : 26937.

2000 : 7 décembre; 2001 : 28 juin.

Présents : Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit municipal — Règlements — Réglementation et restriction de l'utilisation des pesticides — Adoption par la Ville d'un règlement limitant l'utilisation des pesticides sur son territoire à des endroits précis et à des activités énumérées — La Ville avait-elle le pouvoir légal d'adopter le règlement? — Le règlement a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale? — Règlement 270

provincial legislation — Town of Hudson By-law 270 — Cities and Towns Act, R.S.Q., c. C-19, s. 410(1).

The appellants are landscaping and lawn care companies operating mostly in the greater Montreal area, with both commercial and residential clients. They make regular use of pesticides approved by the federal *Pest Control Products Act* in the course of their business activities and hold the requisite licences under Quebec's *Pesticides Act*. In 1991 the respondent Town, located west of Montreal, adopted By-law 270, which restricted the use of pesticides within its perimeter to specified locations and for enumerated activities. The definition of pesticides in By-law 270 replicates that in the *Pesticides Act*. Under s. 410(1) of the Quebec *Cities and Towns Act* ("*C.T.A.*"), the council may make by-laws to "secure peace, order, good government, health and general welfare in the territory of the municipality", while under s. 412(32) *C.T.A.* it may make by-laws to "regulate or prohibit the . . . use of . . . combustible, explosive, corrosive, toxic, radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within l km therefrom". In 1992 the appellants were charged with having used pesticides in violation of By-law 270. They brought a motion for declaratory judgment asking the Superior Court to declare By-law 270 to be inoperative and *ultra vires* the Town's authority. The Superior Court denied the motion, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ.: As statutory bodies, municipalities may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation. Included in this authority are "general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. Section 410 *C.T.A.* is an example of such a general welfare provision and supplements the specific grants of power in s. 412. While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, courts faced with

de la ville de Hudson — Loi sur les cités et villes, L.R.Q., ch. C-19, art. 410(1).

Les appelantes sont des entreprises d'aménagement paysager et d'entretien des pelouses qui exercent leurs activités surtout dans la région métropolitaine de Montréal et qui ont aussi bien des clients commerciaux que des clients résidentiels. Elles utilisent régulièrement, dans le cadre de leurs activités commerciales, des pesticides conformes à la *Loi sur les produits antiparasitaires* du gouvernement fédéral et détiennent les permis requis par la *Loi sur les pesticides* du Québec. En 1991, la Ville intimée, située à l'ouest de Montréal, a adopté le règlement 270, qui limite l'utilisation des pesticides sur son territoire à des endroits précis et aux activités énumérées. La définition de pesticides contenue dans le règlement 270 est la réplique exacte de celle adoptée dans la *Loi sur les pesticides*. En vertu du par. 410(1) de la *Loi sur les cités et villes* du Québec (« *L.C.V.* »), le conseil peut faire des règlements « [p]our assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité », tandis qu'en vertu du par. 412(32) *L.C.V.*, il peut faire des règlements « [p]our réglementer ou défendre [. . .] l'usage de [. . .] matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire ». En 1992, les appelantes ont été accusées d'avoir utilisé des pesticides contrairement au règlement 270. Elles ont introduit une requête en jugement déclaratoire demandant à la Cour supérieure de déclarer inopérant le règlement 270 et *ultra vires* le pouvoir de la Ville. La Cour supérieure a rejeté la requête, et la Cour d'appel a confirmé cette décision.

Arrêt : Le pourvoi est rejeté.

Les juges L'Heureux-Dubé, Gonthier, Bastarache et Arbour : En tant qu'organismes créés par la loi, les municipalités peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme. Y sont inclus les pouvoirs en matière de « bien-être général » conférés par la loi provinciale habilitante, sur laquelle les municipalités peuvent se fonder. L'article 410 *L.C.V.* constitue un exemple d'une telle disposition générale de bien-être et il ajoute aux pouvoirs spécifiques conférés par l'art. 412. Bien que les dispositions habilitantes permettant aux municipalités de réglementer pour le « bien-être général » sur leur territoire autorisent l'adoption de

an impugned by-law enacted under an "omnibus" provision such as s. 410 *C.T.A.* must be vigilant in scrutinizing the true purpose of the by-law.

By-law 270 does not fall within the ambit of s. 412(32) *C.T.A.* There is no equation of pesticides and "toxic . . . materials" either in the terms of the by-law or in any evidence presented during this litigation. Since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) *C.T.A.* By-law 270 read as a whole does not impose a total prohibition, but rather permits the use of pesticides in certain situations where that use is not purely an aesthetic pursuit. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1) *C.T.A.* The distinctions impugned by the appellants as restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) *C.T.A.* Moreover, reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. The interpretation of By-law 270 set out here respects international law's "precautionary principle". In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

By-law 270 was not rendered inoperative because of a conflict with federal or provincial legislation. As a product of provincial enabling legislation, By-law 270 is subject to the "impossibility of dual compliance" test for conflict between federal and provincial legislation set out in *Multiple Access*. The federal *Pest Control Products Act* regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. The *Multiple Access* test also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation. In this case, there is no barrier to dual compliance with By-law 270 and the Quebec *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for

règlements visant véritablement à faciliter la réalisation d'objectifs telles la santé et la sécurité publiques, les tribunaux saisis d'un règlement contesté adopté en vertu d'une disposition « omnibus » comme l'art. 410 *L.C.V.* doivent être vigilants lorsqu'ils cherchent à déterminer le but véritable du règlement.

Le règlement 270 ne tombe pas sous l'égide du par. 412(32) *L.C.V.* Le texte du règlement et la preuve présentée au cours du présent litige n'assimilent pas les pesticides aux « matières [. . .] toxiques ». Étant donné qu'aucune disposition particulière de la loi provinciale habilitante ne mentionne les pesticides, le règlement doit tomber dans le champ d'application du par. 410(1) *L.C.V.* Interprété dans son ensemble, le règlement 270 n'impose pas une interdiction totale, mais permet plutôt l'usage de pesticides dans certains cas où cet usage n'a pas un but purement esthétique. Selon la distinction entre l'usage essentiel et l'usage non essentiel des pesticides, il est raisonnable de conclure que le règlement de la Ville a pour objet de minimiser l'utilisation de pesticides qui seraient nocifs afin de protéger la santé de ses habitants. Cet objet relève directement de l'aspect « santé » du par. 410(1) *L.C.V.* Les distinctions contestées par les appelantes au motif qu'elles restreignent leurs activités commerciales sont des conséquences nécessaires à l'application du pouvoir délégué par la province en vertu du par. 410(1) *L.C.V.* De plus, interpréter le par. 410(1) comme permettant à la Ville de réglementer l'utilisation des pesticides correspond aux principes de droit et de politique internationaux. L'interprétation du règlement 270 exposée ici respecte le « principe de précaution » du droit international. Dans le contexte des postulats du principe de précaution, les craintes de la Ville au sujet des pesticides s'inscrivent confortablement sous la rubrique de l'action préventive.

Le règlement 270 n'a pas été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale. Découlant d'une loi provinciale habilitante, le règlement 270 est sujet au critère de « l'impossibilité de se conformer aux deux textes » en cas de conflit entre la législation fédérale et la législation provinciale, critère qui a été énoncé dans l'arrêt *Multiple Access*. La *Loi sur les produits antiparasitaires* du gouvernement fédéral dicte quels pesticides peuvent être agréés à des fins de fabrication et/ou d'utilisation au Canada. Cette loi est permissive, et non pas exhaustive, de sorte qu'il n'y a aucun conflit d'application avec le règlement 270. Le critère de l'arrêt *Multiple Access* s'applique également à l'examen de la question de savoir s'il y a conflit entre le règlement municipal et la législation provinciale. Dans la présente affaire, rien n'empêche que l'on se conforme à la fois au règlement 270 et à la *Loi sur les*

vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

Per Iacobucci, Major and LeBel JJ.: The basic test to determine whether there is an operational conflict remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. Nor does a conflict exist with the Quebec *Pesticides Act*, for the reasons given by the majority.

The issues in this case remain strictly first whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits, and second whether the particular regulation conforms with the general principles applicable to delegated legislation. The Town concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1) *C.T.A.* While it appears to be sound legislative and administrative policy, under general welfare provisions, to grant local governments a residual authority to address emerging or changing issues concerning the welfare of the local community living within their territory, it is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In this case, the by-law targets problems of use of land and property, and addresses neighborhood concerns that have always been within the realm of local government activity. The by-law was thus properly authorized by s. 410(1).

Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. While on its face, By-law 270 involves a general prohibition and then authorizes some specific uses, when it is read as a whole its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural

pesticides du Québec, et il n'y a aucun élément de preuve plausible indiquant que la législature avait l'intention d'empêcher la réglementation par les municipalités de l'utilisation des pesticides. La *Loi sur les pesticides* établit un régime de permis pour les vendeurs et les applicateurs commerciaux de pesticides et elle est donc complémentaire à la législation fédérale, qui porte sur les produits eux-mêmes. Conjointement avec le règlement 270, ces lois établissent un régime de réglementation à trois niveaux.

Les juges Iacobucci, Major et LeBel : Le critère fondamental permettant de déterminer s'il existe conflit d'application demeure l'impossibilité de se conformer aux deux textes. Dans cette optique, le présumé conflit avec la législation fédérale n'existe tout simplement pas. Il n'y a pas non plus conflit avec la *Loi sur les pesticides* du Québec pour les raisons données par la majorité.

En l'espèce, les questions se résument à savoir si, premièrement, la *L.C.V.* autorise les municipalités à réglementer l'utilisation des pesticides sur leur territoire et, deuxièmement, si le règlement en cause respecte les principes généraux applicables à la législation déléguée. La Ville admet que la seule disposition qui permette de confirmer la légalité de son règlement est la clause générale du par. 410(1) *L.C.V.* Bien qu'il paraisse logique, sur les plans législatif et administratif, de recourir à des dispositions générales de bien-être pour conférer aux administrations publiques locales le pouvoir résiduaire de traiter des questions nouvelles ou évolutives relativement au bien-être de la collectivité locale vivant sur leur territoire, il ne suffit pas qu'une question particulière soit devenue une préoccupation urgente selon la collectivité locale. Cette préoccupation doit être étroitement liée aux intérêts immédiats de la collectivité se trouvant dans les limites territoriales définies par la législature pour ce qui concerne toute question pour laquelle l'intervention des administrations publiques locales peut se révéler utile. En l'espèce, le règlement vise les problèmes liés à l'utilisation des terres et des biens et il porte sur des préoccupations de quartier qui ont toujours relevé du domaine d'activité des administrations publiques locales. Le règlement était donc autorisé en bonne et due forme par le par. 410(1).

Selon deux principes fondamentaux établis depuis longtemps en matière de législation déléguée, un règlement ne peut pas être prohibitif et discriminatoire à moins que la loi habilitante ne l'autorise. Bien que le règlement 270 établisse de prime abord une prohibition générale pour ensuite permettre certaines utilisations particulières, lu dans son ensemble, il a comme effet d'interdire l'utilisation des pesticides pour des raisons

purposes. Moreover, although the by-law discriminates, there can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. An implied authority to discriminate was thus unavoidably part of the delegated regulatory power.

purement esthétiques tout en permettant d'autres utilisations, surtout pour des activités commerciales et agricoles. De plus, bien que le règlement soit discriminatoire, il ne peut y avoir aucune réglementation sur un tel sujet sans une certaine forme de discrimination, en ce sens que le règlement doit établir où, quand et comment un produit particulier peut être utilisé. Le pouvoir de réglementation délégué comportait donc inévitablement le pouvoir implicite de faire de la discrimination.

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By L'Heureux-Dubé J.

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By LeBel J.

Applied: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; **referred to:** *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45;

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APPEAL from a judgment of the Quebec Court of Appeal, [1998] Q.J. No. 2546 (QL), J.E. 98-1855, affirming a decision of the Superior Court (1993), 19 M.P.L.R. (2d) 224, dismissing the appellants' motion for declaratory judgment. Appeal dismissed.

Gérard Dugré and *Denis Manzo*, for the appellants.

Stéphane Brière and *Pierre Lepage*, for the respondent.

Stewart A. G. Elgie and *Jerry V. DeMarco*, for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada.

Written submissions only by *Theresa A. McClenaghan* and *Paul Muldoon*, for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns – Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond.

Jean Piette, for the intervener Fédération interdisciplinaire de l'horticulture ornementale du Québec.

The judgment of L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ. was delivered by

1 L'HEUREUX-DUBÉ J. — The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that

POURVOI contre un arrêt de la Cour d'appel du Québec, [1998] A.Q. nº 2546 (QL), J.E. 98-1855, qui a confirmé un jugement de la Cour supérieure (1993), 19 M.P.L.R. (2d) 224, qui avait rejeté la requête en jugement déclaratoire des appelantes. Pourvoi rejeté.

Gérard Dugré et *Denis Manzo*, pour les appelantes.

Stéphane Brière et *Pierre Lepage*, pour l'intimée.

Stewart A. G. Elgie et *Jerry V. DeMarco*, pour les intervenants la Fédération canadienne des municipalités, Nature-Action Québec Inc. et le Fonds mondial pour la nature (Canada).

Argumentation écrite seulement par *Theresa A. McClenaghan* et *Paul Muldoon*, pour les intervenants Toronto Environmental Alliance, Sierra Club du Canada, l'Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond.

Jean Piette, pour l'intervenante la Fédération interdisciplinaire de l'horticulture ornementale du Québec.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, Bastarache et Arbour rendu par

LE JUGE L'HEUREUX-DUBÉ — Le contexte de ce pourvoi nous invite à constater que notre avenir à tous, celui de chaque collectivité canadienne, dépend d'un environnement sain. Comme l'a affirmé le juge de la Cour supérieure : [TRADUCTION] « Il y a vingt ans, on se préoccupait peu de l'effet des produits chimiques, tels les pesticides, sur la population. Aujourd'hui, nous sommes plus sensibles au genre d'environnement dans lequel nous désirons vivre et à la qualité de vie que nous voulons procurer à nos enfants » ((1993), 19

"[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society": *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

Regardless of whether pesticides are in fact an environmental threat, the Court is asked to decide the legal question of whether the Town of Hudson, Quebec, acted within its authority in enacting a by-law regulating and restricting pesticide use.

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations' World Commission on the Environment and Development. The so-called "Brundtland Commission" recommended that "local governments [should be] empowered to exceed, but not to lower, national norms" (p. 220).

There are now at least 37 Quebec municipalities with by-laws restricting pesticides: J. Swaigen, "The *Hudson* Case: Municipal Powers to Regulate

M.P.L.R. (2d) 224, p. 230). Notre Cour a reconnu que « [n]ous savons tous que, individuellement et collectivement, nous sommes responsables de la préservation de l'environnement naturel [. . .] la protection de l'environnement est [. . .] devenue une valeur fondamentale au sein de la société canadienne » : *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, par. 55. Voir également *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 16-17.

2 Peu importe que les pesticides constituent ou non en fait une menace pour l'environnement, la Cour est appelée à trancher la question de droit consistant à savoir si la ville de Hudson (Québec) a agi dans le cadre de ses pouvoirs en adoptant un règlement régissant et restreignant l'utilisation de pesticides.

3 Cette instance surgit à une époque où les questions de gestion des affaires publiques sont souvent examinées selon le principe de la subsidiarité. Ce principe veut que le niveau de gouvernement le mieux placé pour adopter et mettre en œuvre des législations soit celui qui est le plus apte à le faire, non seulement sur le plan de l'efficacité mais également parce qu'il est le plus proche des citoyens touchés et, par conséquent, le plus sensible à leurs besoins, aux particularités locales et à la diversité de la population. S'exprimant au nom de la majorité dans *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, par. 127, le juge La Forest écrit que « la protection de l'environnement est un défi majeur de notre époque. C'est un problème international qui exige une action des gouvernements de tous les niveaux » (je souligne). Dans ses motifs, il cite avec approbation un extrait de *Notre avenir à tous*, rapport publié en 1988 par la Commission mondiale sur l'environnement et le développement (« Commission Brundtland »), créée par les Nations Unies. Cette commission a recommandé que « les autorités locales [soient] habilitées à renforcer, mais non pas à libéraliser, les normes nationales » (p. 262).

4 Il existe aujourd'hui au Québec au moins 37 municipalités où l'utilisation des pesticides est restreinte par règlement : J. Swaigen, « The *Hudson*

Pesticides Confirmed by Quebec Courts" (2000), 34 C.E.L.R. (N.S.) 162, at p. 174. Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. Ours is a legal inquiry informed by the environmental policy context, not the reverse.

Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts » (2000), 34 C.E.L.R. (N.S.) 162, p. 174. Chaque niveau de gouvernement doit, toutefois, respecter le partage des compétences, qui est la caractéristique de notre système fédéral; il existe une distinction subtile entre les lois qui se complètent légitimement les unes les autres et celles qui empiètent sur le domaine de compétence législative protégé de l'autre ordre de gouvernement. Notre examen en est donc un d'ordre juridique dans le contexte des politiques environnementales et non l'inverse.

I. Facts

I. Les faits

5 The appellants are landscaping and lawn care companies operating mostly in the region of greater Montreal, with both commercial and residential clients. They make regular use of pesticides approved by the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, in the course of their business activities and hold the requisite licences under Quebec's *Pesticides Act*, R.S.Q., c. P-9.3.

Les appelantes sont des entreprises d'aménagement paysager et d'entretien des pelouses qui exercent leurs activités surtout dans la région métropolitaine de Montréal et qui ont aussi bien des clients commerciaux que des clients résidentiels. Elles utilisent régulièrement, dans le cadre de leurs activités commerciales, des pesticides conformes à la *Loi sur les produits antiparasitaires* du gouvernement fédéral, L.R.C. 1985, ch. P-9, et détiennent les permis requis par la *Loi sur les pesticides* du Québec, L.R.Q., ch. P-9.3.

6 The respondent, the Town of Hudson ("the Town"), is a municipal corporation governed by the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*"). It is located about 40 kilometres west of Montreal and has a population of approximately 5,400 people, some of whom are clients of the appellants. In 1991, the Town adopted By-law 270, restricting the use of pesticides within its perimeter to specified locations and for enumerated activities. The by-law responded to residents' concerns, repeatedly expressed since 1985. The residents submitted numerous letters and comments to the Town's Council. The definition of pesticides in By-law 270 replicates that of the *Pesticides Act*.

L'intimée, la ville de Hudson (la « Ville »), est une municipalité régie par la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »). Elle est située à environ 40 kilomètres à l'ouest de Montréal et compte approximativement 5 400 habitants, dont certains sont des clients des appelantes. En 1991, la Ville adopte le règlement 270, qui limite l'utilisation des pesticides sur son territoire à des endroits précis et aux activités énumérées. Ce règlement fait suite aux craintes exprimées à maintes reprises depuis 1985 par les résidants, qui ont présenté de nombreuses lettres et observations au conseil municipal. La définition de pesticides contenue dans le règlement 270 est la réplique exacte de celle adoptée dans la *Loi sur les pesticides*.

7 In November 1992, the appellants were served with a summons by the Town to appear before the Municipal Court and respond to charges of having used pesticides in violation of By-law 270. The appellants pled not guilty and obtained a suspen-

En novembre 1992, les appelantes ont reçu signification, de la part de la Ville, de sommations leur enjoignant de comparaître devant la Cour municipale pour répondre à des accusations d'avoir utilisé des pesticides contrairement au

sion of proceedings in order to bring a motion for declaratory judgment before the Superior Court (under art. 453 of Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25). They asked that the court declare By-law 270 (as well as By-law 248, which is not part of this appeal) to be inoperative and *ultra vires* the Town's authority.

The Superior Court denied the motion for declaratory judgment, finding that the by-laws fell within the scope of the Town's powers under the *C.T.A.* This ruling was affirmed by a unanimous Quebec Court of Appeal.

II. Relevant Statutory Provisions

Town of Hudson By-law 270

1. The following words and expressions, whenever the same occur in this By-Law, shall have the following meaning:

   a) "PESTICIDES": means any substance, matter or micro-organism intended to control, destroy, reduce, attract or repel, directly or indirectly, an organism which is noxious, harmful or annoying for a human being, fauna, vegetation, crops or other goods or intended to regulate the growth of vegetation, excluding medicine or vaccine;

   b) "FARMER": means a farm producer within the meaning of the Farm Producers Act (R.S.Q., chap., P-28);

. . .

2. The spreading and use of a pesticide is prohibited throughout the territory of the Town.

3. Notwithstanding article 2, it is permitted to use a pesticide in the following cases:

   a) in a public or private swimming-pool;

   b) to purify water intended for the use of human beings or animals;

   c) inside of a building;

   d) to control or destroy animals which constitute a danger for human beings;

   e) to control or destroy plants which constitute a danger for human beings who are allergic thereto.

règlement 270. Les appelantes ont plaidé non coupable et ont obtenu la suspension des procédures afin d'introduire une requête en jugement déclaratoire devant la Cour supérieure (en vertu de l'art. 453 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25). Elles ont demandé à la cour de déclarer inopérant le règlement 270 (et le règlement 248, qui ne fait pas l'objet du pourvoi) et *ultra vires* le pouvoir de la Ville.

8 La Cour supérieure a rejeté la requête en jugement déclaratoire, concluant que les règlements relevaient des pouvoirs conférés à la Ville par la *L.C.V.* Cette décision a été confirmée à l'unanimité par la Cour d'appel du Québec.

II. Les dispositions législatives pertinentes

Règlement 270 de la ville de Hudson

9

1. Dans ce règlement, les mots et expressions suivants ont le sens et l'application que leur attribue le présent article :

   a) « PESTICIDE » : toute substance, matière ou micro-organisme destiné à contrôler, détruire, amoindrir, attirer ou repousser, directement ou indirectement, un organisme nuisible, nocif ou gênant pour l'être humain, la faune, la végétation, les récoltes ou les autres biens, ou destiné à servir de régulateur de croissance de la végétation, à l'exclusion d'un médicament ou d'un vaccin.

   b) « FERMIER » : un producteur agricole au sens de la Loi sur les producteurs agricoles (L.R.Q., chap. P-28);

. . .

2. L'épandage et l'utilisation de tout pesticide est interdit partout sur le territoire de la Ville.

3. Nonobstant l'article 2, l'utilisation d'un pesticide est permis dans les cas suivants :

   a) dans une piscine publique ou privée;

   b) pour purifier l'eau destinée à la consommation des humains ou des animaux;

   c) à l'intérieur d'un bâtiment;

   d) pour contrôler ou enrayer la présence d'animaux qui constituent un danger pour les humains;

   e) pour contrôler ou enrayer les plantes qui constituent un danger pour les humains qui y sont allergiques.

4. Notwithstanding article 2, a farmer using a pesticide on an immoveable which is exploited for purposes of agriculture or horticulture, in a hot house or in the open, is requested to

   a) register, by written declaration, with the Town, in the month of march of each year, the products which he stores and which he will be using during that year.

   b) also provide, in the written declaration at article 4 a), the schedule of application of said products and the area(s) of his property where the products will be applied.

5. Notwithstanding article 2, it is permitted to use a pesticide on a golf course, for a period not exceeding five (5) years from the date this by-law comes into force:

. . .

6. Notwithstanding article 2, it is permitted to use a biological pesticide to control or destroy insects which constitute a danger or an inconvenience for human beings.

. . .

10. For the purpose of article 8 of the Agricultural Abuses Act (R.S.Q. chap. A-2) an inspector designated by the Town may use a pesticide, notwithstanding article 2 of the By-Law, if there is no other efficient way of destroying noxious plants determined as such by the Provincial Government and the presence of which is harmful to a real and continuous agricultural exploitation.

Cities and Towns Act, R.S.Q., c. C-19

410. The council may make by-laws:

(1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter;

. . .

In no case may the council make by-laws on the matters contemplated in the Agricultural Products, Marine Products and Food Act (chapter P-29) or in the Dairy Products and Dairy Products Substitutes Act (chapter P-30). This paragraph applies notwithstanding any provision of a special Act granting powers on those matters

4. Nonobstant l'article 2, un fermier utilisant un pesticide sur une propriété qui est exploitée à des fins agricoles ou horticoles, dans une serre ou à l'extérieur, doit :

   a) enregistrer, par déclaration écrite à la Ville, au cours du mois de mars de chaque année, les produits qu'il entrepose et dont il entrevoit faire usage durant l'année;

   b) de plus fournir, dans la déclaration écrite à l'article 4a), la cédule d'épandage desdits produits et les secteurs de sa propriété où les produits seront appliqués.

5. Nonobstant l'article 2, il est permis d'utiliser un pesticide sur un terrain de golf, pour une période n'excédant pas cinq (5) ans, à partir de la date d'entrée en vigueur de ce règlement :

. . .

6. Nonobstant l'article 2, il est permis d'utiliser un pesticide biologique pour contrôler ou enrayer les insectes qui constituent un danger ou qui incommodent les humains;

. . .

10. Selon l'article 8 [de] la Loi sur les abus agricoles (L.R.Q. chap. A-2), un inspecteur désigné par la Ville peut utiliser un pesticide en dépit de l'article 2 du règlement, s'il n'existe aucune autre façon efficace d'enrayer les plantes nocives déterminées comme telles par le gouvernement provincial et la présence desquelles est nuisible à une exploitation agricole véritable et continue.

Loi sur les cités et villes, L.R.Q., ch. C-19

410. Le conseil peut faire des règlements :

1º Pour assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité, pourvu que ces règlements ne soient pas contraires aux lois du Canada ou du Québec, ni incompatibles avec quelque disposition spéciale de la présente loi ou de la charte;

. . .

Le conseil ne peut faire des règlements sur des matières visées par la Loi sur les produits agricoles, les produits marins et les aliments (chapitre P-29) et par la Loi sur les produits laitiers et leurs succédanés (chapitre P-30). Le présent alinéa s'applique malgré une disposition d'une loi spéciale accordant des pouvoirs sur ces

to any municipality other than Ville de Trois-Rivières and Ville de Sherbrooke.

. . .

412. The council may make by-laws:

. . .

(32) To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom;

By-laws passed under the first paragraph in respect of corrosive, toxic or radioactive materials require the approval of the Minister of the Environment;

. . .

463.1 Subject to the Pesticides Act (chapter P-9.3) and the Environment Quality Act (chapter Q-2), the municipality may, with the consent of the owner of an immovable, carry out pesticide application works on the immovable.

Pesticides Act, R.S.Q., c. P-9.3

102. The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community.

102. [As revised in 1993; not yet in force] The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

– concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

– prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

. . .

matières à une municipalité autre que la Ville de Trois-Rivières et la Ville de Sherbrooke.

. . .

412. Le conseil peut faire des règlements :

. . .

32º Pour réglementer ou défendre l'emmagasinage et l'usage de poudre, poix sèche, résine, pétrole, benzine, naphte, gazoline, térébenthine, fulmicoton, nitroglycérine, ainsi que d'autres matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire;

Un règlement adopté en vertu du premier alinéa à l'égard de matières corrosives, toxiques ou radioactives requiert l'approbation du ministre de l'Environnement;

. . .

463.1 Sous réserve de la Loi sur les pesticides (chapitre P-9.3) et de la Loi sur la qualité de l'environnement (chapitre Q-2), la municipalité peut, avec le consentement du propriétaire d'un immeuble, procéder à des travaux d'épandage de pesticides sur l'immeuble.

Loi sur les pesticides, L.R.Q., ch. P-9.3

102. Toute disposition du Code de gestion des pesticides et des autres règlements édictés en vertu de la présente loi prévaut sur toute disposition inconciliable d'un règlement édicté par une municipalité ou une communauté urbaine.

102. [Selon la modification de 1993; non en vigueur] Le Code de gestion des pesticides et tout autre règlement édictés en application de la présente loi rendent inopérante toute disposition réglementaire portant sur une même matière qui est édictée par une municipalité ou une communauté urbaine, sauf dans le cas où cette disposition réglementaire satisfait aux conditions suivantes :

– elle porte sur les activités d'entretien paysager ou d'extermination, notamment la fumigation, déterminées par règlement du gouvernement;

– elle prévient ou atténue davantage les atteintes à la santé des êtres humains ou des autres espèces vivantes, ainsi que les dommages à l'environnement ou aux biens.

. . .

105. [Not yet in force] The Government shall enact by regulation a Pesticide Management Code which may prescribe rules, restrictions or prohibitions respecting activities related to the distribution, storage, transportation, sale or use of any pesticide, pesticide container or any equipment used for any of those activities.

105. [Non en vigueur] Le gouvernement édicte, par règlement, un Code de gestion des pesticides. Ce code peut édicter des règles, restrictions ou prohibitions portant sur les activités relatives à la distribution, à la vente, à l'entreposage, au transport ou à l'utilisation de tout pesticide, de tout contenant d'un pesticide ou de tout équipement servant à l'une de ces activités.

105.1. [Not yet in force] The Pesticide Management Code may require a person who stores pesticides of a determined category or in a determined quantity to subscribe civil liability insurance, the kind, extent, duration, amount and other applicable conditions of which are determined in the said Code, and to furnish proof thereof to the Minister.

105.1. [Non en vigueur] Le Code de gestion des pesticides peut exiger d'une personne qui entrepose des pesticides d'une catégorie ou en quantité déterminée qu'elle contracte une assurance de responsabilité civile, dont il détermine la nature, l'étendue, la durée, le montant ainsi que les autres conditions applicables, et en fournisse l'attestation au ministre.

106. [Not yet in force] The Pesticide Management Code may cause any rule elaborated by another government or by a body to be mandatory.

In addition, the code may cause any instructions of the manufacturer of a pesticide or of equipment used for any activity referred to in the code to be mandatory.

106. [Non en vigueur] Le Code de gestion des pesticides peut rendre obligatoire une règle élaborée par un autre gouvernement ou par un organisme.

Il peut, en outre, rendre obligatoires les instructions du fabricant d'un pesticide ou d'un équipement servant à l'une des activités visées par le code.

107. [Not yet in force] The Government may prescribe that the contravention of the provisions of this code which it determines constitutes an offence.

107. [Non en vigueur] Le gouvernement peut, dans ce code, déterminer les dispositions dont la contravention constitue une infraction.

Pest Control Products Act, R.S.C. 1985, c. P-9

Loi sur les produits antiparasitaires, L.R.C. 1985, ch. P-9

4. (1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.

4. (1) Il est interdit de fabriquer, stocker, présenter, distribuer ou utiliser un produit antiparasitaire dans des conditions dangereuses.

. . .

. . .

(3) A control product that is not manufactured, stored, displayed, distributed or used as prescribed or that is manufactured, stored, displayed, distributed or used contrary to the regulations shall be deemed to be manufactured, stored, displayed, distributed or used contrary to subsection (1).

(3) La fabrication, le stockage, la présentation, la distribution ou l'utilisation d'un produit antiparasitaire, réalisés de façon contraire ou non conforme aux règlements, sont réputés contrevenir au paragraphe (1).

. . .

. . .

6. (1) The Governor in Council may make regulations

6. (1) Le gouverneur en conseil peut, par règlement :

. . .

. . .

(*j*) respecting the manufacture, storage, distribution, display and use of any control product;

j) régir la fabrication, le stockage, la présentation, la distribution et l'utilisation de produits antiparasitaires;

Pest Control Products Regulations, C.R.C. 1978, c. 1253

45. (1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

(2) No person shall use a control product imported for the importer's own use in a manner that is inconsistent with the conditions set forth on the importer's declaration respecting the control product.

(3) No person shall use a control product that is exempt from registration under paragraph 5(*a*) for any purpose other than the manufacture of a registered control product.

III. Judgments

A. *Superior Court* (1993), 19 M.P.L.R. (2d) 224

Kennedy J. held that by-laws are presumed valid and legal. He found that By-laws 248 and 270 were adopted under s. 410 *C.T.A.* and, thus, did not require ministerial approval to enter into effect. Both by-laws deal with pesticides and not toxic substances and since "pesticides" are not included in s. 412(32), ministerial approval is not required. According to Kennedy J., the Town, faced with a situation involving health and the environment, acted in the public interest by enacting the by-laws in question. Consequently, the Town could rely on s. 410(1) *C.T.A.* as the legislative provision that enabled it to adopt these by-laws.

Kennedy J. then considered the provisions of the *Pesticides Act* to determine whether the by-laws conflicted with provincial legislation. He found it clear that the *Pesticides Act* was enacted with the intention to allow municipalities to adopt by-laws of this nature. In this regard, Kennedy J. cited ss. 102 and 105 to 107 of the *Pesticides Act*, which envision the creation of a Pesticide Management Code allowing the provincial government to restrict or prohibit pesticides. Section 102 of that Act states that the provisions of the Code are to take precedence over inconsistent by-laws. Yet, given that the Code had yet to come into force, nothing prohibited municipalities from regulating

Règlement sur les produits antiparasitaires, C.R.C. 1978, ch. 1253

45. (1) Il est interdit d'utiliser un produit antiparasitaire d'une manière qui ne correspond pas au mode d'emploi, ni aux limitations figurant sur le label.

(2) Il est interdit d'utiliser un produit antiparasitaire importé par un utilisateur pour son propre usage d'une manière qui ne correspond pas aux conditions énoncées sur la déclaration de l'importateur visant ledit produit.

(3) Il est interdit d'utiliser un produit antiparasitaire exempté de l'enregistrement en vertu de l'alinéa 5*a*) pour une autre fin que la fabrication d'un produit antiparasitaire enregistré.

III. Les jugements

A. *Cour supérieure* (1993), 19 M.P.L.R. (2d) 224

10 Le juge Kennedy conclut que les règlements sont présumés valides et légaux. À son avis, les règlements 248 et 270 ont été adoptés en vertu de l'art. 410 *L.C.V.*, de sorte que leur entrée en vigueur ne nécessite pas l'approbation du ministre. Ils portent tous deux sur les pesticides et non pas sur les substances toxiques; vu que les « pesticides » ne sont pas visés par le par. 412(32), l'approbation du ministre n'est pas requise. Selon le juge Kennedy, la Ville, face à une situation où la santé et l'environnement sont en jeu, a agi dans l'intérêt public en adoptant les règlements en question. Elle pouvait donc se fonder sur le par. 410(1) *L.C.V.* en tant que disposition législative l'habilitant à adopter ces règlements.

11 Le juge Kennedy examine ensuite les dispositions de la *Loi sur les pesticides* pour déterminer si les règlements vont à l'encontre de cette loi provinciale. À son avis, l'adoption de la *Loi sur les pesticides* vise clairement à permettre aux municipalités d'adopter des règlements de cette nature. À cet égard, le juge Kennedy cite les art. 102 et 105 à 107 de la *Loi sur les pesticides*, qui prévoient la création d'un Code de gestion des pesticides permettant au gouvernement provincial de restreindre ou d'interdire l'utilisation des pesticides. Selon l'article 102 de cette loi, les dispositions du Code prévalent sur tout règlement inconciliable. Toutefois, étant donné que le Code n'était pas encore en

pesticide use in the interim. Kennedy J. thus concluded that there was no conflict between the by-laws and provincial or federal legislation.

vigueur, rien n'empêchait les municipalités de réglementer entre-temps l'utilisation des pesticides. Le juge Kennedy conclut donc qu'il n'y a aucun conflit entre les règlements et la législation provinciale ou fédérale.

B. *Court of Appeal*, [1998] Q.J. No. 2546 (QL)

B. *Cour d'appel*, [1998] A.Q. nº 2546 (QL)

12 Before the Court of Appeal, the Town conceded that By-law 248 was inoperative. Thus, only By-law 270 was at issue. The appellants challenged Kennedy J.'s ruling on two grounds. First, they argued that By-law 270 was inoperative given that it was incompatible with the *Pesticides Act*. Second, the appellants contended that since the regulation of toxic substances was covered by s. 412(32) *C.T.A.*, Kennedy J. erred in finding that the by-law was enacted under s. 410(1) *C.T.A.* While the latter provision allows a municipality to enact by-laws considered necessary for public health and welfare, s. 412(32) *C.T.A.* is concerned with "toxic" materials, and states that by-laws addressing this subject matter require approval from the Minister of the Environment. Given that the Town did not obtain such approval when it enacted By-law 270, the appellants argued that the by-law was invalid.

Devant la Cour d'appel, la Ville admet que le règlement 248 est inopérant. En conséquence, seul le règlement 270 est ici en cause. Les appelantes contestent la décision du juge Kennedy pour deux motifs. Premièrement, elles font valoir que le règlement 270 est inopérant du fait de son incompatibilité avec la *Loi sur les pesticides*. Deuxièmement, elles soutiennent que, la réglementation des substances toxiques étant visée par le par. 412(32) *L.C.V.*, le juge Kennedy a commis une erreur en concluant que le règlement avait été adopté en vertu du par. 410(1) *L.C.V.* Même si cette dernière disposition autorise une municipalité à adopter les règlements jugés nécessaires pour la santé et le bien-être publics, le par. 412(32) *L.C.V.*, qui porte sur les matières « toxiques », prévoit que les règlements en cette matière doivent être approuvés par le ministre de l'Environnement. Les appelantes soutiennent que, la Ville n'ayant pas obtenu l'approbation requise lorsque le règlement 270 fut adopté, celui-ci est en conséquence invalide.

13 The Court of Appeal, *per* Delisle J.A., accepted the Town's position that By-law 270 was enacted under s. 410(1) *C.T.A.* In reaching this conclusion, the court noted that By-law 270 repeated the definition of "pesticide" that is found in the *Pesticides Act*. This definition makes no reference to terms used in s. 412(32) or to toxicity. Moreover, the *C.T.A.* itself does not discuss whether pesticides are "toxic . . . materials", nor does it require ministerial approval for regulations relating to pesticides. No evidence was submitted concerning the toxic character of pesticides. The Court of Appeal also held that By-law 270 furthered the objectives set out in s. 410(1) *C.T.A.* It reiterated the statements of Kennedy J. that by-laws are presumed to be valid and legal and that there is a presumption that legislators act in good faith and in the public interest. It found that s. 410(1) is a very general

Le juge Delisle, au nom de la Cour d'appel, accepte la position de la Ville selon laquelle le règlement 270 a été adopté en vertu du par. 410(1) *L.C.V.* En tirant cette conclusion, la cour souligne que le règlement 270 reprend la définition de « pesticide » dans la *Loi sur les pesticides*. Cette définition ne réfère aucunement aux termes utilisés au par. 412(32) ni à la toxicité. De plus, la *L.C.V.* elle-même ne précise pas si les pesticides sont des « matières [. . .] toxiques » et elle n'exige pas non plus l'approbation du ministre pour les règlements visant les pesticides. Aucun élément de preuve n'a été présenté au sujet de la toxicité des pesticides. La Cour d'appel conclut aussi que le règlement 270 facilite la réalisation des objectifs énoncés au par. 410(1) *L.C.V.* La cour réitère les déclarations du juge Kennedy voulant que les règlements sont présumés valides et légaux et qu'il existe une pré-

enabling clause and must receive a liberal interpretation.

The court agreed with Kennedy J.'s finding that the by-law was enacted by the Town in the public interest and in response to health concerns expressed by residents. The court noted that these concerns were recorded in the Town Council's meeting minutes and manifested themselves in letters to Council, as well as a petition with more than 300 signatures. Moreover, the Court of Appeal recognized that s. 410 *C.T.A.* describes when a municipality may not act under its general governance powers. By-laws on subjects contemplated in the *Pesticides Act* were not included in this list of unauthorized areas of regulation. The appellants argued that s. 410(1) does not permit the Town to ban pesticides. The Court of Appeal held that an absolute ban would be forbidden, but that the by-law does not impose an absolute ban.

The Court of Appeal then examined whether By-law 270 was in conflict with the *Pesticides Act* and thus inoperative. It found that s. 102 of the *Pesticides Act* — which states that the Pesticide Management Code and all regulations of the *Pesticides Act* take precedence over any incompatible municipal by-law — contemplated municipal regulation of pesticide use. The court also commented that the revised version of s. 102, as well as ss. 105 to 107 regarding the Pesticide Management Code, had yet to be enacted. As a result, it held that, as opposed to a real conflict, a potential future incompatibility between the by-law and the Code did not suffice to render the by-law inoperative.

Finally, the Court of Appeal noted that, although not yet in force, the revised version of s. 102 of the *Pesticides Act* allows municipalities to adopt by-laws concerning pesticides, so long as these are not incompatible with the Pesticide Management Code. At the same time, even if such incompatibil-

somption que le législateur agit de bonne foi et dans l'intérêt public. Elle juge que le par. 410(1) est une clause habilitante très générale qui doit recevoir une interprétation libérale.

14 La Cour d'appel partage l'avis du juge Kennedy, selon lequel la Ville a adopté le règlement dans l'intérêt public en réponse aux craintes liées à la santé exprimées par les résidants. Elle souligne que ces craintes ont été consignées dans les procès-verbaux du conseil municipal et qu'elles se sont manifestées par des lettres au conseil de même que par une pétition portant plus de 300 signatures. De plus, la cour reconnaît que l'art. 410 *L.C.V.* précise les cas où une municipalité ne peut pas agir en vertu de son pouvoir général de gestion des affaires publiques. Les règlements portant sur des matières visées par la *Loi sur les pesticides* ne figurent pas parmi les domaines de réglementation interdits. Les appelantes soutiennent que le par. 410(1) n'autorise pas la Ville à interdire les pesticides. La Cour d'appel conclut qu'une interdiction absolue serait interdite, mais que le règlement en question n'impose pas une telle interdiction.

15 La Cour d'appel examine ensuite la question de savoir si le règlement 270 entre en conflit avec la *Loi sur les pesticides* et s'il est en conséquence inopérant. Selon la cour, l'art. 102 de la *Loi sur les pesticides* — qui prévoit que le Code de gestion des pesticides et les règlements d'application de la *Loi sur les pesticides* prévalent sur tout règlement municipal incompatible — vise la réglementation par les municipalités de l'utilisation des pesticides. La cour fait aussi remarquer que la version modifiée de l'art. 102, de même que les art. 105 à 107 relatifs au Code de gestion des pesticides, n'étaient pas encore en vigueur. Elle conclut donc que, contrairement à un conflit réel, une éventuelle incompatibilité entre le règlement et le Code ne suffit pas pour rendre le règlement inopérant.

16 Enfin, la Cour d'appel souligne que, même si la nouvelle version de l'art. 102 de la *Loi sur les pesticides* n'était pas encore en vigueur, elle permettait aux municipalités d'adopter des règlements sur les pesticides dans la mesure où ils ne sont pas incompatibles avec le Code de gestion des pesti-

ity arises, the by-laws can continue to be operative if they relate to landscaping activities, or if they aim to prevent or reduce injury or damage to people, animals, the environment or property. As such, this new regime would enable municipalities to enact by-laws that are more restrictive than the provisions set out in the provincial Pesticide Management Code. Based on these reasons, the Court of Appeal dismissed the appeal, holding that By-law 270 was validly enacted and operative.

cides. Par ailleurs, même en cas d'incompatibilité, les règlements continuent de s'appliquer s'ils ont trait à l'aménagement paysager ou s'ils visent à prévenir ou à réduire les blessures causées aux personnes ou aux animaux ou les dommages causés à l'environnement ou à la propriété. Ainsi, ce nouveau régime permettrait aux municipalités d'adopter des règlements plus restrictifs que le Code de gestion des pesticides de la province. Pour ces motifs, la Cour d'appel rejette le pourvoi, concluant que le règlement 270 a été valablement adopté et qu'il s'applique.

IV. Issues

17 There are two issues raised by this appeal:

(1) Did the Town have the statutory authority to enact By-law 270?

(2) Even if the Town had authority to enact it, was By-law 270 rendered inoperative because of a conflict with federal or provincial legislation?

IV. Les questions en litige

Le pourvoi soulève deux questions :

1) La Ville avait-elle le pouvoir légal d'adopter le règlement 270?

2) Dans l'hypothèse où la Ville avait le pouvoir de l'adopter, le règlement 270 a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale?

V. Analysis

A. *Did the Town Have the Statutory Authority to Enact By-law 270?*

18 In *R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668, this Court recognized "the principle that, as statutory bodies, municipalities 'may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation' (Makuch, *Canadian Municipal and Planning Law* (1983), at p. 115)". Included in this authority are "general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. As I. M. Rogers points out, "the legislature cannot possibly foresee all the powers that are necessary to the statutory equipment of its creatures. . . . Undoubtedly the inclusion of 'general welfare' provisions was intended to circumvent, to some extent, the effect of the doctrine of *ultra vires* which puts the municipalities in the position of having to point to an express

V. Analyse

A. *La Ville avait-elle le pouvoir légal d'adopter le règlement 270?*

Dans l'arrêt *R. c. Sharma*, [1993] 1 R.C.S. 650, p. 668, notre Cour reconnaît que le « principe selon lequel, en tant qu'organismes créés par la loi, les municipalités [TRADUCTION] "peuvent exercer seulement les pouvoirs qui leur sont conférés expressément par la loi, les pouvoirs qui découlent nécessairement ou vraiment du pouvoir explicite conféré dans la loi, et les pouvoirs indispensables qui sont essentiels et non pas seulement commodes pour réaliser les fins de l'organisme" (Makuch, *Canadian Municipal and Planning Law* (1983), à la p. 115) ». Y sont inclus les pouvoirs en matière de « bien-être général » conférés par la loi provinciale habilitante, sur laquelle les municipalités peuvent se fonder. Comme le souligne I. M. Rogers, [TRADUCTION] « la législature ne peut pas prévoir tous les pouvoirs de réglementation nécessaires à ses créatures [. . .] Sans doute, l'inclusion de dispositions en matière de "bien-être général" visait à contourner dans une certaine mesure l'effet de la

grant of authority to justify each corporate act" (*The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at p. 367).

Section 410 *C.T.A.* is an example of such a general welfare provision and supplements the specific grants of power in s. 412. More open-ended or "omnibus" provisions such as s. 410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation. There are analogous provisions in other provinces' and territories' municipal enabling legislation: see *Municipal Government Act*, S.A. 1994, c. M-26.1, ss. 3(*c*) and 7; *Local Government Act*, R.S.B.C. 1996, c. 323, s. 249; *Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; *Municipalities Act*, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule; *Municipal Government* Act, S.N.S. 1998, c. 18, s. 172; *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; *Municipal Act*, R.S.O. 1990, c. M.45, s. 102; *Municipal Act*, R.S.Y. 1986, c. 119, s. 271.

While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, it is important to keep in mind that such open-ended provisions do not confer an unlimited power. Rather, courts faced with an impugned by-law enacted under an "omnibus" provision such as s. 410 *C.T.A.* must be vigilant in scrutinizing the true purpose of the by-law. In this way, a municipality will not be permitted to invoke the implicit power granted under a "general welfare" provision as a basis for enacting by-laws that are in fact related to ulterior objectives, whether mischievous or not. As a Justice of the Ontario Divisional Court, Cory J. commented instructively on this subject in *Re Weir and The*

théorie de l'excès de pouvoir qui oblige les municipalités à invoquer une attribution expresse de pouvoir pour justifier chaque acte qu'elles accomplissent » (*The Law of Canadian Municipal Corporations* (2e éd. (feuilles mobiles)), suppl. cum. du vol. 1, p. 367).

19 L'article 410 *L.C.V.* constitue un exemple d'une telle disposition générale de bien-être et il ajoute aux pouvoirs spécifiques conférés par l'art. 412. Les dispositions moins limitatives ou « omnibus », tel l'art. 410, permettent aux municipalités de relever rapidement les nouveaux défis auxquels font face les collectivités locales sans qu'il soit nécessaire de modifier la loi provinciale habilitante. Les lois habilitantes des autres provinces et des territoires qui autorisent l'adoption de règlements municipaux contiennent des dispositions analogues: voir *Municipal Government Act*, S.A. 1994, ch. M-26.1, al. 3*c*) et art. 7; *Local Government Act*, R.S.B.C. 1996, ch. 323, art. 249; *Loi sur les municipalités*, L.M. 1996, ch. 58, C.P.L.M., ch. M225, art. 232-233; *Loi sur les municipalités*, L.R.N.-B. 1973, ch. M-22, par. 190(2), annexe I; *Municipal Government Act*, S.N.S. 1998, ch. 18, art. 172; *Loi sur les cités, villes et villages*, L.R.T.N.-O. 1988, ch. C-8, art. 54 et 102; *Loi sur les municipalités*, L.R.O. 1990, ch. M.45, art. 102; *Loi municipale*, L.R.Y. 1986, ch. 119, art. 271.

20 Bien que les dispositions habilitantes permettant aux municipalités de réglementer pour le « bien-être général » sur leur territoire autorisent l'adoption de règlements visant véritablement à faciliter la réalisation d'objectifs telles la santé et la sécurité publiques, il importe de garder à l'esprit le fait que ces dispositions non limitatives ne confèrent pas un pouvoir illimité. Les tribunaux saisis d'un règlement contesté adopté en vertu d'une disposition « omnibus » comme l'art. 410 *L.C.V.* doivent plutôt être vigilants lorsqu'ils cherchent à déterminer le but véritable du règlement. Ainsi, une municipalité ne pourra pas invoquer le pouvoir implicite conféré par une disposition de « bien-être général » pour adopter des règlements qui sont en fait liés à des objectifs inavoués, que ceux-ci soient ou non malicieux. Lorsqu'il était juge à la Cour division-

Queen (1979), 26 O.R. (2d) 326 (Div. Ct.), at p. 334. Although he found that the City of Toronto's power to regulate matters pertaining to health, safety and general welfare (conferred by the *Municipal Act*, R.S.O. 1970, c. 284, s. 242) empowered it to pass a by-law regulating smoking in public retail shops, Cory J. also made the following remark about the enabling provision: "There is no doubt that a by-law passed pursuant to the provisions of s. 242 must be approached with caution. If such were not the case, the municipality could be deemed to be empowered to legislate in a most sweeping manner."

naire de l'Ontario, le juge Cory a fait des commentaires instructifs sur ce sujet dans l'affaire *Re Weir and The Queen* (1979), 26 O.R. (2d) 326 (C. div.), p. 334. Même s'il a conclu que le pouvoir de réglementation de la ville de Toronto en matière de santé, de sécurité et de bien-être général (conféré par la *Municipal Act*, R.S.O. 1970, ch. 284, art. 242) lui permettait d'adopter un règlement sur l'usage du tabac dans les commerces de détail, le juge Cory a aussi fait la remarque suivante au sujet de la disposition habilitante : [TRADUCTION] « Il ne fait aucun doute qu'un règlement adopté en vertu de l'art. 242 doit être examiné avec prudence. Sinon, la municipalité pourrait être réputée avoir un pouvoir de réglementation extrêmement étendu. »

21 Within this framework, I turn now to the specifics of the appeal. As a preliminary matter, I agree with the courts below that By-law 270 was not enacted under s. 412(32) *C.T.A.* This provision authorizes councils to "make by-laws: To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom" (emphasis added). In replicating the definition of "pesticides" found in the provincial *Pesticides Act*, By-law 270 avoids falling under the ambit of s. 412(32). There is no equation of pesticides and "toxic . . . materials" either in the terms of the by-law or in any evidence presented during this litigation. The provincial government did not consider By-law 270 to fall under s. 412(32): see letter of July 5, 1991 from the Deputy Minister of the Environment. As Y. Duplessis and J. Hétu state in *Les pouvoirs des municipalités en matière de protection de l'environnement* (2nd ed. 1994), at p. 110,

C'est sur cette toile de fond que j'aborde maintenant les questions spécifiques soulevées par ce pourvoi. Tout d'abord, je suis d'accord avec les cours d'instance inférieure que le règlement 270 n'a pas été adopté en vertu du par. 412(32) *L.C.V.* Cette disposition autorise les conseils à « faire des règlements: Pour réglementer ou défendre l'emmagasinage et l'usage de poudre, poix sèche, résine, pétrole, benzine, naphte, gazoline, térébenthine, fulmicoton, nitroglycérine, ainsi que d'autres matières combustibles, explosives, corrosives, toxiques, radioactives ou autrement dangereuses pour la santé ou la sécurité publiques, sur le territoire de la municipalité ou dans un rayon de 1 km à l'extérieur de ce territoire » (je souligne). Reprenant la définition de « pesticide » dans la *Loi sur les pesticides* de la province, le règlement 270 évite de tomber sous l'égide du par. 412(32). Le texte du règlement et la preuve présentée au cours du présent litige n'assimilent pas les pesticides aux « matières [. . .] toxiques ». Selon le gouvernement provincial, le règlement 270 ne relève pas du par. 412(32) : voir la lettre du 5 juillet 1991 du sous-ministre de l'Environnement. Comme le disent Y. Duplessis et J. Hétu dans *Les pouvoirs des municipalités en matière de protection de l'environnement* (2e éd. 1994), p. 110 :

[TRANSLATION] . . . these subsections concerning "corrosive, toxic or radioactive materials" in no way limit the other more general powers granted to municipalities that

. . . ces paragraphes relatifs aux « matières corrosives, toxiques, radioactives » ne viennent aucunement limiter les autres pouvoirs plus généraux confiés aux munici-

could justify municipal intervention in relation to pesticides.

As a result, since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) *C.T.A.* The party challenging a by-law's validity bears the burden of proving that it is *ultra vires*: see *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234, at p. 239, and *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at p. 395.

The conclusion that By-law 270 does not fall within the purview of s. 412(32) *C.T.A.* distinguishes this appeal from *R. v. Greenbaum*, [1993] 1 S.C.R. 674. In that case, various express provisions of the provincial enabling legislation at issue covered the regulation of Toronto sidewalks. The appellant was therefore trying to expand the ambit of these specific authorizations by recourse to the "omnibus" provision in Ontario's *Municipal Act*. Moreover, that provision, s. 102, stated that "[e]very council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law . . . ." (emphasis added). The Court thus held in *Greenbaum*, at p. 693, that "[t]hese express powers are . . . taken out of any power included in the general grant of power". Since the *C.T.A.* contains no such specific provisions concerning pesticides (nor a clause limiting its purview to matters not specifically provided for in the Act) the "general welfare" provision of the *C.T.A.*, s. 410(1), is not limited in this fashion.

Section 410(1) *C.T.A.* provides that councils may make by-laws:

(1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of

paux [*sic*] et pouvant justifier une intervention municipale dans le domaine des pesticides.

Par conséquent, étant donné qu'aucune disposition particulière de la loi provinciale habilitante ne mentionne les pesticides, le règlement doit tomber dans le champ d'application du par. 410(1) *L.C.V.* Il incombe à la partie qui conteste la validité d'un règlement de prouver qu'il est *ultra vires* : voir *Kuchma c. Rural Municipality of Tache*, [1945] R.C.S. 234, p. 239, et *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368, p. 395.

22 La conclusion selon laquelle le règlement 270 n'est pas visé par le par. 412(32) *L.C.V.* établit une distinction entre le présent pourvoi et l'affaire *R. c. Greenbaum*, [1993] 1 R.C.S. 674. Dans cette affaire, différentes dispositions expresses de la loi provinciale habilitante en cause portaient sur la réglementation des trottoirs de Toronto. L'appelante tentait donc d'élargir la portée de ces autorisations spécifiques au moyen de la disposition « omnibus » de la *Loi sur les municipalités* de l'Ontario. De plus, cette disposition, soit l'art. 102, prévoit que « [l]e conseil peut adopter les règlements municipaux, ainsi que les règlements qui ne sont pas contraires à la loi, qui sont réputés pertinents, et qui portent sur la santé, la sécurité, la moralité et le bien-être des habitants de la municipalité, au sujet de questions qui ne sont pas expressément prévues par la présente loi . . . » (je souligne). Notre Cour a en conséquence conclu dans *Greenbaum*, p. 693, que [TRADUCTION] « [c]es pouvoirs explicites sont [. . .] soustraits de ceux qui sont compris dans le pouvoir général ». Étant donné que la *L.C.V.* ne contient aucune disposition particulière de ce genre au sujet des pesticides (et aucune disposition qui en limite la portée aux matières non expressément prévues par la loi), la disposition en matière de « bien-être général » de la *L.C.V.*, soit le par. 410(1), n'est pas ainsi limitée.

23 Le paragraphe 410(1) *L.C.V.* prévoit que les conseils peuvent faire des règlements :

1º Pour assurer la paix, l'ordre, le bon gouvernement, la salubrité et le bien-être général sur le territoire de la municipalité, pourvu que ces règlements ne soient pas

Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter.

contraires aux lois du Canada ou du Québec, ni incompatibles avec quelque disposition spéciale de la présente loi ou de la charte.

In *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 36, this Court quoted with approval the following statement by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244:

Dans *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 36, notre Cour cite avec approbation l'énoncé suivant du juge McLachlin (maintenant Juge en chef) dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244 :

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives. [Emphasis added.]

> Il ressort d'un commentaire récent que l'on commence à s'accorder pour dire que les tribunaux doivent respecter la responsabilité qu'ont les conseils municipaux élus de servir leurs électeurs et de prendre garde de substituer à l'opinion de ces conseils leur propre avis quant à ce qui est dans le meilleur intérêt des citoyens. A moins qu'il ne soit clairement démontré qu'une municipalité a excédé ses pouvoirs en prenant une décision donnée, les tribunaux ne devraient pas conclure qu'il en est ainsi. Dans les cas où il n'y a pas d'attribution expresse de pouvoirs, mais où ceux-ci peuvent être implicites, les tribunaux doivent se montrer prêts à adopter l'interprétation «bienveillante» évoquée par notre Cour dans l'arrêt *Greenbaum* et à conférer les pouvoirs par déduction raisonnable. Quelles que soient les règles d'interprétation appliquées, elles ne doivent pas servir à usurper le rôle légitime de représentants de la collectivité que jouent les conseils municipaux. [Je souligne.]

24 The appellants argue that By-law 270 imposes an impermissible absolute ban on pesticide use. They focus on s. 2 of the by-law, which states that: "The spreading and use of a pesticide is prohibited throughout the territory of the Town." In my view, the by-law read as a whole does not impose such a prohibition. By-law 270's ss. 3 to 6 state locations and situations for pesticide use. As one commentary notes, "by-laws like Hudson's typically target non-essential uses of pesticides. That is, it is not a total prohibition, but rather permits the use of pesticides in certain situations where the use of pesticides is not purely an aesthetic pursuit (e.g. for the production of crops)": Swaigen, *supra*, at p. 178.

Les appelantes prétendent que le règlement 270 impose une interdiction absolue non permise relativement à l'utilisation de pesticides. Elles mettent l'accent sur l'art. 2 du règlement : « L'épandage et l'utilisation de tout pesticide est interdit partout sur le territoire de la Ville. » Selon moi, le règlement, interprété dans son ensemble, n'impose pas une telle interdiction. Les articles 3 à 6 du règlement 270 indiquent les lieux et les cas où l'utilisation de pesticides est permise. Comme le souligne Swaigen, *loc. cit.*, p. 178 : [TRADUCTION] « les règlements comme celui de Hudson visent généralement les usages non essentiels de pesticides. C'est-à-dire qu'ils ne prévoient pas une interdiction totale, mais permettent plutôt l'usage de pesticides dans certains cas où cet usage n'a pas un but purement esthétique (p. ex. pour la production de récoltes) ».

The appellants further submit that the province's adoption in 1997 of s. 463.1 *C.T.A.*, which states that a municipality may get permission to introduce pesticides onto private property, indicates, by virtue of the principle of *expressio unius est exclusio alterius* (express mention of one is the exclusion of the other), that the province did not intend to allow municipal regulation of pesticides. I find this argument to be without merit, since, even if this subsequent enactment were considered to instantiate prior legislative intent, there is absolutely no implication in s. 463.1 *C.T.A.*, a permissive provision, that it is meant to exhaust municipalities' freedom of action concerning pesticides.

Les appelantes soutiennent, en outre, que l'adoption par la province en 1997 de l'art. 463.1 *L.C.V.*, selon lequel une municipalité peut obtenir la permission d'épandre des pesticides sur une propriété privée, indique, d'après le principe *expressio unius est exclusio alterius* (la mention explicite de l'un signifie l'exclusion de l'autre), que la province n'avait pas l'intention de permettre la réglementation des pesticides par les municipalités. J'estime cet argument mal fondé, car, même si l'on considère que l'adoption ultérieure de cette disposition confirme l'intention antérieure du législateur, absolument rien dans l'art. 463.1 *L.C.V.*, une disposition permissive, ne vise à retirer aux municipalités leur liberté d'action en ce qui a trait aux pesticides. 25

In *Shell*, *supra*, at pp. 276-77, Sopinka J. for the majority quoted the following with approval from Rogers, *supra*, § 64.1:

> In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.

Dans l'arrêt *Shell*, précité, p. 276-277, le juge Sopinka, au nom de la majorité, cite avec approbation l'extrait suivant tiré de l'ouvrage de Rogers, *op. cit.*, § 64.1 : 26

> [TRADUCTION] Devant un problème d'interprétation d'une résolution ou d'un règlement adopté par une municipalité, les tribunaux doivent s'efforcer en premier lieu de donner une interprétation qui harmonise les pouvoirs que l'on cherche à exercer avec les objectifs de la municipalité. La disposition en cause devrait s'interpréter en fonction de l'objectif de la municipalité : fournir des services à un groupe de personnes, dans une localité, en vue d'en améliorer la santé, le bien-être, la sécurité et le bon gouvernement;

In that case, Sopinka J. enunciated the test of whether the municipal enactment was "passed for a municipal purpose". Provisions such as s. 410(1) *C.T.A.*, while benefiting from the generosity of interpretation discussed in *Nanaimo*, *supra*, must have a reasonable connection to the municipality's permissible objectives. As stated in *Greenbaum*, *supra*, at p. 689: "municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws".

Dans cet arrêt, le juge Sopinka énonce le critère applicable afin de déterminer si le règlement municipal a été « adopt[é] à des fins municipales ». Même si elles bénéficient de l'interprétation large mentionnée dans *Nanaimo*, précité, les dispositions tel le par. 410(1) *L.C.V.* doivent être raisonnablement liées aux objectifs municipaux permis. Comme le mentionne l'arrêt *Greenbaum*, précité, p. 689 : « lorsqu'ils sont susceptibles de recevoir plus d'une interprétation, les règlements municipaux doivent être interprétés de manière à respecter les paramètres de la loi provinciale habilitante. Toutefois, les tribunaux doivent veiller à ce que les municipalités n'empiètent pas sur les droits civils ou de common law des citoyens en adoptant des règlements *ultra vires* ».

27 Whereas in *Shell*, the enactments' purpose was found to be "to affect matters beyond the boundaries of the City without any identifiable benefit to its inhabitants" (p. 280), that is not the case here. The Town's By-law 270 responded to concerns of its residents about alleged health risks caused by non-essential uses of pesticides within Town limits. Unlike *Shell*, in which the Court felt bound by the municipal enactments' "detailed recital of . . . purposes" (p. 277), the by-law at issue requires what Sopinka J. called the reading in of an implicit purpose. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1). As R. Sullivan appositely explains in a hypothetical example illustrating the purposive approach to statutory interpretation:

Alors que, dans l'arrêt *Shell*, les règlements adoptés ont été jugés avoir « pour objet d'exercer une influence à l'extérieur des limites de la ville et ne comport[a]nt aucun bénéfice précis pour ses citoyens » (p. 280), tel n'est pas le cas ici. Le règlement 270 de la Ville répondait aux craintes de ses résidants au sujet des risques que pourrait présenter pour la santé l'usage non essentiel de pesticides dans les limites de la Ville. Contrairement à la situation dans *Shell*, où notre Cour s'est sentie liée par « l'énumération détaillée des objets » (p. 277) des règlements municipaux, le règlement en cause exige ce que le juge Sopinka a recommandé de faire, soit de lui prêter un objectif implicite. Selon la distinction entre l'usage essentiel et l'usage non essentiel des pesticides, il est raisonnable de conclure que le règlement de la Ville a pour objet de minimiser l'utilisation de pesticides qui seraient nocifs afin de protéger la santé de ses habitants. Cet objet relève directement de l'aspect « santé » du par. 410(1). Comme R. Sullivan l'explique pertinemment dans un exemple hypothétique illustrant l'interprétation téléologique des lois :

> Suppose, for example, that a municipality passed a by-law prohibiting the use of chemical pesticides on residential lawns. With no additional information, one might well conclude that the purpose of this by-law was to protect persons from health hazards contained in the chemical spray. This inference would be based on empirical beliefs about the harms chemical pesticides can cause and the risks of exposure created by their use on residential lawns. It would also be based on assumptions about the relative value of grass, insects and persons in society and the desirability of possible consequences of the by-law, such as putting people out of work, restricting the free use of property, interfering with the conduct of businesses and the like. These assumptions make it implausible to suppose that the municipal council was trying to promote the spread of plant-destroying insects or to put chemical workers out of work, but plausible to suppose that it was trying to suppress a health hazard.
>
> [TRADUCTION] Supposons, par exemple, qu'une municipalité adopte un règlement interdisant l'utilisation de pesticides chimiques sur les pelouses résidentielles. Sans autre renseignement, on pourrait bien conclure que le règlement avait pour objet la protection contre les risques pour la santé que présente la vaporisation de produits chimiques. Cette conclusion serait fondée sur des croyances empiriques au sujet des problèmes que les pesticides chimiques peuvent causer et des risques d'exposition créés par leur utilisation sur des pelouses résidentielles. Elle serait également fondée sur des présomptions au sujet de la valeur relative de l'herbe, des insectes et des personnes dans la société ainsi qu'au sujet du caractère souhaitable des conséquences possibles du règlement, comme le fait de causer des pertes d'emploi, de restreindre la liberté d'utilisation de la propriété, de s'ingérer dans l'exploitation des entreprises et les autres conséquences semblables. Ces présomptions font en sorte qu'il n'est pas plausible de supposer que le conseil municipal tentait de favoriser la propagation des insectes qui détruisent les plantes ou de causer la mise à pied de travailleurs du domaine des produits chimiques, mais qu'il est plausible de supposer qu'il tentait d'éliminer un risque pour la santé.

(*Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 53)

Kennedy J. correctly found (at pp. 230-31) that the Town Council, "faced with a situation involving health and the environment", "was addressing a need of their community." In this manner, the municipality is attempting to fulfill its role as what the Ontario Court of Appeal has called a "trustee of the environment" (*Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, at p. 257).

The appellants claim that By-law 270 is discriminatory and therefore *ultra vires* because of what they identify as impermissible distinctions that affect their commercial activities. There is no specific authority in the *C.T.A.* for these distinctions. Writing for the Court in *Sharma*, *supra*, at p. 668, Iacobucci J. stated the principle that:

> . . . in *Montréal (City of) v. Arcade Amusements Inc.*, *supra*, this Court recognized that discrimination in the municipal law sense was no more permissible between than within classes (at pp. 405-6). Further, the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province (*Montréal (City of) v. Arcade Amusements Inc.*, *supra*, at pp. 404-6). [Emphasis added.]

See also *Shell*, *supra*, at p. 282; *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 413.

Without drawing distinctions, By-law 270 could not achieve its permissible goal of aiming to improve the health of the Town's inhabitants by banning non-essential pesticide use. If all pesticide uses and users were treated alike, the protection of health and welfare would be sub-optimal. For example, withdrawing the special status given to farmers under the by-law's s. 4 would work at cross-purposes with its salubrious intent. Section 4 thus justifiably furthers the objective of By-law 270. Having held that the Town can regulate the use of pesticides, I conclude that the distinctions

(*Driedger on the Construction of Statutes* (3e éd. 1994), p. 53)

Le juge Kennedy a conclu à bon droit (aux p. 230-231) que, [TRADUCTION] « devant une situation où la santé et l'environnement sont en jeu », le conseil municipal « voyait à un besoin de sa collectivité ». Ainsi, la municipalité tente d'exercer son rôle, qualifié par la Cour d'appel de l'Ontario de [TRADUCTION] « fiduciaire de l'environnement » (*Scarborough c. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, p. 257).

28 Les appelantes font valoir que le règlement 270 est discriminatoire et en conséquence est *ultra vires* en raison de ce qu'elles identifient comme des distinctions non permises affectant leurs activités commerciales. La *L.C.V.* n'autorise pas explicitement de telles distinctions. S'exprimant au nom de la Cour dans *Sharma*, précité, p. 668, le juge Iacobucci énonce le principe suivant :

> . . . dans l'arrêt *Montréal (Ville de) c. Arcade Amusements Inc.*, précité, notre Cour a reconnu que la discrimination au sens du droit municipal n'était pas plus permise entre des catégories qu'au sein de catégories (aux pp. 405 et 406). En outre, le caractère raisonnable ou rationnel général de la distinction n'est pas en cause: il ne saurait y avoir de discrimination que si la loi habilitante le prévoit précisément ou si la discrimination est nécessairement accessoire à l'exercice du pouvoir délégué par la province (*Montréal (Ville de) c. Arcade Amusements Inc.*, précité, aux pp. 404 à 406). [Je souligne.]

Voir également *Shell*, précité, p. 282; *Allard Contractors Ltd. c. Coquitlam (District)*, [1993] 4 R.C.S. 371, p. 413.

29 Sans faire ces distinctions, le règlement 270 ne pourrait pas atteindre l'objectif y autorisé, soit d'améliorer la santé des habitants de la Ville en interdisant l'usage non essentiel de pesticides. Si l'on traitait de façon similaire tous les usages et utilisateurs de pesticides, la protection de la santé et du bien-être ne serait pas optimale. Par exemple, le retrait du statut spécial que l'art. 4 du règlement confère aux fermiers irait à l'encontre de l'objectif de salubrité de ce règlement. L'article 4 facilite ainsi, et il est justifié de le faire, la réalisation de l'objectif visé par le règlement 270. Ayant conclu

impugned by the appellants for restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) *C.T.A.* They are "so absolutely necessary to the exercise of those powers that [authorization has] to be found in the enabling provisions, by necessary inference or implicit delegation"; *Arcade Amusements*, *supra*, at p. 414, quoted in *Greenbaum*, *supra*, at p. 695.

30 To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70, observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". As stated in *Driedger on the Construction of Statutes*, *supra*, at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

31 The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for

que la Ville peut réglementer l'utilisation des pesticides, je juge que les distinctions contestées par les appelantes au motif qu'elles restreignent leurs activités commerciales sont des conséquences nécessaires à l'application du pouvoir délégué par la province en vertu du par. 410(1) *L.C.V.* Elles sont « indispensable[s] à l'exercice de ces pouvoirs de telle sorte que [l'autorisation] doive [être] trouv[ée] dans ces dispositions habilitantes, par inférence nécessaire ou délégation implicite »; *Arcade Amusements*, précité, p. 414, cité dans *Greenbaum*, précité, p. 695.

En conclusion quant à cette partie relative au pouvoir conféré par la loi, je souligne qu'interpréter le par. 410(1) comme permettant à la Ville de réglementer l'utilisation des pesticides correspond aux principes de droit et de politique internationaux. Au nom de la Cour dans *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 70, je note dans mon opinion que « [l]es valeurs exprimées dans le droit international des droits de la personne peuvent [. . .] être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire ». Comme il est mentionné dans *Driedger on the Construction of Statutes*, *op. cit.*, p. 330 :

> [TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d'adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

L'interprétation que je fais ici du règlement 270 respecte le « principe de précaution » du droit international, qui est défini ainsi au par. 7 de la *Déclaration ministérielle de Bergen sur le développement durable* (1990) :

> Un développement durable implique des politiques fondées sur le principe de précaution. Les mesures adoptées doivent anticiper, prévenir et combattre les causes de la détérioration de l'environnement. Lorsque des dommages graves ou irréversibles risquent d'être infligés, l'absence d'une totale certitude scientifique ne

postponing measures to prevent environmental degradation.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 2(1)(*a*); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(*h*) and 11(1).

Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law* (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in *ibid.*, at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Env. L.* 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (*A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53, at para. 27). See also *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

devrait pas servir de prétexte pour ajourner l'adoption de mesures destinées à prévenir la détérioration de l'environnement.

Le Canada « a préconisé l'inclusion du principe de précaution » au cours des négociations de la Conférence de Bergen (D. VanderZwaag, Examen de la LCPE : Document d'élaboration des enjeux 18, *La LCPE et le principe ou l'approche précaution* (1995), p. 11). Ce principe est intégré dans plusieurs dispositions de législation interne : voir par exemple la *Loi sur les océans*, L.C. 1996, ch. 31, Préambule (par. 6); la *Loi canadienne sur la protection de l'environnement (1999)*, L.C. 1999, ch. 33, al. 2(1)*a*); la *Endangered Species Act*, S.N.S. 1998, ch. 11, al. 2(1)(*h*) et par. 11(1).

32 Des auteurs ont démontré que le principe de précaution est repris [TRADUCTION] « dans pratiquement tous les traités et documents de politique récents en matière de protection et de préservation de l'environnement » (D. Freestone et E. Hey, « Origins and Development of the Precautionary Principle », dans D. Freestone et E. Hey, dir., *The Precautionary Principle and International Law* (1996), p. 41. Par conséquent, il y a peut-être [TRADUCTION] « actuellement suffisamment de pratiques de la part des États pour qu'il soit permis de prétendre de façon convaincante que le principe de précaution est un principe de droit international coutumier » (J. Cameron et J. Abouchar, « The Status of the Precautionary Principle in International Law », *ibid.*, p. 52). Voir également O. McIntyre et T. Mosedale, « The Precautionary Principle as a Norm of Customary International Law » (1997), 9 *J. Env. L.* 221, p. 241 [TRADUCTION] (« le principe de précaution s'est vraiment cristallisé en une norme de droit international coutumier »). La Cour suprême de l'Inde considère le principe de précaution comme faisant [TRADUCTION] « partie du droit international coutumier » (*A.P. Pollution Control Board c. Nayudu*, 1999 S.O.L. Case No. 53, par. 27). Voir également *Vellore Citizens Welfare Forum c. Union of India*, [1996] Suppl. 5 S.C.R. 241. Dans le contexte des postulats du principe de précaution, les craintes de la Ville au sujet des pesticides s'inscrivent confortablement sous la rubrique de l'action préventive.

B. *Even if the Town Had Authority to Enact it, Was By-law 270 Rendered Inoperative Because of a Conflict with Federal or Provincial Legislation?*

33 This Court stated in *Hydro-Québec*, *supra*, at para. 112, that *Oldman River*, *supra*, "made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, 'the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament' (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64)." As there is bijurisdictional responsibility for pesticide regulation, the appellants allege conflicts between By-law 270 and both federal and provincial legislation. These contentions will be examined in turn.

1. Federal Legislation

34 The appellants argue that ss. 4(1), 4(3) and 6(1)(*j*) of the *Pest Control Products Act* ("*PCPA*"), and s. 45 of the *Pest Control Products Regulations* allowed them to make use of the particular pesticide products they employed in their business practices. They allege a conflict between these legislative provisions and By-law 270. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 187, Dickson J. (as he then was) for the majority of the Court reviewed the "express contradiction test" of conflict between federal and provincial legislation. At p. 191, he explained that "there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other". See also *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at paras. 17 and 40; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121,

B. *Dans l'hypothèse où la Ville avait le pouvoir de l'adopter, le règlement 270 a-t-il été rendu inopérant du fait de son incompatibilité avec la législation fédérale ou provinciale?*

Notre Cour a dit dans *Hydro-Québec*, précité, par. 112, que l'arrêt *Oldman River*, précité, « a précisé [. . .] que l'environnement n'est pas, comme tel, un domaine de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Comme il y est affirmé, "la *Loi constitutionnelle de 1867* n'a pas conféré le domaine de 'l'environnement' comme tel aux provinces ou au Parlement" (p. 63). Il s'agit plutôt d'un sujet diffus qui touche plusieurs domaines différents de responsabilité constitutionnelle, dont certains sont fédéraux et d'autres provinciaux (pp. 63 et 64). » Étant donné qu'il existe une responsabilité bijuridictionnelle en matière de réglementation de pesticides, les appelantes allèguent que le règlement 270 entre en conflit tant avec la législation fédérale qu'avec la législation provinciale. Je discuterai de ces prétentions à tour de rôle.

1. La législation fédérale

Les appelantes prétendent que les par. 4(1) et 4(3) ainsi que l'al. 6(1)*j*) de la *Loi sur les produits antiparasitaires* (la « *LPAP* ») et l'art. 45 du *Règlement sur les produits antiparasitaires* leur permettaient d'utiliser les pesticides particuliers qu'elles employaient dans le cadre de leurs activités commerciales. Elles allèguent qu'il existe un conflit entre ces dispositions et le règlement 270. Dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 187, le juge Dickson (plus tard Juge en chef), au nom de la majorité de la Cour, examine le « critère du conflit explicite » entre la législation fédérale et la législation provinciale. À la page 191, il explique qu'« il ne semble y avoir aucune raison valable de parler de prépondérance et d'exclusion sauf lorsqu'il y a un conflit véritable, comme lorsqu'une loi dit "oui" et que l'autre dit "non"; "on demande aux mêmes citoyens d'accomplir des actes incompatibles"; l'observance de l'une entraîne l'inobservance de l'autre ». Voir également *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 17 et 40; *Banque de Montréal c. Hall*, [1990] 1 R.C.S.

at p. 151. By-law 270, as a product of provincial enabling legislation, is subject to this test.

Federal legislation relating to pesticides extends to the regulation and authorization of their import, export, sale, manufacture, registration, packaging and labelling. The *PCPA* regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes. Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". See *Multiple Access*, *supra*, at p. 190; *Bank of Montreal*, *supra*, at pp. 151 and 154.

2. Provincial Legislation

Multiple Access also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation, except for cases (unlike this one) in which the relevant provincial legislation specifies a different test. The *Multiple Access* test, namely "impossibility of dual compliance", see P. W. Hogg, *Constitutional Law of Canada* (looseleaf ed.), vol. 1, at p. 16-13, was foreshadowed for provincial-municipal conflicts in *dicta* contained in this Court's decision in *Arcade Amusements*, *supra*, at p. 404. There, Beetz J. wrote that "otherwise valid provincial statutes which are directly contrary to federal statutes are rendered inoperative by that conflict. Only the same type of conflict with provincial statutes can make by-laws inoperative: I. M. Rogers, *The Law of Canadian Municipal Corporations*, vol. 1, 2nd ed., 1971, No. 63.16" (emphasis added).

121, p. 151. Découlant d'une loi provinciale habilitante, le règlement 270 est sujet à ce critère.

35 La législation fédérale relative aux pesticides s'étend à la réglementation et à l'autorisation de leur importation, de leur exportation, de leur vente, de leur fabrication, de leur agrément, de leur emballage et de leur étiquetage. La *LPAP* dicte quels pesticides peuvent être agréés à des fins de fabrication et/ou d'utilisation au Canada. Cette loi est permissive, et non pas exhaustive, de sorte qu'il n'y a aucun conflit opérationnel avec le règlement 270. Nul n'est placé dans la situation impossible d'avoir l'obligation légale de se conformer aux deux régimes de réglementation. L'analogie avec les véhicules automobiles et les cigarettes qui ont été approuvés au niveau fédéral mais dont l'usage peut toutefois être restreint au niveau municipal illustre bien cette conclusion. Il n'y a, en outre, aucune crainte en l'espèce que l'application du règlement 270 écarte ou déjoue « l'intention du Parlement ». Voir *Multiple Access*, précité, p. 190; *Banque de Montréal*, précité, p. 151 et 154.

2. La législation provinciale

36 L'arrêt *Multiple Access* s'applique également à l'examen de la question de savoir s'il y a conflit entre le règlement municipal et la législation provinciale, sauf dans les cas (différents de la présente affaire) où la loi provinciale pertinente spécifie un critère autre. La remarque incidente faite dans la décision rendue par notre Cour dans *Arcade Amusements*, précité, p. 404, présageait le critère de l'arrêt *Multiple Access*, à savoir [TRADUCTION] « l'impossibilité de se conformer aux deux textes », voir P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, p. 16-13. Dans cette décision, le juge Beetz écrit que « des lois provinciales, valides par ailleurs, mais qui se heurtent directement à des lois fédérales, sont rendues inopérantes par suite de ce conflit. Seule la même sorte de conflit avec des lois provinciales peut rendre des règlements inopérants: I. M. Rogers, *The Law of Canadian Municipal Corporations*, vol. 1, 2e éd., 1971, no 63.16 » (je souligne).

37 One of the competing tests to *Multiple Access* suggested in this litigation is based on *Attorney General for Ontario v. City of Mississauga* (1981), 15 M.P.L.R. 212 (Ont. C.A.). In that case, decided before *Multiple Access*, Morden J.A. saw "no objection to borrowing, in this field, relevant principles of accommodation which have been developed in cases involving alleged federal-provincial areas of conflict. In both fields great care is, and should be, taken before it is held that an otherwise properly enacted law is inoperative" (p. 232). He added, at p. 233, the important point that "a by-law is not void or ineffective merely because it 'enhances' the statutory scheme of regulation by imposing higher standards of control than those in the related statute. This is not conflict or incompatibility per se" (quoting *Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484 (C.A.)). See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 353 ("In some cases, the courts have held that the provincial statute does not imply full repeal of the municipal power. The municipality retains its authority as long as there is no conflict with provincial legislation. It may be more demanding than the province, but not less so").

L'un des critères opposés à celui de l'arrêt *Multiple Acesss* qui ont été proposés dans le présent litige est fondé sur l'arrêt *Attorney General for Ontario c. City of Mississauga* (1981), 15 M.P.L.R. 212 (C.A. Ont.). Dans cette décision rendue avant l'arrêt *Multiple Access*, le juge Morden de la Cour d'appel de l'Ontario ne voit [TRADUCTION] « aucun problème à introduire dans ce domaine les principes d'accommodement pertinents qui ont été élaborés dans les affaires portant sur des présumés domaines de conflit entre les textes fédéraux et les textes provinciaux. Dans les deux domaines, on fait, et il faut faire, bien attention avant de déclarer inopérante une disposition qui a été autrement valablement adoptée » (p. 232). Il ajoute, à la p. 233, un point important, qui est qu' [TRADUCTION] « un règlement n'est pas nul ou sans effet simplement parce qu'il "rehausse" le régime législatif de réglementation en imposant des normes de contrôle plus sévères que celles prévues dans la loi connexe. Cela n'est pas un conflit ou une incompatibilité en soi » (citation de *Township of Uxbridge c. Timber Bros. Sand & Gravel Ltd.* (1975), 7 O.R. (2d) 484 (C.A.)). Voir également P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 446-447 (« Dans certaines affaires, on a jugé que l'adoption de la loi provinciale ne devait pas s'interpréter comme une abrogation complète du pouvoir municipal : celui-ci pouvait continuer à s'exercer à la condition toutefois de ne pas contredire la réglementation provinciale, c'est-à-dire que la municipalité pouvait être plus exigeante, mais non moins exigeante que la province »).

38 Some courts have already made use of the *Multiple Access* test to examine alleged provincial-municipal conflicts. For example, in *British Columbia Lottery Corp. v. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, at pp. 147-48, the British Columbia Court of Appeal stated that cases pre-dating *Multiple Access*, including the Ontario Court of Appeal decision in *Mississauga*, *supra*, "must be read in the light of [that] decision".

Certains tribunaux ont déjà recouru au critère de l'arrêt *Multiple Access* pour examiner les présumés conflits entre des textes provinciaux et des textes municipaux. Par exemple, dans *British Columbia Lottery Corp. c. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, p. 147-148, la Cour d'appel de la Colombie-Britannique déclare que les décisions rendues avant l'arrêt *Multiple Access*, notamment la décision de la Cour d'appel de l'Ontario dans *Mississauga*, précité, [TRADUCTION] « doivent être interprétées selon [cette] décision ».

It is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which

[TRADUCTION] On ne résout plus ce genre de problème en examinant un régime complet, en examinant l'autre régime complet et en décidant quel régime

scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity. [Emphasis added.]

occupe tout le domaine à l'exclusion de l'autre. Il faut plutôt examiner les dispositions précises et la manière dont elles s'appliquent dans le cas particulier et se demander si elles peuvent s'appliquer de façon harmonieuse dans ce cas précis? Dans l'affirmative, il faut permettre leur coexistence et elles doivent chacune réglementer en parallèle une facette, ou deux facettes différentes, de la même activité. [Je souligne.]

The court summarized the applicable standard as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." See also *Law Society of Upper Canada v. Barrie (City)* (2000), 46 O.R. (3d) 620 (S.C.J.), at pp. 629-30: "Compliance with the provincial Act does not necessitate defiance of the municipal By-law; dual compliance is certainly possible"; *Huot v. St-Jérôme (Ville de)*, J.E. 93-1052 (Sup. Ct.), at p. 19: [TRANSLATION] "A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters and, second, that obeying one necessarily means disobeying the other."

La cour a résumé ainsi la norme applicable : [TRADUCTION] « On peut dire qu'il y a un conflit réel et direct seulement lorsqu'un texte impose ce que l'autre interdit. » Voir également *Law Society of Upper Canada c. Barrie (City)* (2000), 46 O.R. (3d) 620 (C.S.J.), p. 629-630 : [TRADUCTION] « La conformité à la loi provinciale ne requiert pas l'inobservation du règlement municipal; il est certainement possible de se conformer aux deux textes); *Huot c. St-Jérôme (Ville de)*, J.E. 93-1052 (C.S.), p. 19 : « En effet, pour qu'un règlement municipal soit incompatible avec une loi provinciale (ou une loi provinciale avec une loi fédérale), il faut d'abord que les deux touchent des sujets similaires et, ensuite, qu'un citoyen, pour obéir à l'une doive enfreindre l'autre. »

As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter. As stated by the Quebec Court of Appeal in an informative environmental decision, *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), at pp. 888-91:

39

De façon générale, la simple existence d'une loi provinciale (ou fédérale) dans un domaine donné n'écarte pas le pouvoir des municipalités de réglementer cette matière. Comme le dit la Cour d'appel du Québec dans un arrêt instructif en matière d'environnement, *St-Michel-Archange (Municipalité de) c. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), p. 888-891 :

[TRANSLATION] According to proponents of the unitary theory, although the provincial legislature has not said so clearly, it has nonetheless established a provincial scheme for managing waste disposal sites. It has therefore reserved exclusive jurisdiction in this matter for itself, and taken the right to pass by-laws concerning local waste management away from municipalities. The *Environment Quality Act* therefore operated to remove those powers from municipal authorities.

Pour les tenants de la thèse unitaire, le législateur provincial, sans le dire d'une façon claire, a néanmoins instauré un système provincial de gestion des sites de réception des déchets. Il s'est donc réservé l'exclusivité des compétences en la matière et a enlevé aux municipalités le droit de faire des règlements sur la gestion locale des déchets. La *Loi sur la qualité de l'environnement* aurait donc eu pour effet de retirer ces pouvoirs aux autorités municipales.

According to proponents of the pluralist theory, the provincial legislature very definitely did not intend to abolish the municipality's power to regulate; rather, it

Pour les tenants de la thèse pluraliste, le législateur provincial n'a pas, bien au contraire, entendu abolir le pouvoir municipal de réglementation, mais simplement

intended merely to better circumscribe that power, to ensure complementarity with the municipal management scheme. . . .

. . .

The pluralist theory accordingly concedes that the intention is to give priority to provincial statutory and regulatory provisions. However, it does not believe that it can be deduced from this that any complementary municipal provision in relation to planning and development that affects the quality of the environment is automatically invalid.

. . .

A thorough analysis of the provisions cited *supra* and a review of the environmental policy as a whole as it was apparently intended by the legislature leads to the conclusion that it is indeed the pluralist theory, or at least a pluralist theory, that the legislature seems to have taken as the basis for the statutory scheme.

In this case, there is no barrier to dual compliance with By-law 270 and the *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

40 According to s. 102 of the *Pesticides Act*, as it was at the time By-law 270 was passed: "The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community." Evidently, the *Pesticides Act* envisions the existence of complementary municipal by-laws. As Duplessis and Hétu, *supra*, at p. 109, put it, [TRANSLATION] "the Quebec legislature gave the municipalities the right to regulate pesticides, provided that the by-law was not incompatible with the regulations and the Management Code enacted under the *Pesticides Act*". Since no Pesticide Management Code has been enacted by the province under s. 105, the

l'encadrer davantage dans une perspective de complémentarité de gestion avec les autorités municipales. . .

. . .

La thèse pluraliste admet donc qu'il y a intention de donner priorité aux dispositions législatives et réglementaires provinciales. Elle ne croit cependant pas que l'on puisse en déduire qu'automatiquement toute disposition municipale complémentaire en matière d'urbanisme et d'aménagement et qui touche la qualité de l'environnement soit nulle.

. . .

Une analyse approfondie des textes précités et l'examen de l'ensemble de la politique environnementale que semble avoir voulue le législateur mènent à la conclusion que c'est bien la thèse pluraliste, ou du moins une certaine thèse pluraliste, que celui-ci semble avoir pris comme base de l'ensemble législatif.

Dans la présente affaire, rien n'empêche que l'on se conforme à la fois au règlement 270 et à la *Loi sur les pesticides*, et il n'y a aucun élément de preuve plausible indiquant que la législature avait l'intention d'empêcher la réglementation par les municipalités de l'utilisation des pesticides. La *Loi sur les pesticides* établit un régime de permis pour les vendeurs et les applicateurs commerciaux de pesticides et elle est donc complémentaire à la législation fédérale, qui porte sur les produits eux-mêmes. Conjointement avec le règlement 270, ces lois établissent un régime de réglementation à trois niveaux.

En vertu de l'art. 102 de la *Loi sur les pesticides*, tel qu'il existait au moment de l'adoption du règlement 270 : « Toute disposition du Code de gestion des pesticides et des autres règlements édictés en vertu de la présente loi prévaut sur toute disposition inconciliable d'un règlement édicté par une municipalité ou une communauté urbaine. » Il est clair que la *Loi sur les pesticides* envisage l'existence de règlements municipaux complémentaires. Comme le disent Duplessis et Hétu, *op. cit.*, p. 109, « le législateur provincial reconnaissait aux municipalités le droit de réglementer les pesticides en autant que cette réglementation n'était pas inconciliable avec les règlements et le Code de gestion adoptés en vertu de la *Loi sur les pesti-*

lower courts in this case correctly found that the by-law and the *Pesticides Act* could co-exist. In the words of the Court of Appeal, at p. 16: [TRANSLATION] "The *Pesticides Act* thus itself contemplated the existence of municipal regulation of pesticides, since it took the trouble to impose restrictions."

cides ». Étant donné qu'aucun Code de gestion des pesticides n'a été adopté par la province aux termes de l'art. 105, les tribunaux antérieurs en l'espèce ont eu raison de conclure que le règlement et la *Loi sur les pesticides* pouvaient coexister. Pour reprendre les termes de la Cour d'appel, à la p. 16 : « La *Loi sur les pesticides* envisageait donc elle-même l'existence d'une réglementation municipale sur les pesticides, puisqu'elle prenait la peine d'imposer des contraintes. »

I also agree with the Court of Appeal at p. 16, that: [TRANSLATION] "A potential inconsistency is not sufficient to invalidate a by-law; there must be a real conflict". In this regard, the Court of Appeal quoted, at p. 17, *St-Michel-Archange*, *supra*, at p. 891, to the effect that: [TRANSLATION] "However, to the extent that and for as long as the provincial regulation is not in force, the municipal by-law continues to regulate the activity, provided, of course, that it complies with all the rules established by the law and the courts concerning its validity." 41

Je suis également d'accord avec la Cour d'appel à la p. 16 pour dire qu'« [u]ne éventuelle incompatibilité ne suffit pas pour invalider un règlement; il faut une réelle opposition ». À cet égard, la Cour d'appel a cité, à la p. 17, l'arrêt *St-Michel-Archange*, précité, p. 891, selon lequel « [t]ant et aussi longtemps toutefois que le règlement provincial n'est pas en vigueur, le règlement municipal continue à régir l'activité à condition, naturellement, qu'il respecte toutes les normes fixées par la loi et par la jurisprudence relativement à sa validité ».

I note in conclusion that the 1993 revision to the *Pesticide Act* added a new s. 102 stating: 42

Je souligne, en terminant, que la version modifiée de 1993 de la *Loi sur les pesticides* comporte un nouvel art. 102, ainsi libellé :

The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

Le Code de gestion des pesticides et tout autre règlement édictés en application de la présente loi rendent inopérante toute disposition réglementaire portant sur une même matière qui est édictée par une municipalité ou une communauté urbaine, sauf dans le cas où cette disposition réglementaire satisfait aux conditions suivantes :

– concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

– elle porte sur les activités d'entretien paysager ou d'extermination, notamment la fumigation, déterminées par règlement du gouvernement;

– prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

– elle prévient ou atténue davantage les atteintes à la santé des êtres humains ou des autres espèces vivantes, ainsi que les dommages à l'environnement ou aux biens.

This revised language indicates more explicitly that the *Pesticides Act* is meant to co-exist with stricter municipal by-laws of the type at issue in this case. Indeed, the new s. 102, by including the word "health", echoes the enabling legislation that underpins By-law-270, namely s. 410(1) *C.T.A.* Once a Pesticide Management Code is enacted,

Ce nouveau libellé indique de façon encore plus explicite que la *Loi sur les pesticides* vise à coexister avec des règlements municipaux plus sévères du genre de celui qui est en cause en l'espèce. En fait, l'inclusion du mot « santé » dans le nouvel art. 102 reflète la disposition habilitant le règlement 270, soit le par. 410(1) *L.C.V.* Dès l'adoption

municipalities will be able to draw on s. 102 in order to continue their independent regulation of pesticides. As Duplessis and Hétu, *supra*, explain at p. 111: [TRANSLATION] "the Quebec legislature has again recognized that municipalities have a role to play in pesticide control while at the same time indicating that it intends to make the municipal power subordinate to its own regulatory activity".

VI. Disposition

43 I have found that By-law 270 was validly enacted under s. 410(1) *C.T.A.* Moreover, the by-law does not render dual compliance with its dictates and either federal or provincial legislation impossible. For these reasons, I would dismiss the appeal with costs.

The reasons of Iacobucci, Major and LeBel JJ. were delivered by

LEBEL J. —

Introduction

44 I agree with Justice L'Heureux-Dubé that the impugned by-law on pesticide use adopted by the respondent, the Town of Hudson, is valid. It does not conflict with relevant federal and provincial legislation on the use and control of pesticides and is a valid exercise of municipal regulatory power under s. 410(1) of the *Cities and Towns Act*, R.S.Q., c. C-19 ("*C.T.A.*").

45 I view this case as an administrative and local government law issue. Although I agree with L'Heureux-Dubé J. on the disposition of the appeal, I wish to add some comments on some of the problems raised by the appellants. First, I will discuss the alleged operational conflict with the regulatory and legislative systems put in place by other levels of government. I will then turn to the difficulties created by the use of broad provisions like s. 410 and the application of the general prin-

du Code de gestion des pesticides, les municipalités pourront se fonder sur l'art. 102 pour continuer de réglementer les pesticides de façon indépendante. Comme Duplessis et Hétu, *op. cit.*, l'expliquent à la p. 111 : « le législateur québécois reconnaît une fois de plus que les municipalités ont un rôle à jouer en matière de contrôle des pesticides tout en voulant subordonner le pouvoir municipal à son activité réglementaire ».

VI. Dispositif

J'ai conclu que le règlement 270 a été valablement adopté en vertu du par. 410(1) *L.C.V.* De plus, le règlement ne rend pas impossible la conformité à ses prescriptions ainsi qu'à la législation fédérale et à la législation provinciale. Pour ces motifs, je rejetterais le pourvoi avec dépens.

Version française des motifs des juges Iacobucci, Major et LeBel rendus par

LE JUGE LEBEL —

Introduction

Je conviens avec le juge L'Heureux-Dubé que le règlement sur l'utilisation des pesticides contesté qui a été adopté par l'intimée la ville de Hudson est valide. Il n'entre pas en conflit avec la législation fédérale et la législation provinciale pertinentes sur l'utilisation et le contrôle des pesticides, et il constitue un exercice valide du pouvoir de réglementation que confère aux municipalités le par. 410(1) de la *Loi sur les cités et villes*, L.R.Q., ch. C-19 (« *L.C.V.* »).

Je considère la présente affaire comme une question de droit administratif et de droit municipal. Je suis d'accord avec le juge L'Heureux-Dubé quant à l'issue du pourvoi, mais je désire ajouter quelques observations au sujet de certains problèmes soulevés par les appelantes. J'aborde en premier lieu le présumé conflit d'application avec les régimes réglementaire et législatif mis en place par les autres ordres de gouvernement. Je traite ensuite des difficultés que créent l'application de

ciples of administrative law governing delegated legislation.

The Operational Conflict

As its first line of attack against By-law 270 of the Town of Hudson, the appellants raise the issue of an operational conflict with the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, and the *Pest Control Products Regulations*, C.R.C. 1978, c. 1253. The appellants also assert that the by-law conflicts with the Quebec *Pesticides Act*, R.S.Q., c. P-9.3. As L'Heureux-Dubé J. points out, the applicable test to determine whether an operational conflict arises is set out in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 187 and 189. There must be an actual conflict, in the sense that compliance with one set of rules would require a breach of the other. This principle was recently reexamined and restated by Binnie J. in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at paras. 39-42. The basic test remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. The federal Act and its regulations merely authorize the importation, manufacturing, sale and distribution of the products in Canada. They do not purport to state where, when and how pesticides could or should be used. They do not grant a blanket authority to pesticides' manufacturers or distributors to spread them on every spot of greenery within Canada. This matter is left to other legislative and regulatory schemes. Nor does a conflict exist with the provincial *Pesticides Act*, and I agree with L'Heureux-Dubé J.'s analysis on this particular point. The operational conflict argument thus fails.

The Administrative Law Issues

The most serious problems raised by the appeal involve pure administrative law issues. The appellants' arguments raise some basic issues of admin-

dispositions larges comme l'art. 410 et celle des principes généraux de droit administratif régissant la législation déléguée.

Le conflit d'application

46 Comme premier moyen de contestation du règlement 270 de la ville de Hudson, les appelantes soulèvent la question du conflit d'application avec la *Loi sur les produits antiparasitaires*, L.R.C. 1985, ch. P-9, et le *Règlement sur les produits antiparasitaires*, C.R.C. 1978, ch. 1253, adoptés au niveau fédéral. Les appelantes affirment également que le règlement va à l'encontre de la *Loi sur les pesticides* du Québec, L.R.Q., ch. P-9.3. Comme le souligne le juge L'Heureux-Dubé, le critère servant à déterminer s'il existe un conflit d'application est établi dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 187 et 189. Il faut qu'il y ait un conflit véritable, en ce sens que l'observation d'un ensemble de règles entraîne l'inobservation de l'autre. Le juge Binnie a récemment réexaminé et réaffirmé ce principe dans *M. & D. Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 39-42. Le critère fondamental demeure l'impossibilité de se conformer aux deux textes. Dans cette optique, le présumé conflit avec la législation fédérale n'existe tout simplement pas. La loi fédérale et son règlement d'application ne font qu'autoriser l'importation, la fabrication, la vente et la distribution des produits au Canada. Ils ne visent pas à prescrire où, quand et comment les pesticides peuvent ou doivent être utilisés. Ils ne confèrent pas aux fabricants et aux distributeurs de pesticides l'autorisation générale de les appliquer partout où il y a un bout de verdure au Canada. Cette question relève d'autres régimes législatifs et réglementaires. Il n'y a pas non plus conflit avec la *Loi sur les pesticides* de la province, et je souscris à l'analyse du juge L'Heureux-Dubé sur ce point particulier. L'argument reposant sur le conflit d'application n'est donc pas fondé.

Les questions de droit administratif

47 Les problèmes les plus graves mentionnés dans le pourvoi portent sur des questions de droit administratif pur. Dans leurs arguments, les appelantes

istrative law as applied in the field of municipal governance.

48 The appellants assert that no provision of the *C.T.A.* authorizes By-law 270. If such legislative authority exists, the by-law is nevertheless void because of its discriminatory and prohibitory nature. A solution is to be found in the principles governing the interpretation and application of the laws governing cities and towns like the respondent in the Province of Quebec. Interesting as they may be, references to international sources have little relevance. They confirm the general importance placed in modern society and shared by most citizens of this country on the environment and the need to protect it. Nevertheless, no matter how laudable the purpose of the by-law may be, and although it may express the will of the members of the community to protect their local environment, the means to do it must be found somewhere in the law. The issues in this case remain strictly, first, whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits and, second, whether the particular regulation conforms with the general principles applicable to delegated legislation.

49 A tradition of strong local government has become an important part of the Canadian democratic experience. This level of government usually appears more attuned to the immediate needs and concerns of the citizens. Nevertheless, in the Canadian legal order, as stated on a number of occasions, municipalities remain creatures of provincial legislatures (see *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45, at paras. 33-34; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15, at paras. 29 and 58-59). Municipalities exercise such powers as are granted to them by legislatures. This principle is illustrated by numerous decisions of our Court (see, for example, *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *R. v. Sharma*, [1993] 1 S.C.R. 650). They are not endowed with residuary general powers, which would allow them to exercise dor-

soulèvent des questions de droit administratif fondamentales appliquées au domaine de la gestion des affaires municipales.

Les appelantes affirment qu'aucune disposition de la *L.C.V.* n'autorise le règlement 270. Même si une telle autorisation législative existe, le règlement est nul en raison de son caractère discriminatoire et prohibitif. Une solution se trouve dans les principes régissant l'interprétation et l'application des lois visant les cités et les villes comme l'intimée au Québec. Si intéressants soient-ils, les renvois aux sources internationales ne sont guère pertinents. Ils confirment l'importance que la société moderne accorde généralement à l'environnement et à la nécessité de le protéger, position que partagent la plupart des citoyens de ce pays. Cependant, aussi louable que soit l'objet du règlement et même si celui-ci exprime la volonté des membres de la collectivité de protéger son environnement local, les moyens pour ce faire doivent être tirés de la loi. En l'espèce, les questions se résument à savoir, premièrement, si la *L.C.V.* autorise les municipalités à réglementer l'utilisation des pesticides sur leur territoire et, deuxièmement, si le règlement en cause respecte les principes généraux applicables à la législation déléguée.

La tradition d'établir des administrations publiques locales fortes est devenue une partie importante de l'expérience démocratique canadienne. Cet ordre d'administration publique paraît généralement mieux adapté aux besoins et préoccupations immédiats des citoyens. Toutefois, dans l'ordre juridique canadien, comme on l'a dit à plusieurs reprises, les municipalités demeurent des créatures du législateur provincial (voir *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, [2000] 2 R.C.S. 409, 2000 CSC 45, par. 33-34; *Ontario English Catholic Teachers' Assn. c. Ontario (Procureur général)*, [2001] 1 R.C.S. 470, 2001 CSC 15, par. 29 et 58-59). Les municipalités exercent les pouvoirs que leur confèrent les législatures. Nombre de décisions de notre Cour illustrent ce principe (voir, par exemple, *Montréal (Ville de) c. Arcade Amusements Inc.*, [1985] 1 R.C.S. 368; *R. c. Sharma*, [1993] 1 R.C.S. 650). Elles ne possèdent aucun pouvoir résiduaire

mant provincial powers (see I. M. Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at pp. 358 and 364; J. Hétu, Y. Duplessis and D. Pakenham, *Droit Municipal: Principes généraux et contentieux* (1998), at p. 651). If a local government body exercises a power, a grant of authority must be found somewhere in the provincial laws. Although such a grant of power must be construed reasonably and generously (*Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13), it cannot receive such an interpretation unless it already exists. Interpretation may not supplement the absence of power.

général qui leur permettrait d'exercer des pouvoirs provinciaux non attribués (voir I. M. Rogers, *The Law of Canadian Municipal Corporations* (2e éd. (feuilles mobiles)), suppl. cum. du vol. 1, p. 358 et 364; J. Hétu, Y. Duplessis et D. Pakenham, *Droit Municipal: Principes généraux et contentieux* (1998), p. 651). Une administration publique locale ne peut exercer un pouvoir que s'il est conféré par une loi provinciale. Certes, ce pouvoir doit être interprété de façon raisonnable et libérale (*Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13), mais il ne peut recevoir cette interprétation que s'il existe. L'interprétation ne peut pas suppléer à l'absence de pouvoir.

The appellants argue that no power to regulate the use of pesticides was delegated to municipalities in Quebec, either under a specific grant of power or under the more general provisions of s. 410(1) *C.T.A.* The respondent concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1). It no longer asserts that it could be supported under s. 412(32) concerning toxic materials.

50 Les appelantes prétendent qu'aucun pouvoir de réglementation de l'utilisation des pesticides n'a été délégué aux municipalités du Québec, que ce soit par un pouvoir particulier ou en vertu des dispositions plus générales du par. 410(1) *L.C.V.* L'intimée admet que la seule disposition qui permette de confirmer la légalité de son règlement est la clause générale du par. 410(1). Elle n'affirme plus que son règlement pourrait s'appuyer sur le par. 412(32), qui porte sur les matières toxiques.

As the appellants interpret a general clause like s. 410 *C.T.A.*, it would amount to an empty shell. Any exercise of municipal regulatory authority would require a specific and express grant of power. The history of the *C.T.A.* confirms that the Quebec legislature has generally favoured a drafting technique of delegating regulatory or administrative powers to municipalities through a myriad of specific provisions, which are amended frequently. The reader is then faced with layers of complex and sometimes inconsistent legislation.

51 Si l'on acceptait l'interprétation par les appelantes d'une clause générale comme l'art. 410 *L.C.V.*, cette disposition équivaudrait à une coquille vide. L'exercice de tout pouvoir de réglementation municipal nécessiterait un pouvoir particulier et explicite. L'historique de la *L.C.V.* confirme que la législature du Québec privilégie généralement la technique de rédaction consistant à déléguer des pouvoirs de réglementation ou administratifs aux municipalités par d'innombrables dispositions particulières qui sont modifiées fréquemment. Le lecteur se retrouve donc avec une série de dispositions législatives complexes et parfois incohérentes.

In the case of a specific grant of power, its limits must be found in the provision itself. Non-included powers may not be supplemented through the use of the general residuary clauses often found in municipal laws (*R. v. Greenbaum*, [1993] 1 S.C.R. 674).

52 Dans le cas d'un pouvoir particulier, la disposition elle-même doit en préciser les limites. L'application des clauses générales relatives aux pouvoirs non attribués que comportent souvent les lois municipales ne peut pas suppléer aux pouvoirs non visés (*R. c. Greenbaum*, [1993] 1 R.C.S. 674).

53 The case at bar raises a different issue: absent a specific grant of power, does a general welfare provision like s. 410(1) authorize By-law 270? A provision like s. 410(1) must be given some meaning. It reflects the reality that the legislature and its drafters cannot foresee every particular situation. It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously (see F. Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (1996), at pp. 17-24).

La question qui se pose en l'espèce est différente : en l'absence d'un pouvoir particulier, une disposition de bien-être général comme le par. 410(1) autorise-t-elle le règlement 270? Il faut donner un sens à une disposition comme le par. 410(1). Celui-ci correspond à la réalité que la législature et ses rédacteurs ne peuvent pas prévoir tous les cas particuliers. Il paraît donc logique, sur les plans législatif et administratif, de recourir à de telles dispositions pour conférer aux administrations publiques locales le pouvoir résiduaire d'intervenir en cas d'imprévu et de changements ainsi que de traiter des questions nouvelles ou évolutives relativement au bien-être de la collectivité locale vivant sur leur territoire. On ne peut toutefois pas interpréter une telle disposition comme conférant de façon absolue des pouvoirs provinciaux. Il ne suffit pas qu'une question particulière soit devenue une préoccupation urgente selon la collectivité locale. Cette préoccupation doit avoir trait à des problèmes touchant la collectivité comme entité locale et non pas comme membre de la société au sens large. Elle doit être étroitement liée aux intérêts immédiats de la collectivité se trouvant dans les limites territoriales définies par la législature pour ce qui concerne toute question pour laquelle l'intervention des administrations publiques locales peut se révéler utile. Dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, notre Cour a souligné la portée locale d'un tel pouvoir. Elle ne permet pas aux administrations publiques locales et aux collectivités locales d'exercer des pouvoirs pour des questions ne relevant pas du domaine traditionnel des intérêts municipaux, même si les pouvoirs municipaux doivent être interprétés de façon large et libérale (voir F. Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (1996), p. 17-24).

54 In the present case, the subject matter of the by-law lies within the ambit of normal local government activities. It concerns the use and protection of the local environment within the community. The regulation targets problems of use of land and property, and addresses neighbourhood concerns that have always been within the realm of local government activity. Thus, the by-law was prop-

En l'espèce, l'objet du règlement relève des activités normales des administrations publiques locales. Il s'agit de l'utilisation et de la protection de l'environnement local de la collectivité. La réglementation vise les problèmes liés à l'utilisation des terres et des biens, et elle porte sur des préoccupations de quartier qui ont toujours relevé du domaine d'activité des administrations

erly authorized by s. 410(1). I must then turn briefly to the second part of the administrative law argument raised by the appellants, that the particular exercise of the existing municipal power breached principles of delegated legislation against prohibitory and discriminatory regulations.

publiques locales. Par conséquent, le règlement était autorisé en bonne et due forme par le par. 410(1). Je dois donc aborder brièvement la deuxième partie de l'argument de droit administratif soulevé par les appelantes, selon lequel l'exercice particulier du pouvoir municipal existant a contrevenu aux principes de législation déléguée interdisant la prise de règlements prohibitifs et discriminatoires.

Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. (See P. Garant, *Droit administratif* (4th ed. 1996), vol. 1, at pp. 407 *et seq.*; R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), vol. 1, at pp. 435 *et seq.*; Hétu, Duplessis and Pakenham, *supra*, at pp. 677-82 and 691-96.) The drafting technique used in the present case creates an apparent problem. On its face, the by-law involves a general prohibition and then authorizes some specific uses. This obstacle may be overcome through global interpretation of the by-law. When it is read as a whole, its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural purposes. It does not appear as a purely prohibitory legal instrument. As such, it conforms with this first basic principle of municipal law. There remains the problem of the discriminatory aspect of the by-law. Although the by-law discriminates, I agree with L'Heureux-Dubé J. that this kind of regulation implies a necessary component of discrimination. There can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. The regulation needed to identify the various distinctions between different situations. Otherwise, no regulation would have been possible. An implied authority to discriminate was then unavoidably part of the delegated regulatory power.

55

Selon deux principes fondamentaux établis depuis longtemps en matière de législation déléguée, un règlement ne peut pas être prohibitif et discriminatoire à moins que la loi habilitante ne l'autorise. (Voir P. Garant, *Droit administratif* (4e éd. 1996), vol. 1, p. 407 et suiv.; R. Dussault et L. Borgeat, *Traité de droit administratif* (2e éd. 1984), t. I, p. 557 et suiv.; Hétu, Duplessis et Pakenham, *op. cit.*, p. 677-682 et 691-696.) La technique de rédaction employée en l'espèce crée un problème apparent. Le règlement établit de prime abord une prohibition générale pour ensuite permettre certaines utilisations particulières. L'interprétation globale du règlement permet de contourner cet obstacle. Lu dans son ensemble, le règlement a comme effet d'interdire l'utilisation des pesticides pour des raisons purement esthétiques tout en permettant d'autres utilisations, surtout pour des activités commerciales et agricoles. Il ne paraît pas constituer un texte juridique purement prohibitif. À ce titre, il respecte ce premier principe fondamental du droit municipal. Il reste le problème de l'aspect discriminatoire du règlement. Bien que le règlement soit discriminatoire, je conviens avec le juge L'Heureux-Dubé que ce genre de réglementation comporte nécessairement une composante de discrimination. Il ne peut y avoir aucune réglementation sur un tel sujet sans une certaine forme de discrimination, en ce sens que le règlement doit établir où, quand et comment un produit particulier peut être utilisé. La réglementation devait établir les diverses distinctions entre les différentes situations. Autrement, aucune réglementation n'aurait été possible. Le pouvoir de réglementation délégué comportait donc inévitablement le pouvoir implicite de faire de la discrimination.

56 For these reasons, the appeal is dismissed, with costs to the respondent the Town of Hudson.

Appeal dismissed with costs.

Solicitors for the appellants: Fraser Milner Casgrain, Montréal.

Solicitors for the respondent: Bélanger Sauvé, Montréal.

Solicitors for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada: Sierra Legal Defence Fund, Toronto.

Solicitors for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond: Canadian Environmental Law Association, Toronto.

Solicitors for the intervener Fédération interdisciplinaire de l'horticulture ornementale du Québec: Ogilvy Renault, Québec.

Pour ces motifs, le pourvoi est rejeté avec dépens en faveur de l'intimée la ville de Hudson.

Pourvoi rejeté avec dépens.

Procureurs des appelantes : Fraser Milner Casgrain, Montréal.

Procureurs de l'intimée : Bélanger Sauvé, Montréal.

Procureurs des intervenants la Fédération canadienne des municipalités, Nature-Action Québec Inc. et le Fonds mondial pour la nature (Canada) : Sierra Legal Defence Fund, Toronto.

Procureurs des intervenants Toronto Environmental Alliance, Sierra Club du Canada, l'Association canadienne du droit de l'environnement, Parents' Environmental Network, Healthy Lawns — Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee et Dr Merryl Hammond : Association canadienne du droit de l'environnement, Toronto.

Procureurs de l'intervenante la Fédération interdisciplinaire de l'horticulture ornementale du Québec : Ogilvy Renault, Québec.

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, Minister of Energy, Mines and Resources, and Government of Yukon *Appellants/Respondents on cross-appeal*

v.

Little Salmon/Carmacks First Nation and Johnny Sam and Eddie Skookum, on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation *Respondents/Appellants on cross-appeal*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Newfoundland and Labrador, Gwich'in Tribal Council, Sahtu Secretariat Inc., Grand Council of the Crees (Eeyou Istchee)/ Cree Regional Authority, Council of Yukon First Nations, Kwanlin Dün First Nation, Nunavut Tunngavik Inc., Tlicho Government, Te'Mexw Nations and Assembly of First Nations *Interveners*

David Beckman, en sa qualité de directeur, Direction de l'agriculture, ministère de l'Énergie, des Mines et des Ressources, Ministre de l'Énergie, des Mines et des Ressources, et gouvernement du Yukon *Appelants/Intimés au pourvoi incident*

c.

Première nation de Little Salmon/Carmacks et Johnny Sam et Eddie Skookum, en leur propre nom et au nom de tous les autres membres de la Première nation de Little Salmon/Carmacks *Intimés/Appelants au pourvoi incident*

et

Procureur général du Canada, procureur général du Québec, procureur général de Terre-Neuve-et-Labrador, Conseil tribal des Gwich'in, Sahtu Secretariat Inc., Grand conseil des Cris (Eeyou Istchee)/ Administration régionale crie, Conseil des Premières nations du Yukon, Première nation de Kwanlin Dün, Nunavut Tunngavik Inc., gouvernement tlicho, Nations Te'Mexw et Assemblée des Premières Nations *Intervenants*

INDEXED AS: BECKMAN *v.* LITTLE SALMON/ CARMACKS FIRST NATION

2010 SCC 53

File No.: 32850.

2009: November 12; 2010: November 19.

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

RÉPERTORIÉ : BECKMAN *c.* PREMIÈRE NATION DE LITTLE SALMON/CARMACKS

2010 CSC 53

N° du greffe : 32850.

2009 : 12 novembre; 2010 : 19 novembre.

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

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

Constitutional law — Aboriginal peoples — Aboriginal rights — Land claims — Duty of Crown to consult

EN APPEL DE LA COUR D'APPEL DU YUKON

Droit constitutionnel — Autochtones — Droits ancestraux — Revendications territoriales — Obligation de la

and accommodate in the context of a modern comprehensive land claims treaty — Treaty provides Aboriginal right of access for hunting and fishing for subsistence in their traditional territory — Application by non-Aboriginal for an agricultural land grant within territory approved by Crown — Whether Crown had duty to consult and accommodate Aboriginal peoples — If so, whether Crown discharged its duty — Constitution Act, 1982, s. 35.

Crown law — Honour of the Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate prior to making decisions that might adversely affect Aboriginal rights and title claims.

Administrative law — Judicial review — Standard of review — Whether decision maker had duty to consult and accommodate — If so, whether decision maker discharged this duty — Lands Act, R.S.Y. 2002, c. 132; Territorial Lands (Yukon) Act, S.Y. 2003, c. 17.

Little Salmon/Carmacks entered into a land claims agreement with the governments of Canada and the Yukon Territory in 1997, after 20 years of negotiations. Under the treaty, Little Salmon/Carmacks members have a right of access for hunting and fishing for subsistence in their traditional territory, which includes a parcel of 65 hectares for which P submitted an application for an agricultural land grant in November 2001. The land applied for by P is within the trapline of S, who is a member of Little Salmon/Carmacks.

Little Salmon/Carmacks disclaim any allegation that a grant to P would violate the treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of Little Salmon/Carmacks attach importance to their ongoing treaty interest in surrendered Crown lands (of which the 65 acres forms a small part). Little Salmon/Carmacks contend that in considering the grant to P the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns.

The Yukon government's Land Application Review Committee ("LARC") considered P's application at a

Couronne de consulter et d'accommoder les Autochtones dans le contexte d'un traité récent relatif à des revendications territoriales globales — Traité accordant aux Autochtones l'accès à leur territoire traditionnel pour y pratiquer la chasse et la pêche de subsistance — Approbation, par la Couronne, d'une demande de concession de terres agricoles dans ce territoire présentée par un non-Autochtone — La Couronne avait-elle l'obligation de consulter et d'accommoder les Autochtones? — Si oui, la Couronne s'est-elle acquittée de cette obligation? — Loi constitutionnelle de 1982, art. 35.

Droit de la Couronne — Honneur de la Couronne — Obligation de consulter et d'accommoder les Autochtones — La Couronne a-t-elle l'obligation de consulter et d'accommoder les Autochtones avant de prendre des décisions susceptibles d'avoir des conséquences négatives sur leurs revendications de titre et de droits?

Droit administratif — Contrôle judiciaire — Norme de contrôle — Le décideur avait-il l'obligation de consulter et d'accommoder les Autochtones? — Si oui, s'est-il acquitté de cette obligation? — Loi sur les terres, L.R.Y. 2002, ch. 132; Loi du Yukon sur les terres territoriales, L.Y. 2003, ch. 17.

En 1997, après 20 ans de négociations, la Première nation Little Salmon/Carmacks a conclu avec les gouvernements du Canada et du Territoire du Yukon un accord sur les revendications territoriales. Aux termes du traité, les membres de la première nation possèdent, à des fins de chasse et de pêche de subsistance, un droit d'accès à leur territoire traditionnel qui englobe une parcelle de 65 hectares à l'égard de laquelle P a fait une demande de concession de terres agricoles en novembre 2001. La parcelle visée par la demande de P se trouve dans le territoire de piégeage de S, un membre de la première nation.

La première nation rejette toute allégation que la concession d'une parcelle à P violerait le traité, qui prévoit lui-même que des terres cédées peuvent à l'occasion être prises à d'autres fins, notamment à des fins agricoles. Mais jusqu'à ce que des terres aient été ainsi prises, les membres de la première nation accordent de l'importance à l'intérêt qu'ils conservent sur les terres cédées à la Couronne (dont les 65 hectares forment une petite partie). La première nation soutient qu'en examinant la demande de concession de P, le gouvernement territorial a agi sans tenir la consultation requise et sans prendre en compte les préoccupations pertinentes de la première nation.

Le Comité d'examen des demandes d'aliénation de terres (« CEDAT ») du gouvernement du Yukon a

meeting to which it invited Little Salmon/Carmacks. The latter submitted a letter of opposition to P's application prior to the meeting, but did not attend. At the meeting, LARC recommended approval of the application and, in October 2004, the Director, Agriculture Branch, Yukon Department of Energy, Mines and Resources, approved it. Little Salmon/Carmacks appealed the decision to the Assistant Deputy Minister, who rejected its review request. On judicial review, however, the Director's decision was quashed and set aside. The chambers judge held that the Yukon failed to comply with the duty to consult and accommodate. The Court of Appeal allowed the Yukon's appeal.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ.: When a modern land claim treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people — it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself.

In this case, a continuing duty to consult existed. Members of Little Salmon/Carmacks possessed an express treaty right to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the Treaty did not prevent the government from making land grants out of the Crown's holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic and cultural activities of Little Salmon/Carmacks, and the Yukon was required to consult with Little Salmon/Carmacks to determine the nature and extent of such adverse effects.

The treaty itself set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged

examiné la demande de P lors d'une réunion à laquelle étaient invités les représentants de la première nation. Cette dernière ne s'est pas fait représenter à la réunion mais avait présenté une lettre d'opposition à la demande de P. À la réunion, le CEDAT a recommandé l'approbation de la demande, et le directeur de la Direction de l'agriculture du ministère de l'Énergie, des Mines et des Ressources du Yukon l'a approuvée au mois d'octobre 2004. La première nation a fait appel de la décision auprès du sous-ministre adjoint, qui a rejeté la demande de révision. À l'issue du contrôle judiciaire toutefois, la décision du directeur a été annulée. Le juge siégeant en cabinet a conclu que le Yukon n'avait pas respecté son obligation de consulter et d'accommoder. La Cour d'appel a accueilli l'appel du Yukon.

Arrêt : Le pourvoi et le pourvoi incident sont rejetés.

La juge en chef McLachlin et les juges Binnie, Fish, Abella, Charron, Rothstein et Cromwell : Lorsqu'un traité récent relatif aux revendications territoriales a été conclu, la première étape consiste à en examiner les dispositions et à tenter de déterminer les obligations respectives des parties et l'existence, dans le traité lui-même, d'une forme quelconque de consultation. Les parties peuvent s'entendre sur les modalités de la consultation, mais la Couronne ne peut se soustraire à son obligation de traiter honorablement avec les Autochtones — il s'agit d'une doctrine qui s'applique indépendamment de l'intention des parties, que cette intention soit expresse ou implicite dans le traité lui-même.

En l'espèce, l'obligation de consulter était permanente. Les membres de la première nation possédaient un droit, prévu expressément au traité, de pratiquer la chasse et la pêche de subsistance sur leur territoire traditionnel qui a maintenant été cédé et est considéré comme des terres de la Couronne. Même si le traité n'empêchait pas le gouvernement de concéder des terres de la Couronne, cette possibilité y était même prévue, il était évident que cela risquait d'avoir des conséquences négatives sur les activités économiques et culturelles traditionnelles de la première nation, et le Yukon était tenu de consulter cette dernière afin de déterminer la nature et l'étendue de ces conséquences négatives.

Le traité lui-même précise les éléments considérés par les parties comme constituant une consultation appropriée (lorsqu'une consultation est nécessaire). Ces éléments comprennent un avis suffisamment détaillé concernant la question à trancher afin de permettre à la partie consultée de préparer sa position sur la question, un délai suffisant pour permettre à la partie devant être consultée de préparer sa position sur la question ainsi

to consult; and full and fair consideration by the party obliged to consult of any views presented.

The actual treaty provisions themselves did not govern the process for agricultural grants at the time. However, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more elaborate consultation process in the Treaty itself, the scope of the duty of consultation in this situation was at the lower end of the spectrum.

Accordingly, the Director was required, as a matter of compliance with the legal duty to consult based on the honour of the Crown, to be informed about and consider the nature and severity of any adverse impact of the proposed grant before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to re-open the Treaty or to re-negotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown and promoted the objective of reconciliation.

In this case, the duty of consultation was discharged. Little Salmon/Carmacks acknowledges that it received appropriate notice and information. The Little Salmon/Carmacks objections were made in writing and they were dealt with at a meeting at which Little Salmon/Carmacks was entitled to be present (but failed to attend). Both Little Salmon/Carmacks' objections and the response of those who attended the meeting were before the Director when, in the exercise of his delegated authority, he approved P's application. Neither the honour of the Crown nor the duty to consult required more.

Nor was there any breach of procedural fairness. While procedural fairness is a flexible concept, and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal.

While the Yukon had a duty to consult, there was no further duty of accommodation on the facts of this case. Nothing in the treaty itself or in

que l'occasion de présenter cette position à la partie obligée de tenir la consultation, et un examen complet et équitable de toutes les positions présentées, par la partie obligée de tenir la consultation.

Le processus de concession de terres à des fins agricoles n'était pas régi à l'époque par les dispositions elles-mêmes du traité. Cependant, étant donné l'existence de la cession opérée par le traité et les textes législatifs adoptés en vue de la mise en œuvre de celui-ci, ainsi que la décision des parties de ne pas incorporer dans le traité lui-même un processus de consultation plus élaboré, la portée de l'obligation de consultation dans une telle situation se situait au bas du continuum.

Par conséquent, le directeur était tenu, pour se conformer à l'obligation juridique de consulter fondée sur l'honneur de la Couronne, d'être informé de la nature et de la gravité de toute incidence négative de la concession projetée et d'en tenir compte avant de prendre une décision, pour déterminer (entre autres choses) si des accommodements étaient nécessaires ou appropriés. La consultation n'avait pas pour objet de rouvrir le traité ou de renégocier la possibilité de concéder les terres à des fins agricoles. Cette possibilité était déjà prévue au traité. La consultation était requise afin de faciliter la gestion de la relation importante entre le gouvernement et la communauté autochtone en conformité avec la préservation de l'honneur de la Couronne et la réalisation de l'objectif de réconciliation.

En l'espèce, l'obligation de consultation a été respectée. La première nation reconnaît avoir reçu un avis suffisant et l'information utile. Elle a communiqué ses objections par écrit, et celles-ci ont été étudiées lors d'une réunion à laquelle la première nation avait le droit d'assister (mais à laquelle elle ne s'est pas fait représenter). Le directeur avait pris connaissance des objections de la première nation et de la réponse fournie par les personnes présentes à la réunion lorsque, dans l'exercice de son pouvoir délégué, il a approuvé la demande de P. L'honneur de la Couronne et l'obligation de consultation n'exigeaient rien de plus.

Il n'y a eu non plus aucun manquement à l'équité procédurale. Si l'équité procédurale est une notion souple et prend en compte les aspects qui, dans la décision que doit prendre le directeur, touchent directement les Autochtones, il n'en demeure pas moins que cette doctrine s'applique en droit administratif pour encadrer les relations entre les décideurs gouvernementaux et tous les habitants du Yukon, Autochtones comme non-Autochtones.

Si le Yukon avait une obligation de consultation, les faits de l'espèce ne donnent lieu à aucune autre obligation d'accommodement. Le traité lui-même ou

the surrounding circumstances gave rise to such a requirement.

In exercising his discretion in this case, as in all others, the Director was required to respect legal and constitutional limits. The constitutional limits included the honour of the Crown and its supporting doctrine of the duty to consult. The standard of review in that respect, including the adequacy of the consultation, is correctness. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness.

In this case, the Director did not err in law in concluding that the level of consultation that had taken place was adequate. The advice the Director received from his officials after consultation is that the impact of the grant of 65 hectares would not be significant. There is no evidence that he failed to give full and fair consideration to the concerns of Little Salmon/Carmacks. The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion. Whether or not a court would have reached a different conclusion is not relevant. The decision to approve or not to approve the grant was given by the legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was reasonable in the circumstances.

Per LeBel and Deschamps JJ.: Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Little Salmon/Carmacks Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation

l'ensemble des circonstances ne donnent en aucun cas ouverture à une telle obligation.

Dans l'exercice de son pouvoir discrétionnaire dans ce cas, comme dans tous les autres cas, le directeur devait respecter des limites légales et constitutionnelles. Les limites constitutionnelles incluaient l'honneur de la Couronne et le principe de l'obligation de consulter qui l'appuie. La norme de contrôle à cet égard, y compris à l'égard du caractère adéquat de la consultation, est celle de la décision correcte. Dans les limites établies par le droit et la Constitution, toutefois, la décision du directeur doit être examinée selon la norme de la raisonnabilité.

En l'espèce, le directeur n'a pas commis d'erreur de droit en concluant que la consultation menée était adéquate. Selon l'avis reçu de ses fonctionnaires par le directeur après la consultation, les incidences de la concession de 65 hectares de terres ne seraient pas importantes. Rien n'indique que les préoccupations de la première nation n'ont pas fait l'objet d'un examen complet et équitable de sa part. Les documents déposés par les parties lors de la demande de contrôle judiciaire ne révèlent l'existence d'aucune erreur de fait manifeste dans sa conclusion. Le fait qu'un tribunal judiciaire aurait éventuellement pu arriver à une conclusion différente n'est pas pertinent. La décision d'approuver ou de ne pas approuver la concession de la parcelle de terre a été confiée par l'assemblée législative au ministre qui, de la façon habituelle, a délégué ce pouvoir au directeur. La décision prise par ce dernier était raisonnable dans les circonstances.

Les juges LeBel et Deschamps : Si, jusqu'ici, les litiges ont mis en cause une action unilatérale de la Couronne qui déclenchait une obligation de consulter dont les modalités n'avaient pas été négociées, le présent dossier indique que les parties sont maintenant passées à une autre étape. Les processus formels de consultation font maintenant résolument partie de l'univers juridique des traités. L'Entente définitive de Little Salmon/Carmacks n'en est qu'un exemple. Donner leur plein effet aux stipulations d'un traité comme l'Entente définitive c'est renoncer à toute approche paternaliste à l'égard des peuples autochtones. Il s'agit d'une façon de reconnaître leur pleine capacité juridique. Méconnaître les stipulations d'un tel traité ne peut qu'encourager le recours aux tribunaux, nuire aux négociations futures et compromettre la réalisation de l'objectif ultime de réconciliation.

Permettre à une partie de revenir unilatéralement sur son engagement constitutionnel en y superposant des droits et obligations additionnels portant sur des matières déjà prévues au traité risque de se traduire par un mépris juridique paternaliste, de compromettre le

process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights. Nor does the Crown act dishonourably if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty.

Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters a positive long relationship between Aboriginal and non-Aboriginal communities consists in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and respect the other party's rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

It is in fact because the agreement in issue does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply because this is a "modern" treaty constituting a land claims agreement.

processus national de négociation de traités et de nuire à la poursuite de l'objectif ultime de réconciliation. Voilà le péril auquel nous expose ce qui semble être une malheureuse prise en otage du principe constitutionnel d'honneur de la Couronne et du principe en découlant, l'obligation de consulter les Autochtones.

Dans le cadre de la conclusion d'un traité, il n'y a rien de déshonorant pour la Couronne à s'entendre avec une communauté autochtone sur un régime détaillé et multiforme de consultation relative à l'exercice des droits de cette communauté. Il n'y a rien non plus de déshonorant de la part de la Couronne à exiger de la partie autochtone qu'aucun régime parallèle relatif à une matière prévue au traité ne permette à celle-ci de revenir sur ses engagements. En effet, la sécurité juridique est l'objectif premier de toutes les parties à un accord portant règlement de revendication territoriale globale.

Il ne saurait y avoir de sécurité juridique si une des parties à un traité pouvait — unilatéralement et sans que cela ne soit prévu au traité — revenir sur ses engagements à l'égard d'une matière prévue à ce traité. Cela ne veut pas dire qu'il ne peut pas exister de matières dont les parties n'auront pas traité et à l'égard desquelles la partie autochtone pourra ne pas avoir renoncé à d'éventuels droits ancestraux. La sécurité juridique n'exclut pas non plus la possibilité de prévoir, dans un traité, un mécanisme équitable de réexamen.

En ce sens, il devrait être évident que la meilleure façon pour les tribunaux de contribuer à ce qu'un traité favorise une longue relation positive entre parties autochtone et étatique consiste à s'assurer que les parties ne puissent revenir unilatéralement sur leurs engagements. Et il se trouve que, en aval de sa poursuite en tant qu'objectif partagé à l'étape de la négociation, la sécurité juridique ne saurait, à l'étape de la mise en œuvre d'un traité, opérer à sens unique. Au contraire, la sécurité des droits d'une partie implique nécessairement que celle-ci s'acquitte de ses obligations et respecte les droits de l'autre partie. S'étant toutes deux échinées, dans leur intérêt commun, à substituer un système juridique précis à un régime normatif incertain, la partie autochtone et la partie étatique ont toutes deux intérêt à ce que leur œuvre produise ses effets.

En l'espèce, c'est justement parce que l'accord en cause traite bel et bien des différentes formes de consultation auxquelles a droit la partie autochtone concernant les droits que la Couronne veut exercer qu'il faut se garder de superposer à ce régime des droits et obligations qui lui sont étrangers, et non pas simplement parce qu'il s'agit d'un traité « moderne » constituant un accord portant règlement de revendications territoriales.

Even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party. Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

The consultation that must take place if a right of the Aboriginal party is impaired will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework.

Where a treaty provides for a mechanism for consultation, what it does is to override the common law duty to consult Aboriginal peoples; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually.

The courts are not blind to omissions, or gaps left in the treaty, by the parties with respect to consultation, and the common law duty to consult could always be applied to fill such a gap. But no such gap can be found in this case.

These general considerations alone would form a sufficient basis for dismissing the appeal.

But the provisions of the Final Agreement also confirm this conclusion. The Final Agreement includes general and interpretive provisions that are reproduced from the Umbrella Agreement. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement concluded under it, not only the relationship between them, but also that with the law in general. These rules can be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of "Yukon Indian people" as Canadian citizens and their entitlement to

Même lorsque le traité en cause est un accord portant règlement de revendications territoriales, la Cour doit d'abord dégager l'intention commune des parties, elle se prononcera ensuite sur l'application, à la partie autochtone, du régime jurisprudentiel relatif à l'obligation constitutionnelle de consultation. Par conséquent, en présence d'un traité, l'obligation jurisprudentielle de consultation ne s'appliquera qu'en cas d'omission des parties au traité d'avoir prévu cette matière.

La consultation requise lorsqu'il y a atteinte à un droit des Autochtones comportera : (1) soit les mesures prévues par le traité à cet égard; (2) soit, à défaut de telles mesures dans le traité, un degré de consultation que le régime jurisprudentiel établit.

Lorsqu'un traité établit des mesures de consultation, ce que le traité a pour effet d'écarter dans un tel cas est bien l'obligation jurisprudentielle de consultation des peuples autochtones, non pas toute obligation de consulter individuellement le titulaire d'un droit pouvant découler du principe général du droit administratif qu'est l'équité procédurale.

Les tribunaux ne sont pas aveugles aux omissions ou lacunes des parties au traité en matière de consultation et l'obligation jurisprudentielle de consultation pourrait toujours s'appliquer pour combler cette lacune. Mais aucune lacune de ce genre ne peut être constatée dans la présente affaire.

Il serait possible, sur la seule base de ces considérations d'ordre général, de rejeter l'appel principal.

Cependant, les dispositions de l'Entente définitive confirment elles aussi cette conclusion. L'Entente définitive comporte des dispositions générales et interprétatives qui ont été reprises de l'Accord-cadre. Plus exactement, ce régime a d'abord été élaboré par les parties à l'Accord-cadre, puis repris par les parties aux différentes ententes définitives conclues conformément aux stipulations de cet accord. Advenant toute incompatibilité, ce régime l'emporte sur les principes dégagés par la jurisprudence en matière d'interprétation de traités conclus par les gouvernements et les peuples autochtones.

Ces dispositions interprétatives et générales posent aussi certaines normes relatives aux rapports qu'entretiennent l'Accord-cadre et toute entente définitive conclue conformément à ses stipulations, non seulement entre eux, mais avec le reste du droit également. Ces normes peuvent être résumées par le principe selon lequel l'Entente définitive l'emporte sur toute autre règle de droit infraconstitutionnel, sous réserve du fait que ses dispositions ne doivent pas être interprétées d'une manière portant atteinte aux droits des Indiens du Yukon en tant

all the rights, benefits and protections of other citizens. In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the Constitution of Canada. In other words, the Final Agreement contains no provisions that affect the general principle that the common law duty to consult will apply only where the parties have failed to address the issue of consultation. This will depend on whether the parties have come to an agreement on this issue, and if they have, the treaty will — unless, of course, the treaty itself provides otherwise — override the application to the parties of any parallel framework, including the common law framework.

In this case, the parties included provisions in the treaty that deal with consultation on the very question of the Crown's right to transfer Crown land upon an application like the one made by P.

P's application constituted a project to which the assessment process provided for in Chapter 12 of the Final Agreement applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

Moreover, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in the management of those resources at the predecision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

The territorial government's conduct raises questions in some respects. In particular, there is the fact that the Director did not notify the First Nation of his decision of October 18, 2004 until July 27, 2005.

que citoyens canadiens ni à leur droit de jouir de tous les droits, avantages et protections reconnus aux autres citoyens. En somme, donc, sauf exception le traité se substitue aux droits ancestraux relativement aux matières dont il dispose et il a préséance, en cas d'incompatibilité, sur le reste du droit infraconstitutionnel.

En ce qui a trait à la relation entre le traité en cause et le reste de notre droit constitutionnel au-delà du seul régime jurisprudentiel des droits ancestraux, un tel traité ne saurait évidemment à lui seul modifier la Constitution du Canada. Autrement dit, l'Entente définitive ne contient pas de dispositions qui auraient une incidence sur le principe général selon lequel l'obligation de consultation de régime jurisprudentiel ne s'appliquera qu'en cas d'omission des parties au traité d'avoir prévu cette matière. En effet, tout dépendra de ce que les parties auront ou non convenu sur la question, auquel cas le traité, sauf bien sûr renvoi à l'effet contraire dans celui-ci, aura écarté l'application entre les parties de tout régime parallèle, y compris le régime jurisprudentiel.

En l'espèce, les parties ont prévu, dans le traité des dispositions concernant la consultation sur la question précise du droit de la Couronne de céder de ses terres à la suite d'une demande comme celle de P.

La demande de P constituait un projet soumis au processus d'évaluation prévu au chapitre 12 de l'Entente définitive. Ce processus n'avait pas été mis en œuvre, mais le chapitre 12 l'avait été, y compris les règles de droit provisoire y figurant. En vertu de ces règles, tout processus existant d'évaluation des activités de développement demeurait en vigueur. Ces processus prévoyaient non seulement la consultation de la nation autochtone concernée, mais aussi sa participation à l'évaluation du projet. Une telle participation impliquait un niveau de consultation supérieur à celui qui aurait été fondé sur l'obligation faite par la jurisprudence à cet égard. En conséquence, rien, en l'espèce, ne saurait justifier le recours à une obligation externe à celle prévue par l'Entente définitive.

De plus, les dispositions du chapitre 16 qui concernent la gestion des ressources halieutiques et fauniques instaurent un régime par lequel les premières nations sont généralement invitées à participer à la gestion de ces ressources sur une base prédécisionnelle. Notamment, l'invitation qui leur est faite de proposer des plans de gestion des ressources halieutiques et fauniques peut être considérée comme une consultation.

À certains égards, la conduite des autorités territoriales soulève des interrogations. C'est notamment le cas en ce qui a trait au fait que le directeur n'a signifié que le 27 juillet 2005 à la première nation sa décision

Under s. 81(1) of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"), the "designated office" and, if applicable, the executive committee of the Yukon Development Assessment Board would have been entitled to receive copies of that decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is the Land Application Review Committee ("LARC"). Even if representatives of the First Nation did not attend the August 13, 2004 meeting, it would be expected that the Director would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

The territorial government's decision to proceed with P's application at the "prescreening" stage despite the requirement of consultation in the context of the First Nation's fish and wildlife management plan was not an exemplary practice either. However, the First Nation did not express concern about this in its letter of July 27, 2004 to Yukon's Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

Despite these aspects of the handling of P's application that are open to criticism, it can be seen from the facts as a whole that the respondents received what they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*.

The only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder. That consultation would have been minimal, whereas the First Nation was invited to participate directly in the assessment of P's application as a member of LARC.

du 18 octobre 2004. En vertu du par. 81(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*, L.C. 2003, ch. 7, (« *LÉESY* »), le « bureau désigné » et, le cas échéant, le comité de direction de la Commission d'évaluation des activités de développement du Yukon auraient eu droit de recevoir une copie de cette décision, et ce, on peut le supposer, à l'intérieur d'un délai raisonnable. L'équivalent fonctionnel du bureau désigné est ici le Comité d'examen des demandes d'aliénation de terres (« CEDAT »). Même si les représentants de la première nation ne se sont pas présentés à la réunion du 13 août 2004, on se serait attendu à ce que le directeur informe cette première nation de sa décision dans un délai raisonnable. Ce délai, survenu après la décision, n'a cependant pas affecté la qualité de la consultation préalable.

La décision qu'a prise l'administration territoriale, au terme de l'examen préalable, de poursuivre le traitement de la demande de P malgré la consultation qui avait cours dans le cadre du plan de gestion des ressources halieutiques et fauniques de la première nation n'est pas davantage un exemple de bonne pratique. Cependant, la première nation n'a pas exprimé cette préoccupation dans sa lettre du 27 juillet 2004 à la Direction des Terres du Yukon. De plus, comme le démontre le procès-verbal de la réunion du 13 août 2004, les préoccupations de la première nation concernant la conservation des ressources ont été prises en considération. Au surplus, la consultation qui avait cours dans le cadre du plan de gestion des ressources halieutiques et fauniques était beaucoup plus limitée que celle à laquelle donnait droit la participation de la première nation au CEDAT qui était chargé d'évaluer le projet spécifique faisant l'objet du présent pourvoi. De surcroît, la première nation, le conseil des ressources renouvelables et le ministre ne s'étaient pas entendus sur la suspension provisoire du traitement de toute demande d'aliénation de terres dans la région visée.

Au-delà de ces aspects critiquables du cheminement de la demande de P, l'ensemble des faits révèle que les intimés ont reçu des appelants ce à quoi ils avaient droit de la part de ceux-ci en matière de consultation à titre de première nation. En réalité, ils ont même obtenu à certains égards davantage que ce que leur aurait procuré la *LÉESY*.

Le seul droit qu'aurait obtenu la première nation en vertu de la *LÉESY* est celui d'être entendue à titre de personne intéressée par le bureau de circonscription. Il s'agissait là d'une consultation minimale, alors que la première nation a été invitée à participer directement, à titre d'évaluateur membre du CEDAT, à l'évaluation de la demande de P.

It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had already submitted comments in a letter.

Thus, the process that led to the October 18, 2004 decision on P's application was consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

Cases Cited

By Binnie J.

Considered: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Badger*, [1996] 1 S.C.R. 771; **applied:** *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; **referred to:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

By Deschamps J.

Considered: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Reference*

Il est vrai que les représentants de la première nation ne se sont pas présentés à la réunion du 13 août 2004. Cela est survenu sans qu'ils ne préviennent au préalable les autres membres du CEDAT et sans demander l'ajournement de la réunion mais alors qu'ils avaient fait des commentaires par lettre.

Par conséquent, le processus qui a mené à la décision du 18 octobre 2004 relativement à la demande de P respectait les dispositions de droit provisoire prévues au chapitre 12 de l'Entente définitive. Il n'existe aucun motif juridique permettant de conclure que l'obligation de consultation de la Couronne a été violée.

Jurisprudence

Citée par le juge Binnie

Arrêts examinés : *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Badger*, [1996] 1 R.C.S. 771; **arrêts appliqués :** *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557; **arrêts mentionnés :** *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227, autorisation d'appel refusée, [1981] 2 R.C.S. xi; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256.

Citée par la juge Deschamps

Arrêt examiné : *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; **arrêts mentionnés :** *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004]

re Secession of Quebec, [1998] 2 S.C.R. 217; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. White* (1964), 50 D.L.R. (2d) 613, aff'd (1965), 52 D.L.R. (2d) 481; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746.

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3 R.C.S. 550; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *St. Ann's Island Shooting and Fishing Club Ltd. c. The King*, [1950] R.C.S. 211; *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Mitchell c. M.R.N.*, 2001 CSC 33, [2001] 1 R.C.S. 911; *R. c. White* (1964), 50 D.L.R. (2d) 613, conf. par (1965), 52 D.L.R. (2d) 481; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Province of Ontario c. Dominion of Canada* (1895), 25 R.C.S. 434; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Sundown*, [1999] 1 R.C.S. 393; *R. c. Marshall*, [1999] 3 R.C.S. 456; *Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557; *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; *Bande indienne d'Osoyoos c. Oliver (Ville)*, 2001 CSC 85, [2001] 3 R.C.S. 746.

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Brad Armstrong, *Q.C.*, *Keith Bergner*, *Penelope Gawn* and *Lesley McCullough*, for the appellants/respondents on cross-appeal.

Jean Teillet, *Arthur Pape* and *Richard B. Salter*, for the respondents/appellants on cross-appeal.

Mitchell R. Taylor, *Q.C.*, for the intervener the Attorney General of Canada.

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Brad Armstrong, *c.r.*, *Keith Bergner*, *Penelope Gawn* et *Lesley McCullough*, pour les appelants/intimés au pourvoi incident.

Jean Teillet, *Arthur Pape* et *Richard B. Salter*, pour les intimés/appelants au pourvoi incident.

Mitchell R. Taylor, *c.r.*, pour l'intervenant le procureur général du Canada.

Hugues Melançon and *Natacha Lavoie*, for the intervener the Attorney General of Quebec.

Rolf Pritchard and *Justin S. C. Mellor*, for the intervener the Attorney General of Newfoundland and Labrador.

Brian A. Crane, *Q.C.*, for the interveners the Gwich'in Tribal Council and Sahtu Secretariat Inc.

Jean-Sébastien Clément and *François Dandonneau*, for the intervener the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority.

James M. Coady, *Dave Joe* and *Daryn R. Leas*, for the intervener the Council of Yukon First Nations.

Joseph J. Arvay, *Q.C.*, and *Bruce Elwood*, for the intervener the Kwanlin Dün First Nation.

James R. Aldridge, *Q.C.*, and *Dominique Nouvet*, for the intervener Nunavut Tunngavik Inc.

John Donihee, for the intervener the Tlicho Government.

Robert J. M. Janes and *Karey M. Brooks*, for the intervener the Te'Mexw Nations.

Peter W. Hutchins and *Julie Corry*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

[1] Binnie J. — This appeal raises important questions about the interpretation and implementation of modern comprehensive land claims treaties between the Crown and First Nations and other levels of government.

[2] The treaty at issue here is the Little Salmon/Carmacks First Nation Final Agreement (the "LSCFN Treaty"), which was finalized in 1996 and ratified by members of the First Nation in

Hugues Melançon et *Natacha Lavoie*, pour l'intervenant le procureur général du Québec.

Rolf Pritchard et *Justin S. C. Mellor*, pour l'intervenant le procureur général de Terre-Neuve-et-Labrador.

Brian A. Crane, *c.r.*, pour les intervenants le Conseil tribal des Gwich'in et Sahtu Secretariat Inc.

Jean-Sébastien Clément et *François Dandonneau*, pour l'intervenant le Grand conseil des Cris (Eeyou Istchee)/Administration régionale crie.

James M. Coady, *Dave Joe* et *Daryn R. Leas*, pour l'intervenant le Conseil des Premières nations du Yukon.

Joseph J. Arvay, *c.r.*, et *Bruce Elwood*, pour l'intervenante la Première nation de Kwanlin Dün.

James R. Aldridge, *c.r.*, et *Dominique Nouvet*, pour l'intervenante Nunavut Tunngavik Inc.

John Donihee, pour l'intervenant le gouvernement tlicho.

Robert J. M. Janes et *Karey M. Brooks*, pour l'intervenante les Nations Te'Mexw.

Peter W. Hutchins et *Julie Corry*, pour l'intervenante l'Assemblée des Premières Nations.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, Fish, Abella, Charron, Rothstein et Cromwell rendu par

[1] Le juge Binnie — Ce pourvoi soulève d'importantes questions touchant l'interprétation et la mise en œuvre des traités récents relatifs à des revendications territoriales globales conclus entre la Couronne, les Premières Nations et d'autres paliers de gouvernement.

[2] Le traité en cause en l'espèce est l'Entente définitive de la Première nation de Little Salmon/Carmacks (le « traité PNLSC »), finalisée en 1996 et ratifiée par les membres de la première nation

1997. The LSCFN Treaty is one of 11 that arose out of and implement an umbrella agreement signed in 1993 after 20 years of negotiations between representatives of all of the Yukon First Nations and the federal and territorial governments. It was a monumental achievement. These treaties fall within the protection of s. 35 of the *Constitution Act, 1982*, which gives constitutional protection to existing Aboriginal and treaty rights.

[3] The present dispute relates to an application for judicial review of a decision by the Yukon territorial government dated October 18, 2004, to approve the grant of 65 hectares of surrendered land to a Yukon resident named Larry Paulsen. The plot borders on the settlement lands of the Little Salmon/Carmacks First Nation, and forms part of its traditional territory, to which its members have a treaty right of access for hunting and fishing for subsistence. In the result, Mr. Paulsen still awaits the outcome of the grant application he submitted on November 5, 2001.

[4] The First Nation disclaims any allegation that the Paulsen grant would violate the LSCFN Treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of the LSCFN have an ongoing treaty interest in surrendered Crown lands (of which the 65 hectares form a small part), to which they have a treaty right of access for hunting and fishing for subsistence. The LSCFN contends that the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns. They say the decision of October 18, 2004, to approve the Paulsen grant should be quashed.

[5] The territorial government responds that no consultation was required. The LSCFN Treaty,

en 1997. Le traité PNLSC s'inscrit dans une série de 11 traités découlant et assurant la mise en œuvre d'un accord-cadre signé en 1993 après 20 ans de négociations entre des représentants de l'ensemble des premières nations du Yukon et les gouvernements fédéral et territorial. Il s'agissait d'une réalisation des plus imposantes. Ces traités sont visés par l'art. 35 de la *Loi constitutionnelle de 1982*, qui accorde une protection constitutionnelle aux droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada.

[3] Le litige concerne une demande de contrôle judiciaire d'une décision par laquelle le gouvernement territorial du Yukon a approuvé, le 18 octobre 2004, la concession à un habitant du Yukon nommé Larry Paulsen de 65 hectares de terres cédées. La parcelle en question est contiguë aux terres visées par le règlement de la Première nation de Little Salmon/Carmacks (« PNLSC »), et fait partie de son territoire traditionnel, auquel ses membres ont un droit d'accès issu d'un traité à des fins de chasse et de pêche de subsistance. En raison de ce litige, M. Paulsen attend toujours le résultat de sa demande de concession de terre présentée le 5 novembre 2001.

[4] La première nation rejette toute allégation suivant laquelle la concession de la parcelle à M. Paulsen violerait le traité PNLSC, qui lui-même prévoit que des terres cédées peuvent à l'occasion être prises à d'autres fins, notamment à des fins agricoles. Mais jusqu'à ce que des terres aient été ainsi prises, les membres de la PNLSC conservent un intérêt issu d'un traité relativement aux terres de la Couronne cédées (dont les 65 hectares forment une petite partie), à l'égard desquelles ils ont un droit d'accès issu d'un traité à des fins de chasse et de pêche de subsistance. La PNLSC soutient que le gouvernement territorial a agi sans effectuer la consultation requise et sans tenir compte des préoccupations pertinentes de la première nation. Selon elle, la décision du 18 octobre 2004 approuvant la concession de terres à M. Paulsen devrait être annulée.

[5] Le gouvernement territorial réplique qu'aucune consultation n'était exigée. Le traité

it says, is a complete code. The treaty refers to consultation in over 60 different places but a land grant application is not one of them. Where not specifically included, the duty to consult, the government says, is excluded.

[6] The important context of this appeal, therefore, is an application for judicial review of a decision that was required to be made by the territorial government having regard to relevant constitutional as well as administrative law constraints. The Yukon Court of Appeal held, as had the trial judge, that the LSCFN Treaty did not exclude the duty of consultation, although in this case the content of that duty was at the lower end of the spectrum (2007 YKSC 28; 2008 YKCA 13). The Court of Appeal went on to hold, disagreeing in this respect with the trial judge, that on the facts the government's duty of consultation had been fulfilled.

[7] I agree that the duty of consultation was not excluded by the LSCFN Treaty, although its terms were relevant to the exercise of the territorial government discretion, as were other principles of administrative and Aboriginal law, as will be discussed. On the facts of the Paulsen application, however, I agree with the conclusion of the Court of Appeal that the First Nation did not make out its case. The First Nation received ample notice of the Paulsen application, an adequate information package, and the means to make known its concerns to the decision maker. The LSCFN's objections were made in writing and they were dealt with at a meeting at which the First Nation was entitled to be present (but failed to show up). Both the First Nation's objections and the response of those who attended the meeting were before the appellant when, in the exercise of his delegated authority, he approved the Paulsen application. In light of the consultation provisions contained in the treaty, neither the honour of the Crown nor the duty to consult were breached. Nor was there any breach of procedural fairness. Nor can it be said that the appellant acted unreasonably in making

PNLSC constitue, dit-il, un code complet. Il est question de consultation à plus de 60 endroits différents dans le traité, mais jamais à propos d'une demande de concession de terres. Lorsque l'obligation de consulter n'est pas spécifiquement mentionnée, dit le gouvernement, elle est exclue.

[6] Le pourvoi s'inscrit donc dans le contexte important d'une demande de contrôle judiciaire d'une décision que le gouvernement territorial devait prendre en tenant compte des contraintes applicables qu'imposent tant le droit constitutionnel que le droit administratif. La Cour d'appel du Yukon a conclu, comme le juge de première instance, que le traité PNLSC n'excluait pas l'obligation de consulter, bien que le contenu de cette obligation se situait en l'espèce au bas du continuum (2007 YKSC 28; 2008 YKCA 13). La Cour d'appel a ensuite conclu, en désaccord sur ce point avec le juge de première instance, que selon les faits, le gouvernement s'était acquitté de son obligation de consulter.

[7] J'estime moi aussi que l'obligation de consulter n'était pas exclue par le traité PNLSC, même si les clauses de ce dernier étaient pertinentes à l'égard de l'exercice, par le gouvernement territorial, de son pouvoir discrétionnaire, à l'instar d'autres principes du droit administratif et du droit des Autochtones, comme nous le verrons. Mais devant les faits relatifs à la demande de M. Paulsen, je suis d'accord avec la conclusion de la Cour d'appel selon laquelle la première nation n'a pas réussi à démontrer le bien-fondé de ses arguments. La première nation a été avisée longtemps d'avance de la demande de M. Paulsen; on lui a fourni une documentation adéquate et on lui a donné le moyen de faire connaître ses préoccupations au décideur. La PNLSC a communiqué ses objections par écrit, et celles-ci ont été étudiées lors d'une réunion à laquelle la première nation avait le droit d'assister (mais à laquelle elle ne s'est pas fait représenter). L'appelant avait pris connaissance des objections soulevées par la première nation et de la réponse fournie par les personnes présentes à la réunion lorsque, dans l'exercice de son pouvoir délégué, il a approuvé la demande de M. Paulsen. Vu les dispositions relatives à la consultation contenues

the decision that he did. I would dismiss the appeal and cross-appeal.

I. Overview

[8] Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations. The objective was not only to build alliances with First Nations but to keep the peace and to open up the major part of those territories to colonization and settlement. No treaties were signed with the Yukon First Nations until modern times.

[9] Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties. The negotiation costs to Yukon First Nations of their various treaties, financed by the federal government through reimbursable loans, were enormous. The LSCFN share alone exceeded seven million dollars. Under the Yukon treaties, the Yukon First Nations surrendered their Aboriginal rights in almost 484,000 square kilometres, roughly the size of Spain, in exchange for defined treaty rights in respect of land tenure and a quantum of settlement land (41,595 square kilometres), access to Crown lands, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources. To this end, the LSCFN Treaty creates important institutions of self-government and authorities such as the Yukon Environmental and Socio-economic Assessment Board and the Carmacks Renewable Resources Council, whose members are jointly nominated by the First Nation and the territorial government.

au traité, l'honneur de la Couronne a été préservé et il n'y a eu aucun manquement à l'obligation de consultation. Il n'y a eu non plus aucun manquement à l'équité procédurale. On ne peut en outre affirmer que l'appelant a agi de manière déraisonnable en prenant la décision qu'il a prise. Je suis d'avis de rejeter le pourvoi et le pourvoi incident.

I. Vue d'ensemble

[8] Dans le passé, les traités ont constitué le moyen par lequel la Couronne s'est efforcée de faire accepter aux habitants autochtones de ce qui est maintenant le Canada l'affirmation de la souveraineté européenne sur les territoires traditionnellement occupés par les Premières Nations. L'objectif ne consistait pas seulement à construire des alliances avec celles-ci, mais à maintenir la paix et à ouvrir la majeure partie de ces territoires à la colonisation. Aucun traité n'a été signé avec les premières nations du Yukon avant l'ère moderne.

[9] Contrairement aux traités historiques, les traités récents portant sur des revendications globales sont le fruit de longues négociations entre des parties qui sont averties et disposent de ressources importantes. Le coût énorme de la négociation des divers traités, pour les premières nations du Yukon, a été financé par le gouvernement fédéral au moyen de prêts remboursables. Pour la seule PNLSC, le coût a dépassé les sept millions de dollars. En vertu des traités du Yukon, les premières nations du Yukon ont cédé leurs droits ancestraux sur presque 484 000 kilomètres carrés, soit environ la superficie de l'Espagne, contre des droits définis par traités au chapitre de la tenure et une certaine quantité de terres visées par le règlement (41 595 kilomètres carrés), l'accès aux terres de la Couronne, à la récolte de poissons et d'animaux sauvages et aux ressources patrimoniales, une indemnisation pécuniaire et la participation à la gestion des ressources publiques. À cette fin, le traité PNLSC établit d'importantes institutions d'autonomie gouvernementale et des autorités comme l'Office d'évaluation environnementale et socioéconomique du Yukon et le Conseil des ressources renouvelables de Carmacks, dont les membres sont désignés conjointement par la première nation et le gouvernement territorial.

[10] The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[11] Equally, however, the LSCFN is bound to recognize that the $34 million and other treaty benefits it received in exchange for the surrender has earned the territorial government a measure of flexibility in taking up surrendered lands for other purposes.

[12] The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties such as the 1760-61 Treaty at issue in *R. v. Marshall*, [1999] 3 S.C.R. 456, and post-Confederation treaties such as Treaty No. 8 (1899) at issue in *R. v. Badger*, [1996] 1 S.C.R. 771, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and

[10] La réconciliation des Canadiens autochtones et non autochtones dans le cadre d'une relation à long terme empreinte de respect mutuel : voilà le noble objectif de l'art. 35 de la *Loi constitutionnelle de 1982*. Les traités récents, y compris ceux en cause en l'espèce, tentent de contribuer à la réalisation de cet objectif de réconciliation, non seulement en répondant aux griefs relatifs aux revendications territoriales, mais en créant le fondement juridique propre à favoriser une relation à long terme harmonieuse entre les collectivités autochtones et non autochtones. Une application judicieuse du traité aidera à aplanir, sans nécessairement les éliminer, certains des malentendus et des doléances qui ont caractérisé le passé. Mais comme le montrent les faits de la présente affaire, l'objectif du traité ne pourra être atteint si les responsables territoriaux l'interprètent de façon mesquine ou comme s'il s'agissait d'un banal contrat commercial. Le traité vise tout autant l'établissement de relations que la résolution des griefs du passé. L'avenir est plus important que le passé. Un canoteur qui souhaite avancer regarde devant lui, non derrière.

[11] La PNLSC doit cependant reconnaître du même coup que les 34 millions de dollars et les autres avantages qu'elle a reçus en échange de la cession autorisent le gouvernement territorial à faire preuve d'une certaine souplesse dans l'utilisation à d'autres fins des terres cédées.

[12] Par leur complexité et leur caractère détaillé, les traités récents marquent un énorme progrès, à la fois par rapport aux traités historiques antérieurs à la Confédération tels les traités de 1760 et 1761 en cause dans *R. c. Marshall*, [1999] 3 R.C.S. 456, et par rapport aux traités postérieurs à la Confédération tel le Traité n^{o} 8 (1899) dont il est question dans *R. c. Badger*, [1996] 1 R.C.S. 771, et dans *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388. Les traités historiques, habituellement formulés en termes nobles d'une grande généralité, étaient souvent ambigus. Les tribunaux se sont ainsi vus forcés de recourir à des principes généraux (comme l'honneur de la Couronne) pour pallier les lacunes et parvenir à un résultat équitable. En revanche, si les ententes récentes sur des revendications

applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way. To the extent the Yukon territorial government argues that the Yukon treaties represent a new departure and not just an elaboration of the *status quo*, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step — albeit a very important step — in the long journey of reconciliation (para. 69).

territoriales globales — que l'on pourrait sans doute faire remonter à la *Convention de la Baie-James et du Nord québécois* (1975) — doivent elles aussi être interprétées et appliquées en conformité avec l'honneur de la Couronne, elles étaient néanmoins censées procurer une certaine précision quant aux droits et obligations relatifs à la propriété et à la gouvernance. Au lieu d'instituer des mécanismes ponctuels facilitant la réconciliation, les traités récents visent à inscrire les relations entre Autochtones et non-Autochtones dans le système juridique général, avec les avantages que cela présente au plan de la continuité, de la transparence et de la prévisibilité. Il appartient aux parties, lorsque l'application des traités suscite des difficultés, d'agir de façon diligente pour faire valoir leurs intérêts respectifs. Une bonne gouvernance suppose que les décisions soient prises en temps opportun. Dans la mesure où le gouvernement territorial du Yukon plaide que les traités du Yukon constituent un nouveau départ et non pas simplement un prolongement du *statu quo*, je crois qu'il a raison. Toutefois, comme le juge Veale l'a si justement fait remarquer en première instance, le nouveau départ ne représente qu'une étape — mais une étape très importante — dans le long voyage de la réconciliation (par. 69).

[13] There was in this case, as mentioned, an express treaty right of members of the First Nation to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the LSCFN Treaty did not prevent the government from making land grants out of the Crown's land holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic activities of the LSCFN, and the territorial government was required to consult with the LSCFN to determine the nature and extent of such adverse effects.

[13] Comme je l'ai indiqué, le traité PNLSC conférait expressément aux membres de la première nation, dans le cas présent, un droit de chasse et de pêche de subsistance sur leurs terres ancestrales, qui ont fait l'objet d'une cession et sont maintenant considérées comme des terres de la Couronne. Même si le traité n'interdisait pas aux autorités d'octroyer des terres faisant partie des terres de la Couronne, — en fait, cette possibilité y était envisagée — il était évident que cela risquait d'avoir des conséquences négatives sur les activités économiques traditionnelles de la PNLSC, et le gouvernement territorial était tenu de consulter cette dernière afin de déterminer la nature et l'étendue de ces conséquences négatives.

[14] The delegated statutory decision maker was the appellant David Beckman, the Director of the Agriculture Branch of the territorial Department of Energy, Mines and Resources. He was authorized, subject to the treaty provisions, to issue land grants

[14] Le décideur délégué en vertu de la loi était l'appelant David Beckman, le directeur de la Direction de l'agriculture du ministère de l'Énergie, des Mines et des Ressources du Yukon. Il était autorisé, sous réserve des clauses du traité, à concéder

to non-settlement lands under the *Lands Act*, R.S.Y. 2002, c. 132, and the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17. The First Nation argues that in exercising his discretion to approve the grant the Director was required to have regard to First Nation's concerns and to engage in consultation. This is true. The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously — if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise. The Paulsen application had been pending almost three years before it was eventually approved. It was a relatively minor parcel of 65 hectares whose agricultural use, according to the advice received by the Director (and which he was entitled to accept), would not have any significant adverse effect on First Nation's interests.

des terres non visées par un règlement en vertu de la *Loi sur les terres*, L.R.Y. 2002, ch. 132, et de la *Loi du Yukon sur les terres territoriales*, L.Y. 2003, ch. 17. Selon la première nation, le directeur était obligé, dans l'exercice de son pouvoir discrétionnaire d'approuver la concession de terres, de tenir compte des préoccupations de la première nation et de tenir des consultations. C'est exact. Mais la première nation va trop loin lorsqu'elle prétend imposer au gouvernement territorial non seulement la protection procédurale qu'offre la consultation, mais également le respect d'un droit substantif à l'accommodement. La première nation se plaint de ce que ses préoccupations n'ont pas été prises au sérieux — sinon, dit-elle, la demande de M. Paulsen aurait été rejetée. Elle se trouve ainsi à élargir indûment l'obligation de consulter en l'espèce. La première nation ne jouit pas d'un droit de veto à l'égard du processus d'approbation. Aucun droit semblable n'est prévu par le traité ni par le droit commun, constitutionnel ou autre. La demande de M. Paulsen est demeurée en suspens pendant près de trois ans avant d'être finalement approuvée. Elle concernait une parcelle relativement petite de 65 hectares dont l'utilisation à des fins agricoles, suivant l'avis reçu par le directeur — un avis qu'il était en droit d'accepter — n'aurait aucune incidence négative notable sur les intérêts de la première nation.

[15] Unlike *Mikisew Cree* where some accommodation was possible through a rerouting of the proposed winter road, in this case, the stark decision before the appellant Director was to grant or refuse the modified Paulsen application. He had before him the relevant information. Face-to-face consultation between the First Nation and the Director (as decision maker) was not required. In my view, the decision was reasonable having regard to the terms of the treaty, and in reaching it the Director did not breach the requirements of the duty to consult, natural justice, or procedural fairness. There was no *constitutional* impediment to approval of the Paulsen application and from an *administrative* law perspective the outcome fell within a range of reasonable outcomes.

[15] Contrairement à la situation dans *Première nation crie Mikisew*, où un accommodement était possible par la modification du tracé de la route hivernale projetée, dans la présente affaire, la décision consistait purement et simplement, pour le directeur appelant, à accorder ou à rejeter la demande modifiée de M. Paulsen. Il disposait de l'information pertinente. Les représentants de la première nation et le directeur (en tant que décideur) n'étaient pas tenus de se rencontrer pour tenir des consultations. Je suis d'avis que la décision était raisonnable, compte tenu des termes du traité, et que le directeur, lorsqu'il l'a prise, n'a en aucun cas écarté l'obligation de tenir des consultations, la justice naturelle ou l'équité procédurale. Il n'existait aucun obstacle *constitutionnel* à l'approbation de la demande de M. Paulsen, et du point de vue du droit *administratif*, le résultat entrait dans la gamme des résultats raisonnables.

II. Facts

[16] On November 5, 2001, Larry Paulsen submitted his application for an agricultural land grant of 65 hectares. He planned to grow hay, put up some buildings and raise livestock. The procedure governing such grant applications was set out in a pre-treaty territorial government policy, *Agriculture for the 90s: A Yukon Policy* (1991) (the "1991 Agriculture Policy").

[17] The Paulsen application (eventually in the form of a "Farm Development Plan") was pre-screened by the Agriculture Branch and the Lands Branch as well as the Land Claims and Implementation Secretariat (all staffed by territorial civil servants) for completeness and compliance with current government policies.

[18] The Paulsen application was then sent to the Agriculture Land Application Review Committee ("ALARC") for a more in-depth technical review by various Yukon government officials. ALARC was established under the 1991 Agriculture Policy. It predates and is completely independent from the treaty. The civil servants on ALARC recommended that Mr. Paulsen reconfigure his parcel to include only the "bench" of land set back from the Yukon River for reasons related to the suitability of the soil and unspecified environmental, wildlife, and trapping concerns. Mr. Paulsen complied.

[19] On February 24, 2004, ALARC recommended that the Paulsen application for the parcel, as reconfigured, proceed to the next level of review, namely, the Land Application Review Committee ("LARC"), which includes First Nation's representatives. LARC also functioned under the 1991 Agriculture Policy and, as well, existed entirely independently of the treaties.

II. Les faits

[16] Le 5 novembre 2001, Larry Paulsen a présenté une demande de concession de 65 hectares de terres agricoles. Il projetait de cultiver du fourrage, de construire quelques bâtiments et d'élever du bétail. La façon de traiter de telles demandes était énoncée dans une politique du gouvernement territorial antérieure au traité, intitulée *Agriculture for the 90s : A Yukon Policy* (1991) (la « Politique agricole pour 1991 »).

[17] La Direction de l'agriculture et la Direction des terres ainsi que le Secrétariat des revendications territoriales (le personnel de tous ces services étant formé de fonctionnaires territoriaux) ont procédé à un examen préliminaire de la demande de M. Paulsen (devenue depuis un « plan de développement agricole »), afin de vérifier si la demande était complète et respectait les politiques gouvernementales en vigueur.

[18] La demande de M. Paulsen a ensuite été transmise au Comité d'examen des demandes concernant les terres agricoles (« CEDTA »), où elle devait faire l'objet d'un examen technique plus approfondi par divers fonctionnaires du Yukon. Institué en vertu de la Politique agricole pour 1991, le CEDTA est antérieur au traité et n'a rien à voir avec celui-ci. Les fonctionnaires du CEDTA ont recommandé à M. Paulsen de redélimiter sa parcelle de terre de façon à n'y inclure que la partie du terrain formant terrasse en retrait du fleuve Yukon, pour des raisons liées aux caractéristiques du sol et à des préoccupations non précisées concernant l'environnement, la faune et la flore ainsi que le piégeage. M. Paulsen s'est conformé à cette recommandation.

[19] Le 24 février 2004, le CEDTA a recommandé que la demande de M. Paulsen, ainsi redélimitée, soit soumise au palier d'examen supérieur, soit celui du Comité d'examen des demandes d'aliénation de terres (« CEDAT »), où siègent des représentants des premières nations. Le CEDAT exerçait des fonctions prévues à la Politique agricole pour 1991 et il n'avait lui non plus rien à voir avec les traités.

[20] Reference should also be made at this point to the Fish and Wildlife Management Board — a treaty body composed of persons nominated by the First Nation and Yukon government — which in August 2004 (i.e. while the Paulsen application was pending) adopted a Fish and Wildlife Management Plan ("FWMP") that identified a need to protect wildlife and habitat in the area of the Yukon River, which includes the Paulsen lands. It proposed that an area in the order of some 10,000 hectares be designated as a Habitat Protection Area under the *Wildlife Act*, R.S.Y. 2002, c. 229. The FWMP also recognized the need to preserve the First Nation's ability to transfer its culture and traditions to its youth through opportunities to participate in traditional activities. The FWMP did not, however, call for a freeze on approval of agricultural land grants in the area pending action on the FWMP proposals.

[21] Trapline #143 was registered to Johnny Sam, a member of the LSCFN. His trapline is in a category administered by the Yukon government, not the First Nation. It helps him to earn a livelihood as well as to provide a training ground for his grandchildren and other First Nation youth in the ways of trapping and living off the land. The trapline covers an area of approximately 21,435 hectares. As noted by the Court of Appeal, the 65 hectares applied for by Mr. Paulsen is approximately one-third of one percent of the trapline. A portion of the trapline had already been damaged by forest fire, which, in the LSCFN view, added to the significance of the loss of a further 65 hectares. The severity of the impact of land grants, whether taken individually or cumulatively, properly constituted an important element of the consultation with LARC and, ultimately, a relevant consideration to be taken into account by the Director in reaching his decision.

[20] Il faut aussi mentionner la Commission de gestion des ressources halieutiques et fauniques — un organe constitué par le traité dont les membres sont désignés par la première nation et le gouvernement du Yukon — qui, en août 2004 (soit pendant que la demande de M. Paulsen était toujours à l'étude) a adopté un plan de gestion des ressources halieutiques et fauniques (« PGRHF ») faisant état de la nécessité de protéger la faune et son habitat dans la région du fleuve Yukon où se trouvent les terres demandées par M. Paulsen. Il y était proposé qu'une superficie de quelque 10 000 hectares soit désignée comme région de protection de l'habitat sous le régime de la *Loi sur la faune*, L.R.Y. 2002, ch. 229. Était en outre reconnue dans le PGRHF la nécessité de préserver la capacité de la première nation de transmettre sa culture et ses traditions aux nouvelles générations en leur donnant l'occasion de participer à des activités traditionnelles. Le PGRHF ne prévoyait cependant pas le gel des approbations de concession de terres agricoles dans la région jusqu'à ce qu'il ait été donné suite aux propositions contenues dans le plan.

[21] Le territoire de piégeage n^{o} 143 a été enregistré au nom de Johnny Sam, un membre de la PNLSC. Ce territoire de piégeage appartient à une catégorie administrée par le gouvernement du Yukon, et non par la première nation. Johnny Sam l'utilise comme gagne-pain partiel et comme une base où ses petits-enfants ainsi que d'autres jeunes de la première nation s'y entraînent aux méthodes de piégeage et y apprennent à vivre des ressources de la nature. Le territoire de piégeage s'étend sur une superficie d'environ 21 435 hectares. Comme l'a relevé la Cour d'appel, la parcelle de 65 hectares visée par la demande de M. Paulsen correspond approximativement à un tiers de un pour cent du territoire de piégeage en question. Une partie du territoire de piégeage avait déjà été détériorée par un incendie de forêt, ce qui, pour la PNLSC, avait pour effet de rendre plus onéreuse la perte de 65 autres hectares. La grande incidence des concessions de terres, prises individuellement ou cumulativement, constituait à juste titre pour le CEDAT un élément important de la consultation et, en définitive, une considération pertinente que le directeur devait prendre en compte pour rendre sa décision.

[22] The LARC meeting to discuss the Paulsen application was scheduled for August 13, 2004. The First Nation received notice and was invited to provide comments prior to the meeting and to participate in the discussion as a member of LARC.

[23] On July 27, 2004, the First Nation submitted a letter of opposition to the Paulsen application. The letter identified concerns about impacts on Trapline #143, nearby timber harvesting, the loss of animals to hunt in the area, and adjacent cultural and heritage sites. No reference was made in the First Nation's letter to Johnny Sam's concerns about cultural transfer or to the FWMP. The letter simply states that "[t]he combination of agricultural and timber harvesting impacts on this already-damaged trapline would certainly be a significant deterrent to the ability of the trapper to continue his traditional pursuits" (A.R., vol. II, at p. 22).

[24] Nobody from the LSCFN attended the August 13, 2004 meeting. Susan Davis, its usual representative, was unable to attend for undisclosed reasons. The meeting went on as planned.

[25] The members of LARC who were present (mainly territorial government officials) considered the Paulsen application and recommended approval in principle. The minutes of the August 13 meeting show that LARC *did* consider the concerns voiced by the LSCFN in its July 27, 2004 letter. Those present at the meeting concluded that the impact of the loss of 65 hectares on Trapline #143 would be minimal as the Paulsen application covered a very small portion of the trapline's overall area and noted that Johnny Sam could apply under Chapter 16 of the LSCFN Treaty for compensation for any diminution in its value. LARC recommended an archaeological survey to address potential heritage and cultural sites. (An archaeological assessment was later conducted and reported on

[22] Le CEDAT devait se réunir le 13 août 2004 pour discuter de la demande de M. Paulsen. La première nation en a été avisée; elle a été invitée à présenter des observations avant la réunion et à participer à la discussion en sa qualité de membre du CEDAT.

[23] Le 27 juillet 2004, la première nation a exprimé par lettre son opposition à la demande de M. Paulsen. La lettre faisait état de préoccupations touchant les incidences sur le territoire de piégeage n^{o} 143, la récolte de bois dans les environs, la perte d'animaux pour la chasse dans la région et certains sites d'intérêt culturel et patrimonial. La lettre de la première nation ne faisait pas mention des préoccupations de Johnny Sam concernant la transmission de la culture, ni du PGRHF. Il y était simplement écrit que [TRADUCTION] « [l]a conjugaison d'incidences relatives à l'agriculture et à la récolte de bois sur ce territoire de piégeage déjà détérioré aurait certainement un effet dissuasif notable quant à la possibilité pour le trappeur de continuer à se livrer à ses activités traditionnelles » (d.a., vol. II, p. 22).

[24] Aucun représentant de la PNLSC n'était présent à la réunion du 13 août 2004. Susan Davis, la personne qui représentait habituellement la première nation, n'a pu y assister pour des raisons non précisées. La réunion a eu lieu comme prévu.

[25] Les membres du CEDAT qui étaient présents (principalement des fonctionnaires du gouvernement territorial) ont étudié la demande de M. Paulsen et en ont recommandé l'approbation de principe. Le procès-verbal de la réunion du 13 août indique que le CEDAT a *bel et bien* pris en considération les préoccupations exprimées par la PNLSC dans sa lettre du 27 juillet 2004. Les personnes présentes à la réunion sont arrivées à la conclusion que la perte de 65 hectares aurait une incidence minime sur le territoire de piégeage n^{o} 143, du fait que la demande de M. Paulsen visait une très petite partie du territoire en question. Elles ont signalé que Johnny Sam pouvait, en vertu du chapitre 16 du traité PNLSC, demander une indemnisation pour toute diminution de la valeur du

September 2, 2004, that it was unable to identify any sites that would be impacted adversely by the grant.)

[26] On September 8, 2004, the First Nation representatives met with Agriculture Branch staff who were conducting an agricultural policy review. The meeting did not focus specifically on the Paulsen application. Nevertheless, the First Nation made the general point that its concerns were not being taken seriously. Agriculture Branch officials replied that they consult on such matters through LARC but they were not required by the Final Agreement to consult on such issues. Meetings and discussions with the First Nation had been conducted, they said, only as a courtesy.

[27] On October 18, 2004, the Director approved the Paulsen application and sent a letter to Larry Paulsen, informing him of that fact. He did not notify the LSCFN of his decision, as he ought to have done.

[28] Apparently unaware that the Paulsen application had been approved, the First Nation continued to express its opposition by way of a series of letters from Chief Eddie Skookum to the Yukon government. Johnny Sam also wrote letters expressing his opposition. It seems the government officials failed to disclose that the Director's decision to approve the grant had already been made. This had the unfortunate effect of undermining appropriate communication between the parties.

[29] In the summer of 2005, Susan Davis, representing the First Nation, made enquiries of the Agriculture Branch and obtained confirmation that the Paulsen application had already been approved. She was sent a copy of the October 18, 2004 approval letter.

territoire de piégeage. Le CEDAT a recommandé qu'on procède à une reconnaissance archéologique au sujet des sites d'intérêt patrimonial et culturel. (Une évaluation archéologique a été effectuée par la suite, et selon le rapport en date du 2 septembre 2004, elle n'a permis l'identification d'aucun site sur lequel l'octroi de la parcelle aurait des incidences négatives.)

[26] Le 8 septembre 2004, des représentants de la première nation ont rencontré les fonctionnaires de la Direction de l'agriculture qui procédaient à un examen de la politique agricole. Cette rencontre n'a pas porté spécifiquement sur la demande de M. Paulsen. La première nation a tout de même signalé que ses préoccupations n'avaient pas été prises au sérieux. Les fonctionnaires ont répondu qu'ils tiennent des consultations sur ces questions dans le cadre du CEDAT, mais que l'Entente définitive ne les obligeait pas à tenir des consultations sur de telles questions. C'est uniquement par courtoisie, ont-ils dit, qu'on avait tenu des réunions et des discussions avec la première nation.

[27] Le 18 octobre 2004, le Directeur a approuvé la demande de M. Paulsen et lui a envoyé une lettre pour l'en informer. Il n'a pas avisé la PNLSC de sa décision, ce qu'il aurait dû faire.

[28] N'étant apparemment pas au courant de l'approbation de la demande de M. Paulsen, la première nation a continué à manifester son opposition par une série de lettres adressées par le chef Eddie Skookum au gouvernement du Yukon. Johnny Sam a lui aussi écrit des lettres dans lesquelles il faisait part de son opposition. Les fonctionnaires semblent avoir tu le fait que le directeur avait déjà décidé d'approuver la concession de la parcelle de terre. Cette omission a eu pour effet malheureux de miner la communication opportune entre les parties.

[29] Au cours de l'été 2005, Susan Davis, la représentante de la première nation, a demandé à la Direction de l'agriculture où en était le dossier. On lui a confirmé que la demande de M. Paulsen avait déjà été approuvée et on lui a fait parvenir une copie de la lettre d'approbation du 18 octobre 2004.

[30] In response, by letter dated August 24, 2005, the First Nation launched an administrative appeal of the Paulsen grant to the Assistant Deputy Minister.

[31] On December 12, 2005, the request to review the decision was rejected on the basis that the First Nation had no right of appeal because it was a member of LARC, and not just an intervener under the LARC Terms of Reference. The Terms of Reference specify that only applicants or interveners may initiate an appeal. The Terms of Reference had no legislative or treaty basis whatsoever, but the Yukon government nevertheless treated them as binding both on the government and on the First Nation.

[32] Frustrated by the territorial government's approach, which it believed broadly misconceived and undermined relations between the territorial government and the LSCFN, the First Nation initiated the present application for judicial review.

III. Analysis

[33] The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. This duality is particularly striking in the Yukon, where about 25 percent of the population identify themselves as Aboriginal. The territorial government, elected in part by Aboriginal people, represents Aboriginal people as much as it does non-Aboriginal people, even though Aboriginal culture and tradition are and will remain distinctive.

[34] Underlying the present appeal is not only the need to respect the rights and reasonable expectations of Johnny Sam and other members of his community, but the rights and expectations of

[30] En réponse, la première nation, par une lettre du 24 août 2005, a fait appel de la concession de la parcelle à M. Paulsen auprès du sous-ministre adjoint.

[31] Le 12 décembre 2005, la demande d'examen de la décision a été rejetée au motif que la première nation n'avait aucun droit d'appel, puisqu'en vertu du mandat du CEDAT, elle était un membre de ce comité et non simplement un intervenant. Il est précisé dans ce mandat que seuls les demandeurs ou les intervenants peuvent former un appel. Le mandat ne trouvait aucun fondement dans un texte législatif ou un traité, mais le gouvernement du Yukon considérait tout de même qu'il liait tant le gouvernement que la première nation.

[32] Irritée par la démarche du gouvernement territorial qui, selon elle, dénaturait et bafouait gravement les relations entre le gouvernement et la PNLSC, la première nation a présenté la demande de contrôle judiciaire à l'origine du pourvoi.

III. Analyse

[33] Par la décision d'inscrire à l'art. 35 de la *Loi constitutionnelle de 1982* la reconnaissance et la confirmation des droits existants — ancestraux ou issus de traités — des peuples autochtones, les dirigeants politiques du Canada s'engageaient à protéger et à préserver un espace constitutionnel permettant aux Autochtones d'être des Autochtones. Mais l'existence de leur héritage autochtone ne fait pas en sorte que les Autochtones cessent d'être des citoyens qui participent pleinement avec les autres Canadiens à leur gouvernance collective. Cette dualité est particulièrement frappante au Yukon, où environ 25 pour 100 de la population se réclame d'une identité autochtone. Le gouvernement territorial, élu en partie par les Autochtones, représente tout autant ces derniers que les non-Autochtones, même si la culture et la tradition autochtones conservent maintenant et pour l'avenir leur caractère distinctif.

[34] À la base du présent pourvoi, il y a la nécessité de respecter non seulement les droits et les attentes raisonnables de Johnny Sam et d'autres membres de sa communauté, mais aussi ceux d'autres habitants

other Yukon residents, including both Aboriginal people *and* Larry Paulsen, to good government. The Yukon treaties are intended, in part, to replace expensive and time-consuming *ad hoc* procedures with mutually agreed upon legal mechanisms that are efficient but fair.

[35] I believe the existence of Larry Paulsen's stake in this situation is of considerable importance. Unlike *Mikisew Cree*, which involved a dispute between the Federal government and the Mikisew Cree First Nation over the route of a winter road, Mr. Paulsen made his application as an ordinary citizen who was entitled to a government decision reached with procedural fairness within a reasonable time. On the other hand, the entitlement of the trapper Johnny Sam was a derivative benefit based on the collective interest of the First Nation of which he was a member. I agree with the Court of Appeal that he was not, as an individual, a necessary party to the consultation.

A. *The LSCFN Treaty Reflects a Balance of Interests*

[36] Under the treaty, the LSCFN surrendered all undefined Aboriginal rights, title, and interests in its traditional territory in return for which it received:

- title to 2,589 square kilometres of "settlement land" [Chapters 9 and 15];
- financial compensation of $34,179,210 [Chapter 19];
- potential for royalty sharing [Chapter 23];
- economic development measures [Chapter 22];
- rights of access to Crown land (except that disposed of by agreement for sale, surface licence, or lease) [Chapter 6];
- special management areas [Chapter 10];

du Yukon, y compris les Autochtones *et* Larry Paulsen, relativement à un bon gouvernement. Les traités du Yukon visent notamment à substituer à des procédures ponctuelles coûteuses en temps et en argent des mécanismes juridiques mutuellement acceptés qui sont efficaces tout en étant équitables.

[35] Je crois que l'existence de l'intérêt de Larry Paulsen dans la présente situation revêt une importance considérable. Contrairement à ce qui était le cas dans l'affaire *Première nation crie Mikisew*, où le litige opposait le gouvernement fédéral et la Première nation crie Mikisew au sujet du tracé d'une route hivernale, M. Paulsen a présenté sa demande en qualité de simple citoyen ayant droit à une décision gouvernementale prise conformément à l'équité procédurale dans un délai raisonnable. Par ailleurs, le droit du trappeur Johnny Sam constituait un avantage dérivé qu'il tenait de l'intérêt collectif de la première nation dont il était membre. Je suis d'accord avec la cour d'appel pour dire qu'il n'était pas, à titre individuel, une partie nécessaire à la consultation.

A. *Le traité PNLSC présente un juste équilibre des intérêts*

[36] Aux termes du traité, la PNLSC a renoncé à la totalité de ses droits, titres et intérêts ancestraux non précisés concernant son territoire traditionnel, en échange de quoi elle a reçu :

[TRADUCTION]

- un titre à l'égard d'une superficie de 2 589 kilomètres carrés de « terres visées par le règlement » [chapitres 9 et 15];
- une indemnisation pécuniaire de 34 179 210 $ [chapitre 19];
- une possibilité de partage des redevances [chapitre 23];
- des mesures de développement économique [chapitre 22];
- des droits d'accès aux terres de la Couronne (à l'exception de celles faisant l'objet d'un contrat de vente, d'un permis ou d'un bail de surface) [chapitre 6];
- des zones spéciales de gestion [chapitre 10];

- protection of access to settlement land [s. 6.2.7];
- rights to harvest fish and wildlife [Chapter 16];
- rights to harvest forest resources [Chapter 17];
- rights to representation and involvement in land use planning [Chapter 11] and resource management [Chapters 14, 16-18].

(C.A. reasons, para. 41)

These are substantial benefits, especially when compared to the sparse offerings of earlier treaties such as those provided to the Mikisew Cree in Treaty No. 8. With the substantive benefits, however, came not only rights but duties and obligations. It is obvious that the long-term interdependent relationship thus created will require work and good will on both sides for its success.

[37] The reason for the government's tight-lipped reaction to the unfolding Paulsen situation, as explained to us at the hearing by its counsel, was the fear that if the duty of consultation applies, "these parties will be in court like parties are in areas where there are no treaties, and there will be litigation over whether the consultation applies; what is the appropriate level of the consultation? Is accommodation required? It is all under court supervision" (transcript, at p. 18). The history of this appeal shows, however, that taking a hard line does not necessarily speed matters up or make litigation go away.

[38] The denial by the Yukon territorial government of any duty to consult except as specifically listed in the LSCFN Treaty complicated the Paulsen situation because at the time the Director dealt with the application the treaty implementation provision contemplated in Chapter 12 had itself not yet been implemented. I do not believe the Yukon Treaty was intended to be a "complete code". Be that as it

- la protection de l'accès aux terres visées par le règlement [art. 6.2.7];
- des droits relatifs à la récolte des ressources halieutiques et fauniques [chapitre 16];
- des droits relatifs à la récolte des ressources forestières [chapitre 17];
- des droits relatifs à la représentation et à la participation dans le cadre de l'aménagement du territoire [chapitre 11] et de la gestion des ressources [chapitres 14, 16-18].

(motifs de la C.A., par. 41)

Il s'agit là d'avantages substantiels, surtout si on les compare aux rares avantages offerts par les anciens traités comme ceux accordés à la Première nation crie Mikisew dans le Traité n^{o} 8. Ces avantages considérables, toutefois, s'accompagnaient non seulement de droits, mais aussi d'obligations. La réussite de la relation d'interdépendance à long terme qui a été établie nécessitera de toute évidence du travail et de la bonne volonté de part et d'autre.

[37] Le silence du gouvernement face à la situation que présentait la demande de M. Paulsen, comme l'a expliqué l'avocat du gouvernement à l'audience, était attribuable à la crainte que, dans le cas où l'obligation de consulter s'appliquerait, [TRADUCTION] « les parties se trouveront devant le tribunal dans la même situation que dans les domaines où il n'existe pas de traité, et on débattra la question de savoir si la consultation s'applique, ainsi que celles de savoir quel est le niveau de consultation requis et si un accommodement est nécessaire. Tout est soumis à la supervision du tribunal » (transcription, p. 18). L'historique du présent pourvoi montre cependant que l'adoption de la ligne dure n'accélère pas nécessairement les choses, pas plus qu'elle n'élimine les litiges.

[38] La négation, par le gouvernement territorial du Yukon, de toute obligation de consulter sauf dans les cas prévus spécifiquement dans le traité PNLSC a compliqué la situation que présentait la demande de M. Paulsen car, à l'époque où le directeur a pris une décision sur la demande, la disposition relative à la mise en œuvre du traité envisagée au chapitre 12 n'avait elle-même pas encore été mise en

may, the duty to consult is derived from the honour of the Crown which applies independently of the expressed or implied intention of the parties (see below, at para. 61). In any event, the procedural gap created by the failure to implement Chapter 12 had to be addressed, and the First Nation, in my view, was quite correct in calling in aid the duty of consultation in putting together an appropriate procedural framework.

[39] Nevertheless, consultation *was* made available and *did* take place through the LARC process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfilment of a legal obligation) was sufficient. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, the Court held that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided.

B. *The Relationship Between Section 35 and the Duty to Consult*

[40] The First Nation relies in particular on the following statements in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20:

> 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.

Further, at para. 32:

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

œuvre. Je ne crois pas que le traité du Yukon était censé constituer un « code complet ». Quoi qu'il en soit, l'obligation de consulter découle du principe de l'honneur de la Couronne, qui s'applique indépendamment de l'intention expresse ou implicite des parties (voir le par. 61 ci-après). De toute façon, il fallait remédier à la lacune procédurale suscitée par l'absence de mise en œuvre du chapitre 12, et la première nation a eu tout à fait raison à mon avis d'invoquer l'obligation de consulter et d'établir un cadre de procédure approprié.

[39] Quoi qu'il en soit, la consultation *a effectivement* été rendue possible et *a bel et bien* eu lieu dans le cadre du processus du CEDAT en vertu de la Politique agricole pour 1991. En dernière analyse, la question à trancher est de savoir si, dans la présente affaire, ce que l'on a fait était suffisant (bien que le gouvernement territorial y ait vu à tort une mesure de courtoisie plutôt que l'exécution d'une obligation juridique). Dans *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550, la Cour a conclu que la participation à un forum créé pour d'autres besoins peut tout de même satisfaire à l'obligation de consulter si, *pour l'essentiel*, un niveau approprié de consultation a été rendu possible.

B. *La relation entre l'art. 35 et l'obligation de consulter*

[40] La première nation se fonde en particulier sur le passage suivant de l'arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 20 :

> L'article 35 a pour corollaire que la Couronne doit agir honorablement lorsqu'il s'agit de définir les droits garantis par celui-ci et de les concilier avec d'autres droits et intérêts. Cette obligation emporte à son tour celle de consulter et, s'il y a lieu, d'accommoder.

Également, au par. 32 :

> La jurisprudence de la Cour étaye le point de vue selon lequel l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du

legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. [Emphasis added.]

règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*. [Je souligne.]

[41] Reference should also be made to *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6, where the Court said:

The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. [Emphasis added.]

[41] On peut également citer l'arrêt *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6, où la Cour a dit ce qui suit :

La décision de favoriser la participation des Autochtones à la pêche commerciale peut aussi être perçue comme une réponse à la directive donnée par notre Cour dans l'arrêt *Sparrow*, p. 1119, selon laquelle, en appliquant la réglementation sur les pêches, le gouvernement doit consulter les groupes autochtones afin de respecter l'obligation de fiduciaire qu'il a envers ces collectivités. Des arrêts subséquents ont confirmé l'obligation de consulter et d'accommoder les collectivités autochtones dans les domaines de l'exploitation et de la conservation des ressources; il s'agit là d'une obligation constitutionnelle qui concorde avec le principe de l'honneur de la Couronne : voir, par exemple, l'arrêt *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010. [Je souligne.]

[42] The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. The honour of the Crown has since become an important anchor in this area of the law: see *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; as well as *Badger*, *Marshall* and *Mikisew Cree*, previously referred to. The honour of the Crown has thus been confirmed in its status as a constitutional principle.

[42] L'obligation de se conduire honorablement a été reconnue dès le départ par la Couronne elle-même dans la *Proclamation royale* de 1763 (L.R.C. 1985, App. II, n^{o} 1). La Couronne britannique s'y engageait sur l'honneur à protéger les peuples autochtones contre l'exploitation de la part des peuples non autochtones. L'honneur de la Couronne est devenu depuis lors un important point d'ancrage dans ce domaine du droit : voir *R. c. Taylor* (1981), 62 C.C.C. (2d) 227 (C.A. Ont.), autorisation d'appel refusée, [1981] 2 R.C.S. xi; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, de même que *Badger*, *Marshall* et *Première nation crie Mikisew*, dont il a déjà été fait état. L'honneur de la Couronne a par conséquent été confirmé dans son statut de principe constitutionnel.

[43] However, this is not to say that every policy and procedure of the law adopted to uphold the honour of the Crown is itself to be treated as if inscribed in s. 35. As the Chief Justice noted in *Haida Nation*, "[t]he honour of the Crown gives rise to different duties in different circumstances" (para. 18). This appeal considers its application in

[43] Il ne faut pas en conclure pour autant que toute politique et procédure juridique adoptée en vue de préserver l'honneur de la Couronne doive elle-même être considérée comme inscrite dans l'art. 35. Ainsi que l'a souligné la Juge en chef dans *Nation haïda*, « [l]'honneur de la Couronne fait naître différentes obligations selon les circonstances » (par. 18).

the modern treaty context; its application where no treaty has yet been signed was recently the subject of this Court's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650.

[44] The respondents' submission, if I may put it broadly, is that because the *duty* to consult is "constitutional", therefore there must be a reciprocal constitutional *right* of the First Nation to be consulted, and constitutional rights of Aboriginal peoples are not subject to abrogation or derogation except as can be justified under the high test set out in *Sparrow*. On this view, more or less every case dealing with consultation in the interpretation and implementation of treaties becomes a constitutional case. The trouble with this argument is that the content of the duty to consult varies with the circumstances. In relation to what *Haida Nation* called a "spectrum" of consultation (para. 43), it cannot be said that consultation at the lower end of the spectrum instead of at the higher end must be justified under the *Sparrow* doctrine. The minimal content of the consultation imposed in *Mikisew Cree* (para. 64), for example, did not have to be "justified" as a limitation on what would otherwise be a right to "deep" consultation. The circumstances in *Mikisew Cree* never gave rise to anything more than minimal consultation. The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.

[45] The LSCFN invited us to draw a bright line between the duty to consult (which it labelled constitutional) and administrative law principles such as procedural fairness (which it labelled unsuitable). At the hearing, counsel for the LSCFN was dismissive of resort in this context to administrative law principles:

Dans le présent pourvoi, nous examinons l'application du principe de l'honneur de la Couronne dans le contexte d'un traité récent; son application lorsqu'aucun traité n'a été signé a récemment fait l'objet de la décision de notre Cour dans *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650.

[44] La thèse de l'intimée, si je peux la résumer à grands traits, est celle-ci : étant donné la nature « constitutionnelle » de *l'obligation* de consulter, il doit exister un *droit* constitutionnel réciproque de la première nation d'être consultée, et les droits constitutionnels des peuples autochtones sont à l'abri de toute abrogation ou dérogation, exception faite de celles qui peuvent se justifier au regard du critère rigoureux établi dans *Sparrow*. Selon cette logique, pratiquement chaque affaire ayant trait à la consultation dans le cadre de l'interprétation et de la mise en œuvre des traités devient une affaire constitutionnelle. Cet argument est problématique en ce que le contenu de l'obligation de consulter varie suivant les circonstances. Relativement à ce que l'on a appelé dans *Nation haïda* un « continuum » de consultation (par. 43), on ne peut affirmer que la consultation au bas plutôt qu'au haut du continuum doit être justifiée suivant la doctrine de l'arrêt *Sparrow*. Le contenu minimal de la consultation imposé dans *Première nation crie Mikisew* (par. 64), par exemple, n'avait pas à être justifié comme une limite à ce qui serait autrement un droit à une consultation « approfondie ». Dans *Première nation crie Mikisew*, les circonstances n'ont jamais requis plus qu'un minimum de consultation. Si la notion d'obligation de consulter se veut un complément valable à l'honneur de la Couronne, elle joue un rôle de soutien et ne devrait pas être considérée indépendamment de l'objectif qu'elle vise à atteindre.

[45] La PNLSC nous a demandé d'établir une nette distinction entre l'obligation de consulter (qu'elle a qualifiée de constitutionnelle) et les principes du droit administratif tels l'équité procédurale (qu'elle a qualifiés d'inadéquats). Lors de l'audition, l'avocat de la PNLSC a rejeté le recours aux principes du droit administratif dans ce contexte :

[A]dministrative law principles are not designed to address the very unique circumstance of the Crown-Aboriginal history, the Crown-Aboriginal relationship. Administrative law principles, for all their tremendous value, are not tools toward reconciliation of Aboriginal people and other Canadians. They are not instruments to reflect the honour of the Crown principles. [transcript, at p. 62]

However, as Lamer C.J. observed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, "aboriginal rights exist within the general legal system of Canada" (para. 49). Administrative decision makers regularly have to confine their decisions within constitutional limits: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256. In this case, the constitutional limits include the honour of the Crown and its supporting doctrine of the duty to consult.

[46] The link between constitutional doctrine and administrative law remedies was already noted in *Haida Nation*, at the outset of our Court's duty to consult jurisprudence:

In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law. [Emphasis added; para. 41.]

The relevant "procedural safeguards" mandated by administrative law include not only natural justice but the broader notion of procedural fairness. And the content of meaningful consultation "appropriate to the circumstances" will be shaped, and in some cases determined, by the terms of the modern land claims agreement. Indeed, the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this

[TRADUCTION] [L]es principes du droit administratif ne sont pas conçus pour s'appliquer au cas tout à fait particulier de l'histoire des relations entre la Couronne et les Autochtones. Ces principes, malgré leur valeur considérable, ne constituent pas des outils favorisant la réconciliation entre les Autochtones et les autres Canadiens. Ce ne sont pas des instruments par lesquels peuvent s'exprimer les principes relatifs à l'honneur de la Couronne. [transcription, p. 62]

Toutefois, comme l'a précisé le Juge en chef Lamer dans *R. c. Van der Peet*, [1996] 2 R.C.S. 507, « les droits ancestraux existent dans les limites du système juridique canadien » (par. 49). Les décideurs administratifs doivent couramment confiner leurs décisions dans les limites constitutionnelles : *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, et *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256. En l'espèce, les limites constitutionnelles incluent l'honneur de la Couronne et le principe de l'obligation de consulter qui l'appuie.

[46] Le lien entre la doctrine constitutionnelle et les recours de droit administratif a déjà été signalé dans *Nation haïda*, un des premiers arrêts traitant de l'obligation de consulter :

Dans tous les cas, le principe de l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation, qui soit appropriée eu égard aux circonstances. Lorsque vient le temps de s'acquitter de cette obligation, les garanties procédurales de justice naturelle exigées par le droit administratif peuvent servir de guide. [Je souligne; par. 41.]

Les « garanties procédurales » en question qu'exige le droit administratif englobent non seulement la justice naturelle mais aussi la notion plus générale de l'équité procédurale. Et les termes des ententes récentes sur les revendications territoriales suggéreront, et dans certains cas dicteront, le contenu de la véritable consultation « appropriée eu égard aux circonstances ». Les parties elles-mêmes peuvent décider dans ces ententes d'exclure purement et simplement la consultation dans des situations

outcome would be consistent with the maintenance of the honour of the Crown.

[47] The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new "constitutional remedy". Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.

C. *Standard of Review*

[48] In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

précises, et les tribunaux accepteront cette décision lorsqu'une telle décision serait compatible avec le maintien de l'honneur de la Couronne.

[47] Les parties en l'espèce ont choisi la voie d'une demande ordinaire de contrôle judiciaire. Dans le cadre de cette instance, il était parfaitement possible de prendre en compte la dimension constitutionnelle des droits invoqués par la première nation. Point n'est besoin d'inventer une nouvelle « réparation constitutionnelle ». Le droit administratif est suffisamment souple pour que le tribunal accorde l'importance voulue aux intérêts constitutionnels de la première nation. De plus, l'incidence d'une décision administrative sur un intérêt d'une communauté autochtone — que cet intérêt fasse ou non partie d'un droit reconnu par l'art. 35 — s'avérerait pertinente au titre de l'équité procédurale, tout comme peut s'avérer pertinente l'incidence d'une décision sur toute autre communauté ou tout autre individu (y compris Larry Paulsen).

C. *Norme de contrôle*

[48] Dans l'exercice des pouvoirs discrétionnaires que lui confèrent la *Loi sur les terres* et la *Loi du Yukon sur les terres territoriales*, le directeur devait respecter les limites légales et constitutionnelles. En ce qui a trait à la détermination de ces limites, on n'a pas à faire preuve de déférence à l'endroit du directeur. La norme de contrôle à cet égard, y compris à l'égard du caractère adéquat de la consultation, est celle de la décision correcte. Un décideur qui rend une décision fondée sur une consultation inadéquate commet une erreur de droit. Dans les limites établies par le droit et la Constitution, toutefois, la décision du directeur doit être examinée selon la norme de la raisonnabilité : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339. En d'autres mots, s'il y a eu consultation adéquate, la décision du directeur d'approuver la concession de terres à M. Paulsen se situait-elle, compte tenu de toutes les considérations pertinentes, dans la gamme des résultats raisonnables?

D. *The Role and Function of the LSCFN Treaty*

[49] The territorial government and the LSCFN have very different views on this point. This difference lies at the heart of their opposing arguments on the appeal.

[50] The territorial government regards the role of the LSCFN Treaty as having nailed down and forever settled the rights and obligations of the First Nation community as Aboriginal people. The treaty recognized and affirmed the Aboriginal rights surrendered in the land claim. From 1997 onwards, the rights of the Aboriginal communities of the LSCFN, in the government's view, were limited to the treaty. To put the government's position simplistically, what the First Nations negotiated as terms of the treaty is what they get. Period.

[51] The LSCFN, on the other hand, considers as applicable to the Yukon what was said by the Court in *Mikisew Cree*, at para. 54:

> Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

And so it is, according to the First Nation, with the treaty-making process in the Yukon that led in 1997 to the ratification of the LSCFN Treaty.

[52] I agree with the territorial government that the LSCFN Treaty is a major advance over what happened in Fort Chipewyan in 1899, both in the modern treaty's scope and comprehensiveness, and in the fairness of the procedure that led up to it. The eight pages of generalities in Treaty No. 8 in 1899 is not the equivalent of the 435 pages of the LSCFN Treaty almost a century later. The LSCFN Treaty provides a solid foundation for reconciliation, and the territorial government is quite correct that the LSCFN Treaty should not simply set the stage for further negotiations from ground zero. Nor is that

D. *Le rôle et la fonction du traité PNLSC*

[49] Le gouvernement territorial et la PNLSC ont des points de vue très différents sur cette question. Cette divergence d'opinion se retrouve au centre même des arguments opposés qu'ils ont invoqués dans le cadre du pourvoi.

[50] Pour le gouvernement territorial, le traité PNLSC a fixé de façon définitive les droits et les obligations de la première nation en tant que peuple autochtone. Le traité a reconnu et confirmé les droits ancestraux cédés dans le cadre de la revendication territoriale. À partir de 1997, les droits des communautés autochtones de la PNLSC, selon le gouvernement, ont été limités à ce qui est prévu par le traité. Pour exprimer en termes simplistes la position du gouvernement, les premières nations obtiennent ce qu'elles ont négocié comme termes des traités, un point c'est tout.

[51] La PNLSC, pour sa part, juge applicable au Yukon ce que la Cour a écrit dans *Première nation crie Mikisew*, par. 54 :

> La conclusion de traités est une étape importante du long processus de réconciliation, mais ce n'est qu'une étape. Ce qui s'est passé à Fort Chipewyan en 1899 ne constituait pas un accomplissement parfait de l'obligation découlant de l'honneur de la Couronne, mais une réitération de celui-ci.

Il en va de même, selon la première nation, du processus de conclusion de traités relatifs au Yukon qui a conduit en 1997 à la ratification du traité PNLSC.

[52] Je suis d'accord avec le gouvernement territorial lorsqu'il dit que le traité PNLSC marque un progrès majeur par rapport à ce qui s'est produit à Fort Chipewyan en 1899, tant pour la portée et le caractère global du traité récent que pour la justesse de la procédure qui y a mené. Les huit pages de considérations générales du Traité n^{o} 8 de 1899 ne peuvent équivaloir aux 435 pages du traité PNLSC conclu près d'un siècle plus tard. Le traité PNLSC procure une assise solide à la réconciliation, et le gouvernement territorial a tout à fait raison de soutenir que ce traité ne devrait pas simplement préparer le

the First Nation's position. It simply relies on the principle noted in *Haida Nation* that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples" (para. 16 (emphasis added)). Reconciliation in the Yukon, as elsewhere, is not an accomplished fact. It is a work in progress. The "complete code" position advocated by the territorial government is, with respect, misconceived. As the Court noted in *Mikisew Cree*: "The duty to consult is grounded in the honour of the Crown . . . . The honour of the Crown exists as a source of obligation independently of treaties as well, of course" (para. 51).

[53] On this point, *Haida Nation* represented a shift in focus from *Sparrow*. Whereas the Court in *Sparrow* had been concerned about sorting out the consequences of infringement, *Haida Nation* attempted to head off such confrontations by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where development might have a significant impact on Aboriginal rights when and if established. In *Mikisew Cree*, the duty to consult was applied to the management of an 1899 treaty process to "take up" (as in the present case) ceded Crown lands for "other purposes". The treaty itself was silent on the process. The Court held that on the facts of that case the content of the duty to consult was at "the lower end of the spectrum" (para. 64), but that nevertheless the Crown was wrong to act unilaterally.

[54] The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have

terrain pour d'autres négociations qu'on reprendrait à partir de zéro. Telle n'est pas du reste la position défendue par la première nation. Elle s'appuie simplement sur le principe signalé dans *Nation haïda*, soit que « [l]'honneur de la Couronne est toujours en jeu lorsque cette dernière transige avec les peuples autochtones » (par. 16 (je souligne)). La réconciliation, au Yukon comme ailleurs, n'est pas un fait accompli, mais un chantier permanent. La thèse du « code complet » avancée par le gouvernement territorial est, à mon avis, mal fondée. Comme l'a observé la Cour dans *Première nation crie Mikisew* : « L'obligation de consultation repose sur l'honneur de la Couronne [. . .] L'honneur de la Couronne existe également en tant que source d'obligation indépendante des traités, bien entendu » (par. 51).

[53] Sur cette question, *Nation haïda* marquait un changement de perspective par rapport à *Sparrow*. Alors que dans *Sparrow*, la Cour s'était employée à dégager les conséquences de la violation, elle a tenté dans *Nation haïda* de prévenir de tels affrontements en imposant aux parties une obligation de consulter et (au besoin) d'accommoder, dans des circonstances où le développement est susceptible d'avoir des conséquences importantes sur les droits ancestraux lorsque ceux-ci ont été établis. Dans *Première nation crie Mikisew*, l'obligation de consulter a été appliquée à la gestion d'un processus prévu par un traité de 1899, concernant la « prise » (comme dans la présente espèce) pour d'« autres objets », de terres cédées à la Couronne. Le traité lui-même ne mentionnait aucunement le processus en question. La Cour a conclu que si, d'après les faits de l'espèce, le contenu de l'obligation de consulter se situait « au bas du continuum » (par. 64), la Couronne n'en avait pas moins eu tort d'agir de façon unilatérale.

[54] La différence entre le traité PNLSC et le Traité nº 8 ne tient pas uniquement au fait que le premier est un « traité récent global » tandis que le second a été conclu il y a plus d'un siècle. Le traité récent d'aujourd'hui deviendra le traité historique de demain. La distinction réside plutôt dans la précision et la complexité relatives du document récent. Lorsque des parties bénéficiant de ressources suffisantes et de l'aide de professionnels ont tenté de

given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.

[55] However, the territorial government presses this position too far when it asserts that unless consultation is specifically required by the Treaty it is excluded by negative inference. Consultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people. As the trial judge observed, consultation works "to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address" (para. 82).

[56] The territorial government would have been wrong to act unilaterally. The LSCFN had existing treaty rights in relation to the land Paulsen applied for, as set out in s. 16.4.2 of the LSCFN Treaty:

> Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory . . . all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.

The Crown land was subject to being taken up for other purposes (as in *Mikisew Cree*), including agriculture, but in the meantime the First Nation had a continuing treaty interest in Crown lands to which their members continued to have a treaty right of access (including but not limited to the Paulsen plot). It was no less a treaty interest because it was defeasible.

mettre de l'ordre dans leurs propres affaires et ont donné forme à l'obligation de consulter en incorporant dans un traité la procédure de consultation, il convient d'encourager leurs efforts et, sous réserve des limitations constitutionnelles comme le principe de l'honneur de la Couronne, la Cour devrait essayer de respecter le fruit de leur travail : *Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557.

[55] Cependant, le gouvernement territorial pousse trop loin cette thèse lorsqu'il prétend que la consultation qui n'est pas spécifiquement requise par le traité est exclue par inférence négative. Une consultation digne de ce nom demeure le fondement nécessaire d'une relation réussie avec les peuples autochtones. Comme le juge de première instance l'a pertinemment fait remarquer, la consultation permet [TRADUCTION] « d'éviter l'indifférence et le manque de respect susceptibles d'anéantir le processus de réconciliation que l'entente définitive est censée établir » (par. 82).

[56] Le gouvernement territorial aurait eu tort d'agir de façon unilatérale. La PNLSC avait des droits existants issus d'un traité à l'égard de la parcelle visée par la demande de M. Paulsen, comme l'indique l'art. 16.4.2 du traité PNLSC :

> Les Indiens du Yukon ont le droit de récolter, à des fins de subsistance, dans les limites de leur territoire traditionnel [. . .] toute espèce de poisson et d'animal sauvage, pour eux-mêmes et pour leur famille, en toute saison et sans limite de prises, sur des terres visées par un règlement et sur des terres de la Couronne où ils bénéficient d'un droit d'accès conformément à la section 6.2.0, sous réserve seulement des limites prévues par les ententes portant règlement.

Les terres de la Couronne pouvaient être prises à d'autres fins (comme dans *Première nation crie Mikisew*) et notamment à des fins d'agriculture, mais entre-temps, la première nation conservait un intérêt issu d'un traité sur les terres de la Couronne à l'égard desquelles ses membres avaient toujours un droit d'accès issu d'un traité (y compris la parcelle de M. Paulsen). La possibilité que cet intérêt soit supprimé n'en faisait pas moins un intérêt issu d'un traité.

[57] The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy.

[57] Le décideur était tenu de prendre en compte les conséquences qu'aurait le fait d'accorder la demande de M. Paulsen sur les préoccupations et les intérêts des membres de la première nation. Or, il ne pouvait pas le faire sans que la première nation ne soit consultée au sujet de la nature et de la portée de ses préoccupations. S'ajoutait bien sûr aux obligations habituelles ressortissant au droit administratif, l'obligation légale du gouvernement territorial de préserver l'honneur de la Couronne dans ses relations avec la première nation. Néanmoins, étant donné l'existence de la cession opérée par le traité et les textes législatifs adoptés en vue de la mise en œuvre de celui-ci, ainsi que la décision des parties de ne pas incorporer dans le traité PNLSC lui-même un processus de consultation d'un caractère plus général, le contenu de l'obligation de consultation se situait (comme l'a conclu la Cour d'appel) au bas du continuum. Il ne s'agissait pas d'une obligation exigeante. Mais ce n'était pas non plus une simple affaire de courtoisie.

E. *The Source of the Duty to Consult Is External to the LSCFN Treaty*

E. *La source de l'obligation de consulter est extrinsèque au traité PNLSC*

[58] The LSCFN Treaty dated July 21, 1997, is a comprehensive lawyerly document. The territorial government argues that the document refers to the duty to consult in over 60 different places but points out that none of them is applicable here (although the implementation of Chapter 12, which was left to subsequent legislative action, did not foreclose the possibility of such a requirement).

[58] Le traité PNLSC, daté du 21 juillet 1997, est un document à caractère juridique des plus détaillé. Le gouvernement territorial fait valoir qu'il est fait mention de l'obligation de consulter à plus de 60 endroits différents dans ce document, mais qu'aucun de ces cas n'est applicable en l'espèce (même si la mise en œuvre du chapitre 12, laissée en suspens dans l'attente d'une mesure législative, n'écartait pas la possibilité d'une telle obligation).

[59] There was considerable discussion at the bar about whether the duty to consult, if it applies at all, should be considered an implied term of the LSCFN Treaty or a duty externally imposed as a matter of law.

[59] On a longuement débattu, à l'audience, la question de savoir si l'obligation de consulter, à supposer qu'elle soit applicable d'une quelconque façon, devrait être considérée comme une clause implicite du traité PNLSC ou comme une obligation juridique extérieure au traité.

[60] The territorial government takes the view that terms cannot be implied where the intention of the parties is plainly inconsistent with such an outcome. In this case, it says, the implied term is negated by the parties' treatment of consultation throughout the treaty and its significant absence

[60] Pour le gouvernement territorial, il ne saurait y avoir de clause implicite qui serait à l'évidence incompatible avec l'intention des parties. En l'espèce, plaide-t-il, la clause implicite est contredite par la manière dont les parties ont abordé la consultation dans l'ensemble du traité et par l'absence

in the case of land grants. The necessary "negative inference", argues the territorial government, is that failure to include it was intentional.

[61] I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

[62] The argument that the LSCFN Treaty is a "complete code" is untenable. For one thing, as the territorial government acknowledges, nothing in the text of the LSCFN Treaty authorizes the making of land grants on Crown lands to which the First Nation continues to have treaty access for subsistence hunting and fishing. The territorial government points out that authority to alienate Crown land exists in the general law. This is true, but the general law exists outside the treaty. The territorial government cannot select from the general law only those elements that suit its purpose. The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship: "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" (*Haida Nation*, at para. 17 (emphasis added)). As the text of s. 35(3) makes clear, a modern comprehensive land claims agreement is as much a treaty in the eyes of the Constitution as are the earlier pre- and post-Confederation treaties.

[63] At the time the Paulsen application was pending, the implementation of the LSCFN Treaty was in transition. It contemplates in Chapter 12

significative de celle-ci dans le cas de la concession de terres. La nécessaire « inférence négative », soutient le gouvernement territorial, est que le fait de ne pas prévoir la consultation était intentionnel.

[61] Cet argument ne me paraît pas convaincant. L'obligation de consulter est considérée, dans la jurisprudence, comme un moyen de préserver l'honneur de la Couronne (lorsque cela s'avère indiqué). Les parties ont la possibilité de s'entendre sur les modalités de la consultation, mais la Couronne ne peut pas se soustraire à son obligation de traiter honorablement avec les Autochtones. Cette doctrine, comme nous l'avons affirmé dans *Nation haïda* et confirmé dans *Première nation crie Mikisew*, s'applique indépendamment de l'intention expresse ou implicite des parties.

[62] L'argument suivant lequel le traité PNLSC est un « code complet » ne tient pas. D'une part, comme le reconnaît le gouvernement territorial, le texte du traité PNLSC n'autorise d'aucune manière l'octroi de terres de la Couronne à l'égard desquelles la première nation continue de jouir, en vertu du traité, d'un droit d'accès à des fins de chasse et de pêche de subsistance. Le gouvernement territorial souligne que le pouvoir d'aliéner des terres de la Couronne existe selon le droit commun. C'est vrai, mais le droit commun existe à l'extérieur du traité. Le gouvernement territorial ne peut pas retenir uniquement, dans le droit commun, les éléments qui lui conviennent. Le traité énonce les droits et les obligations des parties, tout en s'inscrivant dans une relation spéciale : « Dans tous ses rapports avec les peuples autochtones, qu'il s'agisse de l'affirmation de sa souveraineté, du règlement de revendications ou de la mise en œuvre de traités, la Couronne doit agir honorablement » (*Nation haïda*, par. 17 (je souligne)). Comme il ressort clairement du texte du par. 35(3), une entente récente relative à des revendications globales constitue, du point de vue de la Constitution, un traité au même titre que les anciens traités conclus avant et après la Confédération.

[63] Au moment où la demande de M. Paulsen était à l'étude, la mise en œuvre du traité PNLSC était dans une phase de transition. Le chapitre 12

the enactment of a "development assessment process" to implement the treaty provisions. This was ultimately carried into effect in the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"). The territorial government acknowledges that the *YESAA* would have applied to the Paulsen application. Part 2 of the Act (regarding the assessment process) did not come into force until after the Paulsen application was approved (s. 134). The treaty required the government to introduce the law within two years of the date of the settlement legislation (s. 12.3.4). This was not done. The subsequent legislative delay did not empower the territorial government to proceed without consultation.

envisage l'adoption d'un « processus d'évaluation des activités de développement » en vue de la mise en œuvre des dispositions du traité. Cette mise en œuvre a finalement été accomplie par la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*, L.C. 2003, ch. 7 (« *LÉESY* »). Le gouvernement territorial reconnaît que la *LÉESY* se serait appliquée à la demande de M. Paulsen. La partie 2 de cette loi (concernant le processus d'évaluation) n'est entrée en vigueur qu'après l'approbation de la demande en question (art. 134). Le gouvernement était tenu, aux termes du traité, d'édicter une mesure législative dans les deux ans suivant l'entrée en vigueur de la loi de mise en œuvre (art. 12.3.4). Il ne l'a pas fait. Le retard législatif subséquent ne donnait pas au gouvernement territorial le pouvoir d'agir sans consultation.

[64] The purpose of the *YESAA* is broadly stated to "[give] effect to provisions of the Umbrella Final Agreement respecting assessment of environmental and socio-economic effects" by way of a "comprehensive, neutrally conducted assessment process" (s. 5) where "an authorization or the grant of an interest in land" would be required (s. 47(2)(*c*)). The neutral assessor is the Yukon Environmental and Socio-economic Assessment Board, to which (excluding the chair) the Council for Yukon Indians would nominate half the members and the territorial government the other half. The Minister, after consultation, would appoint the chair.

[64] La *LÉESY* vise d'une manière générale à « met[tre] en œuvre diverses dispositions de l'accord-cadre relatives à l'évaluation des effets sur l'environnement ou la vie socioéconomique » par l'instauration d'un « processus complet et impartial d'évaluation » (art. 5) lorsque « l'autorisation [. . .] ou l'attribution [. . .] de droits fonciers » serait nécessaire (al. 47(2)*c*)). L'évaluateur neutre est l'Office d'évaluation environnementale et socioéconomique du Yukon, dont les membres (sauf le président) seraient nommés pour moitié par le Conseil des Indiens du Yukon et pour l'autre moitié par le gouvernement territorial. Le ministre nommerait le président après consultation.

[65] The territorial government contends that this new arrangement is intended to satisfy the requirement of consultation on land grants in a way that is fair both to First Nations and to the other people of the Yukon. Assuming (without deciding) this to be so, the fact remains that no such arrangement was in place at the relevant time.

[65] Selon le gouvernement territorial, ce nouveau régime vise à répondre à l'exigence de consultation au sujet de la concession de terres d'une façon équitable à la fois pour les premières nations et pour les autres habitants du Yukon. En supposant que tel soit le cas (je ne me prononce pas sur la question), il n'en demeure pas moins que le régime en question n'était pas en vigueur à l'époque en cause.

[66] In the absence of the agreed arrangement, consultation was necessary in this case to uphold the honour of the Crown. It was therefore imposed as a matter of law.

[66] En l'absence du régime sur lequel on s'était entendu, la consultation était nécessaire en l'espèce pour préserver l'honneur de la Couronne. Elle était donc imposée par le droit.

F. *The LSCFN Treaty Does Not Exclude the Duty to Consult and, if Appropriate, Accommodate*

[67] When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.

[68] The territorial government argues that a mutual objective of the parties to the LSCFN Treaty was to achieve certainty, as is set out in the preamble:

> . . . the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Little Salmon/Carmacks First Nation Traditional Territory;
>
> the parties wish to achieve certainty with respect to their relationships to each other . . . .

Moreover the treaty contains an "entire agreement" clause. Section 2.2.15 provides that

> Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.

[69] However, as stated, the duty to consult is not a "collateral agreement or condition". The LSCFN Treaty *is* the "entire agreement", but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties' "agreement". It does not "affect" the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.

[70] The First Nation points out that there is an express exception to the "entire agreement" clause in the case of "existing or future constitutional rights", at s. 2.2.4:

> Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal

F. *Le traité PNLSC n'exclut pas l'obligation de consulter et, au besoin, d'accommoder*

[67] Lorsqu'un traité récent a été conclu, la première étape consiste à en examiner les dispositions et à tenter de déterminer les obligations respectives des parties et l'existence, dans le traité lui-même, d'une forme quelconque de consultation. Si un processus de consultation a été établi dans le traité, les dispositions du traité indiqueront la portée de l'obligation de consulter.

[68] Le gouvernement territorial plaide que la certitude constituait un objectif mutuel des parties au traité PNLSC, comme l'indique le préambule :

> . . . les parties à la présente entente désirent définir avec certitude les droits de propriété et d'utilisation des terres et autres ressources du territoire traditionnel de la première nation de Little Salmon/Carmacks;
>
> les parties à la présente entente désirent définir avec certitude leurs rapports les unes avec les autres . . .

Qui plus est, le traité renferme une clause du type « intégralité de l'entente », soit l'art. 2.2.15 :

> Chaque entente portant règlement constitue l'entente complète intervenue entre les parties à cette entente et il n'existe aucune autre assertion, garantie, convention accessoire ou condition touchant cette entente que celles qui sont exprimées dans cette dernière.

[69] Toutefois, l'obligation de consulter ne constitue pas, comme je l'ai indiqué, une « convention accessoire ou condition ». Le traité PNLSC *constate* effectivement l'« entente complète », mais il n'existe pas isolément. L'obligation de consulter est imposée par le droit sans égard à l'« entente » conclue entre les parties. Elle ne « touche » pas l'entente elle-même. Elle fait simplement partie du cadre juridique essentiel dans lequel le traité doit être interprété et exécuté.

[70] La première nation souligne qu'une exception à la clause de l'« entente complète » est expressément prévue à l'art. 2.2.4, pour les « droits constitutionnels — existants ou futurs » :

> Sous réserve des sections 2.5.0, 5.9.0 et 25.2.0 et de l'article 5.10.1, les ententes portant règlement n'ont pas pour

people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

Section 2.2.4 applies, the LSCFN argues, because the duty of consultation is a new constitutional duty and should therefore be considered a "future" constitutional right within the scope of the section.

[71] As discussed, the applicable "existing or future *constitutional* right" is the right of the Aboriginal parties to have the treaty performed in a way that upholds the honour of the Crown. That principle is readily conceded by the territorial government. However, the honour of the Crown may not *always require consultation*. The parties may, in their treaty, negotiate a different mechanism which, nevertheless, in the result, upholds the honour of the Crown. In this case, the duty applies, the content of which will now be discussed.

G. *The Content of the Duty to Consult*

[72] The adequacy of the consultation was the subject of the First Nation's cross-appeal. The adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied.

[73] The Yukon *Lands Act* and the *Territorial Lands (Yukon) Act* created a discretionary authority to make grants but do not specify the basis on which the discretion is to be exercised. It was clear that the Paulsen application might *potentially* have an adverse impact on the LSCFN Treaty right to have access to the 65 hectares for subsistence "harvesting" of fish and wildlife, and that such impact would include the First Nation's beneficial use of the surrounding Crown lands to which its members have a continuing treaty right of access. There was at least the possibility that the impact would be significant in economic and cultural terms. The Director was then required, as a matter of both

effet de porter atteinte à la capacité des peuples autochtones du Yukon d'exercer des droits constitutionnels — existants ou futurs — qui sont reconnus aux peuples autochtones et qui s'appliquent à eux ou de tirer parti de tels droits.

L'article 2.2.4 s'applique, soutient la PNLSC, parce que l'obligation de consultation est une nouvelle obligation constitutionnelle et devrait donc être considérée comme un droit constitutionnel « futur » tombant dans le champ d'application de cet article.

[71] Comme nous l'avons vu, le « droit *constitutionnel* existant ou futur » applicable est le droit des parties autochtones à ce que le traité soit exécuté d'une manière propre à préserver l'honneur de la Couronne. Ce principe est admis volontiers par le gouvernement territorial. Toutefois, l'honneur de la Couronne peut ne pas *toujours exiger la consultation*. Les parties peuvent, dans leur traité, négocier un mécanisme différent qui permet malgré tout, dans son résultat, de préserver l'honneur de la Couronne. En l'espèce, l'obligation s'applique, et j'en viens maintenant à l'examen de son contenu.

G. *Le contenu de l'obligation de consulter*

[72] Le pourvoi incident de la première nation porte sur le caractère adéquat de la consultation. Ce qui s'est passé (ou ne s'est pas passé) entre les parties doit être évalué à la lumière du rôle et de la fonction de la consultation au regard des faits de l'espèce, et de la question de savoir si cet objectif a été rempli au regard des faits.

[73] La *Loi sur les terres* du Yukon et la *Loi du Yukon sur les terres territoriales* ont institué un pouvoir discrétionnaire de concession de terres, mais sans préciser la base sur laquelle ce pouvoir discrétionnaire doit être exercé. Il ne faisait de doute que la demande de M. Paulsen était *susceptible* d'avoir des incidences négatives sur le droit d'accès aux 65 hectares conféré par le traité PNLSC pour la « récolte » de poissons et d'animaux sauvages à des fins de subsistance, incidences comprenant l'usage bénéficiaire par la première nation des terres de la Couronne avoisinantes auxquelles ses membres continuent d'avoir un droit d'accès en vertu du traité. Il existait au moins une possibilité que ces

compliance with the legal duty to consult based on the honour of the Crown *and* procedural fairness to be informed about the nature and severity of such impacts before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to reopen the LSCFN Treaty or to renegotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.

[74] This "lower end of the spectrum" approach is consistent with the LSCFN Treaty itself which sets out the elements the parties themselves regarded as appropriate regarding consultation (where consultation is required) as follows:

"Consult" or "Consultation" means to provide:

(a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;

(b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and

(c) full and fair consideration by the party obliged to consult of any views presented.

(LSCFN Treaty, Chapter 1)

At the hearing of this appeal, counsel for the First Nation contended that the territorial government has "to work with the Aboriginal people to understand what the effect will be, and then they have to try and minimize it" (transcript, at p. 48 (emphasis added)). It is true that these treaties were negotiated prior to *Haida Nation* and *Mikisew Cree*, but it must have been obvious to the negotiators that

incidences soient importantes sur les plans économique et culturel. Le directeur était par conséquent tenu, pour se conformer à l'obligation juridique de consulter fondée sur l'honneur de la Couronne *et* au nom de l'équité procédurale, d'être informé de la nature et de la gravité de telles incidences avant de prendre une décision, pour déterminer (entre autres choses) si des accommodements étaient nécessaires ou appropriés. La consultation n'avait pas pour objet de rouvrir le traité PNLSC ou de renégocier la possibilité de concéder les terres à des fins agricoles. Cette possibilité était déjà prévue au traité. La consultation était requise afin de faciliter la gestion de la relation importante entre le gouvernement et la communauté autochtone en conformité avec la préservation de l'honneur de la Couronne.

[74] Cette approche au « bas du continuum » est conforme au traité PNLSC lui-même, qui précise les éléments considérés par les parties elles-mêmes comme constituant une consultation appropriée (lorsqu'une consultation est nécessaire) :

« consulter » ou « consultation » La procédure selon laquelle :

a) un avis suffisamment détaillé concernant la question à trancher doit être communiqué à la partie devant être consultée afin de lui permettre de préparer sa position sur la question;

b) la partie devant être consultée doit se voir accorder un délai suffisant pour lui permettre de préparer sa position sur la question, ainsi que l'occasion de présenter cette position à la partie obligée de tenir la consultation;

c) la partie obligée de tenir la consultation doit procéder à un examen complet et équitable de toutes les positions présentées.

(Traité PNLSC, chapitre 1)

Lors de l'audition du pourvoi, l'avocat de la première nation a soutenu que le gouvernement territorial doit [TRADUCTION] « s'efforcer, de concert avec les peuples autochtones, de comprendre quels seront les effets, et ensuite il doit essayer de les réduire au minimum » (transcription, p. 48 (je souligne)). Il est vrai que ces traités ont été négociés avant les arrêts *Nation haïda* et *Première nation crie Mikisew*, mais

there is a substantial difference between imposing on a decision maker a duty to provide "full and fair consideration" of the First Nation's "views" and (on the other hand) an obligation to try "to understand what the effect will be, and then . . . to try and minimize it". It is the former formulation which the parties considered sufficient and appropriate. Even in the absence of treaty language, the application of *Haida Nation* and *Mikisew Cree* would have produced a similar result.

il devait être évident pour les négociateurs qu'il existe une différence substantielle entre, d'une part, le fait d'imposer à un décideur une obligation de procéder à « un examen complet et équitable » des « positions » de la première nation, et, d'autre part, une obligation de s'efforcer [TRADUCTION] « de comprendre quels seront les effets, et ensuite [. . .] essayer de les réduire au minimum ». C'est la première de ces obligations que les parties ont considérée comme suffisante et appropriée. Même en l'absence de clauses au traité, l'application des arrêts *Nation haïda* et *Première nation crie Mikisew* aurait produit un résultat semblable.

[75] In my view, the negotiated definition is a reasonable statement of the content of consultation "at the lower end of the spectrum". The treaty does not apply directly to the land grant approval process, which is not a treaty process, but it is a useful indication of what the parties themselves considered fair, and is consistent with the jurisprudence from *Haida Nation* to *Mikisew Cree*.

[75] À mon avis, la définition négociée constitue un énoncé raisonnable du contenu de la consultation « au bas du continuum ». Le traité ne régit pas directement le processus d'approbation des concessions de terres, qui ne relève pas d'un traité, mais il indique de façon utile ce que les parties elles-mêmes jugeaient équitable, et il est conforme à la jurisprudence des arrêts *Nation haïda* et *Première nation crie Mikisew*.

H. *There Was Adequate Consultation in This Case*

H. *Il y a eu une consultation adéquate en l'espèce*

[76] The First Nation acknowledges that it received appropriate notice and information. Its letter of objection dated July 27, 2004, set out its concerns about the impact on Trapline #143, a cabin belonging to Roger Rondeau (who was said in the letter to have "no concerns with the application") as well as Johnny Sam's cabin, and "potential areas of heritage and cultural interest" that had not however "been researched or identified". The letter recommended an archaeological survey for this purpose (this was subsequently performed *before* the Paulsen application was considered and approved by the Director). Nothing was said in the First Nation's letter of objection about possible inconsistency with the FWMP, or the need to preserve the 65 hectares for educational purposes.

[76] La première nation reconnaît avoir reçu un avis suffisant et l'information utile. Sa lettre d'opposition datée du 27 juillet 2004 faisait état de ses préoccupations au sujet des incidences de la concession de la parcelle sur le territoire de piégeage n^{o} 143, sur une cabane appartenant à Roger Rondeau (chez qui, d'après la lettre, [TRADUCTION] « la demande [ne suscitait] aucune inquiétude ») ainsi que sur la cabane de Johnny Sam, et sur [TRADUCTION] « des zones pouvant présenter un intérêt patrimonial et culturel » mais qui n'avaient pas « été identifiées » ou n'avaient pas « fait l'objet de recherches ». La lettre recommandait qu'on procède à cette fin à une reconnaissance archéologique (reconnaissance qui a eu lieu par la suite, *avant* l'examen et l'approbation, par le directeur, de la demande de M. Paulsen). Nulle part dans la lettre d'opposition de la première nation n'était-il fait mention d'une possible non-conformité avec le PGRHF, ou de la nécessité de préserver les 65 hectares à des fins éducatives.

[77] The concerns raised in the First Nation's letter of objection dated July 27, 2004, were put before the August 13, 2004 meeting of LARC (which the First Nation did not attend) and, for the benefit of those not attending, were essentially reproduced in the minutes of that meeting. The minutes noted that "[t]here will be some loss of wildlife habitat in the area, but it is not significant." The minutes pointed out that Johnny Sam was entitled to compensation under the LSCFN Treaty to the extent the value of Trapline #143 was diminished. The minutes were available to the LSCFN as a member of LARC.

[77] Les préoccupations soulevées dans la lettre d'opposition de la première nation datée du 27 juillet 2004 ont été évoquées lors de la réunion du CEDAT tenue le 13 août 2004 (à laquelle la première nation n'était pas représentée) et ont été décrites, pour l'essentiel, dans le procès-verbal de cette réunion, à l'intention des personnes qui étaient absentes. Il est mentionné dans le procès-verbal qu'[TRADUCTION] « [i]l y aura une certaine perte au plan de l'habitat faunique dans la région, mais elle n'est pas importante. » Il y est également souligné que Johnny Sam avait droit à une indemnisation en vertu du traité PNLSC dans la mesure où la valeur du territoire de piégeage nº 143 se trouvait diminuée. La PNLSC, en tant que membre du CEDAT, pouvait consulter le procès-verbal.

[78] The First Nation complains that its concerns were not taken seriously. It says, for example, the fact that Johnny Sam is eligible for compensation ignores the cultural and educational importance of Trapline #143. He wants the undiminished trapline, not compensation. However, Larry Paulsen also had an important stake in the outcome. The Director had a discretion to approve or not to approve and he was not obliged to decide this issue in favour of the position of the First Nation. Nor was he obliged as a matter of law to await the outcome of the FWMP. The Director had before him the First Nation's concerns and the response of other members of LARC. He was entitled to conclude that the impact of the Paulsen grant on First Nation's interests was not significant.

[78] La première nation se plaint de ce que ses préoccupations n'aient pas été prises au sérieux. Elle dit par exemple que le fait que Johnny Sam ait droit à une indemnisation témoigne d'une incompréhension de l'importance du territoire de piégeage nº 143 aux plans culturel et éducatif. Il veut conserver le territoire de piégeage dans son intégralité, et non toucher une indemnisation. L'enjeu était cependant important pour Larry Paulsen également. Le directeur avait le pouvoir discrétionnaire d'approuver ou de ne pas approuver sa demande et il n'était pas obligé de trancher la question en faveur de la position défendue par la première nation. Il n'était pas non plus légalement tenu d'attendre le résultat du PGRHF. Le directeur connaissait les préoccupations de la première nation et la réponse des autres membres du CEDAT. Il était en droit de conclure que la concession à M. Paulsen de la parcelle en question n'avait pas d'incidences importantes sur les intérêts de la première nation.

[79] It is important to stress that the First Nation does not deny that it had full notice of the Paulsen application, and an opportunity to state its concerns through the LARC process to the ultimate decision maker in whatever scope and detail it considered appropriate. Moreover, unlike the situation in *Mikisew Cree*, the First Nation here was consulted *as a First Nation* through LARC and not as members of the general public. While procedural fairness is a flexible concept and takes into account the

[79] Il importe de signaler que la première nation ne nie pas avoir reçu un avis suffisant de la demande de M. Paulsen, et avoir eu l'occasion d'exposer, dans toute l'ampleur et la précision jugées appropriées, ses préoccupations au décideur ultime dans le cadre des procédures du CEDAT. De plus, contrairement à la situation en cause dans l'affaire *Première nation crie Mikisew*, la première nation en l'espèce a été consultée dans le cadre du CEDAT *en tant que première nation* et non en tant que membre du grand

Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal, Mr. Paulsen as well as the First Nation. On the record, and for the reasons already stated, the requirements of procedural fairness were met, as were the requirements of the duty to consult.

[80] It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago). This would be unfair.

I. *The Duty to Accommodate*

[81] The First Nation's argument is that in this case the legal requirement was not only procedural consultation but substantive accommodation. *Haida Nation* and *Mikisew Cree* affirm that the duty to consult *may* require, in an appropriate case, accommodation. The test is not, as sometimes seemed to be suggested in argument, a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the exercise of the Director's discretion taking into account all of the relevant interests and circumstances, including the First Nation entitlement and the nature and seriousness of the impact on that entitlement of the proposed measure which the First Nation opposes.

[82] The 65-hectare plot had already been reconfigured at government insistence to accommodate

public. Si l'équité procédurale est une notion souple et prend en compte les aspects qui, dans la décision que doit prendre le directeur, touchent directement les Autochtones, il n'en demeure pas moins que cette doctrine s'applique en droit administratif pour encadrer les relations entre les décideurs gouvernementaux et tous les habitants du Yukon, Autochtones comme non-Autochtones, et M. Paulsen comme la première nation. Au vu du dossier et pour les raisons exposées précédemment, les exigences de l'équité procédurale ont été respectées, tout comme celles de l'obligation de consulter.

[80] Il est impossible de parcourir le dossier de cette affaire sans voir dans la demande de M. Paulsen la petite étincelle qui allait faire éclater le mécontentement accumulé par la première nation face à la bureaucratie du gouvernement territorial. Le rejet de cette demande, cependant, ferait simplement porter le poids de ce problème cumulatif à l'infortuné Larry Paulsen (qui attend toujours l'issue d'une demande présentée il y a plus de huit ans). Ce résultat serait injuste.

I. *L'obligation d'accommoder*

[81] La première nation avance que dans la présente affaire, il y avait une obligation juridique non seulement de tenir une consultation au plan procédural, mais d'offrir des mesures concrètes d'accommodement. Il est précisé dans *Nation haïda* et dans *Première nation crie Mikisew* que l'obligation de consulter *peut*, dans certains cas, exiger des accommodements. Le critère ne consiste pas, comme on a parfois semblé le soutenir dans l'argumentation, dans une obligation d'accommoder jusqu'au point où la population non autochtone subit une contrainte excessive. Une consultation adéquate ayant eu lieu, il incombe à la Cour d'examiner la façon dont le directeur a exercé son pouvoir discrétionnaire, compte tenu de l'ensemble des circonstances et des intérêts pertinents, y compris les droits de la première nation ainsi que la nature et la gravité de l'incidence, sur ces droits, de la mesure proposée à laquelle la première nation s'oppose.

[82] La parcelle de 65 hectares avait déjà été redélimitée à la demande pressante du gouvernement

various concerns. The First Nation did not suggest any alternative configuration that would be more acceptable (although it suggested at one point that any farming should be organic in nature). In this case, in its view, accommodation must inevitably lead to rejection of the Paulsen application. However, with respect, nothing in the treaty itself or in the surrounding circumstances gave rise to a requirement of accommodation. The government was "taking up" surrendered Crown land for agricultural purposes as contemplated in the treaty.

[83] The concerns raised by the First Nation were important, but the question before the Director was in some measure a policy decision related to the 1991 Agricultural Policy as well as to whether, on the facts, the impact on the First Nation interests were as serious as claimed. He then had to weigh those concerns against the interest of Larry Paulsen in light of the government's treaty and other legal obligations to Aboriginal people. It is likely that many, if not most, applications for grants of remote land suitable for raising livestock will raise issues of wildlife habitat, and many grants that interfere with traplines and traditional economic activities will also have a cultural and educational dimension. The First Nation points out that the Paulsen proposed building would trigger a "no-shooting zone" that would affect Johnny Sam's use of his cabin (as well as his trapline). However, where development occurs, shooting is necessarily restricted, and the LSCFN Treaty is not an anti-development document.

[84] *Somebody* has to bring consultation to an end and to weigh up the respective interests, having in mind the Yukon public policy favouring agricultural development where the rigorous climate of the Yukon permits. The Director is the person with the delegated authority to make the decision whether to approve a grant of land already surrendered by the

pour tenir compte de certaines préoccupations. La première nation n'a suggéré aucune autre délimitation qui lui aurait été plus acceptable (bien qu'elle ait mentionné à un certain moment que toute activité agricole devait être de nature biologique). Dans le cas présent, l'accommodement doit inévitablement, à ses yeux, entraîner le rejet de la demande de M. Paulsen. Toutefois, le traité lui-même ou l'ensemble des circonstances ne donnent en aucun cas ouverture à une obligation d'accommodement. Le gouvernement « prenait » des terres de la Couronne cédées pour qu'elles servent à l'agriculture, ce que le traité envisageait.

[83] Les préoccupations soulevées par la première nation étaient certes importantes, mais la question soumise au directeur constituait dans une certaine mesure une décision touchant à la Politique agricole pour 1991 ainsi qu'à la question de savoir si, d'après les faits, les incidences sur les intérêts de la première nation étaient aussi graves que celle-ci le prétendait. Il devait alors mettre dans la balance ces préoccupations et l'intérêt de Larry Paulsen à la lumière des obligations juridiques (issues de traités ou non) du gouvernement envers les Autochtones. Bon nombre, sinon la plupart, des demandes de concession de terres éloignées propres à l'élevage du bétail susciteront des préoccupations au chapitre de l'habitat faunique, et de nombreuses concessions de terres nuisant aux territoires de piégeage et aux activités économiques traditionnelles auront aussi une dimension culturelle et éducative. La première nation souligne que le bâtiment proposé par M. Paulsen entraînerait la création d'une [TRADUCTION] « zone d'interdiction de chasse » qui entraverait l'utilisation par Johnny Sam de sa cabane (et de son territoire de piégeage). Cependant, le développement a nécessairement pour conséquence des restrictions en matière de chasse, et le traité PNLSC n'est pas un document anti-développement.

[84] Il doit y avoir *quelqu'un* qui met un terme à la consultation et soupèse les intérêts respectifs en jeu en tenant compte de la politique du Yukon favorable au développement de l'agriculture là où le climat rigoureux le permet. Or, le directeur est la personne à qui a été délégué le pouvoir de décider s'il y a lieu d'approuver la concession de terres déjà

First Nation. The purpose of the consultation was to ensure that the Director's decision was properly informed.

[85] The Director did not err in law in concluding that the consultation in this case with the First Nation was adequate.

[86] The advice the Director received from his officials after consultation is that the impact would not be significant. There is no evidence that he failed to give the concerns of the First Nation "full and fair consideration". The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion.

[87] It seems the Director was simply not content to put Mr. Paulsen's interest on the back burner while the government and the First Nation attempted to work out some transitional rough spots in their relationship. He was entitled to proceed as he did.

[88] Whether or not a court would have reached a different conclusion on the facts is not relevant. The decision to approve or not to approve the grant was given by the Legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was not unreasonable.

IV. Conclusion

[89] I would dismiss the appeal and cross-appeal, with costs.

English version of the reasons of LeBel and Deschamps JJ. delivered by

[90] DESCHAMPS J. — The Court has on numerous occasions invited governments and Aboriginal peoples to negotiate the precise definitions of Aboriginal rights and the means of exercising them. To protect the integrity of the negotiation process, the Court developed, on the basis of what was

cédées par la première nation. La consultation avait pour but de garantir que la décision du directeur était prise en connaissance de cause.

[85] Le directeur n'a pas commis d'erreur de droit en concluant qu'en l'espèce, la consultation avec la première nation était adéquate.

[86] Selon l'avis reçu de ses fonctionnaires par le directeur après la consultation, les incidences ne seraient pas importantes. Rien n'indique que les préoccupations de la première nation n'ont pas fait l'objet d'un « examen complet et équitable » de sa part. Les documents déposés par les parties lors de la demande de contrôle judiciaire ne révèlent l'existence d'aucune erreur de fait manifeste dans sa conclusion.

[87] Il semble que le directeur était simplement mécontent de mettre en veilleuse le cas de M. Paulsen alors que le gouvernement et la première nation tentaient d'aplanir certaines difficultés liées à la transition dans le cadre de leur relation. Il avait le droit d'agir comme il l'a fait.

[88] Le fait qu'un tribunal judiciaire aurait éventuellement pu arriver à une conclusion différente à partir des mêmes faits n'est pas pertinent. La décision d'approuver ou de ne pas approuver la concession de la parcelle de terre a été confiée par l'assemblée législative au ministre qui, de la façon habituelle, a délégué ce pouvoir au directeur. La décision prise par ce dernier n'était pas déraisonnable.

IV. Conclusion

[89] Je suis d'avis de rejeter le pourvoi et le pourvoi incident, avec dépens.

Les motifs des juges LeBel et Deschamps ont été rendus par

[90] LA JUGE DESCHAMPS — La Cour a maintes fois invité les gouvernements et les peuples autochtones à négocier la définition précise et les modalités d'exercice des droits ancestraux de ces peuples. Afin de protéger l'intégrité du processus de négociation, la Cour a formulé, à partir de ce qui n'était à

originally just one step in the test for determining whether infringements of Aboriginal rights are justifiable, a duty to consult that must be discharged before taking any action that might infringe as-yet-undefined rights. It later expanded the minimum obligational content of a treaty that is silent regarding how the Crown might exercise those of its rights under the treaty that affect rights granted to the Aboriginal party in the same treaty.

[91] In Yukon, the parties sat down to negotiate. An umbrella agreement and 11 specific agreements were reached between certain First Nations, the Yukon government and the Government of Canada. Through these agreements, the First Nations concerned have taken control of their destiny. The agreements, which deal in particular with land and resources, are of course not exhaustive, but they are binding on the parties with respect to the matters they cover. The Crown's exercise of its rights under the treaty is subject to provisions on consultation. To add a further duty to consult to these provisions would be to defeat the very purpose of negotiating a treaty. Such an approach would be a step backward that would undermine both the parties' mutual undertakings and the objective of reconciliation through negotiation. This would jeopardize the negotiation processes currently under way across the country. Although I agree with Binnie J. that the appeal and cross-appeal should be dismissed, my reasons for doing so are very different.

[92] Mr. Paulsen's application constituted a project to which the assessment process provided for in Chapter 12 of the Little Salmon/Carmacks First Nation Final Agreement ("Final Agreement") applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive

l'origine qu'une étape de la justification des atteintes aux droits ancestraux, une obligation de consultation préalable à la prise de mesures pouvant porter atteinte à ces droits non encore définis. Plus tard, elle a élargi le contenu obligationnel minimal d'un traité lorsque celui-ci omettait de prévoir la façon dont la Couronne peut exercer les droits que lui reconnaît un traité et qui ont une incidence sur ceux conférés à la partie autochtone par ce même traité.

[91] Au Yukon, les parties se sont assises ensemble. Un accord-cadre et 11 ententes particulières ont été conclus par des premières nations, le gouvernement du Yukon et le gouvernement du Canada. Ces ententes constituent la concrétisation de la prise en charge par les premières nations concernées de leur destinée. Il va de soi que tout n'est pas prévu dans ces ententes, qui portent tout particulièrement sur les terres et les ressources. En revanche, ce qui l'est lie les parties. L'exercice par la Couronne des droits qui lui sont conférés par le traité fait l'objet dans celui-ci de dispositions concernant la consultation. C'est faire affront à l'objectif même de la négociation d'un traité que d'ajouter à ces dispositions une obligation additionnelle de consultation. Une telle approche constitue un recul, qui a pour effet de saper les engagements pris par les parties l'une à l'égard de l'autre et de miner l'objectif de réconciliation par la négociation. Cet affront met en péril les processus de négociation actuellement en cours d'un bout à l'autre du pays. Si, à l'instar du juge Binnie, je suis d'avis de rejeter l'appel principal et l'appel incident, je le fais cependant pour des motifs fort différents.

[92] La demande de M. Paulsen constituait un projet soumis au processus d'évaluation prévu au chapitre 12 de l'Entente définitive de la Première nation de Little Salmon/Carmacks (« Entente définitive »). Ce processus n'avait pas été mis en œuvre, mais le chapitre 12 l'avait été, y compris les règles de droit provisoire y figurant. En vertu de ces règles, tout processus existant d'évaluation des activités de développement demeurait en vigueur. Ces processus prévoyaient non seulement la consultation de la nation autochtone concernée, mais aussi sa participation à l'évaluation du projet. Une telle participation impliquait un niveau de consultation supérieur

consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

[93] The Crown's constitutional duty to specifically consult Aboriginal peoples was initially recognized as a factor going to the determination of whether an Aboriginal right was infringed (*Guerin v. The Queen*, [1984] 2 S.C.R. 335), and was later established as one component of the test for determining whether infringements of Aboriginal rights by the Crown were justified: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court was subsequently asked in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, whether such a duty to consult could apply even before an Aboriginal or treaty right is proven to exist. The Court's affirmative answer was based on a desire to encourage the Crown and Aboriginal peoples to negotiate treaties rather than resorting to litigation.

[94] I disagree with Binnie J.'s view that the common law constitutional duty to consult applies in every case, regardless of the terms of the treaty in question. And I also disagree with the appellants' assertion that an external duty to consult can never apply to parties to modern comprehensive land claims agreements and that the Final Agreement constitutes a complete code. In my view, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, stands for the proposition that the common law constitutional duty to consult Aboriginal peoples applies to the parties to a treaty only if they have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty. Moreover, it is essential to understand that in this context, the signature of the treaty entails a change in the nature of the consultation. When consultation is provided for in a treaty, it ceases to

à celui qui aurait été fondé sur l'obligation faite par la jurisprudence à cet égard. En conséquence, rien, en l'espèce, ne saurait justifier le recours à une obligation externe à celle prévue par l'Entente définitive.

[93] L'obligation constitutionnelle qui incombe à la Couronne de consulter de façon spéciale les Autochtones est apparue à l'origine comme facteur d'évaluation d'une atteinte à un droit autochtone (*Guerin c. La Reine*, [1984] 2 R.C.S. 335), puis a été établie en tant que composante du critère de vérification du caractère justifié des atteintes portées par la première aux droits constitutionnels des seconds : *R. c. Sparrow*, [1990] 1 R.C.S. 1075. Les affaires *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, et *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550, ont ensuite posé la question de savoir si une telle obligation de consultation pouvait être mise en œuvre avant que soit établie l'existence d'un droit ancestral ou issu de traité. La réponse positive qu'a donnée notre Cour était fondée sur une volonté de favoriser la négociation de traités entre la Couronne et les peuples autochtones plutôt que le recours aux tribunaux.

[94] Si, contrairement au juge Binnie, je ne dis pas que l'obligation constitutionnelle de consultation dégagée par la jurisprudence s'applique dans tous les cas, peu importe les stipulations du traité en cause, je ne dis pas non plus, comme le font les appelants, qu'on peut affirmer qu'une obligation externe de consultation ne saurait jamais s'appliquer aux parties à un accord moderne de règlement de revendication territoriale globale et que l'Entente définitive constitue un code complet. À mon avis, il ressort de l'arrêt *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388, que l'obligation constitutionnelle de consultation des Autochtones établie par la jurisprudence ne s'applique aux parties à un traité que si celles-ci ont été silencieuses à cet égard relativement au droit que la Couronne cherche à exercer en vertu du traité. En outre, il est capital de signaler que, dans un tel contexte, un pas est franchi et que

be a measure to prevent the infringement of one or more rights, as in *Haida Nation*, and becomes a duty that applies to the Crown's exercise of rights granted to it in the treaty by the Aboriginal party. This means that where, as in *Mikisew*, the common law duty to consult applies to treaty rights despite the existence of the treaty — because the parties to the treaty included no provisions in this regard — it represents the minimum obligational content.

la consultation change alors de sens. Lorsqu'elle est prévue par les dispositions d'un traité, la consultation ne constitue plus une mesure visant à prévenir des atteintes à un ou plusieurs droits, comme dans l'affaire *Nation haïda*, mais plutôt une obligation touchant les modalités d'exercice, par la Couronne, des droits que la partie autochtone lui reconnaît par traité. Cela veut donc dire que dans les cas où, comme dans *Mikisew*, l'obligation jurisprudentielle de consultation intervient relativement à des droits issus d'un traité nonobstant l'existence de celui-ci — en raison du défaut des parties à ce traité d'avoir stipulé à cet égard —, c'est à titre de contenu obligationnel minimal.

[95] Binnie J. has set out the facts. I will return to them only to make some clarifications I consider necessary. For now, I will simply mention that the appellants' position is based on the fact that this case concerns a modern treaty. The appellants argue that in a case involving a modern treaty, the duty to consult is strictly limited to the terms expressly agreed on by the parties and there is no such duty if none has been provided for. In their view, a duty to consult can be found to exist only if the parties have expressly provided for one. The appellants seek not a reversal of the Court of Appeal's ultimate conclusion, but a declaration on the scope of the duty to consult. The respondents, who are also cross-appellants, are asking us to overturn the Court of Appeal's decision and affirm the judgment of the Supreme Court of the Yukon Territory quashing the decision to approve the grant of land to Mr. Paulsen. The respondents submit that the source of the Crown's duty to consult them lies outside the treaty, that is, that the duty derives exclusively from constitutional values and common law principles. According to the respondents, the treaty does not purport to define their constitutional relationship with the Crown, nor does the constitutional duty apply in order to fill a gap in the treaty (R.F., at para. 11). They submit that the common law duty to consult applies because Mr. Paulsen's application would affect their interests. They invoke three interests: a right of access for subsistence harvesting purposes to the land in question in the application, their interest under the treaty in fish and wildlife

[95] Le juge Binnie a exposé les faits. Je n'y reviendrai que pour y ajouter les précisions qui me paraîtront s'imposer. Pour l'instant, il suffit de rappeler que la thèse des appelants repose sur le fait qu'il s'agit d'un traité moderne. Ils soutiennent que, en présence d'un tel traité, l'obligation de consultation se limite strictement aux modalités dont les parties ont expressément convenu, et que si rien n'a été prévu, il n'y a pas d'obligation. Selon eux, pour pouvoir conclure à l'existence d'une obligation de consulter, il faut que celle-ci ait été explicitement formulée par les parties. Les appelants ne demandent pas l'infirmation de la conclusion ultime de la Cour d'appel, mais plutôt une déclaration sur la portée de l'obligation de consulter. Les intimés, qui sont aussi appelants incidents, sollicitent pour leur part la cassation du jugement de la Cour d'appel. Ils voudraient que soit confirmé le jugement de la Cour suprême du Yukon qui a cassé la décision autorisant la cession de la terre à M. Paulsen. Les intimés soutiennent que l'obligation qu'a la Couronne de les consulter puise sa source à l'extérieur du traité, soit exclusivement dans les valeurs constitutionnelles et les principes de la common law. Pour eux, le traité n'a pas pour objet de définir leurs relations constitutionnelles avec la Couronne et l'obligation constitutionnelle ne sert pas à combler un hiatus dans le traité (m.i., par. 11). Ils soutiennent que l'obligation jurisprudentielle de consultation s'applique parce que la demande de M. Paulsen affecte leurs intérêts. Ils invoquent trois intérêts : un droit d'accès aux fins de récolte non commerciale à la terre faisant l'objet de la demande, leur intérêt dans la gestion

management, and the reduced value of the trapline of the respondent Johnny Sam.

[96] In my view, the answers to the questions before the Court can be found first in the general principles of Aboriginal law and then in the terms of the treaty. To explain my conclusion, I must review the origin, the nature, the function and the specific purpose of the duty being relied on, after which I will discuss what can be learned from a careful review of the treaty.

I. General Principles

[97] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 48-82, this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.

[98] The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*. The framers of the Constitution also considered it advisable to specify in s. 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary. Finally, s. 35(4) provides that, notwithstanding any other provision of the *Constitution*

des ressources halieutiques et fauniques prévue au traité et la diminution de valeur de la ligne de piégeage que détient l'intimé Johnny Sam.

[96] À mon avis, la réponse aux questions qui sont posées à la Cour se trouve d'abord dans les principes généraux du droit relatif aux Autochtones puis dans les stipulations du traité. Pour expliquer ma conclusion, je dois revenir sur l'origine, la nature, la fonction ainsi que l'objet précis de l'obligation invoquée et sur ce qu'une lecture attentive du traité révèle.

I. Principes généraux

[97] À l'occasion du *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 48-82, notre Cour a dégagé quatre principes qui sous-tendent l'ensemble de notre Constitution et de son évolution : (1) le constitutionnalisme et la primauté du droit; (2) la démocratie; (3) le respect des droits des minorités; (4) le fédéralisme. Ces quatre principes structurants s'articulent dans trois pactes fondamentaux : (1) pacte entre l'État et les personnes au sujet des droits et libertés fondamentaux de ces dernières; (2) pacte entre la population allochtone et les peuples autochtones sur le respect des droits ancestraux des seconds et des traités conclus avec eux; (3) « pacte fédératif » entre les provinces. Le pacte qui nous intéresse tout spécialement en l'espèce est le deuxième, dont nous verrons qu'il est, dans les faits, porteur d'un cinquième principe sous-jacent à notre Constitution : l'honneur de la Couronne.

[98] Notre *Loi constitutionnelle de 1982*, par. 35(1), reconnaît et confirme les droits ancestraux et issus de traités des peuples autochtones du Canada. Le constituant a également jugé bon de préciser, à l'art. 25 de cette même loi, que le fait qu'il reconnaisse des droits et libertés fondamentaux aux personnes et citoyens ne devait pas être jugé en soi incompatible avec la reconnaissance de droits spéciaux aux peuples autochtones. Autrement dit, lorsqu'on interprète les premier et deuxième pactes, il ne faut pas le faire de sorte qu'ils entrent en conflit, mais plutôt qu'ils se complètent. Enfin, le par. 35(4) confirme que, nonobstant toute autre disposition de la *Loi constitutionnelle de 1982*,

Act, 1982, the Aboriginal and treaty rights recognized and affirmed in s. 35(1) "are guaranteed equally to male and female persons". The compact relating to the special rights of Aboriginal peoples is therefore in harmony with the other two basic compacts and with the four organizing principles of our constitutional system.

[99] In the case at bar, all the parties are, in one way or another, bound by the Final Agreement, which settles the comprehensive land claim of the Little Salmon/Carmacks First Nation. Section 35(3) of the *Constitution Act, 1982* provides that "in subsection (1)" the expression "treaty rights" includes "rights that now exist by way of land claims agreements or may be so acquired". The appellants' position is based on one such agreement.

[100] The respondents, intending to rely on *Mikisew*, invoke only the Crown's common law duty to consult Aboriginal peoples, and not the agreement, which, as can be seen from the transcript of the hearing (at p. 46), they do not allege has been breached; they submit that the purpose of the agreement in the instant case was not to define the parties' constitutional duties.

[101] Prior consultation was used originally as a criterion to be applied in determining whether an Aboriginal right had been infringed (*Guerin*, at p. 389), and then as one factor in favour of finding that a limit on a constitutional right — whether an Aboriginal or a treaty right — of the Aboriginal peoples in question was justified (*Sparrow*, at p. 1119). The Crown failed to consult Aboriginal peoples at its own risk, so to speak, if it took measures that, should Aboriginal title or an Aboriginal or treaty right be proven to exist, infringed that right.

[102] Then, in *Haida Nation* and *Taku River*, it was asked whether such a duty to consult exists even though the existence of an Aboriginal right has not been fully and definitively established in a court proceeding or the framework for exercising such a right has not been established in a

les droits ancestraux ou issus de traités reconnus et confirmés par le par. 35(1) « sont garantis également aux personnes des deux sexes ». Le pacte relatif aux droits spéciaux des peuples autochtones s'harmonise donc avec les deux autres pactes fondamentaux et avec les quatre principes structurants de notre ordre constitutionnel.

[99] En l'espèce, les parties sont toutes, d'une manière ou d'une autre, liées par l'Entente définitive qui porte règlement de la revendication territoriale globale de la Première nation de Little Salmon/Carmacks. Justement, le par. 35(3) de la *Loi constitutionnelle de 1982* précise que les « droits issus de traités », « dont il est fait mention au paragraphe (1) », comprennent « les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis. » Les appelants assoient leur position sur un tel accord.

[100] Entendant bien s'appuyer sur l'arrêt *Mikisew*, les intimés n'invoquent quant à eux que l'obligation jurisprudentielle qu'a la Couronne de consulter les Autochtones et non l'accord, à l'égard duquel ils n'allèguent aucune violation, selon ce que révèle la transcription de l'audience (p. 46), et prétendent, en l'espèce, qu'il n'avait pas pour objet de définir les obligations constitutionnelles des parties.

[101] À l'origine, la consultation préalable a été utilisée comme critère d'évaluation de la violation d'un droit autochtone (*Guerin*, p. 389), puis comme un facteur militant en faveur du caractère justifié de la restriction apportée au droit constitutionnel — ancestral ou issu de traité — des Autochtones concernés (*Sparrow*, p. 1119). Si la Couronne ne consultait pas les Autochtones, c'était pour ainsi dire à ses risques et périls si les mesures qu'elle prenait devait, en cas de preuve de l'existence d'un titre aborigène ou d'un droit ancestral ou issu de traité, se révéler attentatoires à ce droit.

[102] Les affaires *Nation haïda* et *Taku River* ont ensuite posé la question de l'existence d'une telle obligation de consultation, indépendamment de l'établissement complet et définitif d'un droit ancestral au terme d'une instance judiciaire ou d'un processus d'aménagement de ses modalités d'exercice

treaty. Had the answer to this question been no, this would have amounted, in particular, to denying that under s. 35 of the *Constitution Act, 1982*, the rights of Aboriginal peoples are protected by the Constitution even if no court has yet declared that those rights exist and no undertaking has yet been given to exercise them only in accordance with a treaty. A negative answer would also have had the effect of increasing the recourse to litigation rather than to negotiation, and the interlocutory injunction would have been left as the only remedy against threats to Aboriginal rights where the framework for exercising those rights has yet to be formally defined. It was just such a scenario that the Court strove to avoid in *Haida Nation* and *Taku River*, as the Chief Justice made clear in her reasons in *Haida Nation* (paras. 14 and 26).

[103] Thus, the constitutional duty to consult Aboriginal peoples involves three objectives: in the short term, to provide "interim" or "interlocutory" protection for the constitutional rights of those peoples; in the medium term, to favour negotiation of the framework for exercising such rights over having that framework defined by the courts; and, in the longer term, to assist in reconciling the interests of Aboriginal peoples with those of other stakeholders. As one author recently noted, the *raison d'être* of the constitutional duty to consult Aboriginal peoples is to some extent, if not primarily, to contribute to attaining the ultimate objective of reconciliation through the negotiation of treaties, and in particular of comprehensive land claims agreements (D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at pp. 18 and 41). This objective of reconciliation of course presupposes active participation by Aboriginal peoples in the negotiation of treaties, as opposed to a necessarily more passive role and an antagonistic attitude in the context of constitutional litigation (*Haida Nation*, at para. 14; S. Grammond, *Aménager la coexistence: Les peuples autochtones et le droit canadien* (2003), at p. 247). The duty to consult can be enforced in different ways. However, the courts must ensure that this duty is not distorted and invoked in a way that compromises rather than fostering negotiation.

dans un traité. Une réponse négative à cette question aurait notamment eu pour effet de nier que, en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*, les droits ancestraux des peuples autochtones bénéficient de la protection de la Constitution, même s'ils n'ont pas encore fait l'objet d'une déclaration judiciaire ou d'un engagement à n'être exercés que conformément aux stipulations d'un traité. Une réponse négative aurait aussi eu pour conséquence d'accroître le recours aux tribunaux plutôt qu'à la négociation et de ne laisser que l'injonction interlocutoire comme seul remède en cas de menace à des droits ancestraux dont les modalités d'exercice n'ont pas encore été formellement définies. C'est un tel scénario qu'a résolument voulu écarter la Cour dans *Nation haïda* et *Taku River*. Ce qui précède se dégage clairement des motifs rédigés par la Juge en chef dans l'affaire *Nation haïda* (par. 14 et 26).

[103] L'obligation constitutionnelle de consulter les Autochtones vise donc trois objectifs : à court terme, assurer la protection « provisoire » ou « interlocutoire » des droits constitutionnels des peuples autochtones; à moyen terme, favoriser la négociation des modalités d'exercice de tels droits plutôt que leur définition par les tribunaux; enfin, à plus long terme, permettre la réconciliation des intérêts respectifs des Autochtones et des autres parties concernées. Comme l'a d'ailleurs récemment souligné un auteur, l'obligation constitutionnelle de consultation des Autochtones a notamment, sinon principalement, pour raison d'être de contribuer à l'objectif ultime de réconciliation par la négociation de traités, en particulier d'accords de règlement de revendications territoriales globales (D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009), p. 18 et 41). Cet objectif de réconciliation suppose bien entendu l'exercice, par les Autochtones, d'un rôle actif de nature constituante lors de la négociation de traités plutôt qu'un rôle forcément plus passif et une attitude antagoniste en cas de contentieux constitutionnel (*Nation haïda*, par. 14; S. Grammond, *Aménager la coexistence : Les peuples autochtones et le droit canadien* (2003), p. 247). L'obligation de consultation peut faire l'objet d'une forme ou une autre d'exécution forcée. Les tribunaux doivent toutefois veiller à ce que cette obligation de

That, in my view, would be the outcome if we were to accept the respondents' argument that the treaties, and the Final Agreement in particular, do not purport to define the parties' constitutional duties, including what the Crown party must do to consult the Aboriginal party before exercising its rights under the treaty.

[104] The short-, medium- and long-term objectives of the constitutional duty to consult Aboriginal peoples are all rooted in the same fundamental principle with respect to the rights of Aboriginal peoples, namely the honour of the Crown, which is always at stake in relations between the Crown and Aboriginal peoples (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 24). Obviously, when these relations involve the special constitutional rights of Aboriginal peoples, the honour of the Crown becomes a source of constitutional duties and rights, such as the Crown's duty to consult Aboriginal peoples with respect to their Aboriginal or treaty rights (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6).

[105] This Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones (*St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at p. 219; *Guerin*; *Sparrow*; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 183; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation*; *Taku River Tlingit First Nation*; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9, *per* McLachlin C.J.; *Mikisew*, at para. 51). Before being raised to the status of a constitutional principle, the honour of the Crown was originally referred to as the "sanctity" of the "word of the white man" (*R. v. White* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649, aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.); see also *R. v. Sioui*,

consultation ne soit pas dénaturée et invoquée d'une manière qui compromette la négociation au lieu de la favoriser. C'est ce qui se produirait, à mon avis, si on retenait l'argument des intimés selon lequel les traités, et plus particulièrement l'Entente définitive, n'ont pas pour objet de définir les obligations constitutionnelles des parties, y compris les modalités de la consultation de la partie autochtone par la partie étatique avant l'exercice par cette dernière des droits que lui reconnaît le traité.

[104] Les différents objectifs — à court, moyen et long terme — de l'obligation constitutionnelle de consultation des Autochtones procèdent tous d'un même principe fondamental en ce qui concerne les droits des peuples autochtones : l'honneur de la Couronne, qui est toujours en jeu dans les rapports entre l'État et les peuples autochtones (*R. c. Van der Peet*, [1996] 2 R.C.S. 507, par. 24). De toute évidence, lorsque ces rapports portent sur les droits constitutionnels spéciaux de ces peuples, l'honneur de la Couronne devient alors source d'obligations et de droits constitutionnels, comme c'est le cas pour l'obligation de la Couronne de consulter les Autochtones relativement aux droits ancestraux ou issus de traités de ces derniers (*R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6).

[105] Dans notre jurisprudence, le principe de l'honneur de la Couronne tend à se substituer à une notion qui possède à la fois une portée se limitant à certains types de rapports n'intéressant pas toujours les droits constitutionnels des Autochtones et des relents de paternalisme, à savoir l'obligation de fiduciaire (*St. Ann's Island Shooting and Fishing Club Ltd. c. The King*, [1950] R.C.S. 211, p. 219; *Guerin*; *Sparrow*; *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159, p. 183; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Nation haïda*; *Première nation Tlingit de Taku River*; *Mitchell c. M.R.N.*, 2001 CSC 33, [2001] 1 R.C.S. 911, par. 9, la juge en chef McLachlin; *Mikisew*, par. 51). Avant d'être élevé au rang de principe constitutionnel, l'honneur de la Couronne s'est d'abord entendu du caractère « sacré » de la [TRADUCTION] « parole de l'homme blanc » (*R. c. White* (1964), 50 D.L.R. (2d) 613 (C.A.C.-B.), p. 649, conf. par (1965), 52 D.L.R.

[1990] 1 S.C.R. 1025, at p. 1041, and *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12, *per* Gwynne J. (dissenting)). The honour of the Crown thus became a key principle for the interpretation of treaties with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24 and 46; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78, *per* McLachlin J. (as she then was), dissenting, but not on this issue; *Mikisew*, at para. 51).

[106] Associating the honour of the Crown with the observance of duly negotiated treaties implies that some value is placed on the treaty negotiation process. But for the treaty to have legal value, its force must be such that neither of the parties can disregard it. The principle of the honour of the Crown does not exempt the Aboriginal party from honouring its own undertakings. What is in question here is respect for the ability of Aboriginal peoples to participate actively in defining their special constitutional rights, and for their autonomy of judgment.

[107] To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to me to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

[108] The Crown does indeed act honourably when it negotiates in good faith with an Aboriginal nation to conclude a treaty establishing how that nation is to exercise its special rights in its traditional territory. Adhering to the principle of the honour of the Crown also requires that in the course of negotiations the Crown consult the Aboriginal party, to an extent that can vary, and in some cases find ways to "accommodate" it, before taking steps or making

(2d) 481 (C.S.C.); voir également *R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1041, et *Province of Ontario c. Dominion of Canada* (1895), 25 R.C.S. 434, p. 511-512, le juge Gwynne (dissident)). L'honneur de la Couronne est ainsi devenu un principe cardinal d'interprétation des traités conclus avec les Autochtones (*R. c. Badger*, [1996] 1 R.C.S. 771, par. 41; *R. c. Sundown*, [1999] 1 R.C.S. 393, par. 24 et 46; *R. c. Marshall*, [1999] 3 R.C.S. 456, par. 78, la juge McLachlin (maintenant Juge en chef), dissidente, mais non sur cette question; *Mikisew*, par. 51).

[106] Associer l'honneur de la Couronne au respect des traités dûment négociés suppose une certaine valorisation du processus de négociation de ces traités. Or, la valeur juridique même du traité dépend de la capacité de celui-ci d'être respecté par les deux parties. Le principe de l'honneur de la Couronne ne dispense pas la partie autochtone de l'obligation d'honorer ses propres engagements. Il en va du respect de la capacité des peuples autochtones de prendre une part active à la définition de leurs droits constitutionnels spéciaux, du respect de leur autonomie de jugement.

[107] Permettre à une partie de revenir unilatéralement sur son engagement constitutionnel en y superposant des droits et obligations additionnels portant sur des matières déjà prévues au traité risque de se traduire par un mépris juridique paternaliste, de compromettre le processus national de négociation de traités et de nuire à la poursuite de l'objectif ultime de réconciliation. Voilà le péril auquel nous expose ce qui me semble être une malheureuse prise en otage du principe constitutionnel de l'honneur de la Couronne et du principe en découlant, l'obligation de consulter les Autochtones.

[108] La Couronne se montre assurément honorable lorsqu'elle négocie de bonne foi avec une nation autochtone un traité précisant les modalités d'exercice des droits spéciaux de celle-ci sur son territoire traditionnel. Le respect du principe de l'honneur de la Couronne exige aussi que, en cas de négociation, cette dernière consulte avec une intensité variable la partie autochtone et, dans certains cas, trouve le moyen de l'« accommoder » avant de prendre des

decisions that could infringe special constitutional rights in respect of which the Crown has already agreed to negotiate a framework for exercising them (*Haida Nation*; *Taku River*). Since the honour of the Crown is more a normative legal concept than a description of the Crown's actual conduct, it implies a duty on the part of the Crown to consult Aboriginal peoples not only with respect to the Aboriginal rights to which the negotiations actually relate, but also with respect to any Aboriginal right the potential existence of which the Crown can be found to have constructive knowledge, provided, of course, that what it plans to do might adversely affect such rights (*Haida Nation*, at para. 35). As we have seen, this principle also requires that the Crown keep its word and honour its undertakings after a treaty has been signed.

[109] In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights: consultation in the strict sense, participation in environmental and socio-economic assessments, co-management, etc. Nor, in such cases — which are the norm since the signing of the *James Bay and Northern Québec Agreement* in 1975 — does the Crown act dishonourably in concluding a land claim agreement based on Aboriginal rights if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

[110] It has sometimes been asserted, incorrectly in my opinion, that in treaty negotiations, the Crown and Aboriginal parties have deeply divergent points of view respecting this objective of legal certainty, which only the Crown is really interested in pursuing. Excessive weight should not be given to the arguments of the parties to this case, as their

mesures ou décisions susceptibles d'attenter à des droits constitutionnels spéciaux dont elle a justement accepté de négocier les modalités d'exercice (*Nation haïda*; *Taku River*). En réalité, étant davantage un concept juridique normatif qu'un concept descriptif de l'action réelle de la Couronne, l'honneur de la Couronne implique l'obligation pour celle-ci de consulter les Autochtones non seulement au sujet des droits ancestraux effectivement visés par les négociations, mais également au sujet de tout droit ancestral dont la connaissance ou l'existence potentielle peut lui être imputée, pour autant, bien entendu, que les dispositions qu'elle envisage de prendre seraient susceptibles d'avoir un effet préjudiciable sur de tels droits (*Nation haïda*, par. 35). Ce même principe commande aussi, comme nous l'avons vu, que la Couronne tienne parole et respecte ses engagements une fois un traité conclu.

[109] Dans le cadre de la conclusion d'un traité, il n'y a rien de déshonorant pour la Couronne à s'entendre avec une communauté autochtone sur un régime détaillé et multiforme de consultation relative à l'exercice des droits de cette communauté : consultation au sens strict, participation à l'évaluation environnementale et socioéconomique, cogestion, etc. En outre, dans un tel cas — et c'est normalement ce qui se produit depuis la signature de la *Convention de la Baie-James et du Nord québécois* en 1975 — lors de la conclusion de tout accord de règlement d'une revendication territoriale fondée sur des droits ancestraux, il n'y a rien non plus de déshonorant de la part de la Couronne à exiger de la partie autochtone qu'aucun régime parallèle relatif à une matière prévue au traité ne permette à celle-ci de revenir sur ses engagements. En effet, la sécurité juridique est l'objectif premier de toutes les parties à un accord portant règlement de revendication territoriale globale.

[110] On a parfois affirmé, à tort selon moi, que, dans la négociation d'un traité, la partie étatique et la partie autochtone divergeaient profondément d'opinions relativement à cet objectif de sécurité juridique, ou « certitude », dont seul l'État aurait à cœur la poursuite. Il ne faut pas accorder un poids démesuré aux thèses avancées par les parties en

positions have clearly become polarized as a result of the adversarial context of this proceeding.

[111] In fact, according to studies commissioned by the United Nations, (1) lack of precision with respect to their special rights continues to be the most serious problem faced by Aboriginal peoples, and (2) Aboriginal peoples attach capital importance to the conclusion of treaties with the Crown (M. Saint-Hilaire, "La proposition d'entente de principe avec les Innus: vers une nouvelle génération de traités?" (2003), 44 *C. de D.* 395, at pp. 397-98). It is also wrong, in my opinion, to say that Aboriginal peoples' relational understanding of the treaty is incompatible with the pursuit of the objective of legal certainty. On this understanding, that of "treaty making", the primary purpose of these instruments is to establish a relationship that will have to evolve (M. L. Stevenson, "Visions of Certainty: Challenging Assumptions", in Law Commission of Canada, ed., *Speaking Truth to Power: A Treaty Forum* (2001), 113, at p. 121; R. A. Williams, *Linking Arms Together* (1997)). The concept of an agreement that provides certainty is not synonymous with that of a "final agreement", or even with that of an "entire agreement". Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty.

[112] Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters, in the words of Binnie J., "a positive long-term relationship between Aboriginal and non-Aboriginal communities" (at para. 10) consists first and foremost in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it

l'espèce, qui ont arrêté des positions sans nul doute polarisées par le contexte contradictoire de la présente instance.

[111] En effet, des travaux commandés par l'Organisation des Nations Unies ont révélé que (1) le déficit de précision de leurs droits spéciaux demeurait le problème le plus important pour les peuples autochtones, en même temps que (2) l'importance capitale que revêt aux yeux de ces peuples la conclusion de traités avec les États (M. Saint-Hilaire, « La proposition d'entente de principe avec les Innus : vers une nouvelle génération de traités? » (2003), 44 *C. de D.* 395, p. 397-398). On fait également fausse route, à mon avis, lorsqu'on affirme que la conception relationnelle que se font les Autochtones des traités est incompatible avec la poursuite d'un objectif de sécurité juridique. Suivant cette conception de la [TRADUCTION] « négociation de traités » (« *treaty making* »), ces instruments viseraient principalement à établir une relation qui serait appelée à évoluer (M. L. Stevenson, « Visions de certitude : question d'hypothèses », dans Commission du droit du Canada, dir., *Parlons franchement à propos des traités* (2001), 123, p. 132; R. A. Williams, *Linking Arms Together* (1997)). Or, la notion d'« accord sûr » ne coïncide pas avec celle d'« accord définitif », ni même avec celle d'« accord complet ». Il ne saurait y avoir de sécurité juridique si une des parties à un traité pouvait — unilatéralement et sans que cela ne soit prévu au traité — revenir sur ses engagements à l'égard d'une matière prévue à ce traité. Cela ne veut pas dire qu'il ne peut pas exister de matières dont les parties n'auront pas traité et à l'égard desquelles la partie autochtone pourra ne pas avoir renoncé à d'éventuels droits ancestraux. La sécurité juridique n'exclut pas non plus la possibilité de prévoir, dans un traité, un mécanisme équitable de réexamen.

[112] En ce sens, il devrait être évident que la meilleure façon pour les tribunaux de contribuer à ce qu'un traité favorise, comme le souhaite le juge Binnie, « une relation à long terme harmonieuse entre les collectivités autochtones et non autochtones » (par. 10), consiste d'abord et avant tout à s'assurer que les parties ne puissent revenir unilatéralement sur leurs engagements. Et il se trouve que, en aval de sa poursuite en tant qu'objectif partagé à

cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and respect the other party's rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

[113] Except where actions are taken that are likely to unilaterally infringe treaty rights of an Aboriginal people, it is counterproductive to assert, as the respondents do, that the common law duty to consult continues to apply in all cases, even where a treaty exists. However, the appellants' argument goes much too far. As I explain more fully below, the fact that a treaty has been signed and that it is the entire agreement on some aspects of the relationship between an Aboriginal people and the non-Aboriginal population does not imply that it is a complete code that covers every aspect of that relationship. It is in fact because the agreement in issue does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply, as the appellants submit, because this is a "modern" treaty constituting a land claims agreement.

[114] It is true that s. 35(3) of the *Constitution Act, 1982* recognizes the existence of a category of treaties, called "land claims agreements", which, in constitutional law, create "treaty" rights within the meaning of s. 35(1). Thus, although the courts will certainly take the context of the negotiation of each treaty into consideration, they will avoid, for example, developing rules specific to each category of treaty identified in the legal literature or by the government (e.g., "peace and friendship" treaties, "pre-Confederation" treaties, "numbered" treaties and "modern" treaties).

l'étape de la négociation, la sécurité juridique ne saurait, à l'étape de la mise en œuvre d'un traité, opérer à sens unique. Au contraire, la sécurité des droits d'une partie implique nécessairement que celle-ci s'acquitte de ses obligations et respecte les droits de l'autre partie. S'étant toutes deux échinées, dans leur intérêt commun, à substituer un système juridique précis à un régime normatif incertain, la partie autochtone et la partie étatique ont toutes deux intérêt à ce que leur œuvre produise ses effets.

[113] Sauf en ce qui concerne la prise de mesures susceptibles d'enfreindre unilatéralement des droits reconnus par traité à un peuple autochtone, il est contre-productif d'affirmer, comme le font les intimés, que l'obligation de consultation de régime jurisprudentiel demeure toujours applicable, même en présence d'un traité. Cela dit, la thèse des appelants va beaucoup trop loin. Comme je l'explique plus amplement ci-dessous, le fait qu'un traité ait été signé et qu'il s'agisse de l'entente complète sur certains aspects de la relation des Autochtones avec les non-Autochtones ne signifie pas qu'il s'agit d'un code complet couvrant tous les aspects de cette relation. En l'espèce, c'est justement parce que l'accord en cause traite bel et bien des différentes formes de consultation auxquelles a droit la partie autochtone concernant les droits que la Couronne veut exercer qu'il faut se garder de superposer à ce régime des droits et obligations qui lui sont étrangers, et non pas simplement, comme le prétendent les appelants, parce qu'il s'agit d'un traité « moderne » constituant un accord portant règlement de revendications territoriales.

[114] Il est vrai que le par. 35(3) de la *Loi constitutionnelle de 1982* reconnaît l'existence d'une catégorie de traités, appelés « accords sur des revendications territoriales », dont la loi constitutionnelle confirme qu'ils créent des droits « issus de traités » visés au par. 35(1). Cela dit, les tribunaux prendront certes acte du contexte des négociations de chaque traité, mais ils éviteront, par exemple, de dégager des règles particulières pour chaque catégorie de traités reconnue par la doctrine ou l'administration publique (p. ex. traités « de paix et d'amitié », traités « préconfédératifs », traités « numérotés », traités « modernes »).

[115] In *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, LeBel J. and I rejected the date of signature as the criterion for determining the rules of interpretation applicable to treaties entered into with Aboriginal peoples: ". . . the issue relates to the context in which an agreement was negotiated and signed, not to the date of its signature" (para. 114). We arrived at that conclusion because we did not believe that distinct legal meanings flowed from the identification in the legal literature and by the government of various categories of treaties on the basis of the historical periods in which the treaties were signed. This approach was also taken by McLachlin J., dissenting on a different issue, in *Marshall*, as she said that "each treaty must be considered in its unique historical and cultural context", which "suggests" that the practice of "slot[ting] treaties into different categories, each with its own rules of interpretation . . . should be avoided" (para. 80).

[116] If, in a given case, a court feels freer to maintain a certain critical distance from the words of a treaty and can as a result interpret them in a manner favourable to the Aboriginal party, this will be because it has been established on the evidence, including historical and oral evidence, that the written version of the exchange of promises probably does not constitute an accurate record of all the rights of the Aboriginal party and all the duties of the Crown that were created in that exchange. It is true that, where certain time periods are concerned, the context in which the agreements were reached will more readily suggest that the words are not faithful. But this is a question that relates more to the facts than to the applicable law, which is, in the final analysis, concerned with the common intention of the parties. From a legal standpoint, a comprehensive land claim agreement is still a treaty, and nothing, not even the fact that the treaty belongs to a given "category", exempts the court from reading and interpreting the treaty in light of the context in which it was concluded in order to identify the parties' common intention. This Court has had occasion to mention that, even where the oldest of treaties are involved, the interpretation "must be realistic and reflect the intention

[115] Dans *Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557, le juge LeBel et moi avons rejeté la date de conclusion comme critère déterminant les règles d'interprétation des traités conclus avec les Autochtones : « . . . le choix de la méthode d'interprétation se rattache au contexte de la négociation et de la signature d'un accord, et non à la date à laquelle il a été signé » (par. 114). Cette conclusion procédait d'un refus de reconnaître une signification juridique autonome ou immédiate aux diverses catégories de traités que la doctrine et l'administration publique ont établies sur la base d'un découpage historique. Cette approche a aussi été défendue par la juge McLachlin, dissidente sur une autre question, qui a affirmé, dans l'arrêt *Marshall*, que « chaque traité doit être examiné à la lumière de son contexte historique et culturel particulier », principe qui « tend à indiquer » que la pratique consistant à « classer les traités en diverses catégories, dont chacune aurait ses propres règles d'interprétation [. . .] devrait être évitée » (par. 80).

[116] Dans les cas où les tribunaux se sentiront davantage libres de prendre une certaine distance critique par rapport au texte d'un traité et pourront, de ce fait, l'interpréter d'une manière favorable à la partie autochtone, ce sera parce que la preuve, y compris la preuve historique et orale, aura établi qu'il est probable que la version écrite de l'échange de promesses ne consigne pas fidèlement tous les droits de la partie autochtone et toutes les obligations de la Couronne qu'a créés cet échange. Il est vrai que, pour certaines époques, le contexte de conclusion des accords suggérera plus facilement l'existence d'une telle infidélité du texte. Mais cela ressortit davantage aux faits qu'au droit applicable, lequel s'attache en dernière analyse à l'intention commune des parties. Du point de vue juridique, les accords de règlement de revendications territoriales globales demeurent des traités. Et rien, pas même l'appartenance du traité à une « catégorie » donnée, ne dispense de lire et d'interpréter ce traité à la lumière du contexte de sa conclusion afin de dégager l'intention commune des parties. La Cour a d'ailleurs eu l'occasion de rappeler que, même lorsqu'il s'agit de traités plus anciens, l'interprétation « doit être réaliste et refléter l'intention des deux parties et non seulement celle [de la première

of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). I would even say that it would be wrong to think that the negotiating power of Aboriginal peoples is directly related to the time period in which the treaty was concluded, as certain Aboriginal nations were very powerful in the early years of colonization, and the European newcomers had no choice but to enter into alliances with them.

[117] My finding with regard to the interpretation of treaties is equally applicable to the relationship between treaties and the law external to them or, in other words, to the application to treaties of the rules relating to conflicting legislation: the mere fact that a treaty belongs to one "category" or another cannot mean that a different set of rules applies to it in this regard. The appellants' invitation must therefore be declined: even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party.

[118] Thus, the basis for distinguishing this case from *Mikisew* is not the mere fact that the treaty in issue belongs to the category of modern land claims agreements. As Binnie J. mentions in the case at bar (at para. 53), the treaty in issue in *Mikisew* was silent on how the Crown was to exercise its right under the treaty to require or take up tracts "from time to time for settlement, mining, lumbering, trading or other purposes". This constituted an omission, as, without guidance, the exercise of such a right by the Crown might have the effect of nullifying the right of the Mikisew under the same treaty "to pursue their usual vocations of hunting, trapping and fishing". Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

nation] » (*Sioui*, p. 1069). Je dirais même qu'il serait erroné de penser que le pouvoir de négociation des Autochtones est directement fonction de l'époque du traité, car certaines nations autochtones étaient très puissantes au début de la colonisation et les arrivants européens ne pouvaient se passer d'alliances avec elles.

[117] Ma conclusion au sujet de l'interprétation des traités vaut tout autant en ce qui concerne la relation entre ceux-ci et le droit qui leur est extérieur, autrement dit, au sujet de l'application aux traités des règles relatives aux conflits de lois : le simple fait qu'un traité appartienne à l'une ou l'autre des « catégories » ne saurait assujettir celui-ci à un régime distinct à cet égard. L'invitation des appelants doit donc être déclinée : même lorsque le traité en cause est un accord portant règlement de revendications territoriales, la Cour doit d'abord dégager l'intention commune des parties; elle se prononcera ensuite sur l'application, à la partie autochtone, du régime jurisprudentiel relatif à l'obligation constitutionnelle de consultation.

[118] C'est donc sur une autre base que la simple appartenance du traité en cause à la catégorie des accords modernes de règlement de revendications territoriales que la présente affaire se distingue de l'affaire *Mikisew*. Comme le rappelle en l'espèce le juge Binnie (par. 53), le traité en cause dans *Mikisew* était silencieux sur les modalités d'exercice du droit reconnu à la Couronne de requérir ou prendre des terrains « de temps à autre [. . .] pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ». Il s'agissait là d'une omission, car, en l'absence de balises, l'exercice d'un tel droit par la Couronne risquait de rendre inopérant le droit des Mikisew « de se livrer à leurs occupations ordinaires de la chasse au fusil, de la chasse au piège et de la pêche » que le même traité leur reconnaissait par ailleurs. Par conséquent, en présence d'un traité, l'obligation jurisprudentielle de consultation ne s'appliquera qu'en cas d'omission des parties au traité d'avoir prévu cette matière.

[119] Moreover, where, as in *Mikisew*, the common law duty to consult must be discharged to remedy a gap in the treaty, the duty undergoes a transformation. Where there is a treaty, the function of the common law duty to consult is so different from that of the duty to consult in issue in *Haida Nation* and *Taku River* that it would be misleading to consider these two duties to be one and the same. It is true that both of them are constitutional duties based on the principle of the honour of the Crown that applies to relations between the Crown and Aboriginal peoples whose constitutional — Aboriginal or treaty — rights are at stake. However, it is important to make a clear distinction between, on the one hand, the Crown's duty to consult before taking actions or making decisions that might infringe Aboriginal rights and, on the other hand, the minimum duty to consult the Aboriginal party that necessarily applies to the Crown with regard to its exercise of rights granted to it by the Aboriginal party in a treaty. This, in my opinion, is the exact and real meaning of the comment in *Mikisew* that the "honour of the Crown exists as a source of obligation independently of treaties as well" (para. 51). This is also the exact meaning of the comment in *Haida Nation* that the "jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (para. 32).

[120] Where the Crown unilaterally limits a right granted to an Aboriginal people in a treaty in taking an action that does not amount to an exercise of one of its own rights under that treaty, the infringement is necessarily a serious one, and the Crown's duty is one of reasonable accommodation. This principle is very similar to that of minimal impairment, with respect to which a duty to consult was held to exist in *Sparrow*.

[119] Par ailleurs, lorsque, comme dans l'affaire *Mikisew*, l'obligation de consultation de régime jurisprudentiel doit être mobilisée afin de combler une lacune du traité, cette obligation connaît alors un phénomène de différenciation. En effet, en présence d'un traité, l'obligation jurisprudentielle de consultation remplit une fonction bien distincte de celle de l'obligation de consultation en cause dans les affaires *Nation haïda* et *Taku River*, si bien qu'il serait trompeur d'assimiler ces deux obligations. Certes, il s'agit dans les deux cas d'une obligation constitutionnelle, fondée sur le principe de l'honneur de la Couronne qui doit présider aux relations entre celle-ci et les peuples autochtones lorsque les droits constitutionnels — ancestraux ou issus de traités — des seconds sont en jeu. Cependant, il est important de bien distinguer, d'une part, l'obligation de consultation qui s'impose à la Couronne préalablement à la prise de mesures ou dispositions qui risquent d'enfreindre les droits ancestraux d'un peuple autochtone et, d'autre part, l'obligation minimale en matière de consultation de la partie autochtone qui s'applique impérativement à la Couronne relativement à l'exercice par celle-ci des droits que la première lui a reconnus par traité. Voilà, à mon avis, la signification précise et véritable du passage suivant de l'arrêt *Mikisew*, selon lequel l'« honneur de la Couronne existe également en tant que source d'obligation indépendante des traités » (par. 51). C'est dans ce sens précis que doit être également compris le passage suivant de l'arrêt *Nation haïda* selon lequel la « jurisprudence de la Cour étaye le point de vue selon lequel l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications » (par. 32).

[120] Lorsque, autrement que dans l'exercice d'un droit découlant d'un traité, la Couronne restreint unilatéralement un droit conféré par ce traité à un peuple autochtone, une telle atteinte est forcément grave et l'obligation qu'a alors la Couronne consiste à prendre des mesures d'accommodement raisonnable. Et cette norme rejoint d'ailleurs celle de l'atteinte minimale, contexte dans lequel l'arrêt *Sparrow* a reconnu l'obligation de consulter.

[121] The consultation that must take place if the Crown's exercise of its own rights under a treaty impairs a right of the Aboriginal party will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework, which varies with the circumstances, and in particular with the seriousness of any potential effects on the Aboriginal party's rights under the treaty (*Haida Nation*, at para. 39; *Mikisew*).

[122] One thing must be made clear at this point, however. Where a treaty provides for a mechanism for consulting the Aboriginal party when the Crown exercises its rights under the treaty — one example would be the participation of the Aboriginal party in environmental and socio-economic assessments with respect to development projects — what the treaty does is to override the common law duty to consult the Aboriginal people; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually. The constitutional duty to consult Aboriginal peoples is rooted in the principle of the honour of the Crown, which concerns the special relationship between the Crown and Aboriginal peoples as peoples (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 59-60). It is as a result of this special relationship, originally based on the recognition of Aboriginal institutions that existed before the Crown asserted its sovereignty, that Aboriginal peoples, as peoples, can enter into treaties with the Crown. The general rules of administrative law do not normally form part of the matters provided for in comprehensive land claims agreements.

[123] When all is said and done, the fatal flaw in the appellants' argument that the duty to consult can never apply in the case of a modern treaty is that they confuse the concept of an agreement that provides certainty with that of an "entire agreement". The imperative of legal certainty that is central to the negotiation of a modern treaty and

[121] La consultation requise en vue de l'exercice de droits reconnus à la Couronne par un traité, lorsqu'il y a atteinte à un droit des Autochtones, comportera : (1) soit les mesures prévues par le traité à cet égard; (2) soit, à défaut de telles mesures dans le traité, au degré de consultation que le régime jurisprudentiel établit et qui est fonction des circonstances, notamment la gravité des effets potentiels sur les droits que le traité reconnaît à la partie autochtone (*Nation haïda*, par. 39; *Mikisew*).

[122] Une précision importante doit toutefois être apportée ici. Lorsqu'un traité établit des mesures de consultation de la partie autochtone en vue de l'exercice par la partie étatique des droits que lui reconnaît ce traité, par exemple la participation de la partie autochtone concernée à l'évaluation environnementale et socioéconomique des projets de développement, ce que le traité a pour effet d'écarter dans un tel cas est bien l'obligation jurisprudentielle de consultation du peuple autochtone, non pas toute obligation de consulter individuellement le titulaire d'un droit pouvant découler du principe général du droit administratif qu'est l'équité procédurale. L'obligation constitutionnelle de consultation des Autochtones procède du principe de l'honneur de la Couronne, lequel concerne la relation toute particulière qu'entretiennent avec l'État les Autochtones en tant que peuples (*Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 59-60). C'est d'ailleurs cette relation particulière, fondée à l'origine sur la reconnaissance d'ordres autochtones préexistants à l'affirmation par la Couronne de sa souveraineté, qui explique que, en tant que peuples, les Autochtones peuvent conclure des traités avec l'État. Les règles générales du droit administratif ne font normalement pas partie des matières prévues dans les accords de règlement de revendications territoriales globales.

[123] Au fond, l'erreur qui vicie la thèse des appelants selon laquelle tout traité moderne écarte, de par sa nature, l'obligation jurisprudentielle de consultation est qu'ils confondent la notion d'« accord sûr » et celle d'« accord complet ». L'impératif de sécurité juridique qui est à la base de la négociation d'un traité moderne et qui appelle au respect de la volonté

that requires a court to defer to the will of the parties must not blind the courts to omissions by the parties. That an agreement is complete cannot be presumed; it must be found to be complete.

[124] The Court obviously cannot bind itself in future cases by assuming that every modern treaty is free of omissions or other gaps with respect to consultation. The possibility of so important a matter being omitted from a modern treaty may at first blush seem unlikely, but as can be seen from the instant case, it is very real. Were it not for the transitional law provisions in Chapter 12, there would probably have been a gap in this case and, on an exceptional basis, in the legal context of the modern treaty, the common law duty to consult could duly have been applied to fill that gap. But no such gap can be found in this case. Yet it is in fact just such a "procedural gap" that Binnie J. finds (at para. 38) to be confirmed here, but he reaches this conclusion without considering the treaty's transitional law provisions, which, in my view, contain the answers to the questions raised in this case. I disagree with the argument that such a procedural gap exists in this case, and I also disagree with superimposing the common law duty to consult on the treaty. These, therefore, are the basic differences between us.

[125] Yukon also submits that the existence of a duty to consult may be inferred from a treaty only in accordance with its express terms. Once again, this is an argument that goes too far and is in no way consistent with the general principles of interpretation of treaties with Aboriginal peoples, even when those principles are applied to modern treaties. As we will see, the treaty itself contains interpretive provisions to the effect that an interpretation should not be limited to the express terms of the treaty, and in particular that its provisions must be read together and that any ambiguities should be resolved in light of the objectives set out at the beginning of each chapter.

des parties ne saurait rendre les tribunaux aveugles aux omissions de ces dernières. La complétude d'un accord ne se présume pas, elle se constate.

[124] La Cour ne peut évidemment pas se lier pour l'avenir et tenir pour acquis que tout traité moderne ne comporte aucune omission ou autre lacune en matière de consultation. La possibilité que, dans un traité moderne, on ait pu omettre une matière aussi importante peut sembler à première vue étonnante, mais nous verrons que la présente affaire démontre qu'une telle éventualité est pourtant bien réelle. En effet, si ce n'était des dispositions de droit provisoire que contient le chapitre 12, il y aurait probablement eu lacune en l'espèce et, à titre exceptionnel dans l'univers juridique des traités modernes au point de vue empirique, l'obligation jurisprudentielle de consultation aurait pu dûment s'appliquer pour combler cette lacune. Mais aucune lacune de ce genre ne peut être constatée dans la présente affaire. Il se trouve que c'est précisément une telle « lacune procédurale » (« *procedural gap* », par. 38) que le juge Binnie affirme être confirmée en l'espèce, et ce, sans se pencher sur le droit provisoire prévu au traité, dispositions qui, selon moi, apportent la réponse aux questions posées par les pourvois. Rejetant la thèse de l'existence, en l'espèce, d'un tel hiatus procédural, je ne souscris pas davantage à la surimposition au traité du régime jurisprudentiel de l'obligation de consultation. Voilà donc ce qui nous sépare pour l'essentiel.

[125] Dans son appel, le Yukon prétend en outre que l'existence d'une obligation de consultation ne pourra être inférée d'un traité que suivant les stipulations expresses de celui-ci. Une fois de plus, il s'agit d'un argument qui va trop loin et ne correspond d'aucune manière aux principes généraux d'interprétation des traités avec les peuples autochtones, même lorsque ces principes sont appliqués aux traités modernes. Comme nous le verrons, le traité lui-même contient des dispositions interprétatives qui précisent qu'il ne faut pas s'en tenir aux stipulations expresses, et notamment qu'il faut lire ses dispositions en corrélation et, au besoin, résoudre les ambiguïtés à la lumière des objectifs énoncés au début de chaque chapitre.

[126] These general considerations alone would form a sufficient basis for dismissing the appeal. But the provisions of the Final Agreement also confirm this conclusion, and they must, in any event, be reviewed in order to assess the respondents' argument.

II. Treaty in Issue

[127] The analysis of the treaty that must be conducted in this case has three steps. To begin, it will be necessary to review the general framework of the treaty and highlight its key concepts. The next step will be to identify the substantive treaty rights that are in issue here, namely, on the one hand, the Crown's right the exercise of which raises the issue of consultation and, on the other hand, the right or rights of the Aboriginal party, which could be limited by the exercise of the Crown's right. Finally, and this is the determining factor, it will be necessary to discuss the formal rights and duties that result from the consultation process provided for in the treaty.

A. *General Framework*

[128] "Comprehensive" Aboriginal land claims agreements form part of the corpus of our constitutional law. And the effect of the implementing legislation of such agreements is that they are usually binding on third parties. The agreements are most often the fruit of many years of intense negotiations. The documents in which they are set out therefore command the utmost respect.

[129] This Court was recently asked to interpret the *James Bay and Northern Québec Agreement* for the first time, some 35 years after it was signed in 1975. Since that year, 19 other similar agreements have been concluded across the country. Subsequently, to take the most striking example, although only one comprehensive claim in British Columbia has resulted in a final settlement and only seven others in that province are currently at relatively advanced stages of negotiation, no fewer than 52 other claims there have been accepted for negotiation by the Treaty Commission.

[126] Il serait possible, sur la seule base des considérations d'ordre général qui précèdent, de rejeter l'appel principal. Cependant, les dispositions de l'Entente définitive confirment elles aussi cette conclusion. Leur examen est d'ailleurs nécessaire pour évaluer la thèse des intimés.

II. Traité en cause

[127] L'analyse du traité que requiert la présente affaire comporte trois volets. Il faudra d'abord en discerner le régime général et en dégager les notions clés. Il s'agira ensuite de déterminer les droits matériels issus de traités qui sont ici en jeu, c'est-à-dire, d'une part, le droit de la partie étatique dont l'exercice soulève la question de la consultation et, d'autre part, le droit ou les droits de la partie autochtone qui, du fait de cet exercice risque de se retrouver limités par celui du droit de la Couronne. Enfin, élément déterminant, il sera question des droits et obligations formels qui résultent du processus de consultation prévu au traité.

A. *Régime général*

[128] Les accords portant règlement de revendications territoriales autochtones dites « globales » font partie de notre corpus constitutionnel. Qui plus est, par l'effet de leur loi de mise en œuvre, ces accords lient normalement les tiers. Ils sont d'habitude le fruit de nombreuses années d'intenses négociations. Les documents qui les consignent commandent donc le plus grand respect.

[129] Notre Cour a récemment été appelée à interpréter pour la première fois la *Convention de la Baie-James et du Nord québécois*, quelque 35 ans après sa signature en 1975. Or, depuis cette date, c'est 19 autres accords du genre qui ont été conclus à travers le pays. Ensuite, et pour prendre l'exemple le plus fort, si à ce jour une seule revendication globale a fait l'objet d'un accord de règlement définitif en Colombie-Britannique et si sept autres seulement y sont à un stade plus ou moins avancé de négociation, en revanche pas moins de 52 autres revendications y ont été acceptées pour négociation par la Commission des traités.

[130] It was after 20 years of negotiations that the Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon ("Umbrella Agreement") was signed on May 29, 1993. At that time, the Little Salmon/Carmacks First Nation was a member of the Council for Yukon Indians, and it still is today, along with nine other First Nations. The Umbrella Agreement provided for the conclusion, in accordance with its terms, of specific agreements with the various Yukon First Nations (s. 2.1.1).

[131] Although the Umbrella Agreement "does not create or affect any legal rights" (s. 2.1.2), it provides that "Settlement Agreements shall be land claims agreements within the meaning of section 35 of the *Constitution Act, 1982*" (s. 2.2.1). Moreover, according to the Umbrella Agreement, "[a] Yukon First Nation Final Agreement shall include the provisions of the Umbrella Final Agreement and the specific provisions applicable to that Yukon First Nation" (s. 2.1.3). It can be seen from the final agreements in question that the parties have given effect to this undertaking. Even the numbering of the Umbrella Agreement's provisions has been reproduced in the 11 final agreements that have been concluded under it so far. These 11 final agreements represent over half of all the "comprehensive" land claims agreements (that is, agreements resulting from claims that Aboriginal rights exist) signed across the country. The Final Agreement in issue here was signed near Carmacks on July 21, 1997 and was subsequently ratified and implemented by enacting legislation; this last step was a condition of validity (ss. 2.2.11 and 2.2.12).

[132] The Umbrella Agreement, as a whole, is founded on a few basic concepts. It should be noted from the outset that this agreement applies to a larger territory than the land claims settlement concluded under it actually does. The agreement refers to "Settlement Land", which is defined as "Category A Settlement Land, Category B Settlement Land or Fee Simple Settlement Land", and to "Non-Settlement Land", which is defined as "all land and water in the Yukon other than

[130] C'est au terme d'une vingtaine d'années de négociations que, le 29 mai 1993, était signé l'Accord-cadre définitif entre le gouvernement du Canada, le Conseil des Indiens du Yukon et le gouvernement du Yukon (« Accord-cadre »). La Première nation de Little Salmon/Carmacks était alors membre du Conseil des Indiens du Yukon. Elle l'est toujours, avec neuf autres premières nations. L'Accord-cadre prévoyait la conclusion, suivant ses stipulations, d'ententes particulières avec les diverses premières nations du Yukon (art. 2.1.1).

[131] Tandis que l'Accord-cadre « n'a pas pour effet de créer des droits légaux ou de porter atteinte à de tels droits » (art. 2.1.2), en revanche « [l]es ententes portant règlement constituent des accords sur des revendications territoriales au sens de l'article 35 de la *Loi constitutionnelle de 1982* » (art. 2.2.1). De plus, l'Accord-cadre précise que « [t]oute entente définitive conclue par une première nation du Yukon doit inclure les dispositions de l'Accord-cadre définitif ainsi que les dispositions spécifiques applicables à cette première nation du Yukon » (art. 2.1.3). La lecture des ententes définitives en question révèle que cet engagement a été tenu par les parties. On a même repris, dans les 11 ententes définitives conclues jusqu'à maintenant conformément à l'Accord-cadre, la numérotation des dispositions de cet accord. Ces 11 ententes représentent ainsi plus de la moitié de la totalité des accords de règlement de revendications territoriales « globales » (c'est-à-dire fondée sur l'allégation de droits ancestraux) conclus au pays. L'Entente définitive qui nous intéresse a été signée près de Carmacks, le 21 juillet 1997, et ultérieurement ratifiée et mise en œuvre par des lois, dernière étape qui constituait une condition de validité (art. 2.2.11 et 2.2.12).

[132] Certaines notions structurent l'ensemble de l'Accord-cadre. Soulignons d'entrée de jeu que celui-ci vise un territoire plus grand que ne le fait, comme tel, le règlement des revendications dont il est porteur. En effet, il y est question, outre d'une « terre visée par le règlement » ou « terre visée par un règlement » (« *Settlement Land* ») coïncidant avec, « [s]elon le cas, les terres visées par le règlement de catégorie A, les terres visées par le règlement de catégorie B ou les terres visées par le règlement

Settlement Land" and as including "Mines and Minerals in Category B Settlement Land and Fee Simple Settlement Land, other than Specified Substances" (Chapter 1). The nature of this distinction will be helpful in our analysis of the provisions relating to legal certainty (Division 2.5.0). But one point that should be made here is that the framework provided for in the agreement varies considerably depending on which of these two broad categories the land in question belongs to. It should also be pointed out that, under the agreement, "Crown land" — such as the land in issue here that was transferred to Mr. Paulsen on October 18, 2004 — is land that, as defined, is not settlement land. Another concept used in the Umbrella Agreement is that of "traditional territory", which transcends the distinction between settlement land and non-settlement land (Chapter 1 and Division 2.9.0). This concept of "traditional territory" is relevant not only to the possibility of overlapping claims of various Yukon First Nations, but also to the extension of claims beyond the limits of Yukon and to the negotiation of transboundary agreements (Division 2.9.0). As we will see, it is also central to the fish and wildlife co-management system established in Chapter 16 of the Final Agreement. The land that was in question in the decision of the Director of Agriculture dated October 18, 2004 in respect of Mr. Paulsen's application is located within the traditional territory of the Little Salmon/Carmacks First Nation, and more specifically in the northern part of that territory, in a portion that overlaps with the traditional territory of the Selkirk First Nation.

[133] The appellants' argument is based entirely on the principle that the agreement provides certainty. More precisely, it is based on an interpretation according to which that principle is indistinguishable from the principle of the "entire agreement". As a result, they have detached a key general provision of the Final Agreement from its context and

détenues en fief simple », d'une « terre non visée par un règlement » ou « terre non visée par le règlement » (« *Non-Settlement Land* »), expression qui s'entend ici « de terres et d'eaux du Yukon qui ne sont pas des terres visées par un règlement » ainsi que des « mines et [des] minéraux — à l'exclusion des matières spécifiées — des terres visées par le règlement de catégorie B et des terres visées par le règlement détenues en fief simple » (chapitre 1). La nature de cette distinction sera utile lorsque nous examinerons les dispositions relatives à la sécurité juridique ou certitude (section 2.5.0). Mais signalons déjà que le régime prévu par l'accord varie considérablement selon qu'il est question de terres relevant de l'une ou l'autre de ces deux grandes catégories. Il convient aussi de souligner que, aux termes de l'accord, une « terre de la Couronne » — telle celle dont la cession à M. Paulsen le 18 octobre 2004 est ici en cause — est une terre qui, par définition, n'est pas une terre visée par le règlement. L'Accord-cadre utilise aussi la notion de « territoire traditionnel » qui dépasse l'opposition entre les terres visées par le règlement de la revendication et celles qui ne le sont pas (chapitre 1 et section 2.9.0). Cette notion de « territoire traditionnel » n'intéresse pas seulement la question du possible chevauchement des revendications de différentes premières nations du Yukon, mais aussi de leur débordement au-delà des limites du Yukon et de la négociation d'accords transfrontaliers (section 2.9.0). Comme nous le verrons, cette notion est également au cœur du régime de cogestion des ressources halieutiques et fauniques instauré par le chapitre 16 de l'entente définitive. La terre qui, le 18 octobre 2004, faisait l'objet de la décision du directeur de l'agriculture relativement à la demande de M. Paulsen se situe à l'intérieur du territoire traditionnel de la Première nation de Little Salmon/Carmacks, plus précisément dans sa partie nord, sur une portion qui chevauche le territoire traditionnel de la Première nation de Selkirk.

[133] La thèse des appelants repose entièrement sur le principe de l'« accord sûr ». Plus exactement, elle repose sur une interprétation imperméable à ce qui le distingue de celui d'« accord complet ». C'est ce qui explique comment ils en arrivent à détacher de son contexte une disposition générale fort importante de l'entente définitive pour en donner

interpreted it in a way that I do not find convincing. The "entire agreement" clause (s. 2.2.15), the actual source of which is the Umbrella Agreement and on which the appellants rely, provides that "Settlement Agreements shall be the entire agreement between the parties thereto and [that] there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them." This clause is consistent with the "out-of-court settlement" aspect of comprehensive land claims agreements. But it is not the only one, which means that such clauses must be considered in the broader context of the Final Agreement, and in particular of the provisions respecting legal certainty, which are set out under the heading "Certainty" (Division 2.5.0).

[134] On this key issue of legal certainty, the Umbrella Agreement and, later, all the final agreements negotiated under it were entered into in accordance with the 1986 federal policy on comprehensive claims (Saint-Hilaire, at pp. 407-8, note 45). It is actually possible to refer to the 1993 policy, as the 1986 policy was not modified on this point. Since 1986, the official federal policy has stated in this respect that rights with respect to land that are consistent with the agreement and "Aboriginal rights which are not related to land and resources or to other subjects under negotiation will not be affected by the exchange" (Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (1993), at p. 9). In short, in the 1986 policy, the government announced that its conduct would be honourable in that it would aim for equitable, or [TRANSLATION] "orthodox", exchanges (Saint-Hilaire, at p. 407). In other words, the principle endorsed in the federal policy since 1986 has involved a distinction between the agreement that provides certainty and the "entire agreement". So much for the general principle behind the division of the agreement in issue entitled "Certainty". Let us now consider in greater detail the specific provisions applicable to the exchange of rights established in the Final Agreement.

une interprétation qui ne me convainc pas. La clause de l'« entente complète » (« *entire agreement clause* ») (art. 2.2.15), dont la source matérielle est l'Accord-cadre et sur laquelle les appelants se fondent, est rédigée ainsi : « Chaque entente portant règlement constitue l'entente complète intervenue entre les parties à cette entente et il n'existe aucune autre assertion, garantie, convention accessoire ou condition touchant cette entente que celles qui sont exprimées dans cette dernière. » Il s'agit ici de la dimension transaction ou « règlement à l'amiable » des accords portant règlement de revendications territoriales globales. Or, celle-ci n'est pas la seule, de sorte qu'il faut replacer une telle clause dans le contexte plus général de l'entente définitive, et notamment de ses dispositions relatives à la sécurité juridique — ou « certitude » — ou, comme ici, relative aux « Précisions » (section 2.5.0).

[134] Sur cette question essentielle de la sécurité juridique, l'Accord-cadre et, par la suite, toutes les ententes définitives négociées suivant les stipulations de celui-ci, ont été conclus conformément à la politique fédérale de 1986 sur les revendications globales (Saint-Hilaire, p. 407-408, note 45). En fait, on peut ici se reporter à la politique de 1993, puisque sur cette question celle-ci n'apportait aucune modification à la politique de 1986. Depuis 1986, la politique fédérale officielle indique à cet égard que « ne seront pas touchés par l'échange » les droits de nature foncière qui sont compatibles avec l'accord ni les « droits ancestraux qui ne sont pas liés aux terres et aux ressources ou à d'autres points négociés » (Affaires indiennes et du Nord Canada, *Politique du gouvernement fédéral en vue du règlement des revendications autochtones* (1993), p. 10). En somme, la politique de 1986 annonçait un comportement honorable en visant des échanges équitables c'est-à-dire « orthodoxes » (Saint-Hilaire, p. 407). Autrement dit, le principe promu par la politique fédérale depuis 1986 établit une distinction entre la notion d'« accord sûr » et celle d'« accord complet ». Voilà pour le principe général qui préside à la section relative aux « Précisions » de l'accord qui nous occupe. Voyons maintenant plus en détail les modalités précises de l'échange de droits établi par l'Entente définitive.

[135] The Umbrella Agreement provides (in s. 2.5.1) that, in consideration of the promises, terms, conditions and provisos in a Yukon First Nation's final agreement,

> 2.5.1.1 subject to 5.14.0 [which sets out a procedure for designating "Site Specific Settlement Land" to which s. 2.5.0 will not apply], that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests, in and to,
>
> (a) Non-Settlement Land and all other land and water including the Mines and Minerals within the sovereignty or jurisdiction of Canada, except the Northwest Territories, British Columbia and Settlement Land,
>
> (b) the Mines and Minerals within all Settlement Land, and
>
> (c) Fee Simple Settlement Land; [and]
>
> 2.5.1.2 that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement . . .

According to the agreement settling its comprehensive land claim, the Little Salmon/Carmacks First Nation therefore "surrender[ed]" any Aboriginal rights it might have *in respect of land, water, mines and minerals*, (1) subject to the procedure for designating "site specific settlement land" (of which

[135] L'Accord-cadre prévoit (art. 2.5.1) que, en contrepartie des promesses, conditions et réserves prévues par l'entente définitive conclue par une première nation du Yukon :

> 2.5.1.1 sous réserve de la section 5.14.0 [qui prévoit une procédure de désignation de « sites spécifiques » auxquels la section 2.5.0 ne s'appliquera pas], cette première nation du Yukon et toutes les personnes qui sont admissibles en tant qu'Indiens du Yukon représentées par cette première nation — à la date d'entrée en vigueur de cette entente définitive — renoncent, en faveur de Sa Majesté la Reine du chef du Canada, à l'ensemble de leurs revendications, droits, titres et intérêts ancestraux :
>
> a) concernant les terres non visées par le règlement et les autres terres et eaux — y compris les mines et les minéraux — relevant de la souveraineté ou de la compétence du Canada, à l'exception des Territoires du Nord-Ouest, de la Colombie-Britannique et des terres visées par le règlement;
>
> b) concernant les mines et les minéraux se trouvant à l'intérieur des terres visées par le règlement;
>
> c) concernant les terres visées par le règlement détenues en fief simple;
>
> 2.5.1.2 cette première nation du Yukon et toutes les personnes admissibles en tant qu'Indiens du Yukon représentées par cette première nation — à la date de cette entente définitive — renoncent, en faveur de Sa Majesté la Reine du chef du Canada, à l'ensemble de leurs revendications, droits, titres et intérêts ancestraux à l'égard des terres visées par le règlement de catégorie A et de catégorie B et des eaux qui s'y trouvent, dans la mesure où ces revendications, droits, titres et intérêts sont incompatibles ou entrent en conflit avec quelque disposition d'une entente portant règlement . . .

Aux termes de l'accord portant règlement de sa revendication globale, la Première nation de Little Salmon/Carmacks a donc « renonc[é] » à tous ses possibles droits ancestraux *relatifs aux terres, eaux, mines et minéraux*, (1) sous réserve de la procédure de désignation de « sites spécifiques » — dont

two parcels were located near the land in question in Mr. Paulsen's application), (2) except insofar as those rights extended into the Northwest Territories or British Columbia, and (3) except for those relating to settlement land and waters therein, but only to the extent that the rights in question were not inconsistent with the settlement and provided that they extended neither to land held in fee simple nor to mines and minerals — as is specified in the definition of non-settlement lands. For greater certainty, the Final Agreement accordingly adds that

> 2.5.1.4 neither that Yukon First Nation nor any person eligible to be a Yukon Indian Person it represents, their heirs, descendants and successors, shall, after the Effective Date of that Yukon First Nation's Final Agreement, assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen in Right of Canada, the Government of any Territory or Province, or any person based on,
>
> (a) any aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2; [or]
>
> (b) any aboriginal claim, right, title or interest in and to Settlement Land, lost or surrendered in the past, present or future . . .

[136] It is also important to consider general provision 2.2.4, which reflects the new orthodox exchange principle introduced by the 1986 federal policy that applied to the negotiation of the Umbrella Agreement:

> Subject to 2.5.0, 5.9.0 [effects of the registration, granting, declaration or expropriation of any interest in a Parcel of Settlement Land less than the entire interest], 5.10.1 [effects of the registration, granting or expropriation of the fee simple title in a Parcel of Settlement Land] and 25.2.0 [negotiation of the transboundary aspect of claims], Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to

deux se situent à proximité de la terre faisant l'objet de la demande de Paulsen —, (2) sauf dans la mesure où ces droits s'étendraient aux Territoires du Nord-Ouest ou à la Colombie-Britannique et (3) à l'exception de ceux qui porteraient sur des terres et eaux visées par le règlement, mais cela dans la seule mesure où ils ne seraient pas incompatibles avec celui-ci et ne s'étendraient ni à des terres détenues en fief simple ni aux mines et minéraux — ce qui précise la définition des terres non visées par un règlement. Pour plus de sûreté, l'Entente définitive ajoute qu'en conséquence :

> 2.5.1.4 ni cette première nation du Yukon ni aucune personne admissible en tant qu'Indien du Yukon représentée par cette première nation, ou leurs héritiers, descendants et successeurs, ne feront valoir ou présenteront, selon le cas, après la date d'entrée en vigueur de cette entente définitive, quelque cause d'action, action déclaratoire, réclamation ou demande de quelque nature que ce soit — passée, actuelle ou future — à l'encontre soit de Sa Majesté la Reine du chef du Canada, soit du gouvernement d'un territoire ou d'une province, ou de quelque autre personne, et qui serait fondée, selon le cas :
>
> a) sur quelque revendication, droit, titre ou intérêt ancestral visé par la renonciation prévue aux articles 2.5.1.1 et 2.5.1.2;
>
> b) sur quelque revendication, droit, titre ou intérêt ancestral relatif à des terres visées par le règlement qui a été ou sera perdu, ou qui a fait, fait ou fera l'objet d'une renonciation . . .

[136] Il est également important de souligner la disposition générale 2.2.4, qui reprend le nouveau principe des échanges orthodoxes introduit par la politique fédérale de 1986, laquelle a présidé à la négociation de l'Accord-cadre :

> Sous réserve des sections 2.5.0, 5.9.0 [effets de l'enregistrement, de l'octroi, de la déclaration ou de l'expropriation d'un intérêt inférieur à l'intérêt complet dans une parcelle de terre visée par le règlement] et 25.2.0 [négociation de la dimension transfrontalière des revendications] et de l'article 5.10.1 [effets de l'enregistrement, de l'octroi ou de l'expropriation du titre en fief simple dans une parcelle de terre visée par le règlement],

exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

[137] The spirit of the Final Agreement is apparent on the very face of these provisions respecting legal certainty: except where otherwise provided in the agreement itself, the agreement replaces the common law Aboriginal rights framework with the one it establishes for the matters it covers. But that is not all.

[138] The Final Agreement also includes general and interpretive provisions, such as general provision 2.2.5, which, like so many others, is reproduced from the Umbrella Agreement. This provision states that "Settlement Agreements shall not affect the rights of Yukon Indian People as Canadian citizens and their entitlement to all of the rights, benefits and protection of other citizens applicable from time to time." There are also relevant provisions in Division 2.6.0 of the Umbrella Agreement:

2.6.1 The provisions of the Umbrella Final Agreement, the specific provisions of the Yukon First Nation Final Agreement and Transboundary Agreement applicable to each Yukon First Nation shall be read together.

2.6.2 Settlement Legislation shall provide that:

2.6.2.1 subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land;

2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;

2.6.2.3 where there is any inconsistency or conflict between the provisions of

les ententes portant règlement n'ont pas pour effet de porter atteinte à la capacité des peuples autochtones du Yukon d'exercer des droits constitutionnels — existants ou futurs — qui sont reconnus aux peuples autochtones et qui s'appliquent à eux ou de tirer parti de tels droits.

[137] L'esprit de l'Entente définitive ressort déjà à la lecture de ces dispositions relatives à l'objectif de sécurité juridique : sauf exception prévue par l'entente elle-même, celle-ci substitue au régime jurisprudentiel relatif aux droits ancestraux celui qu'elle instaure pour les matières dont elle dispose. Mais il y a plus.

[138] L'Entente définitive comporte également des dispositions générales et interprétatives, notamment la disposition générale 2.2.5, qui a comme tant d'autres été reprise de l'Accord-cadre et qui précise que « [l]es ententes portant règlement ne portent pas atteinte aux droits des Indiens du Yukon en tant que citoyens canadiens ni à leur droit de jouir de tous les droits, avantages et protections reconnus aux autres citoyens. » La section 2.6.0 de l'Accord-cadre contient elle aussi des dispositions pertinentes :

2.6.1 Les dispositions de l'Accord-cadre définitif, les dispositions spécifiques de l'entente définitive conclue par une première nation du Yukon ainsi que l'accord transfrontalier applicable à chaque première nation du Yukon doivent être lus en corrélation.

2.6.2 La loi de mise en œuvre doit renfermer des dispositions portant que:

2.6.2.1 sous réserve des articles 2.6.2.2 à 2.6.2.6, les règles de droit fédérales, territoriales et municipales s'appliquent aux Indiens du Yukon, aux premières nations du Yukon et aux terres visées par un règlement;

2.6.2.2 les dispositions d'une entente portant règlement l'emportent sur les dispositions incompatibles d'une règle de droit fédérale, territoriale ou municipale;

2.6.2.3 les dispositions de l'Accord-cadre définitif l'emportent sur les

the Umbrella Final Agreement and the specific provisions applicable to a Yukon First Nation, the provisions of the Umbrella Final Agreement shall prevail to the extent of the inconsistency or conflict; [and]

2.6.2.4 where there is any inconsistency or conflict between Settlement Legislation and any other Legislation, the Settlement Legislation shall prevail to the extent of the inconsistency or conflict;

. . .

2.6.3 There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.

. . .

2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.

2.6.6 Settlement Agreements shall be interpreted according to the *Interpretation Act*, R.S.C. 1985, c. I-21, with such modifications as the circumstances require.

2.6.7 Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.

2.6.8 Capitalized words or phrases shall have the meaning assigned in the Umbrella Final Agreement.

These interpretive provisions establish, *inter alia*, a principle of equality between the parties (s. 2.6.3) and a principle of contextual interpretation based on the general scheme of the provisions, divisions and chapters and of the treaty as a whole in accordance with its systematic nature (s. 2.6.1). The latter principle is confirmed by the rule that in the event of ambiguity, the provisions of the treaty are to

dispositions spécifiques incompatibles, applicables à une première nation du Yukon;

2.6.2.4 les dispositions de la loi de mise en œuvre l'emportent sur les dispositions incompatibles de toute autre mesure législative;

. . .

2.6.3 Il n'existe aucune présomption que les expressions ambiguës d'une entente portant règlement doivent être interprétées en faveur soit d'une partie à cette entente soit de quelque personne en bénéficiant.

. . .

2.6.5 Les ententes portant règlement n'ont pas pour effet d'empêcher une partie de faire valoir, devant les tribunaux, sa position quant à l'existence, à la nature ou à l'étendue des rapports fiduciaires ou autres qui existeraient entre la Couronne et les premières nations du Yukon.

2.6.6 Les ententes portant règlement sont interprétées conformément à la *Loi d'interprétation*, L.R.C. (1985) ch. I-21, avec les adaptations nécessaires.

2.6.7 Les objectifs figurant dans une entente portant règlement constituent l'énoncé des intentions des parties à cette entente et doivent être utilisés dans l'interprétation des expressions douteuses ou ambiguës.

2.6.8 Les mots et expressions définis et utilisés dans l'Accord-cadre définitif ont le sens qui leur est attribué dans la définition correspondante.

De ces stipulations interprétatives se dégagent notamment le principe d'égalité des parties (art. 2.6.3) et le principe d'une interprétation contextuelle fondée sur l'économie générale des dispositions, sections, chapitres et de l'ensemble du traité suivant sa nature systématique (art. 2.6.1). Ce dernier principe est confirmé par la règle voulant que, en cas d'ambiguïté, l'interprétation des dispositions

be interpreted in light of the objectives stated at the beginning of certain chapters of the treaty (s. 2.6.7). The systematic nature of the treaty is also confirmed by the rule that when defined words and phrases are used, they have the meanings assigned to them in the definitions (s. 2.6.8). In other cases, the rules set out in the federal *Interpretation Act* apply (s. 2.6.6). This, then, is the framework for interpretation agreed on by the parties to the treaty. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

[139] These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement concluded under it, not only the relationship between them, but also that with the law in general. One of these rules is that in the event of inconsistency or conflict, the Umbrella Agreement prevails over the agreements concluded under it (s. 2.6.2.3). At first glance, this rule is surprising, since the parties to the Umbrella Agreement were very careful to specify that, on its own, that agreement "does not create or affect any legal rights" (s. 2.1.2). Section 2.6.2.3 is therefore somewhat imprecise. It can only refer to the provisions of the final agreement whose substance (and not form) derives from the Umbrella Agreement, and which prevail over the "specific" provisions. The implementing legislation, the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, provides that "[i]n the event of a conflict or inconsistency between provisions of the Umbrella Final Agreement incorporated in a final agreement that is in effect and provisions of the final agreement that are specific to the first nation, the provisions of the Umbrella Final Agreement prevail to the extent of the conflict or inconsistency" (s. 13(4)). The other provisions of the treaty that relate to this issue of conflicting legislation have also been drawn from the federal implementing legislation (s. 13) and from its territorial

du traité tienne compte des objectifs énoncés au début de certains chapitres de celui-ci (art. 2.6.7). Le caractère systématique du traité est également confirmé par la règle selon laquelle les mots et expressions définis sont porteurs de ces définitions lorsqu'ils sont utilisés (art. 2.6.8). Pour le reste, ce sont les règles établies par la loi fédérale d'interprétation qui s'appliquent (art. 2.6.6). Voilà donc le régime interprétatif dont les parties au traité ont elles-mêmes convenu. Plus exactement, ce régime a d'abord été élaboré par les parties à l'Accord-cadre, puis repris par les parties aux différentes ententes définitives conclues conformément aux stipulations de cet accord. Advenant toute incompatibilité, ce régime l'emporte sur les principes dégagés par la jurisprudence en matière d'interprétation de traités conclus par les gouvernements et les peuples autochtones.

[139] Les dispositions interprétatives et générales que nous venons de voir posent aussi certaines normes relatives aux rapports qu'entretiennent l'Accord-cadre et toute entente définitive conclue conformément à ses stipulations, non seulement entre eux, mais avec le reste du droit également. On peut noter à cet égard la norme énonçant la prépondérance — en cas d'incompatibilité constatée — de l'Accord-cadre sur les ententes conclues suivant ses stipulations (art. 2.6.2.3). À première vue, cette norme surprend, dans la mesure où les parties à l'Accord-cadre ont bien pris soin de préciser que, à lui seul, ce dernier « n'a pas pour effet de créer des droits légaux ou de porter atteinte à de tels droits » (art. 2.1.2). L'article 2.6.2.3 souffre donc d'une imprécision. Il ne peut s'agir que des dispositions de l'entente définitive dont la source matérielle (et non pas formelle) est l'Accord-cadre, lesquelles ont préséance sur les dispositions dites « spécifiques ». La loi de mise en œuvre, nommément la *Loi sur le règlement des revendications territoriales des premières nations du Yukon*, L.C. 1994, ch. 34, précise d'ailleurs que ce sont « [l]es dispositions de l'accord-cadre reprises dans un accord définitif en vigueur [qui] l'emportent sur les dispositions incompatibles qui sont propres à la première nation » (par. 13(4)). Le reste des stipulations du traité relatives à cette question des « conflits de loi » est également repris dans la loi fédérale de mise en œuvre (art. 13)

equivalent (s. 5). The rules can therefore be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of "Yukon Indian people" as Canadian citizens and their entitlement to all the rights, benefits and protections of other citizens (s. 2.2.5). In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

[140] It should be noted that in certain circumstances, the principle applied in the treaty with respect to particular non-constitutional legislation — the *Indian Act*, R.S.C. 1985, c. I-5, where reserves are concerned — is that the treaty replaces that legislation rather than prevailing over it (s. 4.1.2).

[141] Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the "Constitution of Canada" within the meaning of s. 52 and Part V of the *Constitution Act, 1982*. Thus, to give one example, it cannot on its own alter either the protections of rights and freedoms provided for in Part I of that Act, the *Canadian Charter of Rights and Freedoms* (support for this can be found in s. 2.2.5 of the Final Agreement, which was discussed above), or the constitutional division of powers established in Part VI of the *Constitution Act, 1867*. Next, on the specific issue before us in the instant case, since the right to be consulted that corresponds to the common law duty to consult (1) transcends the distinction between Aboriginal rights and treaty rights, (2) is therefore not an Aboriginal right and even less so an Aboriginal right related to land and resources, and (3) accordingly cannot be surrendered under Division 2.5.0, it must be asked whether there is anything explicit in the treaty in issue about how the parties intended to deal with this duty. In other words, does the Final Agreement contain provisions that affect the general principle

ainsi que dans son équivalent territorial (art. 5). Les règles pertinentes peuvent donc être résumées par le principe selon lequel l'Entente définitive l'emporte sur toute autre règle de droit infraconstitutionnel, sous réserve du fait que ses dispositions ne doivent pas être interprétées d'une manière portant atteinte aux droits des « Indiens du Yukon » en tant que citoyens canadiens ni à leur droit de jouir de tous les droits, avantages et protections reconnus aux autres citoyens (art. 2.2.5). En somme, donc, sauf exception le traité se substitue aux droits ancestraux relativement aux matières dont il dispose et il a préséance, en cas d'incompatibilité, sur le reste du droit infraconstitutionnel.

[140] Il importe de souligner ici que, dans certaines circonstances, le traité fait également intervenir le principe de substitution plutôt que le principe de préséance à l'égard d'un texte infraconstitutionnel donné, en l'occurrence la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5, pour ce qui est des réserves (art. 4.1.2).

[141] En ce qui a trait à la relation entre le traité en cause et le reste de notre droit constitutionnel au-delà du seul régime jurisprudentiel des droits ancestraux, un tel traité ne saurait évidemment à lui seul modifier la « Constitution du Canada » au sens de l'art. 52 et de la partie V de la *Loi constitutionnelle de 1982*. Il ne pourrait donc pas, par exemple, modifier à lui seul la protection des droits et libertés prévue à la partie I de cette dernière loi, c'est-à-dire la *Charte canadienne des droits et libertés* (ce qui tend à être confirmé par l'art. 2.2.5 de l'Entente définitive dont il a été question plus haut), ou la répartition fédérative des compétences prévue à la partie VI de la *Loi constitutionnelle de 1867*. Ensuite, relativement à la question qui nous intéresse particulièrement en l'espèce, dans la mesure où le droit d'être consulté qui est corrélatif de l'obligation de consultation de régime jurisprudentiel (1) dépasse l'opposition entre droits ancestraux et droits issus de traité, (2) qu'il n'est donc pas un droit ancestral et encore moins un droit ancestral aux terres et aux ressources et (3) que, par conséquent, il ne saurait avoir fait l'objet d'une renonciation en vertu de la section 2.5.0, il convient de se demander si le traité qui nous occupe contient quelque chose d'explicite

discussed above that the common law duty to consult will apply only where the parties have failed to address this issue? I see none.

[142] It should be borne in mind that an Aboriginal people cannot, by treaty, surrender its constitutional right to be consulted before the Crown takes measures in a manner not provided for in the treaty that might violate, infringe or limit a right that Aboriginal people is recognized as having in the same treaty. By analogy, in contract law, such a surrender would constitute an unconscionable term. But it is not this rule that is in issue here so much as the minimum required content of the duty in the context of treaties with Aboriginal peoples. As set out above, s. 2.6.5 of the Final Agreement, which was reproduced from the Umbrella Agreement, provides that "[n]othing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations". However, the fiduciary duty is not always constitutional in nature. Nor is it equivalent to the duty to consult implied by the principle of the honour of the Crown that the Crown must maintain in its relations with Aboriginal peoples as holders of special constitutional rights. The fiduciary duty may arise, for example, from relations the Crown maintains with Indians in managing reserve lands and, more generally, in administering the *Indian Act* (*Guerin*; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746).

[143] In actual fact, two points are made in s. 2.6.5. First, the settlement of an Aboriginal nation's comprehensive claim does not automatically entail the settlement of any specific claim — based not on Aboriginal rights but rather on the *Indian Act* — that

au sujet de la façon dont les parties entendent régir cette obligation. Autrement dit, l'Entente définitive contient-elle des dispositions qui auraient une incidence sur le principe général dégagé plus haut, selon lequel l'obligation de consultation de régime jurisprudentiel ne s'appliquera qu'en cas d'omission des parties au traité d'avoir prévu cette matière? Je ne vois aucune disposition à cet effet.

[142] Il est utile de rappeler qu'un peuple autochtone ne saurait, par traité, renoncer à son droit constitutionnel d'être consulté avant la prise de mesures étatiques d'une manière non prévue par un traité et susceptible de violer, d'enfreindre ou de restreindre un droit reconnu aux Autochtones par ce même traité. Par analogie avec le droit des contrats, une telle renonciation constituerait une sorte de clause abusive. Or, ce n'est pas tant cette règle comme telle qui est en cause ici que le contenu minimal impératif de l'obligation dans le cas de traités conclus avec les peuples autochtones. Comme il a été souligné ci-dessus, l'art. 2.6.5 de l'Entente définitive — qui a été repris de l'Accord-cadre — précise que « [l]es ententes portant règlement n'ont pas pour effet d'empêcher une partie de faire valoir, devant les tribunaux, sa position quant à l'existence, à la nature ou à l'étendue des rapports fiduciaires ou autres qui existeraient entre la Couronne et les premières nations du Yukon ». L'obligation de fiduciaire n'a cependant pas toujours un caractère constitutionnel. De plus, elle ne coïncide pas avec l'obligation de consultation qu'implique le principe de l'honneur de la Couronne que celle-ci se doit de préserver dans ses relations avec les peuples autochtones en leur qualité de titulaires de droits constitutionnels spéciaux. Par exemple, l'obligation de fiduciaire peut naître des rapports qu'entretient la Couronne avec les Indiens dans sa gestion des terres de réserve et, de façon plus générale, dans l'administration de la *Loi sur les Indiens* (*Guerin*; *Bande indienne d'Osoyoos c. Oliver (Ville)*, 2001 CSC 85, [2001] 3 R.C.S. 746).

[143] En réalité, l'art. 2.6.5 vise à rappeler deux choses. Premièrement le règlement de la revendication globale d'une nation autochtone n'emporte pas nécessairement règlement de toute revendication particulière que pourrait avoir cette même nation et

this nation might have, generally on the strength of the Crown's fiduciary duty. A specific claim could also be based on a "historical" treaty. In the instant case, however, the Little Salmon/Carmacks First Nation expressly ceded, released and surrendered, in the agreement to settle its comprehensive land claim, namely the Final Agreement, any "claims, rights or causes of action which they may ever have had, may now have or may have hereafter" as a result of Treaty 11 (ss. 2.5.1.3, 2.5.1.4(c) and 2.5.2). Finally, unlike a comprehensive claim, a specific claim is not necessarily limited to land or resources. It was therefore quite natural to specify that the mere existence of a settlement of a Yukon First Nation's comprehensive land claim did not, without further verification, support a conclusion that any specific claim the First Nation might have had been settled.

[144] Second, s. 2.6.5 also evokes a more general principle. It provides that a final agreement does not preclude any party from advocating before the courts the existence of not only fiduciary, but also "other", relationships between the Crown and the Yukon First Nations. This, in reality, is but one manifestation of the equitable principle involving a higher standard for exchanges of rights between Aboriginal peoples and the Crown — which the Crown aimed to make more orthodox — that was first mentioned in the federal policy of 1986.

[145] Thus, s. 2.6.5 of the Final Agreement is not at all inconsistent with the general principle discussed above that the common law duty to consult, in its minimum required obligational form, will apply — despite the existence of a treaty — only if the parties to the treaty have clearly failed to provide for it. This will depend on whether the parties have come to an agreement on the issue, and if they have, the treaty will — unless, of course, the treaty itself provides otherwise — override the application to the parties of any parallel framework, including the common law framework.

qui reposerait, par exemple, non pas sur des droits ancestraux, mais sur la *Loi sur les Indiens*, le plus souvent sur le fondement de l'obligation de fiduciaire de la Couronne. Une revendication particulière pourrait aussi être basée sur un traité « historique ». En l'occurrence cependant, la Première nation de Little Salmon/Carmacks a renoncé expressément, dans l'accord de règlement de sa revendication globale que constitue l'Entente définitive, à tout éventuel « réclamation, droit ou cause d'action, passé, actuel ou futur » qui serait issu du Traité n^{o} 11 (art. 2.5.1.3, 2.5.1.4c) et 2.5.2). Enfin, contrairement à une revendication globale, une revendication particulière ne porte pas toujours uniquement sur des terres ou ressources. Il était donc normal de rappeler que la seule existence du règlement de la revendication globale d'une première nation du Yukon ne permet pas, sans autre forme de vérification, de conclure au règlement de toute revendication particulière que pourrait avoir cette première nation.

[144] Deuxièmement, l'article 2.6.5 vise aussi à rappeler un principe d'ordre plus général. En effet, il prévoit qu'une entente définitive n'empêche pas une partie de défendre en justice l'existence de rapports non seulement fiduciaires mais également « autres » entre la Couronne et les premières nations du Yukon. Il ne s'agit là en réalité que d'une manifestation du principe équitable visant des échanges d'une qualité supérieure entre les peuples autochtones et la Couronne — que celle-ci veut plus orthodoxes — qui a d'abord été exprimé dans la politique fédérale de 1986.

[145] L'article 2.6.5 de l'Entente définitive n'est donc nullement incompatible avec le principe général qui a été dégagé plus haut et suivant lequel, comme contenu obligationnel minimal impératif, l'obligation de consultation de régime jurisprudentiel ne s'appliquera, nonobstant la présence d'un traité, que dans les cas d'omission claire des parties à ce traité d'avoir stipulé à cet égard. En effet, tout dépendra de ce que les parties auront ou non convenu sur la question, auquel cas le traité, sauf bien sûr renvoi à l'effet contraire dans celui-ci, aura écarté l'application entre les parties de tout régime parallèle, y compris le régime jurisprudentiel.

[146] In short, in providing in s. 2.2.4 that, subject to certain restrictions, "Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them", the parties could only have had an orthodox exchange of rights in mind. They most certainly did not intend that a consultation framework would apply in parallel with the one they were in the process of establishing in the treaty. If the treaty in issue establishes how the Crown is to exercise its rights under the treaty by providing for a given form of consultation with the Aboriginal party, then the effect of the entire agreement clause in s. 2.2.15 will be to override any parallel framework, including the one developed by this Court.

B. *Substantive Rights in Issue*

(1) Right to Transfer and Right of Access to Crown Land

[147] In the case at bar, it is Chapter 6 on rights of access that must be considered first in respect of the right of the Crown the exercise of which could affect the exercise of rights of the Aboriginal party. As I mentioned above, the agreement in issue establishes two broad categories of land: settlement land and non-settlement land. The category of non-settlement land includes Crown land, and the land in question in Mr. Paulsen's application was Crown land. Chapter 6 is structured on the basis of the principle that the Aboriginal party and third parties have rights of access to unoccupied Crown land, on the one hand, and that the Crown and third parties have rights of access to undeveloped settlement land, on the other. This is a general principle to which there may, of course, be exceptions.

[146] En somme, en stipulant à l'art. 2.2.4 que, sous certaines réserves, « les ententes portant règlement n'ont pas pour effet de porter atteinte à la capacité des peuples autochtones du Yukon d'exercer des droits constitutionnels — existants ou futurs — qui sont reconnus aux peuples autochtones et qui s'appliquent à eux ou de tirer parti de tels droits », les parties ne pouvaient avoir à l'esprit qu'un échange orthodoxe de droits. Elles n'avaient assurément pas l'intention de prévoir l'application d'un régime de consultation parallèle à celui qu'elles pouvaient être en train d'établir par traité. Si le traité qui nous occupe énonce les modalités d'exercice par la Couronne des droits qu'il lui confère en instaurant une forme ou une autre de consultation de la partie autochtone, alors la clause de l'entente complète figurant à l'art. 2.2.15 aura pour effet d'écarter tout régime parallèle, y compris celui qui a été élaboré par la jurisprudence de notre Cour.

B. *Droits matériels en cause*

(1) Droit de cession et droit d'accès aux terres de la Couronne

[147] C'est le chapitre 6 sur les droits d'accès qui doit d'abord retenir notre attention en l'espèce relativement à la question du droit de la Couronne dont l'exercice est susceptible d'affecter l'exercice des droits de la partie autochtone. J'ai mentionné précédemment que l'accord en cause établit deux grandes catégories de terres, les terres visées par le règlement (« *Settlement Lands* ») et les autres (« *Non-Settlement Lands* ») qui comprennent les terres de la Couronne, parmi lesquelles se trouvait la terre faisant l'objet de la demande de M. Paulsen. Le principe qui structure le chapitre 6 est celui des droits d'accès de la partie autochtone et des tiers aux terres inoccupées de la Couronne d'une part (« *unoccupied Crown Land* ») et des droits d'accès de la Couronne et des tiers aux terres visées par le règlement qui n'ont pas été « mises en valeur » (« *undeveloped Settlement Land* ») de l'autre. Il s'agit d'un principe général qui peut certes connaître des exceptions.

[148] It is in Division 6.2.0 that the parties to the Umbrella Agreement — Canada, Yukon and the Council for Yukon Indians — provided for the right of access to Crown land — to be confirmed in the final agreements — of every Yukon Indian person and Yukon First Nation. The effect of the reproduction of that provision in the various final agreements was to grant every Yukon Indian person and Yukon First Nation to which those agreements applied a right of access for non-commercial purposes (s. 6.2.1), which is the right being relied on in this case. However, a review of that right leads to the right of the Crown the exercise of which is in issue here and which constitutes an exception to the right of access.

[148] C'est à la section 6.2.0 que les parties à l'Accord-cadre, soit le Canada, le Yukon et le Conseil des Indiens du Yukon, ont prévu la confirmation dans les ententes définitives du droit de chaque Indien et première nation du Yukon d'accéder aux terres de la Couronne. La reprise de cette disposition dans les diverses ententes définitives a pour effet de conférer à chaque Indien et première nation du Yukon concerné un droit d'accès à des fins non commerciales (art. 6.2.1), droit qui est invoqué ici. Or, c'est en examinant ce droit qu'on arrive à cerner celui de la Couronne dont l'exercice est ici en cause et qui s'impose comme une exception au premier.

[149] The right of access of First Nations to Crown land for non-commercial purposes is subject to strict limits, and also to conditions and exceptions. It is limited in that the access in question is only "casual and insignificant" (s. 6.2.1.1), or "is for the purpose of Harvesting Fish and Wildlife in accordance with Chapter 16 — Fish and Wildlife" (s. 6.2.1.2), which is a chapter I will discuss below. The applicable conditions are set out in s. 6.2.4 — one example is a prohibition against significant interference with the use and peaceful enjoyment of the land by other persons. Finally, regarding the exceptions that are relevant here, the right of access in issue does not apply to Crown land "where access or use by the public is limited or prohibited" (s. 6.2.3.2), or "which is subject to an agreement for sale or a surface licence or lease", except "to the extent the surface licence or lease permits public access" or "where the holder of the interest allows access" (s. 6.2.3.1 (emphasis added)).

[149] En effet, le droit des premières nations d'accéder aux terres de la Couronne à des fins non commerciales est étroitement limité, en plus d'être assorti de conditions et d'exceptions. Il est limité en ce qu'il ne confère qu'un accès « occasionnel et négligeable » (art. 6.2.1.1) ou ayant « pour but la récolte de poissons ou d'animaux sauvages conformément aux dispositions du Chapitre 16 — Ressources halieutiques et fauniques » (art. 6.2.1.2), chapitre sur lequel je reviendrai. Les conditions applicables sont prévues à l'art. 6.2.4 — par exemple, une interdiction de porter atteinte de façon importante à l'utilisation et à la jouissance paisible de ces terres par d'autres personnes. Enfin, au sujet des exceptions qui sont pertinentes ici, le droit d'accès en cause ne s'applique pas aux terres de la Couronne « dont l'accès ou l'utilisation par le public est restreint ou prohibé » (art. 6.2.3.2) ou « faisant l'objet d'un contrat de vente, d'un permis ou d'un bail de surface », et ce, sauf « dans la mesure où le permis ou le bail de surface accorde un droit d'accès au public » ou « si le titulaire du contrat de vente ou encore du permis ou du bail de surface en permet l'accès » (art. 6.2.3.1 (je souligne)).

[150] This last provision is the very one on which the decision on Mr. Paulsen's application was based. It must therefore be determined whether the treaty requires the Crown to consult the Aboriginal party before exercising its right to transfer land belonging

[150] Cette dernière disposition est précisément celle sur laquelle se fonde la décision sur la demande de M. Paulsen. Il s'agit donc de vérifier si, aux termes du traité, avant d'exercer son droit de céder des terres lui appartenant, d'une manière

to it in a way that could limit one or more rights granted to the Aboriginal party in the treaty. As I explain below, there are provisions in the treaty in question that govern this very issue.

[151] The Crown's right is clear, however. This exception to the right of access of First Nations to Crown land obviously implies that the Crown's general right to transfer land belonging to it continues to exist. Crown land, in respect of which Yukon's Aboriginal peoples have surrendered all Aboriginal rights and all rights arising out of Treaty No. 11, and which is not included in the land covered by the settlement of their comprehensive land claims, is defined in the agreement itself as land "vested from time to time in Her Majesty in Right of Canada, whether the administration and control thereof is appropriated to the Commissioner of the Yukon or not" (Chapter 1). Ownership of property implies, with some exceptions, the right to dispose of the property. The Crown's right to transfer land belonging to it is confirmed not only by s. 6.2.3.1 of the treaty, but also by s. 6.2.7, which limits that right by indicating that "Government shall not alienate Crown Land abutting any block of Settlement Land so as to deprive that block of Settlement Land of access from adjacent Crown Land or from a highway or public road." The treaty right being specifically invoked by the Little Salmon/Carmacks First Nation in respect of access to Crown land clearly ends where the Crown's right to transfer such land begins.

[152] Moreover, in invoking the right granted in s. 6.2.1.2 to every Yukon Indian person and Yukon First Nation, that of access to Crown land for the purpose of "Harvesting Fish and Wildlife in accordance with Chapter 16", the respondents are also engaging that chapter on fish and wildlife management. They further submit that the transfer of the land in question would reduce the value of the trapline held by one of them, Johnny Sam, under the *Wildlife Act*, R.S.Y. 2002, c. 229, and — in a more direct, but certainly no less significant,

susceptible de restreindre un ou plusieurs droits que le traité reconnaît à la partie autochtone, la Couronne doit au préalable consulter cette dernière. Comme je l'explique ci-dessous, le traité en cause contient des dispositions régissant précisément cette question.

[151] Le droit de la Couronne est cependant clair. En effet, cette exception au droit d'accès des premières nations aux terres de la Couronne suppose de toute évidence le maintien du droit général de la Couronne de céder des terres lui appartenant. Les terres de la Couronne sur lesquelles les Autochtones du Yukon ont renoncé à tout droit ancestral ou issu du Traité n^{o} 11 et qui ne font pas partie des terres visées par le règlement de leur revendication territoriale globale sont définies dans l'accord même comme des terres « dont la propriété est dévolue à Sa Majesté du chef du Canada — que le commissaire du Yukon ait ou non pleine autorité sur celle-ci » (chapitre 1). Or, sauf exception, la propriété d'un bien implique le droit d'en disposer. Ce droit de la Couronne de céder des terres lui appartenant est confirmé non seulement par l'art. 6.2.3.1 du traité, mais aussi par l'art. 6.2.7 qui limite ce droit en indiquant que « [l]e gouvernement ne peut aliéner des terres de la Couronne attenantes à une pièce de terres visées par un règlement si cela aurait pour effet de couper cette pièce de terres soit des terres de la Couronne qui lui sont adjacentes, soit d'une route ou d'un chemin public. » Le droit issu de traité qu'invoque précisément la Première nation de Little Salmon/Carmacks relativement à l'accès aux terres de la Couronne s'arrête clairement là où commence le droit de celle-ci de céder de telles terres.

[152] Par ailleurs, en invoquant le droit que reconnaît l'art. 6.2.1.2 à chaque Indien et première nation du Yukon d'accéder aux terres de la Couronne pour s'adonner à « la récolte de poissons ou d'animaux sauvages conformément aux dispositions du Chapitre 16 », les intimés font également intervenir le chapitre relatif à la gestion des ressources halieutiques et fauniques. Ils soutiennent aussi que la cession de terre en cause diminuerait la valeur de la ligne de piégeage dont l'un d'entre eux, Johnny Sam, est titulaire en vertu de la *Loi sur la faune*,

manner — under the same Chapter 16 of the Final Agreement. Chapter 16 is accordingly in issue in this case and will have to be considered in greater detail.

(2) Fish and Wildlife Management

[153] Chapter 16 of the Final Agreement establishes a co-management framework with respect to fish and wildlife. It generally confirms the right of Yukon Indian people

> to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0 . . . . [s. 16.4.2]

However, the actual scope of this general principle is limited in that the same provision concludes with the following words: ". . . subject only to limitations prescribed pursuant to Settlement Agreements" (s. 16.4.2). Those limitations are significant and they go beyond the exception to the right of access granted in Division 6.2.0, namely the Crown's exercise of its right to transfer land belonging to it. The exercise of the rights granted to the Aboriginal party in Chapter 16 is subject to limitations provided for not only in the final agreements, but also in "Legislation enacted for purposes of Conservation, public health or public safety" (s. 16.3.3); limitations provided for in legislation "must be consistent with this chapter, reasonably required to achieve those purposes and may only limit those rights to the extent necessary to achieve those purposes" (s. 16.3.3.1).

[154] There are other provisions in Chapter 16 of the Final Agreement, aside from s. 16.3.3, that regulate, in various ways, the right of Yukon Indian people to harvest fish and wildlife by, in particular, authorizing the fixing of quotas — referred to as

L.R.Y. 2002, ch. 229, et — de manière plus immédiate, mais assurément non moins importante — de ce même chapitre 16 de l'Entente définitive. Ce chapitre est donc en cause en l'espèce et il y a lieu de l'examiner plus en détail.

(2) Gestion des ressources halieutiques et fauniques

[153] Le chapitre 16 de l'Entente définitive instaure un régime de cogestion des ressources halieutiques et fauniques. Il vient confirmer de manière générale le droit des Indiens du Yukon

> de récolter, à des fins de subsistance, dans les limites de leur territoire traditionnel et, avec le consentement de celle-ci, sur le territoire traditionnel d'une autre première nation du Yukon, toute espèce de poisson et d'animal sauvage, pour eux-mêmes et pour leur famille, en toute saison et sans limite de prises, sur des terres visées par un règlement et sur des terres de la Couronne où ils bénéficient d'un droit d'accès conformément à la section 6.2.0 . . . [art. 16.4.2]

Cependant, la portée réelle de ce principe général est limitée dans la mesure où la même disposition se termine par les mots suivants : « . . . sous réserve seulement des limites prévues par les ententes portant règlement » (art. 16.4.2). Ces limites sont importantes et vont au-delà de l'exception au droit d'accès conféré par la section 6.2.0 que constitue l'exercice par la Couronne de son droit de céder des terres lui appartenant. L'exercice des droits reconnus à la partie autochtone par le chapitre 16 est assujetti non seulement aux restrictions prévues par les dispositions des ententes définitives, mais aussi aux « mesures législatives édictées à des fins de conservation, de santé publique ou de sécurité publique » (art. 16.3.3), mesures qui « doivent être compatibles avec les dispositions du présent chapitre, être raisonnablement nécessaires à la réalisation des fins susmentionnées et ne limiter les droits en question que dans la mesure nécessaire à la réalisation de ces fins » (art. 16.3.3.1).

[154] Outre l'article 16.3.3, d'autres dispositions du chapitre 16 de l'Entente définitive viennent encadrer de diverses manières le droit des Indiens du Yukon d'exploiter les ressources halieutiques et fauniques, notamment en permettant l'instauration

"total allowable harvest[s]" — "[w]hen opportunities to harvest Freshwater Fish or Wildlife are limited for Conservation, public health or public safety" (s. 16.9.1.1). Chapter 16 also establishes principles for sharing such harvests "between Yukon Indian People and other harvesters" (s. 16.9.1). Overall, the logic behind the principles used to allocate quotas is to "give priority to the Subsistence needs of Yukon Indian People while providing for the reasonable needs of other harvesters" (s. 16.9.1.1).

[155] Another goal of Chapter 16 of each of the final agreements, in addition to the simple fixing and allocation of quotas, is to regulate the exercise by Yukon Indian people of their rights to harvest fish and wildlife by setting up a multi-level management framework that combines the principle of participation of the First Nations in question and that of decentralization. Those with responsibilities in the context of that framework are, in each case, the First Nation in question, the renewable resources council ("council"), which has jurisdiction in respect of that First Nation's traditional territory, the Fish and Wildlife Management Board ("Board") (and its Salmon Sub-Committee), which has jurisdiction throughout the Yukon Territory, and, finally, the Minister responsible for the matter in issue. There is equal representation on the councils and the Board: thus, "[s]ubject to Transboundary Agreements and Yukon First Nation Final Agreements, each Council shall be comprised of six members consisting of three nominees of the Yukon First Nation and three nominees of the Minister" (s. 16.6.2), and "[t]he Board shall be comprised of six nominees of Yukon First Nations and six nominees of Government" (s. 16.7.2). Regarding the composition of the councils, the specific provisions of the final agreements add only that the First Nation and the Minister may each nominate one additional member as an alternate member (ss. 16.6.2.1 to 16.6.2.3). The chairperson of each council, and of the Board, is selected from the membership of the body in question in

de quotas, en l'occurrence des « récolte[s] totale[s] autorisée[s] », « [l]orsque les possibilités de récolter du poisson d'eau douce ou des animaux sauvages sont limitées pour des raisons de conservation, de santé publique ou de sécurité publique » (art. 16.9.1.1). Ce même chapitre prévoit aussi les principes de répartition de ces récoltes « entre les Indiens du Yukon et les autres personnes exerçant des activités de récolte » (art. 16.9.1). Dans l'ensemble, la logique présidant aux principes de répartition des quotas vise à « satisfaire en priorité les besoins pour fins de subsistance des Indiens du Yukon, tout en répondant aux besoins raisonnables des autres personnes qui s'adonnent à des activités de récolte » (art. 16.9.1.1).

[155] Au-delà des seules fins d'établissement et de répartition de quotas, le chapitre 16 de chacune des ententes définitives entend encadrer l'exercice par les Indiens du Yukon de leurs droits d'exploitation des ressources halieutiques et fauniques par la mise en place d'une structure de gestion à plusieurs niveaux conjuguant les principes de participation des premières nations concernées et de décentralisation. Les organes composant cette structure sont, dans chaque cas, la première nation concernée, le conseil des ressources renouvelables (« conseil ») compétent sur le territoire traditionnel de cette première nation, la Commission de gestion des ressources halieutiques et fauniques (« Commission ») (et son sous-comité du saumon) — qui a compétence à l'échelle du territoire du Yukon — et, enfin, le ministre responsable de la matière en question. Les conseils et la Commission sont des organismes paritaires; « [s]ous réserve des dispositions des accords transfrontaliers et des ententes définitives conclues par les premières nations du Yukon, chaque conseil est formé de six membres dont trois sont choisis par la première nation du Yukon visée et trois par le ministre » (art. 16.6.2), et « [l]a Commission est formée de six personnes choisies par les premières nations du Yukon et de six autres choisies par le gouvernement » (art. 16.7.2). Relativement à la composition des conseils, les dispositions spécifiques des ententes définitives ne font qu'ajouter la possibilité pour la première nation et le ministre de proposer chacun un membre supplémentaire à titre de membre suppléant (art. 16.6.2.1

accordance with procedures it has established for itself (ss. 16.6.3 and 16.7.3). If no chairperson is selected within 30 days in the case of a council, or 60 days in the case of the Board, the Minister must, after consulting the council or the Board, as the case may be, appoint one from its membership (ss. 16.6.3.1 and 16.7.3.1).

[156] There are very few instances in which the organs referred to in Chapter 16, other than the Minister, are given decision-making powers. In one of the rare cases, the First Nation is given, "for Category 1 Traplines, the final allocation authority" (ss. 16.11.10.6 and 16.5.1.2) — I should mention that this is not the category to which Johnny Sam's trapline belongs. The First Nation also has sole authority to "align, realign or group Category 1 Traplines where such alignments, realignments or groupings do not affect Category 2 Traplines" (s. 16.5.1.3).

[157] More generally, the First Nation also has the following decision-making powers:

> . . . [to] manage, administer, allocate or otherwise regulate the exercise of the rights of Yukon Indian People under 16.4.0 [concerning the harvesting of fish and wildlife] within the geographical jurisdiction of the Council established for that Yukon First Nation's Traditional Territory by,
>
> (a) Yukon Indian People enrolled pursuant to that Yukon First Nation Final Agreement,
>
> (b) other Yukon Indian People who are exercising rights pursuant to 16.4.2, and
>
> (c) except as otherwise provided in a Transboundary Agreement, members of a transboundary claimant group who are Harvesting pursuant to that Transboundary Agreement in that Yukon First Nation's Traditional Territory . . . [s. 16.5.1.1]

However, the final paragraph of this provision contains the following clarification: ". . . where not inconsistent with the regulation of those rights by

à 16.6.2.3). Le président de chaque conseil et celui de la Commission sont choisis parmi les membres de l'organe en question, conformément à la procédure de sélection établie par celui-ci (art. 16.6.3 et 16.7.3). Si cela n'est pas fait dans un délai de 30 ou 60 jours, suivant le cas et respectivement, le ministre, après consultation de l'organe concerné, désigne l'un des membres de celui-ci comme président (art. 16.6.3.1 et 16.7.3.1).

[156] Hormis le ministre, les organes prévus au chapitre 16 sont très rarement investis de pouvoirs décisionnels. L'un de ces rares cas est l'attribution à la première nation de la « compétence en dernier ressort en ce qui concerne la répartition des lignes de piégeage de catégorie 1 » (art. 16.11.10.6 et 16.5.1.2) — signalons qu'il ne s'agit pas de la catégorie à laquelle appartient la ligne de piégeage de Johnny Sam. La première nation est aussi seule compétente pour « tracer ou modifier le tracé des lignes de piégeage de catégorie 1 ou encore grouper ces lignes de piégeage, si ces mesures n'ont aucune incidence sur les lignes de piégeage de catégorie 2 » (art. 16.5.1.3).

[157] La première nation détient en outre, plus généralement, les pouvoirs décisionnels suivants :

> . . . gérer, administrer, répartir ou réglementer de quelque autre façon que ce soit l'exercice, par les personnes énumérées ci-après, des droits des Indiens du Yukon prévus par la section 16.4.0 [relativement au prélèvement des ressources halieutiques et fauniques], dans la région qui relève de la compétence du conseil établi pour son territoire traditionnel :
>
> a) les Indiens du Yukon inscrits en application de son entente définitive;
>
> b) les autres Indiens du Yukon qui exercent des droits prévus par l'article 16.4.2;
>
> c) sauf disposition contraire d'un accord transfrontalier, les membres d'un groupe revendicateur transfrontalier qui exercent, sur son territoire traditionnel, des activités de récolte conformément à cet accord transfrontalier . . . [art. 16.5.1.1]

Or, le dernier alinéa de cette même disposition donne la précision suivante : « . . . en respectant les mesures de réglementation de ces droits qui sont

Government in accordance with 16.3.3 and other provisions of this chapter" (s. 16.5.1.1, final portion). The reality is that, aside from the allocation of individual rights from a group harvesting allocation, Chapter 16 mainly concerns management activities that ultimately fall under the Minister's authority. The organs mentioned in Chapter 16 other than the Minister have in most cases — with some exceptions where they are given a form of decision-making authority — a power limited to holding consultations before a decision is made.

[158] It is in this context that the respondents' argument regarding the *Community-based Fish and Wildlife Management Plan: Little Salmon/Carmacks First Nation Traditional Territory, 2004-2009* (2004) must be considered. Management plans such as this one are referred to in Chapter 16 of the various final agreements and more specifically, for our purposes, in ss. 16.6.10 and 16.6.10.1, which read as follows:

Subject to Yukon First Nation Final Agreements, and without restricting 16.6.9 [on the Councils' general powers], each Council:

> 16.6.10.1 may make recommendations to the Minister on the need for and the content and timing of Freshwater Fish and Wildlife management plans, including Harvesting plans, Total Allowable Harvests and the allocation of the remaining Total Allowable Harvest [under 16.9.4], for species other than the species referred to in 16.7.12.2 [species included in international agreements, threatened species declared by the Minister as being of territorial, national or international interest, and Transplanted Populations and Exotic Species] . . .

[159] A management plan such as the one relied on by the respondents is a policy statement regarding proposed legal acts, in particular decision

appliquées par le gouvernement conformément à l'article 16.3.3 et aux autres dispositions du présent chapitre » (art. 16.5.1.1, *in fine*). Le fait est que, sauf en matière de répartition de droits individuels à partir d'une allocation de prélèvement de groupe, il est surtout question au chapitre 16 d'activités de gestion qui relèvent, en fin de processus, du ministre. Les organes mentionnés au chapitre 16 — à l'exception du ministre — se voient parfois confier un pouvoir quasi décisionnel, mais il ne s'agit le plus souvent que d'un simple pouvoir consultatif prédécisionnel.

[158] C'est dans ce contexte qu'il faut situer l'argument des intimés relatif au plan de gestion des ressources halieutiques et fauniques de la Première nation de Little Salmon/Carmacks — *Community-based Fish and Wildlife Management Plan : Little Salmon/Carmacks First Nation Traditional Territory, 2004-2009* (2004). Il est question de tels plans de gestion au chapitre 16 des diverses ententes définitives et, plus particulièrement, pour les fins qui nous intéressent, aux art. 16.6.10 et 16.6.10.1, qui prévoient ce qui suit :

Sous réserve des dispositions des ententes définitives conclues par les premières nations du Yukon et sans restreindre la portée générale de l'article 16.6.9 [relatif aux attributions générales des Conseils], chaque conseil peut :

> 16.6.10.1 présenter au ministre des recommandations quant au besoin d'établir des plans de gestion du poisson d'eau douce et des animaux sauvages, à la teneur de ces plans et au moment de leur production, notamment en ce qui concerne les plans de récolte, les récoltes totales autorisées et la répartition du reste de la récolte totale autorisée [en vertu de l'article 16.9.4], à l'égard des espèces autres que celles visées à l'article 16.7.12.2 [espèces visées par des accords internationaux, espèces menacées ou déclarées par le ministre comme étant d'intérêt territorial, national ou international, populations transplantées et espèces exotiques] . . .

[159] Un plan de gestion tel celui invoqué par les intimés constitue un énoncé de politique faisant état d'actes juridiques projetés, le plus souvent des

making and the making of regulations under statutory authority. As its title indicates, therefore, this plan only sets out an administrative agreement on how the partners plan to exercise their legal powers.

[160] The passage from the management plan to which the respondents refer reads as follows:

Concern: There is a need to protect the Yukon River from Tatchun Creek to Minto as important habitat for moose, salmon, and other wildlife.

This section of the Yukon River contains a number of sloughs and islands, and was identified as important habitat for moose during calving, summer and winter. Moose were commonly seen in this area back in the 1960s, but fewer have been seen in recent years. "Dog Salmon Slough" was one area noted in particular as an important habitat area. Bears use Dog Salmon Slough for fishing. Moose might be staying away from river corridors now with the increased river travel traffic during summer. The review process for land applications in this area needs to consider the importance of these habitat areas to fish and wildlife.

Solution: Conserve the important moose and salmon habitat along the Yukon River from Tatchun Creek to Minto.

Pursue designating the area between Tatchun Creek and Minto along the Yukon River as a Habitat Protection Area under the *Wildlife Act*.

The community and governments need to get together to decide what kind of activities should happen in this important wildlife habitat. This is an overlap area with Selkirk First Nation, and the CRRC [Carmacks Renewable Resource Council] needs to consult with them. A [Little Salmon/Carmacks First Nation] Game Guardian could also assist in evaluating the area for designation and providing management guidelines. [pp. 32-33]

[161] Two concerns can therefore be identified: the protection of fish and wildlife and the designation of areas. As I will explain below, the protection of fish and wildlife could be, and in fact

décisions ou des textes réglementaires devant être pris en vertu de la loi. Comme l'indique son titre, ce plan ne fait donc que consigner une entente administrative sur la façon dont les partenaires prévoient exercer leurs pouvoirs juridiques.

[160] Le passage pertinent du plan de gestion auquel renvoient les intimés est le suivant :

[TRADUCTION] **Préoccupation : Il faut protéger le fleuve Yukon, de Tatchun Creek jusqu'à Minto, puisqu'il s'agit d'un habitat important pour le saumon, les orignaux et d'autres animaux sauvages.**

Cette partie du fleuve Yukon contient un certain nombre de faux chenaux et d'îles, et elle est considérée comme un habitat important pour les orignaux pendant le vêlage, l'été et l'hiver. On y voyait couramment des orignaux dans les années 1960, alors qu'on en observe plus rarement au cours des dernières années. Le faux chenal Dog Salmon (« *Dog Salmon Slough* ») était un endroit particulièrement reconnu comme un habitat important. Les ours pêchent à cet endroit. C'est peut-être en raison de l'accroissement de la circulation maritime pendant l'été que les orignaux se tiennent loin des corridors fluviaux. Il faut, dans le cadre du processus d'examen des demandes d'aliénation de terres dans cette région, tenir compte de l'importance de ces habitats pour le poisson et les animaux sauvages.

Solution : Conserver l'habitat important pour les orignaux et le saumon le long du fleuve Yukon, de Tatchun Creek jusqu'à Minto.

Demander la désignation de la région entre Tatchun Creek et Minto, le long du fleuve Yukon, comme région de protection de l'habitat sous le régime de la *Loi sur la faune*.

La communauté et les gouvernements doivent se concerter pour décider quels types d'activités devraient être menées dans cet habitat faunique important. Il s'agit d'un territoire qui chevauche celui de la Première Nation de Selkirk, et le CRRC [Conseil des ressources renouvelables de Carmacks] doit consulter cette première nation. Un garde-faune [de la Première nation de Little Salmon/Carmacks] pourrait aussi aider à l'évaluation de la région devant être désignée et fournir des lignes directrices en matière de gestion. [p. 32-33]

[161] Deux préoccupations ressortent donc : la protection du poisson et des animaux sauvages et la désignation des sites. Comme je l'expliquerai plus loin, le processus menant à la cession de terre

was, taken into consideration in the process leading to the transfer of land. As for the designation of a protected area, which could have prevented any transfer of the land in question in Mr. Paulsen's application from occurring, it was a complex process. Such a designation would have required that three steps be completed successfully: (1) the Little Salmon/Carmacks First Nation would have to recommend the designation after consulting the Selkirk First Nation and the renewable resources council, in accordance with the relevant provisions of the management plan; (2) the Commissioner in Executive Council would have to designate the area by making a regulation under s. 187 of the *Wildlife Act*, the effect of which would simply be to make it possible to withdraw the lands in question from disposition; and (3) the Commissioner in Executive Council would have to actually withdraw the lands from disposition by making an order under s. 7(1)(a) of the Yukon *Lands Act*, R.S.Y. 2002, c. 132, which would be done if the Commissioner in Executive Council considered it advisable to do so in the public interest. These steps had not yet been taken, and in the meantime no provisional suspension of the processing of applications for land in the area in question had been agreed upon, despite the fact that such a suspension had been suggested in September 2004, a few weeks before the decision on Mr. Paulsen's application, at a meeting concerning an agricultural policy review that was attended by representatives from the First Nation and the Agriculture Branch.

[162] In sum, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in fish and wildlife management at the pre-decision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

(3) Trapline

[163] The respondents submit that the land transfer in issue will reduce the value of the trapline

pouvait prendre en considération la protection du poisson et des animaux sauvages et, de fait, il le faisait. Pour ce qui est d'une désignation d'aire protégée, ce qui aurait pu éventuellement conduire à soustraire à toute cession la terre visée par la demande de M. Paulsen, il s'agissait d'un processus complexe. Une telle désignation aurait requis que trois étapes soient franchies avec succès : (1) une recommandation de désignation formulée par la Première nation de Little Salmon/Carmacks après consultation avec la Première nation de Selkirk et le conseil des ressources renouvelables conformément aux dispositions pertinentes du plan de gestion; (2) une désignation effectuée par le commissaire en conseil exécutif au moyen d'un règlement pris en vertu de l'art. 187 de la *Loi sur la faune*, désignation qui a tout simplement pour effet d'ouvrir la possibilité de soustraire les terres à la cession; (3) la soustraction comme telle des terres à la cession par décret du commissaire en conseil exécutif pris en vertu de l'al. 7(1)a) de la loi du Yukon intitulée *Loi sur les terres*, L.R.Y. 2002, ch. 132, une telle mesure étant prise dans les cas où ce dernier l'estime conforme à l'intérêt public. De telles étapes restaient à franchir et, dans l'intervalle, aucune suspension provisoire du traitement des demandes portant sur des terres de la région visée n'avait été convenue, malgré une suggestion à cet effet formulée lors d'une rencontre qui avait eu lieu en septembre 2004, soit quelques semaines avant la décision sur la demande de M. Paulsen, et qui portait sur la révision de la politique agricole et réunissait des représentants de la première nation et de la Direction de l'agriculture.

[162] En somme, les dispositions du chapitre 16 qui concernent la gestion des ressources halieutiques et fauniques instaurent un régime par lequel les premières nations sont généralement invitées à participer à la gestion des ressources halieutiques et fauniques sur une base prédécisionnelle. Notamment, l'invitation qui leur est faite de proposer des plans de gestion des ressources halieutiques et fauniques peut être considérée comme une consultation.

(3) Ligne de piégeage

[163] Les intimés soutiennent que la cession de terre en cause diminuera la valeur de la ligne de

held by Johnny Sam under the *Wildlife Act*, to which Division 16.11.0 of the Final Agreement on trapline management and use applies. In addition to the principles on the allocation of possible quotas between the First Nations and other harvesters, Chapter 16 of the Yukon final agreements includes specific rules for the trapping of furbearers. Division 16.11.0 incorporates, with necessary changes, the framework for granting individual traplines, or "concessions", established in the *Wildlife Act*. The changes made to that general framework in the final agreements relate primarily to the allocation of traplines in the First Nations' traditional territory.

[164] Section 16.11.2 of the final agreements concluded with the Yukon First Nations under the Umbrella Agreement reads as follows:

In establishing local criteria for the management and Use of Furbearers in accordance with 16.6.10.6 [which delegates the authority to adopt bylaws under the *Wildlife Act*] and 16.6.10.7 [which grants the authority to make recommendations to the Minister and the First Nation], the Councils shall provide for:

16.11.2.1 the maintenance and enhancement of the Yukon's wild fur industry and the Conservation of the fur resource; and

16.11.2.2 the maintenance of the integrity of the management system based upon individual trapline identity, including individual traplines within group trapping areas.

[165] The Final Agreement contains a specific provision concerning the allocation of traplines between Aboriginal and non-Aboriginal people in the traditional territory of the Little Salmon/Carmacks First Nation, namely s. 16.11.4.1, which provides that "[t]he overall allocation of traplines which have more than 50 percent of their area in that portion of the Traditional Territory of the Little Salmon/Carmacks First Nation which is

piégeage dont est titulaire Johnny Sam en vertu de la *Loi sur la faune* et à laquelle se rapporte la section 16.11.0 de l'Entente définitive relative à la gestion et à l'utilisation des lignes de piégeage. Au-delà des principes relatifs à la répartition d'éventuels contingents entre les premières nations et les autres exploitants, le chapitre 16 des ententes définitives du Yukon assujettit le piégeage d'animaux à fourrure à des règles particulières. En fait, la section 16.11.0 renvoie avec les adaptations nécessaires au régime d'octroi de lignes, ou « concessions » de piégeage individuelles que prévoit la *Loi sur la faune*. Les modifications qu'apportent les ententes définitives à ce régime d'application générale concernent pour l'essentiel la répartition des lignes de piégeage au sein du territoire traditionnel des premières nations concernées.

[164] En effet, l'art. 16.11.2 des diverses ententes définitives conclues aux termes de l'Accord-cadre avec les premières nations du Yukon stipule que :

Dans l'établissement, conformément aux articles 16.6.10.6 [portant délégation d'un pouvoir réglementaire en vertu de la *Loi sur la faune*] et 16.6.10.7 [attribuant un pouvoir de recommandation auprès du ministre et de la première nation], des critères locaux en matière de gestion et d'utilisation des animaux à fourrure, les conseils doivent viser les objectifs suivants :

16.11.2.1 le maintien et la mise en valeur de l'industrie de la fourrure d'animaux sauvages au Yukon et la conservation de cette ressource;

16.11.2.2 le maintien de l'intégrité du système de gestion fondé sur l'identification des lignes de piégeage individuelles, y compris des lignes de piégeage individuelles situées dans des secteurs de piégeage collectif.

[165] L'Entente définitive contient une disposition spécifique relative à la répartition des lignes de piégeage entre Autochtones et allochtones sur le territoire traditionnel de la Première nation de Little Salmon/Carmacks. Il s'agit de l'art. 16.11.4.1, qui précise que « [l]e nombre total de lignes de piégeage qui sont situées dans une proportion de plus de 50 % dans la partie du territoire traditionnel de la première nation de Little Salmon/Carmacks

not overlapped by another Yukon First Nation's Traditional Territory is 11 traplines held by Yukon Indian People and three traplines held by other Yukon residents." This allocation does not apply to Johnny Sam's trapline, since it is located entirely within the portion of the traditional territory of the Little Salmon/Carmacks First Nation that overlaps the traditional territory of the Selkirk First Nation.

[166] Furthermore, as I mentioned above, the Final Agreement establishes two categories of traplines. After being granted to an individual, a trapline located in the traditional territory of a First Nation may, with the written consent of its registered holder, be designated a Category 1 trapline (s. 16.11.8). Otherwise, it will be a Category 2 trapline. Such a designation gives the First Nation the authority — particularly if the trapline is vacant or underused — to reallocate it (ss. 16.5.1.2 and 16.11.10.6), or to align it, realign it or group it with another line "where such alignments, realignments or groupings do not affect Category 2 Traplines" (s. 16.5.1.3). Authority over Category 2 lines rests not with the First Nation, but with the Minister (ss. 16.3.1 and 16.11.10.7 and Division 16.8.0). In their decisions, the courts below indicated that Johnny Sam's trapline is a Category 2 trapline.

[167] Section 16.11.13 establishes the right of "Yukon Indian People holding traplines whose Furbearer Harvesting opportunities will be diminished due to other resource development activities [to] be compensated". This right is broader than the right to compensation the holder of a trapline has under s. 82 of the *Wildlife Act*, which is limited to situations in which a concession is revoked or the re-issuance of a concession is refused for purposes related to the conservation of wildlife or to protection of the public interest, but without giving two years' notice. Regarding the consequences the transfer of land to one person might have on another person's right to trap, I would point out that the *Wildlife Act* (s. 13(1)) provides that "[a] person

qui ne coïncide pas avec le territoire traditionnel d'une autre première nation est de onze lignes de piégeage détenues par les Indiens du Yukon et de trois lignes de piégeage détenues par d'autres résidents du Yukon. » La ligne de piégeage dont est titulaire Johnny Sam n'est pas visée par cette répartition, dans la mesure où elle se situe entièrement dans cette portion du territoire traditionnel de la Première nation de Little Salmon/Carmacks qui chevauche celui de la Première nation de Selkirk.

[166] En outre, tel qu'il est mentionné ci-dessus, l'Entente définitive établit deux catégories de lignes de piégeage. Une fois octroyée à un individu, une ligne de piégeage se situant dans le territoire traditionnel d'une première nation peut, avec le consentement écrit de son détenteur inscrit, être désignée ligne de piégeage de catégorie 1 (art. 16.11.8). À défaut, la ligne sera donc de catégorie 2. Une telle désignation a pour effet de conférer compétence à la première nation en ce qui concerne — notamment en cas de vacance ou de sous-utilisation — sa réattribution (art. 16.5.1.2 et 16.11.10.6) ou encore son tracé ou son groupage avec une autre ligne « si ces mesures n'ont aucune incidence sur les lignes de piégeage de catégorie 2 » (art. 16.5.1.3). Les lignes de catégorie 2 relèvent quant à elles non pas de la première nation mais du ministre (art. 16.3.1 et 16.11.10.7 et section 16.8.0). Les décisions des juridictions inférieures indiquent que la ligne de piégeage détenue par Johnny Sam appartient à la catégorie 2.

[167] L'article 16.11.13 établit le droit des « Indiens du Yukon qui détiennent des lignes de piégeage et dont les possibilités de récolte d'animaux à fourrure diminueront en raison d'autres activités de mise en valeur des ressources [d']être indemnisés ». Ce droit va au-delà de ce que prévoit l'art. 82 de la *Loi sur la faune* en faveur du titulaire d'une ligne de piégeage, c'est-à-dire le droit d'être indemnisé pour seule cause de révocation ou refus de renouvellement, aux fins de protection de la faune ou de l'intérêt public, sans préavis d'au moins deux ans. Relativement aux conséquences que peut avoir la cession d'une terre à une personne sur le droit de trappe d'une autre, je signale que la *Loi sur la faune* (par. 13(1)) précise qu'« [i]l est interdit de chasser ou

shall not hunt or trap wildlife within one kilometre of a building which is a residence, whether or not the occupants are present in the building at the time, unless the person has the permission of the occupants to do so."

[168] Having discussed the granting of rights and establishment of duties in Chapter 16 of the Final Agreement, on which the respondents are relying, I must now ask whether this chapter establishes a specific procedure to be followed by the Yukon government to consult the signatory First Nation before exercising its right to transfer Crown land under the (Yukon) territory's jurisdiction. The answer is no. The consultation provided for in ss. 16.3.3.2, 16.5.4 and 16.7.16 relates to the management of fish and wildlife, not to the impact an action might have in relation to fish and wildlife. However, ss. 16.5.3, 16.6.11 and 16.7.13 provide that the First Nation, the renewable resources council and the Fish and Wildlife Management Board, respectively, have standing as interested parties to participate in the public proceedings of any agency, board or commission on matters that affect the management and conservation of fish and wildlife and their habitats in the particular traditional territory. But the terms "agency", "board" or "commission" refer, in particular, to the bodies in question in Chapter 12 of the Final Agreement, which establishes a procedure for consulting the First Nations signatories by ensuring their participation in the environmental and socio-economic assessment of development activities such as the one that resulted from the approval of Mr. Paulsen's application.

[169] I would nevertheless like to point out that Johnny Sam had rights as the holder of the trapline. He had the same rights as anyone else where procedural fairness is concerned. He also had the right to be compensated in accordance with s. 16.11.13. But the respondents are neither arguing that there has been a breach of procedural fairness nor asserting their right to compensation. What they are seeking

de piéger une espèce faunique dans un rayon d'un kilomètre d'une maison d'habitation, que les occupants soient présents ou non à ce moment, à moins d'avoir la permission de ces derniers. »

[168] Après avoir exposé la répartition de droits et d'obligations effectuée au chapitre 16 de l'Entente définitive invoqué par les intimés, il faut maintenant se demander si ce chapitre instaure une procédure particulière de consultation de la première nation signataire par le gouvernement du Yukon, préalablement à l'exercice par ce dernier de son droit de céder des terres de la Couronne relevant du Territoire (du Yukon). La réponse est négative. En effet, la consultation prévue aux art. 16.3.3.2, 16.5.4 et 16.7.16 se rapporte à la gestion des ressources halieutiques et fauniques et non pas aux répercussions qu'une mesure est susceptible d'entraîner en ce domaine. En revanche, les art. 16.5.3, 16.6.11 et 16.7.13 disposent que la première nation, le conseil des ressources renouvelables et la Commission de gestion des ressources halieutiques et fauniques, respectivement, ont qualité, en tant que partie intéressée, pour participer aux audiences publiques d'une agence, d'un office ou d'une commission relativement à des questions ayant une incidence sur la gestion et la conservation des ressources halieutiques et fauniques et de leurs habitats dans le territoire traditionnel concerné. Or, cette « agence », cet « office » ou cette « commission », ce seront notamment les organes dont il est question au chapitre 12 de l'Entente définitive, lequel prévoit une procédure de consultation des premières nations signataires concernées en garantissant leur participation à l'évaluation environnementale et socioéconomique des activités de développement, comme l'est l'activité qui résulte de l'approbation de la demande de M. Paulsen.

[169] Je tiens tout de même à signaler que la ligne de piégeage conférait des droits à Johnny Sam. Ce dernier bénéficiait en effet des droits que possède tout administré en matière d'équité procédurale. Il avait aussi le droit d'être indemnisé conformément aux dispositions de l'art. 16.11.13. Or, les intimés n'invoquent ni un manquement à l'équité procédurale ni leur droit à une

is to have the decision on Mr. Paulsen's application quashed on the ground that the Crown had a common law duty to consult them (R.F. on cross-appeal, at para. 86). It is my view, therefore, that a review of the rights granted in the Final Agreement with respect to consultation prior to a decision such as the one in issue in this case is indispensable.

C. *Formal Rights and Duties in Issue*

[170] The appellants argue that Chapter 12 is not applicable on the ground that it had not yet been implemented at the relevant time. According to the respondents, the process provided for in Chapter 12 would have been applicable had it been implemented, but it is only one form of consultation among all those that would be applicable — in their view, the common law duty is not excluded. Binnie J. also proposes that the common law duty to consult should apply where the Crown exercises a right granted to it in the treaty, even if the treaty provides for consultation in relation to that right. I disagree with him on this point. As I mentioned above, respect for the autonomy of the parties implies that effect must be given to the provisions they have agreed on in finalizing the relationship between them on a given matter. I cannot therefore agree with disregarding provisions adopted by the parties with respect to the transitional law.

[171] The Umbrella Agreement and the Final Agreement in issue here state that the settlement legislation must provide that a settlement agreement is binding on third parties (s. 2.4.2.3), and the *Yukon First Nations Land Claims Settlement Act* provides that "[a final agreement or transboundary agreement that is in effect] is binding on all persons and bodies that are not parties to it" (s. 6(2)). Both these agreements are binding not only on the parties, but also on third parties. Therefore, in my opinion, it is necessary for this Court to review the provisions of Chapter 12.

indemnité. Ce qu'ils réclament c'est la cassation de la décision sur la demande de M. Paulsen, au motif que la Couronne avait, selon la jurisprudence pertinente, l'obligation de les consulter (m.i. en appel incident, par. 86). Il est donc déterminant, à mon avis, d'examiner les droits que confère l'Entente définitive en matière de consultation lors d'une décision comme celle en cause en l'espèce.

C. *Droits et obligations formels en cause*

[170] Les appelants écartent l'application du chapitre 12, au motif qu'il n'aurait pas été mis en œuvre au moment des faits pertinents. Par ailleurs, du point de vue des intimés, le processus prévu par le chapitre 12 se serait appliqué s'il avait été mis en vigueur mais ne représente qu'une forme de consultation parmi toutes celles qui seraient applicables — l'obligation jurisprudentielle de consultation ne serait pas exclue. Le juge Binnie, quant à lui, propose aussi le maintien de l'obligation jurisprudentielle de consultation lors de l'exercice par la Couronne d'un droit prévu par le traité et ce, même en présence de dispositions relatives à la consultation relativement à ce droit. Je ne suis pas d'accord avec lui sur ce point. Comme je l'ai mentionné plus tôt, il en va du respect de l'autonomie des parties de respecter les stipulations dont elles ont convenu pour sceller leurs relations sur une matière donnée. Pour cette raison je ne peux accepter qu'on fasse fi des stipulations des parties concernant le droit transitoire.

[171] L'Accord-cadre et l'Entente définitive ici en cause prévoient que la loi de mise en œuvre devra indiquer que l'entente portant règlement lie les tiers (art. 2.4.2.3), et la *Loi sur le règlement des revendications territoriales des premières nations du Yukon* précise qu'« [i]l est entendu [que tout accord — définitif ou transfrontalier — en vigueur] a force obligatoire pour toute personne et tout organisme qui n'y sont pas parties » (par. 6(2)). Cet accord et cette entente lient non seulement les parties, mais aussi les tiers. Par conséquent, je suis d'avis que notre Cour ne saurait écarter l'examen des dispositions du chapitre 12.

[172] Chapter 12 of the Umbrella Agreement, which can also be found in the final agreements, did not simply lay the foundations for an environmental and socio-economic assessment process that was to be implemented by means of a statute other than the general implementing legislation for those agreements — which was done by enacting the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*") — it also contains transitional law provisions regarding the duties of the parties to the Umbrella Agreement and the final agreements that would apply even before the enactment of that statute implementing the process in question.

[173] In reality, the Yukon final agreements provided that they would be implemented and would come into effect by way of legislation or of an order-in-council, as the case may be, and that their coming into effect was a condition precedent to their validity (ss. 2.2.11 and 2.2.12). This could be understood to mean that, since Chapter 12 required the enactment of specific implementing legislation, it constituted an exception to the general implementation of a final agreement and created no legal rights or duties until that legislation was enacted. But that is not what the Final Agreement says.

[174] In Division 12.2.0 of the Final Agreement, the expression "Development Assessment Legislation" is defined as "Legislation enacted to implement the development assessment process set out in this chapter" (emphasis added). This definition therefore does not concern special implementing legislation for Chapter 12 as a whole, but legislation to implement the *process* provided for in that chapter. This is confirmed by s. 12.3.1, which provides that "Government shall implement a development assessment process consistent with this chapter by Legislation". Logically, therefore, when a final agreement concluded under the Umbrella Agreement with the Yukon First Nations comes into effect, the result, even if the assessment process has not yet been implemented, is to give effect to several provisions of Chapter 12 that are common to all the final agreements, including

[172] Le chapitre 12 de l'Accord-cadre, qu'on retrouve aussi dans les ententes définitives, n'a pas fait que jeter les bases d'un processus d'évaluation environnementale et socioéconomique qui devait être mis en œuvre au moyen d'une loi distincte de la loi de mise en œuvre générale de ces ententes — ce qui fut fait par la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*, L.C. 2003, ch. 7 (« *LÉESY* ») — mais il contient également des dispositions de droit provisoires relatives aux obligations des parties à l'Accord-cadre et aux ententes définitives qui s'appliquent même avant la promulgation de cette loi de mise en œuvre du processus qu'il envisage.

[173] En réalité, les ententes définitives du Yukon prévoient que leur mise en œuvre et mise en vigueur se font par loi ou par décret, selon le cas, et que leur mise en vigueur constitue une condition de leur validité (art. 2.2.11 et 2.2.12). On pourrait donc être amené à croire que, dans la mesure où il requiert la promulgation d'une loi de mise en œuvre spécifique, le chapitre 12 constitue une exception à la mise en vigueur générale d'une entente définitive, de telle sorte que, tant que n'a pas été promulguée cette loi, le chapitre 12 n'est porteur d'aucun droit ou obligation juridique. Or, ce n'est pas ce qui ressort du texte de l'Entente définitive.

[174] Aux termes de la section 12.2.0 de l'instrument qui nous occupe, l'expression « [loi] sur l'évaluation des activités de développement » s'entend de la « mesure législative édictée pour assurer la mise en œuvre du processus d'évaluation des activités de développement défini dans le présent chapitre » (je souligne). Cette définition ne renvoie donc pas à une loi de mise en œuvre particulière du chapitre 12 dans son ensemble, mais à la mise en œuvre du *processus* prévu à ce chapitre. Cette conclusion est confirmée par l'art. 12.3.1, qui prévoit que « [l]e gouvernement assure, au moyen d'une mesure législative, la mise en œuvre d'un processus d'évaluation des activités de développement conforme aux dispositions du présent chapitre ». Par conséquent, en toute logique, même si le processus d'évaluation n'a pas encore été mis en œuvre, l'entrée en vigueur d'une entente définitive conclue aux termes

those that establish the applicable transitional law.

[175] Section 12.19.5 provides that "[n]othing in [Chapter 12] shall be construed to affect any existing development assessment process in the Yukon prior to the Development Assessment Legislation coming into effect." This provision sets out the transitional law that would apply until the *YESAA* came into force, establishing that until then, existing statutes and regulations with respect to development assessment would constitute the minimum to which Yukon First Nations were entitled, which meant that those statutes and regulations could not be amended so as to reduce the level of protection enjoyed by the First Nations. Chapter 12 does not require that any amendments be made to that existing law in the meantime.

[176] In addition, s. 12.3.4 provides that "Government shall recommend to Parliament or the Legislative Assembly, as the case may be, the Development Assessment Legislation consistent with this chapter as soon as practicable and in any event no later than two years after the effective date of Settlement Legislation." The "settlement legislation" referred to here is clearly not the implementing legislation for the process contemplated in Chapter 12, but the "settlement legislation" provided for in Division 2.4.0 — the legislation to implement the particular final agreement. Both the territorial settlement legislation and the corresponding federal legislation came into force in 1995. As for the specific process contemplated in Chapter 12, it was ultimately implemented by Parliament by means of the *YESAA*.

[177] The transitional law, that is, the law that applied before the *YESAA* came into force, included, in addition to s. 12.19.5, which was discussed above, s. 12.3.6 of the Final Agreement, which read as follows:

de l'Accord-cadre avec les premières nations du Yukon donne effet à plusieurs dispositions de ce chapitre 12 que toutes les ententes définitives ont en commun, notamment ses dispositions établissant le droit provisoire applicable.

[175] L'article 12.19.5 dispose que le chapitre 12 « n'a pas pour effet de porter atteinte à tout processus existant d'évaluation des activités de développement au Yukon avant l'entrée en vigueur de la [loi] sur l'évaluation des activités de développement. » Cette disposition établit le droit provisoire applicable avant l'entrée en vigueur de la *LÉESY* et signifie que, avant son entrée en vigueur, les lois et règlements existants en la matière établissent le minimum auquel ont droit les premières nations du Yukon, de sorte que ces textes ne sauraient être modifiés d'une manière qui réduirait le niveau de protection reconnu à ces dernières. Par ailleurs, durant ce même intervalle aucune modification de ce même droit existant n'est exigée par le chapitre 12.

[176] En outre, l'art. 12.3.4 prévoit que « [l]e gouvernement recommande au Parlement ou à l'Assemblée législative, selon le cas, l'édiction d'une mesure législative sur l'évaluation des activités de développement qui soit compatible avec les dispositions du présent chapitre et ce, dès que possible ou au plus tard deux ans après la date d'entrée en vigueur de la loi de mise en œuvre. » Cette toute dernière loi de mise en œuvre n'est de toute évidence pas la loi de mise en œuvre du processus envisagé au chapitre 12, mais bien la loi de mise en œuvre dont il est question à la section 2.4.0 — la loi de mise en œuvre de l'entente définitive concernée. Tant la loi territoriale de mise en œuvre des premières ententes définitives que la loi fédérale correspondante sont entrées en vigueur en 1995. Quant à la mise en œuvre spécifique du processus prévu au chapitre 12, c'est finalement le Parlement qui y a procédé avec la *LÉESY*.

[177] Relativement au droit provisoire, c'est-à-dire au droit qui était applicable avant l'entrée en vigueur de la *LÉESY*, outre l'art. 12.19.5 vu plus haut, l'art. 12.3.6 de l'Entente définitive prévoyait ceci :

Prior to the enactment of Development Assessment Legislation, the parties to the Umbrella Final Agreement shall make best efforts to develop and incorporate in the implementation plan provided for in 12.19.1, interim measures for assessing a Project which shall be consistent with the spirit of this chapter and within the existing framework of Law and regulatory agencies. [Emphasis added.]

No implementation plan of the type provided for in s. 12.19.1 was produced in this case. Moreover, s. 12.19.4 provided that Chapter 12 was not to "be construed to prevent Government, in Consultation with Yukon First Nations, from acting to improve or enhance socio-economic or environmental procedures in the Yukon in the absence of any approved detailed design of the development assessment process". No evidence of any such action was adduced in the case at bar. By virtue of s. 12.19.5, therefore, the applicable interim framework corresponded to the "existing development assessment process in the Yukon prior to the Development Assessment Legislation coming into effect".

[178] However, it should be mentioned that the interim framework, which was intended to apply for only a relatively short period, was ultimately in effect longer than planned. This is because the bill that became the implementing legislation for the process contemplated in Chapter 12 was not introduced until October 3, 2002, that is, over five and a half years after the February 14, 1997 deadline provided for in s. 12.3.4 of the Final Agreement. In fact, that deadline had already passed when the Final Agreement was signed in 1997. Since it is clear from the provisions of Chapter 12 that before the *YESAA* came into force, the parties to the Umbrella Agreement were required to make best efforts to ensure that the Yukon First Nations received the benefit of the spirit of that chapter as soon as was practicable, it is important to begin — not in order to apply the *letter* of the *YESAA*, but in order to clearly understand the *spirit* of Chapter 12, of which certain other provisions that were applicable expressly stated that, in the interim, best efforts were to be made to honour that spirit — by

Avant l'édiction de la législation sur l'évaluation des activités de développement, les parties à l'Accord-cadre définitif s'efforcent d'élaborer et d'incorporer au plan de mise en œuvre prévu à l'article 12.19.1 des mesures provisoires d'évaluation des projets qui soient conformes à l'esprit du présent chapitre et respectent les limites existantes établies par les règles de droit applicables et les organismes réglementaires. [Je souligne.]

Aucun plan de mise en œuvre de la nature de celui visé à l'art. 12.19.1 n'a été produit en l'espèce. Du reste, l'art. 12.19.4 précisait que le chapitre 12 n'avait « pas pour effet d'empêcher le gouvernement, en consultation avec les premières nations du Yukon, de prendre des mesures afin d'améliorer les procédures existantes en matière socio-économique ou environnementale au Yukon, en l'absence d'un plan détaillé approuvé [« *approved detailed design* »] du processus d'évaluation des activités de développement ». Aucune preuve n'a été déposée en l'espèce à l'égard d'une telle mesure. Par conséquent, conformément à l'art. 12.19.5, le régime provisoire applicable correspondait au « processus existant d'évaluation des activités de développement au Yukon avant l'entrée en vigueur de la [loi] sur l'évaluation des activités de développement ».

[178] Il convient cependant de noter que le régime provisoire, qui ne devait s'appliquer que pendant une période relativement courte, s'est prolongé plus longtemps que prévu. En effet, je dois souligner que le projet qui est à l'origine de la loi de mise en œuvre du processus envisagé au chapitre 12 n'a été déposé que le 3 octobre 2002, soit plus de cinq ans et demi après l'échéance du 14 février 1997 prévue à l'art. 12.3.4 de l'Entente définitive. En fait, lorsque cette entente a été signée en 1997, cette échéance était déjà dépassée. Comme il ressort de l'économie des dispositions du chapitre 12 que, avant l'entrée en vigueur de la *LÉESY*, les parties à l'Accord-cadre devaient s'efforcer de faire en sorte que les premières nations du Yukon bénéficient de l'esprit de ce chapitre dans les meilleurs délais, il importe, dans un premier temps, de vérifier ce à quoi aurait eu droit la Première nation de Little Salmon/Carmacks en vertu de la *LÉESY* si le processus que celle-ci met en œuvre s'était appliqué à la demande de M. Paulsen, et ce, dans le but, non pas de rendre applicable la *lettre* de la *LÉESY*, mais

determining what the Little Salmon/Carmacks First Nation would have been entitled to under the *YESAA* if the process implemented in that Act had applied to Mr. Paulsen's application.

(1) Permanent Process: *YESAA*

[179] One objective of Chapter 12 of the final agreements concluded with the Yukon First Nations is to ensure the implementation of a development assessment process that "provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process" (s. 12.1.1.2). This framework was designed to incorporate both the participation of the First Nations and a certain degree, if not of decentralization, at least of administrative deconcentration. These objectives are achieved through the membership of the bodies established in Chapter 12 of the final agreements and the *YESAA*, and through the oversight by those bodies of development activities planned for the territory in question. This integrated mechanism was intended, with some exceptions, to become Yukon's default assessment procedure. The relationship between the process established in Chapter 12 and the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, is made clear in s. 63 of the *YESAA*. In addition to the principle of a *single* assessment, Chapter 12 (ss. 12.14.1.2 and 12.14.3.2) and its implementing legislation (ss. 82(1), 83(1) and 84(1)) confirm the principle of *prior* assessment (prior to the authorization of any project).

[180] The process for which Chapter 12 lays the foundations involves two main organs: the Yukon Development Assessment Board and all the "designated offices" at the local level. The *YESAA* also refers to them as the "Board" and the "designated offices". The membership of the Board is established in s. 8 of the *YESAA*. The basis for its membership is equal representation. The Board's Executive Committee consists of one member nominated by the Council for Yukon Indians, one member nominated by the government and a chairperson appointed by the Minister after consultation with the first two members. The Minister then appoints additional members such that, excluding

de bien saisir l'*esprit* du chapitre 12, dont certaines autres dispositions qui étaient quant à elles applicables prévoyaient expressément qu'on devait provisoirement s'efforcer d'y faire honneur.

(1) Processus permanent : *LÉESY*

[179] Le chapitre 12 des ententes définitives conclues avec les premières nations du Yukon a notamment pour objectif d'assurer la mise en place d'un processus d'évaluation des activités de développement « garantissant la participation des Indiens du Yukon au processus d'évaluation des activités de développement et faisant appel à leurs connaissances et à leur expérience » (art. 12.1.1.2). Ce régime devait intégrer à la fois la participation des premières nations et un certain niveau, sinon de décentralisation, du moins de déconcentration administrative. Ces objectifs sont assurés par la composition des organes établis par le chapitre 12 des ententes définitives et la *LÉESY*, ainsi que par le droit de regard de ces organes sur les activités de développement prévues sur le territoire touché. Ce dispositif intégré était appelé, sous réserve d'exceptions, à devenir la procédure d'évaluation par défaut au Yukon. La relation entre le processus établi au chapitre 12 et la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, ch. 37, est précisée à l'art. 63 de la *LÉESY*. Outre le principe de l'évaluation *unique*, le chapitre 12 (art. 12.14.1.2 et 12.14.3.2) et sa loi de mise en œuvre (par. 82(1), 83(1) et 84(1)) reprennent celui de l'évaluation *préalable* (à toute autorisation d'un projet donné).

[180] Le processus dont le chapitre 12 jette les fondations est constitué de deux organes principaux : la Commission d'évaluation des activités de développement du Yukon et l'ensemble des « organismes désignés » au niveau local. Dans la *LÉESY*, la Commission devient un « Office » et les organismes des « bureaux ». La composition de l'Office est prévue à l'art. 8 de la *LÉESY*. L'Office se veut paritaire. Son comité de direction — appelé « comité exécutif » dans les ententes définitives — est composé d'un membre proposé par le Conseil des Indiens du Yukon, d'un membre proposé par le gouvernement et d'un président nommé par le ministre après consultation des deux premiers. Le

the chairperson, half the members are nominees of the Council for Yukon Indians and the other half are nominees of the government. As for the designated offices, they are, pursuant to the *YESAA*, outposts of the Board. Their staff "shall be composed of employees of the Board assigned to that office by the Board" (s. 23(1)).

[181] Chapter 12 establishes two broad categories of assessments — mandatory assessments and optional assessments — which are conducted upon request by the government or by a First Nation, but when the request is made by a First Nation, the government's consent is required, with some exceptions that are subject to specific conditions (ss. 12.8.1.4, 12.8.1.5, 12.8.1.8, 12.8.1.9 and 12.8.1.10 of the Final Agreement, and s. 60 of the *YESAA*). The Board is responsible for optional assessments. It is possible to simply except a project from assessment (s. 47(2) *YESAA*). As for mandatory assessments, they are the responsibility of the designated office for the assessment district in which the project is to be undertaken, or of the Board if the assessment district office refers the assessment to it (s. 50(1) *YESAA*) or if such projects have been classified by way of regulations as requiring submission to the Board (s. 122(*c*) *YESAA*). In short, if a project (1) is not excepted from assessment, (2) is not the subject of an accepted optional assessment, or (3) is not one that is required by regulations to be assessed by the Board or that has been referred to the Board by the office for the project's assessment district, it will be assessed by the assessment district office.

[182] If the environmental and socio-economic assessment process provided for in Chapter 12 — and in fact in the *YESAA*, which implements the process — had applied at the time of the events in this case, Mr. Paulsen's application would have had to be assessed by the designated office for the Mayo assessment district, which was established along with five others (for a total of six) by order of the Minister under s. 20(1) of the *YESAA*. Projects like the one in question in Mr. Paulsen's application were neither excepted by regulations nor required to be assessed by the Board. Section 2 of the

ministre y nomme ensuite des membres supplémentaires de façon à ce que, exclusion faite du président, la moitié des membres soient des personnes dont la nomination a été proposée par le Conseil des Indiens du Yukon et l'autre moitié par le gouvernement. Quant aux bureaux désignés, en vertu de la *LÉESY*, ils sont des antennes de l'Office. Leur personnel « est formé des personnes que l'Office y affecte parmi son propre personnel » (par. 23(1)).

[181] Le chapitre 12 établit deux grandes catégories d'évaluation : les évaluations obligatoires et les évaluations facultatives, lesquelles sont effectives sur demande du gouvernement ou d'une première nation, mais dans ce dernier cas, sauf exceptions et conditions prévues, avec l'assentiment du gouvernement (art. 12.8.1.4, 12.8.1.5, 12.8.1.8, 12.8.1.9 et 12.8.1.10 de l'Entente définitive et art. 60 de la *LÉESY*). Les évaluations facultatives relèvent de l'Office. Un projet peut aussi être simplement exclu de l'évaluation (par. 47(2) *LÉESY*). Les évaluations obligatoires relèvent quant à elles soit du bureau désigné de la circonscription où le projet doit être réalisé, soit de l'Office si le bureau de circonscription le lui réfère (par. 50(1) *LÉESY*) ou si un tel projet a fait l'objet d'une telle classification par règlement (al. 122*c*) *LÉESY*). En somme, si un projet (1) n'est pas exclu de toute évaluation, (2) ne fait pas l'objet d'une évaluation facultative acceptée ou (3) n'est pas soumis par règlement à une évaluation par l'Office ou ne lui a pas été déféré par le bureau de la circonscription du projet, il fera l'objet d'une évaluation par ce dernier.

[182] Si le processus d'évaluation environnementale et socioéconomique prévu au chapitre 12, en fait, à la *LÉESY* qui le met en œuvre, s'était appliqué au moment des faits, alors la demande de M. Paulsen aurait dû obligatoirement être évaluée par le bureau désigné de la circonscription de Mayo, créée avec cinq autres (pour un total de six) par arrêté ministériel en vertu du par. 20(1) de la *LÉESY*. En effet, un projet comme celui faisant l'objet de la demande de M. Paulsen n'a pas été exclu par règlement, ni fait l'objet d'une précision pour évaluation par l'Office. L'article 2 du *Règlement sur les*

Assessable Activities, Exceptions and Executive Committee Projects Regulations, SOR/2005-379, refers to Schedule 1 to those regulations concerning "activities that may . . . be made subject to assessment" within the meaning of s. 47 of the *YESAA*. The following activity is listed as Item 27 of Part 13 — entitled "Miscellaneous" — of Schedule 1:

On land under the administration and control of the Commissioner of Yukon or on settlement land, the construction, establishment, modification, decommissioning or abandonment of a structure, facility or installation for the purpose of agriculture, commercial recreation, public recreation, tourist accommodation, telecommunications, trapping or guiding persons hunting members of a species prescribed as a species of big game animal by a regulation made under the *Wildlife Act*, R.S.Y. 2002, c. 229.

[183] Finally, s. 5 of the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* provides that "[p]rojects for which proposals are to be submitted to the executive committee under paragraph 50(1)(*a*) of the [*YESAA*] are specified in Schedule 3." Since nothing in that schedule corresponds to Mr. Paulsen's application, it must be concluded that the assessment would have been the responsibility of the Mayo designated office, although that office could have referred the project to the Board.

[184] Since Mr. Paulsen's project falls into the category of projects for which an assessment by an assessment district office is mandatory, it is possible to give a precise answer to the question of what measures the respondents would have been entitled to had the letter of the process provided for in Chapter 12 of the Final Agreement applied in the case of Mr. Paulsen's application.

[185] It should first be observed that neither the Final Agreement nor the *YESAA* provides for direct participation by the First Nation in the assessment itself. It is only through the Council for Yukon Indians, or more precisely through those of the Board's members assigned to the Mayo office who were appointed after being nominated by the Council, that the First Nation

activités susceptibles d'évaluation, les exceptions et les projets de développement soumis au comité de direction, DORS/2005-379, renvoie à l'annexe 1 de celui-ci concernant les « activités qui pourraient [. . .] être assujetties à l'évaluation » au sens de l'art. 47 de la *LÉESY*. Cette annexe, à l'art. 27 de sa partie 13, intitulée « Divers », fait état de l'activité suivante :

Sur une terre dont le commissaire du Yukon a la gestion et la maîtrise ou sur une terre désignée, construction, exploitation, modification, désaffectation, fermeture ou abandon d'une structure ou installation agricole, récréative commerciale ou publique, touristique, de télécommunication, de piégeage ou destinée aux guides de chasse au gros gibier d'une espèce prévue par règlement du Yukon pris en vertu de la *Loi sur la faune*, L.R.Y. 2002, ch. 229.

[183] Enfin, l'article 5 du *Règlement sur les activités susceptibles d'évaluation, les exceptions et les projets de développement soumis au comité de direction* indique que « [l]es projets de développement pour lesquels des propositions doivent être soumises au comité de direction en application du paragraphe 50(1) de la [*LÉESY*] sont précisés à l'annexe 3. » Or, comme rien dans cette annexe ne correspond à la demande de M. Paulsen, il faut donc en conclure que l'évaluation aurait ressorti au bureau désigné de Mayo, même si ce dernier aurait pu déférer le projet à l'Office.

[184] Comme le projet Paulsen appartient à la catégorie des projets impliquant une évaluation obligatoire par un bureau de circonscription, il est possible de répondre précisément à la question de savoir quelles sont les mesures auxquelles auraient eu droit les intimés si la lettre du processus prévu au chapitre 12 de l'Entente définitive s'était appliquée à la demande de M. Paulsen.

[185] Il faut d'abord constater que ni l'Entente définitive ni la *LÉESY* ne prévoient la participation directe de la première nation au travail d'évaluation comme tel. La première nation n'aurait *participé* à l'évaluation de la demande de M. Paulsen que par l'intermédiaire du Conseil des Indiens du Yukon, plus exactement par le truchement de ceux des membres détachés par l'Office au bureau de Mayo qui

would have *participated* in the assessment of Mr. Paulsen's application. Furthermore, no provisions regarding the proportion of Aboriginal assessors required for assessments by the designated offices can be found either in the final agreements or in the *YESAA*. All that we know in this respect is that the Final Agreement and the *YESAA* require equal representation in the Board's *overall* membership.

[186] Regarding the right of interested parties, not to actively take part in the assessment itself, but to be heard, the Final Agreement provides that "[i]n accordance with the Development Assessment Legislation, a Designated Office . . . shall ensure that interested parties have the opportunity to participate in the assessment process" (s. 12.6.1.3). Moreover, as I mentioned above, the organs — the First Nations, the renewable resources council and the Fish and Wildlife Management Board — that make up the co-management framework for fish and wildlife established in Chapter 16 of the Final Agreement have standing as interested parties to participate in public proceedings of any agency, board or commission on matters that affect the management and conservation of fish and wildlife and their habitats in the traditional territory in question (ss. 16.5.3, 16.6.11 and 16.7.13). Also, s. 55(1)(*b*) of the *YESAA* provides that "[w]here a proposal for a project is submitted to a designated office under paragraph 50(1)(*b*), the designated office shall . . . determine whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a first nation." The word "territory" is defined as follows in s. 2(1) of the *YESAA*: "in relation to a first nation for which a final agreement is in effect, that first nation's traditional territory and any of its settlement lands within Yukon that are not part of that traditional territory". After it has been determined under s. 55(1)(*b*) that the project will be so located or that it might have such effects, s. 55(4) of the *YESAA* applies. It reads as follows:

auraient été nommés sur proposition de ce conseil. D'ailleurs, ni les ententes définitives ni la *LÉESY* ne précisent la proportion d'évaluateurs autochtones en cas d'évaluation par les bureaux désignés. Tout ce que nous savons à cet égard est que l'Entente définitive et la *LÉESY* exigent la parité dans la composition d'*ensemble* de l'Office.

[186] Au sujet du droit des parties intéressées, non pas de prendre part activement à l'évaluation elle-même, mais d'être entendues, l'Entente définitive prévoit ceci : « Conformément à la législation sur l'évaluation des activités de développement, les organismes désignés [. . .] font en sorte que les parties intéressées aient l'occasion de participer au processus d'évaluation » (art. 12.6.1.3). D'ailleurs, les organes composant le système de cogestion des ressources halieutiques et fauniques mis en place par le chapitre 16 de l'Entente définitive — soit les premières nations, le conseil des ressources renouvelables et la Commission de gestion des ressources halieutiques et fauniques — ont, comme je l'ai mentionné plus tôt, qualité pour participer à titre de partie intéressée aux audiences publiques tenues par une agence, un office ou une commission relativement à des questions ayant une incidence sur la gestion et la conservation des ressources halieutiques et fauniques et de leurs habitats dans le territoire traditionnel concerné (art. 16.5.3, 16.6.11 et 16.7.13). Aussi, l'alinéa 55(1)*b*) de la *LÉESY* précise que, « [s]aisi d'une proposition relative à un projet de développement en application du paragraphe 50(1), le bureau désigné [. . .] établit si le lieu de réalisation se trouve dans le territoire d'une première nation ou si le projet est susceptible d'avoir, dans un tel territoire, des effets importants sur l'environnement ou la vie socioéconomique. » Il faut savoir que le par. 2(1) de cette même loi définit ainsi le terme « territoire » : « En ce qui touche les premières nations qui sont parties à un accord définitif en vigueur, leur territoire traditionnel ainsi que leurs terres désignées situées à l'extérieur de celui-ci mais au Yukon ». Une fois faite, la détermination prévue à l'al. 55(1)*b*), la *LÉESY* précise en conséquence, au par. 55(4), que

Before making a recommendation . . . a designated office shall seek views about the project, and information that it believes relevant to the evaluation, from any first nation identified under paragraph (1)(*b*) and from any government agency, independent regulatory agency or first nation that has notified the designated office of its interest in the project or in projects of that kind.

Therefore, under the process provided for in Chapter 12 of the Final Agreement and in the *YESAA*, the Little Salmon/Carmacks First Nation would have had the right only to be heard in the assessment of Mr. Paulsen's application, and not to actively take part in it by delegating assessors.

[187] This, therefore, is the collective consultation measure to which the respondents would have been entitled in the case of Mr. Paulsen's application had the process provided for in Chapter 12 of the Final Agreement and implemented by the *YESAA* applied to it. This should enable us now to answer the ultimate question in the case at bar: whether, given that the letter of that process does not apply, the respondents could receive the benefit of the spirit of the process, as was their right under the transitional provisions of Chapter 12 of the Final Agreement. For this purpose, we must reiterate that although those transitional provisions did impose a particular responsibility on the Crown party, they were nevertheless not silent with respect to the participation of the Aboriginal party. Thus, s. 12.3.6 refers in this regard to efforts on the part not only of "government", but of the parties to the Umbrella Agreement.

(2) Transitional Law: Any "Existing Process" Before the Coming Into Force of the *YESAA*

[188] As far as Mr. Paulsen's application is concerned, the "existing process" within the meaning of the transitional law provisions, that is, of ss. 12.3.6 and 12.19.5 of the Final Agreement, was the process provided for in the *Environmental Assessment Act*, S.Y. 2003, c. 2, and Yukon's 1991

[l]e bureau désigné ne formule ses recommandations [. . .] qu'après avoir, d'une part, demandé l'avis de la première nation dont le territoire est touché aux termes de l'alinéa (1)*b*) et des autorités publiques, organismes administratifs autonomes et premières nations l'ayant avisé de leur intérêt dans le projet de développement ou dans les projets de même catégorie et, d'autre part, cherché à obtenir d'eux l'information qu'il estime nécessaire à l'examen.

Aux termes du processus prévu au chapitre 12 de l'Entente définitive et des dispositions de la *LÉESY*, la Première nation de Little Salmon/Carmacks n'aurait donc eu droit que d'être entendue lors de l'évaluation de la demande de M. Paulsen, et non pas d'y prendre part activement en y déléguant des évaluateurs.

[187] Voilà donc ce à quoi auraient eu droit les intimés comme mesure de consultation collective relativement à la demande de M. Paulsen si le processus prévu au chapitre 12 de l'Entente définitive et mis en œuvre par la *LÉESY* s'était appliqué à cette demande. Cela devrait maintenant nous permettre de répondre à la question que pose la présente affaire en dernière analyse, soit celle de savoir si, à défaut d'applicabilité de la lettre de ce processus, les intimés ont pu bénéficier de l'esprit de celui-ci, comme ils y avaient droit en vertu de l'économie des dispositions provisoires du chapitre 12 de l'Entente définitive. Pour ce faire, il faudra nous rappeler que, même si ces dispositions de droit provisoire conféraient une responsabilité particulière à la partie étatique, elles n'étaient pas pour autant silencieuses quant à la participation de la partie autochtone. En effet, l'art. 12.3.6 parle à cet égard des efforts qui sont dus non seulement de la part du « gouvernement », mais de celle de toutes les parties à l'Accord-cadre.

(2) Droit provisoire : tout « processus existant » avant l'entrée en vigueur de la *LÉESY*

[188] Au sens des dispositions de droit provisoire, c'est-à-dire les art. 12.3.6 et 12.19.5 de l'Entente définitive, le « processus existant » était, en ce qui concerne la demande de M. Paulsen, celui prévu à la *Loi sur l'évaluation environnementale*, L.Y. 2003, ch. 2, et à la politique agricole yukonnaise

agriculture policy, which, moreover, also referred to the environmental legislation (*Agriculture for the 90s: A Yukon Policy* (1991) (the "agriculture policy"), Section II, at para. 6(1)). Since the parties did not rely on that Act, I will merely mention that the assessment provided for in it was completed, but more than five months after the date of the decision on Mr. Paulsen's application, despite the fact that it was a mandatory prior assessment.

[189] Under the 1991 agriculture policy, Mr. Paulsen's application first had to undergo a "prescreening" by the Land Claims and Implementation Secretariat, the Lands Branch and the Agriculture Branch. The prescreening process involved determining whether the application was eligible for consideration, and in particular whether the application was complete, whether the land in question was available, whether that land was under territorial jurisdiction, whether there was a possibility that the land would be subject to Aboriginal land claims, whether the land had agronomic capability and, more specifically, whether the application was, at first glance, consistent with the policy then in effect.

[190] Mr. Paulsen's application then had to undergo a more technical review by the Agriculture Land Application Review Committee ("ALARC"). ALARC is a cross-sector, interdepartmental committee that, among other things, reviews the farm development plan that every applicant for agricultural land must submit (agriculture policy, Section II, at subpara. 9(1)(c)). ALARC's review of Mr. Paulsen's application was originally scheduled for June 26, 2002, but it could not proceed on that date because the applicant had not yet submitted a farm development plan.

[191] On June 10, 2002, an analysis by the Agriculture Branch showed that if Mr. Paulsen's application were accepted as configured, it would not represent the most efficient use of the land. On October 20, 2003, Mr. Paulsen reconfigured the parcel in question in his application. On February 24, 2004, ALARC recommended that his

de 1991 qui renvoyait d'ailleurs aussi à la législation sur l'environnement (*Agriculture for the 90s : A Yukon Policy* (1991) (la « politique agricole »), section II, par. 6(1)). Comme les parties n'ont pas invoqué cette loi, je me limiterai à mentionner que l'évaluation prévue par celle-ci a été complétée, mais plus de cinq mois après la date de la décision sur la demande de M. Paulsen, et ce, même s'il s'agissait d'une évaluation préalable obligatoire.

[189] Aux termes de la politique agricole de 1991, la demande de M. Paulsen a d'abord fait l'objet d'un examen préliminaire par le Secrétariat des revendications territoriales et de la mise en œuvre, par la Direction des terres ainsi que par la Direction de l'agriculture. Cet examen préliminaire devait consister en un contrôle de recevabilité de la demande, et notamment de son caractère complet, de la disponibilité de la terre visée, de la compétence territoriale sur celle-ci, d'éventuelles revendications territoriales autochtones dont elle pouvait faire l'objet, de son potentiel agricole et, plus généralement, de la conformité a priori de la demande à la politique en vigueur.

[190] La demande de M. Paulsen devait ensuite faire l'objet d'un examen davantage technique par le Comité d'examen des demandes d'aliénation de terres agricoles (« CEDATA »). Il s'agit d'un comité intersectoriel et interministériel qui procède notamment à l'examen du plan d'exploitation exigé de toute personne sollicitant l'obtention d'une terre à des fins agricoles (politique agricole, section II, al. 9(1)c)). L'examen de la demande de M. Paulsen par le CEDATA avait été initialement prévu pour le 26 juin 2002. Toutefois, comme le demandeur n'avait toujours pas produit de plan d'exploitation à cette date, cet examen n'a pas pu avoir lieu au moment prévu.

[191] Le 10 juin 2002, une analyse effectuée par la Direction de l'agriculture a révélé que, si elle était acceptée suivant la délimitation proposée, la demande de M. Paulsen ne constituerait pas une utilisation optimale du sol. Le 20 octobre 2003, M. Paulsen a revu la délimitation de la terre qui faisait l'objet de sa demande. Le 24 février 2004, le

application proceed to an assessment by the Land Application Review Committee ("LARC").

[192] LARC is a body whose membership consists of representatives of the Yukon government and, depending on the case, of Yukon First Nations, Yukon municipalities and/or the federal Department of Fisheries and Oceans (*Land Application Review Committee (LARC): Terms of Reference*, Section 4.0: Membership/Public Participation, A.R., vol. II, at p. 29). It is chaired by a territorial government official. A First Nation will be represented on LARC if, as was the case here, the application to be reviewed has potential consequences for the management of its "traditional territory".

[193] LARC's mandate is, in particular, to "review matters concerning land applications from a technical land-management perspective, in accordance with legislation, First Nation Final & Self Government Agreements and criteria in specific land application policies" (*Land Application Review Committee (LARC): Terms of Reference*, Section 6.0: Land Application & Policy Development Procedures — Mandate, A.R., vol. II, at p. 32).

[194] A notice concerning Mr. Paulsen's application was published on March 26, 2004, and the public were invited to submit written comments within 20 days. On April 28, 2004, the Agriculture Branch sent a summarized version of the application to the Little Salmon/Carmacks First Nation (A.R., vol. II, at p. 6) together with a letter notifying the First Nation that the application was to be reviewed by LARC and asking it to submit its written comments within 30 days. The First Nation was also sent an information package, which included notice that the LARC meeting was scheduled for August 13, 2004.

[195] On July 27, 2004, Susan Davis, the Director of Land and Resources of the Little Salmon/Carmacks First Nation, sent Yukon's Lands Branch

CEDATA a recommandé que sa demande soit évaluée par le Comité d'examen des demandes d'aliénation de terres (« CEDAT »).

[192] Le CEDAT se compose de représentants du gouvernement du Yukon et, suivant les cas, des premières nations du Yukon, des municipalités du Yukon et/ou du ministère fédéral des Pêches et Océans (*Land Application Review Committee (LARC) : Terms of Reference*, section 4.0 : Membership/Public Participation, d.a., vol. II, p. 29). Il est présidé par un fonctionnaire territorial. Une première nation y est représentée si la demande à examiner peut avoir des conséquences sur la gestion de son « territoire traditionnel », ce qui était le cas en l'espèce.

[193] Le CEDAT a notamment pour mandat d'[TRADUCTION] « examiner d'un point de vue technique de gestion du territoire certains aspects des demandes d'aliénation de terres, conformément aux lois, aux ententes définitives et accords d'autonomie gouvernementale des premières nations et aux critères prévus par certaines politiques relatives aux demandes d'aliénation de terres » (*Land Application Review Committee (LARC) : Terms of Reference*, section 6.0 : Land Application & Policy Development Procedures — Mandate, d.a., vol. II, p. 32).

[194] Le 26 mars 2004, la demande de M. Paulsen a fait l'objet de publicité et le public a été invité à formuler ses observations par écrit dans les 20 jours suivant cette date. Le 28 avril 2004, la Direction de l'agriculture a communiqué une version résumée de la demande de M. Paulsen à la Première nation de Little Salmon/Carmacks (d.a., vol. II, p. 6), accompagnée d'une lettre informant celle-ci que la demande serait examinée par le CEDAT et l'invitant à présenter ses observations écrites dans les 30 jours suivant cette date. Une trousse d'information contenant notamment la date prévue de la réunion du CEDAT, en l'occurrence le 13 août 2004, a aussi été envoyée à la première nation.

[195] Le 27 juillet 2004, la directrice des terres et ressources de la Première nation de Little Salmon/Carmacks, Susan Davis, a fait parvenir à la Direction

a letter in which she expressed the First Nations' concerns about Mr. Paulsen's application (A.R., vol. II, at p. 22). Those concerns were threefold. First of all, the First Nation was concerned about the impact of the application on the trapline. It was also concerned about the anticipated impact on settlement land under its comprehensive land claim agreement, and in particular on two parcels of site specific settlement land (a concept referred to above) as well as on the cabin of the holder of the trapline concession, which was located on one of those parcels. Finally, the First Nation asked the Yukon government to take into consideration the fact that there might be sites of heritage or archaeological interest, including a historical trail, on the land in question in the agriculture land application.

[196] LARC met to review Mr. Paulsen's application on August 13, 2004. For reasons that are not explained in the record of this case, the Little Salmon/Carmacks First Nation, without notifying the other members in advance, did not attend the meeting and did not request an adjournment of the August 13, 2004 review, to which it had been invited as a member of LARC. However, it can be seen from the minutes of that meeting that even though no representatives of the First Nation attended, its concerns had been taken into account even before the meeting. The following passages are relevant:

> The original rectangular parcel was reconfigured in October, 2003. The NRO [Natural Resources Officer] inspection report in April this year recommended it be reconfigured again to remove a portion, which is a potential timber allocation area for point source premits [*sic*]. Opposition from the First Nation has caused the abandonment of that plan.
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> . . .
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> Little Salmon Carmacks First Nation [LSCFN] express concern that the application is within Trapline Concession Number 143, held by an elder [Johnny Sam]. Forestfire burns have impacted this trapline, and

des terres du Yukon une lettre exprimant les préoccupations de la première nation relativement à la demande de M. Paulsen (d.a., vol. II, p. 22). Les préoccupations exprimées étaient de trois ordres. La première nation s'inquiétait d'abord des répercussions de la demande sur la ligne de piégeage. Elle se préoccupait des conséquences à prévoir sur les terres visées par le règlement de la revendication territoriale globale de la première nation, notamment sur deux sites spécifiques (notion vue ci-haut) ainsi que sur le refuge de trappe du titulaire de la ligne de piégeage, qui se trouve sur l'un de ces sites. Enfin, la première nation invitait l'administration yukonnaise à prendre en considération la présence possible de sites pouvant revêtir une valeur patrimoniale ou archéologique, dont un sentier historique, sur la terre faisant l'objet de la demande d'aliénation à des fins agricoles.

[196] Le CEDAT a procédé à l'examen de la demande de M. Paulsen le 13 août 2004. Pour des raisons non précisées dans le présent dossier, sans prévenir d'avance les autres membres, la Première nation de Little Salmon/Carmacks n'a pas pris part à la réunion et n'a pas demandé l'ajournement de l'examen du 13 août 2004 auquel elle avait été invitée à titre de membre du CEDAT. Le procès-verbal de cette réunion atteste toutefois que, en dépit de l'absence de représentants de la première nation, les préoccupations de celles-ci ont été prises en compte, et ce, même avant la réunion en question. Je reproduis ci-après les extraits pertinents du procès-verbal :

> [TRADUCTION] La parcelle rectangulaire originale a été reconfigurée en octobre 2003. Le rapport d'inspection de l'agent des ressources naturelles d'avril de cette année recommandait sa reconfiguration afin d'en retirer une partie, qui constitue une zone potentielle d'attribution de permis de coupe de bois visant des sources ponctuelles. Par suite de l'opposition manifestée par la première nation, ce projet a été abandonné.
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> . . .
>
> La Première nation de Little Salmon/Carmacks [PNLSC] s'est dite préoccupée par le fait que la demande vise une terre se trouvant à l'intérieur de la concession de piégeage nº 143 dont est titulaire un aîné [Johnny Sam].

the only area left is a small strip of land between the Klondike Highway and the Yukon River, which is considered to be suitable land for farming. As a result of the report, there have been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agriculture and timber harvesting impacts on this already damaged trapline would be a significant deterrent to the ability of the trapper to continue his traditional pursuits. There are two site specifics, personal/traditional use areas considered to be LSCFN settlement lands in the area in question, S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and users would be the loss of animals to hunt in the area. S-4B is also the site of Concession 143's base camp and trapper cabin.

. . .

Other LSCFN concerns relatied [*sic*] to cultural sites: There are potential areas of heritage and cultural interests which may be impacted by point source timber harvesting. An historic First Nation trail follows the ridge in the area. [A]t present these sites have not been researched or identified, and there would need to be an archaeological survey carried out in order to confirm the prescence [*sic*] or lack thereof of any such sites.

Environment advised they walked the site and discovered an old trap on top of the bluff, facing the Yukon River. The owner of Trapline #143 will have the right to seek compensation. An appropriate 30-metre setback is recommended from the bluff. There was evidence of bears and moose. There will be some loss of wildlife habitat in the area, but it is not significant.

. . .

Recommendation: Approval in principle. Setback from the bluff 30 meters . . . . Subdivision approval will be required. Trapper, based on reduced trapping opportunities, has opportunity to seek compensation.

Des incendies de forêt ont endommagé ce territoire et il n'en reste qu'une petite bande de terre entre la route Klondike et le fleuve Yukon, laquelle est considérée propice à l'agriculture. À la suite du rapport, plusieurs demandes d'aliénation de terres à des fins agricoles ont été présentées afin d'obtenir des terres dans la région en vue d'y élever du bétail et d'y construire des maisons. L'effet conjugué d'activités agricoles et d'activités de récolte du bois sur cette ligne de piégeage par ailleurs déjà endommagée nuirait de façon appréciable à la capacité du trappeur de continuer ses activités traditionnelles. Il y a, dans la région en question, deux zones utilisées à des fins personnelles ou traditionnelles, sites spécifiques S-4B et S-127B, qui sont considérées comme des terres visées par le règlement de la PNLSC. Ces deux emplacements se trouvent près de la zone concernant la demande de permis de coupe de bois visant des sources ponctuelles. L'effet des activités envisagées sur les sites et les usagers serait une réduction de la quantité d'animaux pouvant être chassés dans la région. Le site S-4B est aussi l'emplacement du camp de base et de la cabane du trappeur de la concession de piégeage n^{o} 143.

. . .

D'autres préoccupations exprimées par la PNLSC se rapportaient à des sites culturels : il y aurait certains endroits susceptibles de présenter de l'intérêt du point de vue culturel et patrimonial qui pourraient être touchés par les activités de récolte de bois. Un sentier historique de la première nation suit la ligne de crête dans la région. [A]ctuellement, aucun de ces sites n'a été identifié ou n'a fait l'objet de recherches. Il faudrait procéder à une reconnaissance archéologique pour confirmer la présence ou l'absence de tels sites.

Des fonctionnaires du ministère de l'Environnement ont affirmé avoir marché dans le site en question et y avoir découvert un vieux piège en haut de la falaise, face au fleuve Yukon. Le propriétaire de la ligne de piégeage n^{o} 143 aura le droit de demander d'être indemnisé. Il est recommandé de créer une zone tampon adéquate de 30 mètres à partir de la falaise. Certains éléments indiquaient la présence d'ours et d'orignaux. Il y aura une certaine perte au plan de l'habitat faunique dans la zone visée, mais peu importante.

. . .

Recommandation : Approbation de principe. Zone tampon de 30 mètres à partir de la falaise [. . .] Il faudra faire approuver le lotissement. Le trappeur pourra demander une indemnisation, sur la base de la réduction des possibilités de piégeage.

[197] On September 2, 2004, the territorial government's archaeologist reported that no evidence of prehistoric artifacts had been found on the land in question in the agriculture land application, but as a precaution he also recommended a 30-metre buffer between the bluff and the land that was to be transferred.

[198] The territorial government's conduct raises questions in some respects. In particular, there is the fact that the appellant David Beckman, in his capacity as Director of Agriculture, did not notify the respondent First Nation of his decision of October 18, 2004 until July 27, 2005. Under s. 81(1) of the *YESAA*, the designated office and, if applicable, the executive committee of the Board would have been entitled to receive copies of that decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is LARC. Even if representatives of the respondent First Nation did not attend the August 13 meeting, it would be expected that the Director of Agriculture would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

[199] The territorial government's decision to proceed with Mr. Paulsen's application at the prescreening stage despite the requirement of consultation in the context of the respondent First Nation's fish and wildlife management plan was not an exemplary practice either. In that respect, Yukon's 1991 agriculture policy provided that "[a]pplications to acquire land for agriculture will be reviewed by the Fish and Wildlife Branch to safeguard wildlife interests", that "[m]easures will be taken to avoid overlap between allocation of lands for agriculture and key wildlife habitat" and that, in particular, all "key wildlife habitat will be excluded from agricultural disposition except where the Fish and Wildlife Branch determines that adverse effects upon wildlife interests can be successfully mitigated" (Section II, subpara. 6(3)(b)). As we have seen, however, Susan Davis did not express concern about this in her letter of July 27, 2004 to Yukon's

[197] Le 2 septembre 2004, l'archéologue du gouvernement territorial a rapporté n'avoir pu relever aucune trace d'artefact préhistorique sur la terre faisant l'objet de la demande d'aliénation à des fins agricoles, mais par prudence a recommandé à son tour la création d'une zone tampon de 30 mètres de largeur entre la falaise et la terre qui serait éventuellement cédée.

[198] À certains égards, la conduite des autorités territoriales soulève des interrogations. C'est notamment le cas en ce qui a trait au fait que, en sa qualité de directeur de l'agriculture, l'appelant M. Beckman n'a signifié que le 27 juillet 2005 à la première nation intimée sa décision du 18 octobre 2004. En vertu du par. 81(1) de la *LÉESY*, le bureau désigné et, le cas échéant, le comité de direction de l'Office auraient eu droit de recevoir une copie de cette décision, et ce, on peut le supposer, à l'intérieur d'un délai raisonnable. L'équivalent fonctionnel du bureau désigné est ici le CEDAT. Même si les représentants de la première nation intimée ne se sont pas présentés à la réunion du 13 août, on se serait attendu à ce que le directeur de l'agriculture informe cette première nation de sa décision dans un délai raisonnable. Ce délai, survenu après la décision, n'a cependant pas affecté la qualité de la consultation préalable.

[199] La décision qu'a prise l'administration territoriale, au terme de l'examen préalable, de poursuivre le traitement de la demande de M. Paulsen malgré la consultation qui avait cours dans le cadre du plan de gestion des ressources halieutiques et fauniques de la première nation intimée n'est pas davantage un exemple de bonne pratique. La politique agricole yukonnaise de 1991 prévoyait pourtant à ce sujet que les [TRADUCTION] « [d]emandes d'acquisition de terres à des fins agricoles seraient examinées par la Direction de la faune et du poisson en vue de protéger la faune », que des « [m]esures seraient prises pour éviter que, dans l'attribution de terres à des fins agricoles, on empiète sur des habitats essentiels pour la faune » et qu'en particulier tout « habitat essentiel pour faune serait exclu des terres susceptibles d'aliénation à des fins agricoles, sauf dans les cas où la Direction de la faune et du poisson juge qu'il est possible d'atténuer les effets

Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the Little Salmon/Carmacks First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

préjudiciables sur la faune » (section II, al. 6(3)b)). Cependant, comme on a pu le constater, Susan Davis n'a pas exprimé cette préoccupation dans sa lettre du 27 juillet 2004 à la Direction des terres du Yukon. De plus, comme le démontre le procès-verbal de la réunion du 13 août 2004, les préoccupations de la Première nation de Little Salmon/Carmacks concernant la conservation des ressources ont été prises en considération. Au surplus, la consultation qui avait cours dans le cadre du plan de gestion des ressources halieutiques et fauniques était beaucoup plus limitée que celle à laquelle donnait droit la participation de la première nation au CEDAT qui était chargé d'évaluer le projet spécifique faisant l'objet du présent pourvoi. De surcroît, la première nation, le conseil des ressources renouvelables et le ministre ne s'étaient pas entendus sur la suspension provisoire du traitement de toute demande d'aliénation de terres dans la région visée.

[200] Despite these aspects of the handling of Mr. Paulsen's application that are open to criticism, it can be seen from the facts as a whole that the respondents received what they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*. As we saw above, the only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder (s. 55(4)). That consultation would have been minimal, whereas in the context of the 1991 agriculture policy, the First Nation was invited to participate directly in the assessment of Mr. Paulsen's application as a member of LARC.

[200] Au-delà de ces aspects critiquables du cheminement de la demande de M. Paulsen, l'ensemble des faits révèle que les intimés ont reçu des appelants ce à quoi ils avaient droit de la part de ceux-ci en matière de consultation à titre de première nation. En réalité, ils ont même obtenu à certains égards davantage que ce que leur aurait procuré la *LÉESY*. En effet, comme on a pu le constater précédemment, le seul droit qu'aurait obtenu la première nation en vertu de la *LÉESY* est celui d'être entendue à titre de personne intéressée (par. 55(4)) par le bureau de circonscription. Il s'agissait là d'une consultation minimale, alors que, dans le contexte de l'application de la politique agricole de 1991, la première nation a été invitée à participer directement, à titre d'évaluateur membre du CEDAT, à l'évaluation de la demande de M. Paulsen.

[201] It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had nonetheless already submitted comments in a letter.

[201] Il est vrai que les représentants de la première nation ne se sont pas présentés à la réunion du 13 août 2004. Cela est survenu sans qu'ils ne préviennent au préalable les autres membres du CEDAT et sans demander l'ajournement de la réunion, mais ils avaient néanmoins fait des commentaires par lettre.

[202] Thus, the process that led to the October 18, 2004 decision on Mr. Paulsen's application was

[202] Par conséquent, le processus qui a mené à la décision du 18 octobre 2004 relativement à la

consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

III. Conclusion

[203] Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, as in the Court's recent decision regarding the *James Bay and Northern Québec Agreement*, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

[204] The appellants seek a declaration that the Crown did not have a duty to consult under the Final Agreement with respect to Mr. Paulsen's application. Their interpretation of the Final Agreement is supported neither by the applicable principles of interpretation nor by either the context or the provisions of the Final Agreement. The cross-appellants argue that the common law duty to consult continued to apply despite the coming into effect of the Final Agreement. As I explained above, it is my view that there is no gap in the Final Agreement as regards the duty to consult. Its provisions on consultation in relation to the management of fish and wildlife were in effect. And the Little Salmon/Carmacks First Nation had in fact submitted comments in the process provided for in that respect. Moreover, the administrative law rights of Johnny Sam are governed neither by the common law duty to consult nor by the Final Agreement. Although the Little Salmon/Carmacks First Nation's argument

demande de M. Paulsen respectait les dispositions de droit provisoire prévues au chapitre 12 de l'Entente définitive. Il n'existe aucun motif juridique permettant de conclure que l'obligation de consultation de la Couronne a été violée.

III. Conclusion

[203] Si, jusqu'ici, les litiges ont mis en cause une action unilatérale de la Couronne qui déclenchait une obligation de consulter dont les modalités n'avaient pas été négociées, le présent dossier, tout comme celui dans lequel la Cour a récemment été appelée à étudier la *Convention de la Baie-James et du Nord québécois*, indique que les parties sont maintenant passées à une autre étape. Les processus formels de consultation font maintenant résolument partie de l'univers juridique des traités. L'Entente définitive n'en est qu'un exemple. Donner leur plein effet aux stipulations d'un traité comme l'Entente définitive c'est renoncer à toute approche paternaliste à l'égard des peuples autochtones. Il s'agit d'une façon de reconnaître leur pleine capacité juridique. Méconnaître les stipulations d'un tel traité ne peut qu'encourager le recours aux tribunaux, nuire aux négociations futures et compromettre la réalisation de l'objectif ultime de réconciliation.

[204] L'appel principal visait à obtenir une déclaration portant que la Couronne n'avait pas d'obligation de consultation en vertu de l'Entente définitive en relation avec la demande de M. Paulsen. L'interprétation que font les appelants de l'Entente définitive n'est appuyée ni par les principes interprétatifs applicables, ni par le contexte de l'Entente définitive ou les stipulations de celle-ci. Par ailleurs, l'appel incident est fondé sur la survivance, malgré l'entrée en vigueur de l'Entente définitive, de l'obligation de consultation de source jurisprudentielle. Comme je l'ai expliqué précédemment, je suis d'avis qu'il n'existe aucun hiatus dans l'Entente définitive concernant l'obligation de consultation. Ses dispositions concernant la consultation en relation avec la gestion des ressources halieutiques et fauniques étaient en vigueur. La Première nation de Little Salmon/Carmacks a d'ailleurs présenté ses observations dans le cadre du processus prévu à cet effet. Par ailleurs, les droits de Johnny Sam,

that it had a right to be consulted with respect to Mr. Paulsen's application is valid, the source of that right is not the common law framework. The fact is that the transfer to Mr. Paulsen constituted an agricultural development project that was subject to Chapter 12 of the Final Agreement and that that chapter's transitional provisions established the applicable framework.

[205] In this case, given that Mr. Paulsen's application would have been subject to a mandatory assessment by the local assessment district office, the fact that recourse was had to the existing process to assess the application supports a conclusion that the actual consultation with the respondents was more extensive than the consultation to which they would have been entitled under the *YESAA*.

[206] For these reasons, I would dismiss the appeal and the cross-appeal, both with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants/respondents on cross-appeal: Lawson Lundell, Vancouver.

Solicitors for the respondents/appellants on cross-appeal: Pape Salter Teillet, Vancouver.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the interveners the Gwich'in Tribal Council and Sahtu Secretariat Inc.: Gowling Lafleur Henderson, Ottawa.

en tant qu'administré, ne sont régis ni par l'obligation de consultation de régime jurisprudentiel ni par l'Entente définitive. Si la Première nation de Little Salmon/Carmacks a raison de soutenir qu'elle avait le droit d'être consultée en ce qui a trait à la demande de M. Paulsen, ce n'est pas en vertu du régime jurisprudentiel. C'est que, conformément à l'Entente définitive la cession à M. Paulsen constituait un projet de développement agricole assujetti aux dispositions du chapitre 12 de ce traité et que ses dispositions provisoires établissaient le régime applicable.

[205] En l'espèce, le recours au processus existant pour l'évaluation de la demande de M. Paulsen, compte tenu du fait que cette demande aurait relevé d'une évaluation obligatoire par le bureau de circonscription locale, permet de conclure que les intimés ont bénéficié d'un régime supérieur à celui auquel ils auraient eu droit en vertu de la *LÉESY* en matière de consultation.

[206] Pour ces motifs, je rejetterais les pourvois principal et incident, avec dépens dans les deux cas.

Pourvoi et pourvoi incident rejetés avec dépens.

Procureurs des appelants/intimés au pourvoi incident : Lawson Lundell, Vancouver.

Procureurs des intimés/appelants au pourvoi incident : Pape Salter Teillet, Vancouver.

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

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général de Terre-Neuve-et-Labrador : Procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureurs des intervenants le Conseil tribal des Gwich'in et Sahtu Secretariat Inc. : Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority: Gowling Lafleur Henderson, Montréal.

Solicitors for the intervener the Council of Yukon First Nations: Boughton Law Corporation, Vancouver.

Solicitors for the intervener the Kwanlin Dün First Nation: Arvay Finlay, Vancouver.

Solicitors for the intervener Nunavut Tunngavik Inc.: Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Solicitor for the intervener the Tlicho Government: John Donihee, Calgary.

Solicitors for the intervener the Te'Mexw Nations: Janes Freedman Kyle Law Corporation, Victoria.

Solicitors for the intervener the Assembly of First Nations: Hutchins Caron & Associés, Montréal.

Procureurs de l'intervenant le Grand conseil des Cris (Eeyou Istchee)/Administration régionale crie : Gowling Lafleur Henderson, Montréal.

Procureurs de l'intervenant le Conseil des Premières nations du Yukon : Boughton Law Corporation, Vancouver.

Procureurs de l'intervenante la Première nation de Kwanlin Dün : Arvay Finlay, Vancouver.

Procureurs de l'intervenante Nunavut Tunngavik Inc. : Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Procureur de l'intervenant le gouvernement tlicho : John Donihee, Calgary.

Procureurs de l'intervenante les Nations Te'Mexw : Janes Freedman Kyle Law Corporation, Victoria.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Hutchins Caron & Associés, Montréal.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al,***
2005 BCSC 283

Date: 20050302
Docket: L043154
Registry: Vancouver

Between:

Darren Blaney, Chief Councillor, Florence Hackett, Bonnie Wilson, Clyde Leo, Bill Blaney, Band Councillors, suing on their own behalf and on behalf of all the members of the Homalco Indian Band, and the Homalco Indian Band

Petitioners

And

The Minister of Agriculture Food and Fisheries and Marine Harvest Canada

Respondents

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Petitioners	P.R. Grant, N.B. O'Reilly and L. Schmidt
Counsel for the Respondent, The Minister of Agriculture Food and Fisheries	L. Mrozinski and P.E. Yearwood
Counsel for the Respondent, Marine Harvest Canada	S.B. Armstrong, Q.C., J.M. Shore and C.J. Kowbel
Date and Place of Trial/Hearing:	January 24 – 28, January 31, February 1 & 2, February 10 & 11, 2005 Vancouver, B.C.

INTRODUCTION

[1] The petitioners, who I will refer to as “the Homalco”, are the Chief councillor and Band councillors suing on their own behalf, and on behalf of the members of the Homalco Indian Band. The Homalco Band is also known as the Xwèmalhkwu First Nation.

[2] The Minister of Agriculture, Food and Fisheries (“MAFF” or “Ministry”) is the Minister responsible on behalf of the Crown in right of British Columbia for licensing and approval of aquaculture facilities and amendments to aquaculture licenses.

[3] “Marine Harvest Canada” is a trade name for Nutreco Canada Inc. Marine Harvest Canada (“Marine Harvest”) operates an aquaculture facility in British Columbia at a site adjacent to the Church House Indian Reserve at Bute Inlet. The reserve is held in trust by the Crown in right of Canada on behalf of the Homalco.

[4] The Homalco seek judicial review of the decision by the Minister, through its decision maker, to approve an amendment to an existing fish farm licence on Bute Inlet. Marine Harvest has a licence to operate a fish farm and raise Chinook salmon at this facility. They applied to amend that licence in April of 2004 to allow them to raise Atlantic salmon. The amendment was granted effective December 8, 2004.

[5] The Homalco say the approval of the amendment was done without proper consultation and accommodation of their concerns, as required by law.

[6] The Homalco seek the following in their petition:

1. a declaration that the Minister has failed to properly consult and accommodate them with respect to the amendment;

2. an order quashing or setting aside the decision of the Minister;

3. relief in the nature of certiorari quashing the decision of the Minister approving the amendment;

4. a declaration that the decision of the Minister to proceed with the granting of approval of the amendment prior to meaningful consultation with the Homalco in good faith was a breach of the constitutional duty of the Crown to consult in good faith with the Homalco;

7. a permanent injunction prohibiting Marine Harvest from placing Atlantic salmon in the Church House fish farm without proper authorization from the Department of Fisheries and Oceans for the harmful alteration, disruption or destruction [HAAD] of fish habitat pursuant to s. 35(2) of the ***Fisheries Act***, R.S.C. 1985, c. F-14 ("***Fisheries Act***") and without obtaining a licence pursuant to s. 55 of the ***Fishery (General) Regulations***.

[7] They also seek an order that the Atlantic salmon which are presently located in this fish farm be removed.

BACKGROUND

[8] The Homalco Band are Aboriginal people who claim Aboriginal title and rights to an area on the central coast of British Columbia that includes Bute Inlet and the area surrounding the Church House and Barlett Island Indian Reserves.

[9] Marine Harvest operates the aquaculture facility which is at the site adjacent to the Church House Reserve and at the mouth of Bute Inlet. The licence was originally granted in 2002, allowing the raising of Chinook salmon. Marine Harvest applied in April of 2004 to amend the licence to allow them to raise Atlantic salmon. The MAFF wrote to Homalco on July 20, 2004 to notify them of the application and to obtain their input. A biologist at MAFF "approved" the application on July 28, 2004.

[10] Homalco replied, expressing their concerns about the amendment, and seeking additional information.

[11] These exchanges were followed by a number of letters and emails, as well as telephone communication between the Ministry representatives, Homalco's lawyers, and in some instances, the Homalco themselves. Despite this communication and the expressed desire and willingness to meet in some of the communications, the parties never did have a meeting to discuss the concerns raised by the Homalco. The Ministry, in late November, indicated that it intended to make its decision by December 9. In fact, its decision was made on December 8, without a meeting

occurring between the parties. The Homalco submitted further materials, and the Ministry responded to those materials on January 18, 2005.

[12] These proceedings were commenced on December 22, 2004, after Marine Harvest had placed 700,000 Atlantic smolts out of a possible 1 million in the Church House site.

THE LAW

[13] The Supreme Court of Canada has dealt with the issue of the obligation to consult and accommodate in two recent decisions. These decisions are ***Haida Nation v. British Columbia (Minister of Forests)*** 2004 SCC 73, [2004] S.C.J. No. 70 (S.C.C.) (Q.L.) and ***Taku River Tlingit First Nation v. (British Columbia) (Project Assessment Director)***, [2004] S.C.J. No. 69. These decisions were delivered November 18, 2004. They confirm the Crown's obligations to consult, and decided that a third party in the position of Marine Harvest did not have a duty to consult.

[14] The Supreme Court of Canada in ***Haida***, *supra,* said the following:

> ¶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.

…

¶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.

…

¶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.

…

¶32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982.* This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the

> Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.,* [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation…" (emphasis added).

[15] The Supreme Court of Canada said in the ***Taku****, supra,* case:

> ¶24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra,* the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982,* which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

WHEN DOES THE DUTY ARISE?

[16] The petitioner correctly argues that the duty arises when the Crown makes decisions that have a serious impact on asserted Aboriginal rights and title. The duty comes into existence when:

1. the Crown has knowledge, real or constructive of the potential existence of Aboriginal rights or titles; and

2. it contemplates conduct that might adversely affect them.

[17] The Supreme Court of Canada in ***Haida*** said:

> ¶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 (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

(Also see ***Taku*** at ¶25).

[18] In situations where claims have not yet been resolved, the court in ***Haida*** said:

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

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

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

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

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

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

¶ 41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into

watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

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

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

¶ 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that

Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

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

¶ 46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1998) provides insight:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ... (at s. 2.0 of Executive Summary)
> ... genuine consultation means a process that involves ...:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalized
> - seeking Maori opinion on those proposals
> - informing Maori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Maori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding)

¶ 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

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

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

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

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

[19] The court in ***Haida*** then went on to consider the nature of the review of the government's conduct where it is challenged. In particular, the court said the following:

> ¶ 60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.
>
> ¶ 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the

> issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> ¶ 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective Aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice ... ". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> ¶ 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
>
> H. *Application to the Facts*
>
> (1) *Existence of the Duty*

[20] The process of consultation and accommodation places obligations on both sides of the discussion. The parties are not obliged to reach an agreement, but they are obliged to make reasonable efforts in the process of consultation, and to keep an open mind. Failure to reach an agreement does not mean that consultation and reasonable accommodation has not occurred. Accommodation involves a balancing of competing societal interests with Aboriginal and treaty rights. The Supreme Court

of Canada has made it clear that balance and compromise are inherent in the notion of reconciliation as discussed in ***Haida***.

[21] I find that there is a duty on the Crown to consult in the circumstances of this case. The Crown has actual knowledge of the claims by the Homalco to Aboriginal title and rights in the area of the Bute Inlet. The basis of that knowledge includes the following:

1. The submissions of Homalco's statement of intent filed with the British Columbia Treaty Commission;

2. Information regarding Homalco's traditional and present day use of the Homalco territory transmitted directly to British Columbia and Canada by Homalco elders and other representatives in the course of the treaty process and regional planning process.

3. Information regarding Homalco's traditional and present day use of the Homalco Territory contained in the Homalco Traditional Use Study and in the March 2003 Marine Resources Study prepared by Dorothy Kennedy and Randy Bouchard and transmitted to British Columbia during the course of treaty negotiations.

4. Published information regarding Homalco traditional use and occupation of the Homalco Territory available on reasonable enquiry and Sliammon people, Sliammon lands, 1999.

5. The Homalco had made earlier submissions to MAFF regarding licensing applications with respect to the Marine Harvest fish farm.

[22] The fish farm in question is close to the Church House reserve. The Church House reserve is not presently occupied by the Homalco but it is an area which they have rights to and where they may attend.

[23] The Homalco have claimed the rights to harvest wild salmon stocks, clam beds, rock fish and other stocks and they are concerned about the management protection and enhancement of these resources within their claimed territory.

[24] The Crown is aware that the Homalco claim Aboriginal rights with regard to the wild Pacific salmon stocks that spawn in rivers and creeks flowing into Bute Inlet. The Homalco argue that these wild stocks can pass by the fish farm and be affected by it. The Homalco also argue that their rights to harvest shell fish and clams at sites in the vicinity of the fish farm can be impacted. They argue that these rights are an integral part of their Aboriginal culture for their sustenance needs, social needs and trade.

[25] There may be claims by other bands that overlap a portion of the territory claimed by the Homalco (the Sliammon and the Klahoose), however, I am satisfied that:

1. There is a reasonable probability that the Homalco will be able to establish Aboriginal title to at least some parts of the Homalco Territory including portions of Bute Inlet in the vicinity of Church House.

The Homalco certainly have rights to the use and occupation of the reserve lands;

2. There is a substantial probability that the Homalco will be able to establish Aboriginal rights to harvest wild Pacific salmon and other marine resources of the Homalco territory.

EXTENT OF THE SCOPE AND CONTENT OF THE OBLIGATION TO CONSULT AND ACCOMMODATE IN THIS CASE

[26] The parties disagree as to the scope and content of the obligation to consult and whether there has been reasonable accommodation.

[27] The Homalco argue that they have presented a strong *prima facie* case with regard to their claims to title and rights. The Homalco also argue that the evidence they have presented and the evidence which was submitted to the Ministry demonstrates the seriousness of their concerns and the serious potential risks to their Aboriginal rights to continue to harvest marine resources.

[28] The Ministry, supported by Marine Harvest, argue that in this case the scope and content of the consultation is at the low end of the scale. They say that the obligation to consult relates only to the amendment to the license to substitute Atlantic salmon for Chinook salmon. They argue that any issues regarding the existence or location of the fish farm have been resolved or dealt with when the license was initially granted. They argue that the evidence submitted by the Homalco with regard to the potential harm against wild salmon stocks or marine life

has already been considered when the Province conducted an extensive review of salmon aquaculture in the past. They argue that any new evidence submitted by the Homalco has been considered by the Ministry and is inconsistent with other expert opinions known to the Ministry. They argue that any risk to wild salmon or marine life from the introduction of Atlantic salmon to the Church House fish farm is low or non-existent.

[29] The parties have submitted voluminous affidavits including opinions of various scientists to support their positions. The parties have all agreed that it is not the function of the Court to decide which of these conflicting opinions is correct. Marine Harvest refers to the decision ***Vancouver Island Peace Society v. Canada***, [1992] 3 F.C. 42 at 51 (T.D.). This was a case dealing with a federal decision to allow nuclear powered ships into Canadian ports. Voluminous affidavit material was provided which offered opinions on environmental risks. The Honourable Mr. Justice Strayer said:

> It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the Federal Court Act [R.S.C., 1985, c. F-7]

They refer to this material, however, to support their arguments about the risks of potential harm or infringement of the rights claimed by the Homalco.

[30] In their supplemental argument, the Homalco identify what they say are the potential adverse impacts on wild salmon arising from the introduction of Atlantic salmon to include the following:

> (a) The potential of farmed Atlantic salmon from their net cages through accident, negligence or force of nature;
>
> (b) The certainty of 'leakage' of Atlantic salmon from the aquaculture facility;
>
> (c) The potential colonization of the spawning habitat of wild Pacific salmon stocks by escaped Atlantic salmon and their offspring;
>
> (d) The potential displacement of wild stocks through competition from escaped Atlantic salmon for competition for food and other resources;
>
> (e) The potential spread of diseases such as ISA, IHN and Kudoa from farmed Atlantic salmon to wild Pacific salmon stocks;
>
> (f) The potential spread of sea lice from farmed Atlantic salmon to migrating wild Pacific salmon smolts causing significant declines in those stocks;
>
> (g) The potential adverse impact on wild Pacific salmon stocks arising from the cumulative effect of any of these adverse impacts in the impact such as habitat loss, overfishing and climate change which are already causing a significant decline in wild stocks;
>
> (h) The potential scale effects of the introduction of Atlantic salmon to the facility at issue when taken together with the adverse impacts arising from other salmon farms which may have an impact on the relevant stocks.

[31] Regarding shell fish and other marine life the Homalco argue that the impact is effluent from the farm containing feces, food waste, and chemotheropeutants on nearby clam beds and other aquatic life forms may detrimentally affect their interests.

[32] They also raise the issue of the potential impact on marine mammals which may attempt to feed on the Atlantic salmon at the fish farm and be destroyed in order to prevent that.

[33] The Homalco argue that the Ministry has failed to properly consider the significant evidence of potential adverse impacts on their Aboriginal rights and failed to apply proper principles of risk assessment. They also argue that the Ministry, in making its decision, has failed to properly apply the "precautionary principle".

[34] I have been referred to large volumes of scientific information in the affidavits. However, as I said earlier, all of the parties agreed that the court should not become the arbitrator of scientific theories. I agree. However, what is clear from the material is that there are differences in scientific opinion about the effects and risks involved with salmon aquaculture, and particularly the farming of Atlantic salmon and its affect, or potential affect on wild salmon stocks. All of the scientists and panels involved in studying the issues confirm that there are serious gaps in knowledge and that research is needed to fill those gaps.

[35] The Ministry referred to the Salmon Aquaculture Review. The review commenced in 1995 and the report was released August 1997. The study was conducted through the Environmental Assessment Office. Input was received from various groups including scientists and technical experts. The presenters included government agencies, local governments, Aboriginal people, industry, support services to the industry, environmental organizations, wild salmon commercial fishing organizations, recreational and tourism organizations and labour.

[36] The review was to assess environmental, economic, social, cultural, heritage and health impacts related to issues of (1) escaped farm fish, (2) fish health, (3) waste discharges, (4) interactions between salmon farms and coastal mammals and other species, and (5) fish farm siting. The review did not deal with the issue of sea lice but that issue does not appear to have been identified at the time.

[37] The Salmon Aquaculture Review in its summary, Volume 1, p. 4 stated the following:

> The technical advisory team concluded that salmon farming in B.C. as presently practised and at current production levels, presents a low overall risk to the environment. However, this general finding is tempered by certain reservations. First, continuing concern about localized impacts on benthic (sea bed) organisms, shell fish populations and marine mammals suggests the need for additional measures to protect them. Second, significant gaps in the scientific knowledge on which the technical advisory teams' conclusions are based point to the need for monitoring and research in areas such as the potential impacts of interactions of escaped farm salmon with wild populations, identification and control of disease and disease pathogens, potential for disease transfer and impacts from antibiotic residues, and affects of waste discharges on water quality and sea bed life.
>
> Science rarely has the ability to reach definitive conclusions on the risk or potential severity of the consequences of human interactions with complex ecosystems. In the face of this uncertainty, governments still need to make land and resource management decisions. Direction is provided by the precautionary principle which advocates the consideration and anticipation of the potential negative impacts of any activity before it is approved. Similarly, the concept of preventative management allows government to manage, to prevent certain specific events even though not all potential outcomes can be predicted. Where the risk of environmental impacts from an economically important activity is low but the consequences of damages may be significant, the public interest may best be served by dealing with risk, by being precautionary and invoking a series of measures, including: preventative management, adaptive management, and performance-based standards. In the case of salmon farming, this means reducing

> risk by setting high standards for farm operations based on the best available knowledge, and rigorously enforcing the implementation of those standards. And it means being prepared to alter management practices over time to take account of increased understanding of risk and different means of reducing it. This means that industry will be required to adapt to evolving management schemes.

[38] The Ministry argues the response to this report included the development of extensive obligatory requirements dealing with the issues identified by the Salmon Aquaculture Review. The Ministry argues that as a result of this, the practices in salmon aquaculture have greatly improved and, therefore, argue the risks or any potential risks are reduced. It should be noted that since the review and the new regulations, the number of salmon aquaculture sites has also increased.

[39] The thrust of the Salmon Aquaculture Review is not that its recommendations will address all of the concerns. The thrust of the review is that its recommendations are important in reducing potential risks, but that further research and ongoing preventative management and review are required.

[40] The Homalco argue that the application of the precautionary principle or approach requires the Ministry to take steps to avoid the identified risks until further research allows the uncertainty with respect to the extent of those risks to be reduced or eliminated.

[41] The respondent's arguments are essentially that the precautionary principle does not require government action, but simply says that lack of scientific knowledge is not an excuse to fail to take action. The respondents argue that the adaptive

management approach that the government has taken is in line with precautionary principles and appropriate in this case.

[42] In correspondence and in argument, the Homalco referred to the precautionary principle as defined in the **Bergen Ministerial Declaration on Sustainable Development (1990)** as follows:

> In order to achieve sustainable development, policies must based on the precautionary principle. Environmental measures must anticipate, prevent and attack the cause of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[43] The Homalco take the position that there should be no amendment to allow the aquaculture of Atlantic salmon until the Ministry and Marine Harvest can prove that there is no risk to wild salmon stock. They argue, that the gaps in scientific knowledge and research make it impossible to prove that there is no risk to wild salmon stock. Therefore, they argue that no amendment should be allowed.

[44] The respondents argue that the Homalco have misunderstood the precautionary principle. They argue that the principle really means that lack of scientific knowledge is not a basis for failing to pass regulations or controls to avoid potential serious or irreversible damage to the environment. They argue that it does not mean, nor are governments bound, to prevent all activities which might cause such harm however low the risk might be, or however speculative the risk might be, until it is proven as a certainty that there is no risk.

[45] I agree with the respondents that the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks. This is exactly the kind of situation which requires consultation, discussion, exchange of information, and perhaps accommodation.

[46] In some portions of the submissions, it appears the parties are confusing the issues of the obligation to consult and the appropriate accommodation after that consultation. However, I do not think I could say the adaptive management approach is not a proper means of accommodation, although there may be some other things that should be considered. Some of these may be the levels of enforcement of the regulations and monitoring those regulations, et cetera. These matters are certainly the proper subject of consultation and discussions about accommodation, and do not appear to have been considered here. I am sure there are many other matters as well that the parties can discuss, and that may amount to reasonable accommodation.

THE REQUIRED SCOPE AND CONTENT OF CONSULTATION

[47] The respondents argue that the only matters or issues that require consultation were those that involve the change in risks between the introduction of Atlantic as opposed to Chinook salmon at this fish farm. They argue the existence of the fish farm and any potential harm caused by fish farming in general has already been dealt with when the original license was granted. The respondents point to the

fact that the prior Chief and council supported the establishment of this fish farm at this particular location. Marine Harvest had originally considered a different location, but with the encouragement of the Chief agreed to establish the fish farm at the present Church House location. The Chief at that time wrote a letter of support for the granting of a license for a fish farm for Chinook salmon. The original application had been for Chinook and Atlantic salmon but Marine Harvest withdrew its request with regard to Atlantic salmon. Shortly after the licences were granted there were new elections within the band and the Chief and council were replaced. The new Chief and council appeared to oppose fish farming in general and the fish farm at Church House in particular.

[48] The Ministry has taken the position that it is only concerned with regard to the change of species which is the subject matter of consultation. Their position is that unless some new evidence was submitted to them to demonstrate some significant risk over and above that of salmon farming in general, to the Homalco's Aboriginal rights or title, there was no need for anything more than the lowest level of consultation. They argue that any consultation necessary did occur by an exchange of correspondence and the accommodations that were necessary have occurred as a result of the implementation of the detailed Aquaculture Regulations, following the Salmon Aquaculture Review.

[49] I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. However, that does not mean that these matters do not continue to be the subject of review and further consultation in

light of additional knowledge or information. The fact that there may be some controversy about the new evidence or information provided does not mean that it is not a proper matter of consultation. The underlying message in the Salmon Aquaculture Review is that the present state of knowledge is incomplete, further research is required, and that the approaches to management of salmon aquaculture need to be reviewed and altered as the circumstances dictate.

[50] The issue of siting of a particular aquaculture fish farm is not something that is concluded once and for all. Additional information may require a review of the siting and further consultation with the Homalco.

[51] The fact that the Salmon Aquaculture Review occurred and that some Aboriginal people may have been involved in that study does not eliminate or reduce the need for consultation on a site by site basis. Different Aboriginal groups may take different positions on aquaculture. The Homalco are a group of people whose claims to Aboriginal title and Aboriginal rights may well be affected by the actions of the government. It is the obligation of the Crown to consult with them and it is their entitlement to be consulted. In this case, the obligation to consult, and if appropriate, accommodate, is not at the lowest end of the spectrum as argued by the respondents. Nor is it the deep level of consultation that the petitioners argue.

WHAT HAS OCCURRED IN THIS CASE?

[52] The Homalco take the position that the Ministry has failed to fulfill the obligation to consult and accommodate. They argue that the Ministry has failed to

act in good faith through a meaningful process with the intention of substantially addressing the Homalco's concerns.

[53] The Homalco and the Ministry both appear to lack any faith in the good will of the other. The Homalco argue that the Ministry has acted in bad faith. The Homalco argue that the Ministry approved the application by Marine Harvest on July 28, only eight days after sending notice of the application to Homalco and before Homalco could respond. The Homalco argue that there was no genuine consultation after that.

[54] The Ministry argue and believe that the Homalco were not interested in consultation, but had simply decided that they no longer supported aquaculture of any kind. The Ministry believed that the Homalco were not really prepared to engage in meaningful consultation. The Ministry argues in any event that they did consult and have accommodated or addressed the concerns raised by the Homalco. The Ministry argues that the Homalco have not demonstrated any real risk or infringement on any of their claimed rights or title. The Ministry, therefore, argues that any obligation to consult is at the lower end of the scale in any event.

[55] The Ministry received the application to amend the license in April 2004. However, it was not until July 20, 2004, that they wrote to the Homalco advising them of this application, enquiring as to how it may affect the Homalco. The delay is explained by the workload the Ministry experienced at the time. The letter does indicate that the Ministry would be available to discuss any issues with regard to the amended application. The same correspondence was sent to the Klahoose First

Nation and the Sliammon First Nation. The Ministry believes they have overlapping claims to this area. The Klahoose and Sliammon First Nations did not respond to these letters.

[56] The Homalco responded with a letter from their counsel on August 9, 2004. The letter requests a copy of the amended management plan and any studies or documentation furnished by Marine Harvest regarding any applications whether new or for amendments. The Homalco say they require this information in order to properly consult.

[57] Prior to receiving that information, however, the initial response of the Chief and council was that they did not support the amendment application because of too many outstanding risks to the marine environment related to open netcage finfish aquaculture as it presently practiced at the site. They stated the introduction of the Atlantic salmon would only exacerbate those conditions.

[58] The letter included a July 16, 2003 correspondence and a report by Dorothy Kennedy dealing with the traditional use of that area. The July 2003 letter sent was a letter sent by the Homalco's lawyers. It is just over eighteen pages long and deals with an earlier application by Marine Harvest to expand the aquaculture operation by adding two additional pens. The application appears to be made in order to provide additional space for the same number of fish. The material in support of that application and the Ministry's response indicates that it was believed by having additional area there would be better disbursement of waste. It appears that the

application was not to add additional fish but merely to make more room for the fish that were there.

[59] The letter of July 2003 refers to the Homalco's claim and the obligation to consult. The letter refers to the traditional and current uses of the Church House area by the Homalco including the harvesting of clams, oysters, mussels, sea urchins, prawns, herring, red snapper, rock fish and various kinds of wild salmon. The letter makes clear the importance of the wild salmon and other marine resources to the Homalco. The letter then identifies what the Homalco believe to be extremely serious risks to the wild salmon and environment as a result of aquaculture. The risks identified include:

1. Spread of disease;
2. Spread of parasites such as sea lice;
3. Introduction of non-native species, being Atlantic salmon and potential escapements and competition with wild salmon;
4. Destruction of mammals attempting to feed or to feed at the net pens;
5. Pollution from waste feed, excrement, pesticides, antibiotics.

[60] The letter refers to the concerns about sea lice infestation in the Broughton Archipelago in June 2001, and the need to invoke the precautionary principle as a result of these concerns. The letter points out that the Church House site is on a wild salmon migration route and that the wild salmon species are already depressed making them more vulnerable.

[61] The letter makes it clear that the Salmon Aquaculture Review cannot be relied upon because it was based on the then levels of production and as it

identified, there was severe gaps in knowledge or research. The letter takes a position that most of the recommendations by the Salmon Aquaculture Review have not been meaningfully implemented. The letter takes a position that the precautionary principle must be applied "…where any risk of severe, irreversible impacts exist, that risk must be eliminated before those impacts have already occurred and it may then be too late to preserve the wild salmon stocks. It is even more important to apply the precautionary principle where what is at stake are the resources on which the exercise of the most fundamental rights of an Aboriginal people depend." The letter refers to the Supreme Court of Canada decision 114957, ***Canada Ltée (Spraytech, Sociéty and Sociétéd'arrosage the Hudson Town)*** [2001] S.C.J. 42, ¶31, where the precautionary principle is referred to as defined at ¶7 of The Burgen Ministerial Declaration on Sustainable Development (1990) as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the cause of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[62] The letter does recognize that there is little or no evidence of these risks but says the reason is because of the lack of research by the provincial or federal government.

[63] The letter also refers to cumulative impacts they say could arise because of the location and a number of other fish farms in the vicinity.

[64] The letter does refer to the fact that the Homalco had approved Marine Harvest's original application including the one at Church House. The letter makes the point that those approvals were given before more current information was available particularly with regard to the potential impact of sea lice. The letter alleges a lack of full disclosure by the provincial government and Marine Harvest and says that vitiates any approval given.

[65] It is not clear to me what the claims of failure to disclose are based on. The letter concludes stating that meaningful consultation and accommodation is required with regard to the application to add additional netcages that was made in 2003.

[66] The August 9, 2004, letter also refers to a Johnstone Bute Coastal Plan and the submissions of the Homalco with regard to the area that includes the Church House site.

[67] The letter points out that the Homalco have declared this area as a Xwèmalhkwu salmon enhancement and protected area, as a Xwèmalhkwu Xwèmalhkwu rock fish conservation area, and as a Xwèmalhkwu krill conservation area, and a Xwèmalhkwu heritage and protected zone. The letter takes the position that the amendment by adding Atlantic salmon and even the fish farm aquaculture as it is presently practiced is in conflict with those designations.

[68] The letter included a report from a fisheries biologist that indicated the addition of Atlantic salmon would create new risks because of the possibility of

escaped Atlantic salmon competing with native species. The report also indicates that the existing wild salmon stocks are already under pressure or decline.

[69] The Homalco's lawyer sent a second letter dated August 9, 2004, which is a one page letter which encloses the Band Council's Resolution regarding the application and the submission of the Homalco to the Johnstone Bute Coastal Plan.

[70] The letter again asks for the amended management plan and any studies or documentation furnished by Marine Harvest to support the application. The final paragraph of the letter indicates the Homalco would be pleased to meet in person and provide information on their concerns and Aboriginal perspectives and traditional, ecological knowledge, and the potential infringements on their rights and titles.

[71] The August 8, 2004 Band Council Resolution that was attached resolves that the Band and council do not approve of open netcage fin fish aquaculture as presently practiced in British Columbia and in their traditional territory. The letter does not approve the facility at Church House or the amendment to add Atlantic salmon or any species to the operation.

[72] The Church House management plan was provided to Homalco's counsel by email October 4, 2004. The Homalco counsel responded by email on the same date and itemized the information that they required, including the Management Plan; any amended management plans, any studies or reports subsequent to the first management plan for the site, any environmental monitoring results with respect to

the site; any new policy or approach by the proponent to deal with potential escapees; any studies or updated studies by the proponent with respect to historical or current escapement data or monitoring of streams in the environs which they may have used in bringing forward this amendment or any previous amendment or the initial application; any specific consultation the proponent has carried out with my client with respect to learning of any Aboriginal interests in the site area and the surrounding Bute Inlet area, including any important fish streams or marine resources harvested close to or potentially affected by the introduction of yet another species to the site; any updated provincial policies on aquaculture, including specifically the introduction of Atlantic salmon and its potential harm to wild salmon stocks, clam beds, rock fish habitat, et cetera; any previous amendment applications or approvals, including rational for such approval and reconciliation with the potential harm to my client's interest.

[73] A letter dated October 7, 2004, from Homalco's counsel to the Ministry confirms a telephone conversation between counsel and Ministry representatives on September 28, 2004. Their letter repeats the submissions opposing the application and lists them. They ask for information about how Marine Harvest will monitor and respond to potential Atlantic salmon escapes. The letter again speaks of information necessary for consultation and asks if the Minister has taken into account the Johnstone Bute Coastal Plan including the Homalco submission and the conservation declarations made by the Homalco. The letter refers to the Johnstone Bute Coastal Plan with regard to Unit 15 where Church House is located and that

plan provides only tenure modifications relating to anchoring or waste management should be considered.

[74] The letter expresses concern that the Ministry refers to Marine Harvest by the term “client”. The letter confirms that the Ministry representative, Mr. Westlake, will review all of the materials submitted and provide a written response. The letter confirms that Mr. Westlake is prepared to meet with the Homalco and their counsel to review the process by which applications are organized and co-ordinate the status of outstanding applications. It also confirms that communications with regard to the application should be made through counsel and not directly to the Homalco. The letter states at p. 4:

> However, I have now advised our client that you confirm that no aquaculture application would be decided until meaningful consultation had occurred with Homalco. By this I understand that you agree that no decision will be made until any and all follow-up questions and information requests for original or amended management plans, studies or research information provided by the various proponents to your Ministry regarding each and every application has been provided to my client by your Ministry.

[75] A similar letter was sent on October 28, 2004, including further requests for specific information including the following:

> …any studies completed by the proponent since the original management plan for the site, including results of environmental monitoring, letters to the proponent approving any previous amendments, new technical information or reports to the ministry has been provided,and will use in relation to making such a decision.

[76] The Ministry responded to this by an email dated October 29, 2004 indicating they were working on a substantive response to the October 7 letter. The email also discusses the request for clarification about potential earlier escapes.

[77] The Homalco counsel responded by email November 2, 2004, referring to the earlier escape of Chinook salmon that they say occurred, and asking what remediation was proposed.

[78] The Homalco counsel sent an email to the Ministry on November 3, 2004 requesting a copy of Marine Harvest's fish health management plan for the Church House site. This is a document that was submitted by Marine Harvest to the Ministry as a condition of its licence. It again confirms that the Chief and council are prepared to meet with the Ministry to discuss their concerns.

[79] Mr. Westlake did provide a letter dated November 22, 2004 responding to the concerns raised by the Homalco. The letter does point out that the fish health management plan is proprietary, that is, the property of Marine Harvest, and cannot be released by the Ministry. The template for a fish health management plan is referred to. Mr. Westlake indicates that he believes that this information and that available on the electronic website should be sufficient for a response. The letter refers Chief Blaney to the Ministry of Water, Land and Air Protections, FinFish Agriculture Waste Control Regulations and a contact person where Chief Blaney can obtain information that has been gathered by the licence holder in fulfillment of those regulations.

[80] The letter makes it clear that the position of the Ministry is that the Homalco have already approved the initial site, and that the Ministry is seeking information in support of specific concerns relating to the addition of Atlantic salmon. The letter also makes it clear that the Ministry will consider information relating to potential infringements that may have arisen through the operation of the facility since the initial decision to grant the licence.

[81] The letter deals with the report of the biologist indicating that it had been reviewed by the Ministry's biologist and states:

> In their view, the concerns raised in the report are not sufficient to result in a rejection of the species amendment application.

[82] There is no further discussion about why that conclusion has been reached.

[83] The letter states that the anthropological information referred to in the July 2003 letter was relevant to the original licensing, and confirms that the ***Heritage Conservation Act,*** [RSBC 1996] c. 187 protects archaeological resources from disturbance or damage. The letter asks for any specific aspects of the anthropological information contained in the Kennedy report of July 31, 2003 that relates to potential infringement as a result of the amendment application.

[84] The letter states the Johnstone-Bute Coastal Plan is not in effect, but that the Ministry will refer to it for general guidance.

[85] The letter confirms that Atlantic salmon are an approved species for FinFish Aquaculture.

[86] The letter states that the Ministry has received no reports of escapes from the Church House facility, and that the regulations require reporting of any escapes. The letter confirms that Marine Harvest's plan to deal with escapes is contained in the management plan which was forwarded to the Homalco or their counsel. The letter refers to the regulatory framework that deals with escapes and its requirements that each aquaculture facility implemented Best Management Practices document describing how they will meet the regulations.

[87] The letter confirmed that the Department of Fisheries and Oceans ("DFO") did not object to the application pending negotiation of an authorization to "Harmfully Alter, Disrupt and Destroy" habitat under the federal ***Fisheries Act***.

[88] The letter confirms that it is aware of the Homalco's opposition to the application, and will ensure that the Ministry's statutory decision maker is aware of their position.

[89] The letter confirms the Ministry's interest in further discussions with Homalco, and suggests that a meeting could be arranged to discuss those concerns, particularly the monitoring of potential escapes and regarding the proximity of the fish farm to shellfish resources. The letter confirms that Marine Harvest has expressed a willingness to participate in those discussions. The letter also refers to the fact that Marine Harvest is participating in the development of a multi-stakeholder area management process for finfish aquaculture that includes areas within the Homalco's asserted traditional territory.

[90] The letter concludes:

> Unless there are specific infringement concerns, MAFF will be making a decision on this application on December 9, 2004. If there are specific infringement concerns related to this amendment application, we ask that you provide them to us by the end of November.

[91] The Homalco's counsel responded by letter dated November 29, 2004 indicating that they have significant substantive concerns and will be providing a substantive response in reply. The letter confirmed that Homalco had an interest in meeting with Mr. Westlake to attempt to address those concerns. The letter confirms that counsel had been asked by their clients to coordinate that meeting time.

[92] The Ministry replied by letter November 30, 2004 confirming that the Ministry would be happy to meet with Homalco and their counsel, but that they required a written copy of the substantive concerns so that they could be reviewed ahead of time and an agenda be formulated. The letter confirms that a decision will be made on the application on December 9, 2004. The letter asks for the substantive response no later than December 2.

[93] The letter confirms that if a meeting is not possible, the concerns of the Homalco will be taken into consideration.

[94] Chief Blaney responded to that letter by his of December 2, 2004, expressing his disappointment in the response from the Ministry, and seeking meaningful consultation by way of a meeting between the Ministry and the Chief and council.

He confirms that, in his opinion, meaningful consultation should include meeting with them and addressing their concerns prior to making a decision. He confirms that further submissions will be delivered. He states that the short timeline given by the Ministry is not reasonable, especially given that it took approximately a month for the Ministry to respond to counsel's letter at the end of October 2004. The letter asks that a decision not be made prior to the Ministry knowing the Homalco's concerns and meeting with them.

[95] The Ministry responded by letter dated December 3, 2004 confirming a willingness to meet with the Homalco, and confirming the need to develop an agenda before any meeting. The letter does state, however, that they are prepared to meet with the band and counsel, either on December 6 or December 8.

[96] Chief Blaney responded by letter dated December 3, 2004, and stated that a number of requests for information remained outstanding. He asked that at any meeting Ministry staff be prepared to substantially and meaningfully respond to numerous concerns and impacts on the Homalco rights that have already been raised. He expresses concern that substantial and meaningful consultations cannot occur if the meeting does not occur until December 8, when the decision is to be made December 9, 2004. He formally requests an extension of the deadline for making a decision on the application. He confirms that he will be unavailable on December 6 or 8, because he is required to be in Ottawa and asks for an extension of the deadline so that a proper meeting can occur. He confirms that Homalco's further submissions would be sent within a week.

[97] The actual approval by the Ministry was granted on December 8, 2004, and the Homalco were notified of this on December 10, 2004. They were told a decision had made, but not the nature of the decision. When learning of the decision, Homalco's counsel immediately forwarded their further submissions to the Ministry on December 10, 2004.

[98] The Ministry advised Chief Blaney, by letter dated December 17, 2004, that the decision was made before receiving the December 10 submission, but offers to continue discussions. The letter confirms that the Ministry will review the materials received on December 10 and 13, provide a response. The letter also confirms that the Ministry is prepared to meet and discuss the response with the Homalco, and consider any new information when renewals of the licence occur. The letter confirms that the application to amend the licence was approved.

[99] The Homalco's counsel then sent a letter December 20, 2004, seeking the name of the statutory decision maker and a copy of the decision as soon as possible.

[100] The Ministry provided a response to the December 10 submissions by letter dated January 18, 2005, after these proceedings were commenced. The covering letter pointed out that many of the concerns appeared to relate to the site and the original licence rather than the amendment to allow Atlantic salmon, as opposed to Chinook salmon. The letter confirms that the response deals with those issues, with the concerns about the site as well as the amendment. The letter also states that

the Ministry is committed to meaningful consultation, including meetings with the Homalco, if requested.

[101] The response consists of a twenty-seven page document that deals with the concerns raised in the material of the Homalco's on an item by item basis. Attached to the report were thirteen appendices referred to in the response. The response is extensive, and I accept that it is an honest attempt by Mr. Westlake to address the concerns raised. Basically, the position is that the government does apply the precautionary principle in dealing with aquaculture by way of an adapted management strategy and by implementation of detailed regulations controlling aquaculture. The Ministry states that the application of the precautionary approach includes an assessment of the proposed risks, incorporates mitigation and management strategies and adjustments based on experience. The response confirms that aquaculture has to develop in consideration of its possible effects on other marine resources and in a precautionary manner.

[102] The response also takes the position that the amendment to allow Atlantic salmon in the Church House facility will not produce any infringement of asserted Aboriginal rights, and then addresses the assertions made by the Homalco on an item by item basis.

[103] The response at page 9 indicates that the Ministry's position is that the initial approval by the Homalco of the Church House site is binding on the Homalco. The response states that the Ministry will continue to respond to new scientific information where appropriate, but that new information does not invalidate the

processes or approvals that predate that information. The response is that this information will be considered in future management strategies if appropriate. The response reviews the submissions made by the Homalco and the evidence in support of those submissions, and comments on it.

[104] Page 20 of the report deals with the requirement by DFO for an authorization to Harmfully Alter, Disrupt and Destroy habitat ("HADD"). The response essentially is that that is a matter between DFO and Marine Harvest, and it was not a condition of the amendment. The Homalco are simply referred to the DFO. The response is not particularly helpful to the Homalco. I would have expected that the Ministry would be concerned about whether Marine Harvest was compliant with all of the federal regulations as well as the provincial regulations.

[105] The response concludes this is an initial response provided for Homalco's consideration and future discussion. The response also states that the Ministry is committed to meaningful consultation, including meetings as are required to fully understand the Homalco's position and accommodate any unidentified infringements on rights or title.

HAS SUFFICIENT OR APPROPRIATE CONSULTATION OCCURRED?

[106] I agree with the Ministry that all of their responses are relevant. They form an excellent basis for continuing discussion. However, the responses by themselves do not amount to the level of consultation that I find was necessary in this case. I understand why the Ministry might conclude that the Homalco's statement of

concerns were really a statement of position, on which they had little interest in moving. Despite the strong position that the Homalco appeared to take, however, the communications from them made it clear that they wished to discuss their position with the Ministry. They did not assert, at any time, that they were not prepared to change their position as a result of further consultation.

[107] I do not agree with the Homalco's assertion that the Ministry was not prepared to engage in meaningful consultation because it had already made up its mind with regard to this application. The Homalco argue that the Ministry has been guilty of bad faith, or sharp dealing, because the licence has the word "Approved" dated July 28, 2004. I understand why this would initially give them some concern, but the explanation given by the Ministry is reasonable. The "Approved" simply indicates when the Ministry's biologist had reviewed the application to make an initial determination as to whether it meets their requirements. It is clear throughout the correspondence that the Ministry understood that consultation with the Homalco was necessary before a final determination was made as to whether the "Approval" would be made effective. The effective date of the approval was December 8, 2004. I am not convinced that the Ministry has been guilty of bad faith or sharp dealing as alleged by the Homalco.

[108] I find that the Ministry has erred in failing to consult to the extent necessary in these particular circumstances. The Ministry believed that the change of species from Chinook to Atlantic salmon was not a significant amendment, and did not have any different impact on the claims or rights of the Homalco than the original licence.

Based on that starting point, they believed that the level of consultation required was not great. Their approach also was that it was only with regard to the effect of the amendment itself that they were required to consult. They believed that the matter would proceed fairly quickly, and when correspondence continued until late 2004, found themselves in a situation where Marine Harvest was making inquiries as to when the amendment might be granted, because they had been raising smolts and needed to place them somewhere. This combination of circumstances led the Ministry to proceed with the final approval of the amendment before there was an opportunity for them to meet with the Homalco, discuss their concerns and the Ministry's response. The concerns raised by the Homalco were not frivolous or vexatious. The Ministry does not agree with the scientific opinions presented by the Homalco, and the response required was significantly more than that contained in the letter of November 22, 2004. The letter of January 18, 2005 is a good foundation for the face to face meetings that consultation requires. Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. This type of consultation should have occurred before the amendment to the existing licence was approved.

STANDARD OF REVIEW

[109] On the issue of standard of review, the counsel referred to the comments of the Supreme Court of Canada in ***Haida*** at ¶61 to 63 as follows:

> ¶ 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
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> ¶ 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice ... ". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
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> ¶ 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[110] In determining the standard of review on a judicial review procedure, the courts often distinguish between questions of law where the standard is correctness,

and questions of fact or mixed fact in law, where the court may show a degree of deference to the decision maker. The deference recognizes in some cases the expertise of the decision maker in an area where the courts may not have the same expertise. In cases such as this, the decision maker may have expertise which the court does not have with regard to the analysis of scientific evidence. However, the decision maker does not have any special expertise over and above that of the court in determining when the obligation to consult arises. In determining whether the decision maker has correctly decided whether an obligation to consult has arisen, the standard of review is correctness.

REQUEST FOR INFORMATION

[111] The Homalco argue that there has been a breach of the obligation to consult because of a failure to provide information. Certainly, the obligation to consult includes the provision of relevant information that the Ministry may have in its possession. A great deal of information was provided, but there were some items that were still in contention between the parties. Some of the information that was only provided at the hearing included some survey results conducted on behalf of the Ministry or Marine Harvest of the seabed beneath and around the fish netcages. The Ministry failed to provide this information simply as a result of an oversight not with any intention to deprive the Homalco of information they required in order to engage in meaningful consultation.

[112] The Homalco were provided with the management plan relating to the Church House site, or at least part of it, but did not receive a copy of the fish health

management plan. Marine Harvest took the position that the information contained in that plan is proprietary information. They are concerned that if it is delivered to the Homalco that it could be used for purposes other than consultation. They are concerned that it may get into the hands of their competitors, or could be used by the Homalco themselves, if they decided to enter the aquaculture business. The Homalco are, at present, opposed to aquaculture in the area they claim as their traditional territory, but that has not always been the case. They were involved in applications to allow the aquaculture of Atlantic salmon in the Bute Inlet as recently as 2002. It does not appear that they are presently pursuing those applications. Marine Harvest is also concerned that the information may be delivered to the Georgia Strait Alliance, an organization opposed to aquaculture, and with whom the Homalco are presently cooperating.

[113] I accept Marine Harvest's argument that the Fish Health Management Plan, which is a 218 page comprehensive document, does contain confidential proprietary information. The document specifically details operational instructions and procedures during all stages of production, specifies operational instructions and procedures determined by their veterinarian or fish house staff. The document is for the use of the operators' site staff in training, and in day-to-day contact with the fish by the fish house staff. Marine Harvest also use this document in making decisions about fish health. The Fish Health Management also applies to sites other than the Church House site. I accept Marine Harvest's argument that it contains the collective experience and expertise in producing Chinook and Atlantic salmon. This

expertise is derived from extensive research and experience of their experts, and enables Marine Harvest to maintain a competitive advantage over its competitors.

[114] The Best Management Practices Plan may also contain confidential information. However, it was my understanding that this plan had been disclosed. The plan contains the process by which Marine Harvest meets its obligations under the regulations dealing with aquaculture. Some of the information may not be confidential or proprietary. However, I accept that some of it may contain in-house specific procedures, technologies and techniques developed and used by Marine Harvest. Marine Harvest says that this information is based on expertise that has allowed it to be the only aquaculture company in North America that is both IS014001 and IS09001 certified. Marine Harvest does say that it is prepared to share this information, provided there are confidentiality arrangements and communication protocol agreements in place.

[115] The Ministry and Marine Harvest point out that the template for the fish health management plan, that has been provided to the Homalco, which they were able to access on the Ministry's website, gives the Homalco a great deal of information about the sort of things which would be contained in the plan. Marine Harvest indicates that they are prepared to sit down with the Homalco and discuss the contents of the fish health management plan, as they do with the Ministry, but they wish some assurances to be made regarding the confidentiality of that information.

[116] I find that the concerns raised by Marine Harvest are reasonable. I would not order the production of the fish health management plan without specific terms that

protect the interests of Marine Harvest, if actual production of the plan is necessary. Marine Harvest's suggestion that they meet and discuss the contents of the plan with the Homalco under certain conditions may be sufficient to meet the needs of all of the parties.

THE REMEDY

[117] The Homalco argue that the only appropriate remedy is a declaration that the Ministry has failed to properly consult, and an order quashing the approval of the amendment. They say an order should then be made that all of the Atlantic salmon presently at the Church House site be removed until consultation and, if necessary, reasonable accommodation is made for their concerns. They say this is necessary to put them in the position they were in before December 8, 2004.

[118] The Ministry and Marine Harvest argue that such an order is unnecessary and inappropriate in these circumstances. They argue that even on the evidence provided by the Homalco, the risks that they raise regarding potential infringement of their Aboriginal rights are at the low end of the scale. Marine Harvest argues that it would cost them approximately $300,000.00 to move the Atlantic salmon that are presently at the Church House site. They also argue that this would have a significant impact on their potential earnings because they would lose the capacity for rearing salmon that they have at the Church House site. In other words, even if they had somewhere else to place these salmon, they will still lose the opportunity to use the Church House site and profit from the activities there. They estimate that

the value of the salmon presently at Church House will be approximately 15 million dollars when the salmon reaches the stage where they are able to harvest them.

[119] I find that it would be unreasonable to order the immediate removal of all of the Atlantic salmon presently at the Church House site.

[120] Marine Harvest, in their argument, points out that the court has a discretion to exercise in determining what remedy to apply in a judicial review proceeding. They cite from ***Brown and Evans, Judicial Review of Administrative Action in Canada:***

> The exercise of the court's supervisory jurisdiction is discretionary. That is, even where a litigant has established a ground on which the courts may intervene in the administrative process, relief will not necessarily be granted: the court may decline to provide a remedy for reasons other than the merits of the application for a judicial review.
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> (**Judicial Review of Administrative Action in Canada Volume I Toronto**: canvas back, loose leaf updated August 2003 release chapter 3 … pages 3-1).

[121] Marine Harvest points to other cases in which the court did grant a remedy short of attempting to place the parties back in their original positions.

[122] Some of those cases are:

Cheslatta Carrier Nation v. British Columbia (Project Assessment Director) (1998), 53 B.C.L.R. (3D) 1 (S.C.). In this case, Chief Justice Williams, as he then was, attempted to balance the rights and potential prejudices to the parties, and

made orders requiring the respondents to fulfil their obligation to consult meaningfully and properly and made directions for production of information.

They refer to the ***Gitxsan First Nation v. British Columbia (Minister of Forests)*** 2002 BCSC 1701. In that case, Mr. Justice Tysoe dealt with the issue of remedies, beginning at ¶100. There Mr. Justice Tysoe also referred to a decision ***Haida Nation v. British Columbia (Minister of Forests)***, [2002] B.C.C.A 147 (Haida No. 1) where the court declined to quash a decision of the Ministry even though consultation had not occurred. Haida No. 1 was a decision of the Court of Appeal, and the Court of Appeal indicated that a decision on whether or not to quash the licence itself, or the transfer of the licence, is better determined after the extent of any infringement had been determined.

[123] Similarly, in ***Gitxsan****, supra,* Mr. Justice Tysoe determined at ¶106:

> …it is my view that it is preferable to first make a declaration with respect to the duty of consultation on an interim basis and to then allow the parties to undertake a proper process of consultation and accommodation. If the process does not succeed, the matter can be brought back before the Court for further directions or further declarations.

[124] Mr. Justice Tysoe also dealt with the issue of the disclosure of information. In that case, he found that there should be discussion between the parties as to the exact type and extent of information to be provided before the court makes a determination as to whether specific documents should be provided. (¶113).

[125] Marine Harvest suggests that an appropriate order in this case that would balance the interests of all of the parties would include:

1. an adjournment of the application for judicial review;

2. a declaration of the need for further consultation between the Homalco and the Crown;

3. some direction as to the scope and content of the consultation, and potentially the schedule for consultation;

4. an encouragement to Marine Harvest to participate in an appropriate way in the consultation (which Marine Harvest is prepared to do);

5. some direction on the provision of information, subject to protection for confidentiality with respect to the fish health management plan and the best management plan;

6. providing leave to the parties to seek further directions; and

7. providing leave to the Homalco to pursue its remedy in the event that they are of the view that further consultation and accommodation are inadequate.

[126] I find that the remedy suggested by Marine Harvest is appropriate.

[127] Therefore, I make the following orders:

1. I adjourn the application for judicial review generally;

2. I declare that the Minister had, and continues to have, a legally enforceable duty to the Homalco to consult with them in good faith, and to endeavour to seek workable accommodation between their interests and the long-term objectives of the Crown and Marine Harvest, and the public interest, both Aboriginal and non-Aboriginal. This includes issues surrounding the location and management of the Church House fish farm and the amendment to the existing licence to allow the introduction of Atlantic salmon;

3. The parties are at liberty to apply for further directions if they are unable to agree on a schedule for consultation;

4. Marine Harvest is to participate in an appropriate way in the consultation;

5. Marine Harvest will provide information subject to protection of confidentiality with respect to the fish health management plan and the best management plan. The parties have liberty to apply if they are unable to agree under the specific terms required to protect the confidentiality of the information;

6. Marine Harvest will not add any more Atlantic salmon to the Church House site until the process of consultation and potential accommodation has been completed, and the Ministry confirms the amendment of the licence, if it does so;

7. The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so, or add whatever conditions appear to be necessary for reasonable accommodation of the concerns of the Homalco;

8. The parties have leave to apply for further directions;

9. The Homalco have leave to bring the matter back before the court in the event that they are of the view that further consultation and accommodation are inadequate.

[128] In making this order I have considered the factors referred to in Marine Harvest's argument:

> Marine Harvest argues the factors to consider are:
>
> a) that there is no direct or immediate interference with Homalco's claimed rights arising from the farm raising Atlantic salmon rather than Pacific. I would point out, however, that it is not simply direct or immediate interference which is a concern. It is also indirect and potential future interference. This is the very subject matter of the consultation. This is also a matter on which the various scientists differ;
>
> b) concerns of the Homalco respecting risks to wild salmon and to the marine environment or substantively addressed through the regulatory

requirements which govern the operation of the fish farm (e.g. protection against escapes, and measures respecting fish health, waste management and general protection of the environment).

I have considered the regulatory requirements, but again, that is not the end of the matter. Those are the proper subject matters of discussion during consultation. There may well be additional measures which should be taken to address the concerns of the Homalco.

[129] Marine Harvest also refers to:

a) The fact that there was consultation prior to the decision, further submission issued by the Homalco after the decision (on December 10, 2004), and the substantive response giving additional reasons by the Crown on January 18, 2005;

b) This does indicate a willingness to consult and is a good starting point;

c) The recognition that the obligation to consult and accommodate is an evolving one, which was only fully articulated by the Supreme Court of Canada on November 18, 2004 (in ***Haida*** and in ***Taku River***), only twenty days before the decision of MAFF was made on December 8, 2004. Each of the parties to the consultation can take direction respecting rights and obligations from these cases.

However, I note the recognition of the obligation to consult is not a new one and did not arise simply out of the Supreme Court of Canada

decisions referred to. The obligation to consult has been recognized by the courts for a considerable period of time, and the British Columbia Court of Appeal decision in ***Haida*** certainly made it clear that the province had this obligation whether or not they agreed with that decision or were appealing it.

d) The fact that Marine Harvest, as a third party, has relied on the December 8, 2004 decision, and would suffer significant damages if the decision was quashed and the salmon requested to be removed. This would be particularly unjust if the only issue is further consultation and a similar decision may be the ultimate result.

I have pointed out the estimated financial cost to Marine Harvest. I also find that they are entitled to rely on the amendment granted to them.

e) The fact that further consultation may well satisfy the Homalco in their concerns, or identify some further accommodation which could be implemented, in other words, that setting aside the decision may be premature.

I agree that this is a reasonable matter to consider, including the willingness of Marine Harvest to participate in that consultation.

f) The fact that continuing with the Atlantic salmon in the fish farm will not cause irreparable harm (e.g. unlike carrying on with timber harvesting

> or building a road). If the ultimate decision of the court, after a period of further consultation, is that the December 8, 2004 decision should be set aside, the salmon could then be removed. The potential for any harm during an interim period allowing for further consultation is low (remote).
>
> To some extent this is part of the argument that is made and the disagreement between the scientists. The consultation, including the early portion of the consultation, could be specific steps that may be taken to further minimize the risk above and beyond the existing regulations, or steps that could be taken to ensure that the existing regulations are enforced.

[130] I have also considered the evidence submitted about Marine Harvest's practices. Marine Harvest's evidence is that they take seriously all of their obligations under the regulations, and pride themselves in the manner in which they operate their fish farms. They state they are the world's largest aquaculture company, and the largest producer and suppler of farmed salmon. They point out that they own or operate 19 salmon farms in British Columbia, all but five of which are currently licensed for both Chinook and Atlantic salmon production. They also point out that they own and operate two land-based fresh water hatcheries that produce almost all of the smolts that they use.

[131] Their position is that they are at the leading edge of development in aquaculture and are committed to conducting their operations to maximize

environmental protection of fish health. They argue that they impose their own stringent environmental management and fish health policies, as well as applying all of the governmental regulations and policies.

[132] Marine Harvest points out that its environmental management system for its fin fish production sites is registered to the Environmental Management System Standard IS014001: 1996 which is an international standard that specifies a process for controlling and improving a company's environmental performance. In addition to the creation and implementation of strict policies and procedures, there must be a monitoring system in place to monitor compliance. The standards also require internal and external audits to ensure compliance. Marine Harvest is also IS09001 certified, which deals with quality management systems, including product quality, management style, customer relations and other business related issues. Marine Harvest points out that they are one of only five aquaculture companies worldwide who hold both IS014001 and IS09001 registrations. Their management plan includes a goal to eliminate all escapes from marine netcage operations, and a detailed fish escape prevention and response plan. They say that this plan is implemented daily.

[133] I should deal with the comment made by Mr. Westlake in his affidavit #2 at paragraph 25, which reads as follows:

> In my view, if I were to recommend that MAFF deny Marine Harvest's application to farm Atlantic salmon on the basis that escapees might cause one or any of the various harms that are identified from time to time, I could not recommend approval of Atlantic or any other salmon farming at all in British Columbia.

[134] It was suggested that this was one of the principle reasons that Mr. Westlake recommended approval of the amendment. Counsel for the Ministry argues that Mr. Westlake is merely indicating the issues with regard to escapees have already been considered at length, and that the appropriate regulations and policies are in place to deal with that issue. The Ministry argues this is really not a new or significant issue.

[135] Clearly, the Ministry must deal with each application on its own merits, and consult and address the individual concerns of the Homalco with regard to this specific sight. If, after consultation, reasonable accommodation of the concerns raised by the Homalco required a refusal to allow the amendment, then that would be the decision that the Ministry must make. The Ministry must deal with the concerns of potential infringements on a sight by sight basis, not based on any general policy.

[136] There was a significant amount of argument about the admissibility and consideration of certain evidence, including the scientific evidence. Counsel have made it clear that they do not feel it is the court's position to chose between the scientific opinions. Therefore, I have not found it necessary to consider the arguments about the validity or qualifications of the various scientists making their opinions. The only use I have made of the scientific evidence, is for the purposes of concluding that there is some basis for the Homalco's concerns without deciding the strength or weight that should be given to those opinions of concern.

[137] The Homalco did argue that the provincial jurisdiction under s. 92(5) of the ***Constitution Act*** 1867 which is the basis of the authority for the ***Fisheries Act***,

[RSBC 1996) c. 149 and the way in which the regulations are framed as prohibitions or requirements for permission, supports the argument that the purpose and the constitutional obligations in the ***Fisheries Act*** are to conserve the stock of fish and to protect the fish environment. They referred to **Peter Hogg, Constitutional Law 3rd Edition** at 29.5(c) as follows:

> The management of public lands in section 92(5) [of the *Constitution Act 1867*] must include measures to conserve the stock of fish and to protect the fish environment. [my emphasis added]

[138] No authority was cited for the proposition that the ***Fisheries Act*** and regulations must conserve the stock of fish and protect the fish environment. I conclude that all Hogg was saying is that the powers that the province has under s. 92(5) must include measures to conserve, not that the province must pass legislation and regulations to conserve stock. He is merely stating what the province can do as a result of its legislative authority, not what it must do.

RELIEF UNDER PARAGRAPH 7 OF THE PETITION

[139] Paragraph 7 of the petition applies for the following relief:

> 7. An interlocutory and permanent injunction prohibiting the Respondent, Marine Harvest Canada, from placing Atlantic salmon in the Church House fish farm without proper authorization from the Department of Fisheries and Oceans for the harmful alteration, disruption or destruction ["HADD"] of fish habitat pursuant to s. 35(2) of the ***Fisheries Act*** and without obtaining a licence pursuant to s. 55 of the **Fisheries (General) Regulations**.

[140] Marine Harvest argues that relief applied for in paragraph 7 of the petition is not available under Rule 10 of the **Rules of Court** and that it is not available under the ***Judicial Review Procedures Act***.

[141] I am satisfied that if it were necessary, directions could be given as to how to resolve this issue to eliminate any concerns whether the petition under Rule 10 was the appropriate method of pursuing this relief. Rule 2(3) states:

> (3) The court shall not wholly set aside a proceeding on the ground that it was required to be commenced by an originating process other than the one employed.

[142] In other words, appropriate directions or orders could be made to allow the matter to be resolved, even though it had been commenced by way of petition.

[143] I agree with the petitioner that an injunction can be included in claims for relief under the ***Judicial Review Procedures Act***.

[144] Marine Harvest also argues that this claim for relief really relates to the exercise of the jurisdiction of the federal Minister of Fisheries and Oceans, and that the petitioners have started separate proceedings for relief in the federal court where these matters should be resolved.

[145] The Homalco respond by saying that they are simply attempting to prevent a breach of a federal statute, where that breach may have a direct impact upon themselves. They point to the decision ***Re National Capital Commission et al v. Pugliese et al***; ***Re Regional Municipality of Ottawa – Carleton et al and Dunn***,

97 D.L.R. (3d) 631. The Supreme Court of Canada found that individual homeowners had a right of action for damages to their property. They say that damage arose when the defendants breached the Ontario ***Water Resources Act*** by abstracting more than 10,000 gallons of water per day without a permit. They argued that the removal of under-surface water caused their properties to subside and suffer damage. The Homalco argue that this demonstrates that an individual may have the right to sue a party for breach of a statute.

[146] The Federal ***Fisheries Act*** provides that someone shall not cause a HADD without a permit. In this case, there is discussion between Marine Harvest and the Department of Fisheries as to whether they require a permit to cause a HADD in this case. The initial operation of the Church House site operated under an agreement not to cause a HADD. Marine Harvest is in the process of negotiating with the Department of Fisheries to determine whether a permit to cause a HADD is necessary, or should be granted. There is evidence that the Department of Fisheries may require a permit, but it is not clear on the evidence that Marine Harvest is operating in contravention of the ***Fisheries Act***. The Department of Fisheries and Oceans did send a letter to the Ministry on July 14, 2004 indicating that they were not opposed to the amendment of the licence, provided Marine Harvest obtained a HADD. Marine Harvest was in the process of negotiating for a HADD, but only as part of an overall process to convert permits not to cause a HADD to a permit to cause a HADD. It is not clear that they were unable to continue to operate with the existing permit.

[147] Marine Harvest also points out that the petition has not alleged that the Church House facility has caused a HADD, or is likely to cause a HADD. Nor is there any evidentiary foundation to conclude that the facility has caused a HADD, or is expected to cause a HADD. The Ministry has referred to the decision ***Operation Dismantle Inc. v. Canada***, [1985] 1 S.C.R. 441. This dealt with a judicial review of a Cabinet decision relating to missile testing. The opponents were concerned about risks of nuclear war and alleged that their s. 7 ***Charter*** rights, life and security of the person were being infringed. The court said that the government did not have a duty to refrain from the action it proposed to take based on the ***Charter*** rights, and the allegation of infringement was based on speculation or hypotheses about possible effects of the government action (¶29). The court in ***Operation Dismantle*** said the following at ¶34 through ¶36:

> ¶ 34 A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, Injunctions and Specific [page458] Performance (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective, at pp. 30-31:
>
> > All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered....
> >
> > Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues quia timet -- because he fears -- and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

> ¶ 35 The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": (Sharpe, supra, at p. 31). In Redland Bricks Ltd. v. Morris, [1970] A.C. 652, at p. 665, per Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:
>
> 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.
>
> ¶ 36 It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

[148] I conclude that this is a matter better resolved through the process provided by the ***Fisheries*** Act, rather than making findings with only a portion of the evidence available. In these circumstances, even if I have discretion or the authority to grant an injunction, I decline to do so on the evidence before me.

[149] I am satisfied that this is a matter that is more properly handled, at this stage, through the Department of Fisheries and Oceans. Certainly, I anticipate the Department of Fisheries and Oceans would consult with the Homalco on the issue of whether a permit for a HADD should be granted, or whether an agreement to prevent a HADD is appropriate. Those matters, however, may be the subject of the proceedings in the federal court, and I do not wish to make any further comment on them.

[150] The parties have not addressed the issue of costs. They are at liberty to do so if they are unable to agree on that issue.

“”R.E. Powers, J.”
The Honourable Mr. Justice R.E. Powers

March 23, 2005 – ***Revised Judgment***

Corrigendum issued advising that on the first page, counsel for the Respondent, The Minister of Agriculture Food and Fisheries should read L. Mrozinski and P.E. Yearwood.

At paragraph 1, “Xwemahlkwu” should read “Xwèmalhkwu” and elsewhere throughout the judgment.

At paragraph 3, “Neutreco Canada Inc.” should be spelled “Nutreco Canada Inc.”.

At paragraph 8, “Bartlett” should read “Bartlett Island”.

At paragraph 21, clause 3: “Homalco Treaty” should read “Homalco Territory”.

At paragraph 24, the second line: “wild Pacific salmon stocks spawn” should read “wild Pacific salmon stocks that spawn”.

At paragraph 31, the reference to “affluent” should be “effluent”.

At paragraph 35, 26, 38 and 39 the courts refers to the “salmon agriculture report” and should be referred to the “Salmon Aquaculture Review”. Also at paragraph 35, the “Environmental Assessment Office” should be capitalized.

At paragraph 56, second line: “amendment management plan” should read “amended management plan”.

At paragraph 57, third line: “open netcage fin fish culture” should read “open netcage finfish aquaculture”.

At paragraph 61, 69 and 73, “Johnson” should read “Johnstone”.

At paragraph 98, fourth line: “received on December 10 and 13 and provides a response” should read “received on December 10 and 13 provide a response”.

At paragraph 122, ninth line: “(Haidia No. 1)” should read “(Haida No. 1)”.

At paragraph 127.7 it reads:

> "… to withdraw its approval of the amendment if, after reasonable compensation, it determines …"

and should read:

> "… to withdraw its approval of the amendment if, after reasonable consultation, it determines …"

2013 CarswellOnt 18046
Ontario Environmental Review Tribunal

Bovaird v. Director, Ministry of the Environment

2013 CarswellOnt 18046, [2013] O.E.R.T.D. No. 87, 83 C.E.L.R. (3d) 13

In the Matter of appeals filed on June 25, 2013 by D&C Vander Zaag Farms Ltd., Conserve Our Rural Environment, Dennis Sanford, Roselyn Bovaird, John Maguire, and Kathleen Kurtin for a Hearing before the Environmental Review Tribunal pursuant to section 142.1 of the Environmental Protection Act, R.S.O. 1990, c. E.19, as amended with respect to Renewable Energy Approval Number 5460-98BPH8 issued by the Director, Ministry of the Environment, on June 10, 2013 to Dufferin Wind Power Inc. under section 47.5 of the Environmental Protection Act, regarding the construction, installation, operation, use and retiring of a Class 4 wind facility with a total name plate capacity of 99.1 megawatts at a location described in the Renewable Energy Approval as Dufferin Wind Power Project, Various Properties SWTS as in MEL3218, Lot 270, Concession 1, in the Township of Melancthon, County of Dufferin, Ontario

In the Matter of a hearing held on August 20, 21, 22, 26-30, September 3-5, 9-13, 18, 24-26, October 7-11 and November 18, 2013 variously at the Grace Tipling Theatre, 203 Main Street East, Shelburne, Ontario, and at 655 Bay Street, Toronto, Ontario

Heather I. Gibbs Chair, Dirk VanderBent V-Chair, Maureen Carter-Whitney Member

Heard: August 20-22, 26-30; September 3-5, 9-13, 18, 24-26; October 7-11; November 18, 2013
Judgment: December 23, 2013
Docket: 13-070 to 13-075

Counsel: Laura Bisset, David Crocker, Chris Barnett, for Appellants, Roselyn Bovaird, Conserve Our Rural Environment (CORE), D&C Vander Zaag Farms Ltd., Kathleen Kurtin and John Maguire, and the Other Party, Dr. William Crysdale
Eric Gillespie, for Appellant, Dennis Sanford
Frederika Rotter, Phil Pothen, Matthew Horner, Sarah Wright, Courtney Harris, Daniel Huffaker, for Director, Ministry of the Environment
Dennis Mahony, John Terry, Andrew Finkelstein, Crawford Smith, Arlen Sternberg, Justin Necpal, for Approval Holder, Dufferin Wind Power Inc.
Mayor Don MacIvor, for Presenter, Corporation of the Township of Amaranth
Joan Lever, for herself
Leo Blydorp, for Dufferin Federation of Agriculture
Norm Wolfson, for himself
Bohdan Wynnycky, Linda Laflamme, for Niagara Escarpment Commission

Subject: Environmental
Related Abridgment Classifications
Environmental law

I Constitutional issues
I.3 Charter of Rights and Freedoms
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.m Appeals
III.2.m.ii To administrative tribunal
III.2.m.ii.A General principles
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.q Species protection

Headnote

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Appeals — To administrative tribunal — General principles

Ministry of Environment issued renewable energy approval to DWP Inc. for construction, installation, operation, use and retiring of wind facility with wind turbine generators — Appellants brought appeal — Appeal dismissed — Appellants did not establish that engaging in project as approved would cause serious and irreversible harm to plant life, animal life or natural environment — Appellants did not establish that engaging in project as approved would cause serious harm to human health — Appellants did not establish that renewable energy approval process violated right to security of person under s. 7 of Canadian Charter of Rights and Freedoms.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Species protection

Bats — Ministry of Environment issued renewable energy approval to DWP Inc. for construction, installation, operation, use and retiring of wind facility with wind turbine generators — Appellants brought appeal — Appeal dismissed — Appellants did not establish that engaging in project as approved would cause serious and irreversible harm to plant life, animal life or natural environment — At renewal energy approval stage, analysis of project's impact depended entirely on value of renewable energy approval regulation and MNR's bat guidelines in identifying threats to bat species by identifying only threats to what was deemed significant habitat — On other hand, Environmental Protection Act test did not focus on significant habitat but on plant life, animal life and natural environment — Fulfilment of regulatory and guideline requirements provided baseline amount of information that could begin to inform tribunal in its determination of whether requisite harm would occur but that was only part of information base that might have been relevant to statutory test utilized in appeal — Onus was on appellants to show that test had been met, regardless of inadequacies of information generated in renewable energy approval process.

Environmental law --- Constitutional issues — Charter of Rights and Freedoms

Right to life, liberty and security of person — Ministry of Environment issued renewable energy approval to DWP Inc. for construction, installation, operation, use and retiring of wind facility with wind turbine generators — Appellants brought appeal — Appeal dismissed — Assuming, without deciding, that wind turbines would cause annoyance in percentage of population, appellants had nevertheless not established that annoyance per se constituted serious harm to human health or that project would cause any health impacts at set-back distances and sound pressure levels mandated — Annoyance per se had not been proven to be health effect and was too vague to be considered serious harm so as to engage s. 7 of Canadian Charter of Rights and Freedoms — Appellants did not establish that annoyance could have been considered serious for either of tests sought to be met: s. 145.2.1(2)(a) of Environmental Protection Act "serious harm to human health" or "serious and profound effect on psychological integrity" — "Risk of harm"was better characterized as risk that harm might have resulted from wind turbine project operating at established decibel limit, not that known harm had increased chance of occurring.

Table of Authorities

Cases considered:

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Bedford v. Canada (Attorney General) (2012), 91 C.R. (6th) 257, 2012 ONCA 186, 2012 CarswellOnt 3557, 109 O.R. (3d) 1, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 290 O.A.C. 236, (sub nom. *Canada (Attorney General) v. Bedford)* 256 C.R.R. (2d) 143 (Ont. C.A.) — referred to

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Blencoe v. British Columbia (Human Rights Commission) (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 3 C.C.E.L. (3d) 165, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307 (S.C.C.) — considered

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Kawartha Dairy Ltd. v. Ontario (Director, Ministry of the Environment) (2008), 2008 CarswellOnt 8217, 41 C.E.L.R. (3d) 184 (Ont. Environmental Review Trib.) — considered

Lewis v. Director, Ministry of the Environment (2013), 2013 CarswellOnt 15895 (Ont. Environmental Review Trib.) — considered

Moseley v. Director, Ministry of the Environment (2013), 2013 CarswellOnt 17004 (Ont. Environmental Review Trib.) — considered

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TrueHope Nutritional Support Ltd. v. Canada (Attorney General) (2011), 2011 CarswellNat 818, 2011 FCA 114, 2011 CAF 114, 2011 CarswellNat 1947, 420 N.R. 420 (F.C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 24(1) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52(1) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Endangered Species Act, 2007, S.O. 2007, c. 6

Generally — referred to

s. 9(1)(a) — considered

s. 10 — considered

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

s. 1(1) "natural environment" — considered

s. 1(1) "land" — referred to

s. 47.5 [en. 2009, c. 12, Sched. G, s. 4(1)] — considered

s. 142.1 [en. 2009, c. 12, Sched. G, s. 9] — considered

s. 142.2 [en. 2009, c. 12, Sched. G, s. 10] — considered

s. 145.2.1 [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2)(a) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2)(b) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(3) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(4) [en. 2009, c. 12, Sched. G, s. 13] — considered

Niagara Escarpment Planning and Development Act, R.S.O. 1990, c. N.2

Generally — referred to

s. 3(2) — considered

Planning Act, R.S.O. 1990, c. P.13

Generally — referred to

s. 62.0.2 [en. 2009, c. 12, Sched. K, s. 3] — considered

s. 62.0.2(1) ¶ 2 [en. 2009, c. 12, Sched. K, s. 3] — considered

s. 62.0.2(2)(a) [en. 2009, c. 12, Sched. K, s. 3] — considered

Regulations considered:

Endangered Species Act, 2007, S.O. 2007, c. 6

General, O. Reg. 242/08

Generally — referred to

s. 23.20 [en. O. Reg. 176/13] — considered

s. 23.20(11) [en. O. Reg. 176/13] — considered

Environmental Protection Act, R.S.O. 1990, c. E.19

Renewable Energy Approvals under Part V.0.1 of the Act, O. Reg. 359/09

Generally — referred to

APPEAL from Ministry of Environment decision to issue renewable energy approval for construction, installation, operation, use and retiring of wind facility with wind turbine generators.

***Decision of the Board*:**

Background

1 On June 10, 2013, Vic Schroter, Director, Ministry of the Environment ("MOE"), issued Renewable Energy Approval No. 5460-98BPH8 (the "Approval" or the "REA") to Dufferin Wind Power Inc. (the "Approval Holder" or "Dufferin") for the construction, installation, operation, use and retiring of a Class 4 wind facility with 49 wind turbine generators with a total name plate capacity of 99.1 megawatts ("MW"). The location is described in the Approval as Dufferin Wind Power Project, Various Properties SWTS as in MEL3218, Lot 270, Concession 1, and described in the application for the Approval as bound by the following roads: the Melancthon-Osprey Townline to the north, the Melancthon-Mulmur Townline to the east, Sideroad 15 in Melancthon to the south and 5th Line/6th Line northeast/ Sideroad 240/ County Road 2 to the west, in the Township of Melancthon, County of Dufferin, Ontario (the "Project").

2 The Approval was issued pursuant to Part V.0.1, s. 47.5 of the *Environmental Protection Act* ("*EPA*").

3 On June 25, 2013, Conserve Our Rural Environment ("CORE"), D&C Vander Zaag Farms Ltd., Roselyn Bovaird, John Maguire and Kathleen Kurtin filed notices of appeal of the Approval with the Environmental Review Tribunal (the "Tribunal"). They are represented by Davis LLP and raised issues related to both the health and natural environment grounds under s. 142.2 of the *EPA*.

4 Also on June 25, 2013, Dennis Sanford, through his counsel Eric Gillespie, filed a notice of appeal with the Tribunal. He raised issues only in relation to the heatlh ground.

5 Therefore, the grounds for the appeals of the Approval are, collectively, that engaging in the Project will cause serious harm to human health and serious and irreversible harm to plant life, animal life or the natural environment, in accordance with s. 142.2 of the *EPA*.

6 On July 22, 2013, the Tribunal held the preliminary hearing in Shelburne, Ontario. The Tribunal subsequently issued an order granting party status to Dr. William Crysdale, and presenter status to the Niagara Escarpment Commission ("NEC"), Norman Wolfson and Sandra Wong, Joan Lever, the Corporation of the Township of Amaranth ("Amaranth"), and the Dufferin

Federation of Agriculture ("DFA"). Further details and the specific terms under which status was granted can be found in the Tribunal's order dated August 8, 2013 [2013 CarswellOnt 11267 (Ont. Environmental Review Trib.)].

7 On July 19, 2013, the Appellant Mr. Sanford served and filed a Notice of Constitutional Question (the "Notice"). In a letter dated August 8, 2013, Davis LLP filed a notice that Ms. Kurtin and Ms. Bovaird were joining Mr. Sanford in advancing the constitutional issues set out in his Notice. Those Appellants argue that the renewable energy approval process violated their right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

8 The Director brought a motion for an order striking the Appellants' claim for constitutional relief, which was heard on August 12, 2013. On August 15, 2013, the Tribunal issued a disposition dismissing the Director's motion, with written reasons issued on September 6, 2013. As a result, the constitutional challenge is a matter before this panel.

9 The hearing began on August 20, 2013. The Tribunal heard evidence and submissions over 26 days in August, September, October and November 2013. For the reasons that follow, the Tribunal dismisses the appeals.

Relevant Legislation

10 The relevant legislation can be found throughout the body of this decision except for the following provisions:

> **Environmental Protection Act**
>
> 1. (1) "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario; ("environnement naturel")
>
> **145.2.1** (2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,
>
> (a) serious harm to human health; or
>
> (b) serious and irreversible harm to plant life, animal life or the natural environment.
>
> (3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).
>
> (4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,
>
> (a) revoke the decision of the Director;
>
> (b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
>
> (c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

Issues

11 The issues are:

> 1. Whether engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment;
>
> 2. Whether engaging in the Project as approved will cause serious harm to human health;

3. Whether the renewable energy approval process violated the Appellants' rights under s. 7 of the *Charter* to security of the person.

Issue 1: Whether engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment

12 A number of Appellants raised issues including harm to farm animals due to electro-magnetic fields and harm to farming practices. Their evidence will be discussed below. However, counsel for the parties called expert evidence and focused on the following sub-issues under Issue No.1:

a) Harm to soils;

b) Harm to groundwater resources and local wells;

c) Harm to the Niagara Escarpment Plan ("NEP") area;

d) Harm to bats; and

e) Harm to other animal life.

13 As noted above, the Appellant Mr. Sanford raised issues only in relation to the health ground. In the discussion of Issue No. 1, the term "Appellants" refers to CORE, D&C Vander Zaag Farms Ltd., Ms. Bovaird, Mr. Maguire and Ms. Kurtin.

a) Harm to Soils

Evidence on Harm to Soils

14 The Appellants submit that harm to soils is harm to the natural environment. They also submit that soil assessment, in the context of an agricultural setting, requires expertise in crop production.

15 In the Appellants' submissions, there are four areas of dispute in relation to soils:

- the significance of Honeywood soils in the context of Ontario;
- the scale or amount of land permanently or temporarily affected by construction;
- the significance of the effect on soils arising from the construction, operation and decommissioning of the Project; and
- the ability to restore soil to preconstruction characteristics.

16 The evidence of the witnesses called in relation to this issue addressed these four areas of dispute.

David Vander Zaag

17 Mr. Vander Zaag, an owner of the Appellant D&C Vander Zaag Farms Ltd., did not seek to be qualified as an expert witness. He alleged that the Project will cause serious and irreversible harm to the natural environment and plant life. He expressed concern about the impact of the Project on the soils in the area that are rated Class 1 based on "soil capability class", a seven class rating system (classes 1 through 7) that follows the Canada Land Inventory ("CLI") system of soil classification. He also raised concerns that dairy cattle will be harmed by effects from the Project, and that the Project will sterilize farm properties for future agricultural use. He is a third generation farmer who grows 800 acres of potatoes adjacent to the Project site. He is also the owner and president of a dealership of specialized agricultural equipment and, as a result, has travelled extensively and gained knowledge of agricultural operations in many parts of the world.

18 He testified that the Project is located on a 15,000 acre contiguous block of Honeywood silt loam called the Honeywood Plateau, which he stated provides some of the most valuable potato production in Ontario. Mr. Vander Zaag believes the Honeywood Plateau is special and rare, and says that "the very unique natural attributes which make this land and landscape so special will be forever altered" if the Project proceeds as planned.

19 Mr. Vander Zaag submits that any harm to the soils should be considered serious due to the quality of the soils in the Project area. Specifically, they are Class 1 soils with premier characteristics. Mr. Vander Zaag testified that this land rates "excellent" on every one of the following seven characteristics, which make these soils so valuable:

- Soil type (sandy loam)
- Stone-free (ideal for potatoes; does not damage equipment)
- Flat (large equipment can work freely, and soil does not wash away)
- Uniform (each 100 acre block is the same soil type front to back)
- Contiguous (it is one large 15,000 acre block of the same soil type)
- Well drained (ideal for potatoes; underlain by karst limestone)
- Geographic Location (28" annual rainfall, moderate climate, 1 hour to large city)

20 Mr. Vander Zaag submits that Dufferin's land lease agreements allow it to place the Project infrastructure in any location it chooses, with no regard for farming practices. As a result, the Project could legally take far more land out of useful production than what is listed as the footprint of the infrastructure. With respect to the roadways, Mr. Vander Zaag points out that the Project Description Report estimates that 26 kilometres ("km") of 5 metre ("m") wide roads will be built. This will result in 13 hectares ("ha") of prime Class 1 vegetable land being taken out of production and, he submits, soil forever altered from its natural state. He notes that the lease agreements do not require Dufferin to minimize the roadways or keep them to any specific width.

21 Mr. Vander Zaag testified that vegetable production requires long straight flat fields for the operation of large and wide mechanical equipment. He said that obstructions, including laneways and "fenced 125 square metre blocks", seriously affect normal farming practices. This is particularly so for commercial potato farms, he noted, as the farmer must follow efficient practices to make the business viable. He also raised the concern that stripping topsoil and installing gravel laneways will cause irreversible harm to the soil profiles, which "have taken thousands of years to develop". In his view, the soil profiles of topsoil, subsoil, overburden and underlying limestone karst "are indeed one living thing". He stated that the edges of roadways are an example of how it is mechanically impossible to return soil to its natural state.

22 Mr. Vander Zaag plans to locate a dairy cattle operation at his home farm, which is within 550 m of a proposed 2.6 kW turbine. He is concerned that electromagnetic fields, stray voltage, nuisance noise and blade flicker will all negatively impact dairy animals, which are "notoriously" highly susceptible to these impacts.

23 Mr. Vander Zaag listed examples of how he believes the Project will sterilize lands from normal farming practices in the future. For the reasons noted above, he is concerned that new dairy facilities cannot be located at his home farm. He is also concerned that drainage and irrigation water lines across neighbouring fields, previously subject to understandings and cooperation between neighbours, will now be subject to permission from Dufferin. Mr. Vander Zaag alleges that this may interfere with historic practices as well as damage landowner cooperation. In addition, the presence of turbine towers will prevent aerial application of fertilizer or pesticides, which "will put local farmers at a needless disadvantage versus farmers in other areas." Similarly, the turbines will prevent the use of centre pivot irrigation in some locations. He testified that this "sterilizes the farm from future potential economic irrigation development."

24 In cross-examination, Mr. Vander Zaag agreed that he leases land from another local landowner, Arley Leader. Mr. Leader's land has four wind turbines that have been operational since 2006, part of the Melancthon Phase 1 wind project. Mr. Vander Zaag acknowledged that he has not expressed any concern to Mr. Leader regarding the adverse effects of the turbines on his farming operations; he also noted that he values his relationship with Mr. Leader, and that good potato land is scarce.

25 Mr. Vander Zaag agreed that he has removed buildings on land that he farms and remediated the soil, mainly because the building was in the way of a central pivot. However, he testified that the remediated soil is not the same as the surrounding soil, as the topsoil has been spread out thinly over top and now dries out faster.

Leo Blydorp, Dufferin Federation of Agriculture ("DFA")

26 Mr. Blydorp spoke on behalf of the DFA, which was granted Presenter status at the preliminary hearing. The DFA listed a number of reasons why it is opposed to Dufferin Wind Power's Project.

27 Mr. Blydorp raises the issue of the loss of prime agricultural land, testifying that only 0.5% of Canada's land mass is classified as Class 1 land, of which 52% is in Ontario. He stated that as of 2001, 18% of Class 1 land in Ontario had been urbanized. He testified that prime agricultural land in Ontario is being lost at an alarming rate. The DFA is opposed to further non-agricultural development on prime agricultural land. He pointed out that s. 2.3.3.1 of the Provincial Policy Statement ("PPS") states that permitted uses and activities in prime agricultural areas are "agricultural uses, secondary uses and agriculture-related uses."

28 Mr. Blydorp provided photographs to demonstrate how access roads cause the loss of agricultural land: under the road itself; on the edges of the road where gravel is present; in the adjacent fields due to water changes including flood damage; and on strips of land between the access road and the edge of the field where the strip of land is too small to farm.

29 Mr. Blydorp said that the DFA believes that it is not possible to return land to agricultural use after construction, contrary to assertions made in the Approval Holder's Construction Plan Report.

30 Mr. Blydorp raises the concern in his submission that Project construction would create impediments to agricultural use, noting that:

> [e]vidence from existing wind energy developments show that agricultural production problems continue to persist following commissioning of wind energy projects. Access roads have interfered with water flow and have damaged pre-existing subsurface tile drains.... Areas around the turbine are still littered with stones from the excavated subsoil removed to build turbine foundations.

31 Mr. Blydorp stated that the DFA is not convinced the sites will be restored to pre-construction conditions following de-commissioning of the Project. The turbine foundations will be left in the ground, and it will be very difficult to remove the gravel from the access roads without mixing it with the topsoil. He also noted a number of other concerns, including that stray voltage may adversely affect livestock, and that doing field work could be dangerous at certain times of the year due to the strobing effect of the turning turbine blade in front of the sun. DFA has also received some reports by farmers of headaches due to working in the vicinity of turbines.

32 He also noted that the DFA questions who will determine whether or not rehabilitation was successful and what the penalties will be if it is not successful, and noted that these questions are not answered in the REA.

Sam Squire

33 Mr. Squire, who testified on behalf of the Appellants, was recognized by the Tribunal as an expert in potato cultivation, qualified to give opinion evidence about conditions and practices required for potato growing.

34 In his witness statement, Mr. Squire noted that:

> The construction, operation and decommissioning of the wind project will significantly affect potato plant life and the natural environment by reducing the productivity of the area's farmland. The natural environment will be harmed by removing highly productive land from use for potato farming. As well, heavy machinery will compact the soil and undermine the unique benefits of Honeywood Loam, causing long term damage to the ability of the land to support strong plant growth.

35 Mr. Squire testified that the soil conditions required for potato cultivation are sandy loam/loam, well drained, stone-free, flat, and loose soil. He stated that all growers agree that potato land is in short supply. A field planted with potatoes should be in a three year rotation, so it is not used to grow potatoes for two out of three years. Mr. Squire testified that the predominant soil in the area between Shelburne and Honeywood is known as Honeywood loam, which was deposited by wind and covers an area of approximately 15,000 contiguous acres. He characterized it as ideal potato-growing soil, noting that "this is a very special soil and it is, in my view, irreplaceable." He said it has been carefully cultivated by farmers over the years to build on its inherent characteristics by, for example, rotating crops, fertilizing soil, installing drainage systems, and minimizing interference with fields.

36 Mr. Squire said that, due to the expense involved in properly maintaining fields for potato production (approximately $4,000 per acre), the yields must be good in order to remain in production. In this regard, Mr. Squire noted that Ontario has state-of-the-art machinery, growers and packaging. While he agreed on cross-examination that potatoes can probably be grown in soils from Classes 1 to 7, he added that they cannot profitably be grown in lower Classes of soils. If farmers cannot grow them profitably, he noted, they will not grow them. Thus, he said that the question of whether it would be theoretically possible to grow potatoes in Class 3 soil with appropriate inputs (like drainage tiles or fertilizer) is irrelevant.

37 Mr. Squire is concerned about damage to both the soils and subsoils, and contamination of the subsoils and stored soils by aggregate materials brought on site for the access roads. He stated that Honeywood soil is very susceptible to compaction, which changes the drainage and distorts root growth. He is also concerned that the buried collection lines will interfere with drainage tiles, thereby causing drainage problems that could affect productivity and require costly repairs. Given that Dufferin has full discretion to place the turbine and road anywhere in a given field, Mr. Squire is concerned that the Project could damage up to 30% of a 100 acre field, if the components are poorly placed.

38 With respect to rehabilitation of the land after development, Mr. Squire stated that he is unaware of any situation where "sensitive topsoil" has been taken off-site, replaced after damage to the subsoil, and returned to its previous state. He is not aware of any successful restoration of potato-growing agricultural land of this quality elsewhere.

Michael Hoffman

39 Mr. Hoffman was qualified to give opinion evidence as an agrologist with special expertise in soil science. He is President of AgPlan Limited, which was retained by the Appellants to undertake a land assessment of the Dufferin Project. Mr. Hoffman authored a report entitled *Land and Surficial Soils Report for the Dufferin Wind Power Undertaking Located in the County of Dufferin*, dated August 13, 2013.

40 In Mr. Hoffman's opinion, the Project will cause serious and irreversible harm to land. He states the harm will be irreversible due to a "loss of land due to wind turbine tower bases, permanent construction and/or maintenance areas and/or access areas," as well as an "alteration of soils due to mixing, compaction and the spreading of excess soil materials on existing soil surfaces which will result, at minimum, in changes to soil layers (horizons), soil organic matter content, soil structure, water infiltration rate, soil hydraulic conductivity and plant available water." Mr. Hoffman believes the harm will be serious because it affects the most productive soils. He noted that the definition of "natural environment" in the *EPA* is "air, land and water", and that the definition of "land" in the *EPA* includes surface land and subsoil.

41 Mr. Hoffman testified that he was unable to locate any scientific literature measuring the effects of wind turbine construction on productive lands. He therefore considered literature related to pipeline construction as a comparator. He disagreed with the conclusion of Dr. Gregory Wall, an expert witness for the Approval Holder, that the impact of construction of the Project on

potato production is "infinitesimal". He stated that, measured on the basis of area, potato production is the crop with the highest proportion (16%) of provincial production within Dufferin County. Mr. Hoffman noted that the Approval Holder's project information shows 19 ha of land will be affected permanently (i.e., for the life of the Project), and he stated that the temporary land areas to be affected amount to approximately 427 ha. He therefore concluded that the success of land/soil mitigation for temporary use areas is significant. He explained that the "area of effect" for his analysis was measured on the basis of the shape files supplied by Dillon Consulting Limited ("Dillon").

42 Mr. Hoffman interpreted the determination of "serious" as having three components: rarity (relatively rare or in 'short supply' at a regional through to a national scale); mitigation limitations (rehabilitation will not result in soil that will "match or exceed" the land's characteristics pre-construction); and necessity (a consideration of whether poorer lands are available).

43 Mr. Hoffman analyzed the soil capability classes of the Project site, and soil potential ratings, noting that the best soils with no limitations for production of common field crops are ranked as Class 1. He concluded from his analysis that soil capability likely to be affected by the Project is almost entirely Class 1, and is much higher than the average for Dufferin County.

44 He testified that, although the Project area has not been recognized as a specialty crop area from a land use planning perspective, the proposed Project location is at one of the locations in Dufferin County where it will cause the most serious harm. "Soil potential rank" rates soils for fruit and vegetable production. He testified that the Project site has the soil potential for a "restricted range" of specialty crop, in that the soil potential for potato production is high. Mr. Hoffman disagreed with Dr. Wall's contention that potatoes are considered a common field crop, and stated that potatoes "can reasonably be classified as a specialty crop" within the "fruit and vegetables" category. Mr. Hoffman further testified that, when corrected for size, Dufferin County is the most important potato producer in Ontario. He acknowledged that Simcoe County produces more potatoes, but noted that it is larger in size.

45 Mr. Hoffman agreed with Dr. Wall that *Planning Act* considerations do not apply to the wind project. However, he used the PPS to demonstrate a relative hierarchy of value in land. He also noted that *Planning Act* considerations are relevant where an environmental assessment is required for electricity projects, where the Ontario Energy Board is considering the location of hydrocarbon pipelines.

46 Mr. Hoffman considers "irreversible" to mean that "land will probably not regain its former productivity during the lifetime of the wind turbines." He believes crop yields in this case will be affected to such a degree that soil capability Class 1 will "reasonably be reclassified as soil capability Class 2". He concluded, at the end of his reply witness statement, the following:

> The Dufferin Wind Power Undertaking will cause irreversible harm to land because changes to soil structure due to soil compaction cannot be mitigated except by the natural processes that created the soil structure in the first place.

47 With respect to mitigation, Mr. Hoffman's view is that avoidance of the better agricultural land should be the first mitigation measure considered. His criticisms of the Project's planned mitigation measures are that little detail has been provided (e.g., no detailed soil map and locations of drainage swales), and there is no requirement for wet weather shutdown or criteria that would be used to indicate when the shutdown will occur. He disagreed with Dr. Wall's statement that construction practices and soil management techniques have evolved considerably over the past 30 years. In Mr. Hoffman's view, there is simply more oversight, which he calls a "policing" effect.

48 Mr. Hoffman believes that the Project will cause considerably more soil compaction than would farm equipment, due to the difference in the number of machines and frequency of their use. He pointed out that Mr. McEwan, in his affidavit, does not reference the total number of trips, vehicle loads, number of passes and conditions that are laid out in tables in Dillon's Final Construction Report (2012), such as Table 5 on page 42.

49 Mr. Hoffman acknowledged that he was involved in a study prepared for the MNR in 1985 which found it was possible to rehabilitate gravel pits to tender fruit production in some cases. However, he testified that the literature does not say that rehabilitated soils will have the same percentage of productivity, i.e., the same output given the same inputs.

50 In conclusion, Mr. Hoffman stated that the Project

> is not a reasonable location for wind turbine development. There will be lands permanently affected by the proposed Undertaking and there are poorer lands available to accommodate the wind turbine use. Therefore, the proposed Dufferin wind power Undertaking will result in serious and irreversible harm to land.

Dr. Gregory Wall

51 Dr. Wall was qualified as an expert in soil science. He was retained by the Approval Holder to provide opinion evidence on two points:

- Whether the Honeywood soils referred to in the Appellants' materials are unique soils particularly suited to potato farming; and

- Whether the Honeywood soils referred to in the Appellants' materials can be removed during the construction phase of Dufferin's wind farm project and subsequently restored to their current state.

52 It is Dr. Wall's opinion that, "while the Honeywood soils in Dufferin County are well-suited to potato production, they are not the only soils in Ontario that are well-suited to potato production." In addition, his view is that "soil restoration, including with respect to Honeywood soils, is possible following development projects."

53 Dr. Wall testified that the best farmland in Canada is within 100 miles of the Great Lakes, although nationally, it is in short supply. He said that Honeywood soils are fairly widespread in Ontario, Dufferin being only one county in which they are found (others include Oxford, Middlesex, Brant and Waterloo). He said that other soils are very similar, such as "Brant". Dr. Wall stated that there are approximately 45,000 acres of the Honeywood soil series in Dufferin County. He is not familiar with the "15,000 acre Honeywood Plateau" referred to by Mr. Vander Zaag, and does not believe there is any basis to differentiate the soils. He does not believe the soils in the Project area should be considered "unique".

54 Dr. Wall stated that he is aware of successful rehabilitation of Class 1 soils, in contrast to Mr. Squire who said that he is not aware of such examples. He noted that, over the last number of years,

> the installation of utilities on private land has undergone significant changes in terms of planning considerations, construction, restoration, and remediation techniques. The advent of comprehensive environmental assessments has resulted in much improved planning and construction techniques.

55 He gave examples of such techniques in pipeline construction, and hydro towers. One technique involves building temporary access roads to maintain towers, which are then removed. Another is to keep the various layers of topsoil, subsoil and geologic materials separate when excavating, and return them in the proper order and compacted to original densities.

56 Dr. Wall noted that some of the components and considerations of a plan for a new utility corridor on private land will now typically include:

> landowner input, grading to original contour, topsoil stripping and storage, subsoil de-compaction, drainage (field tile and natural) management, restoration plans, landowner access consideration, third party monitoring of construction activities, wet weather shut down criteria, and seasonal construction restrictions.

57 He testified that he is involved in monitoring construction of a pipeline in the London area, and that wet weather shut-down is an important component of the plan in that case. In his view, the soil modification required for a wind turbine is not as drastic as for a pipeline. The largest issue is one of compaction. He said that compaction is not irreversible; rather, it is the easiest thing to remediate. Dr. Wall testified that farmers, and pipeline companies, have been successfully remediating compacted soil for many years.

58 Dr. Wall compared the tower base to a pipeline situation, noting that current construction practices go to great lengths to separate the topsoil from the subsoil and to not allow them to be mixed. In addition, he agreed the wet weather issue is an important one. No bulldozers should be allowed in when the soil is too wet. In the concluding paragraph of his witness statement, Dr. Wall gave the example of a soil restoration project with which he is currently involved, installing a pipeline of over 1 m in depth in a clay loam textured till. He stated that using modern construction and management techniques in pipeline installations, he "expects these lands to return to original crop production levels within ten years. It is my understanding that landowners affected by pipeline construction are often compensated on this basis."

59 With respect to the scale of the impact, Dr. Wall referred to s. 1.8.3 of the PPS, which states that renewable energy projects should minimize impacts on agricultural operations:

> Alternative energy systems and renewable energy systems shall be permitted in settlement areas, rural areas and prime agricultural areas in accordance with provincial and federal requirements. In rural areas and prime agricultural areas, these systems should be designed and constructed to minimize impacts on agricultural operations.

60 Dr. Wall testified in his witness statement to his understanding, based on his review of the Approval Holder's website, that the "wind farm project will be spread out over approximately 2,400 hectares". He noted that the wind turbines and other project components would be constructed on privately owned land, under lease agreements between landowners and the Approval Holder, and that much of this land is, and will continue to be, used for agricultural purposes. He calculated that the amount of topsoil temporarily impacted by the construction represents approximately 110 ha, or less than 5%, based on that total area.

61 At para. 19, of his reply witness statement Dr. Wall put the amount of soil affected "into context" this way:

> To put this in context, all of Dufferin County accounts for only 16% of potato production in the province... The area of the Dufferin wind farm project represents a small fraction of Dufferin County (Dufferin County covers an area of approximately 150,000 hectares). Within that small subset of Dufferin County, less than 5% of the soils in the project area will be affected. Accordingly, the impact of the construction on Dufferin's wind farm project on the total potato production in the province will be infinitesimal.

62 He stated at para. 24 that "(t)here is no evidence that this effect will have any impact on the productivity of any farm in this area."

63 In cross-examination, Dr. Wall confirmed that in his experience environmental assessments have resulted in improved construction techniques, and that no environmental assessment took place for this Project. He noted, however, that in his opinion a detailed assessment of soils and agricultural activity had been undertaken. Nonetheless, he agreed that in an environmental assessment situation, decisions about placement of infrastructure would have been based on their environmental impact. He agreed there are no conditions in this REA that require the use of mitigation techniques related to soils.

64 Dr. Wall testified that pipelines that were installed without appropriate mitigation techniques in the 1960s resulted in significant yield restrictions. However, with the "major changes" in mitigation techniques, full yields are now experienced approximately two years post-construction.

65 Dr. Wall stated that climate also plays a major role in remediation of disturbed land. He did, however, agree that "you cannot get better than a Class 1 soil. Rehabilitated soil could, at its maximum, return to its original capability."

66 Dr. Wall noted that the Ontario Power Authority has been directed by the Minister of Energy not to enter into contracts for certain solar power projects when those facilities would be located on prime (Class 1 to 3) agricultural lands or specialty crop areas as defined in the PPS. He was not aware of a similar restriction for wind farm projects.

67 He acknowledged that the soil management plan referred to in para. 21 of his witness statement, which provides for the removal and temporary stockpiling of soil during construction, is not before the Tribunal, and that the REA has no condition requiring it.

Alex Campbell

68 Mr. Campell was qualified to give opinion evidence as a soil scientist with expertise in soil management. He testified on behalf of the Director. Mr. Campbell testified that any disruption to a soil surface as a result of construction will have some negative impact on the soil and crops grown, but that within five years or less crop yield rebounds and production levels are no longer affected. He cited as common examples: transmission power lines, pipelines, and drain layers. Even in cases of more serious disturbance, such as mine tailings storage, there are examples of areas rehabilitated to a point where crops could be grown. He indicated in cross-examination that these results were qualified, and that total crop failures had occurred in years of weather stress. However, he also noted that total crop failures could also occur on undisturbed land due to unfavourable weather.

69 Mr. Campbell testified that impacts like compaction can be offset by other advantages; for example, tile drain installation can result in drastic improvements even where an entire field is ripped apart and heavy construction vehicles pass over almost every inch of the field. He stated that crops can continue to thrive and do better due to drainage. In his view, crop yield may be significantly impacted in the short term and immediately after construction, but will not be significantly impacted over the long term. In his experience with pipeline rights-of-way, crop yield returns to pre-construction activity levels within five years, and usually within one to two years. He said that soil compaction is one of the easiest disturbance impacts to mitigate, and that after mitigation the crop yield is very close to, if not better than, the production in surrounding soils.

70 With respect to the amount of arable land involved, Mr. Campbell assessed the amount lost due to the presence of wind turbines to be insignificant. He noted that other normal farming practices would result in the loss of crops, such as putting in dairy facilities or using arable land as pasture. In response to Mr. Squire's contention that the soil is irreplaceable, Mr. Campbell's view was that "general best management practices and soil reclamation and conservation practices are such that the soil can be preserved, and a disturbed site can be rehabilitated to pre-disturbance conditions." He testified that these soils are very "forgiving".

71 Mr. Campbell stated at para. 35 of his witness statement that:

> Given proper land stewardship, best management practices, an environmental monitoring plan as required in the REA, the mitigation measures stipulated in the Public Consultations, Consultation Report, Final Construction Report and the Design and Operation Report of Dillon, for dealing with the construction activity, all but the permanent loss areas will be rehabilitated. It is necessary to ensure that these measures are undertaken, as per the required Environmental Monitoring Plan.

72 Mr. Campbell then examined the allegations of "permanent loss" and "temporary loss" areas made by Mr. Hoffman and Mr. Vander Zaag concerning the 196 ha to be used for temporary storage and laydown, 427 ha of temporarily disturbed soils and 19 ha of permanently removed soils, totalling 642 ha. He noted that a total of 623 ha (97%) of the area will be subject to temporary uses and therefore not irreversibly harmed, and that the remaining 3% comprises the 19 ha that will be permanently lost. In determining whether the 19 ha of permanently lost soil is significant, Mr. Campbell compared it to "all known Honeywood Series soils in Dufferin County", stating that it makes up 0.1%. He further noted that the entire disturbed area of 642 ha makes up 3.5% of the Honeywood soil series.

73 Mr. Campbell concluded that in his opinion, "what is being proposed and the resulting permanent loss is not serious as it represents less than 0.2% of the soils area of Melancthon Township and less than 0.1% of the estimated total amount of Honeywood soils." He noted that all of the Honeywood soils have not been mapped to date. Further, he testified that these soils are not unique, and not a special type of soil.

74 On cross-examination, Mr. Campbell agreed with the statement that to minimize damage, one must handle the soils carefully and use proper techniques, and that the REA does not include these requirements. However, he believes it is not possible to include every detail as a condition in the REA. Instead, it is necessary to include the basics and accept the methodologies and best management practices that will be applied. With respect to how long one can stockpile soil, Mr. Campbell testified

that it can be stored for a number of years, but that five to ten years would be "pushing the envelope" because organic matter would not be inputted again.

Discussion, Analysis and Findings on Harm to Soils

75 In addressing the question of harm to soils, the parties addressed the following issues:

(i) Are soils under agricultural production included in the definition of "natural environment" in s. 1 of the *EPA*?

(ii) Is the Appellants' concern harm to the natural environment or impact on commercial potato production?

(iii) Will the Project cause serious and irreversible harm to soils?

(i) Are soils under agricultural production included in the definition of "natural environment" in s. 1 of the EPA?

75 The Appellants note that the *EPA* defines "natural environment" as the "air, land and water", and submit that soils are part of the land. They note the decision in *Kawartha Dairy Ltd. v. Ontario (Director, Ministry of the Environment)* (2008), 41 C.E.L.R. (3d) 184 (Ont. Environmental Review Trib.) ("*Kawartha Dairy*"), in which the Tribunal accepted a residential dwelling to be part of the natural environment, and found that the "migration of a contaminant to the interior of a building resulted in an impairment of the quality of the nature of the natural environment for use as a residential property" (at para. 26).

76 The Appellants further state that the *Natural Heritage Assessment Guide for Renewable Energy Projects* ("NHA Guide") specifically lists an analysis of surface and subsurface soils as information that may be included on the existing environmental conditions for a proposed project (at page 43 - 44), and assert that soils are viewed as part of the natural environment in this context. They note Appendix A.2.1 to the NHA Guide, which lists information sources and techniques for describing existing environmental conditions, including with regard to soils.

77 The Approval Holder submits that not everything that resembles a natural feature is actually natural, or treated under environmental legislation as such. As examples, it points to settling ponds and drainage ditches that are constructed as part of approved water treatment systems, as well as the plantings, soil structure and passive hydration systems used to create manufactured wetlands for the treatment of effluent. The Approval Holder asserts that the soils at issue are not part of the "natural environment" because they are regularly processed and restructured due to agricultural activities.

78 The Director agrees that soils are part of the land, and form part of the natural environment. However, he submits that there is nothing natural about these significantly disturbed agricultural soils. The Director also asserts that soils are not natural heritage features that must be considered and evaluated under the NHA Guide and that the NHA Guide does not provide guidance in evaluating and assessing the significance of soils. Furthermore, he notes that while Ontario Regulation ("O. Reg.") 359/09 sets out categories of the natural environment where renewable energy facilities may not be built or may be built only subject to restrictions, it does not prohibit wind farms on productive agricultural soils.

79 The Tribunal finds that the soil in the Project area is included in the *EPA* definitions of "natural environment" and "land" in s. 1. The definition of "natural environment" lists "land", and soils are part of the land. The Tribunal sees no reason to exclude soils from the definition of "natural environment", even where those soils have been worked for agricultural production. The Tribunal also notes that the NHA Guide provides for the analysis of surface and subsurface soils as part of assessing natural heritage features in the context of renewable energy projects.

80 As noted by the Director, O. Reg. 359/09 does not prohibit wind farms on productive agricultural soils. The Tribunal notes that the Minister of Energy is prohibited from entering into contracts for solar panel projects on certain classes of agricultural soils. This suggests that wind projects are not prohibited on agricultural soils based on the assumption that they cover much smaller areas of land. However, this argument does not support a conclusion that agricultural soils are irrelevant to the analysis of harm to the natural environment.

(ii) Is the Appellants' concern harm to the natural environment or impact on commercial potato production?

81 The Appellants submit that it mischaracterizes their argument to say that their case is based on harm to commercial potato production. They say that the evidence of Mr. Hoffman, Mr. Squire and Mr. Vander Zaag was intended to give the Tribunal a practical understanding of how potato crop yields can serve as an indicator of the extent of the Project's impact on soil health and capability' i.e., to be used as a measurement tool.

82 The Appellants assert that evidence was led on the impact of the Project on soils, and that evidence was not led to quantify the loss of commercial production. They also state that the loss of arable land is not purely an economic loss because it impacts the ability of the land to receive and transmit rainfall through the surface and subsurface layers.

83 The Approval Holder submits that the Appellants' submissions and evidence indicate that their ultimate concern is to avoid any risk to commercial potato production on the lands at issue, and to preserve a commercial interest in potato production. It states that the Appellants claim that the soils in Dufferin County are well-suited to potato production, and assert that the Appellants are not asking the Tribunal to intervene to protect the natural environment.

84 The Approval Holder submits that the Legislature did not intend that the Tribunal weigh the relative commercial value of wind farm development over commercial potato production, and that such an exercise is not properly before this Tribunal.

85 The Director also submits that the Appellants' main concern is a disturbance in the ability to cultivate a profitable potato crop, and not harm to the environment. He states that the Appellants' evidence about the composition, characteristics, location and drainage of Honeywood soils does not establish them as significant natural heritage features, but does demonstrate that the terrain is well suited to potato production.

86 While the Appellants have presented the issues relating to harm to soils in the context of commercial potato production, the Tribunal accepts that their case concerns the issue of harm to the natural environment. While the Appellants did focus on the impacts on soil productivity to illustrate the nature of the harm to the soil, they did not characterize the issues in purely commercial terms, which would not be a relevant consideration under s. 145.2.1 test, and did lead evidence alleging that the Project would have an impact on the soil itself. For example, Mr. Vander Zaag raised the issue of irreversible harm to the soil profiles of topsoil, subsoil, overburden and underlying limestone karst, noting that they were, in his view, "one living thing". Mr. Hoffman testified about changes to soil layers, soil organic matter content, soil structure and water infiltration rates.

(iii) Will the Project cause serious and irreversible harm to soils?

87 The Appellants submit that the Project will cause serious and irreversible harm to soils in the Project area. They say that the soils in the Project area are significant based on a variety of measures of significance, stating that Mr. Hoffman testified on the scale of the disturbance to the soils and Mr. Squire and Mr. Vander Zaag identified additional harms to the soils, including the limitations on farming the land leased for the Project. The Appellants argue that, in assessing the extent of lands that will be affected by the Project, the Tribunal should consider that significant amounts of productive agricultural lands, which are undisturbed by construction activities, may also be rendered sterile and unproductive due to poor layout of the Project, and the unimpeded discretion of the Approval Holder with respect to project placement. They assert that the Project will reduce the productivity of the farmland in the Project area by removing highly productive land from use for potato farming, by interfering with adjacent land, by compacting the soils, by mixing in gravel from access roads, and by disrupting drainage systems. They say that the current four soil horizons will become two horizons, changing the water movement within the soil.

88 The Appellants argue that there are three components to "serious" harm in the context of soil: rarity; mitigation limitations; and necessity. They submit that significant disturbance to the soil and interruptions in drainage will affect productivity on lands with relatively rare characteristics and productivity. They say it is not possible for mitigation to restore or improve the soil characteristics to their pre-construction state. The Appellants assert that, even after temporary access roads are removed, the harm to the soil will not be reversible through human intervention because once the different horizons of the soil have been mixed, they cannot be unmixed and will be permanently changed. They also assert that it is not necessary to locate the Project on Class 1 lands with high soil capability, based on the seven CLI soil classes. They note other planning and assessment policies and guidelines that restrict the siting of development on prime agricultural lands.

89 The Appellants submit that there will be a permanent loss of soil under the cement pads required for the Project and a partial loss in areas where the soil cannot be returned to its original character. While they acknowledge that the soils may return to their original condition over a long period of time due to the natural processes that produced the soils in the first place, they say it is more reasonable to consider irreversibility in the context of a 25 year period relative to the life of the Project. As noted above, they assert that harm to the soil will not be reversible because the soil horizons cannot be unmixed, once mixed, and so will be permanently changed.

90 The Appellants argue that the harm will be irreversible because soil capability will be reduced and there will be crop yield losses following construction, even if mitigation measures are implemented and construction is adequately supervised, because the most productive soils cannot be returned, through rehabilitation, to pre-disturbance levels of productivity, with the same inputs and management. They further submit that the Tribunal has no reliable evidence before it regarding the mitigation measures that will be implemented, and there are no conditions in the REA as to how soils will be treated in the Project area.

91 The Approval Holder submits that the alleged harm to commercial soils is not serious, but narrow and economic. It further submits that all disturbance will be temporary, whether for construction or over the life of the Project. The Approval Holder disputes Mr. Hoffman's assumption that 427 ha will be affected by construction activities, and asserts that less than 110 ha of soil will be disturbed by construction. In response to Mr. Hoffman's allegation that 19 ha will be removed from the Project permanently, it says that approximately 17 ha will be affected throughout the life of the Project, or less than 1% of the entire 2,400 ha Project area.

92 The Approval Holder states that the question of whether the Honeywood soils are unique is irrelevant, although it argues that they are not unique but abundant in Ontario, and just one of many Class 1 soils in the area. It submits that the question of the CLI soil classification may be relevant, and notes that 60% of the soils in Dufferin County are rated Class 1, and Class 1 soils are abundant in southern Ontario. The Approval Holder states that, while the Class 1 soils in Dufferin County are well suited to potato production, many other soil types in Ontario are also well suited, including the sandy Class 3 soils in Simcoe County, which produces the most potatoes in the province. It asserts that the Ontario government has restricted the construction of ground-mounted solar generation facilities greater than 10 kilowatt ("kW") on Class 1 to 3 soils, but has placed no such restrictions on wind turbines, and concludes on this basis that the Ontario Government "does not consider the minor displacement of Class 1 soils resulting from the installation of wind turbines to be sufficiently significant to warrant restrictions."

93 The Approval Holder asserts that any impact of the Project on the soils will be minimal, both due to the small amount of land affected, as discussed above, and based on the Dufferin soil management plan that will be in place to protect the soils.

94 The Approval Holder states that the Appellants have not shown that any loss of harvestable area caused by the presence of wind turbines is irreversible. It submits that, to be "irreversible", harm to the natural environment must be incapable of remediation following the decommissioning of the Project. The Approval Holder cites *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 40 (Ont. Environmental Review Trib.) ("*APPEC*"), at para. 625, in which the Tribunal found that the wind power generation project at issue in that case would not cause irreversible harm to plant life, recognizing that vegetation recolonizes wind turbine bases after the removal of wind turbine infrastructure. It asserts that, with the use of soil management techniques planned for the Project, such as separately stockpiling the topsoil and subsoil, the soils can be brought back within one or two years, or up to four to five years in the case of the most disturbed areas.

95 The Director takes a similar position to that of the Approval Holder, and submits that construction will disrupt soils and have some negative impacts initially, but that mitigation measures can minimize impacts such as subsoil compaction. He argues that the loss of crop land as a result of the Project is comparable in scale to land used for other farm activities other than crop production, such as dairy facilities and pasture lands. The Director states that rehabilitation will depend on proper land stewardship, best management practices and compliance with the Environmental Effects Monitoring Plan ("EEMP"), as required in the REA, and with mitigation measures set out in the Approval Holder's application documents incorporated into the REA.

96 The Director also submits that the alleged harm is not irreversible, and that disturbance to land where no turbines are placed will be reversed and undetectable within five years. He further submits that best management practices can rehabilitate sites to pre-disturbance conditions, and that temporarily disturbed soil will be returned to its previous level of productivity or better.

97 When applying the environmental branch of the test in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, the Tribunal stated at para. 206: "the relevant factors, and their respective importance and weight, must be assessed on a case by case basis." The Tribunal agrees with this approach and applies it in this case as well.

98 The Tribunal has considered a number of factors in this case in determining whether the proposed soil disturbance amounts to serious and irreversible harm to soils. These factors include: the amount of soils affected; the quality of the soils (based, for example, on soil capability class, soil potential rank or soil productivity index) and their relative rarity; the degree of harm to the soils that will be caused by the Project; and the degree to which it is possible to restore the soils (remediation or rehabilitation success).

99 The Tribunal finds that one of the factors listed by Mr. Hoffman, the "necessity" of using the soils in the Project location as compared to soils of a lesser quality elsewhere, is a land use planning consideration that is not within the purview of the Tribunal. Similarly, the concern raised by the some of the Appellants regarding interference with farming practices is not within the issues the Tribunal may determine under s. 145.2.1(2) of the *EPA*.

100 In this case, the amount of soils affected is not large by any of the relevant scales referred to in the hearing. There are numerous scales at which the amount of soils to be disturbed could be assessed, as compared to: the total amount of Class 1 soils for in the province, or in Dufferin County, or in the Project area; the amount of Honeywood soils available at any of these scales; or the amount of soils used for growing potatoes at any of these scales.

101 At the Project area scale, for example, there is a difference of opinion between the parties on the exact amount but it appears that, out of the 2,400 ha of land in the Project area, between 110 and 427 ha (or approximately 5 to 18%) of the soils will be disturbed by construction activities and between 17 and 19 ha (or approximately 0.7 to 0.8%) of the soils will be affected throughout the life of the Project. In addition, as noted by Mr. Campbell, approximately 196 ha of land (or 8%) will be used for temporary storage and laydown. Even assuming that potatoes are currently produced on all 2,400 ha of the land, the Tribunal finds these ranges to represent a relatively small percentage of the potential potato producing lands in the Project area.

102 Dr. Wall described the impact of the Project, including construction, on potato production in Dufferin County to be "infinitesimal". He said that Dufferin County covers approximately 150,000 ha of land. Map 3 in Mr. Hoffman's report, filed as Exhibit 65, Tab 2, shows an abundance of Class 1 soils outside of the Project area in Dufferin County. Given that Dufferin County accounts for 16% of potato production in Ontario, it is apparent that much of this land is used for potato production. The Tribunal notes that the Project area takes up only a small part of Dufferin County, and finds that the land potentially taken out of potato production in the Project area, for construction and during the life of the Project, is extremely small in the context of potato production in Dufferin County.

103 Honeywood soils are prevalent across Dufferin County. The Tribunal heard evidence, based on the May 25, 2010 report, "The Honeywood Soils Series and Potato Production in Dufferin County, Ontario," by Dr. J. Kenneth Torrance, that there are approximately 45,000 acres (or approximately 18,210 ha) of Honeywood soil series in Dufferin County. When considered as a percentage of the highly productive Honeywood soils in Dufferin County, the maximum area of 427 ha to be affected by construction activities and the maximum area of 19 ha to be affected for the life of the Project, taken together, represent less than 1%.

104 The Tribunal therefore finds that, at all of these scales, the amount of soils affected by the Project does not amount to serious harm.

105 It is clear that the construction activities and Project components, once installed, will impact the surface soil that has been disturbed by agriculture. However, as noted above, the Project area is small, relative to the size of Dufferin County. Thus,

a relatively small amount of soil will be disturbed for the Project. The Tribunal heard evidence that a certain amount of soil is disturbed and not available for crop production in the normal course of farming activities as well, through such activities as barn construction and pasture land. The Tribunal finds that the amount of soil to be disturbed in order to construct and operate the Project is consistent with the scale of disturbance for roads, farm buildings and other facilities required in the normal use of agricultural lands. The Tribunal adds that the above findings are specific to this case and that a relatively small disturbance to an environmental feature that is less widespread may be considered serious.

106 With respect to the quality of the soils, the Honeywood soils are not identified as a "specialty crop area" under the PPS, and the Tribunal heard no evidence that the Honeywood soils constitute a significant natural heritage feature. However, the Honeywood soils are Class 1 and clearly of high quality and prized, among other things, for profitable commercial potato farming. These soils possess special characteristics that allow potatoes, for example, to be grown at high production rates with relatively few inputs. The Tribunal finds that it is unnecessary to make a finding respecting whether reducing soils now classified as Class 1 to Class 2 or a lower CLI classification post-remediation would constitute serious and irreversible harm as the Tribunal finds, as discussed below, that in this case, the Appellants have not established that the soil will be reduced to a lower CLI classification post-remediation.

107 The Tribunal will now turn to the question of whether remediation of these Class 1 soils is likely to be successful. With respect to soil that is intended to be remediated after the Project is decommissioned, the Tribunal finds that a time scale spanning the operation and decommissioning is appropriate for analyzing irreversible harm to soil. The Tribunal notes that different time scales may be more appropriate for other environmental features and for different types of harm, such as animal mortality.

108 The Tribunal observes that, although it is not a condition of the REA, the Approval Holder is developing a soil management plan that seeks to preserve and ultimately restore the soils that are disturbed through construction of the Project.

109 The success of mitigation and remediation measures is crucial to determining the extent of the long-term impact. The Tribunal heard evidence that, in accordance with the soil management plan, soil would be removed in layers, stockpiled and eventually used to reconstruct reasonably productive agricultural soil. The experts had different views as to whether the reconstructed soil would be as productive as it was prior to disturbance, but no one testified that the reconstructed soils would not be capable of producing agricultural crops, nor even potatoes.

110 The Tribunal notes that the soil management plan is not included as a specific condition in the REA. However, condition J1 of the REA states that the Approval Holder shall implement the EEMP and the commitments made in the listed reports, including the Environmental Impact Study ("EIS") report. The EIS sets out a description of Project construction activities, including soil management, at s. 7.

111 The Appellants have not satisfied the Tribunal in this case that the soils will be reduced to a lower CLI classification post-remediation. The evidence of the Appellants on this point did not rise above the level of a concern. The Tribunal accepts Dr. Wall's evidence in this regard, which is based on his considerable experience with respect to pipeline construction, that Class 1 soils can be successfully rehabilitated.

112 The Tribunal accepts that the mitigation measures, if applied as described by the experts for the responding parties, will be successful in restoring the soils to productive agricultural use and are appropriate to the scale of soil disturbance as a result of the Project. Therefore, the Tribunal finds that the Appellants have not established that the Project will cause serious and irreversible harm to soils.

b) Harm to Groundwater Resources and Local Wells

113 Mr. Vander Zaag raised concerns related to water quality and quantity, in particular the potential for the Project to interfere with the water supply to irrigation wells in the area. He noted a concern that excavation during construction of the Project "could intersect our underground streams that exist in the karst as well as allow foreign material from the construction process to enter the karst 'water highways' unfiltered." Mr. Vander Zaag notes there is no detailed analysis in Dufferin's materials

of each foundation site, to determine if Dufferin is going to be blasting into the limestone rock. In addition, Ms. Bovaird's notice of appeal lists a concern about the impact of the Project on water bodies in the areas bordering the Niagara Escarpment.

114 No expert witnesses were called by the Appellants related to the impact of the Project on the water supply, although witnesses who testified on soil and agricultural impacts touched on water recharge and the permeability of the soil.

John Petrie

115 The Approval Holder called Mr. Petrie to give evidence on the impact of the Project on groundwater in the area. Mr. Petrie was qualified to give expert opinion evidence as a hydrogeologist. Mr. Petrie was asked by Dufferin to provide an opinion on the potential for the planned construction of the wind turbine foundations to affect the water supply of the underlying aquifer or interfere with the performance of the irrigation wells in the area. He concluded that "the planned construction will not affect the water supply potential of the underlying aquifer or the performance of any high yielding bedrock irrigation wells located 500 m and more from the nearest foundation."

116 Mr. Petrie described the Amabel limestone, found in the Project area, as a regionally extensive aquifer which provides water supplies for a number of municipalities, rural residences and commercial irrigation requirements. In his witness statement, he described the aquifer as being "typically in excess of 20 metres thick and contains abundant quantities of good quality groundwater." In oral testimony, Mr. Petrie described the limestone as being "weakly karstic in some places", which means the water moves underground through fractures, fissures and some tunnels. If soil or sediment gets into the karst, it may result temporarily in cloudy water from a well in the aquifer, but would get flushed out within a day or so due to the overall movement of the water underground.

117 Mr. Petrie explained that two tests have been done in the Project area to calculate the depth to groundwater. A study by SPL Consultants Limited ("SPL") on behalf of Dufferin found groundwater more than 4 m below surface, while Dillon located groundwater less than 4 m from the surface at 25% of the locations surveyed. Mr. Petrie stated the results likely differ due to the timing of the measurements, as groundwater rises in the spring. The SPL measurements took place in the winter, and the Dillon measurements took place in the spring.

118 In any event, Mr. Petrie testified, excavation for the turbine bases will be less than 3 m in depth and will not encounter groundwater. He described the footprint of each turbine tower as "small", measuring 25 m × 25 m, which would not eliminate recharge but deflect it to the sides of the turbine base. Mr. Petrie testified there is no reason to believe the Project will have any effect on local wells, or on the recharge of aquifers.

119 In cross-examination, Mr. Petrie testified that the amount of hydrogeological study that should take place prior to a development is dependent on the impact the proposed development is likely to have. A quarry, for example, which would excavate below the groundwater level and require pumping, would require far more extensive hydrogeological studies. In this case, however, there is no likelihood of interference with any local wells and sufficient study has taken place, in his view.

Analysis and Finding on Harm to Groundwater Resources and Local Wells

120 The expert evidence of Mr. Petrie was not challenged by the Appellants, who simply raised concerns unsupported by evidence. On the basis of Mr. Petrie's evidence, the Tribunal finds that the Appellants have not established that the Project will have a negative impact on the aquifer, and consequently on the well water, in the area. The Tribunal finds therefore that the Appellants have not established that the Project will cause serious and irreversible harm to groundwater resources and local wells.

c) Harm to the natural environment through visual impact in relation to the Niagara Escarpment

121 The NEC was granted Presenter status at the preliminary hearing. Two persons spoke at the hearing on its behalf: Bohdan Wynnycky, manager of the NEC, who was qualified to give expert opinion evidence as a professional planner; and Linda Laflamme, a landscape architect who was qualified to give expert opinion on visual impacts.

122 Under the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), the NEC is charged with implementing the NEP. While no portions of the Project are planned within the NEP boundaries, several proposed turbines are located adjacent to the NEP area.

123 The purpose of the NEP is:

> to provide for the maintenance of the Niagara Escarpment and the land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment.

124 The objectives of the NEP include: (iv) "To maintain and enhance the open landscape character of the Niagara Escarpment in so far as possible, by such means as compatible farming or forestry and by preserving the natural scenery;" and (v), "to ensure that all new development is compatible with the purpose of the Plan."

125 The NEC has addressed the issue of wind power projects and the Niagara Escarpment in two policy papers, delivered in 2003 and 2004, which are now operational policy. Specifically, the Commission Recommendations from 2004 include the following:

> **Recommendation 4**
>
> The Niagara Escarpment Commission should review wind power proposals in areas adjacent to the Niagara Escarpment Plan boundaries where the physical presence of the structures and the motion of the blades may have a visual impact on prominent Escarpment features and landscapes, and provide comments based on the effects the facility(s) may have on the Escarpment landscape character and natural scenery.

Bohdan Wynnycky

126 Mr. Wynnycky testified that, from March to June 2012 there was active consultation and interaction between NEC staff and the Approval Holder's agent, Dillon, during which the Approval Holder was made aware of the NEC's specific concerns. A viewshed analysis was prepared by Dillon, on behalf of the Approval Holder.

127 Mr. Wynnycky said that s. 62.0.2 of the *Planning Act* provides that the NEP continues to apply with respect to renewable energy undertakings, while other provincial plans do not. It reads:

> 62.0.2 (1) Despite any Act or regulation, the following do not apply to a renewable energy undertaking, except in relation to a decision under section 28 or Part VI:
>
> 1. . . .
>
> 2. a provincial plan, subject to subsection (2)
>
> **Exception**
>
> (2) Subsection (1) does not apply in respect of,
>
> (a) the Niagara Escarpment Plan...

128 Mr. Wynnycky argues that the objectives of the NEP and its policies continue to be in play if the NEP area is impacted by a proposed development, whether or not the development is physically located in the NEP area.

129 In 1976, the Ministry of Natural Resources ("MNR") and the NEC jointly produced a Landscape Evaluation Study for the Niagara Escarpment Planning Area, which rates the scenic resources of the area. The introduction to that document notes that:

> the Niagara Escarpment Commission viewed the landscape study as a pre-requisite to pursuing one of the stated objectives of the Plan — that of "maintaining and enhancing the Escarpment's open landscape character". An assessment of landscape quality was regarded as an essential factor both in determining policies that might be developed to protect scenic areas and to arrive at judicious land use allocations in the planning process.

130 Mr. Wynnycky stated that several of the proposed turbines are in areas deemed to be of "outstanding" visual quality within the NEP area, which was the highest rating for scenic resources in the 1976 study. Such views are afforded an exceptional level of protection within the NEP. It is for this reason that the NEC argues that the Tribunal should give serious consideration where initiatives may have an impact.

131 Mr. Wynnycky agreed on cross-examination that the *NEPDA* includes an entire legislative scheme for development permits within the NEP development control area; a scheme which includes a review by the Hearing Officers where a permit is refused, and penalties for undertaking development without a permit. Development outside the development control area, however, does not require a development permit from the NEC.

Linda Laflamme

132 Ms. Laflamme testified to the viewshed report prepared by Dillon and the NEC's resulting recommendations.

133 She testified that the NEC has policies related to "open landscape character" and scenery. She referred to the Purpose of the NEP, which states it applies to the "vicinity" of the Escarpment.

134 The NEC has a policy that "adequate public access" includes visual as well as physical access to the NEP area.

135 The NEC considered the Project proposal and concluded that only four of the proposed 49 wind turbines would significantly visually impact the protected "outstanding" views, and recommended that four turbines (T1, T2, T20 and T21) be relocated to minimize the impact.

136 Ms. Laflamme testified that, rather than implement the NEC recommendations, Dufferin left all four turbines and further chose to replace T21 with a taller turbine, creating a more significant visual impact (from 130 m to 136.5 m).

137 Ms. Laflamme referred to several Observation Points ("OP"), and in particular OP 13, which looks across the Noisy River Valley. This particular viewscape, over a pristine/intact area is rated "outstanding" in the 1976 report. OP 13 is 5.5 km from the closest turbine, T1, with T2 a close second. The NEC recommended to Dufferin that those two turbines should be moved. The computer modeling analysis shows a number of other turbines will be clearly visible at OP 13.

Norman Wolfson

138 Mr. Wolfson was granted Presenter status. Mr. Wolfson, together with Sandra Wong, owns a 100-acre property on the crest of the Niagara Escarpment in Mulmur. They are primarily concerned about serious and irreversible harm to the natural environment, particularly as a result of visual impact, light pollution and flicker from the proposed 49 turbines. Mr. Wolfson states that the "natural environment in this area includes not only flora and fauna, but also landforms (and the visual integrity to, of and from the landform of the Niagara Escarpment)."

139 Mr. Wolfson supports the NEC's views that the turbines will have an impact on the visual landscape, and in particular he is concerned about their interference with the views of the Escarpment enjoyed from his home.

140 Mr. Wolfson is particularly concerned with turbine T21, which is situated between his home and the setting sun, and he fears the flicker impacts and pulsating lights "will prove to be intolerable". He said that his home is located approximately 3,000 m from T21. Mr. Wolfson is concerned he may have to make alterations to the house because currently, the bedroom, study and studio all face west. He is also concerned about the impacts of turbine noise on their peaceful enjoyment of their property.

141 Mr. Wolfson raised concerns with the accuracy of Dillon's visual assessment document, which he finds misleading. In particular, he believes the elevations are wrong as T21 is shown at 136 m above sea level while his house is approximately 500 m above sea level.

142 Mr. Wolfson further raised concerns regarding the loss of prime agricultural land, and negative impacts on birds and bats. In this regard he testified that his home is in a migration pathway and that geese barely get above the house, on the 500 m above sea level natural ridge. He recently counted 28 species of birds in one day. In addition, Mr. Wolfson sees numerous bats in the area, in the evening.

143 Mr. Wolfson and Ms. Wong request that the Project be deferred until study on health impacts currently underway by Health Canada is complete, especially in view of the fact that Melancthon Township already has a high concentration of turbines. Mr. Wolfson testified that the proposed Project will result in one industrial wind turbine for every 14.82 residents, making it the highest per capita concentration of turbines in North America.

Joan Lever

144 Ms. Lever, a Presenter at the hearing, also provided testimony and documents in support of the environmental concerns raised by the Appellants and other Presenters. Ms. Lever's submissions will be more fully described below, under the portion of the decision dealing with alleged harm to human health.

Eha Naylor

145 Ms. Naylor was qualified to give opinion evidence as an expert planner and landscape architect with expertise in assessing visual impacts. She is a partner at Dillon, which was retained by the Approval Holder to conduct a visual impact assessment of the potential impact of the Project to the viewsheds from the public areas within the NEP area, following concerns raised by the NEC. She confirmed that the "Draft" Report dated October 2012 is the only one that was prepared, and testified that this type of assessment is not a requirement of the REA process.

146 Ms. Naylor described the process for preparation of the visual impact assessment, which involved computer modeling of the location of the Project through GIS mapping which was layered with other information to predict where the turbines would be visible within the "Escarpment view". She testified that Dillon followed the NEC process, which was detailed and prescriptive, and resulted in a conservative estimate. For example, woodlots were considered to be at a 15 m height, while in Ms. Naylor's experience they are generally considered to be at a 25 m height, further obscuring views of the turbines.

147 Ms. Naylor's conclusion was that the four turbines about which the NEC is concerned, T1, T2, T20 and T21, have no significant impact on scenic resources. She acknowledged that a visual assessment is a largely subjective exercise, and that context is important. Elements considered include the complexity of the landscape, where the turbines are sited, and their distance from the viewer. The further away, she testified, the smaller the impact.

148 Ms. Naylor commented on the view from the various OPs modeled. Elements taken into consideration by Ms. Naylor, in assessing views from each observation point, include:

- Distance between OP and turbines;
- Other elements in the scene;
- Whether it is a "complex landscape";
- Whether or not it is a "continuous viewshed"; and
- The level of rated attractiveness of the scene to begin with.

149 In her analysis, Ms. Naylor considered whether the Project diminishes the "visual experience" in the NEP area. In general, Ms. Naylor considers the turbines to be "part of the view" and "part of the scene".

150 With respect to the concern expressed by the NEC witness that T1 and T21 were made taller after the NEC suggested they be moved due to diminishment of scenic value, Ms. Naylor's witness statement explains that some turbines were increased in height from the original plan, and others were reduced in height, depending on optimization of the Project. She agreed in her witness statement that T1 and T21 were modeled at 130 m, but then were changed to 136.5 m in height. Ms. Naylor testified that both T1 and T21 are located in close proximity to 136.5 m turbines, and that the 6.5 m difference in the turbine height would not be discernible from 3.7 km away, the closest OP.

151 Ms. Naylor agreed that it is a subjective assessment and what is acceptable to her, may not be acceptable to other viewers. She also agreed that the area is composed of forested hills and agricultural lands now, and that wind turbines introduce a visual quality very different from the current view. She agreed that areas ranked "attractive" or "very attractive" are sensitive to change, and that in a normally evolving rural landscape, acceptable change is incremental change.

152 Ms. Naylor further agreed that, where there are views of turbines from the NEP area, the visual characteristic will change. However, she testified that the issue Dillon addressed was whether there would be "significant change"; i.e., whether the change would significantly impact one's enjoyment when using the NEP area. She agreed there would be some diminishment of the visual experience.

153 When asked whether the Project view will be consistent with the Purpose of the NEP, "to maintain... as a continuous natural environment", (i.e., whether non-incremental change to a sensitive are of the Plan is "maintenance" of the Escarpment), Ms. Naylor testified that the Project is not within the NEP area, that the views across the Plan area to the Project area are in limited locations and a considerable distance from the Project, and that in her view maintenance of the quality within the Plan area remains intact.

154 When it was put to her in cross-examination that the NEP requires maintenance of land in the plan "and in its vicinity", Ms. Naylor testified that the Plan has boundaries, and that the "vicinity" of the Plan is not clearly established here. The closest turbine is 3.7 km away. In her view, "vicinity" would have to be interpreted as a very large distance to have any impact here.

Analysis and Finding on Harm to the Natural Environment through Visual Impact in Relation to the Niagara Escarpment

155 The Appellants support the submission of the NEC that if the Tribunal is satisfied that lands within the NEP area may be impacted by the Project, its decision should be subject to the policies of the NEC. They also support the NEC's position that the Project will have a visual impact on lands within the NEP area as viewed from the Escarpment. They submit that the Project is not in keeping with the purpose and objectives of the NEP because it will not maintain the Niagara Escarpment as a continuous natural environment and does not preserve the natural scenery of the NEP area.

156 The Approval Holder states that the NEC did not address the statutory test on this appeal under the *EPA*, but spoke to the NEC's governing statute, the *NEPDA*, and the NEP. It submits that there is no legal basis for the position that the policies of the NEC should apply to the Project and this proceeding. The Approval Holder says that the *NEPDA* empowers the Minister to designate lands within the Niagara Escarpment planning area as areas of development control, but the NEC cannot exercise its development control jurisdiction outside of the NEP, and the Project is not within the NEP. It goes on to assert that any impact on the views from the NEP area cannot constitute serious and irreversible harm to the natural environment within the meaning of the *EPA*.

157 The Director submits that the issue of visual impacts is not properly before the Tribunal because visual impacts are not natural heritage features that must be considered and evaluated in a NHA under O. Reg. 359/09. The Director states that the Project is not located within the NEP area and, therefore, is not subject to development control. He further submits that visual impact assessment is a subjective exercise and, in this case, the visual simulations provided by the Presenters demonstrate that the turbines appear as generally distant objects that have no negative impact on the view.

158 The Director asserts that the issue of visual impacts was not raised as an issue in this appeal by a party to these proceedings, while acknowledging that the Appellant Mr. Maguire raised the "considerable visual impact and degradation of the Niagara Escarpment" in his notice of appeal. The Director says, however, that Mr. Maguire did not raise visual impact as a specific issue, nor did he claim that the visual impact of the Project would cause serious and irreversible harm.

159 The Tribunal has recently addressed the distinction between grounds of appeal and issues in *Moseley v. Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 74 (Ont. Environmental Review Trib.). In that decision, the Tribunal stated, at paras. 24 and 25:

> Thus, in an appeal under s. 142.1 of the *EPA*, the maximum number of grounds that can be raised is two [serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment]. ...
>
> Rule 29(e) sets out an additional requirement that goes beyond the basic requirements of the *EPA*. This Rule requires an appellant to provide additional information so that the responding parties (and any proposed presenters and participants) know and can prepare for the issues and facts to be raised in the appeal, which is required to be expedited under the legislation.

160 Therefore, the "issues" that may be considered in a REA appeal are limited to those that the Appellants have identified in their notices of appeal. Mr. Maguire did raise the issue of visual impact in relation to the Niagara Escarpment in his notice of appeal. Thus, the Tribunal finds that this issue has been raised by an Appellant in these proceedings.

161 The Tribunal must next turn to the question of whether it has jurisdiction to deal with this issue in the context of a REA appeal. The Appellants submit that the NEP applies to the Project on the basis of the *Planning Act*, which states at s. 62.0.2(1)2 that provincial plans do not apply to renewable energy undertakings, but makes an exception to that provision in respect of the NEP in s. 62.0.2(2)(a).

162 While the NEC provided comments on the Project, it understood that the Project was outside of its specific geographic jurisdiction. The Tribunal accepts the Approval Holder's submission that the exemption in s. 62.0.2(2)(a) of the *Planning Act* applies only to renewable energy projects that are within the NEP. The Project is outside the boundaries of the Niagara Escarpment planning area, and those boundaries may only be altered by regulation by the Lieutenant Governor in Council, under s. 3(2) of the *NEPDA*. The exception in s. 62.0.2(2)(a) does not expand the scope of the NEP outside of the planning area with respect to a renewable energy project.

163 Section 145.2.1 of the *EPA* sets out what the Tribunal must consider in a REA hearing under s. 142.1. Pursuant to s. 145.2.1(2), the Tribunal shall review the decision of the Director and *shall consider only* whether engaging in the renewable energy project in accordance with the REA will cause: (a) serious harm to human health; and (b) serious and irreversible harm to plant life, animal life or the natural environment. In a REA appeal, the Tribunal is constrained by the legal tests set out in this provision.

164 The Tribunal, therefore, finds that it is beyond its jurisdiction to address the specific question of whether impacts on the scenic resources of the Niagara Escarpment are consistent with the NEP.

d) Harm to Bats

Evidence on Bats

165 The Tribunal heard evidence from six expert biologists, three of whom were experts specifically on bats.

166 The areas of dispute among the experts that are relevant to the issues the Tribunal must decide are the following:

- Whether the Project will negatively impact bat habitat (or whether there is sufficient information to make such an assessment);

- The extent to which the Project will cause bat collision mortality;
- The extent to which collision mortality caused by this Project will impact bat species through cumulative effects; and
- How the Project will impact endangered species of bats.

167 The following biological information was not in dispute. There are eight bat species in Ontario: five species of hibernating bats that are resident year-round; and three migratory species that are present in Ontario part of the year. Hibernating bats are active from late April to approximately October in Ontario. They roost in colonies in the summer, in barns or old trees called "snags". In the winter they hibernate in caves, mines and some in old buildings. Migratory bats are present from approximately early May until late September. They are strictly tree-roosting. Bats are insectivores and play an extremely important pest control role in the ecosystem. Each bat eats approximately half its body weight in insects, each night.

168 White-nose syndrome ("WNS"), a disease caused by a fungus that kills bats during hibernation, has devastated hibernating species in the last few years. Two species have recently been put on the endangered list in Ontario: the Little Brown Myotis, also known as the Little Brown Bat, and the Northern Myotis, also known as the Northern Long-eared Bat. Estimates are that 80 to 90% of the Little Brown Myotis species has been killed from WNS in the past few years.

169 Migratory bats make up the highest percentage of bat deaths due to wind turbines across Canada, and 80% of such deaths across North America. Most are killed in Canada during the fall migration from late July to September. Little is known about migratory bat species, and in particular their migratory routes.

170 In preparing its application for this Project, Dufferin retained Dillon to conduct a NHA of the Project area. Natural Resources Solutions Inc. ("NRSI") was in turn retained by Dillon to conduct portions of the NHA specific to bats and bat habitats. NRSI prepared the *2011 Bat Monitoring Report and Environmental Impact Study*, dated December 12, 2011 (the "Bat Report").

Dr. Robert Barclay

171 Dr. Barclay was qualified to give expert opinion evidence as a biologist with expertise in bats and their interaction with wind turbines. Dr. Barclay testified on behalf of the Appellants.

172 Dr. Barclay's criticisms of the bat work done for this Project include the following: it ignores cumulative effects; it relies on the MNR *Bat Guidelines* which use an arbitrary mortality threshold that is not based on science; it under-reports the bat use of the Project area; and two bat species became listed as species-at-risk under the *Endangered Species Act, 2007*, S.O. 2007, c. 6 (the "*ESA")* since the Bat Report was prepared.

173 Dr. Barclay contends that the MNR *Bat Guidelines'* threshold of 10 bats per turbine per year, before mitigation is required, is not based on science, but an arbitrary number.

174 Dr. Barclay testified that the Bat Report does not accurately reflect bat activity over the Project area, and opined that the area is more important to bats than reported. He gave the following reasons:

- The Bat Report focuses on bat roosting sites only, ignoring foraging habitat. Bats are not killed while roosting or hibernating, but when they are foraging for food, commuting or migrating. If there is significant foraging on site, bats can be attracted from a long way away. The *Bat Guidelines* ignore feeding habitat, which is critical habitat in Dr. Barclay's view. Other jurisdictions do consider feeding habitat, when considering the impact of development on bats.
- Most bats killed by wind projects are migratory, but the Bat Report and EIS looked only at hibernating bats. NRSI did its monitoring in late June and early July, prior to the commencement of the narrow six-week window during fall migration. It is simply unknown, therefore, whether the Project includes critical habitat for migratory species of bats. Wind turbine collision mortality impacts migratory bat populations at a broader scale than for hibernating bats, as it will impact their populations in their overwintering sites in the south, as well as summer roosting sites further north. The current state of

science is such that we are not able to identify migratory routes. If a project is located along a migratory route, it may eliminate that route altogether.

• Dillon and NRSI placed microphones to record sounds at only two snags (roost trees) for the entire Project area, which was insufficient. In addition, the chosen trees were in forested areas, but few bats feed within forests, as they prefer forest edges.

• In calculating abundance from the sound recordings, the number of calls was averaged out over 10 hours, while bats are only active at that time of year for 7.5 hours per night. Dr. Barclay calls this "sloppy science".

175 With respect to endangered species, the Little Brown Myotis and Northern Long-eared Myotis have been put on the endangered list in Ontario since the initial EIS studies were done. Dr. Barclay commented that Little Brown Myotis fatalities at the nearby Melancthon wind project represent a significant percentage of its population. The *ESA* prohibits the killing of endangered species. Dr. Barclay emphasized that the population is in desperate trouble, and that additional fatalities caused by wind turbines at this Project will only exacerbate the situation. Dr. Barclay noted that, according to the Bird and Bat monitoring database, almost 25% of bats killed at turbines in Ontario from 2006 to 2010 were Little Brown Myotis.

176 Dr. Barclay put the levels of permitted bat fatalities under the REA into context by stating that the 490 bats allowed to be killed per year at this Project without mitigation (10 per turbine, 49 turbines), cannot be replaced. The number represents several entire maternity colonies for the Little Brown Myotis.

177 In order to estimate the bat fatality rate that will occur from this Project, Dr. Barclay used the fatality rates recorded at the Melancthon wind project as a comparator. Based on his calculations, the fatality rate at Melancthon would result in approximately 78 bat deaths per year at this Project. It represents the approximate size of a Little Brown Myotis colony in a tree, and therefore is equal to killing an entire Little Brown Myotis colony per year. He testified that, with the population having been devastated by WNS, 78 bats deaths /year at one project could have a significant impact on the entire population.

178 Dr. Barclay acknowledged that, had he done his bat fatality estimate per turbine for the Melancthon data as opposed to per mW, then the fatality estimate for this Project would be 17% less. He noted that there is an ongoing debate as to which method of calculation is more relevant, but, in any event, it still represents thousands of bat deaths, which is especially harmful in conjunction with the other proposed or approved wind turbine facilities within 20 km of Dufferin.

179 It is estimated that WNS has killed 80 to 90% of the population of Little Brown Myotis. In Dr. Barclay's view, with endangered species any additional mortality is a significant impact, as it will speed up the demise of the population. One cannot simply discount other causes of mortality due to WNS.

180 In response to Dr. Fenton's comment that agricultural lands have low bat activity, Dr. Barclay noted that studies of wind turbine projects on agricultural lands in Alberta have shown high rates of bat fatality. Further, studies in Alberta have shown that, with an activity rate of six to eight bat passes per night, the project recorded a fatality rate of over 20 bats/turbine/year. Thus, although the activity rate was not deemed to be high, it was related to high levels of fatality.

181 With respect to cumulative effects, Dr. Barclay's concern is that MNR's *Bat Guidelines* view each facility in isolation. He said that both migratory and hibernating bats are very mobile, travelling tens of km per night for commuting and feeding. The *Bat Guidelines* provide that, where 10 bats or more are killed per turbine per year across a project, mitigation measures come into play. The *Bat Guidelines*' focus on a particular number of bats killed per turbine, rather than calculating mortality on a population or landscape level, could lead to very high bat mortality with no requirement for mitigation measures.

182 Dr. Barclay noted that three other wind projects already operate in the surrounding area (Plateau, Grand Valley I and II, and Melancthon), and 12 more are proposed or already approved. He indicated that the population of bats in the entire area should be considered, on a landscape scale.

183 With respect to the effectiveness of mitigation measures, Dr. Barclay agreed that bats do not fly at high wind speeds, and studies have shown that increasing the turbine blade cut-in speed to 5.5 m/sec has been shown to reduce bat fatalities by 60%.

184 Dr. Barclay noted that this REA focuses on mitigation during the migratory period (i.e., Condition J 8 (1) notes from July 15 to September 30). This is strange, he found, as the report itself focuses on resident hibernating bats. Dr. Barclay testified that, if the mitigation measures in this REA were to cover the active period for hibernating bats, it would extend from late April to the end of September.

Amy Cameron

185 The Director called Amy Cameron, a biologist with the MNR, who reviewed, and approved, the NHA. Ms. Cameron was qualified to give opinion evidence as a biologist with expertise in the MNR's REA Guidelines and as an expert in reviewing natural heritage assessments for REA projects. The Tribunal observes that, while Ms. Cameron was qualified to provide opinion evidence, the majority of her evidence was factual.

186 Ms. Cameron described the REA process, and testified that the Approval Holder's NHA was deemed to fulfill the requirements of the Regulation, and the MNR's *Bat Guidelines*.

187 Ms. Cameron noted that condition J15(2), with respect to reporting requirements for species at risk, requires immediate reporting to the MNR if a carcass of an endangered bat is found, so that mitigation measures can be taken immediately.

188 She testified that proponents are subject to the *ESA*, which is separate from the REA requirements.

David Restivo

189 Mr. Restivo was qualified, on behalf of the Approval Holder, as an expert biologist with expertise conducting environmental assessments of wind projects. He works for Dillon which prepared the NHA. Dillon conducted site investigations and identified six woodland candidate bat habitats for further consideration by NRSI biologists.

190 He stated that the "Project Location", as defined by the REA Regulation, includes all development activities proposed to occur on land or in the air. The "Project Area" includes all land, water and air within 120 m of the Project Location.

Andrew Ryckman

191 Mr. Ryckman was qualified by the Tribunal on consent of all parties to give opinion evidence as a biologist with expertise in conducting environmental assessments of wind projects, including assessment of impacts on bats and bat habitats. He testified on behalf of the Approval Holder.

192 Mr. Ryckman works for NRSI, which was retained by Dillon to do a bat study for the Project location. He testified that the work conducted by NRSI "confirmed the existence of the candidate significant bat habitat within the project area that had been identified by Dillon, assessed the likely impact of the project on such habitat and determined appropriate mitigation measures to address and minimize any potential negative impacts as need be." Mr. Ryckman's witness statement notes that "our overall conclusion in respect of the NHA bat assessment is that, assuming the mitigation measures incorporated in the REA are followed, the anticipated impacts of the Dufferin Project on bats and bat habitats are expected to be minimal."

193 In Mr. Ryckman's view, the habitat-based focus of the NHA ensures protection of significant wildlife habitats, and therefore protects the wildlife that rely on those habitats.

194 Mr. Ryckman said that, of the six woodland candidate bat habitats identified by Dillon, three are farther than 120 m from the nearest turbine and therefore fall outside the REA Regulation stipulation that "only suitable habitats within 120 m of the Project location be considered during the evaluation of significance."

195 Mr. Ryckman testified that, in the evaluation of significance stage, NRSI investigated for two types of habitat: bat hibernacula, and bat maternity colonies. Of the three candidate bat habitats that were within the 120 m setback, all three were considered to be significant after an evaluation in accordance with the bat monitoring protocol outlined in the MNR *Bat*

Guidelines 2010. Two were confirmed significant upon further investigation (BMA-003 and BMA-005), and one was assumed significant due to lack of access (BMA-006).

- BMA-003 is a natural feature 4.5 ha in size, which is 86 m to the closest turbine.
- BMA-005 is a natural feature 19.2 ha in size, which is 80 m to the closest turbine.
- BMA-006 is a natural feature 9 ha in size, which is 29 m to the closest turbine, identified as suitable habitat for roosting bats.

196 Mr. Ryckman noted that section 7.3 of the NRSI Bat Report states that NRSI biologists did not find suitable habitat for bat hibernacula within the Project area, according to the guidelines established in the MNR's Significant Wildlife Habitat Technical Guide ("SWHTG"), and the *Significant Wildlife Habitat Ecoregion Criteria Schedules Addendum (draft guidance, undated)*.

197 Mr. Ryckman indicated that, under the REA Regulation, since only three locations were identified as "significant natural features", an EIS leading to possible mitigation measures need only be conducted for these features.

198 Mr. Ryckman described the surveys conducted. Mr. Ryckman testified that provincial standards provide for a minimum of five hours of acoustic surveys, but NRSI chose 10 hours to get a better picture of bat activity in the woodlots through the night. In response to Dr. Barclay's concern that the survey took place partially during daylight hours, Mr. Ryckman testified that NRSI's interpretation of the MNR *Bat Guidelines* is that the standard time for surveying is to begin one half hour before sunset (in order not to miss the bats emerging from their roosts), and end at approximately sunrise. Mr. Ryckman stated that NRSI clarified with the MNR that "dusk" means one half hour before sunset.

199 Mr. Ryckman agreed with Dr. Barclay that the focus of the NRSI Bat Report was on maternity roosting colonies rather than bat foraging habitat, but in his view the protection of these habitats has the effect of also protecting foraging habitat, because any habitat that is considered to be significant is delineated to contain the entire woodlot in which it is found.

200 Mr. Ryckman testified that foraging bats are generally not at risk of collision mortality with wind turbines, because they fly at a lower height than the blade swept area.

201 Mr. Ryckman also agrees with Dr. Barclay that the Bat Report's focus was on hibernating bats, rather than migrating bats.

202 Mr. Ryckman testified that he is confident there is low bat use of the area, despite his acknowledgement that NRSI does not have information on the size of the bat population using the Project area. This is consistent with his understanding that bats do not make extensive use of agricultural fields.

Dr. Scott Reynolds

203 Dr. Reynolds, who testified on behalf of the Approval Holder, was qualified to give expert opinion evidence on bats and impacts of wind farms on bats.

204 Dr. Reynolds testified that the Dufferin site does not contain any of the features that would make it significant habitat for migratory bat activity, such as mountain ridges, large riparian corridors, or coastal shorelines which act as a visual marker during migration. Dr. Reynolds acknowledged that the Niagara Escarpment may act as a geographic landform for migrating bats, but if it were used by bats they would migrate along it, rather than across it. Given its orientation with respect to the Project site, Dr. Reynolds testified the Project would not put any migrating bats at greater risk and they would be unlikely to be impacted by turbines.

205 Dr. Reynolds testified there would be no loss of bat habitat because the EEMP provides there will be no removal of significant bat habitat, and in his view there will be no indirect effects on habitat.

206 With respect to collision mortality, Dr. Reynolds testified that foraging and commuting bats would fly below the turbine blade swept area and therefore not be at risk during those behaviours (3 to 12 m above the ground for commuting). Further, the mitigation measure of increasing the cut-in speed to 5.5 m/s has been proven to be an effective mitigation measure to reduce bat collision mortality. He provided his opinion that the threshold of 10 bats/turbine/year is a reasonable operational threshold.

207 Dr. Reynolds testified that the availability of bat mortality information for the neighbouring Melancthon wind project gives him further comfort in his conclusions. In his view, the Melancthon data, for a project on similar landscape to this Project and in the same general area, shows low collision mortality for bats. According to Dr. Reynolds' interpretation of the data, 98% of the mortality occurred during the fall migratory period, affecting migratory bats, whereas Dr. Barclay had interpreted the mortality as affecting endangered bats.

208 Dr. Reynolds stated that, while much is not known about bats, it is known that three species of bat have consistently been most affected by collision mortality at wind facilities: the migratory tree bats (silver-haired, red, and Hoary bats.) He stated that 80% to 87% of all bat mortality is attributed to these three species.

209 While the Bird and Bat Monitoring Database shows a figure of 23.5% of bat mortality attributed to local hibernating Little Brown Myotis, Dr. Reynolds is confident the number is not an accurate estimate for the Dufferin site for three reasons: the database number is a composite and not predictive for any one project; the data is from a time when the Little Brown Bats were much more numerous on the landscape (2006 to 2010); and almost all the projects from which the data was taken are located within 15 km of a shoreline of a major water body. It is common ground that bats are attracted to shorelines. Dr. Reynolds believes the location of the Dufferin Project inland, away from large water bodies, makes it a much lower risk for bat mortality.

210 Dr. Reynolds agreed in cross-examination that the sampling efforts of NRSI were to sample for summer resident bat activity, not for migratory activity. He testified that, since Melancthon data is available, from a location less than 10 km away, the absence of fall migratory data is not an impediment to reaching a conclusion on bat activity in this Project area.

211 Dr. Reynolds testified in cross-examination that, due to the current lack of knowledge about migratory habitats, he would look for features that suggest migratory concentrations to identify migratory routes. Dr. Reynolds agreed that it "would have been helpful" in this instance to monitor the wetlands on the Project site for bat activity.

Dr. Melville Fenton

212 Dr. Fenton was called by the Approval Holder and qualified to give expert opinion evidence as an expert on bats and bat habitats. Dr. Fenton is the Chair of the Committee on the Status of Species at Risk in Ontario ("COSSARO").

213 Dr. Fenton concludes that, regardless of the issues raised by Dr. Barclay with respect the NHA report underestimating bat use of the area, "it seems clear that, compared to other sites in southern Ontario, the Dufferin site is not an area of high bat activity". Dr. Fenton states that agricultural fields are typically low bat use areas, although no scientific literature was filed to back up this statement.

214 Dr. Fenton relies on the mitigation requirements of the REA to conclude that, even if the bat use of the area is higher than predicted, this does not mean the Project will cause serious and irreversible harm to bat species. He testified that the mitigation measures that will be triggered if the threshold of 10 bats/turbine/year were to be exceeded would significantly reduce the level of any mortality.

215 Dr. Fenton concludes there is unlikely to be any significant mortality risk from this Project to species-at-risk bats, for two reasons: (i) the site is "an area of low activity for them (again there is no hibernacula or swarming site present)", and (ii) the two endangered species of bats are not generally present in the blade-swept area. The Little Brown Myotis forages close to the ground, within 1 to 2 m of the surface of the water, and a maximum of 2 km from maternity roosting habitat. The commuting height for this bat is also below the blade-swept area. Northern Long-eared Myotis mainly forage within wooded areas close to vegetation, and their height depends on the tree canopy.

216 Dr. Fenton stated that the mitigation measures in the REA give him further comfort in stating that bats will not be seriously impacted by this Project.

217 With respect to cumulative impact, Dr. Fenton states that the sizes of the bat populations in Ontario are not known, and as a consequence it is not possible to know whether the mortality level, even if the MNR *Bat Guidelines* threshold were exceeded, would cause any serious and irreversible harm to populations of bats in southern Ontario.

218 Dr. Fenton agreed there is no population database for bats, in the way there is for birds. COSSARO recommended that two species of bats be listed as endangered because of "catastrophic declines" due to WNS, in the order of 95% of the population within one to two years. Based on MNR surveys, 30,000 bats were found to be hibernating in 2009 while in 2013, less than 100 were found.

219 Dr. Fenton reviewed the COSSARO and Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") reports in his evidence. He testified that there is no evidence that wind turbines are causing a precipitous decline in bats. The COSSARO report mentions wind farms as an "additional potential agent of mortality" in deaths of endangered bat species, but Dr. Fenton said the Little Brown Myotis was listed due to concern about WNS, which in his view "trumps everything".

220 Dr. Fenton testified that it is expected that Little Brown Myotis will probably be extinct in five years. For the Northern Myotis, all information is based on American data as there is no data in Canada, and no data on population sizes in Canada. He stated that, regarding the question of how long it will be before the Northern Myotis are extinct, COSEWIC states five generations. However Dr. Fenton said this is a guess because of the lack of knowledge as to what a generation is.

221 In Dr. Fenton's view, the chance of mortality of either of these two endangered species due to operation of the Project is "extremely low".

Submissions, Analysis and Findings on Bats

222 To summarize, the Appellants assert that there will be serious and irreversible harm to bats if the Project is permitted in accordance with the REA. Their submissions greatly focus on hibernating bats, and particularly on the two endangered species, Little Brown Myotis and Northern Myotis. The Approval Holder and the Director argue that none of the experts on bats asserted that the Project will cause serious and irreversible harm to bats. The Director's submissions were generally consistent with those of the Approval Holder.

Appellants' Submissions

223 The Appellants argue that the Tribunal should apply the framework it established for the analysis of an endangered species in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, and does not need to make a finding about the number of individual bat fatalities that would constitute serious and irreversible harm. They say that the Tribunal has the evidence it needs to make a finding on the population impact of the Project on Little Brown Myotis and Northern Myotis.

224 The Appellants submit that the Tribunal should apply the same factors as it did in its analysis of harm to the endangered Blanding's turtle in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, because these two species of bat are also endangered. Those factors are: conservation status of the species; species habitat on the site and in the area; vulnerability of the population; type and extent of harm caused by the Project; vulnerability of the species to this type and extent of harm due to its life history traits; mitigation measures in the REA; and demonstrated effectiveness of the mitigation measures.

225 The Appellants state that although Little Brown Myotis and Northern Myotis are listed as endangered under the *ESA* in Ontario, they are not protected by that legislation due to the July 2013 exemption for wind facilities in O. Reg. 242/08. As a result of that exemption, the *ESA* prohibitions on killing, harming, harassing, capturing or taking a living member of an endangered species, and on damaging or destroying the habitat of the species, no longer apply to a person engaged in operating a wind facility if they meet the conditions included in the regulation. Those conditions include giving notice to the MNR of the

operation of the wind facility, preparing a mitigation plan, and monitoring and reporting on the effects of the operation on the endangered species. They note that the Approval Holder's mitigation plan under the *ESA* was not entered into evidence.

226 The Appellants assert that there is confirmed significant bat habitat for endangered bats in the Project area, noting that there are three bat maternal roost colony habitats that were evaluated by Dufferin as significant or deemed to be significant and potentially sensitive to development. These habitats include habitat for Little Brown Myotis and Northern Myotis. Two of these habitats are located 5 m from Project components, and the other is 20 m from Project components.

227 The Appellants submit that Dr. Barclay doubted that the acoustic and visual surveys conducted on behalf of the Approval Holder accurately assessed the abundance and diversity of bats in the Project area, and said that the *Bat Guidelines* do not require adequate habitat monitoring in the vicinity of renewable energy projects, making it likely that the extent of bat habitat and number of bats in the Project area have been underestimated. They also say that it is not clear that the distances between the bat habitat and the Project components are great enough to adequately scientifically assess the use of the Project area by bats.

228 The Appellants also raise concerns that, at the Evaluation of Significance stage of the REA application process, the MNR only requires assessment of bat hibernacula up to 1km from the Project area, bat maternity colonies within 120 m of the Project area, and bat migratory stopover areas.

229 The Appellants submit that the Little Brown Myotis is at imminent risk of extinction, and the Northern Myotis is also at risk of extinction in the future. They state that COSSARO has identified WNS and wind farms as direct threats to the endangered bat species, stating that COSSARO identified wind farms as "an additional agent of mortality" for Little Brown Myotis and as "an additional *potential* agent of mortality" for Northern Myotis.

230 The Appellants, based on Dr. Barclay's evidence, assert that, although much of the feeding by some of the resident bat species, such as the Little Brown Myotis, occurs relatively low to the ground, below the blade-swept area of turbines, these species often commute at greater heights, potentially placing them at risk. They say Dr. Barclay's opinion is substantiated by August 2012 post-construction monitoring data from the nearby Melancthon project indicating that Little Brown Myotis represent 24% of total bat fatalities from wind turbines in Ontario. They submit that the combined effect of WNS and wind turbine-related fatalities needs to be considered in assessing the vulnerability of the population.

231 The Appellants argue that the conservation status of the two species of endangered bats, and the cumulative impacts on their populations of the many wind farms in the region as well as WNS, render those populations vulnerable to serious and irreversible harm from the Project.

232 The Appellants say there is no dispute that the turbines are a direct mortality threat to bats, and it is nearly certain that bats will die as a direct result of the Project. They dispute the assertion by the Approval Holder that the Project Area is a low use area for bats, and any bat mortality will be low and mitigated. They assert that there is ample suitable habitat for bats in and around the Project Area, and that acoustic and visual monitoring has confirmed the presence of Little Brown Myotis and Northern Myotis in the Project Area. While the Appellants do not dispute that bats prefer woodland edge habitats and water bodies over all other habitat types, they assert that there is no evidence before the Tribunal that bats are not present on agricultural landscapes. Instead, they say there is evidence of bat fatalities from turbines in agricultural areas, and submit that post-construction fatality data shows that Little Brown Myotis is the second most frequently killed species of bat by wind turbines.

233 The Appellants note the evidence that bats have long lifespans and slow reproductive rates, so that bat populations cannot increase rapidly after a drop in population size. They submit that the life history traits of Little Brown Myotis and Northern Myotis do not allow their populations to absorb the impact of additional mortality from wind turbines. They further note that bats' feeding habits require them to leave their roosts and trees to search for food, and they must fly among wind turbines that are present in their habitats.

234 The Appellants note the mitigation measures related to bats in the REA, but submit that the Tribunal should be satisfied that the impacts to bats of the Project are acceptable without the mitigation measures in place, in the event that those measures fail. They say that none of the mitigation measures recommended by Mr. Ryckman are requirements in the REA. They observe

that there is no requirement that one of the three significant bat habitats be monitored because access to the property has been denied to the Approval Holder, and submit that the Project components impacting on that habitat should not be built if the area cannot be monitored.

235 The Appellants assert that the EIS Report does not contain any commitments and is incapable of implementation or enforcement, and that the EEMP contains mistakes. They state that the REA conditions do not indicate which turbines will be monitored or whether the turbines selected will indicate the direct mortality impacts across the site. They assert that, unless all of the turbines are monitored, it will not be possible to know for certain whether the mortality threshold is being exceeded.

236 The Appellants argue that 490 bats must die before operational mitigation is required, and that operational mitigation will not eliminate mortality given the evidence that these measures would reduce mortality by about 60%. They submit that wind turbine mortality will accelerate the extinction of the Little Brown Myotis and Northern Myotis species. They also point out that there is no basis for the Tribunal to evaluate the effectiveness of the contingency plan mitigation measures because contingency plans have not been developed.

237 The Appellants state that migratory bats are also vulnerable to wind turbine fatalities as they have long lives and slow reproduction rates, and there is greater potential that they will encounter wind turbines due to long distance travel during migration. They say that their submissions regarding mitigation measures and their effectiveness in respect of hibernating bats apply equally to migratory bats. They note that migratory bats do not share the same endangered status as hibernating bats, and there is there little information about the vulnerability of their populations to harm from wind turbines.

238 The Appellants submit that migratory bats were ignored in the Approval Holder's bat assessment, because the MNR does not require the assessment of migratory bat habitat. They note that proponents are not required to assess bat migratory stopover areas because there are no criteria in the Significant Wildlife Habitat Ecoregion 6E Criterion Schedule. They further submit that post-construction monitoring data from other projects indicates that migratory bats are the bats most harmed by wind facilities. The Director's Submissions

239 The Director disagrees with the Appellants' suggestion that O. Reg. 242/08 exempts wind farms from compliance with the general *ESA* prohibitions applicable to endangered species. He notes that the Approval Holder's compliance with the requirements in O. Reg. 242/08 will effectively minimize and mitigate any harm to endangered bats from the Project.

240 The Director submits that the evidence demonstrates that there is no reasonable expectation of high bat activity and use in the Project area due to its geographic and topographic features, and that no development of the Project will occur within the boundaries of any significant bat habitat, so no bat habitat will be affected or destroyed.

241 The Director also submits that WNS, not the negligible impacts of wind turbines, is responsible for the serious population decline in endangered species bats. He further states that the endangered bat species are unlikely to be present at the site in any significant numbers. The Director asserts that, based on the evidence of the Approval Holder, there will be very little, if any, collision mortality to the Little Brown Myotis from the operation of the Project. He says that any minimal collision mortality suffered by endangered bats will not cause serious and irreversible harm to those species.

242 The Director submits that the issue of cumulative impacts of all wind energy projects on bats is outside the Tribunal's jurisdiction because the test in s. 145.2.1(2) of the *EPA* is whether this Project will cause serious and irreversible harm to bats, not whether the cumulative impacts of all wind energy development in Ontario will cause serious and irreversible harm.

243 In response to the Appellants' argument that mitigation measures not specifically set out as REA conditions may not be implemented, the Director submits that all of the conditions, commitments and mitigation measures referred to in the Bat Report and the conditions in the EIS Report are incorporated by reference into the REA by condition J1. He notes that Ms. Cameron confirmed in cross-examination that these requirements are considered mandatory and the Approval Holder would be considered to have contravened the REA if they are not complied with. The Director also addressed the errors in the EEMP, saying that Ms. Cameron had indicated that she would ensure they are corrected. He also notes the finding by the Tribunal in

Alliance to Protect Prince Edward County v. Director, Ministry of the Environment, at para. 518, that the mitigation measures required to be implemented are effective at significantly reducing the risk of collision mortality.

244 The Director submits that there are no regulatory requirements or criteria for surveying bat migration pathways and stopover areas because it is currently not possible to effectively monitor where bats are travelling to and from. He says that the evidence of Dr. Fenton and Dr. Reynolds indicated that if migrating bats use the Project area as a migratory pathway, they would likely fly along the eastern side of the Niagara Escarpment, which is the furthest side from the Project.

Findings on Bats

Harm to Bats from the Project

245 It has been established in the evidence that there are three bat maternal roost colony habitats in the Project area that were evaluated as, or deemed to be, significant. It is clear that there are bats in the vicinity of the Project area, and pre-construction monitoring suggests the presence of the Little Brown Myotis and Northern Myotis in these habitats. Both of these hibernating bat species are listed as "endangered" under the *ESA*. However, as the Appellants point out, endangered species within a wind facility are subject to a regulatory exemption in amendments to O. Reg. 242/08 that came into effect in July 2013.

246 Under s. 23.20 of O. Reg. 242/08, a person engaged in operating a wind facility will not be subject to the prohibitions in s. 9(1)(a) and s. 10 of the *ESA*, which include killing or harming a listed species, or damaging or destroying their habitat, if the conditions set out in s. 23.20 are met. These conditions include giving notice to the MNR and preparing a mitigation plan. While the wind facility is operating, the proponent must comply with the mitigation plan and ensure that reasonable steps are taken to minimize adverse effects on listed species. Generally speaking, prior to the July 2013 amendments, wind facility proponents were required to obtain a permit under the *ESA* where species listed under the *ESA* were present. The mitigation plan required under O. Reg. 242/08 will be further discussed below, in addition to the mitigation measures required in the REA.

247 There is no dispute that WNS has caused the population decline, at the provincial scale, of the Little Brown Myotis and Northern Myotis, which has led to their being listed as endangered under the *ESA*. The Appellants acknowledge that the primary reason for the conservation status change for both species is the impact of WNS. This dramatic decline, which has taken place over a short period of time, makes it less likely that significant numbers of the endangered species bats will be present at the local scale in the Project area. As discussed below, it is possible that some additional endangered bats may be killed as a result of the operation of the Project. However, the Tribunal accepts the evidence of Dr. Reynolds that the current downward slope of the population trajectory of Little Brown Myotis is due to WNS, and that incidental mortalities from this Project will not be scientifically significant, and will not affect the slope of that trajectory, either at the local scale or the provincial scale. The Tribunal therefore finds that the Appellants have not shown that the number of fatalities of endangered bats, in addition to the overwhelming number of deaths due to WNS, will constitute serious and irreversible harm.

248 The evidence was clear that the Project does not require the removal of any of the significant bat habitats. All of the Project components will be located outside of these habitats and all of the construction will be done outside the boundaries of the habitats. The Tribunal finds that the evidence does not show that the construction and operation of the Project will impact the significant bat habitats in the Project area in any way other than the potential for collision fatalities.

249 The Appellants argue that the Project area is a high use bat activity area, based on Dr. Barclay's opinion that the surveys done to support the NHA report underestimate the bat use of the area. The responding parties say the surveys were adequate, and rely on evidence that bat activity is low on the type of agricultural habitat predominantly found in the Project area because it provides few areas for adequate roosting and foraging. Dr. Fenton, who is familiar with the region where the Project is proposed, testified that the Project site is an area of low activity where there are no hibernacula or swarming sites.

250 Although the MNR *Bat Guidelines* do not require an assessment of bat foraging habitat, the Approval Holder says that foraging habitats in woodlands were included in the surveys for the Project. However, the Appellants point out that wetlands were not surveyed, and assert that wetlands attract foraging bats. Dr. Reynolds agreed that wetlands should have been evaluated as potential bat habitat for the Project.

251 Dr. Barclay disagrees with the contention that this is a low use area on the basis that, in his opinion, the assessment of bat activity was flawed. The REA application process established that there are bats and significant bat habitats near the Project area, but the level of study required by the REA Regulation is not sufficient for the Tribunal to make a determination as to whether this is a low or high use area for bats. There may be higher use by bats of the area than was recorded.

252 There is a dispute between the Appellants and the responding parties concerning whether there is a risk to hibernating bats while foraging and commuting. The respondents' experts gave evidence that hibernating bats fly below the sweep of the turbine blades, and may prefer to forage over open water and along forest edges. It seems clear, however, that they are present in agricultural fields at times, given the evidence that Little Brown Myotis carcasses have been found at turbines located in agricultural fields. Dr. Barclay suggested that there was potential for bats to commute at greater heights and be put at risk. The Tribunal finds, based on the evidence, that the hibernating bats may at times fly at blade height where they are at risk to be killed as a result of the operation of the Project.

253 While the Tribunal accepts that there may be a higher use of the Project area by bats than was reflected in the NHA report, and that there is potential for the bats to fly at the height of the sweep of the rotor blades, the Tribunal finds that it was not presented with evidence that the Project will cause serious and irreversible harm to the bats when operated in accordance with the REA conditions.

Mitigation

254 The following monitoring and mitigation measures in the REA relate to bats:

> J4. The Company shall implement the post-construction monitoring described in the Environmental Effects Monitoring Plan and the Environmental Impact Study, described in Condition J l, including the following:
>
> (1) Disturbance Monitoring for Bat Maternal Roost Colony Habitat (BMRC 1 and BMRC 4).
>
> . . .
>
> **POST CONSTRUCTION MONITORING - BIRD AND BAT MONITORING**
>
> J6. The Company shall implement the post-construction bird and bat mortality monitoring described in the Environmental Effects Monitoring Plan, described in Condition J1, at a minimum of 15 of 49 constructed turbines. Turbine 15 must be monitored as one of the selected turbines.
>
> **THRESHOLDS AND MITIGATION**
>
> J7. The Company shall contact the Ministry of Natural Resources and the Director if any of the following bird and bat mortality thresholds, as stated in the Dufferin Wind Power Inc. Natural Heritage Environmental Effects Monitoring Plan for the Dufferin Wind Farm described in Condition J1, exceeds:
>
> (l) 10 bats; per turbine per year across the Facility
>
> . . .
>
> J8. If the bat mortality threshold described in Condition J7 (1) is exceeded, the Company shall:
>
> (1) implement operational mitigation measures consistent with those described in the Ministry of Natural Resources publication entitled "Bats and Bat Habitats: Guidelines for Wind Power Projects" dated July 2011, or in an amended version of the publication. Such measures shall include some or all of the following:

(i) increasing cut-in speed to 5.5 m/s and/or feather wind turbine blades when wind speeds are below 5.5 m/s between sunset and sunrise, from July 15 to September 30 at all turbines or a select number of turbines as deemed appropriate by the Ministry of Natural Resources; or

(ii) implementing an alternate plan agreed to between the Company and the Ministry of Natural Resources.

(2) implement an additional three (3) years of effectiveness monitoring.

J9. If the bat mortality threshold described in Condition J7 (1) is exceeded after operational mitigation is implemented in accordance with Condition J8, the Company shall prepare and implement a contingency plan, in consultation with the Ministry of Natural Resources, to address mitigation actions which shall include additional mitigation and scoped monitoring requirements.

. . .

REPORTING AND REVIEW OF RESULTS

J14. The Company shall report, in writing, the results of the post-construction disturbance monitoring described in Condition J4 and J5, to the Ministry of Natural Resources for three (3) years on an annual basis and within three (3) months of the end of each calendar year in which the monitoring took place.

J15. The Company shall report, in writing, bird and bat mortality levels to the Ministry of Natural Resources for three (3) years on an annual basis and within three (3) months of the conclusion of the November monthly monitoring, with the exception of the following:

(1) if either of the bird mortality thresholds described in Conditions J7 (5) or J7 (6) is exceeded, the Company shall report the mortality event to the Ministry of Natural Resources within 48 hours of observation;

(2) for any and all mortality of species at risk (including a species listed on the Species at Risk in Ontario list as Extirpated, Endangered or Threatened under the provincial Endangered Species Act, 2007) that occurs, the Company shall report the mortality to the Ministry of Natural Resources within 24 hours of observation or the next business day;

(3) if the bat mortality threshold described in Condition J7 (1) is exceeded, the Company shall report mortality levels to the Ministry of Natural Resources for the additional three (3) years of monitoring described in Condition J8, on an annual basis and within three (3) months of the conclusion of the October mortality monitoring for each year.

255 The Tribunal notes that the mitigation measures are consistent with those in other REAs, including the conditions before the Tribunal in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*. In *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, at para. 518, the Tribunal accepted that, with these mitigation measures in place, the Project as approved would not cause serious and irreversible harm to bats.

256 The Appellants raised a concern about the mortality threshold of 10 bats/turbine/year across the Project, which must be met before mitigation measures under the REA are invoked. This threshold comes from the MNR *Bat Guidelines* and is a requirement in O. Reg. 359/09 under the *EPA*. Dr. Barclay testified that he could not discern any scientific basis to support this mortality threshold. According to Dr. Reynolds' evidence, it is a reasonable operational threshold.

257 The Tribunal observes that the state of scientific knowledge with respect to bats is very rudimentary at present. The Appellants' concerns with the protective effect of the threshold mortality levels in the *Bat Guidelines* arise because of recorded bat mortality elsewhere. However, the Tribunal was not provided with evidence upon which the Tribunal could rely to make a finding that the threshold of 10 bats/turbine/year will cause serious and irreversible harm to bats in relation to this Project. In fact, both Dr. Reynolds and Dr. Fenton testified that this threshold is protective.

258 The Appellants raise a number of other issues with the mitigation measures, including the following: the question of which turbines would be monitored; the fact that one habitat was not required to be monitored because the property owner had not granted access; lack of inclusion of commitments and mitigation measures in the Bat and EIS Reports; whether operational mitigation measures are likely to be successful; and lack of information about contingency plan measures. The responding parties put forward a number of responses to these issues, noting in particular that the measures referred to in the Bat and EIS Reports are incorporated by reference into the REA by condition J1, and that these requirements are considered mandatory.

259 The Appellants argue that a decision to issue an approval should not be based on the anticipated effectiveness of mitigation measures, but on adequate pre-construction site investigation. They say that the Tribunal should be satisfied that the impacts to bats from the Project are acceptable even without the mitigation measures in place.

260 The Tribunal finds that this recommended approach is not consistent with the wording of the *EPA* test. A "decision to issue an approval" is one taken by the Director. Whether it is "based on adequate pre-construction site investigation which demonstrates acceptable environmental impacts" is not a question for the Tribunal to determine. The Tribunal notes that the mitigation measures are precautionary in nature, and are required in order to address the currently insufficient knowledge about the natural environment to conclusively understand impacts.

261 The Tribunal observes that, in the case of the endangered species bats, condition J15 requires the Approval Holder to promptly report even a single mortality of an endangered bat. In addition, the provisions of s. 23.20 of O. Reg. 242/08 under the *ESA* come into play, which require the preparation of a mitigation plan for approval by the MNR. The mitigation plan must include the steps set out in s. 23.20(11) to minimize the adverse effects on the species from wind turbines. These steps include adjusting the blades of the turbines, changing the speed of wind turbines, and periodically shutting the turbines down at times of highest risk. The Tribunal accepts the evidence before it that these mitigation measures are effective at significantly reducing collision mortality.

Migratory Bats

262 The Tribunal received relatively little in the way of submissions and evidence with respect to migratory bats. There is no requirement in the REA application process to assess bat migratory pathways and stopover areas. The Director says that this is because it is currently not possible to monitor them. The evidence established that migratory bats are the most at risk from wind turbines, and are also more abundant than hibernating bats. The Tribunal notes that they are not listed under the *ESA*. The responding parties' evidence was that the Project area would not be a significant migratory pathway, and that monitoring of other projects in the area indicates that mortality to migratory bats will be low.

263 Based on the evidence before it, the Tribunal finds that the Appellants have not shown that the Project will cause serious and irreversible harm to migratory bats.

264 However, the Tribunal notes that the Appellants have raised some valid questions about the MNR *Bat Guidelines*, including whether the required surveys are adequate to determine the number of bats present in the area, and whether the 120 m setback of the Project area from significant bat habitats is sufficient to prevent bat fatalities. The regulatory requirements in the REA application process are based on an analysis of wildlife habitat and its significance within 120 m of the Project. The Tribunal notes the evidence of Dr. Reynolds that: when assessing bat hibernacula, he looks for hibernacula as far away as 100 miles from a project; when assessing foraging habitat he looks as far away as 10 miles; when assessing maternity roosts he looks as far away as two miles; and when assessing migratory habitat, he looks as far away as 20 miles. The MNR *Bat Guidelines* do not address the assessment of habitats used by migrating bats at all. The Tribunal heard no evidence as to why 120 m was chosen as an appropriate setback for bats.

265 Mr. Ryckman testified that the "habitat-based focus of the NHA ensures protection of significant wildlife habitats, and therefore protects the wildlife that rely on the habitats." The Tribunal notes two assumptions embedded in this statement: that the NHA process identifies all significant wildlife habitats; and that protecting "significant wildlife habitat", as defined by the MNR, is sufficient to protect the wildlife.

266 As set out in *Lewis v. Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 70 (Ont. Environmental Review Trib.) (at para. 16), the Tribunal must assess harm under the test set out in s.145.2.1 of the *EPA*, which is different from the REA approval process undertaken by the Director and the processes or regimes in which the MNR is involved. As the Tribunal stated in *Lewis* (para. 16) "[t]he information generated and decisions made by those agencies may be relevant to, though not determinative of, the question before the Tribunal."

267 The Tribunal found in *Lewis*, at para. 32, that

> the work done at the REA approval stage (including any MNR sign-off regarding natural heritage features) and in other regimes (such as the *ESA* and Bald Eagle Guidelines) may be relevant information to consider under the *EPA* test, but it is not determinative because the statutory test is part of a distinct appellate process, which involves a different test than what is used by other decision-makers in reviewing applications for renewable energy approvals and other regimes.

268 The guidance documents assume that, if no "significant habitat" is present in the project area or within 120 m, there will be minimal impact on a species. At the REA approval stage, the analysis of the Project's impact, therefore, depends entirely on the value of the REA Regulation and MNR's Bat Guidelines in identifying threats to a bat species by identifying only threats to what is deemed significant habitat. The *EPA* test that the Tribunal must apply, on the other hand, does not focus on "significant habitat" but on "plant life", "animal life", and the "natural environment", which is defined as "air, land and water".

269 In exercising its function, then, the Tribunal would be wrong to rely simply on O. Reg. 359/09 and the various MNR guides (including the SWHTG, and the *Bird* and *Bat Guidelines*) in assessing whether a project will cause serious and irreversible harm to plant life, animal life, or the natural environment.

270 This is clear in the present case, with respect to migratory bats. The MNR guidance documents recognize that migratory routes can be significant habitat. However, as there is no guidance in identifying them, they are simply disregarded. It is therefore conceivable that a project could cause serious and irreversible harm to migratory bats without causing serious and irreversible harm to resident local bats, because bat hibernacula and maternity roosting sites are the only two habitat types singled out for protection by the MNR guidance documents. The SWHTG identifies three types of significant habitat for bats, which proponents must identify and evaluate in the course of preparing their NHA. However, the Tribunal heard testimony that there are other elements to significant bat habitat, such as foraging grounds, migratory routes, and commuting areas. These areas are not identified in the NHA and thus not evaluated.

271 The legal test in the *EPA* cannot mean that the Tribunal is unable to find serious and irreversible harm where there has not been adequate research done by the Approval Holder or Director. The fulfillment of the regulatory and guideline requirements provides a baseline amount of information that can begin to inform the Tribunal in its determination of whether the requisite harm will occur, but that is only part of the information base that may be relevant to the statutory test utilized in an appeal. Appellants can bring evidence that the information generated in the REA approval process needs to be supplemented by other information more directly addressed at the appeal test. For example, information on significant wildlife habitat may be only part of the relevant evidence to determine if there will be serious and irreversible harm to animal life. Nevertheless, the onus is on the Appellants to show that the test has been met, regardless of the inadequacies of the information generated in the REA approval process. As noted above, the Tribunal recognizes that there are still many unknowns in the science regarding bats, particularly with respect to migratory bats. The Tribunal urges the MNR to monitor and support ongoing research on bats in order to strengthen the REA regulatory requirements and guidelines that relate to them.

Conclusion on Bats

272 In conclusion, the Tribunal finds that the Appellants have not met the legal test of demonstrating that the Project will cause serious and irreversible harm to plant life, animal life or the natural environment with respect to bats.

e) Harm to Other Animal Life

Roselyn Bovaird

273 Ms. Bovaird testified concerning health effects but also raised concerns about harm to animal life she has observed on her property and in the region, in addition to bats. These include snapping turtles and painted turtles.

Dr. Dale Strickland

274 Dr. Strickland was qualified to give opinion evidence as a wildlife ecologist with expertise in assessing impacts of wind turbines on wildlife, including turtles.

275 Dr. Strickland was called by the Approval Holder to address the concerns raised by Ms. Bovaird with respect to any possible impact of the Project on turtles.

276 Dr. Strickland testified that the Project data suggests there are very few turtles present. In his view there is very little potential turtle habitat in the Project area.

277 The Records Review Report identified that snapping turtles may exist within the Project area, and one was seen during the site investigation. Dr. Strickland testified, however, that there is no significant snapping turtle habitat based on MNR criteria. While snapping turtles are a special concern species under the *ESA*, Dr. Strickland notes that they may be legally harvested in Ontario with a valid fishing license. Few painted turtles were observed in the Project area. They are considered a common and secure species and have a healthy population in Ontario. Dr. Strickland testified there is no significant painted turtle habitat in the Project area according to MNR criteria.

278 According to the documents he reviewed, Dr. Strickland concluded Blanding's turtle is not present in the Project area. He noted that "using appropriate descriptions of habitat, and the information obtained through field investigations, potential habitat for Blanding's turtles in and adjacent on the project location was assessed by Dillon Consulting". Dillon concluded that no significant turtle habitat exists within the Project area or 120 m setback. Dr. Strickland concluded that "it is highly unlikely that Blanding's turtle occurs or will occur in the future in the Project area".

279 Dr. Strickland testified that no roads are planned through wetland areas, and it is very unlikely there would be any biologically significant turtle mortality due to the Project. Dr. Strickland testified that any contact with turtles would likely occur with workers, and therefore a Worker Awareness Program is essential.

Findings on Harm to Other Animal Life

280 The Tribunal finds that the Appellants have adduced no evidence to counter the expert evidence of Dr. Strickland. The Tribunal finds that the Appellants have not shown that the Project will cause serious and irreversible harm to other types of animal life.

281 While some of the Appellants raised concerns about harm to other animal life, such as dairy cattle, and to other unspecified plant life, no evidence was tendered other than that relating to the plant life and animal life already discussed.

Summary of Findings on Issue No. 1, Environment

282 In conclusion, the Tribunal finds that the Appellants have not established that engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment.

Issue 2: Whether engaging in the Project in accordance with the REA will cause serious harm to human health

283 In the discussion of Issues 2 and 3, the term "Appellants" includes all of the Appellants, including Mr. Sanford.

Overview

284 The test under s. 145.2.1(2) (a) of the *EPA*, is whether engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health (the "Health Test"). Pursuant to conditions imposed in the REA, noise generated by the Project cannot exceed 40 dbA measured at the exterior of buildings which are non-participating receptors as this term is defined in the regulations. Residential homes are an example of such non-participating receptors. The setback distance from Project components is 550 m. Section 145.2.1(3) of the *EPA* states that the onus of proving that such serious harm will occur rests with the Appellants. Therefore, they must demonstrate that serious harm to human health will occur in circumstances where these conditions have been met. If the evidence suggests that serious harm will occur only in circumstances where noise levels exceed 40 dbA at a non-participating receptor and/or at a distance less than 550 m from a receptor, then the Health Test will not be satisfied.

285 The Appellants were represented in two groups. CORE, D&C Vander Zaag Farms Ltd., Ms. Bovaird, Mr. Maguire, Dr. Crysdale, and Ms. Kurtin (collectively referenced as the "CORE Appellants"), and Mr. Sanford. However, these two groups relied on the evidence adduced by each other, and filed joint written submissions regarding the Health Test in this proceeding.

286 The Tribunal heard extensive evidence on this issue, and, as well, extensive written submissions from the parties numbering several hundred pages. While the Tribunal has reviewed and considered the evidence and submissions in detail, it is not feasible to include a detailed synopsis of all of the evidence or the submissions within a decision of reasonable length.

287 During the course of the hearing, the parties made several references to the Tribunal's decision in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*. In this regard, the Tribunal notes that many of the same witnesses testified in both this proceeding and *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, and, particularly with respect to the same or similar issues that have been raised in both proceedings. The Appellants dispute an assertion made by the Director that the case presented by the Appellants is, in essence, a duplicate of the case presented in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*. The Tribunal finds that, although the evidence, issues, and submissions are very similar, this case is not a duplicate of *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*. The Tribunal has undertaken its own deliberation of the evidence and submissions of parties in this proceeding, and has independently arrived at its own conclusions respecting the issues raised. However, as the Tribunal's findings are similar to those in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, the Tribunal has structured its analysis and discussion in a manner similar to the approach adopted by the Tribunal in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*. In this regard, the Tribunal accepts that its analysis of Issue 2 should be addressed under three sub-issues:

- 2A. Whether the Appellants have established a causal link between wind turbines and human health effects where there is a 550m setback and 40 dBA noise limit;
- 2B. Whether engaging in this Project in accordance with the REA will cause serious harm to human health; and
- 2C. Whether Sarah Laurie should be qualified as an expert to give opinion evidence.

288 In this proceeding, the Appellants approached the test outlined in s. 145.2.1(2) (a) of the *EPA* as building on the groundwork laid by *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* and *Erickson v. Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No. 29 (Ont. Environmental Review Trib.) ("*Erickson*").

289 As stated in the Appellants' joint submissions on the Health Test:

> 187. The following findings were made in *Erickson*, on a much more fulsome record with far more expert evidence available:
>
> > **The Known Effects of IWTs Are Serious**: Para. 640 - In this case, there is apparent agreement that many of the medical conditions discussed by the witnesses are serious (the debate on those is, therefore, confined to whether they will result from the Project).

> **Mechanism Is Not Required**: Para. 819 - For the purposes of this Decision, the Tribunal finds that the Appellants can attempt to satisfy the section 145.2.1(2) test even if there is uncertainty about the specific mechanism that causes the alleged health effects.
>
> **IWTs Can Cause Harm to Human Health**: Para. 872 - While the Appellants were not successful in their appeals, the Tribunal notes that their involvement and that of the Respondents, has served to advance the state of the debate about wind turbines and human health. This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health?
>
> [Emphasis added]

188. The Appellants submit that the Tribunal's decision in the within proceedings should be reflective of the Erickson findings. These are fundamental issues that were fully considered and determined in Erickson. For many reasons, they should not be relitigated in this or future ERT hearings. The time and costs alone of revisiting each of these issues would be extremely onerous and unmanageable. *Erickson* allows the process to move forward, to look at the real question that must be determined in each subsequent case, which the Tribunal clearly articulated above.

. . .

290 The evidence on causation, as described in *Erickson* and subsequent Tribunal decisions, can be described as falling within one of two general categories. The first is described as a direct effect such as hearing loss. The second category is described as an indirect effect. This refers to health effects alleged to result from annoyance, stress and sleep disturbance associated with living in proximity to a wind turbine or related components.

291 Under either of these two categories, there are two bases on which the Appellants seek to establish that engaging in the Project in accordance with the REA will cause serious harm to human health. The first basis is to show that current experience with wind farm projects, both in Ontario, and elsewhere in the world, demonstrates that it is sufficiently predictable that some or all persons living within the vicinity of wind project components (wind turbine(s) being the prominent component) will experience serious health effects. This may be generally described as a generic approach, as it does not seek to establish causation with respect to specific identified individuals. To support their position in this regard the Appellants adduced evidence regarding the incidence of annoyance, which they assert will be caused by wind turbine projects, as well as evidence that environmental noise and annoyance cause stress and sleep disturbance. The Appellants also adduced evidence of persons living in the vicinity of existing wind turbine projects, both in Ontario and elsewhere in the world, who report adverse health effects attributed to their exposure to these wind turbine projects.

292 The second basis on which the Appellants seek to establish that the Health Test is met is to show that specific individuals have suffered serious harm to their health as a result of living in proximity to wind project components. In this case, the Appellants have adduced evidence of persons living in the vicinity of existing wind turbine projects in Ontario who report adverse health effects which they assert are caused by these wind turbine projects ("the post-turbine witnesses").

293 In overview the Appellants assert that they have established causation on both bases. Based on the generic approach, they maintain that it is predictable that a certain percentage of the persons living in proximity to the Project will suffer adverse health effects. Based on the approach respecting the experience of specific individuals, they maintain that the evidence of the post-turbine witnesses establishes that wind turbines do cause harm to human health, and, more specifically, that wind turbines exacerbate certain types of pre-existing medical conditions. The Appellants then argue that this evidence will establish causation with respect to this Project. In this regard, they point to evidence they have adduced respecting individuals who will live in the vicinity of wind turbines in the Project (the "pre-turbine witnesses"), asserting that each of these individuals currently suffers from medical conditions that will be exacerbated by exposure to wind turbines. The Appellants maintain that the evidence of

these pre-turbine witnesses "is highly relevant to establish a causal link between the proposed Project and the more likely than not probable effect on those living nearby."

294 In summary, it is the Appellants' position that this evidence, considered in the context of the *Erickson* and *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* decisions, demonstrates that engaging in the project in accordance with the REA will cause serious harm to human health.

Issue 2A: Whether the Appellants have established a causal link between wind turbines and human health effects where there is a 550m setback and 40 dBA noise limit.

295 Paragraph 88 of the Appellants' written submissions states: "The causal links between the risk of harm and IWTs are amply established in the evidence." Implicitly, their argument is that this risk, if established, will be sufficient to meet the Health Test in this case. As discussed below, the Tribunal finds that the Appellants have not established this causal link. Consequently, it is unnecessary for the Tribunal to address whether such causal link, if established, would be sufficient to satisfy the Health Test as it applies to the Project under appeal in this proceeding.

296 The Appellants seek to establish the causal link between wind turbines and human health based on the following evidence:

- The evidence of the "post-turbine witnesses", who each report that they have experienced adverse health effects. They assert their conviction that these symptoms are caused by wind turbines.

- The medical opinion evidence of Dr. Robert McMurtry which supports the views of the post-turbine witnesses. Dr. McMurtry also provides his own opinion respecting the causation issue.

- The evidence of Ms. Laurie regarding her work with persons in Australia living in proximity to industrial wind projects, who have also reported that they experience some of the health effects listed above.

- The evidence of Brian Howe respecting annoyance.

297 The Tribunal has structured its analysis and findings in two sections: the Appellants' case based on the evidence of the post-turbine witnesses; and the Appellants' case based on the evidence of Ms. Laurie, Dr. McMurtry, and Mr. Howe.

Appellants' Case Based On The Evidence Of The Post-Turbine Witnesses

Appellants' Evidence

298 The Appellants' submissions summarize the evidence of the post-turbine witnesses, stating that they gave testimony:

> ... regarding their debilitating and enduring experiences with sleep disturbance, vertigo, nausea, tinnitus, heart palpitations, memory and concentration loss, mood swings, chronic fatigue, breathing difficulty, headaches/migraines, and even suicidal thoughts. Those with pre-existing medical conditions such as back pain, chronic fatigue, fibromyalgia, and high blood pressure, spoke of how these conditions worsened with the turbines becoming functional.
>
> They also testified that when away from their homes, they gained respite from their various symptoms.

299 The Appellants characterize these health effects as falling within the category of indirect harm. As stated at paras. 72 and 73 of the Appellants' submissions:

> 72. There is therefore undisputed evidence before this Tribunal that at sound levels at or below those approved for the operation of this Project, 6-20% of people will be very annoyed. There is a causal chain between annoyance, stress, sleep disturbance, and adverse health effects.
>
> 73. This causal chain is evidenced by the adverse health effects suffered by the post-turbine witnesses who testified in this case...

300 All of the post-turbine witnesses provided a witness information form which essentially sets out their responses to a list of questions regarding their medical history, self-reported health symptoms, and other personal information. They each provided medical records that they were able to obtain in time to present at the hearing. Some of these medical records included documents setting out medical opinions respecting specific conditions. None of these witnesses provided a medical opinion which attributed exposure to wind project components as the cause of their complaints. Dr. McMurtry has expressed an opinion in this regard. The Tribunal addresses his evidence below. Despite any pre-existing medical condition these witnesses may have, they each testified that, after the wind turbines became operational in their environs, they have experienced adverse health effects which they had not experienced before. They state their views that exposure to the wind farm project in the vicinity of their residences has caused these adverse health effects. They maintain that they had no negative perceptions or expectations respecting the impacts of wind turbine projects prior to experiencing adverse health effects.

301 They cite one or both of the following reasons to support their assertion regarding causality:

- The adverse health effects they have experienced manifested when the wind farm project commenced operation, or shortly thereafter, and they have been unable to find any other explanation for their condition; and

- They have gained respite from their various symptoms when they leave their homes, more specifically, when they are no longer in the vicinity of the wind farm for a period of time (where symptom relief is either immediate or gradual). Their symptoms resume upon returning to their homes either immediately or shortly thereafter.

302 Inherent in the views expressed by the post-turbine witnesses are two major premises: (i) for the post-turbine witnesses with pre-existing conditions, the adverse health effects they experience are in fact, different from the health effects associated with their pre-existing conditions, or potential side effects from the medication they are currently taking; and (ii) their inability to find another cause for their symptoms, considered together with the relief they experience when they remove themselves from exposure, is, in their view, conclusive evidence that their adverse health effects are caused by wind turbines. Both these premises are challenged by witnesses called by the Director and the Approval Holder.

Respondents' Evidence

303 The Director and the Approval Holder called the following witnesses:

- Dr. Robert McCunney, who was qualified as medical doctor specializing in occupational and environmental medicine with particular expertise in health implication of noise exposure;

- Dr. Cornelia Baines, who was qualified as an epidemiologist with special expertise in design measurement and evaluation of research studies.

- Dr. Kieran Moore, who was qualified as a physician with expertise in family and emergency medicine, public health, and preventative medicine.

304 For ease of reference, the Tribunal collectively describes these witnesses as the respondents' health experts. Each of them has testified in *Erickson*, *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, or both. The Tribunal's decisions in these cases already provide detailed summaries of their evidence. Much of the evidence they gave in those cases has been repeated in this proceeding. Therefore, the Tribunal does not find it necessary to provide a detailed synopsis of all of their evidence in this decision.

305 In summary, the evidence of these witnesses is that the reliable determination of causality with respect to adverse health effects is a very complex exercise.

306 In addressing both premises, they note that many of the symptoms reported by the post-turbine witnesses are known to commonly occur in the general population and have numerous causes. Considerations related to medical causality assessment are discussed in paras. 75 to 82 of Dr. McCunney's witness statement:

Causality Assessment

75. The information in the Information Forms is insufficient to conduct formal individual causality assessments, most notably because of limited diagnostic work ups and the absence of noise measurements. The collection of statements is also not appropriate for a group analysis, in part, since they represent different sites and different times of exposure that may not be representative of each particular site.

76. A proper causality assessment includes a thorough review of symptoms and past medical history with appropriate diagnostic studies. The determination of causality is an important exercise in health care, but it is customarily only undertaken after diagnosis and treatment. A causality assessment should also consist of a thorough review of noise measurements conducted in the vicinity of the home along with a comparison of the symptoms, diagnosis and noise levels in light of what has been published in the peer reviewed scientific literature.

77. As noted above, the symptoms reported in the Information Forms are common in the general population and have numerous causes. ... Other groups of symptoms, such as fatigue, loss of energy and poor concentration, reported in the Information Forms strongly suggest depression as the appropriate diagnosis.

78. Sleep disturbance, one of the symptoms described in the Information Forms, can be due to many factors ranging from stress and medications to potential serious medical diagnoses such as sleep apnea. Vertigo, another symptom reported in the forms, has numerous causes; it must be appropriately diagnosed before attributing causal links to any potential environmental concern. ...

79. It is important to distinguish the medical activities necessary in (1) forming a diagnosis of symptoms and (2) assessing the cause of the symptoms. A causality assessment customarily begins with a thorough medical evaluation that leads to a diagnosis. The cause can be determined thereafter based on consideration of the scientific literature and alternative explanations.

80. Another key aspect of conducting a causality assessment is the determination of biological plausibility; in essence, does the proposed link make sense from a biological perspective? ... Since noise is the potential hazard associated with the operation of a wind turbine, it is not appropriate science to link these conditions to wind turbines if the conditions have not been definitively linked with noise exposure in other settings. Furthermore, many of the health conditions reported originated before the installation of wind turbines, thus making any causal connection with wind turbines implausible.

81. In any causality assessment, it is necessary to establish a diagnosis based on accepted medical criteria. ... Based on the information presented, it is not possible to determine whether the asthma reported in the symptom statements was made according to widely accepted medical criteria.

. . .

82. The symptoms and conditions described in the Information Forms need to be properly evaluated by a physician in the context of appropriate diagnostic studies before one could reliably form specific diagnoses or draw causal connections between the symptoms and living in the vicinity of a wind turbine. Forming a diagnosis is the first step in attempting to draw causal inferences between exposure to any type of hazard and health related symptoms from the exposure.

83. The Information Forms represent the self-reporting of individuals from various sites in Ontario who live in the vicinity of wind turbines. They do not represent a defined group of people, who could be evaluated in any systematic fashion, such as can be done in epidemiological studies. ...

307 The above comments are made in specific reference to the witness information forms. The Tribunal notes that the medical records and oral testimony of the post-turbine witnesses as well as the information provided in telephone interviews conducted by Dr. McMurtry, are, for the most part, consistent with the information provided in these witness information forms.

It should be noted that the information provided by the post-turbine witnesses in telephone interviews was not admitted into evidence by the Tribunal, as noted below.

308 This evidence underscores that determining the cause of an adverse health effect requires comprehensive investigation in order to accurately ascertain symptom etiology. In this regard, Dr. McCunney also noted that information regarding the level of noise experienced by the post-turbine witnesses is absent. He explained that an exposure assessment is critical to any evaluation of causality in order to assess how the specific exposure compares with the dose-response results described in applicable scientific literature.

309 Regarding the premise that a causal connection is demonstrated by the fact the post-turbine witnesses experience relief from their symptoms when they remove themselves from exposure to wind turbines, Dr. Moore also states in his witness statement at para. 106:

> 106. Since multiple witnesses have stated they have depression, this can be associated with somatoform disorders, which are characterized by physical symptoms that have a psychological, as opposed to a physical, cause. Also, conversion is a common disorder where stress and anxiety are unconsciously expressed as physical symptoms, such as sensation of tingling or discomfort, fatigue, abdominal pain, headaches, back or neck pain, weakness, loss of balance, and hearing and visual abnormalities. This could explain some of the symptoms that individuals report when returning to their homes, which is part of the syndrome discussed by Dr. McMurtry.

310 Dr. Moore also testified that it is understandable that if someone's symptoms started when a wind turbine project commenced, they could believe that this has caused their symptoms. However, he points out that a temporal association between these two events does not establish causation. In referring to sleep disturbance, he states at paras. 22 and 23 of his witness statement:

> 22. Hence, sleep disturbance is a very common condition in the general older adult population and especially in those with underlying medical conditions. Sleep disturbance must be put in context and investigated as to its etiology. Sleep disturbances increase with age.
>
> 23. By extrapolation of the population prevalence data of insomnia or sleep disturbance, approximately one third of all adults exposed to wind turbines will experience insomnia. A significant portion of these, due to chance alone, could be temporally associated with the commencement of a wind turbine development. If patients have any chronic medical condition that causes pain, such as osteoarthiritis the above study suggests that up to seventy percent could report poor sleep.

311 The respondents' health experts note that, as associations between events can occur by chance, an epidemiological approach to assessment of causation is required. They note that the most widely accepted criteria, referred to as the Bradford Hill criteria, provide a reasonable framework to be applied when determining causal associations. These criteria include strength of association, consistency, specificity, temporality, biological gradient, plausibility, coherence, experimental evidence, and analogy. As their evidence in applying these criteria to this case is both detailed and lengthy, the Tribunal does not include a synopsis of this evidence in this decision. In summary, the conclusion drawn by the respondents' health experts is that, in applying these criteria, causation cannot be established based on the evidence adduced by the Appellants.

Findings

312 The issue to be addressed by the Tribunal in respect of the post-turbine witnesses is whether they have experienced adverse health effects that have been caused by exposure to industrial wind turbines outside of the 550m regulated setback and under 40 dBA noise limit. For the following reasons, as well as the Tribunal's analysis and findings in respect of the other Appellants' health witnesses (discussed below), the Tribunal finds that the Appellants have not done so.

313 The Tribunal does not question the sincerity of the post-turbine witnesses in giving their evidence. They acknowledge that the identification of their adverse health effects is through their own self-diagnosis. They also acknowledge that they have

reached personal conclusions regarding the issue of causation. Several of them assert that they have had to do so, because they maintain that medical professionals either have no knowledge regarding the effects of wind turbines, or are skeptical or dismissive of the possibility that wind turbines can negatively affect human health. Nevertheless, none of the post-turbine witnesses adduced any medical opinion from their health practitioners which confirms that they have experienced symptoms caused by wind turbines. The Tribunal does not question that the post-turbine witnesses have experienced the symptoms they have described. After all, only they can say how they feel. However, in order to arrive at a reliable conclusion respecting causation, personal assessments which do not consider the full range of potential causes of these symptoms, are incomplete. Furthermore, the exercise of arriving at a diagnosis requires a level of education, training and experience, which none of the post-turbine witnesses possess. In this regard, the Tribunal notes that in *Kawartha Dairy*, the Tribunal found that confirmation of medical conditions requires the diagnostic skills of a qualified health professional. This conclusion was accepted in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, and the Tribunal accepts that it applies in the circumstances of this case. As discussed below, the Tribunal also does not find that Dr. McMurtry's opinion about each of the post-turbine witnesses establishes they have experienced adverse health effects caused by wind turbines.

314 The evidence adduced must support a conclusion that the post-turbine witnesses have experienced serious harm that is caused by wind turbines or related components. The Tribunal accepts that causality assessment is a complex exercise. The Tribunal finds that the evidence adduced by Dr. McCunney, Dr. Baines, and Dr. Moore respecting causality assessment has not been seriously challenged by the Appellants. Therefore, the Tribunal accepts their evidence in this regard. Their evidence is that there is a level of uncertainty regarding the conclusions reached by the post-turbine witnesses in several areas including: (i) failure to obtain qualified medical investigation to rule out other potential causes of their symptoms, before arriving at the conclusion that their symptoms must by default, be caused by exposure to wind turbines or related components; (ii) failure to consider whether wind turbine noise is a plausible cause of their symptoms by considering existing known effects of noise exposure; and (iii) failure to consider the noise exposure levels experienced by these individuals. As a result, the Tribunal finds that the evidence adduced by the post-turbine witnesses is insufficient to support a conclusion that the post-turbine witnesses have experienced serious harm to their health caused by wind project components.

315 Even if the Tribunal accepted that causation is established, it is unclear whether this evidence could be extrapolated to apply to the Project under appeal in this proceeding. In this regard, the Tribunal has noted that the evidence adduced does not include confirmation of the noise exposure levels experienced by the post-turbine witnesses. As such, the Tribunal finds that it is has not been established that the adverse effects they have described, if attributable to industrial wind turbines, are caused by noise levels at or below 40 dbA.

316 Finally the Tribunal notes that, although causation has not been established with respect to these individuals, this does not preclude their evidence from being considered as data in support of the Appellants' position that current evidence demonstrates that it is sufficiently predictable that some or all persons living within the vicinity of wind project components (wind turbine(s) being the prominent component) will experience serious health effects. This is considered below in the Tribunal's analysis respecting the evidence of Dr. McMurtry, Ms. Laurie, and Mr. Howe.

Appellants' Case Based On The Evidence of Ms. Laurie, Dr. McMurtry, and Mr. Howe

Appellants' Evidence

317 As is discussed below, the Tribunal did not grant the Appellants' request that Ms. Laurie be qualified to given opinion evidence. Dr. McMurtry is a practicing medical doctor who was qualified to give opinion evidence as a physician and surgeon with experience in the delivery of health care, health care policy, and health policy. Mr. Howe was qualified to give opinion evidence as an acoustical engineer with specialized expertise in sound from, and the effects of sound from, wind turbines.

Ms. Laurie

318 Ms. Laurie is a non-practicing physician, who was called by the Appellant, Mr. Sanford, to give evidence in this proceeding. He requested that she be qualified to give opinion evidence, a request that was supported by the CORE Appellants,

and opposed by the Director and Approval Holder. In an oral ruling, the Tribunal refused Mr. Sanford's request, indicating that its written reasons for this disposition would follow. As the Tribunal's written reasons for this disposition are lengthy they have been addressed separately under Issue 2C below.

319 Ms. Laurie's experience respecting health impacts of industrial wind turbines has been gained primarily from her work for an organization known as the Waubra Foundation. In summary, Ms. Laurie testified that she has not approached communities to conduct surveys, and that she has not conducted formal structured research. She states that she conducts an ongoing survey, where, to date, she has spoken with approximately 130 people in Australia who live in the vicinity of industrial wind turbine projects. She indicated that these people have identified themselves to her, by contacting her directly, or indirectly by contacting the Waubra Foundation. She explained that these persons describe their symptoms to her and request information. She testified that the symptoms reported to her are consistent with the adverse health effects identified as being associated with industrial wind turbines by other researchers, including Dr. Geoff Leventhall, Dr. Nina Pierpont, and Dr. McMurtry. She provided a number of published articles and papers, and copies of written statements to agencies in Australia and elsewhere.

Dr. McMurtry

320 Dr. McMurtry's evidence in this proceeding is, in part, similar to the evidence he gave in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*. As noted at para. 74 of that decision:

> 74. Although Dr. McMurtry's witness statement from the Erickson proceeding was referenced in his current witness statement and included in his book of documents, the focus of Dr. McMurtry's evidence in this proceeding centred on his proposed case definition as described in his article "*Toward a Case Definition of Adverse Health Effects in the Environs of Industrial Wind Turbines: Facilitating a Clinical Diagnosis*", which was published in the peer-reviewed journal Bulletin of Science, Technology and Society, 2011 31: 316.

321 For purposes of this decision, this is referenced as the Case Definition.

322 Since giving his evidence in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, Dr. McMurtry testified that he has prepared an update to the Case Definition. A copy of the Case Definition and this update are attached to this Decision as Appendix B. Dr. McMurtry testified that the updated Case Definition is intended to be used by primary health care physicians to diagnose whether a patient who lives in the environs of industrial wind turbines is experiencing adverse health effects. His update confirms that the deployment of the diagnostic criteria in the Case Definition "requires use by [a] health care practitioner licensed to take a history and make diagnoses." His update also states that a 'probable' diagnosis "indicates that AHE/IWT [adverse health effects in the environs of industrial wind turbines] more likely than not are the cause of the complaints. AHE/IWT is the working diagnosis. Other diagnostic possibilities continue to exist and should be considered in the differential diagnoses."

323 As noted in the Case Definition there are three categories of diagnosis: possible, probable, and confirmed. The update indicates the following:

- "possible" means that a diagnosis of such adverse effects is to be considered a potential diagnosis;
- "probable" indicates that it is more likely than not that living in the environs of industrial wind turbines is the cause of the complaints. This becomes the physician's working diagnosis. Other diagnostic possibilities continue to exist and should be considered in the differential diagnosis;
- "confirmed" indicates other diagnosis is very unlikely, i.e., less than one chance in 20.

324 Regarding a "confirmed" diagnosis, Dr. McMurtry explained that other diagnoses should be ruled out. As stated in the Case Definition, this is the responsibility of the licenced clinician.

325 In his witness statement, Dr. McMurtry lists several reasons supporting his proposed diagnosis including:

• He notes that there are reports of adverse health effects in all countries where industrial wind turbines are erected;

• There is convergent validity of reports of adverse health effects in different cultures and languages;

• Infrasound and low frequency noise is a plausible mechanism for adverse health effects;

• There is no medical evidence to support set back distances intended to protect individuals from experiencing adverse health effects;

• There is a common finding that persons experiencing adverse health effects prefer being away from their homes for restoration and in some cases even abandon their home, and this is unique to persons in the environs of industrial wind turbines who experience adverse health effects;

• A dose-response relationship has been confirmed in many studies;

• Dr. Leventhall, an industry expert, acknowledges that "always a few" experience adverse health effects, and a "non-trivial percentage" will be highly annoyed; and

• The working diagnosis accords with principles of evidence-based medicine, which is defined to be the conscientious, explicit and judicious use of current best evidence in making decisions about the care of individual patients. The practice of evidence based medicine means integrating individual clinical expertise with the best available external clinical evidence from systematic research.

326 Respecting the post-turbine witnesses, Dr. McMurtry testified that he reviewed their witness information forms and the medical records that they have provided. Dr. McMurtry reported information that he obtained from these witnesses by conducting a telephone interview with each of them. At the hearing, each of these witnesses testified before Dr. McMurtry did. However, none of the witnesses disclosed that they had participated in an interview with Dr. McMurtry. Consequently, the Tribunal did not admit Dr. McMurtry's evidence obtained from these interviews. In making this finding, the Tribunal noted that the best evidence regarding their medical condition is the testimony they each provided in this hearing. However, the Tribunal further notes that there was no substantive inconsistency between their oral evidence and what was reported by Dr. McMurtry.

327 Dr. McMurtry applies the diagnostic criteria as set out in the Case Definition, and for each witness states his opinion that they satisfy the 'probable' criterion for experiencing adverse health effects from living in the environs of industrial wind turbines.

328 Dr. McMurtry also provided his analysis of the Bradford Hill criteria, disagreeing with the conclusion of the respondent health experts. His evidence in this regard is summarized at para. 82 of the Appellants' submissions:

82. In his reply affidavit, Dr. McMurtry criticized Dr. Moore's comments regarding criteria for causation, by stating in is affidavit, that these have already been met in relation to IWTs through the Bradford Hill, Criteria for Causation.

(a) Strength: A small association does not mean that there is not a causal effect, though the larger the association, the more likely that it is causal.

(b) Consistency: Consistent findings observed by different persons in different places with different samples strengthens the likelihood of an effect.

(c) Specificity: Causation is likely if a very specific population at a specific site and disease with no other likely explanation. The more specific an association between a factor and an effect is, the bigger the probability of a causal relationship.

(d) Temporality: The effect has to occur after the cause (and if there is an expected delay between the cause and expected effect, then the effect must occur after that delay.

(e) Biological gradient: Greater exposure should generally lead to greater incidence of the effect. However, in some cases, the mere presence of the factor can trigger the effect. In other cases, an inverse proportion is observed: greater exposure leads to lower incidence.

(f) Plausibility: A plausible mechanism between cause and effect is helpful (but Hill noted that knowledge of the mechanism is limited by current knowledge).

(g) Coherence: Coherence between epidemiologist and laboratory findings increases the likelihood of an effect.

(h) Experiment: "Occasionally it is possible to appeal to experimental evidence".

(i) Analogy: The effect of similar factors may be considered. Unperceived stimuli of smell, touch, vision and taste are able to harm human health so there is no reason to believe that noise below the hearing threshold is harmless.

Mr. Howe

329 Mr. Howe co-authored a report for the MOE, dated December 2010, entitled *Low Frequency Noise and Infrasound Associated with Wind Turbine Generation Systems, A Literature Review* (the "MOE Review Report").

330 Mr. Howe testified that this report is a review of existing research papers on the topic, rather than being primary research. He confirmed that the statistics regarding the percentage of people very annoyed, and the decibel level of noise impacts, come from published studies.

331 Mr. Howe testified that the relationship between the sound levels and annoyance is not clear; there are a number of non-acoustic factors that influence a reaction of annoyance, an important one being attitude toward the noise source. He testified that, if you do not like a source, you are more likely to find the sound from it to be annoying. In this regard, Mr. Howe agreed with the statement from the MOE Review Report at page 19, heading 3.10:

> The wide availability of popular media items describing fears of direct health effects from wind turbine noise and infrasonic noise specifically may result in fears of the wind turbines in some people leading to increased annoyance with the sound. This may be exacerbated by certain moderating factors (Leventhall, 2004; Job, 1999; Guski, 1999; Fields, 1993), including "anxiety about the source" and "suspicion of those who control the sources".

332 Regarding the MOE Review Report, Mr. Howe's witness statement, at paras. 9 and 21, states:

> 9. The report concluded that, while the overall magnitude of the sound pressure levels, including infrasound, produced by wind turbine generators at the setback distances required in Ontario does not represent a direct health risk, annoyance will likely be experienced by some persons.
>
> 21. Based on research completed by HGC Engineering for the Ontario Ministry of the Environment, at the sound levels experienced at the receptor distances noted for this project, the audible sound from wind turbines is expected to result in a small percentage of persons being very annoyed. The largest and most comprehensive studies completed to date suggest that at noise impacts between 35 and 40 dBA, 6% will be very annoyed, while at noise impacts between 40 and 45 dBA, up to 20% of persons will be very annoyed. As with sounds from other sources, research has shown that annoyance associated with sound from wind turbines can be expected to contribute to stress-related health impacts in some persons. These finding have been supported by papers and general consensus of the Wind Turbine Noise 2011 conference held in Rome, http://www.windturbinenoise2011.org/ and a comprehensive review by the Oregon Health Authority, 2013. The relationship between the sound level and the prevalence of annoyance is complicated, and is often influenced by other non-acoustic factors. Given the number of receptors expected to be impacted at a sound level between 35 and 40 dBA, it would be statistically invalid to predict the exact number of persons expected to be very annoyed, other than noting that those predisposed against the project are more likely to be annoyed.

Respondents' Evidence

Dr. McCunney

333 The evidence of Dr. McCunney is summarized in the submissions of the Approval Holder and the Director.

334 On the issue of annoyance, the Approval Holder's submission states:

> With respect to annoyance, Dr. McCunney testified that annoyance is a subjective phenomenon that is usually self-reported. It is not considered a health effect. Dr. McCunney noted that he could not find "annoyance" in any medical dictionary and that annoyance is not part of the new International Classification of Diseases (10th edition). He stated that claims that "annoyance" is an adverse health effect reflect individual opinions rather than the consensus of the international medical community. He specifically noted that annoyance associated with wind turbines has been found to be primarily related to attitudes about the visual impact of wind turbines and financial interests, as reflected in the various studies referred to by the appellants' noise expert, Brian Howe. Dr. McCunney further explained that, given its subjective nature, annoyance in a given population is difficult to predict, and that even the largest studies of annoyance associated with wind farms (the Pedersen studies based on self-reports) are considered limited data sets by epidemiological standards, such that any attempt to apply those data sets to another population would be fraught with uncertainty and potential errors.

and the Director's submission states:

> Dr. McCunney categorically disagreed with the proposition that some people will always exhibit effects, and provided examples where this was not the case. He referred to the recent study by Dr. Simon Chapman which showed large spatio-temporal variations in complaints about noise and health from wind farms. Chapman found that 33 of 51 wind farms in Australia had never been subject to noise or health complaints. Dr. McCunney preferred the evidence in this study to the less current opinion from Dr. Leventhall, and questioned whether Dr. Leventhall would have the same view as he previously expressed, given this new information.

335 Respecting Dr. McMurtry's updated Case Definition, the Approval Holder's submission states:

> 108. Dr. McCunney was also critical of Dr. McMurtry's proposed case definition, concluding that it was devoid of scientific validity and of no value in assessing causal links between health effects and wind turbines. His specific criticisms included:
>
> (a) the flawed process by which it was developed and proposed for use (proposed by one individual, through a process that did not follow international standards for the development of consensus statements);
>
> (b) its lack of validation by any medical association (Dr. McMurtry himself admits that his proposed case definition has not been validated);
>
> (c) its lack of any scientific support for the exposure metric (i.e., living within 5 km of a wind turbine);
>
> (d) its lack of precision, which results in application difficulties (i.e. 3264 options for meeting second and third order criteria); and
>
> (e) its lack of any peer-reviewed citations to support its conclusions.

336 Respecting the effects of noise exposure, the Approval Holder's submission states:

> 102. ...Dr. McCunney conducted a comprehensive literature search to review scientific literature, government reports and other articles related to potential health implications of living in the vicinity of wind turbines that have been published since the expert panel report was released in 2009. He testified that he has not identified any scientific support for a direct causal link between chronic noise exposure of less than 40 dBA and adverse health effects. Dr. McCunney highlighted field studies in the vicinity of operating wind farms in many different countries. These studies have demonstrated that infrasound

and low-frequency sound from wind turbines are not at levels that are harmful to human health. He also highlighted human experimental studies conducted by NASA that found no adverse health effects of infrasound levels several orders of magnitude higher than those measured in the vicinity of wind farms.

337 Respecting the Appellants' post-turbine witness evidence, the Approval Holder's submission states:

103. With respect to the post-turbine witnesses, Dr. McCunney concluded that their evidence does not establish a causal link between health effects and living in the vicinity of wind turbines. He explained that to assess potential causal links between exposure to a hazard and an illness, the first step is to confirm the diagnosis of the illness or disease. Here, however, the information in respect of the post-turbine witnesses is too limited, according to Dr. McCunney, to make a definitive diagnosis of their symptoms based on contemporary medical standards. Dr. McCunney noted, in particular, the absence of appropriate diagnostic tests and results (such as sleep studies) in the medical records that had been provided by the post-turbine witnesses. He also noted that there were a number of inconsistencies between the self-reports of the witnesses and their medical records, such as pre-existing conditions and side-effects of medications that might explain the symptoms experienced by the witnesses after the installation of wind turbines.

104. Critical exposure information - the level of noise experienced by the post-turbine witnesses - was also absent. As Dr. McCunney explained, an exposure assessment is critical to any evaluation of causality in order to assess how the specific exposure compares with the dose-response results described in applicable scientific literature.

105. Dr. McCunney further noted that many of the symptoms reported by the post-turbine witnesses lack biological plausibility, based on his experience in evaluating health effects from high noise level exposures in industrial environments. Dr. McCunney explained that "biological implausibility" is one of the fundamental principles of occupational and environmental medicine: as he put it, "if there is no link at high levels of exposure to a hazard ... it is virtually implausible that low levels would cause an effect that is not noted at high levels." Dr. McCunney further noted that in his 30 years of experience in occupational and environmental medicine, he has never encountered so many symptoms attributable to a single hazard.

338 Dr. McCunney's opinion respecting the pre-turbine witnesses was that there was no reason to conclude that they will be affected by the operation of the Project, having regard to the medical information they provided and the scientific literature.

Dr. Baines

339 At para. 14 of Dr. Baines' witness statement, she states:

14. With respect to demonstrating causation, six criteria are applicable to wind turbines:

a. The first is an appropriate temporal relationship between cause and effect, namely that the cause precedes the effect. It is claimed the symptoms begin after exposure to wind turbines. However when data are gathered in a biased fashion (sampling bias) together with the potential for suggestibility bias (filling out a questionnaire labelled adverse health effects of IWTs, reading media reports of illness due to IWTs, concern about loss of property values) may all lead to heightened awareness of symptoms previously ignored.

b. The second criterion is a strong association between the cause and the effect. Unfortunately, the adverse effects reported are also observed in the absence of wind turbines and only a minority of those exposed experience symptoms.

c. The third criterion is specificity. Does the cause produce an effect not seen in other situations? Clearly this criterion is not fulfilled.

d. The fourth criterion is constancy, the effect reliably follows the cause, and we know that not all people exposed to IWTs experience the adverse effects claimed. As well, people not exposed experience the same symptoms reported by plaintiffs.

> e. A fifth criterion is a dose-response effect meaning that the more intense the exposure, the more severe the effect. This has never been persuasively demonstrated in the anti-turbine literature.
>
> f. The sixth criterion is biological plausibility. It is generally accepted that a wide range of symptoms involving many body systems will not be due to a single cause or, in the case of IWTs, arise from the visual and sound consequences of their presence. With the wide range of reported symptoms, virtually all of which are experienced widely in the general population, the case for causality due to IWTs is weak.

Findings

Dr. McMurtry's qualification as an expert witness

340 The Director and the Approval Holder opposed the Appellants' request that Dr. McMurtry be qualified to give opinion evidence as a physician and surgeon with expertise in the delivery of health care, health care policy and health policy. Dr. McMurtry testified in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, where a request for the same qualification was also opposed. In APPEC, at paras. 72 and 73, the Tribunal provided a summary of the submissions made in respect of this request for qualification, and the Tribunal's reasons for granting the request:

> 72. The Approval Holder and the Director objected to the qualification of Dr. McMurtry and to the admissibility of his evidence. While the Approval Holder and Director took no issue with Dr. McMurtry's expertise as requested, they argued that it was irrelevant to the issue to be determined by the Tribunal. Specifically, he is an orthopedic surgeon, not an epidemiologist or an expert in any of the illnesses allegedly caused by exposure to wind turbines. Secondly, they argued the evidence should be inadmissible as Dr. McMurtry could not be neutral and unbiased as required of an expert witness under the Tribunal's Practice Direction, due to involvement in wind turbine issues as an advocate. Dr. McMurtry is a former Director of APPEC.
>
> 73. The Tribunal found that, despite Dr. McMurtry's involvement in wind turbine issues in general and with APPEC in particular, he could be qualified as an expert. The reasons include that health impacts of wind turbines is an emerging area of science with few experts at the ready to testify; that Dr. McMurtry has engaged with more individuals alleging these health effects than anyone in Canada; that Dr. McMurtry testified as an expert in the Erickson hearing; and due to his demonstrated personal integrity as an advocate of public health. The Tribunal found that issues of bias would go to weight, rather than admissibility of the evidence. With respect to the area of expertise, the Tribunal found Dr. McMurtry to be an expert in the area requested, and that it was not able to make a determination on relevance at the qualifications stage in the proceeding. ...

341 The Tribunal finds that these paragraphs adequately describe the submissions made and the Tribunal's reasons for granting the requested qualification in this case.

Whether Dr. McMurtry's proposed reply evidence should be accepted

342 As explained more fully in the Tribunal's order of November 27, 2013, it was not possible to hear *viva voce* evidence from the Appellants' proposed reply witnesses during the scheduled days for the hearing. The Tribunal therefore outlined a schedule whereby the Appellants' reply evidence would be filed by way of affidavits, along with the transcripts of the cross-examinations of those witnesses. As the Approval Holder and the Director submitted that the evidence was not proper reply, the Tribunal directed the parties to address this issue in their final written submissions. All parties did so.

343 The Director and Approval Holder argue that Dr. McMurtry's reply affidavit is improper reply and should not be accepted by the Tribunal. The Director discussed bringing a motion to exclude the proposed reply evidence, but the Tribunal ruled orally on October 7, 2013 that it would receive the evidence via affidavit, and consider submissions on admissibility of the proposed reply evidence along with the final submissions of the parties.

344 The Director and Approval Holder note that Dr. McMurtry's reply affidavit includes reference to studies by Pedersen and a report by the World Health Organization ("WHO") (Europe), *Burden of Disease from Environmental Noise: Quantification of Healthy Life Years Lost in Europe*, 2011 (the "WHO (Europe) 2011 Report"). They argue that, if Dr. McMurtry was relying on them, he should have included them in his original witness statements and during oral testimony before the Tribunal. They argue that the reply affidavit does not reply to constitutional evidence adduced by the Director.

345 The Appellants argue that Dr. McMurtry has been qualified as an expert in health care policy and his reply affidavit is within his expertise, and responds to the Director's evidence asserting that the purpose of the renewable energy approval provisions is constitutional. It is thus *Charter*-related reply, they submit, and is proper.

346 The Tribunal finds that paras. 6, 7 and 8 of Dr. McMurtry's reply affidavit discuss Ontario's energy mix and its electricity generating capacity. These are clearly not within Dr. McMurtry's area of expertise and the Tribunal does not admit them as evidence.

347 Paragraphs 9 to 13 of Dr. McMurtry's reply affidavit respond to Dr. Moore's comments regarding criteria for causation, and evidence entered during the Approval Holder's case regarding annoyance. An excerpt from the WHO (Europe) 2011 Report referred to in para. 13, for example, was entered into evidence during Dr. McCunney's testimony. For this reason, the Tribunal allows those paragraphs into evidence, along with the documents they refer to, as reply evidence on the health case.

Dr. McMurtry's opinions respecting the post-turbine witnesses

348 As noted earlier in the description of his evidence, Dr. McMurtry states his opinion that each of the post-turbine witnesses satisfies the 'probable' criteria for experiencing adverse health effects from living in the environs of industrial wind turbines. The Tribunal notes that he did not expressly state that this was his *diagnosis* respecting each of these individuals. However, as he noted in his update to the Case Definition, a 'probable' diagnosis "indicates that AHE/IWT [adverse health effects in the environs of industrial wind turbines] more likely than not are the cause of the complaints. AHE/IWT is the working diagnosis. Other diagnostic possibilities continue to exist and should be considered in the differential diagnoses."

349 The Tribunal notes the purpose of opinion evidence is to assist the Tribunal in making its decision respecting the statutory test under the *EPA*, which is a legal determination. Dr. McMurtry is clearly asserting that it is more likely than not that each of the post-turbine witnesses has suffered adverse health effects caused by industrial wind turbines. Consequently, the nature of this opinion evidence is to be assessed in this legal context, and not the context of how a health practitioner may differentiate between commenting on whether a post-turbine witness satisfies the criteria of the Case Definition and making a diagnosis. In the legal context, the Tribunal finds that any such differentiation is artificial.

350 The Tribunal also notes that Dr. McMurtry's updated Case Definition sets out diagnostic criteria intended for use by primary health care physicians to diagnose whether a patient who lives in the environs of industrial wind turbines is experiencing adverse health effects. As such, this Case Definition is based on the presumption that adverse health effects are caused by being in proximity to industrial wind turbines. Therefore, the Case Definition, in and of itself, does not establish causation. As stated in Dr. Moore's witness statement at para. 142, "Case studies and the associated methodology is a particular way of defining cases, and not a way of analyzing cases or a way of modeling causal relations."

351 The basis on which Dr. McMurtry concludes that industrial wind turbines cause adverse health effects is summarized in the Introduction to the Case Definition, which states:

> These [adverse] health effects *appear to correlate* with proximity to IWTs [industrial wind turbines], the frequency of the noise, the time of exposure, and individual response. The pattern of individual's complaints demonstrates a striking similarity internationally in media reports and in physician-generated case series.
>
> [emphasis added]

352 The Tribunal notes that evidence of the post-turbine witnesses, and Ms. Laurie's evidence respecting her survey of 130 Australians, provide data in support of this statement. However, while correlation can be indicative of causation, it is not synonymous with causation, because, as noted in Dr. Moore's evidence, associations between events can occur by chance. The evidence adduced by the respondents respecting causality assessment and the accepted use of the Bradford Hill criteria for assessing causal associations indicate that more than correlation is required in order to establish causation.

353 The Tribunal recognizes that the reasons advanced by Dr. McMurtry also include his observation respecting the incidence of reports of adverse health effects in all countries where industrial wind turbines are erected, and that the reports of adverse health effects are similar despite differing culture and languages (described as convergent validity). While these considerations are not to be discounted, the Tribunal finds that it has received insufficient evidence to establish that a causal association can be made, based on this information alone. While it is Dr. McMurtry's opinion that such a conclusion is established, the respondents' health experts clearly express their opinion that all of the Bradford Hill criteria must be satisfied, and, in this case, that these criteria have not been met.

354 As is discussed in greater detail below, the evidence here is closer to the hypothesis generating phase of scientific research than it is to the point where conclusions can be made on causation. Consequently, the Tribunal finds that the Case Definition does not establish causation. In reaching this conclusion, the Tribunal also relies on its analysis and findings, described below, respecting Dr. Leventhall, and the evidence respecting annoyance.

355 In light of the above finding, it follows that any diagnosis based on the assumption that adverse health effects are caused by living in the environs of industrial wind turbines, also does not establish causation.

356 As the Tribunal has found that the Case Definition does not establish causation, the Tribunal finds that it is unnecessary to address the respondents' submissions challenging other aspects of the validity of the Case Definition.

Appellants' Submission respecting evidence of Dr. Leventhall in Erickson

357 The Appellants assert that there is a causal chain between annoyance, stress, sleep disturbance, and adverse health effects. In their submissions in support of this position, they maintain that the evidence of Dr. Leventhall, as reported in *Erickson*, that annoyance is a psychological effect, predominantly somatoform disorders, which occur in small numbers of people. The Appellants further maintain that: (i) he stated that the effects of extreme annoyance include symptoms such as sleep disturbance, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration and memory, panic episodes; and (ii) he acknowledged that sleep disturbance is an adverse health effect.

358 The Appellants state, that, in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, the Tribunal found that if the approval holder disagreed with how Dr. Leventhall's evidence was interpreted in *Erickson*, or wished to have him give different or updated evidence, it had the opportunity to do so. The Appellants assert that the Tribunal, therefore, inferred that Dr. Leventhall's evidence from *Erickson* was not contested. The Appellants point out that the Approval Holder could have called Dr. Leventhall to give evidence in this proceeding and has not done so. Therefore, the Appellants submit that the Tribunal should draw the same inference in these proceedings as they assert was drawn in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*.

359 The Tribunal notes that the reference quoted from *Erickson* is with respect to the *evidence* of Dr. Leventhall, not any *finding* made with respect to this evidence. Nowhere in *Erickson* did the Tribunal make a specific finding in respect of this evidence. At paras. 832 and 836, the Tribunal in *Erickson* stated:

> 832. Given the current level of science, the Tribunal finds that it is not necessary to make major findings regarding the weight that should be attached to each witness' testimony.
>
> 836. In many cases, the evidence (as opposed to the conclusions) was simply different, but not divergent. To use an example, the Appellants put forward a non peer-reviewed study that showed an association between distance from turbines and

> reports of effects. The Director and Suncor did not counter with a similar study that did not find an association (a point that was generally made by Dr. Shepherd). Rather, they provided expert evidence on some of the apparent weaknesses in the study and conclusions on why definitive causal correlations could not be found. They also provided evidence about what the existing peer-reviewed articles have studied (for example, perceived impacts, such as "annoyance", "high annoyance", etc.) and contrasted them with what the legal test asks for. This type of evidence added to the evidentiary picture presented to the Tribunal. In very few instances did the scientific evidence run in completely opposite directions. Indeed, the Tribunal heard evidence from Dr. Mundt that many of the applicable peer-reviewed articles are about the perception of noise from wind turbines and not necessarily health effects. *This, in part, led to the significant debates about the applicability of words like "annoyance" in the perception of noise studies to the test used in this proceeding, which focuses on health. Obviously, the Tribunal would have preferred clear evidence from peer-reviewed studies that actually measured health effects and their relation to wind turbines, but research in that area is still quite limited.*
>
> [emphasis added]

360 Secondly, in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, the Tribunal did not make a finding accepting Dr. Leventhall's evidence. Instead, the Tribunal in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* addressed an issue regarding the interpretation of Dr. Leventhall's evidence in *Erickson*. At para. 49, the Tribunal stated:

> Dr. Leventhall testified for the approval holder in *Erickson*, and although originally on the witness list for the Approval Holder in this proceeding, he was never called. If the Approval Holder disagreed with how Dr. Leventhall's evidence was interpreted in the earlier decision, or wished to have him give different or updated evidence, it clearly had the opportunity to do so. The Tribunal therefore infers that Dr. Leventhall's evidence, as reflected in *Erickson*, was not contested.

361 In any event, Dr. Leventhall did not testify in this proceeding. Consequently, his work in this area is relevant only to the extent that it has been referenced by the experts who have testified in this proceeding who rely on his work in support of the opinions they have expressed.

Annoyance

362 The Tribunal now turns to the Appellants' submissions regarding annoyance. They rely on Mr. Howe's evidence as described above. They submit that, there is, therefore, undisputed evidence before this Tribunal that, at sound levels at or below those approved for the operation of this Project: (i) 6 to 20% of people will be very annoyed, and (ii) such persons will experience adverse health effects, as there is a causal chain between annoyance, stress, sleep disturbance, and adverse health effects.

363 For the following reasons, the Tribunal does not accept the Appellants' assertion that this evidence is undisputed, or that it has been conclusively established that such persons will experience adverse health effects.

364 The Tribunal first notes that it accepts, as stated in *Erickson* at para. 630, that "sometimes a causal link can be established, even if the specific mechanism responsible for that link has not been identified with certainty within a suite of plausible pathways." However, to establish causation, there is still a requirement to demonstrate that annoyance *will* result in the adverse health effects listed by the Appellants, even if the exact mechanism is not identified.

365 Supporting the Appellants' position is the evidence of Mr. Howe, who is a professional engineer specializing in acoustics. While the Tribunal accepts that the nature of his work as an acoustician includes consideration of whether noise can cause annoyance, it has not been suggested that he has the qualification to comment on the health effects that can be expected to result from annoyance. Instead, in his witness statement, he states that research has shown that annoyance associated with sound from wind turbines can be expected to contribute to stress-related health impacts in some persons. Mr. Howe included as part of his evidence, a report he authored for the MOE, the MOE Review Report noted above, which indicates that the referenced research is primarily the published work of Dr. Leventhall. Mr. Howe also refers to a 2013 review conducted by the Oregon Health Authority, entitled *Strategic Health Impact Assessment on Wind Energy Development in Oregon* (the "Oregon Study"),

and a recent study conducted by the University of Scotland. Dr. McMurtry's evidence on these issues refers to Mr. Howe's MOE Review Report.

366 The Director and Approval Holder do not agree with the Appellants' position. They rely on the evidence of the respondents' health experts, and in particular, the evidence of Dr. McCunney described above, wherein he disputes that some people will always exhibit effects, and refers to a study which indicates that some wind projects had never been subject to noise or health complaints.

367 Based on the evidence adduced in this proceeding, the Tribunal finds that the proposition that annoyance will occur as a result of exposure to noise levels between 35 to 40 dBA has not been clearly established, as the expert opinion on this issue is divided. In this regard, for example, Mr. Howe relies on the work of Dr. Leventhall, as well as a 2009 study by a group of researchers (Pedersen et al.) that states that close to 20% of people were "very annoyed" by wind turbine sound levels. Dr. McCunney refers to a more recent report by Dr. Chapman which showed large spatio-temporal variations in complaints about noise and health from wind farms. Dr. Chapman found that 33 of 51 wind farms in Australia had never been subject to noise or health complaints. While the information respecting these studies has been provided to the Tribunal, no evidence has been provided to indicate that one study should be relied on over another. For example, when challenged in cross-examination as to whether Dr. Leventhall would accept the Chapman study, Dr. McCunney testified that Dr. Leventhall would have to testify to indicate how this more recent study would affect his views.

368 The divergence of opinion in this area is also documented by the WHO (Europe) 2011 Report referenced by Dr. McMurtry. This report includes a chapter on "Environmental Noise and Annoyance", which highlights the debate and uncertainty respecting noise annoyance. At page 91 the report states:

> Noise annoyance is widely accepted as an end-point of environmental noise that can be taken as a basis for evaluating the impact of noise on the exposed population. As a consequence, EU Directive 2002/49/EC recommends evaluating environmental noise exposures on the basis of estimated noise annoyance.
>
> As discussed in Chapter 1, WHO defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". This *implies* that noise-induced annoyance may be considered an adverse effect on health. People annoyed by noise may experience a variety of negative responses, such as anger, disappointment, dissatisfaction, withdrawal, helplessness, depression, anxiety, distraction, agitation or exhaustion. Furthermore, stress-related psycho-social symptoms such as tiredness, stomach discomfort and stress have been found to be associated with noise exposure as well as noise annoyance. *Some public health experts feel that severe forms of noise-related annoyance should considered a legitimate environmental issue affecting the well-being and quality of life of the population exposed to environmental noise.* The most important issue in the present context is to what extent health (according to the broad definition given above) is reduced by noise and whether a DW that expresses this reduction, when combined with the prevalence of annoyance, leads to a significant burden of "disease". *The other possibility would be that noise annoyance does not significantly contribute to disability and, hence, should not be taken into account when considering the noise-induced burden of disease.*
>
> (emphasis added)

369 At page 93, this report also confirms that data below 45 dBA was not considered "because the risk of unreliable noise data is high at very low levels ..." This report further notes, at page 97, that:

> **Uncertainty with respect to the exposure-response relationship**
>
> One cause of doubt regarding the predictability of noise annoyance is that the studies show a large variation in individual annoyance reactions to the same noise exposure level. The other cause of doubt is that attempts to integrate the results from different studies show that there is a large variation in the relationships found in different studies. The large individual variation and the large study variation suggest that it is difficult to predict annoyance with sufficient accuracy. Indeed, the

> annoyance response of a particular individual or group of individuals can be predicted on the basis of the exposure only with a large amount of uncertainty. ...

370 The Tribunal notes that it is also unclear whether adverse health effects will occur only at elevated levels of annoyance. In this regard, there is nothing in the evidence to indicate how levels of annoyance would be measured. In addition, Mr. Howe, in his witness statement, notes that "it would be statistically invalid to predict the exact number of persons expected to be very annoyed, other than noting that those predisposed against the project are more likely to be annoyed." Furthermore, if there is any consensus to be found among the experts who testified, it is that annoyance is not likely to result solely from exposure to noise, but includes other factors affecting an individual's attitude toward the project.

371 If the intent of this evidence regarding annoyance is to support a generic approach to establish causation, i.e., where causation is not in relation to specific identified individuals, then it is clear that the epidemiological framework set out in the Bradford Hill criteria is relevant. Dr. Baines was qualified to give opinion evidence as an epidemiologist. As noted above, in para. 14 of her witness statement, she reviews these criteria and concludes that, in respect of wind turbines, none of these criteria have been fulfilled. The opinion evidence respecting the application of the Bradford Hill criteria is conflicting. Dr. McMurtry's analysis of these criteria is clearly at odds with the conclusions of Dr. McCunney, Dr. Moore, and Dr. Baines. While the Tribunal does not conclusively reject Dr. McMurtry's evidence, the Tribunal finds that it is not sufficiently compelling to lead the Tribunal to conclude that the opinions of Dr. McCunney, Dr. Moore, and Dr. Baines should be rejected. Consequently, in weighing this evidence, the most that can be said is that the preponderance of this opinion evidence favours the position of the Director and the Approval Holder. Based on these conclusions, the Tribunal finds that the evidence is inconclusive respecting whether industrial wind turbines would cause annoyance. Assuming that the evidence established that annoyance will be caused, the Tribunal also finds this evidence is inconclusive regarding the degree of annoyance which would be caused, and, in turn, whether such annoyance will result in adverse health effects.

372 The Appellants assert that the causal chain between annoyance, stress, sleep disturbance, and adverse health effects, is evidenced by the adverse health effects suffered by the post-turbine witnesses who testified in this proceeding. The Tribunal does not accept that this has been established by the Appellants. Instead, the Tribunal finds that, based on the evidence adduced in this proceeding, the symptoms reported by the post-turbine witnesses *may* be evidence of the causal chain between annoyance, stress, sleep disturbance and adverse health effects. In this regard, the Tribunal notes that the Appellants did not adduce any opinion evidence by a qualified health practitioner to confirm that the symptoms reported by the post-turbine witnesses resulted from annoyance, manifested through a somatoform or other disorder or condition.

373 In summary, the Tribunal finds that the evidence is inconclusive on the issue of whether wind turbine noise at 40 dBA or less, and other associated factors, such as being predisposed against a wind turbine project, can be expected to cause annoyance that will result in serious harm to human health for a small percentage of the population that will be exposed to the Project under appeal. In this regard, Tribunal finds that the Tribunal's finding in *Erickson*, at para. 838, also applies here:

> 838. To summarize, the evidence in this Hearing on serious indirect harm was largely exploratory. The evidence on a lack of serious indirect harm was also limited (the evidence on a lack of serious direct harm is much stronger, however). The Tribunal is not giving significant weight to the latter and little to the former in reaching its conclusion. That is because the legal test itself tilts the balance in one direction. The onus is on one side (in this case, the Appellants). That side has provided evidence that the Tribunal finds to be exploratory in nature, even if given significant weight. Put another way (using the wording of Dr. Mundt), the present situation is closer to the hypothesis generating phase of scientific research than it is to the point where conclusions can be made on causation (with respect to the sound levels expected at the Project's receptors). Or, using the approach of Dr. Shepherd, it is clear that we are not yet at the third stage of research on a new condition where intensive research has been completed so as to determine causation. We are at a much earlier stage, where there have been adverse event reports and some exploratory studies, such as the Nissenbaum Study. It is, therefore, no surprise that the legal test, which requires proof of harm, has not been satisfied when the applicable scientific evidence is in such an early stage of development.

Low Frequency Noise and Infrasound ("LFNI")

374 Mr. Howe's evidence briefly touched on LFNI. Both Dr. McMurtry and Dr. McCunney addressed the issue of LFNI in greater detail in their witness statements. The Tribunal has not found it necessary to include a synopsis of this evidence in this decision, as they both testified in *Erickson* on this issue, and much of their evidence adduced in this proceeding is as described in that decision. Regarding Dr. McMurtry's evidence in this proceeding, he relies on his witness statement which was filed in *Erickson* in 2011. In this proceeding, Dr. McCunney's witness statement further addresses LFNI, providing reference to studies published after 2011. In summary, there is a clear difference of opinion between them regarding whether LFNI generated by wind turbines will cause harmful effects to humans.

375 The Tribunal notes that the Appellants' submissions did not address LFNI separately from the issue respecting the health effects resulting from annoyance. The Tribunal also notes that para. 193 of the Appellants' submissions states:

> ... there remain key gaps in the information available about the relationship between IWTs and human health:
>
> • Sleep disruption and health effects from long-term exposure to low levels of low frequency sound and infrasound.

376 In light of the divergent expert opinions on this issue, and the current status of the research in this area, the Tribunal finds that the present situation still remains closer to the hypothesis generating phase of scientific research than it is to the point where conclusions can be made on causation. Consequently, the Tribunal finds that the Appellants have not established that LFNI generated by wind turbines will cause serious harm to human health.

Conclusion on Issue 2A

377 For the above reasons, the Tribunal finds that the Appellants have not established a causal link between wind turbines and human health effects where there is a 550m setback and 40 dBA noise limit.

Issue 2B: Whether Engaging in This Project in Accordance with the REA Will Cause Serious Harm to Human Health

378 As the Tribunal has noted earlier in this decision, the Appellants seek to establish causation by establishing that specific individuals have suffered serious harm to their health as a result of living in proximity to wind project components, maintaining that this evidence establishes that wind turbines will exacerbate certain types of pre-existing medical conditions. The Appellants maintain that the pre-turbine witnesses who have testified in this proceeding, are vulnerable people living in the vicinity of the Project who have such pre-existing medical conditions. The Appellants assert, therefore, that their testimony respecting their pre-existing medical conditions is highly relevant to establish a causal link between the proposed Project and "the more likely than not probable effect on those living near the Project".

379 The pre-turbine witnesses each testified that they had or have a pre-existing medical condition. They each expressed their concern that, due to their proximity to the proposed wind turbines in the Project, they could experience a resumption or exacerbation of their symptoms, or suffer additional adverse health effects. They each produced medical records that they were able to obtain regarding their past medical history. However, none of them presented opinion evidence from a qualified health practitioner to confirm that their concerns will occur. In the absence of such medical opinion, the Appellants rely on the evidence of the post-turbine witnesses to establish their assertion that exposure to wind turbines will exacerbate pre-existing medical conditions.

380 In light of the Tribunal's findings above that the Appellants have not established a causal link between wind turbines and human health effects, and, in particular, that causation has not been established in respect of the post-turbine witnesses, the Tribunal finds that the Appellants have not established that any of the pre-turbine witnesses will suffer serious harm to their health as a result of the Approval Holder engaging in the Project in accordance with the REA. As such, the Tribunal finds it is unnecessary to engage in a detailed review of the medical evidence respecting their pre-existing conditions. However, the Tribunal will address the evidence of one pre-turbine witness, as her evidence includes an assertion of direct causation, namely, that shadow flicker will cause her to experience epileptic seizures. For ease of reference, the Tribunal will refer to this pre-turbine witness as "PTW".

Evidence of Witness PTW

381 PTW owns a 22 acre property in the Project area, and plans to retire in December 2013 and use this rural property as her primary residence. She believes the Project will cause serious harm to her health due to two health conditions: high blood pressure and epilepsy. She has been taking blood pressure medication for many years, having been hospitalized in the past due to high blood pressure. She testified that she monitors her blood pressure every day, and works hard to keep it at a reasonable level by, among other things, a daily fitness regime.

382 She testified that she has suffered from epileptic seizures from the age of two. PTW testified that she can recognize the onset of an episode with approximately two hours' warning, which has allowed her to live a fairly normal life. She states that each episode of an epileptic seizure is extremely physically taxing, and she fears ongoing damage to her health. She described episodes she has experienced, which she states have had a significant impact on her. She cites, for example, that a single seizure will leave her bedridden for days and take several weeks for a full recovery. Multiple seizures will require an even longer recovery process.

383 PTW has become attuned to triggers throughout her life, and finds that nausea is a trigger, as well as illness and fatigue. She states that she attempts to minimize the likelihood of epileptic seizures through lifestyle, including a regular exercise regime and sufficient sleep. When she feels a seizure coming on, it is very important to find a quiet place so she can "push it away".

384 PTW makes use of her property for outdoor recreation, gardening, and tapping maple trees in the early spring. She is concerned that the wind turbine project may cause her a loss of sleep, headaches and nausea, all of which increase the likelihood of suffering an epileptic seizure. In addition, she notes the shadow impacts will occur during seasons when she is using the outdoor space, including tapping the maple trees in early spring and gardening in the fall. She feels she cannot live on the property and put herself at risk of seizures, should the Project proceed.

385 In cross-examination, PTW agreed that flashing lights have never triggered a seizure in the past, but she is not willing to test it. Her main concern is nausea associated with moving shadows.

386 PTW filed a review of the literature on health impacts of wind turbines, in a paper prepared by Knopper and Ollson (2011). She notes that the authors state "in Ontario it has been common practice to attempt to ensure no more than 30 hours of shadow flicker per annum at any one residence" (page 6). She also notes that Germany has regulations related to shadow flicker, and stipulates a maximum of 30 hours per year for worst case scenario, and eight hours per year (30 minutes on any one day) actual amounts of shadow flicker. She states that the United Kingdom ("UK") takes the approach of a minimum setback (9 or 10 times the rotor diameter of the blade, and or 10 times the tower height to the hub) to reduce shadow flicker. According to her calculations, the UK regulations would result in Turbines T1 and T2 of the Project being set back 850 m to 1,030 m from her home, were they to apply in Ontario.

387 Regarding shadow flicker, Steve Hilditch gave opinion evidence regarding the time of the year that shadow flicker from the two turbines would affect PTW's property.

388 In response, the Approval Holder called Shant Dakouzian to respond to Mr. Hilditch's evidence. Both Mr. Hilditch and Mr. Dakouzian used computer simulation modelling as the basis for their evidence. It was not disputed by Mr. Dakouzian that PTW's property would be subject to shadow flicker at some times of the year, although it is his opinion that, given the distance from the turbines, the intensity of the shadow would be diffused. Mr. Hilditch's estimates of the amount of time each day that PTW's property would be exposed to shadow flicker is higher than Mr. Dakouzian's estimates. The Approval Holder also called Dr. McCunney to respond to PTW's health concerns. His evidence is described below.

Findings Regarding Evidence of PTW

389 In summary, PTW asserts that she will experience increased risk of having epileptic seizures as a result of potential for sleep deprivation from noise, or as a result of nausea and risk of increased blood pressure caused by wind turbine shadow

flicker from the two Project turbines to be located nearest her property. Regarding sleep deprivation from noise, this issue has already been addressed under Issue 2A, particularly in respect of the post-turbine witnesses.

390 The Tribunal finds that it does not need to make specific findings respecting these areas of disagreement between the shadow flicker experts, because (i) they both agree that her property will be affected to some degree by shadow flicker each year; and (ii) PTW's evidence is that she will be at risk of experiencing a seizure if she is exposed to any shadow flicker.

391 The Tribunal notes that PTW has adduced some evidence that shadow flicker affects people with photo-sensitive epilepsy. The Knopper and Ollson paper notes at page 5, however, that "turbines are designed not to pose a risk of photo-induced epilepsy". They state:

> Harding et al. and Smedley et al. investigated the relationship between photo-induced seizures (i.e., photo-sensitive epilepsy) and wind turbine blade flicker (also known as shadow flicker). This is an infrequent event, typically modelled to occur less than 30 hours a year form wind turbine projects we have reviewed and would be most common at dusk and dawn, when the sun is at the horizon. Both studies suggested that flicker from turbines that interrupt or reflect sunlight at frequencies greater than 3 Hz pose a potential risk of inducing photosensitive seizures in 1.7 people per 100,000 of the photosensitive population. For turbines with three blades, this translates to a maximum speed of rotation of 60 rpm. The normal practice for large wind farms is for frequencies well below this threshold.

392 The practice in Ontario to attempt to ensure no more than 30 hours of shadow flicker per annum on a residence, as referenced by PTW, is directed to reducing the "annoyance" factor, rather than any likelihood of photosensitive epileptic seizures.

393 In response to PTW's evidence, Dr. McCunney's uncontradicted opinion evidence is as follows:

> 7. Concerns about the potential health impact of wind turbine operations on people who have been diagnosed with epilepsy have been addressed in the peer reviewed scientific literature. (Smedley et al, 2010 and Harding et al, 2008) The type of epilepsy that has been suggested as possibly at risk from wind turbine operations is known as "photosensitive epilepsy". Photosensitive epilepsy, which occurs in about 1 in every 4000 people (0.025%), may be precipitated by flickering sunlight. However, flicker that occurs at less than 3 cycles per second, (180 revolutions per minute) such as occurs in wind turbine operations, does not pose a risk of provoking photo-epileptic seizures. (Harding et al, 2008) As indicated above, there is no evidence in [PTW's] records that she is part of the small fraction of the population that has photosensitive epilepsy. This conclusion is corroborated by the fact that [PTW] had an EEG on October 24, 2008 in which photic stimulation triggered no results.
>
> 8. In my view, the evidence does not support the view that shadow flicker from the wind turbines will pose a risk of provoking a seizure in [PTW] because the evidence does not indicate that [PTW] has photosensitive epilepsy. The type of her epilepsy - at the most recent evaluation - appears, based on the records produced, very stable in that she has had very few seizures since her early college days, and had a normal EEG in 2008.
>
> 9. Even if [PTW] did have photosensitive epilepsy, the shadow flicker from the wind turbines would not pose a significant risk of provoking a seizure. My opinion is based on a review of pertinent scientific studies (Harding, 2008; Smedley, 2010), and the technical Specifications for the GE turbines planned for the Dufferin wind farm which indicate that the rotating blade frequency will not exceed 16.18 revolutions per minute (rpm), which is less than 10% of the threshold proposed by Smedley et al as capable of provoking a photo-epileptic seizure. (Technical Documentation Wind Turbine Generator Systems GE 1.6-100-50 Hz/ 60 Hz and General Electric 2.75 MW Turbines) The turbine blades will not rotate at a sufficiently high frequency, i.e.> 3 cycles per second (180 revolutions per minute) to provoke a photo epileptic seizure. (Smedley et al, 2010) In a comprehensive report prepared for the state of Massachusetts, the expert panel came to a similar conclusion, finding that the scientific evidence suggests that there is no risk of seizure from shadow flicker caused by wind turbines. (MDPH, 2012)
>
> 10. *Effect of shadow flicker on blood pressure.* Apart from her concern about epilepsy, in her witness statement [PTW] also raised concern that shadow flicker has the potential to affect her blood pressure. There is insufficient scientific evidence

> to suggest that shadow flickering will cause blood pressure to elevate and cause hypertension, and in fact experts have concluded that shadow flicker does not cause any adverse health effects. (MDPH, 2012) As [PTW] herself has observed, there is only one German study that indicates that prolonged shadow flicker (more than 30 minutes) *could* result in stress — related health: effects, (Pohl et al, 1999) A single study does not constitute enough to prove a link. That is particularly true in light of the fact that other studies conducted among people living in the vicinity of wind turbines have not shown causal links between wind turbines and hypertension. (Pedersen, 2011)

394 The Tribunal notes that Dr. McCunney's uncontroverted evidence provides the only qualified medical opinion respecting PTW's condition. While the Tribunal accepts PTW's description of her symptoms, this evidence does not establish that: (i) she, in fact, suffers from photo-sensitive epilepsy; (ii) the frequency of shadow flicker from wind turbines will trigger photo-epileptic seizures; or that (iii) shadow flicker will cause elevated blood pressure resulting in hypertension. For these reasons, the Tribunal finds that the Appellants have has not established that PTW will suffer serious harm to her health caused by the Project wind turbines that will be located near her property.

Evidence of the Other Party, Participant and Presenter

Joan Lever (Participant)

395 Ms. Lever lives in the vicinity of the Project and expressed her view on the harm that she believes will be caused by the Project. She has been a dedicated follower of this proceeding, and she is a vocal opponent of locating wind project development close to peoples' homes.

396 Ms. Lever supports the position of the Appellants in this proceeding. Her evidence touched on many, if not all of the issues before the Tribunal, including the impact of wind turbine noise, and sleep disturbance on human health. She also spoke passionately regarding the social impact of turbine projects on communities.

397 Ms. Lever's evidence included a sophisticated multi-media presentation that included excerpts from the CBC television documentary, "Wind Rush", as well as video footage from community demonstrations, and of a case of turbine fire. She appended many of the scientific documents that were also referred to by Ms. Laurie.

398 Ms. Lever expressed concern about direct health effects from low-frequency noise and infrasound, as well as indirect effects from stress and sleep disturbance. She asserts that the current set-back distances are entirely insufficient, citing her understanding of set-back requirements in other jurisdictions, including Australia, New Zealand, and a number of US states. She maintains that, in all cases, they are well beyond Ontario's 550 m requirement.

399 Ms. Lever is also concerned with safety issues, such as fires and ice throw. She supports the submissions by the Municipality of Amaranth, with respect to the danger of installing overhead transmission lines within this municipality.

Dr. William Crysdale (Party)

400 Dr. Crysdale is a retired physician who, when in active practice, specialized in children's health. He testified as a witness with respect to human health issues, although he did not seek to be qualified to give opinion evidence. He stressed the importance of recognizing that adverse health effects are serious.

401 Dr. Crysdale expressed his concern that the regulated set-back of 550 m is insufficient and is becoming ever more insufficient, given the increasing size of wind turbines. He asserts that Australia and New Zealand currently have established residential setbacks of 1.5 to 2 km.

402 Dr. Crysdale refers to several abstracts of studies and other papers supporting the view that low frequency noise and infrasound may impact a person's health, and that chronic annoyance is a risk factor for other types of diseases.

403 Dr. Crysdale is particularly concerned with the impact of loss of sleep on children. He asserts that independent research into the health effects of existing wind farms is long overdue, and is alarmed that the current Health Canada study to better understand health impacts of wind turbine noise, will not include anyone under the age of 18.

404 Dr. Crysdale submits that "the precautionary principle is one of the central concepts of modern environmental policy." He discussed a number of examples where it has been applied. After examining factors used by an Ontario medical officer of health to apply the precautionary principle, Dr. Crysdale concludes, that "at least a moderate precautionary principle" approach should be adopted. In reaching this conclusion, he relies, in part, on his assertion that there is a "low societal need for the electricity produced".

405 Dr. Crysdale also commented that he has proposed to the Hospital for Sick Children, where he worked until his recent retirement, that they undertake a study related to wind turbine noise and its impact on children's health.

Don MacIver (Presenter)

406 Mr. MacIver is the mayor of the Corporation of the Municipality of Amaranth (the "Municipality"), in which the Project is located. He gave a detailed presentation of the Municipality's health and safety concerns regarding the Project's proposed overhead transmission line. As his presentation was extensive, the Tribunal will only highlight the subject areas covered in his presentation:

- high voltage transmission lines impact human health;
- the multi-use of an elevated recreational trail within the Municipality will be severely limited, as a section of the Project overhead transmission line will be situated in close proximity to a section of this trail, causing safety concerns;
- electro-magnetic fields caused by transmission lines may be linked to a variety of human health problems, impact property values, and effect livestock.

407 Mayor MacIver testified that the Municipality wants the transmission line buried throughout the Municipality.

Norman Wolfson (Presenter)

408 Mr. Wolfson testified regarding both the health case, and concerns related to the natural environment. In the portion of his presentation which addressed health issues, he expressed significant concern about the potential for noise generated by 49 industrial wind turbines, some of which, he stated, are to be built in close proximity to his home. He further stated that this noise will disrupt his family's peaceful enjoyment of their property and the surrounding area.

409 Mr. Wolfson asserts that the area already has an inordinately high number of wind turbines, and maintains that the Project area is much too small to accommodate 49 industrial wind turbines.

410 Mr. Wolfson states his understanding that the Approval Holder has not conducted studies on possible impacts on human health, and states that he cannot understand why the Approval Holder's application for the REA could not have been deferred until the completion of the current study by Health Canada.

Findings Regarding Evidence of the Other Party, Participant, and Presenter

411 The evidence of Ms. Lever, Dr. Crysdale, Mayor MacIver and Mr. Wolfson, has been of assistance to the Tribunal in better understanding the issues to be addressed in this proceeding. The Tribunal notes that much of the evidence presented by Ms. Lever, Dr. Crysdale, and Mr. Wolfson, has been addressed by the other parties in this proceeding, and as such, their concerns and submissions have been addressed by the Tribunal elsewhere in this decision.

412 Regarding the Municipality's evidence respecting the health and safety impacts of above ground transmission lines, the Tribunal notes that a presenter may only give evidence respecting the issues raised in the appeal. Some of the appeals, in referring

to adverse health effects, do state that it is more likely than not that they are caused by a number of factors including stray voltage or electromagnetic fields. However, neither the Appellants' evidence nor their submissions in respect of the Health Test, have directly addressed this issue. Therefore, it is not entirely clear that this issue is before the Tribunal. However, assuming that it is, the Tribunal notes that no expert opinion evidence has been adduced to support the views expressed in Mayor MacIver's presentation. Consequently, the Tribunal finds that Mayor MacIver's evidence does not establish that serious harm to human health will be caused by high voltage transmission lines.

Conclusion on Issue 2B

413 The Tribunal finds that the Appellants have not established that any pre-turbine witnesses will suffer serious harm to their health caused by the Project wind turbines.

414 As noted above, the evidence in this proceeding does not establish a causal link between wind turbines and either direct or indirect serious harm to human health under the conditions imposed in the REA requiring a setback distance of 550 m, and a maximum noise level of 40 dBA.

415 Consequently the Tribunal finds that the Appellants have not established that engaging in the Project in accordance with the REA will cause serious harm to human health.

Issue 2C: Whether Ms. Laurie should be qualified to give opinion evidence

416 The Appellant, Mr. Sanford, called Ms. Laurie as a witness to give opinion evidence respecting the issue whether engaging in the Project in accordance with the REA will cause serious harm to human health. As noted earlier in this decision, Mr. Sanford requested that she be qualified as "a physician with experience in the delivery of health care." In an oral ruling, the Tribunal refused Mr. Sanford's request, indicating that its written reasons for this disposition would follow. The Tribunal's reasons are provided below.

Ms. Laurie's Education, Training, and Experience

417 The factual evidence regarding this witness' education, training, and experience in support of the requested qualification is not in dispute. Ms. Laurie obtained a Bachelor of Medicine, Bachelor of Surgery in 1995 from Flinders University, South Australia, and subsequently practiced, and obtained a Fellowship with the Royal Australian College of General Practitioners ("RACGP") awarded in 1999, and Fellowship with the Australian College of Remote and Rural Medicine ("ACRRM") in March 2000. She stopped practicing medicine in April 2002 due to personal circumstances. Ms. Laurie testified that in order to practice medicine, and more specifically, to diagnose and treat patients, Australian law requires that she must be registered with Australian Health Practitioners Registration Authority ("AHPRA"). She indicates that she let her registration lapse approximately two and half years after she ceased practicing in 2002. Ms. Laurie indicates that it is her intention to re-register with AHPRA. However, she stated that she must complete some self-study, particularly to update her knowledge respecting medication regimes, before she will be ready to re-apply. She confirmed that, to date, she has not done so. In light of these circumstances, Ms. Laurie confirmed that she cannot diagnose patients or prescribe medication for them.

418 As a result of a complaint filed with the AHPRA in 2013 that her current activities (discussed below) constituted practice as a physician, she voluntarily agreed not to use the title/honourific "Doctor" or "Dr.". She states that she has done so, in order to avoid any potential misunderstanding by members of the public regarding her status as a practicing physician. Documentary evidence respecting the complaint was adduced in evidence and marked confidential, i.e., it is not included in the public record in this proceeding. Ms. Laurie was cross-examined on this evidence. The Tribunal finds that this evidence supports Ms. Laurie's assertion that the AHPRA did not make any finding in respect of the complaint made against her.

419 In terms of her other professional training and experience, Ms. Laurie acknowledges that she has no training or experience in conducting medical or scientific research. She further acknowledges that she also does not have any training or experience in research methodology and design, other than some undergraduate exposure when obtaining her medical degree, and does not have post-graduate experience in this area. She acknowledges that she is not a qualified acoustician, and she has no experience

or training in acoustics generally, or, in particular, pertaining to noise generated by industrial wind turbines, although she has reviewed publications in the subject area of acoustics, and has consulted with acousticians.

420 Ms. Laurie testified that she first became interested in the potential health impacts of industrial wind turbines, specifically resulting from noise generated by industrial wind turbines, in 2010, when a wind project was proposed to be a situated near her home (but subsequently never built). Since that time, she accepted an invitation to be the medical director of foundation known as the Waubra Foundation, a volunteer position, which has subsequently changed to her current volunteer position as Chief Executive Officer. Ms. Laurie testified that the Waubra Foundation was formed in March 2010 to facilitate research into the adverse health impacts being described by neighbours to wind developments in Australia. She also stated that this Foundation has a particular interest in the role of low frequency industrial noise from any source, and resultant health problems.

421 The majority of Ms. Laurie's work experience related to health impacts of industrial wind turbines, comes from her work for the Waubra Foundation which is a full time volunteer position. In summary, Ms. Laurie testified that she has not approached communities to conduct surveys, and that she has not conducted formal structured research. She states that she conducts an ongoing survey, where, to date, she has spoken with approximately 130 people in Australia who live in the vicinity of industrial wind turbine projects. She indicated that these people have identified themselves to her, by contacting her directly, or indirectly by contacting the Waubra Foundation. She explains that these persons describe their symptoms to her and request information. She maintains that, when speaking with these people, she does not provide an individual diagnosis. She states that she has not ever taken a formal medical history, which is what a registered medical practitioner would do. She asserts that, instead, she provides information which people can choose to take to their health care practitioner, if they wish to do so, and that, sometimes, their practitioner will contact her for information. Ms. Laurie states that she is interested in learning about their problems, so she can provide information to enable them to assist their own practitioners in working out whether or not their symptoms are related in any way to a source of noise, whether the source is an operating wind turbine, or some other source.

422 Ms. Laurie explained that the Waubra Foundation is solely concerned with the human health consequences of exposure to operating industrial wind turbines and other sources of infrasound and low frequency noise. She states that she does not oppose industrial wind projects *per se*, but is concerned about the current practice of siting wind turbines in locations where, in her view, they are likely, on the basis of current knowledge, to cause harm to human health.

423 Apart from interviewing self-identified individuals as described above, Ms. Laurie states that she also works with acousticians to advance multi-disciplinary research which she asserts is needed. She further testified that she has conducted reviews of the published literature in this field, both in the subject area of noise impacts on human health associated with or caused by wind turbines or other sources, and in the subject area of noise acoustics. She also consults with other professionals who are working in this area, both in Australia and internationally, and, in this context, is familiar with the work of Dr. McMurtry, who has also testified in this proceeding.

424 In her witness statement, Ms. Laurie, in describing her work in this area, makes the following assertions:

> My own field work, and knowledge of the field work of others including acoustic and psycho acoustic measurements and physiological research, is appreciated by those genuinely seeking to understand why people are becoming unwell living near wind turbines. My help, knowledge and advice is sought by doctors, acousticians and researchers working in this field in Australia and overseas. My ability to understand and communicate the essence of the existing acoustic and human health evidence, has contributed to the general community understanding of the existing known pathophysiological pathways which make this condition so devastating to a significant proportion of wind project neighbours.

Ms. Laurie's Proposed Opinion Evidence

425 Ms. Laurie's opinion evidence is set out in her witness statement which has been filed in this proceeding. Although the Tribunal has given careful consideration to each of the opinions advanced in her witness statement, for the purpose of this decision, it is sufficient to describe these opinions by way of a summary overview. Ms. Laurie's opinion evidence falls into three main areas.

426 First, Ms. Laurie reviewed the witness statements and other information respecting Ontario residents who have testified in this proceeding. These witnesses fall into two categories:

- The post-turbine witnesses who reside in the vicinity of existing wind turbine projects who assert they have suffered harm to their health as a result of exposure to operating wind turbines.

- the pre-turbine Witnesses residing in the vicinity of Project wind turbines.

427 There are other persons referenced in Ms. Laurie's witness statement who did not testify in this proceeding.

428 In her witness statement Ms. Laurie states that she was retained to read the witness statements from the people named in her witness statement, and comment on:

a) whether they conform with Dr. McMurtry's case definition (described previously in this decision); and

b) whether they are in accordance with her own knowledge of the range and pattern of health problems being reported by residents living near industrial wind turbines.

429 In this regard, Ms. Laurie also reviewed medical records provided by these witnesses and questionnaires completed by them, and conducted a telephone interview with each of the witnesses who testified in this proceeding.

430 In her concluding remarks regarding the post-turbine witnesses, Ms. Laurie states:

Despite the individual differences between these witnesses with respect to the type, range and severity of the symptoms experienced, the speed of onset of symptoms, there is a clear pattern of exposure to operating wind turbines being associated with the symptoms, which are relieved or improve with cessation of exposure, ...

Overall, it is clear that all of them have experienced serious health impacts as a result of exposure to wind turbines. This makes it probable that others will experience similar effects if they are exposed to turbines.

431 In her concluding remarks regarding the pre-turbine witnesses, Ms. Laurie states:

It is probable that each of these individual residents will have serious adverse health impacts from wind turbine emissions from the proposed wind development.

Each of them has one or more of the risk factors identified by Dr. Nina Pierpont and Dr. Geoff Leventhall, being either at the extremes of age, or a clinical history of migraines, motion sickness, or inner ear pathology.

In addition each of them have underlying medical conditions which make them more likely to suffer the health damaging consequences of exposure to wind turbine noise because of the well established effects of sleep deprivation and physiological stress from exposure to infrasound and low frequency noise.

432 In her witness statement, Ms. Laurie describes a study by Dr. Pierpont, who is a practicing medical physician. Ms. Laurie provides an overview of symptoms identified by Dr. Pierpont, and she states that Dr. Levanthall, an acoustician, has acknowledged that these symptoms have been known to him to result from exposure to environmental low frequency noise. These symptoms are:

- Sleep disturbance and sleep deprivation

- Headaches

- Tinnitus (ringing in the ears)

- Ear Pressure

- Dizziness
- Vertigo
- Nausea
- Visual Blurring
- Tachycardia (fast heart rate)
- Irritability
- Problems with concentration and memory
- Panic episodes associated with sensations of movement,
- Quivering inside the body that arise when awake or asleep

433 Ms. Laurie also describes four specific risk factors identified by Dr. Pierpont as increasing the risk of developing characteristic symptoms from exposure to wind turbine noise. These are:

- The extremes of age - babies and young children and older citizens
- History of migraines
- History of motion sickness
- History of pre-existing otological (ear) conditions including inner ear disorders and industrial deafness

434 Ms. Laurie also expressed opinions that each of the post-turbine and pre-turbine witnesses who testified in this proceeding, satisfy the criteria for the 'probable' category of diagnosis as defined in Dr. McMurtry's Case Definition. She also expressed further opinions respecting these witnesses as described below.

Findings Regarding Mr. Sanford's Request to Qualify Ms. Laurie to Give Opinion Evidence

435 Tribunal Rule 170 regarding the production of witness statements, confirms that the Tribunal requires that a witness who wishes to give opinion evidence must be qualified to do so. Regarding the nature of these qualifications, the Tribunal has issued a Practice Direction for Technical and Opinion Evidence (the "Practice Direction"). Paragraphs 5 and 9(c) of this Practice Direction state:

> 5. To give opinion evidence, a witness must have specialized education, training, or experience that qualified him or her to reliably interpret scientific or technical information or to express opinions about matters for which untrained or inexperienced person cannot provide reliable opinions. ...
>
> 9.(c) The witness should express an opinion to the Tribunal only when the opinion is based on adequate knowledge and sound conviction. The witness should be reluctant to accept an assignment to provide evidence for use by the Tribunal if the terms of reference of the assignment do not allow the witness to carry out the investigations and obtain the information necessary to provide such an opinion. A witness who accepts an assignment under these circumstances should advise the Tribunal of the limitations that the terms of reference place on his or her ability to provide the information necessary to assist the Tribunal in making a sound decision.

436 The Tribunal notes Rule 170(d) requires that a witness who proposes to give opinion evidence, must complete Form 5, which requires that the witness acknowledge that the witness' evidence will be fair, objective and non-partisan. Therefore, it is clear that the witness' duty in this regard, is provide opinions which will assist the Tribunal to make a sound decision.

437 The requirement set out in para. 5 of the Practice Direction, reflects the law of evidence that, in order to give opinion evidence, a witness must have acquired special or peculiar knowledge through study or experience that is beyond the knowledge of the common person. So long as the witness satisfies this requirement, the way in which a witness has acquired the knowledge is immaterial (see *R. v. Kinnie* (1989), 40 B.C.L.R. (2d) 369 (B.C. C.A.) ("*Kinnie*"), and *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) ("*Mohan*"), and cases cited therein). As such, the fact that Ms. Laurie is not registered with the AHPRA, and, therefore, cannot practice medicine (which includes making diagnoses and prescribing medication), does not, in and of itself, preclude her from being qualified to give opinion evidence. The test is whether she has the special or peculiar knowledge in respect of the matters on which she undertakes to testify.

438 However, the rationale for this requirement is to ensure that such opinions meet a basic threshold of reliability. As noted in *Mohan* (at page 25), where the proposed opinion evidence advances a novel scientific theory or technique, such evidence is to be subjected to special scrutiny to determine whether it meets the reliability threshold.

439 Clearly, the obligation of the expert witness is to provide opinions which are not subject to any limitation or deficiency which causes the Tribunal to question their reliability. In this regard, the Tribunal observes that para. 9(c) of the Practice Direction, is an example of such scrutiny. The underlying rationale for paragraph 9(c) is that opinion evidence which is proffered subject to restrictions or conditions, will limit its assistance to the Tribunal in making a sound decision.

440 In this case, the terms of reference of Ms. Laurie's retainer do not place any limits on her ability to provide the information necessary to assist the Tribunal in making a sound decision. Instead, Ms. Laurie herself stipulates the limitation that her opinion evidence cannot and does not include diagnostic opinion.

441 The Tribunal accepts that Ms. Laurie, in her curriculum vitae and her oral testimony during the qualification phase of her testimony, clearly indicates this limitation. However, such acknowledgment, in and of itself, does not mean that the opinions she proposes to advance are sufficiently reliable to assist the Tribunal in making a sound decision. The Tribunal's decision in this regard is discussed below.

442 The Tribunal has reviewed Ms. Laurie's proposed evidence in detail. For reasons described below, the Tribunal finds that Ms. Laurie, in expressing her opinions either:

- makes a diagnosis;

- applies diagnostic interpretation of pre-existing medical conditions to reach conclusions that exposure to operating industrial wind turbines has exacerbated such conditions, or has resulted in additional health problems; or

- as in the case of the pre-turbine witnesses, includes the application of diagnostic interpretation to formulate opinions as to the likelihood that these individuals will suffer health damaging consequences if exposed to an operating industrial wind turbine.

443 The Tribunal has addressed Dr. McMurtry's evidence previously in this decision. However, for the purpose of determining whether Ms. Laurie should be permitted to give opinion evidence in this proceeding, it is sufficient to note that Dr. McMurtry has clearly identified that the deployment of the diagnostic criteria set out in the Case Definition should be conducted by a health care practitioner licensed to take a history and make diagnoses.

444 Ms. Laurie testified that she did not consider that she made diagnoses of any of the pre-turbine or post-turbine witnesses. Her witness statement indicates that she was asked to comment on whether the medical information she reviewed for each witness, conforms with the Case Definition. In cross-examination, she stated that she is not making a diagnosis in the sense of seeing somebody professionally, providing medical services, and providing a diagnosis on the basis of seeing the patient. She acknowledged that she clearly is not able to do this at the present time, and stated that she would not do so. She also maintains that the purpose of the Case Definition is to assist physicians in making a diagnosis. Respecting this latter statement, the Tribunal notes that Ms. Laurie did not dispute that the Case Definition does describe a medical diagnosis.

445 In addressing this aspect of Ms. Laurie's evidence, the Tribunal first repeats its earlier finding made in respect of Dr. McMurtry's opinion evidence. The purpose of opinion evidence is to assist the Tribunal in making its decision respecting the statutory test under the *EPA*, which is a legal determination. Consequently, the nature of the proposed opinion evidence is to be assessed in this legal context, and not the context of how a health practitioner may differentiate between commenting on conformity with the Case Definition and making a diagnosis. In the legal context, the Tribunal finds that any such differentiation is artificial. An opinion that the diagnostic criteria set out in the Case Definition are satisfied *is* a medical diagnosis. As Dr. McMurtry noted in his update to the Case Definition, a 'probable' diagnosis "indicates that AHE/IWT [adverse health effects in the environs of industrial wind turbines] more likely than not are the cause of the complaints. AHE/IWT is the working diagnosis. Other diagnostic possibilities continue to exist and should be considered in the differential diagnoses."

446 In any event, the Tribunal also finds that the opinions expressed by Ms. Laurie go well beyond mere commentary regarding conformity with the Case Definition. As noted earlier in this decision, her general opinion in respect of the post-turbine witnesses is: "Overall, it is clear that all of them have experienced serious health impacts as a result of exposure to wind turbines." Her opinion in respect of the pre-turbine witnesses is: "In addition each of them have underlying medical conditions which make them more likely to suffer the health damaging consequences of exposure to wind turbine noise."

447 The Tribunal does not consider that a detailed review of every opinion in Ms. Laurie's witness statement is necessary. The Tribunal accepts that Ms. Laurie provided a fair overview of her opinions when providing what she describes as her overall conclusions. The Tribunal will, however, provide one example. In respect of the pre-turbine witness identified earlier in this decision as PTW, Ms. Laurie states:

> For someone like [PTW] with epilepsy, known by her to be triggered by sleep deprivation, she is rightly very concerned about the impact of wind turbine noise on her health, and her ability to live on her property, specifically because of the likely impact on her sleep, and therefore on her epilepsy....
>
> Sleep deprivation is known by clinicians generally to lower the threshold for seizures, ...
>
> She will have no control over the wind turbine infrasound and low frequency noise emissions she is exposed to inside her home if the project proceeds. In particular, there is no way of successfully preventing the effects of the frequencies below 200Hz (infrasound and low frequency noise) from penetrating, resonating and potentially amplifying inside her home and causing disturbed sleep. It is predictable the proposed wind turbine project in this case will cause serious adverse health impacts if the project is allowed to proceed.

448 Apart from the consideration that this opinion is, in part, based on assumptions regarding noise acoustics, the Tribunal finds that Ms. Laurie is clearly making a diagnostic interpretation of PTW's current medical condition, and applying this interpretation to formulate her opinion that PTW will suffer serious health impacts if exposed to noise from an operating industrial wind turbine.

449 The Tribunal has considered whether it should find Ms. Laurie is qualified to provide such diagnostic opinions, notwithstanding that she has indicated that she cannot provide such opinions. In this regard, the Tribunal notes that she has a medical degree and has a number of years of past experience practicing as treating physician. However, the Tribunal has found that most of the opinions expressed by Ms. Laurie do require the making of a diagnosis, or the application of diagnostic interpretation. Therefore, the Tribunal finds that it cannot ascribe sufficient reliability to these opinions, in contradictory circumstances where diagnostic opinion is being proffered by the witness, while, at the same time, the witness stipulates that she cannot provide such diagnostic opinion.

450 The above analysis and findings address the opinions in Ms. Laurie's witness statement which require the making of a diagnosis and/or the application of diagnostic interpretation as described above.

451 The Tribunal now turns to consideration of Ms. Laurie's opinions based on the risk factors identified by Dr. Pierpont. The Tribunal notes that Ms. Laurie made specific reference to these risk factors in her concluding remarks regarding the pre-

turbine witnesses, and that she included consideration of these factors in her individual evaluation of each of these witnesses. Although she did not make express reference to Dr. Pierpont's work in respect of the post-turbine witnesses, it is the Tribunal's understanding that her acceptance of these risk factors also informed her conclusions respecting these witnesses.

452 The Tribunal finds that Ms. Laurie's evaluation of:

(i) whether any of the witnesses exhibited symptoms identified by Dr. Pierpont as resulting from exposure to low frequency noise, and

(ii) whether the any of the witnesses exhibit the risk factors identified by Dr. Pierpont,

again, requires the application of diagnostic interpretation. To find otherwise, would be to conclude that no special expertise would, in most cases, be required to conduct such an evaluation. In further support of this finding, the Tribunal also observes that these symptoms and risk factors are similar to the adverse health effects identified in Dr. McMurtry's Case Definition. Again, Dr. McMurtry has clearly identified that the deployment of the Diagnostic Criteria set out in the Case Definition should be by a health care practitioner licensed to take a history and make diagnoses.

453 The Tribunal now turns to consideration of Ms. Laurie's experience in terms of her survey work in interviewing and documenting the health symptoms reported by people who have contacted her. As noted earlier in this decision, Ms. Laurie acknowledges that she has no training or experience in conducting medical or scientific research, nor has she any training or experience in research methodology. She states that her only training in research design has been some undergraduate exposure while obtaining her medical degree, but she provided no specific particulars of the education or training that she received. She acknowledges that she does not have post-graduate experience in this area. The Appellant, Mr. Sanford, did not seek to qualify Ms. Laurie as an expert in these areas. The Tribunal finds that, based on Ms. Laurie's acknowledgements, she cannot be qualified to give opinion evidence in these areas. Consequently, the Tribunal finds that Ms. Laurie is not qualified to give her proposed opinion evidence based on expertise in medical or scientific research or research methodology and design. However, for reasons discussed below, this does not preclude her from describing the results of the survey work she has done, including making comparisons to the similarity of the results from this survey work to the results of similar surveys conducted elsewhere.

454 The Tribunal now turns to another aspect of Ms. Laurie's witness statement, namely her review of published literature on the subject of the health impacts from noise exposure from a variety of noise sources, industrial wind turbines in particular. In her witness statement, she summarizes information from some of these publications, which includes publications in the subject area of noise acoustics. In her testimony, Ms. Laurie has acknowledged that she has no expertise as an acoustician. However, she has also stated that she consults with other experts in the areas of acoustics and psycho acoustic measurements, to promote a multi-disciplinary approach in order to contribute to the general community understanding of what she asserts are "the existing known pathophysiological pathways which make this condition so devastating to a significant proportion of wind project neighbours." Although she has undertaken self-study to inform herself on the issue of noise acoustics, Ms. Laurie did not suggest that her self-study is sufficient to qualify her to express expert opinion on noise acoustics. Consequently, the Tribunal finds that she is not qualified to give opinion evidence in the subject area of noise acoustics, and, in particular, opinions regarding the noise to be generated by the industrial wind turbines in the Project, and the noise levels at sensitive receptors in the Project area.

455 The Tribunal accepts that it is appropriate for Ms. Laurie to consider existing published research or other literature in formulating her opinions. However, the Tribunal has already found that Ms. Laurie cannot be qualified to give opinion evidence based on formal medical or scientific research, or research design and methodology. The Tribunal has also found that she cannot be qualified to give opinion evidence requiring diagnostic opinions, or the application of diagnostic interpretation to formulate conclusions on the potential health impacts of exposure to operating industrial wind turbines. This raises the question whether she can be qualified to give her proposed opinion evidence on the basis of the experience she has obtained through self-study of the published research and other literature. The Tribunal accepts that the time Ms. Laurie has devoted to this aspect of her work experience is not insignificant. However, Ms. Laurie's evidence does not indicate that she has conducted a comprehensive review of all literature, nor that she has the expertise to assess the sufficiency of the research methodology in individual research studies. Consequently, the Tribunal finds that her self-study of the published literature, as described in her witness statement,

even if considered in conjunction with her survey of self-identified participants, is not sufficient to meet the basic threshold of reliability necessary to assist the Tribunal in making a sound decision.

456 In summary, the Tribunal has found that the Appellant, Mr. Sanford has not established a basis on which Ms. Laurie can be qualified to give her proposed opinion evidence in this proceeding.

457 The above finding, however, does not preclude Ms. Laurie from giving evidence. As a fact witness, she can testify respecting her work in this area, particularly the information she has obtained from the survey work that she has conducted. It may be less clear whether other aspects of her evidence are strictly fact evidence. However, the Tribunal notes that the Practice Direction recognizes that a witness who provides technical evidence may, to some extent, interpret information that is essential to the Tribunal's understanding of the issues. In this regard, the Tribunal finds that Ms. Laurie's training, education and experience is certainly sufficient to qualify her to provide this level of interpretation. Accordingly, the Tribunal is prepared to hear her evidence regarding the similarity of health complaints obtained through her survey work, as compared to the health complaints reported in similar surveys conducted elsewhere in Australia and other jurisdictions.

458 Similarly, the Tribunal has allowed her evidence respecting her review of published research and literature to be submitted, as set out in her witness statement, subject to the important *caveat* that none of the articles, studies, or reports attached to, or described in her witness statement are being accepted as proof of the opinions and conclusions stated therein. This part of Ms. Laurie's witness statement has been accepted solely on the basis that it describes some of the current body of research and academic or other informed discussion which has been published in this field. In this regard, the Tribunal notes that the other parties did not object to the receipt of this part of Ms. Laurie's evidence, subject to this *caveat*.

459 Finally, the Approval Holder and the Director opposed Ms. Laurie's qualification on the grounds of bias. As stated earlier in this decision, the Tribunal, in its oral ruling, confirmed that the Tribunal would consider the evidence and submissions of the parties respecting the issue of bias, as it relates to the weight to be given to Ms. Laurie's evidence.

Issue 3: Whether the renewable energy approval process violated the Appellants' right under section 7 of the Charter to security of the person

460 The Appellants allege that the renewable energy approval process violates their right to security of the person under s.7 of the *Charter*.

461 Section 7 of the *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

462 The Appellants request a remedy under s. 24(1) of the *Charter* and s.52(1) of the *Constitution Act, 1982* which provide:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

463 A legal analysis of s. 7 of the Charter involves two steps: first, a determination of whether the legislation causes a deprivation of the right to security of the person; and second, a determination of whether the deprivation is in accordance with the principles of fundamental justice.

464 The provisions of the *EPA* that are challenged in this appeal are the following.

> 47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,

(a) issue or renew a renewable energy approval; or

(b) refuse to issue or renew a renewable energy approval.

Terms and conditions

(2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so.

Other powers

(3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,

(a) alter the terms and conditions of a renewable energy approval after it is issued;

(b) impose new terms and conditions on a renewable energy approval; or

(c) suspend or revoke a renewable energy approval.

Same

(4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations.

142.1 (1) This section applies to a person resident in Ontario who is not entitled under section 139 to require a hearing by the Tribunal in respect of a decision made by the Director under section 47.5.

Same

(2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3).

Grounds for hearing

(3) A person may require a hearing under subsection (2) only on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.

465 During the preliminary stages of this proceeding, the Director brought a motion for an order striking the Appellants' claim for constitutional relief, on the basis that the s. 142.1 challenge was too vague, and that the Tribunal does not have jurisdiction to consider the constitutionality of s. 47.5. The Tribunal issued an order on August 15, 2013, with reasons issued September 6, 2013, dismissing that motion. With respect to the challenge to s. 47.5 of the *EPA*, the Tribunal made no ruling on the jurisdictional argument. It observed at para. 43 that "the focus of the constitutional claim relates to s. 47.5 only to the extent that it relates to the grounds stated in s. 142.1," and therefore the Tribunal "need not determine whether it has jurisdiction to consider a constitutional challenge to this more narrow aspect of s. 47.5. In effect, a determination of the constitutionality of s. 142.1 in this case will result in a similar legal effect for the challenged aspects of s. 47.5." The parties in this case, therefore, brought evidence and argument related to both challenged sections of the *EPA*, and the Tribunal has considered them only to the extent that they relate to the gounds stated in s. 142.1.

466 The following passages from Mr. Sanford's Notice of Constitutional Question, which the other Appellants support, outline the basis for the challenge:

4. The legislative scheme for granting approvals to wind farm projects violates the Applicant's right to security of the person as guaranteed by section 7 of the *Charter* in that approvals can be issued to project proponents notwithstanding the known adverse health effects.

5. Industrial wind turbines (IWT's) are recognized for causing a range of serious health effects such as sleep disturbance, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration, and so on, particularly when IWTs are erected within 2 kilometres of an occupied residence.

6. As a result of the regulatory process which does not require the project proponent to establish that there are no adverse health effects associated with IWTs, it is clear that there will be health effects that will violate the section 7 rights of the Applicant.

7. Furthermore, reversing the burden of proof in circumstances where there ***is*** evidence of adverse health effects is itself a violation of s. 7.

8. The Director has the discretion to grant or refuse approval of a renewable energy project. The Director's decision ***must*** conform to the *Charter*. By approving this project the Director has violated the Applicant's right to security of the person and such violation is not in accordance with the principles of fundamental justice.

467 In addition, the following three paragraphs in the joint written submissions by all the Appellants also assist in understanding their constitutional challenge (emphasis added):

• The Appellants argue that "*permitting the Project as set out in the REA* puts the Appellants' physical and psychological integrity at risk, directly and indirectly, thereby depriving them of their right to security of the person." (para. 20)

• "In sum, the Appellants are at risk of serious physical and psychological harm as a *result of the approval of the Project pursuant to the REA provisions of the EPA*." (para. 88)

• In reply submissions, the Appellants clarify that they "assert *a right not to be placed in harm's way by state action*, which is a right the Charter protects."

468 Thus, the Appellants argue that it is the process by which the approval is issued, pursuant to the renewable energy legislative provisions, that deprives them of their right to security of the person.

469 The Director and Approval Holder argue there is no deprivation of the Appellants' right to security of the person. The Director includes three reasons for this position:

• For s. 7 to be engaged, the impugned laws must actively cause a serious harm to physical health or create serious state-imposed psychological stress. The impugned legislation in this case does not cause a deprivation of rights;

• For s. 7 to be engaged, the deprivation must be "serious". Taking the Appellants' evidence at its highest, the harm to human health in this case does not rise to the level of serious; and

• Even if s. 7 is engaged, the Appellants must prove a serious harm. They have not discharged their onus of proving serious harm to human health at a 550m setback/40 dBA sound level limit.

470 The Appellants disagree with the Director's position that s. 7 creates no positive obligation on the state to ensure security of the person. The Appellants argue that the courts have found a s. 7 violation where there was only indirect state action. Further, the Appellants argue that an increased risk of serious harm has been found to be sufficient for a s.7 violation.

471 The Tribunal's s. 7 analysis is structured according to the following three sub-issues:

(a) Whether s. 7 of the Charter is engaged due to state action.

(b) Whether the deprivation of security of the person is serious.

(c) Whether the Appellants have proven that the impugned provisions or government conduct will cause serious psychological or physical harm (i.e., has the Appellant proven the harm exists, or simply a risk of harm?)

472 As discussed below, the Tribunal finds that, assuming that the *Charter* is engaged, the Appellants have not established that there would be a serious deprivation of security of the person, nor that the impugned provisions or government conduct would cause serious psychological or physical harm. Consequently, it is not necessary to make a finding whether the *Charter* is engaged due to state action. However, as this Tribunal received extensive submissions respecting sub-issue (a), the Tribunal has included a review of these submissions in this decision.

Sub-issue (a): Whether s. 7 of the Charter is engaged due to state action

Submissions

473 The Appellants argue that the Supreme Court of Canada has not determined that s. 7 may never create a positive obligation on government to ensure the rights listed therein, but has consciously left the door open for such a finding. In support of its position, the Appellants cite Madam Justice Arbour's dissent in the case *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429 (S.C.C.) ("*Gosselin*"). Paragraphs 308 and 309 of her dissent in that decision read:

> [308] I would allow this appeal on the basis of the appellant's s.7 *Charter* claim. In doing so, I conclude that the s.7 rights to "life, liberty and security of the person" include a positive dimension. Few would dispute that an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and security of its citizens. There is considerably less agreement, however, as to whether this positive moral obligation translates into a legal one. Some will argue that there are interpretive barriers to the conclusion that s.7 imposes a positive obligation on the state to offer such basic protection.
>
> [309] In my view these barriers are all less real and substantial than one might assume. This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state - as in this case - for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s.7. In my view, far from resisting this conclusion, the language and structure of the *Charter* - and of s.7 in particular - actually compel it.
>
> (emphasis in the original)

474 Further, the Appellants draw an analogy between the fact situation in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.) ("*G(J)*"), referred to by Justice Arbour in her dissent, and the present case. In *G. (J.)*, a child was removed from the custody of the child's parents. The Supreme Court of Canada held that in the ensuing court proceedings, the failure of the state to provide legal aid to the child's parents engaged their s. 7 right to security of the person. The Appellants draw the analogy that the state acted by issuing the REA for the Project; the subsequent failure of the province to provide for safe set-back distances and/or to conduct studies that prove the safety of the Project then engage the Appellants' s. 7 rights.

475 The Appellants also argue that s. 7 can be engaged where the harm is caused by state action in an indirect way, citing *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264 (Ont. S.C.J.), affd 2012 ONCA 186 (Ont. C.A.) (upheld by the Supreme Court of Canada on December 20, 2013 [2013 CarswellOnt 17681 (S.C.C.)]) ("*Bedford*"). *Bedford* addressed a claim that, by prohibiting prostitutes from taking certain actions that were protective of their health, such as working indoors, the state increased a risk of harm to sex workers. In that case, the Ontario Court of Appeal found s. 7 to be engaged despite the fact that it was the behaviour of the clients that directly caused the harm, not state action. Drawing a parallel to the present case, the Appellants argue that the Province does not need to own the turbines, in order to indirectly cause a harm sufficient to deprive the Appellants of their s. 7 right to security of the person.

476 The Director and the Approval Holder submit that there is an established line of cases from the Supreme Court of Canada stating that s. 7 of the *Charter* does not provide a "freestanding right" to security of the person. Only state action (i.e., legislation) that limits the right to life, liberty and security of the person will attract s. 7 scrutiny. They agree that the Supreme Court has determined that security of the person under s. 7 of the *Charter* protects against state interference with the physical and psychological integrity of the individual.

477 The Director points out that Madam Justice Arbour's dissent in *Gosselin* has been discussed but not been followed in subsequent Supreme Court jurisprudence. The Director notes that the majority opinion in *Gosselin* is stated in para. 81, by Chief Justice McLachlin:

> Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> (emphasis in the original)

478 McLachlin, C.J. goes on to recognize that the Constitution is a "living tree" such that the current interpretation of s. 7 is not frozen, and that "one day it may be interpreted to include positive obligations" (para. 82). The Director argues, however, that thus far the Court has consistently refused to interpret it in that way and in every case where s. 7 has been engaged, there has been a legislative prohibition on conduct.

479 The Director argues that the case of *G. (J.)*, relied on by the Appellants, is not an example of the Court recognizing positive rights because there was a "profound" state-imposed deprivation of a s. 7 right (serious psychological harm through removal of the litigant's child), and for that reason it was found that legal aid funding had to be extended to the parents.

480 Similarly in *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791 (S.C.C.) ("Chaoulli"), the Quebec provincial legislation in question prohibited people from obtaining private health care where it was established on the evidence that people died while on public health care waiting lists. It was the fact that the legislation deprived citizens of the opportunity to seek alternative forms of health care, that engaged s. 7.

481 The Approval Holder argues that the Appellants are incorrect in their submissions that the Ontario Court of Appeal in *Bedford* expanded the scope of state action that is proscribed by s. 7, to indirect effects. Rather, the Approval Holder argues that the Court of Appeal in that case found a direct link between the Criminal Code provisions and the impact on security of the person.

482 The Director argues that *Bedford* is also an example of state prohibition engaging the s. 7 right. There, the impugned provisions criminalized basic actions that sex workers might take to reduce their risk of physical harm. In para. 111, the Court of Appeal notes:

> On the facts as found by the application judge, each of the provisions criminalizes conduct that would mitigate, to some degree, the risk posed to prostitutes. On those findings, the relevant Criminal Code provisions, individually and in tandem, increase the risk of physical harm to persons in engaged in prostitution, a lawful activity.

Discussion of sub-issue (a)

483 The Supreme Court of Canada has consistently found that s. 7 of the *Charter* protects only against state-imposed deprivations of security of the person and rejected arguments that s. 7 can apply in the absence of a prohibition that deprives a person of a protected right. Examples of the approach include *Gosselin* and *Chaoulli*. The Supreme Court of Canada decision in *Bedford v. Canada (Attorney General)*, 2013 SCC 72 (S.C.C.), which was issued after final submissions had been filed in

this proceeding, upholds the Ontario Court of Appeal decision which was extensively referred to and cited by the parties, and is consistent with this pattern.

484 The following passage from *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 (Ont. C.A.) ("*Flora*"), a case where Mr. Flora alleged that a refusal by the Ontario Health Insurance Plan ("OHIP") to reimburse him for an out-of-country medical treatment for liver cancer violated his right to security of the person, helps clarify the distinction between state conduct which might infringe s. 7 by imposing a legal prohibition, and other forms of state conduct:

> In *Chaoulli, Morgentaler* and *Rodriguez*, but not in Mr. Flora's situation, the state took action to prohibit something. The prohibition in these cases meant that the individual was not allowed to take his or her desired course of control over his or her own health without suffering consequences imposed by the state (*Chaoulli* at para. 122). These are all very much cases essentially dealing with freedom "from" state interference in the manner in which individuals arrange their health care. While the decision by the state to fund or not to fund a particular course of treatment may certainly impact a person's s. 7 interests, such an effect is not the type of infringement contemplated by s. 7. If it were, it would seem that the burden on the government would be limitless.

485 The Supreme Court of Canada has expressed the *caveat*, as noted in Chief Justice McLachlin's comments at para. 82 in *Gosselin*, that s. 7 may be interpreted more expansively in the future. This *caveat* was expressed by Cronk, J.A. of the Ontario Court of Appeal in *Flora* as "s. 7 may one day be interpreted to include positive obligations in special circumstances where, at a minimum, the evidentiary record discloses actual hardship" (at para. 105).

486 It is not a straightforward exercise in this case, however, to determine whether or not the alleged deprivation is attributable to the state. As Madam Justice Arbour observed in *Gosselin*: "It may also be the case that no such definitive state action can be located in the instant appeal, though this will largely depend on how one chooses to define one's terms and, in particular, the phrase "state action"." (para. 319)

487 The Appellants argue that they "do not assert a positive right to a constitutionally-mandated process for restricting the development of IWTs. The Appellants assert a right not to be placed in harm's way by state action, which is a right that the Charter protects." Further, the Appellants argue that "(t)he legislative means chosen to implement the decision to permit IWTs do cause or increase the risk of serious harm to the Appellants, at the hands of the state. There are known health effects associated with placing IWTs within 550 metres of human beings."

488 The Director and the Approval Holder argue that it is not state action that "places" the Appellants "in harm's way" (even if this were made out on the facts). They argue that renewable energy projects are private businesses, not government projects. On the contrary, they argue the renewable energy approval process is *protective* of human health by requiring set-backs and maximum sound levels for these private projects. The Approval Holder argues that the renewable energy approval regime prohibits wind projects to start with, unless they meet certain criteria, including an onerous, prescriptive process, intensive review, and an appeal process open to any person. The Approval Holder argues that the Appellants' real complaint here is that the protective measures should be more rigorous, which, it suggests, is an assertion of a right to positive state action.

489 The Approval Holder submits: "In stark contrast to the legislation at issue in such cases as *Morgentaler*, *Rodriguez*, *Chaoulli*, *Bedford* and *PHS*, the REA process imposes no prohibitions on individuals that would interfere with a person's ability to take control over his or her own body or impose serious psychological stress."

490 The Director argues that, unlike in *Bedford*, the alleged harm here is not state-imposed. Rather, the current situation is more like *Flora*, noted above. At issue there was a section in the regulation that had been amended to alter the test for OHIP funding, such that under the earlier version of the regulation Mr. Flora would have qualified for reimbursement for out-of-country medical treatment, but he did so no longer. The Ontario Court of Appeal found at para. 101 that the regulation in question "does not prohibit or impede anyone from seeking medical treatment":

> Section 28.4(2) neither prescribes nor limits the types of medical services available to Ontarians. Nor does it represent governmental interference with an existing right or other coercive state action. Quite the opposite. Section 28.4(2) provides

a defined benefit for out-of-country medical treatment that is not otherwise available to Ontarians - the right to obtain public funding for certain specific out-of-country medical treatments. By not providing funding for all out-of-country medical treatments, it does not deprive an individual of the rights protected by s.7 of the *Charter*.

491 Further, the Director argues that *Flora* clarifies the principle that a *Charter* breach is not made out where a change in law allegedly takes away privileges that were available under an earlier law. In this regard the Ontario Court of Appeal in *Flora* cites *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (Ont. C.A.) at p.110, as follows: "If there is no constitutional obligation to enact [the legislation at issue] in the first place, I think that it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before [the impugned legislation]." On this point, the Director argues that if you strip away the regulatory protections such as set-back requirements and appeal rights, the only protections otherwise available to Ontarians are under the common law, not the *Charter*. Thus, it does not assist the *Charter* argument for the Appellants to claim that they have less protection under the current regime than under the pre-renewable energy approval regime.

492 The Approval Holder argues that the renewable energy approval process promotes and protects human health, including by:

- promoting renewable energy to protect the environment, including human life;
- establishing a mandatory application process for renewable energy projects, which includes, among other things, (i) an extensive consultation process; (ii) adherence to setback requirements; and (iii) demonstrated management of potential environmental effects;
- requiring compliance with the Noise Guidelines;
- requiring the Director to form an opinion as to whether it is in the public interest to issue a renewable energy approval;
- conferring on the Director significant continuing powers over renewable energy projects;
- conferring a wide right of appeal to a specialized tribunal for a specific, independent and fresh review of whether the project, as approved, will cause serious harm to human health;
- conferring a further right of appeal to the Minister of the Environment, for a further consideration of the public interest.

493 The Tribunal finds that the core of the Appellants' claim is that greater protections are required for human health than what are currently provided for under the requirements for renewable energy approvals. This claim applies to *all* renewable energy approvals, not just the current Project, despite the fact that under the legislative scheme it is the approval for the Project that is under appeal to the Tribunal.

494 Such a characterization might lend itself to a finding that the current appeal is analogous to the OHIP case of *Flora*; that is, the impugned sections of the *EPA* are protective of security of the person, rather than causing a deprivation of a freestanding right.

495 At the same time, the demand for greater health protections only arises because of the Director's decision to allow a wind project in an area where it did not previously exist. The Appellants argue that the protections built into the approval are insufficient *in the context of* a project that is being allowed to proceed. In this regard the present case is more akin to *G. (J.)*, where the state action in allowing the Project necessitates sufficient protections to prevent harm to human health. Viewed in this manner, it is the Director's decision, or the statutory scheme that has charged the Director with making this decision based on "public interest" factors, that would engage s. 7.

496 As noted above, the Tribunal finds that it is not necessary to determine which characterization is more appropriate in this case, in light of its findings respecting sub-issues (b) and (c). Either characterization may be argued and considered by the Tribunal in future.

Sub-issue (b): Whether the deprivation of security of the person is serious.

497 As noted above, for the purposes of analysis of this sub-issue, the Tribunal assumes that s. 7 is engaged due to state action in this case.

498 The Approval Holder cites the Supreme Court of Canada decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) ("*Blencoe*") for the proposition that state action is a deprivation of security of the person only when it interferes "with an individual interest of fundamental importance" (at paras. 81-83).

499 The Director argues that the Supreme Court of Canada has been clear in holding that the right to security of the person is not engaged by ordinary stresses and anxiety, citing Chief Justice Lamer in *G. (J.)*.

500 The Approval Holder referred to two Supreme Court of Canada decisions in particular, as illustrative of what is, and what is not, serious harm engaging s. 7. In *Chaoulli*, the Court found that the anxiety associated with waiting for health care could "have a serious and profound effect on a person's psychological integrity", and therefore s. 7 was engaged. The evidence in that case was that patients had died as a result of waiting lists for public health care. On the other hand, the Court found in *Blencoe* that depression, anxiety and psychological problems associated with a delay in having a human rights complaint heard did not engage s. 7. In that case, the Approval Holder submits, the delay and associated psychological impacts did not interfere with an individual interest of fundamental importance.

Findings on sub-issue (b)

501 The Tribunal agrees with the Approval Holder and Director, that harm must be "serious" in order to engage s. 7. As the Supreme Court of Canada held in *Chaoulli* at para. 123:

> Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious.

502 See also *Blencoe*, at para. 81:

> In order for security of the person to be triggered ... the impugned state action must have a serious and profound effect on the respondent's psychological integrity.

503 The Chief Justice in *G. (J.)* explained the threshold in a more fulsome way, at paras. 59 - 60:

> Dickson C.J. in *Morgentaler*, *supra*, at p. 56, suggested that security of the person would be restricted through "serious state-imposed psychological stress" (emphasis added). Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected .... [emphasis in original]
>
> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

504 As discussed above, the Appellants brought evidence in this case that some people will be annoyed by wind turbine projects. As noted in the Tribunal's findings in the health section above, whether a person will be annoyed by wind turbine

noise at 40 dBA is a subjective reaction which cannot be predicted with any accuracy, and the impact of that annoyance on the person's health status is not clear.

505 As concluded in the WHO (Europe) 2011 Report, annoyance is difficult to define. While it may be that severe and prolonged annoyance may lead to stress-related physical effects in some cases, the evidence before the Tribunal in this case does not make even that qualified a connection between possible stress-related physical effects and wind turbines, where noise is limited to 40 dBA.

506 On the evidence before us, the Tribunal finds that the annoyance referred to in the Howe study is a subjective psychological state. According to the Supreme Court of Canada in *Blencoe*, an interference with psychological integrity must have a "serious and profound effect on psychological integrity", to engage s. 7 of the *Charter*. The Appellants in this case have not established human health effects through annoyance to be more significant than "ordinary stress or anxiety", as discussed in *Blencoe* .

507 Supreme Court of Canada jurisprudence has stated that physical harm must be "serious" to engage s. 7. If annoyance were accepted to have physical effects, which was not established on the evidence, those effects would have to be serious to engage s. 7. The Tribunal finds the evidence in this proceeding does not rise to the level of seriousness required to engage s. 7.

508 With respect to the post-turbine witness' evidence, as noted above it has not been established that the health complaints they assert are causally connected to wind turbines, including those resulting from annoyance caused by wind turbines.

509 In conclusion, the Tribunal finds that the Appellants have not established that annoyance could be considered serious for either of the tests sought to be met: s. 145.2.1(2)(a) of the *EPA* "serious harm to human health", or serious enough for s. 7 of the *Charter* to be engaged (i.e., "serious" from *Chaoulli* para. 123, or "serious and profound effect on psychological integrity" from *Blencoe* para. 81).

Sub-issue (c): Whether the Appellants have proven that the impugned provisions or government conduct will cause serious psychological or physical harm (has the Appellant proven the harm exists, or simply a risk of harm?)

510 As noted above, for the purposes of analysis of this sub-issue, the Tribunal assumes that s. 7 is engaged due to state action in this case. The Appellants argue that the Supreme Court has found s. 7 of the *Charter* to be engaged where a risk of harm is established. They refer to *Bedford* (Criminal Code provisions preventing sex workers from taking steps to protect their health and safety), *Chaoulli* (risk of harm due to waiting lists for health care), and *PHS Community Services Society v. Canada (Attorney General)*, [2011] 3 S.C.R. 134 (S.C.C.) ("*Insite")* (decision to close safe injection site increases risk to intravenous drug users), as support.

511 The Appellants argue the Constitution should be given a generous interpretation (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at 344).

512 The Director argues that proving a risk of harm is not sufficient; rather, that real harm must be proven to be caused by the provision in question. The Director argues that, in cases where a "risk of harm" was established, such as the *Insite* and *Bedford* cases, the impugned prohibitions were proven to cause an increased risk of serious harm in circumstances where an existing serious harm has already been proven.

513 In *Insite*, the Court's finding of a deprivation of security of the person was grounded in the trial judge's finding of fact that there was a pre-existing risk of serious physical harm from drug addiction and the injection of drugs. The Court recognized that "[t]he risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals" and that the criminal prohibition (without an exemption) increased that risk. The Court in that case concluded that where a law "creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out." (*Insite*, para. 93)

514 Similarly, in the case of *Chaoulli* (para. 123):

> ... because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s.7 protection of security of the person is engaged. ... As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. ... The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets the threshold requirement of seriousness.

515 The Director argues that, in *Bedford*, the Ontario Court of Appeal found that by prohibiting prostitutes from working at home and hiring a bodyguard, the legislation increased pre-existing, inherent risks involved in the profession of prostitution, including physical violence or death (upheld by the Supreme Court of Canada).

516 The Director argues that the risk of a known harm was proven in each of the cases where s. 7 was found to be engaged. By contrast, the Director argues that the Appellants in this case have no such evidentiary basis.

517 The Approval Holder argues that *Charter* jurisprudence has consistently relied on expert evidence to establish the harm. In this regard the Approval Holder cites the Federal Court decision in *TrueHope Nutritional Support Ltd. v. Canada (Attorney General)*, 2011 FCA 114 (F.C.A.) (CanLII), para. 89, which held that determining whether psychological prejudice engages the right to security of the person requires "a critical analysis of not only [the plaintiff's] subjective evidence but also relevant objective evidence with respect to the content of [the plaintiff's] subjective claim in order to determine the weight to be given to [the] subjective evidence."

Findings on sub-issue (c)

518 The Tribunal finds that in all of the Supreme Court of Canada cases where a risk of harm has engaged s. 7 of the *Charter*, the "risk of harm" described is with respect to a proven pre-existing harm. In this case, the "risk of harm" is better characterized as a risk that a harm may result from a wind turbine project operating at the established decibel limit; not that a known harm has an increased chance of occurring. Tribunal decisions on wind energy appeals have consistently noted the lack of current scientific evidence establishing a causal link at regulated noise levels and setbacks, and indeed Health Canada has instigated a study on this topic in order to better understand the effects, if any, of wind turbines on human health.

519 The Tribunal finds that the state of the evidence in this case is on all fours with *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) *("Operation Dismantle")*, where the Supreme Court stated:

> Section 7 of the *Charter* cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act. (at para 29)

520 Consequently, the Tribunal finds that the Appellants have not established that the impugned provisions or government conduct will cause serious psychological or physical harm.

Summary of Findings on Issue 3

521 Assuming, without deciding, that wind turbines will cause annoyance in a percentage of the population consistent with Mr. Howe's report, the Appellants have nevertheless not established that annoyance per se constitutes serious harm to human health, or even that this Project will cause any health impacts at the set-back distances and sound pressure levels mandated. Annoyance per se has not been proven to be a health effect, and is too vague a concept to be considered serious harm so as to engage s. 7 of the *Charter*. The constitutional challenge therefore fails on the evidence.

522 Given the Tribunal's finding that s. 7 of the *Charter* is not engaged due to lack of an evidentiary foundation of serious harm, there is no need to proceed to the second stage of the analysis relating to whether the deprivation is in accordance with the principles of fundamental justice.

Decision

523 The Tribunal finds that the Appellants have not established that engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment.

524 The Tribunal finds that the Appellants have not established that engaging in the Project as approved will cause serious harm to human health.

525 The Tribunal finds that the Appellants have not established, on the facts of this case, that the renewable energy approval process violated the Appellants' right to security of the person under section 7 of the *Charter*.

Appeal dismissed.

AppendixA

Dr. McMurthy's Case Definition

Case Definition

The criteria for making an individual diagnosis of probable AHEs in the environs of IWTs are presented in the following paragraphs. The definition endeavors to be specific and sensitive. While the definition has not been validated formally in practice, it has proven useful. The case definition represents an important starting point for future international research collaboration. The genesis of the definition is based on a review of the literature and direct experience with those individuals experiencing AHE/IWT. It has been used to provide guidance to physicians and other primary health providers when they are asked to manage individuals following exposure to IWTs. The value of this proposal is based on the absence of a specific case definition either in the peer-reviewed or gray literature.

Diagnosis of Adverse Health Effects in the Environs of Industrial Wind Turbines Possible adverse health effects.

Report of a change in health status by people living within 5 km of a wind farm installation. Further confirmation is required to validate or exclude AHE/IWT by establishing a medical history that satisfies the criteria identified under "Probable Adverse Health Effects" below.

Probable adverse health effects.

1. First-order criteria (all four of the following must be present):

    (a) Domicile within 5 km of industrial wind turbines (IWT)

    (b) Altered health status following the start-up of, or initial exposure to, and during the operation of, IWTs. There may be a latent period of up to 6 months

    (c) Amelioration of symptoms when more than 5 km from the environs of IWTs

    (d) Recurrence of symptoms upon return to environs of IWTs within 5 km

2. Second-order criteria (at least three of the following occur or worsen after the initiation of operation of IWT):

    (a) Compromise of quality of life

    (b) Continuing sleep disruption, difficulty initiating sleep, and/or difficulty with sleep disruption

    (c) Annoyance producing increased levels of stress and/or psychological distress

    (d) Preference to leave residence temporarily or permanently for sleep restoration or well-being

3. Third-order criteria (at least three of the following occur or worsen following the initiation of IWTs):

(i) Otological and vestibular

(a) Tinnitus

(b) Dizziness

(c) Difficulties with balance

(d) Ear ache

(e) Nausea

(ii) Cognitive

(a) Difficulty in concentrating

(b) Problems with recall or difficulties with remembering significant information

(iii) Cardiovascular

(a) Hypertension

(b) Palpitations

(c) Enlarged heart (cardiomegaly)

(iv) Psychological

(a) Mood disorder, that is, depression, anxiety

(b) Frustration

(c) Feelings of distress

(d) Anger

(v) Regulatory disorders

(a) Difficulty in diabetes control

(b) Onset of thyroid disorders or difficulty controlling hypo- or hyperthyroidism

(vi) Systemic

(a) Fatigue

(b) Sleepiness

Confirmed adverse health effects.

The confirmation of AHE/IWT is achieved by a clinical evaluation and physiological monitoring of individuals during exposure to IWT sonic energy or an accurate facsimile (recording or other imitative source of IWT sound). Ideally, sleep studies should be carried out in the home of people experiencing AHEs. The complex physiological monitoring equipment required for a sleep

study is not readily made mobile. Accordingly, sleep studies need to be carried out in an established clinical sleep laboratory with a source of sonic energy that accurately reflects the person's exposure to IWTs.

The process may be simpler once controlled studies comparing possible victims with a nonexposed matched population are carried out. These studies could help determine the core physiological change(s) that is (are) likely occurring to those who live in the environs of IWTs.

The need to rule out alternate explanations is the responsibility of the licensed clinician. While adherence to the criteria has resulted in no false positive diagnosis to date further validation is required.

Update to Case Definition

1. The deployment of the Diagnostic Criteria requires use by health care practitioner licensed to take a history and make diagnoses.

2. Exclusion criteria were not included in the first paper and are itemized below.

A person is to be excluded those if the individual is;

- under the age of 18
- lacking in English language skills in the verbal domain
- sufficiently cognitively impaired to be unable to answer questions reasonably and consistently
- uffering from recent illness or injury which interferes with cognitive function

3. There are 3 categories of diagnosis, possible, probable and confirmed. "Possible" diagnosis indicates that the diagnosis of adverse health effects in the environs of industrial wind turbines (AHE/IWT) should be considered as a potential diagnosis and considered among differential diagnoses of the presenting complaints. "Probable" diagnosis indicates that AHE/IWT more likely than not are the cause of the complaints. AHE/IWT is the working diagnosis. Other diagnostic possibilities continue to exist and should be considered in the differential diagnoses. "Confirmed diagnosis" indicates that other diagnosis are very unlikely i.e. less than one chance in twenty.

4. Among the original three orders of criteria for diagnosis of AHE/IWT i.e. First-, Second- and Third-order, the first two orders have proven consistently vigorous in practice and robust when challenged in quasi-judicial processes (example Environmental Review Tribunals or ERT). In addition the Case Definition has been cited 10 times (1) in the literature according to Google Scholar. The Third-order criteria have been misunderstood and proven to be a major focus of authors criticizing and in some instances denying the existence of AHE/IWT (Simon Chapman).

Castonguay Blasting Ltd. *Appellant*

v.

Her Majesty The Queen in Right of the Province of Ontario as represented by the Minister of the Environment *Respondent*

and

Canadian Environmental Law Association and Lake Ontario Waterkeeper *Interveners*

Dynamitage Castonguay Ltée *Appelante*

c.

Sa Majesté la Reine du chef de la province de l'Ontario, représentée par le ministre de l'Environnement *Intimée*

et

Association canadienne du droit de l'environnement et Lake Ontario Waterkeeper *Intervenantes*

Indexed as: Castonguay Blasting Ltd. *v.* Ontario (Environment)

2013 SCC 52

File No.: 34816.

2013: May 17; 2013: October 17.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Répertorié : Dynamitage Castonguay Ltée *c.* Ontario (Environnement)

2013 CSC 52

N° du greffe : 34816.

2013 : 17 mai; 2013 : 17 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Environmental law — Offences — Obligation to report to Ministry of Environment discharge of contaminant into natural environment — Subcontractor's blasting operations propelling rock debris into air, damaging home and car — Subcontractor failing to report to Ministry of Environment discharge of contaminant — Whether reporting requirement triggered in this case — Environmental Protection Act, R.S.O. 1990, c. E.19, s. 15(1).

The appellant C was conducting blasting operations for a highway-widening project when the operation went awry and rock debris known as "fly-rock" was propelled into the air by an explosion. The fly-rock shot approximately 90 metres in the air and damaged a home and a car. A significant amount of rock also landed in the yard. C did not report the incident to the Ministry of the Environment ("Ministry") and was subsequently charged with failing to report to the Ministry the discharge of a contaminant into the natural environment contrary to s. 15(1) of the *Environmental Protection Act* ("*EPA*"). C was acquitted by the Ontario Court of Justice. The

Droit de l'environnement — Infractions — Obligation d'aviser le ministère de l'Environnement du rejet d'un contaminant dans l'environnement naturel — Opérations de dynamitage d'un sous-traitant entraînent la projection dans les airs d'éclats de roc, endommageant une demeure et une voiture — Omission par le sous-traitant d'aviser le ministère de l'Environnement du rejet du contaminant — L'obligation d'aviser est-elle entrée en jeu en l'espèce? — Loi sur la protection de l'environnement, L.R.O. 1990, ch. E.19, art. 15(1).

L'appelante C effectuait des opérations de dynamitage dans le cadre de travaux d'élargissement d'une route lorsque l'opération a mal tourné et que des « éclats de roc » ont été projetés dans les airs par la force d'une explosion. Les éclats de roc ont été propulsés dans les airs sur une distance approximative de 90 mètres et ont endommagé une demeure et une voiture. Une quantité importante d'éclats sont aussi tombés dans la cour. C n'a pas signalé l'incident au ministère de l'Environnement (« ministère ») et, par la suite, a été accusée d'avoir omis, en violation du par. 15(1) de la *Loi sur la protection de l'environnement* (« *LPE* »), d'aviser

Ontario Superior Court of Justice set aside the acquittal and entered a conviction. A majority in the Court of Appeal dismissed C's appeal.

Held: The appeal should be dismissed.

Ontario's *EPA* requires that the Ministry of the Environment be immediately notified when a contaminant is discharged into the environment. There are two preconditions to this reporting requirement — the discharge must have been out of the normal course of events and it must have had — or was likely to have — an adverse environmental impact. The purpose of the requirement is to let the Ministry know about potential environmental damage so that any consequential remedial steps can be taken in a timely way.

The *EPA* is Ontario's principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation. Environmental protection is a complex subject matter — the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification. As a result, environmental legislation embraces an expansive approach to ensure that it can adequately respond to a variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation. Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep.

The overall purpose of the *EPA* is set out in s. 3: "The purpose of this Act is to provide for the protection and conservation of the natural environment." The *EPA* also protects those who *use* the natural environment by protecting human health, plant and animal life, and property. The *EPA* seeks to achieve its goal of protecting the natural environment and those who use it through a series of regulations, prohibitions and reporting requirements. It also provides for a wide range of inspection, enforcement, preventative and remedial powers.

One of the means by which the *EPA* promotes its protective and preventative purposes is through the prohibition in s. 14(1) against discharging a contaminant into the natural environment where it is likely to have an

le ministère qu'elle avait rejeté un contaminant dans l'environnement naturel. C a été acquittée par la Cour de justice de l'Ontario, mais la Cour supérieure de justice de l'Ontario a annulé l'acquittement et inscrit une déclaration de culpabilité. Les juges majoritaires de la Cour d'appel ont rejeté l'appel de C.

Arrêt : Le pourvoi est rejeté.

La *LPE* exige que le ministère de l'Environnement soit avisé sans délai lorsqu'un contaminant a été rejeté dans l'environnement. Cette obligation de signalement est assujettie à deux conditions préalables — il doit s'agir d'un rejet accompli en dehors du cours normal des événements, et qui cause — ou causera vraisemblablement — une conséquence préjudiciable sur l'environnement. L'obligation en question a pour but d'informer le ministère des dommages possibles à l'environnement, afin que puissent être prises en temps utile les mesures correctives qui s'imposent.

La *LPE* est la principale loi ontarienne en matière de protection de l'environnement. Comme elle constitue une loi réparatrice, elle doit recevoir une interprétation généreuse. La protection de l'environnement est un sujet complexe — en effet, l'environnement lui-même et la vaste gamme d'activités susceptibles d'en causer la dégradation ne se prêtent pas aisément à une codification précise. Par conséquent, les lois protégeant l'environnement reposent sur l'application d'une approche générale, qui permet de réagir adéquatement à une gamme d'atteintes environnementales, y compris celles qui n'ont peut-être même pas été envisagées par leurs rédacteurs. Parce que l'objectif poursuivi par le législateur est la protection de l'environnement, la portée voulue de ces lois est large et profonde.

L'objectif général de la *LPE* est énoncé à l'art. 3 : « La présente loi a pour objet d'assurer la protection et la conservation de l'environnement naturel. » La *LPE* protège également les personnes qui *utilisent* l'environnement naturel en protégeant la santé des humains, les végétaux, les animaux et les biens. La *LPE* cherche à réaliser son objectif de protection de l'environnement naturel et des personnes qui l'utilisent au moyen d'un ensemble de règlements, d'interdictions et d'obligations de signalement. Elle prévoit également un large éventail de pouvoirs en matière d'inspection, de mise en application de la loi, de prévention et de réparation.

L'un des moyens par lesquels la *LPE* tend à l'atteinte de ses objectifs de protection et de prévention réside dans l'interdiction, énoncée au par. 14(1), de rejeter dans l'environnement naturel un contaminant qui causera

"adverse effect". This purpose is reinforced by the related requirement in s. 15(1) that any such discharge which is out of the normal course of events be reported to the Ministry of the Environment.

When a contaminant is discharged, the discharger may not know the full extent of the damage caused or likely to be caused. The purpose of the reporting requirement in s. 15(1) is to ensure that it is the Ministry, and not the discharger, who decides what, if any, further steps are required. Moreover, many potential harms may be difficult to detect without the expertise and resources of the Ministry. As a result, the statute places both the obligation to investigate and the decision about what further steps are necessary with the Ministry and not the discharger. Notification provides the Ministry with the opportunity to conduct an inspection as quickly as possible and to obtain information in order to take any necessary remedial action and to fulfill its statutory mandate. This enables the Ministry to respond in a timely way to the discharge of a contaminant into the natural environment and to be involved in determining what, if any, preventative or remedial measures are appropriate.

"Adverse effect" is defined in s. 1(1) of the *EPA*. It has eight definitional components. These eight branches of the definition reflect a statutory recognition that protecting the natural environment requires, among other strategies, maximizing the circumstances in which the Ministry of the Environment may investigate and remedy environmental harms. Each of the eight branches provides an independent trigger for the duty to report.

Section 15(1) of the *EPA* was clearly engaged in the circumstances of this case and C was required to report the discharge of fly-rock forthwith to the Ministry of the Environment. C "discharged" fly-rock into the "natural environment", and there is no doubt that fly-rock meets the definition of "contaminant". The discharge was "out of the normal course of events", and it caused an "adverse effect" under the definition of that term in s. 1(1), namely, it caused injury or damage to property and loss of enjoyment of the normal use of property. The adverse effects were not trivial. The force of the blast, and the rocks it produced, were so powerful they caused extensive

vraisemblablement une « conséquence préjudiciable ». Cet objectif est renforcé par l'obligation connexe, prévue au par. 15(1), d'aviser le ministère de l'Environnement d'un tel rejet s'il est accompli en dehors du cours normal des événements.

Lors du rejet d'un contaminant, il est possible que l'auteur ne connaisse pas toute l'ampleur des dommages qui sont causés ou qui peuvent vraisemblablement être causés. L'obligation de signalement prescrite par le par. 15(1) a pour but de faire en sorte que ce soit le ministère, et non l'auteur du rejet, qui décide si des mesures supplémentaires sont requises et, dans l'affirmative, lesquelles. En outre, de nombreuses nuisances éventuelles peuvent être difficiles à détecter sans l'expertise et les ressources dont dispose le ministère. En conséquence, la loi confère au ministère, et non à l'auteur du rejet, l'obligation d'enquêter ainsi que le pouvoir de décider des mesures supplémentaires qui sont nécessaires. La réception de l'avis prescrit donne au ministère la possibilité de procéder aussi rapidement que possible à une inspection et d'obtenir des renseignements en vue de prendre toutes les mesures réparatrices nécessaires et de s'acquitter du mandat que lui confie la loi. Ce processus lui permet également de réagir en temps utile au rejet d'un contaminant dans l'environnement naturel et de participer à la détermination, s'il y a lieu, des mesures préventives ou réparatrices appropriées.

La définition du terme « conséquence préjudiciable » est énoncée au par. 1(1) de la *LPE* et comporte huit éléments. Ceux-ci montrent que la loi reconnaît que la protection de l'environnement naturel exige, entre autres stratégies, de maximiser l'éventail des circonstances dans lesquelles le ministère de l'Environnement peut enquêter sur les nuisances environnementales et y remédier. Chacune des huit formes de la notion de « conséquence préjudiciable » constitue une source autonome de responsabilité.

Le paragraphe 15(1) entrait manifestement en jeu dans les circonstances de la présente espèce et C était tenue de signaler sans délai au ministère de l'Environnement le rejet des éclats de roc. C « a rejeté » dans « l'environnement naturel » des éclats de roc et il ne fait aucun doute que ces éclats de roc sont visés par la définition de « contaminant ». Le rejet a été accompli « en dehors du cours normal des événements » et a causé une « conséquence préjudiciable » au sens de la définition de ce terme énoncée au par. 1(1), c'est-à-dire qu'il a causé un tort ou des dommages à des biens et la perte de jouissance de l'usage normal de ces biens. Les

and significant property damage, penetrating the roof of a residence and landing in the kitchen. A vehicle was also seriously damaged. The fly-rock could easily have seriously injured or killed someone. Accordingly, C was required to report the discharge of fly-rock forthwith to the Ministry of Environment under s. 15(1) of the *EPA*.

Cases Cited

Referred to: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Dow Chemical Canada Inc.* (2000), 47 O.R. (3d) 577; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241.

Statutes and Regulations Cited

Environmental Protection Act, R.S.O. 1980, c. 141, s. 13(1).

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 1(1) "adverse effect", "contaminant", "discharge", "natural environment", 3, 6, 7, 8, 14, 15(1), 17, 18, 91.1, 92, 93, 94, 97, 132, 156, 157, 157.1, 188.1.

Legislation Act, 2006, S.O. 2006, c. 21, Sch. F, s. 64.

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 53.

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McIntyre, Owen, and Thomas Mosedale. "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Envtl. L.* 221.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Simmons and Blair JJ.A.), 2012 ONCA 165, 109 O.R. (3d) 401, 289 O.A.C. 146, 65 C.E.L.R. (3d) 1, 10 C.L.R. (4th) 165, [2012] O.J. No. 1161 (QL), 2012 CarswellOnt 2199, affirming a decision of Ray J., 2011 ONSC 767, 57 C.E.L.R. (3d) 142, 226 C.R.R. (2d) 180, [2011] O.J. No. 364 (QL), 2011 CarswellOnt 467, which set aside a decision of Hunter J., 53 C.E.L.R. (3d) 140, [2010] O.J. No. 5713 (QL), 2010 CarswellOnt 6245. Appeal dismissed.

conséquences préjudiciables n'étaient pas négligeables. La force de l'explosion et les éclats de roc qu'elle a produits étaient si puissants que d'importants dommages aux biens ont été causés, les éclats ayant en effet traversé le toit d'une résidence et fini leur course dans la cuisine. En outre, un véhicule a été gravement endommagé. Les éclats de roc auraient pu facilement blesser sérieusement une personne ou la tuer. En conséquence, en application du par. 15(1) de la *LPE*, C était tenue de signaler le rejet des éclats de roc sans délai au ministère de l'Environnement.

Jurisprudence

Arrêts mentionnés : *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031; *R. c. Dow Chemical Canada Inc.* (2000), 47 O.R. (3d) 577; *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, 2001 CSC 40, [2001] 2 R.C.S. 241.

Lois et règlements cités

Loi de 2006 sur la législation, L.O. 2006, ch. 21, ann. F, art. 64.

Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141, art. 13(1).

Loi sur la protection de l'environnement, L.R.O. 1990, ch. E.19, art. 1(1) « conséquence préjudiciable », « contaminant », « environnement naturel », « rejet », « rejeter », 3, 6, 7, 8, 14, 15(1), 17, 18, 91.1, 92, 93, 94, 97, 132, 156, 157, 157.1, 188.1.

Loi sur la santé et la sécurité au travail, L.R.O. 1990, ch. O.1, art. 53.

Doctrine et autres documents cités

McIntyre, Owen, and Thomas Mosedale. « The Precautionary Principle as a Norm of Customary International Law » (1997), 9 *J. Envtl. L.* 221.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Simmons et Blair), 2012 ONCA 165, 109 O.R. (3d) 401, 289 O.A.C. 146, 65 C.E.L.R. (3d) 1, 10 C.L.R. (4th) 165, [2012] O.J. No. 1161 (QL), 2012 CarswellOnt 2199, qui a confirmé une décision du juge Ray, 2011 ONSC 767, 57 C.E.L.R. (3d) 142, 226 C.R.R. (2d) 180, [2011] O.J. No. 364 (QL), 2011 CarswellOnt 467, qui avait infirmé une décision du juge Hunter, 53 C.E.L.R. (3d) 140, [2010] O.J. No. 5713 (QL), 2010 CarswellOnt 6245. Pourvoi rejeté.

J. Bruce McMeekin, *Andrea Farkouh* and *Marie-France Major*, for the appellant.

Sara Blake, *Paul McCulloch* and *Danielle Meuleman*, for the respondent.

Joseph F. Castrilli and *Ramani Nadarajah*, for the interveners.

The judgment of the Court was delivered by

[1] Abella J. — Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("*EPA*"), requires that the Ministry of the Environment be immediately notified when a contaminant is discharged into the environment. There are two preconditions to this reporting requirement — the discharge must have been out of the normal course of events and it must have had — or was likely to have — an adverse environmental impact. The purpose of the requirement is to let the Ministry know about potential environmental damage so that any consequential remedial steps can be taken in a timely way.

[2] The interpretive exercise engaged in this appeal is to determine when the reporting requirement is triggered. In my view, there is clarity both of legislative purpose and language: the Ministry of the Environment must be notified when there has been a discharge of a contaminant out of the normal course of events without waiting for proof that the natural environment has, in fact, been impaired. In other words: when in doubt, report.

Background

[3] In 2007, Castonguay Blasting Ltd. was hired as a subcontractor to conduct blasting operations for a highway-widening project commissioned by the Ontario Ministry of Transportation.

[4] On November 26, 2007, Castonguay was blasting rock when the operation went awry and rock debris known as "fly-rock" was propelled into

J. Bruce McMeekin, *Andrea Farkouh* et *Marie-France Major*, pour l'appelante.

Sara Blake, *Paul McCulloch* et *Danielle Meuleman*, pour l'intimée.

Joseph F. Castrilli et *Ramani Nadarajah*, pour les intervenantes.

Version française du jugement de la Cour rendu par

[1] La juge Abella — La *Loi sur la protection de l'environnement* de l'Ontario, L.R.O. 1990, ch. E.19 (« *LPE* »), exige que le ministère de l'Environnement soit avisé sans délai de tout rejet d'un contaminant dans l'environnement. Cette obligation de signalement est assujettie à deux conditions préalables — il doit s'agir d'un rejet accompli en dehors du cours normal des événements, et qui cause — ou causera vraisemblablement — une conséquence préjudiciable sur l'environnement. L'obligation en question a pour but d'informer le ministère des dommages possibles à l'environnement, afin que puissent être prises en temps utile les mesures correctives qui s'imposent.

[2] L'exercice d'interprétation que requiert le présent pourvoi consiste à déterminer à quel moment entre en jeu l'obligation de donner l'avis en question. Selon moi, tant le texte de la *LPE* que son objet sont clairs : le ministère de l'Environnement doit être avisé lorsqu'un contaminant a été rejeté en dehors du cours normal des événements, sans qu'il soit nécessaire d'attendre la preuve que l'environnement naturel a bel et bien été dégradé. Autrement dit : quand on doute, on signale.

Contexte

[3] En 2007, Dynamitage Castonguay Ltée a été engagée comme sous-traitant pour effectuer des opérations de dynamitage dans le cadre de travaux d'élargissement d'une route commandés par le ministère des Transports de l'Ontario.

[4] Le 26 novembre 2007, Castonguay dynamitait un rocher lorsque l'opération a mal tourné et que des « éclats de roc » ont été projetés dans les airs

the air by an explosion. Had the blast been carried out according to plan, the force of the blast would have been contained and concentrated inwards, reducing the risk of shattered rock becoming airborne. In this case, however, the fly-rock shot approximately 90 metres in the air and crashed through the roof of a home, damaging the kitchen ceiling, the siding and the eavestroughs. Some of the fly-rock hit a car, breaking the windshield and damaging the hood. There was also a significant amount of rock in the yard.

[5] Castonguay immediately reported the incident to the contract administrator, who in turn reported it to the Ministry of Transportation (which had commissioned the project) and the provincial Ministry of Labour in accordance with the requirements in s. 53 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1. Further blasting on the project stopped until the site was inspected and remedial steps were agreed to with the Ministry of Labour.

[6] Castonguay did not report the incident to the Ministry of the Environment. That Ministry was not notified until May 2008, when it was told about the incident by the Ministry of Transportation.

[7] In September 2009, Castonguay was charged with failing to report the "discharge of a contaminant into the natural environment" to the Ministry of the Environment contrary to s. 15(1) of the *EPA*. Castonguay was acquitted by the Ontario Court of Justice. The Ontario Superior Court of Justice set aside the acquittal and entered a conviction (2011 ONSC 767, 57 C.E.L.R. (3d) 142). Castonguay appealed on the basis that s. 15(1) was not triggered in these circumstances.

[8] In the Court of Appeal (2012 ONCA 165, 109 O.R. (3d) 401), MacPherson J.A., writing for the majority, concluded that the plain meaning of the relevant provisions of the *EPA*, the relevant case law, and a proper understanding of the broad purposes of the *EPA* confirmed that the discharge of the

par la force d'une explosion. Si le dynamitage avait été effectué comme prévu, la force de l'explosion aurait été circonscrite et concentrée vers l'intérieur, ce qui aurait diminué le risque de voir des éclats de roc s'envoler. Dans le cas qui nous intéresse toutefois, les éclats de roc ont été propulsés dans les airs et, après avoir franchi approximativement 90 mètres, ils ont traversé le toit d'une demeure, endommageant le plafond de la cuisine, le revêtement mural extérieur et les gouttières. Certains éclats ont frappé une auto, fracassant le pare-brise et endommageant le capot. En outre, une quantité importante d'éclats sont tombés dans la cour.

[5] Castonguay a immédiatement signalé l'incident à l'administrateur du contrat qui, à son tour, en a avisé le ministère des Transports (qui avait commandé les travaux) ainsi que le ministère du Travail provincial, conformément aux exigences prescrites par l'art. 53 de la *Loi sur la santé et la sécurité au travail*, L.R.O. 1990, ch. O.1. Les opérations de dynamitage sur le chantier ont alors cessé jusqu'à ce que le site ait été inspecté et des mesures correctives convenues avec le ministère du Travail.

[6] Castonguay n'a pas signalé l'incident au ministère de l'Environnement. Ce ministère n'en a été avisé qu'en mai 2008, lorsque le ministère des Transports l'a informé de ce qui s'était passé.

[7] En septembre 2009, Castonguay a été accusée d'avoir omis, en violation du par. 15(1) de la *LPE*, d'aviser le ministère de l'Environnement qu'elle avait « rejet[é] un contaminant dans l'environnement naturel ». L'entreprise a été acquittée par la Cour de justice de l'Ontario, mais la Cour supérieure de justice de l'Ontario a annulé l'acquittement et inscrit une déclaration de culpabilité (2011 ONSC 767, 57 C.E.L.R. (3d) 142). Castonguay a ensuite interjeté appel, au motif que les circonstances de l'espèce n'avaient pas déclenché l'application du par. 15(1).

[8] En Cour d'appel (2012 ONCA 165, 109 O.R. (3d) 401), le juge MacPherson a conclu, au nom des juges majoritaires, que le sens ordinaire des dispositions pertinentes de la *LPE*, la jurisprudence applicable et l'interprétation adéquate des objectifs généraux de la *LPE* confirmaient que

fly-rock in this case was covered by s. 15(1) of the *EPA* and that Castonguay was therefore required to report the incident to the Ministry of the Environment. In dissent, Blair J.A. found no breach of s. 15(1) in these circumstances. I agree with the majority that Castonguay was required to report the incident.

le rejet des éclats de roc survenu en l'espèce était une situation visée par le par. 15(1) de la *LPE* et que Castonguay avait en conséquence l'obligation de signaler l'incident au ministère de l'Environnement. Le juge Blair, dissident, n'a constaté aucune violation du par. 15(1) dans les circonstances de la présente affaire. Je suis d'accord avec les juges majoritaires pour dire que Castonguay était tenue de signaler l'incident.

Analysis

[9] The *EPA* is Ontario's principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation (*Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 84). Moreover, as this Court recognized in *Canadian Pacific*, environmental protection is a complex subject matter — the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification (para. 43). As a result, environmental legislation embraces an expansive approach to ensure that it can adequately respond "to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation" (para. 43). Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep (para. 84).

Analyse

[9] La *LPE* est la principale loi ontarienne en matière de protection de l'environnement. Comme elle constitue une loi réparatrice, elle doit recevoir une interprétation généreuse (*Loi de 2006 sur la législation*, L.O. 2006, ch. 21, ann. F, art. 64; *Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, par. 84). En outre, comme notre Cour l'a établi dans l'affaire *Canadien Pacifique*, la protection de l'environnement est un sujet complexe — en effet, l'environnement lui-même et la vaste gamme d'activités susceptibles d'en causer la dégradation ne se prêtent pas aisément à une codification précise (par. 43). Par conséquent, les lois protégeant l'environnement reposent sur l'application d'une approche générale, qui permet de réagir adéquatement « à une vaste gamme d'atteintes environnementales, y compris celles qui n'ont peut-être même pas été envisagées par leurs rédacteurs » (par. 43). Parce que l'objectif poursuivi par le législateur est la protection de l'environnement, la portée voulue de ces lois est large et profonde (par. 84).

[10] The overall purpose of the *EPA* is set out in s. 3: "The purpose of this Act is to provide for the protection and conservation of the natural environment." "[N]atural environment" is defined in s. 1(1) as the "air, land and water, or any combination or part thereof, of the Province of Ontario". The *EPA* also protects those who *use* the natural environment by protecting human health, plant and animal life, and property. This purpose was aptly summarized by MacPherson J.A. in *R. v. Dow Chemical Canada Inc.* (2000), 47 O.R. (3d) 577 (C.A.), as being "to protect the natural environment and the people who live, work and play in it" (para. 49).

[10] L'objectif général de la *LPE* est énoncé à l'art. 3 : « La présente loi a pour objet d'assurer la protection et la conservation de l'environnement naturel. » La notion d'« environnement naturel » est définie ainsi au par. 1(1) : « Air, terrain et eau ou toute combinaison ou partie de ces éléments qui sont compris dans la province de l'Ontario. » La *LPE* protège également les personnes qui *utilisent* l'environnement naturel en protégeant la santé des humains, les végétaux, les animaux et les biens. Dans *R. c. Dow Chemical Canada Inc.* (2000), 47 O.R. (3d) 577 (C.A.), le juge MacPherson a d'ailleurs bien résumé cet objectif comme étant [TRADUCTION] « la protection de l'environnement naturel et des personnes qui y vivent, travaillent et jouent » (par. 49).

[11] The *EPA* seeks to achieve its goal of protecting the natural environment and those who use it through a series of regulations, prohibitions and reporting requirements. It also provides for a wide range of inspection, enforcement, preventative and remedial powers, such as the authority to issue control orders (s. 7), stop orders (s. 8), orders requiring the repair of damage (s. 17), preventative measure orders requiring steps to ensure that a discharge does not occur or recur (s. 18), or contravention orders requiring a discharger to take compliance steps (s. 157).

[11] La *LPE* cherche à réaliser son objectif de protection de l'environnement naturel et des personnes qui l'utilisent au moyen d'un ensemble de règlements, d'interdictions et d'obligations de signalement. Elle prévoit également un large éventail de pouvoirs en matière d'inspection, de mise en application de la loi, de prévention et de réparation, comme le pouvoir de prendre des arrêtés d'intervention (art. 7), de suspension immédiate (art. 8), des ordonnances de réparation des dommages (art. 17), de prise de mesures préventives précisant celles qui doivent être appliquées pour empêcher qu'un rejet ne se produise ou ne se produise de nouveau (art. 18), ou des arrêtés constatant une violation de la loi et ordonnant à l'auteur de la violation de prendre des mesures pour se conformer à la loi (art. 157).

[12] One of the means by which the *EPA* promotes its protective and preventative purposes is through the prohibition in s. 14(1) against discharging a contaminant into the natural environment where it is likely to have an adverse effect, and the related requirement in s. 15(1) that any such discharge which is out of the normal course of events be reported to the Ministry of the Environment.

[12] L'un des moyens par lesquels la *LPE* tend à l'atteinte de ses objectifs de protection et de prévention réside dans l'interdiction, énoncée au par. 14(1), de rejeter dans l'environnement naturel un contaminant qui causera vraisemblablement une conséquence préjudiciable, et dans l'obligation connexe, prévue au par. 15(1), d'aviser le ministère de l'Environnement d'un tel rejet s'il est accompli en dehors du cours normal des événements.

[13] The issue in this appeal is the proper interpretation of the reporting requirement in s. 15(1). This provision states:

[13] La question soulevée dans le présent pourvoi concerne l'interprétation qu'il convient de donner à l'obligation de signalement que prévoit le par. 15(1). Cette disposition est rédigée comme suit :

15.—(1) Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment shall forthwith notify the Ministry if the discharge is out of the normal course of events, the discharge causes or is likely to cause an adverse effect and the person is not otherwise required to notify the Ministry under section 92.

15.—(1) Quiconque rejette un contaminant dans l'environnement naturel, ou permet ou fait en sorte que cela se fasse, en avise sans délai le ministère si un tel acte est accompli en dehors du cours normal des événements, s'il cause ou causera vraisemblablement une conséquence préjudiciable et si la personne qui l'accomplit n'est pas tenue par ailleurs d'aviser le ministère aux termes de l'article 92.

[14] The terms "discharge", "contaminant", "natural environment" and "adverse effect" are defined in s. 1(1) of the *EPA*, as follows:

[14] Les termes « rejet », « rejeter », « contaminant », « environnement naturel » et « conséquence préjudiciable » sont définis comme suit au par. 1(1) de la *LPE* :

"**natural environment**" means the air, land and water, or any combination or part thereof, of the Province of Ontario;

« **environnement naturel** » Air, terrain et eau ou toute combinaison ou partie de ces éléments qui sont compris dans la province de l'Ontario.

"**discharge**", when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak;

"**contaminant**" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect;

"**adverse effect**" means one or more of,

(a) impairment of the quality of the natural environment for any use that can be made of it,

(b) injury or damage to property or to plant or animal life,

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(e) impairment of the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,

(g) loss of enjoyment of normal use of property, and

(h) interference with the normal conduct of business;

« **rejet** » S'entend en outre d'un ajout, d'un dépôt, d'une perte ou d'une émission; le verbe « **rejeter** » s'entend en outre d'ajouter, de déposer, de perdre ou d'émettre.

« **contaminant** » Solide, liquide, gaz, son, odeur, chaleur, vibration, radiation ou combinaison de ces éléments qui proviennent, directement ou indirectement, des activités humaines et qui ont ou peuvent avoir une conséquence préjudiciable.

« **conséquence préjudiciable** » L'une ou plusieurs des conséquences suivantes :

a) la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait;

b) le tort ou les dommages causés à des biens, des végétaux ou des animaux;

c) la nuisance ou les malaises sensibles causés à quiconque;

d) l'altération de la santé de quiconque;

e) l'atteinte à la sécurité de quiconque;

f) le fait de rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains;

g) la perte de jouissance de l'usage normal d'un bien;

h) le fait d'entraver la marche normale des affaires.

[15] Castonguay conceded that the discharge of fly-rock caused property damage, but argued that injury or damage to private property alone is insufficient to engage the reporting requirement. Since the discharge did not impair the natural environment — the air, land or water — Castonguay was not required to report the incident to the Ministry.

[15] Castonguay a concédé que le rejet des éclats de roc avait causé des dommages à des biens, mais a plaidé que le tort ou les dommages causés à une propriété privée ne suffisent pas à eux seuls à déclencher l'application de l'obligation de signalement. Et donc, que comme le rejet n'a pas dégradé l'environnement naturel — à savoir l'air, le terrain ou l'eau —, elle n'était pas tenue de signaler l'incident au ministère.

[16] Castonguay's argument is, in essence, an argument that while the definition of "adverse effect" has eight components — paras. (a) to (h) — para. (a) is an umbrella clause. In other words, there *must* be, in the language of para. (a), "impairment of the quality of the natural environment for any use that can be made of it" before

[16] Essentiellement, l'argument de Castonguay consiste à dire que, quoique la définition de « conséquence préjudiciable » comporte huit éléments — les al. a) à h) — l'al. a) constitue une exigence applicable dans tous les cas. En d'autres mots, il *doit* exister, comme le prévoit cet alinéa, une « dégradation de la qualité de l'environnement

any of the other seven elements come into play. They are not stand-alone elements and only constitute an "adverse effect" if they are accompanied by the impairment to the quality of the natural environment set out in para. (a). An adverse effect as defined in paras. (b) through (h) *without* any accompanying impairment to the quality of the natural environment under para. (a) will not be sufficient to trigger s. 15(1).

[17] The Minister of the Environment, on the other hand, argued that if the discharge caused or was likely to cause *one or more of* the adverse effects listed in paras. (a) to (h) of the statutory definition, the obligation to report the discharge of a contaminant under s. 15(1) materializes. Each of the eight listed components is a separate impact that can trigger the requirement to report.

[18] The Minister's position is demonstrably supported by the language of s. 15(1) and the relevant definitions in the *EPA*. The purpose of the reporting requirement in s. 15(1) is to ensure that it is the Ministry of the Environment, and not the discharger, who decides what, if any, further steps are required. When a contaminant is discharged, the discharger may not know the full extent of the damage caused or, in the words of s. 15(1), likely to be caused. Moreover, many potential harms such as harm to human health, or injury to plants and animals, and even impairment of the natural environment, may be difficult to detect without the expertise and resources of the Ministry. As a result, the statute places both the obligation to investigate and the decision about what further steps are necessary with the Ministry and not the discharger.

[19] Notification provides the Ministry with the opportunity to conduct an inspection as quickly

naturel relativement à tout usage qui peut en être fait » avant que l'un des sept autres éléments puisse entrer en jeu. Ceux-ci ne seraient pas des éléments indépendants et ils ne constitueraient une « conséquence préjudiciable » que s'ils s'accompagnent d'une dégradation de la qualité de l'environnement naturel prévue à l'al. a). Pour cette raison, une conséquence préjudiciable définie aux al. b) à h), *qui ne serait pas* accompagnée de la dégradation de la qualité de l'environnement naturel visée à l'al. a), ne suffirait pas pour déclencher l'application du par. 15(1).

[17] Le ministre de l'Environnement a pour sa part plaidé que, si un rejet cause ou peut vraisemblablement causer *une ou plusieurs des* conséquences préjudiciables énumérées aux al. a) à h) de la définition énoncée dans la loi, l'obligation que fait le par. 15(1) de signaler le rejet d'un contaminant se matérialise alors. Chacun des huit éléments du paragraphe constitue une conséquence distincte, susceptible de faire naître l'obligation de signalement.

[18] Le texte du par. 15(1) et les définitions pertinentes de la *LPE* appuient manifestement la thèse du ministre. L'obligation de signalement prescrite par le par. 15(1) a pour but de faire en sorte que ce soit le ministère de l'Environnement, et non l'auteur du rejet, qui décide si des mesures supplémentaires sont requises et, dans l'affirmative, lesquelles. Lors du rejet d'un contaminant, il est possible que l'auteur ne connaisse pas toute l'ampleur des dommages qui sont causés ou qui, comme le dit le par. 15(1), peuvent vraisemblablement être causés. En outre, de nombreuses nuisances éventuelles, par exemple des atteintes à la santé humaine ou le tort aux végétaux ou aux animaux, et même la dégradation de l'environnement naturel, peuvent être difficiles à détecter sans l'expertise et les ressources dont dispose le ministère. En conséquence, la loi confère au ministère, et non à l'auteur du rejet, l'obligation d'enquêter ainsi que le pouvoir de décider des mesures supplémentaires qui sont nécessaires.

[19] La réception de l'avis prescrit donne au ministère la possibilité de procéder aussi rapidement

as possible and to obtain information in order to take any necessary remedial action and to fulfill its statutory mandate. This enables the Ministry to respond in a timely way to the discharge of a contaminant into the natural environment and to be involved in determining what, if any, preventative or remedial measures are appropriate.

[20] As the interveners Canadian Environmental Law Association and Lake Ontario Waterkeeper pointed out in their joint factum, s. 15(1) is also consistent with the precautionary principle. This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation (O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Envtl. L.* 221, at pp. 221-22; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at paras. 30-32). Section 15(1) gives effect to the concerns underlying the precautionary principle by ensuring that the Ministry of the Environment is notified and has the ability to respond once there has been a discharge of a contaminant out of the normal course of events, without waiting for proof that the natural environment has, in fact, been impaired.

[21] Parsing the language of s. 15(1) illuminates its clear preventative and protective purposes. First, a person must discharge a *contaminant*. Second, the contaminant must be discharged *into the natural environment*. Third, the discharge must be *out of the normal course of events*. Fourth, the discharge must be one that *causes or is likely to cause an adverse effect*. Finally, the person must not be otherwise required to notify the Ministry under s. 92, which refers to the spill of pollutants from a structure, vehicle or container and is therefore not applicable to the circumstances of this case.

que possible à une inspection et d'obtenir des renseignements en vue de prendre toutes les mesures réparatrices nécessaires et de s'acquitter du mandat que lui confie la loi. Ce processus lui permet également de réagir en temps utile au rejet d'un contaminant dans l'environnement naturel et de participer à la détermination, s'il y a lieu, des mesures préventives ou réparatrices appropriées.

[20] Comme le soulignent dans leur mémoire conjoint les intervenantes l'Association canadienne du droit de l'environnement et Lake Ontario Waterkeeper, le par. 15(1) est également compatible avec le principe de précaution. Ce principe émergent en droit international reconnaît en effet que, parce qu'il est intrinsèquement difficile de déterminer et de prédire avec une certitude scientifique les répercussions environnementales, les politiques en la matière doivent anticiper et prévenir les dégradations environnementales (O. McIntyre et T. Mosedale, « The Precautionary Principle as a Norm of Customary International Law » (1997), 9 *J. Envtl. L.* 221, p. 221-222; *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, 2001 CSC 40, [2001] 2 R.C.S. 241, par. 30-32). Le paragraphe 15(1) répond aux préoccupations à la base du principe de précaution en faisant en sorte que le ministère de l'Environnement soit avisé et ait la possibilité de réagir dès qu'il y a eu rejet de contaminants en dehors du cours normal des événements, sans qu'il soit nécessaire d'attendre la preuve d'une dégradation effective de l'environnement naturel.

[21] L'analyse grammaticale du texte du par. 15(1) fait bien ressortir les objectifs limpides de prévention et de protection qu'il vise. En premier lieu, il faut qu'une personne rejette un *contaminant*. Deuxièmement, ce contaminant doit être rejeté *dans l'environnement naturel*. Troisièmement, le rejet doit être accompli *en dehors du cours normal des événements*. Quatrièmement, il faut que ce soit un rejet qui *cause ou causera vraisemblablement une conséquence préjudiciable*. Enfin, l'auteur du rejet ne doit pas être par ailleurs tenu d'aviser le ministère conformément à l'art. 92; cet article vise le déversement de polluants à partir d'un ouvrage, d'un véhicule ou d'un contenant, et il ne s'applique donc pas dans les circonstances de l'espèce.

[22] Taking each phrase in turn, the full scope of the reporting requirement is revealed. Section 15(1) applies to the discharge of "contaminant[s]" as defined by the *EPA*. The definition of contaminant in s. 1(1) of the *EPA* includes "any solid liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect". The reference to human activities in the definition of contaminant, when read in the context of s. 15 and the *EPA* as a whole, recognizes that the *EPA* applies only to those activities which engage the natural environment — the air, land or water in the province. This ensures that the definition of contaminant and s. 15 of the *EPA* maintain a nexus to the statutory objective of environmental protection.

[22] L'examen de chacune de ces expressions à tour de rôle révèle toute la portée de l'obligation de signalement. Le paragraphe 15(1) s'applique au rejet de « contaminant[s] » au sens de la *LPE*. Le mot « contaminant » est défini ainsi au par. 1(1) de la *LPE* : « Solide, liquide, gaz, son, odeur, chaleur, vibration, radiation ou combinaison de ces éléments qui proviennent, directement ou indirectement, des activités humaines et qui ont ou peuvent avoir une conséquence préjudiciable. » La mention de l'expression activités humaines dans la définition de contaminant, lorsqu'elle est considérée dans le contexte de l'art. 15 et de la *LPE* dans son ensemble, indique que la *LPE* ne s'applique qu'aux activités touchant l'environnement naturel — l'air, le terrain et l'eau dans la province. Cela permet de rattacher la définition de contaminant et l'art. 15 de la *LPE* à l'objectif de la loi, c'est-à-dire la protection de l'environnement.

[23] The discharge must be *into the natural environment*, defined as the air, land and water of Ontario. Section 15(1) does not impose any restrictions on the length of time the contaminant remains in the natural environment, nor does it require that the contaminant become part of the natural environment.

[23] Il doit s'agir d'un rejet *dans l'environnement naturel*, expression définie comme étant l'air, le terrain et l'eau en Ontario. Le paragraphe 15(1) n'impose aucune restriction quant à la durée de la présence du contaminant dans l'environnement naturel et il n'exige pas non plus que le contaminant s'y intègre.

[24] Only discharges that are *out of the normal course of events* are required to be reported to the Ministry. This restricts the application of s. 15(1) by excluding many everyday, routine activities. Although driving a car, for example, discharges fumes into the natural environment, the discharge is not out of the normal course of events and no report to the Ministry is required.

[24] L'obligation de signaler un rejet au ministère vise seulement les rejets accomplis *en dehors du cours normal des événements*. Cette précision a pour effet de restreindre le champ de l'application du par. 15(1) du fait qu'elle exclut de celui-ci de nombreuses activités courantes de la vie quotidienne. Par exemple, bien que la conduite d'une automobile entraîne le rejet de gaz d'échappement dans l'environnement naturel, un tel rejet n'est pas accompli en dehors du cours normal des événements et, en conséquence, aucun avis au ministère n'est requis à cet égard.

[25] The key, in my view, to understanding s. 15(1) is that the discharge of the contaminant caused or was likely to cause an "adverse effect". As previously noted, adverse effect is defined as:

[25] Selon moi, le facteur clé pour bien comprendre le par. 15(1) est la condition requérant que le rejet du contaminant ait causé ou causerait vraisemblablement une « conséquence préjudiciable ». Comme je l'ai souligné précédemment, l'expression conséquence préjudiciable est définie ainsi :

"**adverse effect**" *means one or more of*,

(a) impairment of the quality of the natural environment for any use that can be made of it,

(b) injury or damage to property or to plant or animal life,

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(e) impairment of the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,

(g) loss of enjoyment of normal use of property, and

(h) interference with the normal conduct of business;

[26] There is already a jurisprudential trail from this Court and the Ontario Court of Appeal to guide our interpretation. In *Canadian Pacific*, this Court considered an earlier version of the *EPA*, which did not specifically mention the term "adverse effect". The appeal focused on what was then s. 13(1) of the *EPA*, R.S.O. 1980, c. 141, which stated:

13.—(1) Notwithstanding any other provision of this Act or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that,

(*a*) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it;

(*b*) causes or is likely to cause injury or damage to property or to plant or animal life;

(*c*) causes or is likely to cause harm or material discomfort to any person;

« **conséquence préjudiciable** » *L'une ou plusieurs des conséquences suivantes* :

a) la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait;

b) le tort ou les dommages causés à des biens, des végétaux ou des animaux;

c) la nuisance ou les malaises sensibles causés à quiconque;

d) l'altération de la santé de quiconque;

e) l'atteinte à la sécurité de quiconque;

f) le fait de rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains;

g) la perte de jouissance de l'usage normal d'un bien;

h) le fait d'entraver la marche normale des affaires.

[26] Il existe déjà un certain nombre de décisions de notre Cour et de la Cour d'appel de l'Ontario susceptibles de guider notre interprétation. Ainsi, dans l'arrêt *Canadien Pacifique*, notre Cour a examiné une version antérieure de la *LPE*, qui ne comportait pas expressément l'expression « conséquence préjudiciable ». Le pourvoi portait principalement sur l'ancien par. 13(1) de la *LPE*, L.R.O. 1980, ch. 141, qui était rédigé en ces termes :

[TRADUCTION]

13.—(1) Malgré toute autre disposition de la présente loi et des règlements, nul ne doit déposer, ajouter, émettre ou rejeter un contaminant, ou causer ou permettre le dépôt, l'ajout, l'émission ou le rejet dans l'environnement naturel d'un contaminant qui

(*a*) cause ou risque de causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait;

(*b*) cause ou risque de causer du tort ou des dommages à des biens, des végétaux ou des animaux;

(*c*) cause ou risque de causer de la nuisance ou des malaises sensibles à quiconque;

(*d*) adversely affects or is likely to adversely affect the health of any person;

(*e*) impairs or is likely to impair the safety of any person;

(*f*) renders or is likely to render any property or plant or animal life unfit for use by man;

(*g*) causes or is likely to cause loss of enjoyment of normal use of property; or

(*h*) interferes or is likely to interfere with the normal conduct of business.

[27] The first part of s. 13(1) is now s. 14(1).[1] Paragraphs (*a*) to (*h*) now form part of the definition of "adverse effect" found in s. 1(1) of the *EPA*.

[28] The issue in *Canadian Pacific* was whether the words "for any use that can be made of it" in para. (*a*) of s. 13(1) were unconstitutionally vague or overbroad. Although the Court's reasoning was focused on the constitutional issues raised in that case, the Court made several statements about the interpretation of s. 13(1)(*a*) of the *EPA* which are helpful in resolving the interpretive issue in this appeal. Notably, in finding that the provision was neither vague nor overbroad, Gonthier J., writing for the majority, held that the application of s. 13(1)(*a*) was confined to the discharge of contaminants that cause, or are likely to cause, *non-trivial* impairment of the quality of the natural environment for any use that could be made of it.

[29] Lamer C.J., in concurring reasons which were not endorsed by the majority, was of the view

1 Section 14(1) of the *EPA* states:

14. (1) Subject to subsection (2) but despite any other provision of this Act or the regulations, a person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment, if the discharge causes or may cause an adverse effect.

(*d*) cause ou risque de causer l'altération de la santé de quiconque;

(*e*) cause ou risque de causer l'atteinte à la sécurité de quiconque;

(*f*) rend ou risque de rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains;

(*g*) cause ou risque de causer la perte de jouissance de l'usage normal d'un bien;

(*h*) entrave ou risque d'entraver la marche normale des affaires.

[27] La première partie du par. 13(1) constitue maintenant le par. 14(1)[1]. Quant aux al. (*a*) à (*h*), ils sont maintenant intégrés à la définition de « conséquence préjudiciable » figurant au par. 1(1) de la *LPE*.

[28] La question qui se posait dans l'arrêt *Canadien Pacifique* était de savoir si les mots « relativement à tout usage qui peut en être fait » utilisés à l'al. 13(1)(*a*) étaient imprécis ou de portée excessive sur le plan constitutionnel. Bien que, dans son raisonnement, la Cour se soit attachée aux questions constitutionnelles que soulevait cette affaire, elle a tout de même formulé plusieurs observations concernant l'interprétation de l'al. 13(1)(*a*) de la *LPE* qui sont utiles pour résoudre les questions d'interprétation du présent pourvoi. En particulier, en décidant que cette disposition n'était ni imprécise ni de portée excessive, le juge Gonthier, qui a rédigé les motifs de la majorité, a conclu que l'application de l'al. 13(1)(*a*) ne visait que le rejet de contaminants causant ou risquant de causer une dégradation *non négligeable* de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait.

[29] Dans des motifs concordants auxquels n'a toutefois pas souscrit la majorité, le juge en chef

1 Le paragraphe 14(1) de la *LPE* est libellé comme suit :

14. (1) Sous réserve du paragraphe (2), mais malgré toute autre disposition de la présente loi ou des règlements, nul ne doit rejeter un contaminant dans l'environnement naturel ou permettre ou faire en sorte que cela se fasse si le rejet cause ou peut causer une conséquence préjudiciable.

that para. (*a*) should be interpreted as an umbrella clause so that harm to the quality of the natural environment was independently required before the rest of the provisions in paras. (*b*) to (*h*) of s. 13(1) were engaged.

[30] Castonguay advocates that we adopt the minority approach of Lamer C.J. in *Canadian Pacific*. This, with respect, is an argument that cannot survive the amended language in the *EPA* after *Canadian Pacific* was decided. The most significant change to the *EPA* was the creation of a separate statutory definition of "adverse effect". The definition included the words "*means one or more of*" the eight components set out in paras. (a) through (h). None of these components is said to be an overriding requirement, and each is stated to be an adverse effect. As a result, all eight branches of "adverse effect" provide independent triggers for liability. Castonguay's interpretation reads out these crucial legislative directives that *each* effect is deemed to be adverse.

[31] To interpret "adverse effect" restrictively not only reads out the plain and obvious meaning of the definition, it narrows the scope of the reporting requirement, thereby restricting its remedial capacity and the Ministry's ability to fulfill its statutory mandate.

[32] *Canadian Pacific* was interpreted and applied by the Ontario Court of Appeal in *Dow Chemical*. In that case, Dow Chemical, like Castonguay, argued that, in order to establish an adverse effect under the *EPA*, "impairment of the quality of the natural environment" under para. (a) *must* be made out *in addition* to any of the other effects set out

Lamer a conclu que l'al. (*a*) devait être considéré comme une exigence applicable dans tous les cas, de telle sorte qu'il fallait d'abord conclure, de façon indépendante, à l'existence d'un préjudice causé à la qualité de l'environnement naturel avant de pouvoir prendre en compte les autres dispositions, soit les al. (*b*) à (*h*) du par. 13(1).

[30] Pour sa part, Castonguay nous demande de retenir la démarche de la minorité qu'a formulée le juge en chef Lamer dans *Canadien Pacifique*. Avec égards, cet argument ne saurait être adopté compte tenu des modifications apportées au libellé de la *LPE* postérieurement à l'arrêt *Canadien Pacifique*. La modification la plus importante au texte de la *LPE* fut la création d'une définition législative particulière du terme « conséquence préjudiciable ». Cette définition comportait les mots « *[l]'une ou plusieurs des* » avant l'énumération des huit situations décrites aux al. a) à h). Rien ne précise que l'une d'elles représente une exigence impérative, et chacune est présentée comme étant une conséquence préjudiciable. Par conséquent, chacune des huit formes de la notion de « conséquence préjudiciable » constitue une source autonome de responsabilité. L'interprétation préconisée par Castonguay fait abstraction de ces directives cruciales du législateur selon lesquelles *chaque* conséquence est réputée préjudiciable.

[31] Le fait d'interpréter restrictivement l'expression « conséquence préjudiciable » a non seulement pour effet d'écarter le sens évident et manifeste de la définition, mais également de restreindre la portée de l'obligation de signalement, limitant en conséquence la capacité réparatrice de cette obligation ainsi que la capacité du ministère de s'acquitter du mandat que lui confie la loi.

[32] Dans *Dow Chemical*, la Cour d'appel de l'Ontario a interprété et appliqué l'arrêt *Canadien Pacifique*. À l'instar de Castonguay, Dow Chemical prétendait que, pour démontrer l'existence d'une conséquence préjudiciable sous le régime de la *LPE*, il était *nécessaire* d'établir « la dégradation de la qualité de l'environnement naturel » prévue à

in paras. (b) through (h). MacPherson J.A. rejected this approach, concluding instead that

> [paragraph] (*a*) is just one of eight defined adverse effects. It relates to the natural environment, which is defined in the Act as "the air, land and water" (s. 1(1)). The other seven [paragraphs] set out other forms of adverse effect. Some relate to plants and animals ([paras.] (*b*) and (*f*)); some relate to people ([paras.] (*c*), (*d*) and (*f*)) and their property ([para.] (*g*)) and business ([para.] (*h*)). [para. 29]

[33] Applying Gonthier J.'s language in *Canadian Pacific*, MacPherson J.A. accepted that each of the eight enumerated adverse effects must be more than trivial but that any of them was sufficient to satisfy the definition (para. 30).

[34] The effects set out in paras. (a) to (h) are designed to capture a broad range of impacts. Some are limited to impacts on animals, people or property and do not require any impairment of the air, land or water in Ontario. Since the *EPA* protects the natural environment *and those who use it*, this is consistent with the broader protections the *EPA* was intended to provide. Paragraphs (a) through (h) also reflect a statutory recognition that protecting the natural environment requires, among other strategies, maximizing the circumstances in which the Ministry of the Environment may investigate and remedy environmental harms, including those identified in paras. (a) to (h).

[35] Moreover, it is important to note that the words "adverse effect" appear in many provisions of the *EPA*. Sections 6, 14, 18, 91.1, 93, 94, 97, 132, 156, 157.1, and 188.1 deal with a range of environmental concerns such as when an order to take preventative measures may be issued or the development of spill prevention and contingency plans. Restricting the definitional scope of "adverse effect" would therefore also limit the scope of the *EPA*'s protective and preventative capacities and,

l'al. a), *en plus* de l'une ou l'autre des conséquences énoncées aux al. b) à h). Le juge MacPherson a rejeté cette thèse, concluant plutôt ainsi :

> [TRADUCTION] L'alinéa (*a*) ne constitue que l'une des huit conséquences préjudiciables définies. Il porte sur l'environnement naturel, qui est défini dans la Loi comme étant « [l']air, [le] terrain et [l']eau » (par. 1(1)). Les sept autres alinéas précisent d'autres formes de conséquences préjudiciables. Certaines ont trait aux végétaux et aux animaux (al. (*b*) et (*f*)), alors que d'autres concernent les personnes (al. (*c*), (*d*) et (*f*)), leurs biens (al. (*g*)) et leurs affaires (al. (*h*)). [par. 29]

[33] Appliquant les propos du juge Gonthier dans l'arrêt *Canadien Pacifique*, le juge MacPherson a reconnu que chacune des huit conséquences préjudiciables devait être plus que négligeable, mais par ailleurs que l'existence de n'importe laquelle de ces conséquences suffisait pour satisfaire à la définition (par. 30).

[34] Les conséquences énoncées aux al. a) à h) visent à couvrir un large éventail de répercussions. Certaines se limitent aux répercussions sur les animaux, les personnes ou les biens et ne requièrent pas de dégradation de l'air, du terrain ou de l'eau en Ontario. Comme la *LPE* protège l'environnement naturel *et quiconque en fait usage*, tout cela est compatible avec les mesures de protection plus étendues qu'elle a pour but d'offrir. Les alinéas a) à h) montrent également que la loi reconnaît que la protection de l'environnement naturel exige, entre autres stratégies, de maximiser l'éventail des circonstances dans lesquelles le ministère de l'Environnement peut enquêter sur les nuisances environnementales et y remédier, notamment celles précisées aux al. a) à h).

[35] Qui plus est, il importe de signaler que l'expression « conséquence préjudiciable » figure dans un grand nombre de dispositions de la *LPE*. Ainsi, les art. 6, 14, 18, 91.1, 93, 94, 97, 132, 156, 157.1 et 188.1 traitent d'une gamme de préoccupations environnementales, par exemple les circonstances dans lesquelles peut être pris un arrêté ordonnant la mise en place de mesures préventives, ou encore l'élaboration de plans de prévention et de plans d'urgence en matière de

consequently, the Ministry's ability to respond to the broad purposes of the statute.

[36] In summary, the requirement to report "forthwith" in s. 15(1) of the *EPA* is engaged where the following elements are established:

i. a "contaminant" is discharged;

ii. the contaminant is discharged into the natural environment (the air, land and water or any combination or part thereof, of the Province of Ontario);

iii. the discharge is out of the normal course of events;

iv. the discharge causes, *or is likely to cause*, an adverse effect, namely one or more of the effects listed in paras. (a) to (h) of the definition;

v. the adverse effect or effects are not trivial or minimal; and

vi. the person is not otherwise required to notify the Ministry under s. 92, which addresses the spill of pollutants.

[37] Applying these elements to this case, s. 15(1) was clearly engaged. Castonguay "discharged" fly-rock, large pieces of rock created by the force of a blast, into the "natural environment". There is also no doubt that fly-rock meets the definition of "contaminant". The discharge in this case was "out of the normal course of events" — it was an accidental consequence of Castonguay's blasting operation. Had the blast been conducted routinely, the fly-rock would not have been thrust into the air.

déversements. Limiter la portée de la définition de « conséquence préjudiciable » aurait donc aussi pour effet de restreindre la portée des moyens dont la *LPE* permet la mise en œuvre en matière de prévention et de protection et, par conséquent, la capacité du ministère de réaliser les objectifs généraux de la loi.

[36] En résumé, l'obligation de donner « sans délai » l'avis prescrit par le par. 15(1) de la *LPE* entre en jeu lorsque les éléments suivants sont établis :

i. un « contaminant » est rejeté;

ii. le contaminant est rejeté dans l'environnement naturel (l'air, le terrain et l'eau, ou toute combinaison ou partie de ces éléments qui sont compris dans la province de l'Ontario);

iii. le rejet est accompli en dehors du cours normal des événements;

iv. le rejet cause *ou causera vraisemblablement* une conséquence préjudiciable, à savoir une ou plusieurs des conséquences énoncées aux al. a) à h) de la définition;

v. la ou les conséquences préjudiciables ne sont ni négligeables ni minimes;

vi. la personne concernée n'est pas tenue par ailleurs d'aviser le ministère conformément à l'art. 92, lequel vise le déversement de polluants.

[37] Il ressort de l'application de ces éléments à la présente affaire que le par. 15(1) entrait manifestement en jeu en l'espèce. Castonguay « a rejeté » dans « l'environnement naturel » des éclats de roc, soit de gros morceaux de roc créés par la force d'une explosion. Il ne fait aucun doute que ces éclats de roc sont visés par la définition de « contaminant ». En l'espèce, le rejet a été accompli « en dehors du cours normal des événements » — il s'agissait d'une conséquence accidentelle des activités de dynamitage menées par Castonguay. Si le dynamitage s'était déroulé de façon routinière, les éclats de roc n'auraient pas été projetés dans l'air.

[38] Finally, the discharge of fly-rock caused an "adverse effect" under paras. (b) and (g) of the definition, namely, it caused injury or damage to property and loss of enjoyment of the normal use of the property. Because the reporting requirement is also engaged when the discharge is "likely to cause an adverse effect", para. (e) is also applicable since the potential existed for "impairment of the safety of any person".

[39] The adverse effects were not trivial. The force of the blast, and the rocks it produced, were so powerful they caused extensive and significant property damage, penetrating the roof of a residence and landing in the kitchen. A vehicle was also seriously damaged. The fly-rock could easily have seriously injured or killed someone.

[40] Accordingly, s. 15(1) of the *EPA* applied and Castonguay was required to report the discharge of fly-rock forthwith to the Ministry of the Environment.

[41] I would therefore dismiss the appeal. In accordance with the Minister of the Environment's request, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Miller Thomson, Markham; Supreme Advocacy, Ottawa.

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

Solicitor for the interveners: Canadian Environmental Law Association, Toronto.

[38] Enfin, le rejet d'éclats de roc a causé une « conséquence préjudiciable » au sens des al. b) et g) de la définition, c'est-à-dire qu'il a causé un tort ou des dommages à des biens et la perte de jouissance de l'usage normal de ces biens. Comme l'obligation de signalement entre également en jeu lorsque le rejet « causera vraisemblablement une conséquence préjudiciable », l'al. e) est lui aussi applicable, puisqu'il existait une possibilité d'« atteinte à la sécurité de quiconque ».

[39] Les conséquences préjudiciables n'étaient pas négligeables. La force de l'explosion et les éclats de roc qu'elle a produits étaient si puissants que d'importants dommages aux biens ont été causés, les éclats ayant en effet traversé le toit d'une résidence et fini leur course dans la cuisine. Un véhicule en outre a été gravement endommagé. Les éclats de roc auraient pu facilement blesser sérieusement une personne ou la tuer.

[40] En conséquence, le par. 15(1) de la *LPE* s'appliquait et Castonguay était tenue de signaler sans délai au ministère de l'Environnement le rejet des éclats de roc.

[41] Je suis donc d'avis de rejeter le pourvoi. Conformément à la demande du ministre de l'Environnement, aucune ordonnance n'est rendue concernant les dépens.

Pourvoi rejeté.

Procureurs de l'appelante : Miller Thomson, Markham; Supreme Advocacy, Ottawa.

Procureur de l'intimée : Procureur général de l'Ontario, Toronto.

Procureur des intervenantes : Association canadienne du droit de l'environnement, Toronto.

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

v.

Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) and Attorney General of Canada *Respondents*

and

Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario *Interveners*

Hameau de Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River et Jerry Natanine *Appelants*

c.

Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) et procureure générale du Canada *Intimées*

et

Procureur général de l'Ontario, procureur général de la Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Conseil de gestion des ressources fauniques du Nunavut, Inuvialuit Regional Corporation et Chiefs of Ontario *Intervenants*

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

2017 SCC 40

File No.: 36692.

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

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

Répertorié : Clyde River (Hameau) *c.* Petroleum Geo-Services Inc.

2017 CSC 40

N° du greffe : 36692.

2016 : 30 novembre; 2017 : 26 juillet[*].

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Inuit — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact upon treaty rights — Offshore seismic testing for oil and gas resources potentially affecting Inuit treaty rights — National Energy Board authorizing project — Whether Board's approval process triggered Crown's duty to consult — Whether

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Inuits — Droits issus de traités — Couronne — Obligation de consultation — Décision d'un organisme de réglementation fédéral indépendant qui pourrait avoir une incidence sur des droits issus de traités — Essais sismiques extracôtiers liés aux ressources pétrolières et gazières et susceptibles d'avoir une incidence sur des droits issus de traités des Inuits —

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

[*] Ce jugement a été modifié le 30 octobre 2017, par adjonction des notes en bas de page qui figurent maintenant aux par. 31 et 47 des versions anglaise et française des motifs.

Crown can rely on Board's process to fulfill its duty — Role of Board in considering Crown consultation before approval of project — Whether consultation was adequate in this case — Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5(1)(b).

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, is the final decision maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. The proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.

Held: The appeal should be allowed and the NEB's authorization quashed.

The NEB's approval process, in this case, triggered the duty to consult. Crown conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult.

Projet autorisé par l'Office national de l'énergie — Le processus d'approbation de l'Office a-t-il donné naissance à l'obligation de consulter de la Couronne? — La Couronne peut-elle s'en remettre au processus de l'Office pour satisfaire à son obligation? — Rôle de l'Office dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet — La consultation a-t-elle été adéquate en l'espèce? — Loi sur les opérations pétrolières au Canada, L.R.C. 1985, c. O-7, art. 5(1)b).

L'Office national de l'énergie (ONÉ), tribunal administratif fédéral et organisme de réglementation, prend en dernier ressort la décision d'autoriser ou non des activités telles la recherche et l'exploitation des ressources pétrolières et gazières dans certains endroits désignés. Les promoteurs ont demandé à l'ONÉ l'autorisation de mener des essais sismiques extracôtiers liés aux ressources pétrolières et gazières au Nunavut. Les essais proposés pourraient avoir des incidences négatives sur les droits issus de traités des Inuits de Clyde River, qui se sont opposés aux essais sismiques, affirmant qu'il n'avait pas été satisfait à l'obligation de consultation en ce qui a trait à ces essais. L'ONÉ a accordé l'autorisation demandée. Il a conclu que les promoteurs avaient déployé suffisamment d'efforts pour consulter les groupes autochtones et que ces groupes avaient eu une possibilité adéquate de participer au processus d'évaluation environnementale de l'ONÉ. L'ONÉ a également conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants. Clyde River a demandé le contrôle judiciaire de la décision de l'ONÉ. La Cour d'appel fédérale a jugé que l'obligation de consulter avait pris naissance, mais que la Couronne pouvait s'en remettre à l'ONÉ pour que celui-ci procède à la consultation, et que le processus de l'ONÉ avait permis de satisfaire à l'obligation de consulter de la Couronne en l'espèce.

Arrêt : Le pourvoi est accueilli et l'autorisation de l'ONÉ est annulée.

Dans la présente affaire, le processus d'approbation de l'ONÉ a donné naissance à l'obligation de consulter. Les mesures de la Couronne susceptibles de donner naissance à l'obligation de consulter ne se limitent pas à l'exercice, par la Couronne ou en son nom, de la prérogative royale ou de pouvoirs conférés par la loi, et ne se limitent pas non plus aux décisions qui ont une incidence immédiate sur les terres et les ressources. L'ONÉ n'est pas, à proprement parler, « la Couronne » ou un mandataire de la Couronne. Cependant, il agit pour le compte de la Couronne lorsqu'il prend une décision définitive à l'égard d'une demande de projet. Dans ce contexte, l'ONÉ est le moyen par lequel la Couronne agit. Par conséquent, il importe

The substance of the duty does not change when a regulatory agency holds final decision-making authority.

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to s. 35(1) the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and the duty to consult do not operate in conflict here. The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project

peu que le décideur ultime soit le Cabinet ou l'ONÉ. Dans les deux cas, la décision constitue une mesure de la Couronne qui peut donner naissance à l'obligation de consulter. La substance de cette obligation ne change pas lorsqu'un organisme de réglementation détient le pouvoir de prendre la décision définitive.

Il est loisible aux législateurs d'habiliter des organismes de réglementation à contribuer à la réalisation de l'obligation de consulter de la Couronne. Bien que ce soit toujours à la Couronne qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation, elle peut s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à son obligation de consulter. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. De plus, lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. L'ONÉ dispose des pouvoirs procéduraux nécessaires pour mener des consultations, ainsi que des pouvoirs de réparation lui permettant de prendre, au besoin, des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La Couronne peut donc s'en remettre au processus de l'ONÉ pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe.

L'ONÉ dispose de vastes pouvoirs l'autorisant à entendre et à trancher toute question pertinente de droit et de fait, et ses décisions doivent respecter le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, l'ONÉ peut décider s'il a été satisfait à l'obligation de consulter de la Couronne. L'intérêt public et l'obligation de consulter ne sont pas incompatibles en l'espèce. En tant qu'impératif constitutionnel, l'obligation de consulter fait naître un intérêt public spécial, qui l'emporte sur les autres préoccupations dont tiennent habituellement compte les tribunaux administratifs appelés à évaluer l'intérêt public. Lorsque l'autorisation accordée à l'égard d'un projet viole les droits constitutionnels des peuples autochtones, cette autorisation ne saurait servir l'intérêt public. Lorsque les groupes autochtones touchés soulèvent directement auprès de l'ONÉ des préoccupations concernant la consultation qui a été menée par la Couronne, l'ONÉ doit habituellement traiter de ces préoccupations dans des motifs. L'étendue de l'analyse qui conviendra variera selon les circonstances propres à chaque cas. Par-dessus tout, toute décision touchant des droits ancestraux ou issus

approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

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de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter. Lorsque la Couronne n'a pas satisfait à son obligation de consulter, l'ONÉ doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait être annulée à l'issue d'un contrôle judiciaire.

Bien que la Couronne puisse s'en remettre au processus mené par l'ONÉ pour satisfaire à son obligation de consulter, les efforts de consultation et d'accommodement déployés dans le présent cas ont été inadéquats et lacunaires à plusieurs égards. Premièrement, la consultation était mal orientée. Le processus consultatif ne vise pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le droit lui-même. Dans son évaluation environnementale, l'ONÉ n'a pas pris en considération la source des droits issus de traités des Inuits, ni l'incidence des essais proposés sur ces droits. Deuxièmement, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'ONÉ pour satisfaire à son obligation de consulter. Enfin, élément le plus important, le processus de l'ONÉ n'a pas permis de satisfaire à l'obligation de la Couronne de mener la consultation approfondie qui était requise dans la présente affaire. Très peu de possibilités de participation et de consultation ont étés offertes. Il n'y a pas eu d'audiences en l'espèce ni d'aide financière à l'intention des participants. Bien que ces garanties procédurales ne soient pas toujours nécessaires, leur absence dans la présente instance a réduit de façon importante la qualité de la consultation. De plus, les promoteurs ont finalement répondu aux questions soulevées durant le processus d'évaluation environnementale, mais au moyen d'un document pratiquement inaccessible, et ce, des mois après que les questions aient été posées. Il n'existait aucune compréhension mutuelle sur les points fondamentaux — à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements. En outre, les changements apportés au projet par suite de la consultation ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En conséquence, la Couronne a manqué à son obligation de consulter en ce qui concerne les essais proposés.

Jurisprudence

Arrêt appliqué : *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; **distinction d'avec l'arrêt :** *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550; **arrêts mentionnés :** *Chippewas of the Thames First Nation c. Pipelines Enbridge inc.*, 2017 CSC 41, [2017] 1 R.C.S. 1099; *Nation haïda c. Colombie-Britannique (Ministre des*

v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

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Nader R. Hasan, *Justin Safayeni* and *Pam Hrick*, for the appellants.

Sandy Carpenter and *Ian Breneman*, for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS).

Mark R. Kindrachuk, *Q.C.*, and *Peter Southey*, for the respondent the Attorney General of Canada.

Manizeh Fancy and *Richard Ogden*, for the intervener the Attorney General of Ontario.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Dominique Nouvet, *Marie Belleau* and *Sonya Morgan*, for the intervener Nunavut Tunngavik Incorporated.

Written submissions only by *David Schulze* and *Nicholas Dodd*, for the intervener the Makivik Corporation.

Marie-France Major and *Thomas Slade*, for the intervener the Nunavut Wildlife Management Board.

Kate Darling, *Lorraine Land*, *Matt McPherson* and *Krista Nerland*, for the intervener the Inuvialuit Regional Corporation.

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POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Nadon, Dawson et Boivin), 2015 CAF 179, [2016] 3 R.C.F. 167, 474 N.R. 96, 94 C.E.L.R. (3d) 1, [2015] A.C.F. nº 991 (QL), 2015 CarswellNat 12196 (WL Can.), qui a confirmé une décision de l'Office national de l'énergie, nº 5554587, datée du 26 juin 2014. Pourvoi accueilli.

Nader R. Hasan, *Justin Safayeni* et *Pam Hrick*, pour les appelants.

Sandy Carpenter et *Ian Breneman*, pour les intimées Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) et TGS-NOPEC Geophysical Company ASA (TGS).

Mark R. Kindrachuk, *c.r.*, et *Peter Southey*, pour l'intimée la procureure générale du Canada.

Manizeh Fancy et *Richard Ogden*, pour l'intervenant le procureur général de l'Ontario.

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Dominique Nouvet, *Marie Belleau* et *Sonya Morgan*, pour l'intervenante Nunavut Tunngavik Incorporated.

Argumentation écrite seulement par *David Schulze* et *Nicholas Dodd*, pour l'intervenante Makivik Corporation.

Marie-France Major et *Thomas Slade*, pour l'intervenant le Conseil de gestion des ressources fauniques du Nunavut.

Kate Darling, *Lorraine Land*, *Matt McPherson* et *Krista Nerland*, pour l'intervenante Inuvialuit Regional Corporation.

Maxime Faille, *Jaimie Lickers* and *Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

[2] The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

Maxime Faille, *Jaimie Lickers* et *Guy Régimbald*, pour l'intervenant Chiefs of Ontario.

Version française du jugement de la Cour rendu par

LES JUGES KARAKATSANIS ET BROWN —

I. Introduction

[1] À plusieurs reprises, la Cour a confirmé la place que tient l'obligation de consultation de la Couronne lorsqu'il s'agit de favoriser la réconciliation entre les peuples autochtones du Canada et la Couronne. Dans le présent pourvoi, ainsi que dans le pourvoi connexe *Chippewas of the Thames First Nation c. Pipelines Enbridge inc.*, 2017 SCC 41, [2017] 1 R.C.S. 1099, nous examinons l'obligation de la Couronne de consulter les peuples autochtones avant qu'un organisme de réglementation indépendant n'autorise un projet susceptible d'avoir des incidences sur leurs droits. Selon la jurisprudence de notre Cour, la substance de cette obligation ne change pas lorsqu'un organisme de réglementation détient le pouvoir de prendre la décision définitive à l'égard d'un projet. Bien que la Couronne soit toujours tenue de consulter, elle peut satisfaire partiellement ou totalement à cette obligation dans le cadre du processus de réglementation.

[2] Le hameau de Clyde River est situé sur la côte nord-est de l'île de Baffin, au Nunavut. La communauté se trouve dans une plaine inondable entre la Baie Patricia et la cordillère arctique. La plupart des résidents sont des Inuits et ils comptent sur les mammifères marins pour se nourrir et assurer leur bien-être économique, culturel et spirituel. Ils récoltent les mammifères marins depuis des générations. Ils accordent une importance particulière à la baleine boréale, au narval, au phoque annelé, au phoque barbu, au phoque du Groenland et à l'ours polaire. Aux termes de l'*Accord sur les revendications territoriales du Nunavut* (1993), les Inuits de Clyde River ont cédé l'ensemble de leurs revendications, droits, titres et intérêts ancestraux dans la région du Nunavut, qui comprend Clyde River, contre des droits définis par traité, notamment le droit de récolter des mammifères marins.

[3] In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

[4] While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

II. Background

A. *Legislative Framework*

[5] The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

[6] The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to

[3] En 2011, les intimées TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As et Petroleum Geo-Services Inc. (les promoteurs) ont demandé à l'Office national de l'énergie (ONÉ) l'autorisation de mener des essais sismiques extracôtiers liés aux ressources pétrolières et gazières. Nul ne conteste que ces essais pourraient avoir des incidences négatives sur les droits de récolte des Inuits de Clyde River. Après une période de consultation entre les promoteurs du projet, l'ONÉ et les communautés inuites touchées, l'ONÉ a accordé l'autorisation demandée.

[4] Bien que la Couronne puisse s'en remettre au processus mené par l'ONÉ pour satisfaire à son obligation de consulter, vu l'importance des droits issus de traités reconnus en jeu et l'incidence que les essais sismiques pourraient avoir sur ces droits, à l'instar des appelants nous estimons que les efforts de consultation et d'accommodement en l'espèce ont été inadéquats. Pour les motifs qui suivent, nous sommes donc d'avis d'accueillir le pourvoi et d'annuler l'autorisation de l'ONÉ.

II. Contexte

A. *Cadre législatif*

[5] La *Loi sur les opérations pétrolières au Canada*, L.R.C. 1985, c. O-7 (*LOPC*), vise en partie à promouvoir la recherche et l'exploitation responsables des ressources pétrolières et gazières (art. 2.1). Elle s'applique à la recherche, notamment par forage, à la production, à la rationalisation de l'exploitation, à la transformation et au transport du pétrole et du gaz dans certains endroits désignés, notamment au Nunavut (art. 3). Il est interdit de se livrer à de telles activités sans avoir obtenu le permis de travaux prévu à l'al. 5(1)a) ou l'autorisation prévue à l'al. 5(1)b).

[6] L'ONÉ est un tribunal administratif fédéral et un organisme de réglementation établi par la *Loi sur l'Office national de l'énergie*, L.R.C. 1985, c. N-7 (*Loi sur l'ONÉ*). En l'espèce, c'est lui qui prend en dernier ressort la décision d'accorder ou non l'autorisation prévue à l'al. 5(1)b) de la *LOPC*. L'ONÉ est investi d'un large pouvoir discrétionnaire

provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. *The Seismic Testing Authorization*

[7] In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

[8] The NEB launched an environmental assessment of the project.[1]

[9] Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

[10] In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in

[1] This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

qui l'habilite à assortir de conditions, en vertu du par. 5(4), les autorisations qu'il délivre, et il peut demander aux parties tout renseignement qu'il juge nécessaire pour s'acquitter du mandat que lui confère la loi (art. 5.31).

B. *L'autorisation relative aux essais sismiques*

[7] En mai 2011, les promoteurs ont demandé à l'ONÉ, aux termes de l'al. 5(1)b) de la *LOPC*, l'autorisation d'effectuer des essais sismiques dans la baie de Baffin et le détroit de Davis, lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins. Les essais proposés prévoyaient que des canons à air seraient remorqués par navire à travers une région visée par le projet. Ces canons produisent des ondes sonores sous-marines qui permettent de trouver et de mesurer les ressources géologiques sous-marines tel le pétrole. Les essais devaient avoir lieu de juillet à novembre, pendant cinq années consécutives.

[8] L'ONÉ a procédé à une évaluation environnementale du projet[1].

[9] Clyde River s'est opposé aux essais sismiques et a présenté à l'ONÉ une pétition à l'encontre de ces essais en mai 2011. En 2012, les promoteurs ont répondu à des demandes de renseignements supplémentaires de l'ONÉ. Ils ont tenu des assemblées dans des communautés qui seraient touchées par les essais, notamment à Clyde River.

[10] En avril et en mai 2013, l'ONÉ a tenu des assemblées dans les hameaux de Pond Inlet, Clyde River, Qikiqtarjuaq et Iqaluit afin de recueillir les commentaires des membres du public concernant le projet. Des représentants des promoteurs ont assisté à ces assemblées. Les membres des communautés ont posé des questions de base au sujet de l'effet des essais sur les mammifères marins de la région, mais

[1] Cette évaluation était initialement exigée par la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, c. 37. Depuis l'abrogation de cette loi et son remplacement par la *Loi canadienne sur l'évaluation environnementale (2012)*, L.C. 2012, c. 19, art. 52, l'ONÉ continue de mener des évaluations environnementales relativement aux projets proposés, considérant qu'il possède toujours le pouvoir de le faire en vertu de la *LOPC*.

Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: "That's a very difficult question to answer because we're not the core experts" (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

> . . . a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.

(A.R., vol. III, at p. 651)

[11] These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

[12] Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

les promoteurs n'ont pas été en mesure de répondre à bon nombre de celles-ci. Par exemple, à Pond Inlet, un membre de la communauté a demandé aux promoteurs quels mammifères marins seraient touchés par les essais. Ceux-ci ont donné la réponse suivante : [TRADUCTION] « Il est très difficile de répondre à cette question parce que nous ne sommes pas des experts à ce sujet » (d.a., vol. III, p. 541). De même, à Clyde River, un membre de la communauté voulait savoir quel serait l'effet des essais sur les mammifères marins. Les promoteurs ont répondu ce qui suit :

> [TRADUCTION] . . . il y a eu beaucoup de travaux en matière d'essais sismiques à d'autres endroits, et une grande partie de cette information est utilisée dans la réalisation de l'évaluation environnementale, le document qui a été soumis à l'Office national de l'énergie par les entreprises pour les besoins du processus d'approbation. Il comporte une section sur, vous savez, les mammifères marins et les effets sur ceux-ci.

(d.a., vol. III, p. 651)

[11] Ce ne sont là que deux exemples des nombreux cas où les promoteurs n'ont pas su donner de réponses concrètes à des questions de base au sujet des répercussions des essais sismiques proposés. C'est ce qui a amené l'ONÉ à suspendre son évaluation en mai 2013. En août 2013, les promoteurs ont déposé auprès de l'ONÉ un document de 3 926 pages censé répondre à ces questions. Ce document a été affiché sur le site Web de l'ONÉ et envoyé aux bureaux des hameaux. La majeure partie de ce document n'a pas été traduite en inuktitut. Aucun effort additionnel n'a été déployé pour vérifier si les communautés avaient accès à ce document, et si elles avaient obtenu des réponses à leurs questions. Après le dépôt du document, l'ONÉ a repris son évaluation.

[12] Tout au long du processus d'évaluation environnementale, Clyde River et diverses organisations inuites ont déposé auprès de l'ONÉ des lettres de commentaires dans lesquelles ils affirmaient que la consultation était inadéquate et ils exprimaient leurs inquiétudes au sujet des essais.

[13] In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment[2] before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

[14] In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

[15] In its environmental assessment report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised" and that

[13] En avril 2014, des organisations représentant les appelants et des Inuits d'autres communautés ont écrit au ministre des Affaires autochtones et du Nord et à l'ONÉ, affirmant qu'à leur avis il n'avait pas été satisfait à l'obligation de consultation en ce qui a trait aux essais. Selon ces organisations, il était possible de remédier à cette situation en réalisant une évaluation environnementale stratégique[2] avant que des essais sismiques ne soient autorisés. En mai, le Conseil du milieu marin du Nunavut a lui aussi écrit à l'ONÉ, avec copie au ministre, et demandé que toute décision réglementaire touchant le milieu marin de la région du Nunavut soit reportée jusqu'à ce que l'évaluation environnementale stratégique soit terminée. De l'avis du Conseil, cette évaluation était nécessaire pour que l'on comprenne les conditions de référence du milieu marin et pour veiller à ce que les essais sismiques soient adéquatement réglementés.

[14] En juin 2014, le ministre a répondu à ces deux lettres, exprimant son [TRADUCTION] « désaccord avec l'idée de suspendre l'exploration sismique de la région jusqu'à ce que l'évaluation environnementale stratégique soit terminée » (d.a., vol. IV, p. 967). Peu de temps après, une lettre émanant de l'ONÉ qui accordait l'autorisation de mener des travaux géophysiques a suivi, indiquant que le rapport d'évaluation environnementale était terminé et que l'autorisation avait été accordée.

[15] Dans son rapport d'évaluation environnementale, l'ONÉ a traité de la consultation et de la participation des groupes autochtones dans le cadre de son processus. Il a conclu que les promoteurs [TRADUCTION] « ont déployé suffisamment d'efforts pour consulter les groupes autochtones susceptibles

[2] At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment — specifically, the "Eastern Arctic Strategic Environmental Assessment" — for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

[2] À cette époque, le ministère des Affaires indiennes et du Nord canadien préparait une évaluation environnementale stratégique — plus précisément l'[TRADUCTION] « Évaluation environnementale stratégique dans l'Arctique de l'Est » — pour la baie de Baffin et le détroit de Davis, qui visait l'examen de « tous les aspects de l'exploitation pétrolière et gazière future ». Une fois terminée, cette évaluation « guiderait les décisions de politique générale concernant l'opportunité d'inviter les sociétés pétrolières et gazières à soumissionner à l'égard de parcelles de terre afin d'y obtenir des droits d'exploration par forage dans la baie de Baffin et le détroit de Davis, ainsi que le moment où cela pourrait se faire et les endroits qui seraient visés » (lettre de l'honorable Bernard Valcourt à Cathy Towtongie et autres, d.a., vol. IV, p. 966-967).

"Aboriginal groups had an adequate opportunity to participate in the NEB's [environmental assessment] process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. *The Judicial Review Proceedings*

[16] Clyde River applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of *COGOA* (2015 FCA 179, [2016] 3 F.C.R. 167). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

[17] The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development

d'être touchés et pour répondre aux préoccupations qu'ils ont soulevées », et que « les groupes autochtones ont eu une possibilité adéquate de participer au processus d'évaluation environnementale de l'ONÉ » (d.a., vol. I, p. 24). L'ONÉ a également conclu que les essais pouvaient modifier les routes migratoires des mammifères marins et augmenter le risque de mortalité chez ces animaux, situation qui influerait sur la récolte traditionnelle des mammifères marins, notamment les baleines boréales et les narvals, deux espèces qualifiées d'« espèces préoccupantes » par le Comité sur la situation des espèces en péril au Canada (COSEPAC). L'ONÉ a toutefois conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants compte tenu des mesures d'atténuation que les promoteurs mettraient en œuvre.

C. *La demande de contrôle judiciaire*

[16] Clyde River a demandé à la Cour d'appel fédérale le contrôle judiciaire de la décision de l'ONÉ accordant l'autorisation. La juge Dawson (avec l'appui des juges Nadon et Boivin) a conclu que l'obligation de consulter avait pris naissance, parce que l'ONÉ ne pouvait pas accorder l'autorisation tant que le ministre n'aurait pas approuvé (ou renoncer à l'obligation d'approuver) un plan de retombées économiques relativement au projet, conformément au par. 5.2(2) de la *LOPC* (2015 CAF 179, [2016] 3 R.C.F. 167). La Cour d'appel fédérale a considéré que les circonstances requéraient une consultation approfondie, suivant le sens donné à cette notion dans l'arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 44, et elle a jugé que la Couronne pouvait s'en remettre à l'ONÉ pour que celui-ci procède à la consultation.

[17] La Cour d'appel a également conclu que, du fait de la nature et de l'étendue des processus de l'ONÉ, il avait été satisfait à l'obligation de consulter incombant à la Couronne. Les conditions auxquelles l'ONÉ avait accordé son autorisation montraient qu'il avait suffisamment pris en compte les intérêts des Inuits et qu'il était permis de s'attendre à ce que de nouvelles consultations soient

activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

[18] The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?

2. Can the Crown rely on the NEB's process to fulfill the duty to consult?

3. What is the NEB's role in considering Crown consultation before approval?

4. Was the consultation adequate in this case?

A. *The Duty to Consult — General Principles*

[19] The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

menées si les essais proposés étaient suivis d'autres activités de mise en valeur. Dans les circonstances, un rapport d'évaluation environnementale stratégique n'était pas nécessaire.

III. Analyse

[18] Le présent pourvoi soulève les questions suivantes :

1. Un processus d'approbation de l'ONÉ peut-il donner naissance à l'obligation de consulter?

2. La Couronne peut-elle s'en remettre au processus de l'ONÉ pour satisfaire à l'obligation de consulter?

3. Quel est le rôle de l'ONÉ dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet?

4. La consultation a-t-elle été adéquate en l'espèce?

A. *L'obligation de consulter — principes généraux*

[19] L'obligation de consulter vise la protection des droits ancestraux et issus de traités tout en favorisant la réconciliation entre les peuples autochtones et la Couronne (*Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 34). Elle revêt à la fois une dimension constitutionnelle et une dimension légale (*R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6; *Carrier Sekani*, par. 34). Sa dimension constitutionnelle découle du principe de l'honneur de la Couronne (*Kapp*, par. 6). Ce principe est lui-même consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits existants ancestraux et issus de traités (*Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550, par. 24). Et, en tant qu'obligation légale, elle découle de la proclamation de la souveraineté de la Couronne sur des terres et ressources autrefois détenues par les peuples autochtones (*Haïda*, par. 53).

[20] The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

[21] This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani*, at para. 56; *Haida*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

[22] In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties

[20] Une fois que l'obligation a pris naissance, son contenu se situe sur un continuum qui va de la consultation limitée à la consultation approfondie, selon la solidité de la revendication autochtone et la gravité de l'impact potentiel sur le droit concerné. Il faut procéder au cas par cas et faire preuve de souplesse, car le caractère approfondi de la consultation nécessaire peut varier au fur et à mesure que se déroule le processus et que sont mis au jour de nouveaux renseignements (*Haïda*, par. 39 et 43-45).

[21] Notre Cour a affirmé qu'il est loisible aux législateurs d'habiliter des organismes de réglementation à contribuer à la réalisation de l'obligation de consulter de la Couronne (*Carrier Sekani*, par. 56; *Haïda*, par. 51). Les appelants plaident qu'un processus réglementaire ne peut à lui seul assurer le respect de l'obligation de consulter, parce qu'il faut au moins un certain dialogue direct entre « la Couronne » et la communauté autochtone touchée.

[22] À notre avis, bien que la Couronne puisse s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire, en tout ou en partie, à son obligation de consulter et, lorsque cela se justifie, à son obligation d'accommoder, c'est toujours à elle qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation. Sur le plan pratique, cela ne signifie pas qu'un ministre doive dans chaque cas se demander explicitement s'il a été satisfait à l'obligation de consulter, ou qu'il doive participer directement au processus de consultation. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. Elle pourrait devoir combler les lacunes soit au cas par cas, soit de manière plus systématique au moyen de modifications législatives ou réglementaires (voir, par ex., *Ross River Dena Council c. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Elle pourrait également exiger la présentation d'observations à l'organisme de réglementation, demander le réexamen de la décision ou solliciter le report de l'audience afin de mener d'autres consultations dans le cadre d'un processus distinct avant que la décision ne soit rendue. Par ailleurs, si un groupe autochtone

are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12).

[23] Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

[24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal

touché est (comme les Inuits du Nunavut) partie à un traité moderne et juge que le processus est déficient, il devrait, comme ce fut le cas en l'espèce, demander une intervention directe de la Couronne en temps opportun (puisque les parties aux traités sont tenues d'agir de façon diligente pour faire valoir leurs intérêts respectifs) (*Beckman c. Première nation de Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103, par. 12).

[23] De plus, étant donné que l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation (*Haïda*, par. 41), lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. Les peuples autochtones doivent être avisés de la forme que prendra le processus de consultation, afin de savoir comment les consultations se dérouleront, de pouvoir y participer activement et, au besoin, d'être en mesure de soulever en temps opportun leurs préoccupations au sujet de la forme des consultations proposées.

[24] Par-dessus tout, et peu importe le processus de consultation entrepris, toute décision touchant des droits ancestraux ou issus de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter, laquelle est un impératif constitutionnel. En cas de contestation, la décision devrait être annulée à l'issue d'un contrôle judiciaire. Cela dit, le contrôle judiciaire ne saurait remplacer une consultation adéquate. On ne parvient que rarement, voire jamais, à une véritable réconciliation dans une salle d'audience. Un recours judiciaire peut tendre à corriger des atteintes passées à des droits ancestraux ou issus de traités, mais une consultation adéquate par la Couronne *avant* que le projet ne soit approuvé est toujours préférable à des remontrances judiciaires formulées après le fait, au terme d'une procédure contradictoire. Après tout, la consultation [TRADUCTION] « s'attache au maintien de relations constantes » (*Carrier Sekani*, par. 38, citant D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009),

interests" (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

B. *Can an NEB Approval Process Trigger the Duty to Consult?*

[25] The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida*, at para. 35; *Carrier Sekani*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46).

[26] In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in *COGOA*'s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment

p. 21). Comme notre Cour l'a souligné dans *Haïda*, « [m]ême si les revendications autochtones sont et peuvent être réglées dans le cadre de litiges, il est préférable de recourir à la négociation pour concilier les intérêts de la Couronne et ceux des Autochtones » (par. 14). Il n'est à l'avantage de personne — promoteurs du projet, peuples autochtones ou membres non autochtones des communautés touchées — qu'un projet soit approuvé prématurément mais fasse ensuite l'objet d'un litige.

B. *Un processus d'approbation de l'ONÉ peut-il donner naissance à l'obligation de consulter?*

[25] L'obligation de consulter prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle d'une revendication autochtone ou de droits ancestraux ou issus de traités susceptibles de subir des effets préjudiciables en raison d'une mesure prise par la Couronne (*Haïda*, par. 35; *Carrier Sekani*, par. 31). Les mesures de la Couronne susceptibles de donner naissance à l'obligation de consulter ne se limitent pas à l'exercice, par la Couronne ou en son nom, de la prérogative royale ou de pouvoirs conférés par la loi, et ne se limitent pas non plus aux décisions qui ont une incidence immédiate sur les terres et les ressources. Il faut se demander si la mesure a des effets préjudiciables, quelle qu'en soit la cause, sur des droits ancestraux ou issus de traités. D'ailleurs, un des objectifs de la consultation consiste à cerner les effets préjudiciables, à les réduire au minimum et à y remédier si possible (*Carrier Sekani*, par. 45-46).

[26] Dans le présent pourvoi, toutes les parties ont reconnu que l'obligation de consulter de la Couronne avait pris naissance, mais elles ont été incapables de s'accorder sur la *nature exacte* de la mesure de la Couronne qui a donné naissance à cette obligation. La Cour d'appel fédérale a considéré que l'élément ayant fait naître l'obligation est l'exigence prévue par la *LOPC* qui requiert que le ministre approuve (ou renonce à l'obligation d'approuver) un plan de retombées économiques pour les essais. Dans l'affaire connexe *Chippewas of the Thames*, les juges majoritaires de la Cour d'appel fédérale ont conclu qu'il n'était pas nécessaire de

of the *NEB Act*[3] (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

[27] Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

[28] It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:

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

décider si l'obligation de consulter s'appliquait, puisque la Couronne n'était pas partie à l'instance devant l'ONÉ, mais ils ont évoqué l'idée que la seule mesure de la Couronne en cause pourrait être l'adoption en 1959 de la *Loi sur l'ONÉ*[3] (*Première Nation des Chippewas de la Thames c. Pipelines Enbridge Inc.*, 2015 CAF 222, [2016] 3 R.C.F. 96). Bref, dans les deux affaires la Cour d'appel fédérale était d'avis que seule une mesure prise par un ministre ou un ministère du gouvernement, ou une société d'État, peut constituer une mesure de la Couronne donnant naissance à l'obligation de consulter. Et devant notre Cour, dans le pourvoi *Chippewas of the Thames*, la procureure générale du Canada a plaidé que c'est l'approbation du projet de pipeline par l'ONÉ qui a donné naissance à l'obligation, puisqu'il s'agissait d'une mesure de l'État susceptible d'avoir une incidence sur des droits ancestraux ou issus de traités.

[27] Contrairement aux conclusions de la Cour d'appel fédérale sur ce point, nous sommes d'avis qu'en l'espèce, tout comme dans *Chippewas of the Thames*, c'est le processus d'approbation de l'ONÉ qui a donné naissance à l'obligation de consulter.

[28] Il importe de répéter que l'obligation de consulter incombe à la Couronne. En un sens, la « Couronne » s'entend de la personnification de Sa Majesté de l'État canadien dans l'exercice des prérogatives et des privilèges qui lui sont réservés. Cependant, la Couronne désigne aussi la souveraine dans l'exercice de son rôle législatif officiel (lorsqu'elle sanctionne les projets de loi, qu'elle refuse de les sanctionner ou qu'elle réserve sa décision), et en tant que chef du pouvoir exécutif (*McAteer c. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, par. 51; P. W. Hogg, P. J. Monahan et W. K. Wright, *Liability of the Crown* (4e éd. 2011), p. 11-12; mais voir *Carrier Sekani*, par. 44). Pour cette raison, le mot « Couronne » est couramment employé comme symbole du pouvoir exécutif et pour désigner ce pouvoir. C'est ce que lord Simon of Glaisdale a décrit dans *Town Investments Ltd. c. Department of the Environment*, [1978] A.C. 359 (H.L.), p. 397 :

[3] *Loi sur l'Office national de l'énergie*, S.C. 1959, c. 46.

The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

[29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final

[TRADUCTION] La couronne, en tant qu'objet, est une coiffure ornée de bijoux conservée sous garde à la tour de Londres. Mais elle symbolise les pouvoirs du gouvernement qui étaient auparavant exercés par la personne portant la couronne; c'est ainsi qu'au 13e siècle, les crimes étaient commis non seulement contre la paix du roi, mais aussi contre « sa couronne et sa dignité » : *Pollock and Maitland, History of English Law*, 2e éd. (1898), vol. I, p. 525. Par conséquent, on utilise l'expression « la Couronne » en droit constitutionnel pour désigner l'ensemble des pouvoirs de cette nature qui subsistent (la prérogative royale), ainsi que les autres pouvoirs que la loi confère expressément à « la Couronne ».

[29] Selon cette interprétation, l'ONÉ n'est pas, à proprement parler, « la Couronne ». Il n'est pas non plus, à proprement parler, un mandataire de la Couronne, étant donné que — comme l'ONÉ exerce ses activités de manière indépendante des ministres de la Couronne — il n'existe entre eux aucun lien de dépendance (Hogg, Monahan et Wright, p. 465). Cependant, en tant qu'organisme créé par la loi à qui incombe la responsabilité visée à l'al. 5(1)b) de la *LOPC*, l'ONÉ agit pour le compte de la Couronne lorsqu'il prend une décision définitive à l'égard d'une demande de projet. En termes simples, dès lors que l'on accepte qu'un organisme de réglementation existe pour exercer le pouvoir de nature exécutive que le législateur concerné l'autorise à exercer, toute distinction entre les mesures de cet organisme et celles de la Couronne disparaît rapidement. Dans ce contexte, l'ONÉ est le moyen par lequel la Couronne agit, d'où l'emploi interchangeable dans *Carrier Sekani* des expressions « mesure gouvernementale » et « mesure [. . .] de la Couronne » (par. 42-44). Par conséquent, il importe peu que le décideur ultime dans un projet soit le Cabinet ou l'ONÉ. Dans les deux cas, la décision constitue une mesure de la Couronne qui peut donner naissance à l'obligation de consulter. Comme l'a affirmé en dissidence le juge Rennie de la Cour d'appel fédérale dans *Chippewas of the Thames*, « [l]'obligation,

decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. *Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?*

[30] As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

[31] We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, 5.31(1) and 5.32). It can also require

comme l'honneur de la Couronne, ne s'envole pas en fumée simplement parce qu'une décision sans appel a été rendue par un tribunal établi par le Parlement, plutôt que par le Cabinet » (par. 105). La mesure qu'a prise l'ONÉ dans l'exercice du pouvoir qu'il possède, en vertu de l'al. 5(1)b) de la *LOPC*, de prendre la décision ultime concernant des essais tels ceux proposés en l'espèce, constitue manifestement une mesure de la Couronne.

C. *La Couronne peut-elle s'en remettre au processus de l'ONÉ pour satisfaire à l'obligation de consulter?*

[30] Comme nous l'avons déjà dit, bien que la Couronne demeure ultimement responsable de veiller au caractère adéquat de la consultation, celle-ci peut s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à l'obligation de consulter. Cependant, la question de savoir si la Couronne est en mesure de le faire, en tout ou en partie, dépend de la réponse à la question de savoir si les attributions que la loi confère à l'organisme habilitent ce dernier à faire ce que l'obligation exige dans les circonstances particulières (*Carrier Sekani*, par. 55 et 60). En conséquence, dans le cas de l'ONÉ, la question consiste à décider si celui-ci peut, dans la mesure où la Couronne s'en remet à lui, assurer un niveau de consultation adéquat et, au besoin, accorder aux Inuits de Clyde River des mesures d'accommodement à l'égard des essais proposés.

[31] Nous constatons que tant l'ONÉ que la *LOPC* sont antérieurs à la reconnaissance judiciaire de l'obligation de consulter. Toutefois, compte tenu du caractère souple de cette obligation, la Couronne peut s'en remettre à un processus qui a été initialement conçu pour une autre fin, tant que ce processus rend possible un niveau approprié de consultation du groupe autochtone touché (*Beckman*, par. 39; *Taku River*, par. 22). En vertu de la *LOPC*, l'ONÉ dispose d'un large éventail de pouvoirs qui permettent une consultation étendue. Il peut tenir des audiences, en plus de posséder un vaste pouvoir discrétionnaire l'habilitant à rendre des ordonnances ou obtenir

studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).[4]

[32] *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), 5(5) and 5.36(2)).

[33] The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

[34] In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill

[4] While s. 5.002 (participant funding) and s. 5.331 (public hearings) of *COGOA* were not in force at the time the NEB considered and authorized the project at issue here, they were added later (see S.C. 2015, c. 4, ss. 7 and 13).

des renseignements pour l'application de la *LOPC* et dans l'intérêt public (art. 5.331, par. 5.31(1), art. 5.32). Il peut également exiger que des études soient entreprises et imposer des conditions préalables à l'approbation (par. 5(4)). Dans le cas de projets désignés, il peut aussi (comme c'est le cas en l'espèce) réaliser des évaluations environnementales et créer un programme d'aide financière pour faciliter la participation du public (art. 5.002)[4].

[32] La *LOPC* confère aussi à l'ONÉ de vastes pouvoirs d'accommodement afin de répondre, au besoin, aux préoccupations des groupes autochtones. L'ONÉ peut assortir l'autorisation qu'il accorde en vertu de l'al. 5(1)b) de toute condition qu'il juge appropriée, et peut faire dépendre la prise d'effet de cette autorisation de l'exécution de ces conditions (par. 5(4) et 5.36(1)). Plus important encore, l'ONÉ peut exiger que des accommodements soient apportés soit en exerçant son pouvoir discrétionnaire de refuser une autorisation, soit en réservant sa décision pendant le règlement d'autres questions (al. 5(1)b), et par. 5(5) et 5.36(2)).

[33] L'ONÉ a également acquis une importante expertise institutionnelle, tant en effectuant des consultations qu'en évaluant les effets environnementaux des projets proposés. Lorsque les effets d'un projet proposé sur un droit ancestral ou issu d'un traité chevauchent considérablement les répercussions environnementales potentielles du projet, l'ONÉ est bien placé pour superviser les consultations visant l'examen de ces effets, et pour utiliser son expertise technique afin d'évaluer les formes d'accommodement possibles.

[34] En somme, l'ONÉ dispose (1) des pouvoirs procéduraux nécessaires pour mener des consultations et (2) des pouvoirs de réparation lui permettant de prendre, au besoin, des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La

[4] Même si les art. 5.002 (aide financière) et 5.331 (audiences publiques) de la *LOPC* n'étaient pas en vigueur lorsque l'ONÉ a examiné et autorisé le projet litigieux en l'espèce, ils ont été ajoutés à la loi par la suite (voir L.C. 2015, c. 4, art. 7 et 13).

the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

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

[35] The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

[36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72).

Couronne peut donc s'en remettre au processus de l'ONÉ pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe. Nous allons examiner ci-après si le processus de l'ONÉ a permis de satisfaire à cette obligation en l'espèce.

D. *Quel est le rôle de l'ONÉ dans l'appréciation de la consultation incombant à la Couronne avant l'approbation d'un projet?*

[35] Les appelants soutiennent que, en tant que tribunal administratif habilité à trancher des questions de droit, l'ONÉ *doit* exercer son pouvoir décisionnel en conformité avec le par. 35(1) de la *Loi constitutionnelle de 1982*, et ce, en évaluant le caractère adéquat de la consultation avant d'accorder une autorisation pour des essais sismiques. À l'inverse, les promoteurs plaident que rien dans la jurisprudence de notre Cour ne permet d'imposer cette obligation à l'ONÉ. Bien que la procureure générale du Canada soit d'accord avec les appelants pour dire que l'ONÉ possède la capacité juridique de trancher des questions constitutionnelles lorsque cela est nécessaire dans l'exercice de ses pouvoirs décisionnels, elle soutient que, dans sa décision relative à l'évaluation environnementale en l'espèce, l'ONÉ a examiné de manière appropriée le caractère adéquat des efforts de consultation déployés par les promoteurs.

[36] En général, un tribunal administratif habilité à examiner des questions de droit doit décider si une consultation de ce genre était suffisante sur le plan constitutionnel dans le cas où cette question est régulièrement soulevée devant lui. Le pouvoir d'un tribunal administratif « de statuer en droit emporte celui de trancher une question constitutionnelle dont il est régulièrement saisi, sauf lorsqu'il est clairement établi que le législateur a voulu le priver d'un tel pouvoir » (*Carrier Sekani*, par. 69). Les organismes de réglementation investis du pouvoir de trancher des questions de droit ont le devoir et le pouvoir d'appliquer la Constitution, sauf si le pouvoir de statuer sur la question constitutionnelle a clairement été écarté (*R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 77). Il s'ensuit qu'ils doivent s'assurer que leurs décisions sont conformes à l'art. 35 de la *Loi constitutionnelle de 1982* (*Carrier Sekani*, par. 72).

[37] The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

[38] We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames* considered that this issue was not properly before the NEB. It distinguished *Carrier Sekani* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames*, while the Crown (in the form of BC Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

[39] The difficulty with this view, however, is that — as we have explained — action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been

[37] L'ONÉ dispose, tant en vertu de la *Loi sur l'ONÉ* que de la *LOPC*, de vastes pouvoirs l'autorisant à entendre et à trancher toute question pertinente de droit et de fait (*Loi sur l'ONÉ*, par. 12(2); *LOPC*, par. 5.31(2)). Aucune disposition de l'une ou l'autre de ces lois ne tend à indiquer que le législateur entendait priver l'ONÉ du pouvoir de statuer sur le caractère adéquat de la consultation. De plus, dans *Québec (Procureur général) c. Canada (Office national de l'énergie)*, [1994] 1 R.C.S. 159, notre Cour a conclu que les décisions de l'ONÉ doivent respecter le par. 35(1) de la *Loi constitutionnelle de 1982*. Par conséquent, l'ONÉ peut décider s'il a été satisfait à l'obligation de consulter de la Couronne.

[38] Nous constatons que, dans l'affaire *Chippewas of the Thames*, les juges majoritaires de la Cour d'appel fédérale ont considéré que l'ONÉ n'avait pas été régulièrement saisi de cette question. Ils ont distingué cette affaire de l'arrêt *Carrier Sekani* sur la base que, dans *Chippewas of the Thames*, la Couronne n'était pas partie à l'audience devant l'ONÉ, tandis que dans *Carrier Sekani* la Couronne (par l'entremise de BC Hydro, une société d'État) était partie à l'instance devant la commission des services d'utilité publique. Se fondant sur l'arrêt *Première nation dakota de Standing Buffalo c. Enbridge Pipelines Inc.*, 2009 CAF 308, [2010] 4 R.C.F. 500, les juges majoritaires de la Cour d'appel fédérale dans *Chippewas of the Thames* ont estimé que l'ONÉ n'est pas tenu de se demander si l'obligation de consulter incombant à la Couronne a pris naissance (ou s'il a été satisfait à cette obligation) avant d'autoriser un projet lié aux ressources, sauf dans le cas où la Couronne est une partie à l'instance devant l'ONÉ.

[39] Toutefois, la difficulté que soulève cette opinion est que — comme nous l'avons expliqué — les mesures prises par l'ONÉ en application de son pouvoir de rendre des décisions définitives en vertu de l'al. 5(1)b) de la *LOPC* sont *elles-mêmes* des mesures prises par la Couronne qui donnent naissance à l'obligation de consulter. Nous ne pouvons pas non plus, soit dit en tout respect, souscrire à l'opinion des juges majoritaires de la Cour d'appel fédérale dans l'affaire connexe *Chippewas of the Thames* selon laquelle une décision de l'ONÉ respecte le par. 35(1) de la *Loi constitutionnelle de 1982* dans

triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

la mesure où l'ONÉ s'assure que les promoteurs participent à des « discussions » avec les groupes autochtones susceptibles d'être touchés (par. 62). Si l'obligation de la Couronne de consulter a pris naissance, un décideur ne peut approuver un projet que si la consultation incombant à la Couronne est adéquate. Même si dans bien des cas la Couronne peut s'en remettre aux processus de l'ONÉ pour satisfaire à son obligation de consulter, étant donné que c'est l'ONÉ qui prend la décision définitive, la question fondamentale consiste à décider s'il a été satisfait à l'obligation avant l'approbation du projet (*Haïda*, par. 67). En conséquence, lorsque la Couronne n'a pas satisfait à son obligation de consulter les groupes autochtones touchés par un projet visé par la *LOPC*, l'ONÉ doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait (comme nous l'avons dit précédemment) être annulée à l'issue d'un contrôle judiciaire, puisque l'obligation de consulter doit être respectée avant la prise de mesures susceptibles d'avoir des effets préjudiciables sur le droit en question (*Nation Tsilhqot'in c. Colombie-Britannique*, 2014 CSC 44, [2014] 2 R.C.S. 257, par. 78).

[40] Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

[40] Certains auteurs affirment que, comme l'ONÉ a pour mission de trancher des questions dans l'intérêt public, il ne peut, de manière effective, tenir compte des droits ancestraux et issus de traités et apprécier l'obligation de consulter de la Couronne (voir R. Freedman et S. Hansen, « Aboriginal Rights vs. The Public Interest », préparé pour une conférence du Pacific Business & Law Institute, Vancouver, C.-B. (26-27 février 2009) (en ligne), p. 4 et 14). À notre avis, cependant, l'intérêt public et l'obligation de consulter ne sont pas incompatibles. Comme l'a expliqué la Cour dans *Carrier Sekani*, en tant qu'impératif constitutionnel, l'obligation de consulter fait naître un intérêt public spécial, qui l'emporte sur les autres préoccupations dont tiennent habituellement compte les tribunaux administratifs appelés à évaluer l'intérêt public (par. 70). Lorsque l'autorisation accordée à l'égard d'un projet viole les droits constitutionnels des peuples autochtones, cette autorisation ne saurait servir l'intérêt public (*ibid.*).

[41] This leaves the question of what a regulatory agency must do where the adequacy of Crown

[41] Il reste à déterminer ce qu'un organisme de réglementation doit faire dans les cas où se soulève

consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

devant lui la question du caractère adéquat de la consultation incombant à la Couronne. Lorsque les groupes autochtones touchés soulèvent directement auprès de l'ONÉ des préoccupations concernant la consultation qui a été menée par la Couronne, l'ONÉ doit habituellement traiter de ces préoccupations dans des motifs, plus particulièrement s'il s'agit d'une demande d'approbation de projet requérant une consultation approfondie. Le fait que l'honneur de la Couronne soit en jeu ne permet pas de préjuger d'un résultat donné, mais favorise la réconciliation en imposant des obligations quant à l'approche et à la façon de faire du gouvernement (*Haïda*, par. 49 et 63). L'existence de motifs écrits favorise la réconciliation, parce que ces motifs montrent aux peuples autochtones touchés que leurs droits ont été considérés et comment on en a tenu compte (*Haïda*, par. 44). Des motifs constituent [TRADUCTION] « une marque de respect [qui] démontre la courtoisie dont doit faire preuve la Couronne en tant que souverain envers une nation qui occupait le territoire avant elle » (*Kainaiwa/Blood Tribe c. Alberta (Energy)*, 2017 ABQB 107, par. 117 (CanLII)). Les motifs écrits favorisent également une meilleure prise de décision (*Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 39).

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

[42] Cependant, cela ne signifie pas, contrairement à ce qu'affirment les appelants, que l'ONÉ est toujours tenu d'examiner le caractère adéquat de la consultation qui a été menée en appliquant mécaniquement l'« analyse requise par l'arrêt *Haïda* ». Des motifs explicites ne sont pas non plus requis dans tous les cas. L'étendue de l'analyse qui conviendra variera selon les circonstances propres à chaque cas. Mais dans les cas où une consultation approfondie est nécessaire et que les peuples autochtones touchés ont fait connaître leurs préoccupations, l'honneur de la Couronne obligera généralement l'ONÉ, lorsque son processus d'approbation donne naissance à l'obligation de consulter, à expliquer de quelle manière il a considéré ces préoccupations et il en a tenu compte.

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

E. *La consultation a-t-elle été adéquate en l'espèce?*

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

[43] La Couronne reconnaît qu'une consultation approfondie était requise dans le cas qui nous

this Court explained in *Haida*, deep consultation is required "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

> The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than . . . just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.
>
> (*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25)

occupe, et nous en convenons. Comme notre Cour l'a expliqué dans l'arrêt *Haïda*, une consultation approfondie est requise dans « les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé » (par. 44). En l'espèce, les appelants possèdent des *droits issus de traités établis* leur permettant de chasser et de récolter des mammifères marins. La Cour d'appel fédérale a reconnu que ces droits étaient extrêmement importants pour le bien-être économique, culturel et spirituel des appelants (par. 2). Jerry Natanine, l'ancien maire de Clyde River, a fourni les explications qui suivent à ce sujet : [TRADUCTION] « [la chasse aux mammifères marins] nous fournit des aliments nutritifs, en plus de nous permettre d'exercer des pratiques observées depuis des générations et d'entretenir d'étroites relations les uns avec les autres grâce au partage de ce que nous appelons les "aliments traditionnels" » (d.a., vol. II, p. 197). Récemment, la Cour de justice du Nunavut a également reconnu l'importance de ces droits :

> [TRADUCTION] Le droit inuit qui nous intéresse en l'espèce est le droit de récolter les mammifères marins. Le régime alimentaire de nombreux Inuits au Nunavut se compose en grande partie d'aliments traditionnels. Le coût des aliments est très élevé, et plusieurs habitants seraient dans l'incapacité d'acheter des aliments pour remplacer les aliments traditionnels si ceux-ci n'étaient plus disponibles. Il est reconnu que les aliments traditionnels ont une valeur nutritive plus élevée que les aliments achetés. Cependant, l'incapacité de récolter des mammifères marins n'aurait pas uniquement des répercussions sur le régime alimentaire des Inuits. La tradition culturelle qu'ont les Inuits de partager les aliments traditionnels entre eux dans la communauté serait perdue. La fabrication de vêtements traditionnels serait aussi touchée. Les Inuits perdraient la possibilité de participer à la chasse, une activité qui constitue un aspect fondamental de l'identité inuite. Le droit des Inuits qui est en jeu est d'une grande importance, d'où la nécessité d'une consultation approfondie et de mesures d'accommodement substantielles.
>
> (*Qikiqtani Inuit Assn. c. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, par. 25)

[44] The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

[45] Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

[46] Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

[47] Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). Despite the NEB's broad powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants.

[44] Les essais proposés comportent également des risques importants pour ces droits issus de traités. Selon l'évaluation environnementale de l'ONÉ, ce projet est susceptible d'accroître le risque de mortalité chez les mammifères marins, de causer des dommages permanents à leur ouïe et de modifier leurs routes migratoires, situation qui a en conséquence une incidence sur l'utilisation des ressources traditionnelles. En raison de l'importance du droit en jeu, de la portée des effets potentiels et du risque de préjudice non indemnisable, l'obligation qui s'impose dans la présente affaire se situe à l'extrémité supérieure du continuum.

[45] Dans cette optique, la consultation qui a eu lieu en l'espèce a été lacunaire à plusieurs égards. Premièrement, la consultation était mal orientée. Bien que l'ONÉ ait conclu que les essais proposés n'étaient pas susceptibles d'avoir des effets environnementaux négatifs importants, et que tout effet sur l'utilisation des ressources traditionnelles pourrait faire l'objet de mesures d'atténuation, le processus consultatif ne vise pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le *droit*. Dans son évaluation environnementale, l'ONÉ n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins, ni l'incidence des essais proposés sur ces droits.

[46] Deuxièmement, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'ONÉ pour satisfaire à son obligation de consulter. L'importance du processus ne leur a pas été expliquée adéquatement.

[47] Enfin, élément le plus important, le processus de l'ONÉ n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie. Une telle consultation « pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision » (*Haïda*, par. 44). Malgré les vastes pouvoirs que la *LOPC* confère à l'ONÉ pour offrir de telles mesures avantageuses, les appelants n'ont bénéficié

Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument.[5] While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani*, at para. 38).

[48] The consultation in this case also stands in contrast to *Taku River* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

[49] While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including

[5] The NEB process in *Chippewas of the Thames* was undertaken pursuant to the *NEB Act*, not *COGOA*. Under the *NEB Act*, the NEB had at the relevant time, and still has today, explicit statutory powers to conduct public hearings (s. 24) and provide participant funding for such hearings (s. 16.3). As noted above, Parliament conferred similar powers upon the NEB under *COGOA* in 2015.

que de très peu de possibilités de participation et de consultation. Contrairement à de nombreuses autres instances de l'ONÉ, y compris celle dans l'affaire *Chippewas of the Thames*, il n'y a pas eu d'audiences en l'espèce. Bien que les appelants aient soumis des éléments de preuve scientifique à l'ONÉ, ils l'ont fait sans recevoir d'aide financière à l'intention des participants. Une autre situation qui contraste avec l'affaire *Chippewas of the Thames*, où le processus de consultation a été beaucoup plus robuste. Dans cette affaire, l'ONÉ a tenu des audiences, les appelants ont reçu des fonds pour y participer et ils ont eu l'occasion de présenter des éléments de preuve et des observations finales[5]. Quoique ces garanties procédurales constituent des caractéristiques d'un processus contradictoire, elles peuvent être nécessaires pour qu'une véritable consultation ait lieu (*Haïda*, par. 41) et elles ne transforment pas l'objectif sous-jacent de cette consultation, soit encourager la réconciliation tout en favorisant le maintien de relations constantes (*Carrier Sekani*, par. 38).

[48] La consultation qui s'est déroulée en l'espèce contraste également avec celle tenue dans l'affaire *Taku River* où, même si elle avait droit uniquement à un niveau de consultation se trouvant à mi-chemin du continuum (par. 32), la Première Nation Tlingit de Taku River a obtenu de l'aide financière (par. 37) et a participé pleinement au processus d'évaluation en tant que membre du comité responsable du projet, comité qui était le « principal moteur du processus d'évaluation » (par. 3, 8 et 40).

[49] Bien que ces garanties procédurales ne soient pas toujours nécessaires, leur absence en l'espèce a réduit de façon importante la qualité de la consultation. Même si les appelants ont eu la possibilité d'interroger les promoteurs au sujet du projet lors des rencontres organisées par l'ONÉ au printemps 2013, ces derniers ont été incapables de répondre à

[5] Le processus suivi par l'ONÉ dans l'affaire *Chippewas of the Thames* s'est déroulé conformément à la *Loi sur l'ONÉ*, et non à la *LOPC*. En vertu de la *Loi sur l'ONÉ*, l'ONÉ possédait au moment pertinent, et possède encore aujourd'hui, le pouvoir explicite de tenir des audiences publiques (art. 24) et de verser de l'aide financière en vue de faciliter la participation à de telles audiences (art. 16.3). Comme il a été indiqué précédemment, le Parlement a conféré à l'ONÉ des pouvoirs similaires dans la *LOPC* en 2015.

basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.

[50] The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

de nombreuses questions, y compris des questions de base sur les effets des essais proposés sur les mammifères marins. Les promoteurs ont finalement répondu à ces questions; cependant, ils l'ont fait dans un document de 3 926 pages, qu'ils ont soumis à l'ONÉ. Ce document a été affiché sur le site Web de l'ONÉ et remis aux bureaux des hameaux de Pond Inlet, Clyde River, Qikiqtajuak et Iqualuit. Toutefois, l'Internet est lent au Nunavut, et la bande passante est coûteuse. L'ancien maire de Clyde River a déclaré avoir été incapable de télécharger le document, puisque celui-ci était trop volumineux. De plus, une fraction seulement de cet énorme document a été traduite en inuktitut. Le moins que l'on puisse dire, c'est que le fait de répondre à des questions qui touchent à l'essence des droits issus de traités en cause au moyen d'un amas documentaire pratiquement inaccessible, et ce, des mois après que les questions aient été posées en personne ne constitue pas une véritable consultation. Selon des auteurs, le mot [TRADUCTION] « "consultation", dans son sens le moins technique, s'entend de l'action de se parler dans le but de se comprendre les uns les autres » (T. Isaac et A. Knox, « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49, p. 61). Aucune compréhension mutuelle sur les points fondamentaux — à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements — n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire.

[50] Les fruits de la participation limitée des Inuits au processus d'évaluation en l'espèce ressortent clairement de l'examen des mesures d'accommodement consignées dans le rapport d'évaluation environnementale de l'ONÉ. Il y est fait état des changements apportés au projet par suite de la consultation, par exemple un engagement à poursuivre les consultations, l'affectation d'agents de liaison auprès de la communauté dans les communautés touchées et un projet d'étude sur les Inuit Qaujimajatuqangit (connaissances traditionnelles inuites). Les promoteurs se sont aussi engagés à doter le navire devant être utilisé pour les essais proposés d'appareils de surveillance acoustique passive afin d'éviter les collisions avec des mammifères marins.

[51] These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

[52] The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

[53] For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

Appeal allowed with costs.

[51] Cependant, ces changements ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En outre, la surveillance acoustique passive ne constituait aucunement une concession, puisqu'elle est exigée par l'Énoncé des pratiques canadiennes d'atténuation des ondes sismiques en milieu marin, lequel énonce des « normes minimales, qui s'appliquent dans toutes les eaux marines du Canada libres de glace » (d.a., vol. I, p. 40), et qui figureraient virtuellement dans tous les projets d'essais sismiques. Aucune de ces soi-disant concessions, ni les motifs eux-mêmes exposés par l'ONÉ, n'ont donné aux Inuits une assurance raisonnable que leurs droits issus de traités protégés par la Constitution avaient été considérés en tant que *droits*, plutôt que comme un aspect accessoire de l'évaluation des préoccupations environnementales.

[52] Compte tenu des droits issus de traités établis que possèdent les Inuits et des risques que posent pour ces droits les essais proposés, le processus de consultation qui s'est déroulé en l'espèce a comporté d'importantes lacunes. Si les appelants avaient disposé des ressources nécessaires pour présenter leur propre preuve scientifique, et s'ils avaient eu l'occasion de vérifier la validité de la preuve des promoteurs, le résultat de l'évaluation environnementale aurait pu être bien différent. Les Inuits n'ont pas non plus reçu de réponses concrètes à leurs questions au sujet de l'effet des essais sur la vie marine. Bien que l'ONÉ ait examiné les répercussions potentielles du projet sur les mammifères marins et sur l'utilisation traditionnelle des ressources par les Inuits, son rapport ne reconnaît pas, ni même ne mentionne, l'existence des droits issus de traités des Inuits de récolter des ressources fauniques au Nunavut ou le fait qu'une consultation approfondie était nécessaire.

IV. Conclusion

[53] Pour ces motifs, nous concluons que la Couronne a manqué à son obligation de consulter les appelants au sujet des essais proposés. Nous sommes d'avis d'accueillir le pourvoi, avec dépens en faveur des appelants, et d'annuler l'autorisation de l'ONÉ.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Stockwoods, Toronto.

Solicitors for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS): Blake, Cassels & Graydon, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

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

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

Solicitors for the intervener Nunavut Tunngavik Incorporated: Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Solicitors for the intervener the Makivik Corporation: Dionne Schulze, Montréal.

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener the Inuvialuit Regional Corporation: Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

Procureurs des appelants : Stockwoods, Toronto.

Procureurs des intimées Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) et TGS-NOPEC Geophysical Company ASA (TGS) : Blake, Cassels & Graydon, Calgary.

Procureure de l'intimée la procureure générale du Canada : Procureure générale du Canada, Saskatoon.

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

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

Procureurs de l'intervenante Nunavut Tunngavik Incorporated : Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Procureurs de l'intervenante Makivik Corporation : Dionne Schulze, Montréal.

Procureurs de l'intervenant le Conseil de gestion des ressources fauniques du Nunavut : Supreme Advocacy, Ottawa.

Procureurs de l'intervenante Inuvialuit Regional Corporation : Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Procureurs de l'intervenant Chiefs of Ontario : Gowling WLG (Canada), Ottawa.

2015 CarswellOnt 16111
Ontario Environmental Review Tribunal

East Oxford Community Alliance Inc. v. Ontario (Director, Ministry of the Environment and Climate Change)

2015 CarswellOnt 16111, [2015] O.E.R.T.D. No. 45, 99 C.E.L.R. (3d) 107

Proceeding Commenced Under section 142.1(2) of the Environmental Protection Act, R.S.O. 1990, c. E.19, as amended

Appellant: East Oxford Community Alliance Inc.

Approval Holder: GHLP General Partner Inc. as general partner for and on behalf of Gunn's Hill LP

Respondent: Director, Ministry of the Environment and Climate Change

Subject of appeal: Renewable Energy Approval for Gunn's Hill Wind Farm

Reference No.: 6862-9RDJZX

Property Address/Description: Middletown Line R.R. 4, Lot 12, Concession 5

Municipality: Norwich Township

Upper Tier: Oxford County

ERT Case No.: 15-028

ERT Case Name: East Oxford Community Alliance Inc. v. Ontario (Environment and Climate Change)

Marlene Cashin Member, Dirk VanderBent V-Chair

Heard: June 29-30, 2015; July 7-8, 14, 16, 2015
Judgment: October 21, 2015
Docket: 15-028

Counsel: Ian Flett, for East Oxford Community Alliance Inc.
Sarah Kromkamp, Jocelyn Curry, Danielle Meuleman, for Director, Ministry of the Environment and Climate Change
Albert Engel, Sarah Power, for GHLP General Partner Inc.
Wayne Buchanan, for Township of Norwich

Subject: Environmental
Related Abridgment Classifications
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.f Air
III.2.f.i General principles
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.j Noise

Environmental law
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III.2.s Practice and procedure

Headnote

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Appeals — To administrative tribunal — General principles

Director of Ministry of Environment and Climate Change issued Renewable Energy Approval (REA) to G Inc., as general partner for and on behalf of approval holder under s. 47.5 of Environmental Protection Act — REA was for renewable energy product consisting of construction, installation, operation, use and retiring of Class 4 wind facility with total nameplate capacity of 18 megawatts — E Inc. appealed REA to Environmental Review Tribunal — Appeal dismissed — Views and expressions of concerns expressed by E Inc.'s witnesses in respect of Health Test and Environmental Test pertained to matters requiring expert or technical expertise — As no such supporting opinion evidence was adduced, lay opinions could not be relied upon to make finding of causation in respect of health effects of noise — Evidence adduced by E Inc.'s lay witnesses only rose to level of expression of concern — Relevant factual evidence that had been adduced by E Inc.'s witnesses was limited and insufficient to establish that Environmental Test had been met.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Appeals — To administrative tribunal — Grounds for appeal — Irreparable harm

Director of Ministry of Environment and Climate Change issued Renewable Energy Approval (REA) to G Inc., as general partner for and on behalf of approval holder under s. 47.5 of Environmental Protection Act — REA was for renewable energy product consisting of construction, installation, operation, use and retiring of Class 4 wind facility with total nameplate capacity of 18 megawatts — E Inc. appealed REA to Environmental Review Tribunal — Appeal dismissed — E Inc. failed to establish, on balance of probabilities, that Environmental Test had been met — E Inc. had adduced no expert opinion evidence to support opinions advanced by its lay witnesses — Opinions expressed by lay witnesses would only be accepted as expressions of their views — Many of views and expressions of concern expressed by E Inc.'s witnesses in respect of Environmental Test pertained to matters requiring expert or technical expertise — No such supporting opinion evidence had been adduced by E Inc. and relevant factual evidence that had been adduced by E Inc.'s witnesses was limited and insufficient to establish that Environmental Test had been met.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Appeals — To administrative tribunal — Grounds for appeal — Miscellaneous

Director of Ministry of Environment and Climate Change issued Renewable Energy Approval (REA) to G Inc., as general partner for and on behalf of approval holder under s. 47.5 of Environmental Protection Act — REA was for renewable energy product consisting of construction, installation, operation, use and retiring of Class 4 wind facility with total nameplate capacity of 18 megawatts — E Inc. appealed REA to Environmental Review Tribunal — Appeal dismissed — With exception of evidence of one expert witness, E Inc. had provided no expert opinion evidence to support opinions expressed by its lay witnesses — All of views and expressions of concerns expressed by E Inc.'s witnesses in respect of Health Test pertained to matters requiring expert or technical expertise — As no such supporting opinion evidence was adduced, lay opinions could not be relied upon to make finding of causation in respect of health effects of noise — Evidence adduced by E Inc.'s lay witnesses only rose to level of expression of concern — Health Test required that Tribunal consider only whether engaging in Project, in accordance with REA, would cause serious harm to human health — REA included condition which imposed limits on noise emissions — Evidence of E Inc.'s expert witness did not address this requirement and his evidence fell short of establishing that Health Test had been met.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Noise

Director of Ministry of Environment and Climate Change issued Renewable Energy Approval (REA) to G Inc., as general partner for and on behalf of approval holder under s. 47.5 of Environmental Protection Act — REA was for renewable energy product consisting of construction, installation, operation, use and retiring of Class 4 wind facility with total nameplate capacity of 18 megawatts — E Inc. appealed REA to Environmental Review Tribunal — Appeal dismissed — With exception of evidence of one expert witness, E Inc. had provided no expert opinion evidence to support opinions expressed by its lay witnesses — All of views and expressions of concerns expressed by E Inc.'s witnesses in respect of Health Test pertained to matters requiring expert or technical expertise — As no such supporting opinion evidence was adduced, lay opinions could not be relied upon to make finding of causation in respect of health effects of noise — Evidence adduced by E Inc.'s lay witnesses only rose to level of expression of concern — Health Test required that Tribunal consider only whether engaging in Project, in accordance with REA, would cause serious harm to human health — REA included condition which imposed limits on noise emissions — Evidence of E Inc.'s expert witness did not address this requirement and his evidence fell short of establishing that Health Test had been met.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Practice and procedure

Director of Ministry of Environment and Climate Change issued Renewable Energy Approval (REA) to G Inc., as general partner for and on behalf of approval holder under s. 47.5 of Environmental Protection Act — REA was for renewable energy product consisting of construction, installation, operation, use and retiring of Class 4 wind facility with total nameplate capacity of 18 megawatts — E Inc. appealed REA to Environmental Review Tribunal — Hearing commenced and on second day approval holder brought motion to dismiss — Motion dismissed — Rule 111(c) of Tribunal's Rules of Practice did not apply — Onus was on moving party to establish that its motion to dismiss should be granted — Parties had not addressed important questions which Tribunal must consider in making determination of matter — There was insufficient information on which to base finding to grant relief requested by approval holder in its motion to dismiss — Approval holder had not met onus to establish that its motion to dismiss should be granted.

Table of Authorities

Cases considered:

Borowski v. Canada (Attorney General) (1989), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232, 1989 CarswellSask 241, 1989 CarswellSask 465 (S.C.C.) — followed

Monture v. Ontario (Director, Ministry of the Environment) (2012), 2012 CarswellOnt 8748, 68 C.E.L.R. (3d) 191 (Ont. Environmental Review Trib.) — considered

Mothers Against Wind Turbines Inc. v. Ontario (Director, Ministry of the Environment and Climate Change) (2015), 2015 CarswellOnt 7809 (Ont. Environmental Review Trib.) — followed

Ontario (Ministry of Natural Resources and Forestry) and OPSEU (Bharti), Re (2015), 2015 CarswellOnt 3076, 253 L.A.C. (4th) 79 (Ont. Grievance S.B.) — followed

R. v. Stinchcombe (1991), [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277, 68 C.C.C. (3d) 1, 8 W.A.C. 161, 18 C.R.R. (2d) 210, 1991 CarswellAlta 192, 1991 CarswellAlta 559 (S.C.C.) — considered

Spellman v. Ontario (Director, Ministry of the Environment) (2007), 2007 CarswellOnt 7915, 34 C.E.L.R. (3d) 83 (Ont. Environmental Review Trib.) — referred to

Statutes considered:

Endangered Species Act, 2007, S.O. 2007, c. 6

Generally — referred to

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

s. 1(1) "natural environment" — considered

s. 47.5 [en. 2009, c. 12, Sched. G, s. 4(1)] — considered

s. 142.1(3) [en. 2009, c. 12, Sched. G, s. 9] — considered

s. 145.2.1 [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(3) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(4) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(6) [en. 2009, c. 12, Sched. G, s. 13] — considered

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

s. 25.0.1 [en. 1999, c. 12, Sched. B, s. 16(8)] — considered

Regulations considered:

Environmental Protection Act, R.S.O. 1990, c. E.19

Renewable Energy Approvals Under Part V.0.1 Of The Act, O. Reg. 359/09

Generally — referred to

APPEAL from issuance of Renewable Energy Approval; MOTION for dismissal of appeal.

***The Board*:**

Reasons

Background

1 On April 9, 2015, Mohsen Keyvani, Director, Ministry of the Environment and Climate Change ("MOECC") issued Renewable Energy Approval No. 6862-9RDJZX (the "REA") to GHLP General Partner Inc., as general partner for and on behalf of Gunn's Hill LP (the "Approval Holder") under s. 47.5 of the *Environmental Protection Act* ("*EPA*"). The REA is for a renewable energy project known as the Gunn's Hill Wind Farm, consisting of the construction, installation, operation, use and retiring of a Class 4 wind facility with a total nameplate capacity of 18 megawatts, located on Middletown Line R.R. 4, Lot 12, Concession 5 in Norwich Township, County of Oxford, Ontario (the "Project").

2 On April 24, 2015, East Oxford Community Alliance Inc. (the "Appellant") appealed the REA to the Environmental Review Tribunal (the "Tribunal"). The Appellant appeals under s. 142.1(3) of the *EPA* on the grounds that "engaging in the Project in accordance with the REA will cause serious harm to human health" (the "Health Test") and also that "engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment" (the "Environmental Test").

3 A preliminary hearing was held on May 25, 2015. At that time, the Tribunal granted the Township of Norwich's request for presenter status, and gave procedural directions respecting the main hearing in the proceeding, as set out in the order of June 18, 2015.

4 On June 29, 2015 the hearing commenced in Woodstock and continued over several days, continuing into July. On the second day of the hearing, when the Tribunal had heard the testimony from all of the Appellant's witnesses, and following the Township of Norwich's presentation, the Approval Holder brought a motion to dismiss. The Approval Holder had previously served and filed its Notice of Motion, as required by Rule 98 of the Tribunal's *Rules of Practice* (the "Rules") and had notified the other parties and the Tribunal regarding the intended timing of the motion.

5 On July 7, 2015, the Approval Holder requested that the motion be heard orally. However, given the complexity of the issues raised by this motion and having regard to the expedited timeline for the main hearing of the evidence in this renewable energy approval appeal, the Tribunal directed that the motion be heard in writing. On consent of counsel for the Parties, the Tribunal set due dates for filing submissions in respect of this motion. At the request of the Approval Holder, and on consent of counsel for the Director and the Appellant, the Tribunal directed that the hearing would continue as previously scheduled. This Decision includes the Tribunal's reasons and disposition of the Approval Holder's motion.

6 Having considered the evidence submitted in respect of the motion and the evidence adduced in the main hearing, as well as the submissions of the parties on the motion and on the main hearing, the Tribunal dismisses the motion to dismiss, dismisses the appeal. The decision of the Director is confirmed.

Relevant Legislation

7 The relevant legislation is as follows:

> **Environmental Protection Act**
>
> 1. (1) "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario;
>
> ***Director's powers***
>
> 47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,
>
> (a) issue or renew a renewable energy approval; or
>
> (b) refuse to issue or renew a renewable energy approval.
>
> ***Terms and conditions***
>
> (2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so.
>
> ***Other powers***
>
> (3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,
>
> (a) alter the terms and conditions of a renewable energy approval after it is issued;
>
> (b) impose new terms and conditions on a renewable energy approval; or
>
> (c) suspend or revoke a renewable energy approval.
>
> ***Same***

(4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations.

145.2.1(2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.

(3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;

(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or

(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

Issues

8 The issues on the appeal are:

1. Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

2. Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

3. Whether the Tribunal should grant the Approval Holder's motion to dismiss the Appellant's appeal on the basis that the Appellant has failed to establish a *prima facie* case.

9 Because the Tribunal has dismissed the motion to dismiss, the Tribunal will address this as the third issue in this Decision.

Issue 1: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

Discussion, Analysis and Findings

Evidence of the Appellant

Overview

10 The Appellant called seven lay witnesses: Joan Morris, Carol Hopkins-Engberts, Keith McKay, Michelle Poulin, George Rand, Karen Wesseling, and John Eacott. The Appellant also called one expert witness, William Palmer. With the exception of Mr. Palmer, the Appellant did not request that any of its witnesses be qualified to give opinion or technical evidence.

Joan Morris

11 Joan Morris and her husband live on a farm in East Oxford. The Project's closest turbine will be located approximately 700 metres ("m") from their dairy barn. Ms. Morris did not request to be qualified as an expert witness in this proceeding, but she notes for the Tribunal's information that she holds an Honours Bachelor of Science degree in Human Biology and a

Master of Health Science degree in Community Health and Epidemiology, and that she is also a Certified Clinical Research Professional. She characterizes herself and her husband as "stewards of the land and ... guardians for our livestock", and says her main concerns about the Project are for her family's health and safety, and their ability to continue with their livelihood of dairy farming. Ms. Morris included a large number of documents in support of her testimony, and also gave evidence that she has communicated with other individuals in Ontario who have experienced health effects from living in proximity to wind turbines. Ms. Morris testified to the World Health Organization's definition of health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, and referenced several documents pointing to the conclusion that the audible presence of wind turbines will cause annoyance in certain individuals.

Carol Hopkins-Engberts

12 Carol Hopkins-Engberts testified on behalf of herself and her husband Gerhard Hopkins-Engberts. They live near the location of the Project and operate a farming business there. Four turbines will be located within 900 m of the Hopkins-Engberts property, and a further three turbines will be located within 1500 m. Ms. Hopkins-Engberts stated their concerns about the Project in terms of noise, environmental issues regarding birds, bats, insects, deer and other wildlife, land use, safety, and potential impacts of the Project on views from their home, and on the future sale of their property. Ms. Hopkins-Engberts expressed her concern and that of her husband, that "low-grade noise is a source of stress" and that the Project's turbines could possibly cause illness related to lack of sleep.

Keith McKay and Michelle Poulin

13 Keith McKay and Michelle Poulin provided a joint witness statement and gave oral testimony together. Their home is located in the vicinity of the Project, with turbines to be located to the east, west, and south of their property. They stated their concerns about the Project in terms of the negative effects on their personal health, and the impact of radar interference on air traffic, public safety and their own personal safety during takeoff and landing at the nearby Curries Aerodrome, where Mr. McKay hangars his plane and uses the runways for takeoff and landings. Attached to the Poulin/McKay witness statement is a letter from Paul A. Hayes, President of Aerocan Aviation Specialists Inc. to George Rand, owner of Curries Aerodrome. Mr. Hayes had recommended "a safety setback zone of 4 km from the ends of an aerodrome runway, and 2.5 km laterally from each side of the runway". The document was included as having informed Ms. Poulin and Mr. McKay's opinions but not was not admitted for the truth of its contents.

14 Ms. Poulin and Mr. McKay testified to their concerns about adverse health effects caused by noise from wind turbines, saying in their joint witness statement, "infrasound emitted by turbines has negative effects on the mechanism of inner ear function which controls equilibrium", and "regular frequency audible noise is an irritant which negatively impacts health".

George Rand

15 George Rand lives in the vicinity of the proposed Project and is the owner and operator of Curries Aerodrome, which has two airstrips. His main concern is air safety, for himself and for the general public using the airspace near the Project turbines. Mr. Rand also farms approximately 1100 acres spread throughout Norwich Township and in the past has conducted seed and fertilizer application by air. He states that these farming methods are in jeopardy now, stating that he has spoken with pilots who refuse to fly in areas where turbines are located. Mr. Rand testified that Curries Aerodrome is a registered Aerodrome, but it is not a certified airport. He confirmed that he is aware that, on occasion, some pilots will use his airstrips without notifying him in advance, and that he has given a generalized permission to flying clubs in the area and others, to use the strips. He also testified that he was unaware of Condition N in the REA that specifically requires development of any mitigation measures that may be required for the Curries Aerodrome.

Karen Wesseling

16 Karen Wesseling and her family live adjacent to the Project site and operate a dairy farm. Turbine 4 will be located approximately 86 m from her property line. Ms. Wesseling expressed concern about not being able to use a walking path located on her property, due to its proximity to one of the Project's turbines. She also expressed concern about the health and safety

of her family and farm employees due to the possibility that debris or ice may be thrown from the nearest proposed turbine onto her property.

17 Ms. Wesseling's main concern is for the health of the cows on the property due to potential negative effects caused by the Project from stray voltage. Ms. Wesseling testified as to what she had been told by her veterinarian about negative impacts on cows near other wind projects. Ms. Wesseling testified in cross-examination that she did not know whether stray voltage will occur on her property as a result of the configuration of the turbines, and she confirmed that the buried electrical cable does not travel under her property.

18 Ms. Wesseling also testified regarding her concern that shadow flicker will be a source of annoyance and create a safety risk for her husband and others working in and around her family's milking barn.

William Palmer

19 William Palmer is a professional engineer who retired from Bruce Power in 2004. Since retiring, Mr. Palmer has conducted research into public safety and acoustics, and has written and presented a number of technical papers at conferences. On consent of the parties, he was qualified by the Tribunal as a professional engineer with expertise in public safety risks due to turbine failure and some experience in the acoustics of wind turbines. Mr. Palmer's testimony focussed on turbine safety issues, including blade throw, turbine collapse, fires, and ice throw. He also testified regarding amplitude modulation created by turbines and its possible contribution to annoyance. In this respect, he cited a number of papers in support of this proposition, such as the Council of Canadian Academies report and the Health Canada study with regards to annoyance from wind turbine noise and health.

20 In its final submissions, the Appellant summarizes Mr. Palmer's evidence on the effects of noise from wind turbines on human health as follows:

> He testified that wind turbine noise annoyance was found to be statistically related to several self-reported health effects including, but not limited to blood pressure, migraines, tinnitus, dizziness and perceived stress. While not an expert in health, Mr. Palmer factored available information into forming his opinion about the public safety risks created by wind turbines.

21 Mr. Palmer's testimony regarding safety concerns related to the Project was that nearby non-participating properties would be susceptible to debris, ice throw and tower collapse due to their proximity to the Project turbines. In his witness statement he referenced a table that he had compiled of turbine failure incidents in the last five years, and based on this table he estimated that the rate of failure is 0.0006 turbine failures per year in Ontario. In cross-examination, he corrected this to a failure rate of 0.0005. Mr. Palmer estimated that the probability is one in ten that a neighbour will be impacted by turbine failure within the 20 year Project life. Mr. Palmer confirmed in cross-examination, that he has not done an assessment of the probability that a person would be in the vicinity of a turbine when it failed and explained that his assessment assumed that there would be someone at the location of the turbine failure when the failure occurred, which he described as a deterministic risk assessment.

22 Mr. Palmer also raised the issue of turbine fires and questioned the capacity of local fire services to effectively deal with a fire should one occur.

Evidence of the Approval Holder

Overview

23 The Approval Holder called five expert witnesses: Terrance F. Kelly, Dr. Jim Salmon, Dr. Dariush Faghani, Dr. Christopher Ollson, and Dr. Robert McCunney. The Approval Holder also called two lay witnesses: Rochelle Rumney and Juan Anderson.

Terrance F. Kelly

24 Terrance F. Kelly testified that he has been a pilot since 1974 and has held positions in the aviation safety field for approximately 35 years. He is a former employee of Transport Canada, the Canadian Aviation Safety Board, and of NAV Canada.

Mr. Kelly was qualified by the Tribunal to provide expert opinion evidence in the field of aviation safety risk management including the proactive identification of aviation hazards and the development of mitigation strategies. The focus of his evidence was on the impacts of the Project on aviation safety.

25 Mr. Kelly expressed his opinion that:

> provided pilots operate their aircraft in accordance with Transport Canada regulations and standards, and supplementary procedures that will be developed and implemented in accordance with Condition N1 of the REA — the future safety risks to aircraft operating at or in the vicinity of the Curries Aerodrome will be effectively mitigated.

26 Mr. Kelly addressed the witnesses' concerns that turbines will be obstacles to aircraft operating at or in the vicinity of the aerodrome; generate turbulent air; affect the safety of Ornge (air ambulance) operations; impact radar services provided by NAV Canada; and induce vertigo in pilots caused by 'shadow flicker'.

27 With regard to concerns about wind turbines being obstacles to aircraft operating at or in the vicinity of the aerodrome, Mr. Kelly's evidence was that:

> (i) The Canadian Aviation Regulations (CARs) direct and govern the safe operation of aircraft in the presence of obstacles such as wind turbines;
>
> (ii) Prevailing winds will cause most flight operations to take place in directions away from the turbines;
>
> (iii) Pilots will be aware of the location of the turbines because of information depicted on or contained within air navigation maps and charts, Notices To Airmen and the Canadian Flight Supplement;
>
> (iv) Customized procedures for operating at the Curries Aerodrome will be published in the CFS, and conveyed to local pilots and organizations who regularly operate from or in the vicinity of the aerodrome; and
>
> (v) Itinerant and other pilots will be advised of locally developed procedures when they seek permission to use the aerodrome.

28 Regarding the concern that Project turbines will generate turbulent air, Mr. Kelly stated that he was not an expert in "turbulent air generated by wind turbines", but was of the opinion that the concerns will be addressed because:

> (i) Turbulence generated by Turbines 6 through 10 will occur at locations and altitudes at which aircraft do not normally operate;
>
> (ii) Prevailing winds will cause turbulent air generated by Turbines 1 through 5 to exist at locations and altitudes at which aircraft do not normally operate;
>
> (iii) Northerly winds will not be sufficiently strong to cause turbulent air generated by T1, T2 and T3 to be found in the vicinity of the runways;
>
> (iv) Mitigation strategies can be developed to help detect and avoid turbine generated turbulent air; and
>
> (v) On those few occasions when strong easterly winds could cause turbulence from T4 and T5 in the vicinity of runway 09, the runways will not normally be usable, and the conditions will normally be forecast, and mitigated.

29 In response to the concern that Project turbines could affect the safety of Ornge operations, Mr. Kelly's opinion was that modern navigational aids make it easy for all pilots to know precisely their position in relation to every wind turbine in Ontario, and thus navigate accordingly, and that the pilots of Ornge helicopters operating to and from the Woodstock General Hospital will manage the hazards and risks relating to the wind turbines that make up the Project.

30 Mr. Kelly also responded to concerns regarding the Project's impact on radar services provided by NAV Canada. He stated that the NAV Canada contract with the Approval Holder, signed in February 2015, describes a relatively standard mitigation strategy that NAV Canada employs to negate the effect of the turbines on radar facilities such as those at London and Hamilton. He stated that it was important to note that NAV Canada did not cite safety concerns in its correspondence with the proponent in 2014, or in its contract with Prowind in 2015.

31 Mr. Kelly confirmed that he was not an expert in shadow flicker but was of the opinion that "research and evidence related to shadow flicker suggests that shadow flicker may occur infrequently — if ever — during takeoff and landing at the Curries Aerodrome, and in the rare case where it did exist, a pilot would experience very few changes in light intensity when passing through the area.

Dr. Jim Salmon

32 Dr. Jim Salmon is the President of Zephyr North, a wind energy consulting company. He has completed 30 to 40 noise assessments of wind projects in the last five to six years, and previously completed wind resource assessments for the Meteorological Service of Canada (previously Atmospheric Environment Service), a service of Environment Canada. Dr. Salmon was qualified by the Tribunal to provide expert opinion evidence with respect to wind resources assessment including wind farm design, energy production, shadow flicker, and noise assessment. The focus of his evidence was on the noise expected to be generated by the Project.

33 Dr. Salmon expressed his opinion that Mr. Palmer's concerns with respect to noise assessment are generally irrelevant with regard to amplitude modulation. Dr. Salmon stated in response to many of the paragraphs contained in the witness statement of Mr. Palmer, that there is no requirement "in Ontario O. Reg.359/09 and amendments, Ontario MOECC Guidelines for Wind Farms (2008), or the ISO 9613-2 Standard to consider "amplitude modulation" in noise assessments."

34 In response to the McKay/Poulin evidence, Dr. Salmon testified that: their residence is located 1048 m from the nearest project turbine (T3); the estimated cumulative sound pressure level at this site is 34.3 dBA; and this level is 5.7 dB below the 40 dBA level mandated by the MOECC. Regarding the Hopkins-Engberts property, he testified that, the estimated cumulative sound pressure level at this site is 38.1 dBA, which is 1.9 dB below the 40 dBA level.

Dr. Dariush Faghani

35 Dr. Dariush Faghani is a Senior Engineer in Development and Engineering Services at DNV GL, where he has been employed since 2006. His work involves the design, configuration, and optimization of wind farms. Dr. Faghani has worked on a dozen ice throw, shadow flicker, and/or overall risk assessments for wind farms. He was qualified by the Tribunal to provide expert opinion evidence with respect to public safety risks associated with wind turbines, and testified in respect of shadow flicker, turbine fires, ice throw, and debris and blade failure.

36 Dr. Faghani responded to Mr. Palmer's evidence regarding safety concerns. With respect to ice throw, he referred to a letter from the wind turbine supplier Senvion, which indicates that the radius around a turbine where ice might fall is 290 m. Dr. Faghani testified that beyond 290 m the risk of ice throw is "negligible". He also testified that the turbines to be used in the Project are equipped with a blade icing detection system and an automated shutdown mode, which are designed to reduce the chance of ice build-up and of ice being thrown by the blades. Dr. Faghani also testified that the risk of blade failure or tower collapse is very low.

37 Dr. Faghani responded to Ms. Wesseling's concern regarding shadow flicker. He testified that there are no local or Canadian regulations on shadow flicker, and that noise receptor setbacks typically mitigate the risk of shadow flicker annoyance. He further testified that the estimated annual shadow flicker calculated for Ms. Wesseling's residence is low.

38 Dr. Faghani also expressed his opinion that the risk that a fire may occur in this Project is low. However, he agreed under cross-examination that he could not say the extent of harm that might result should a fire occur.

Dr. Christopher Ollson

39 Dr. Christopher Ollson is the Vice President, Strategic Development, and Senior Environmental Health Scientist at Intrinsik Environmental Sciences Inc. Dr. Ollson holds Bachelor of Science, Master of Science, and Doctorate of Philosophy, Environmental Science degrees, and teaches at the Royal Military College of Canada and the University of Toronto. He was retained by the Approval Holder in 2012 to provide expertise and information on the current scientific and government literature related to wind turbines and health matters. Dr. Ollson was qualified by the Tribunal to provide expert opinion evidence in the field of environmental health science as it relates to windfarms. The focus of his evidence was on shadow flicker, stray voltage, and potential health impacts of the Project. Dr. Ollson's evidence on the health effects of wind turbines was unequivocal, and he concurred with Dr. McCunney in concluding that the Project would not cause serious harm to human health.

40 Dr. Ollson responded to the concerns expressed by the Appellant's witnesses respecting stray voltage, stating that the potential for stray voltage to affect livestock health can be prevented through adequate design, and that in his opinion, the operation of the Project in accordance with its REA will not result in serious or irreversible harm to livestock.

41 Regarding concerns expressed respecting shadow flicker, Dr. Ollson testified that the frequency of the flickering should not cause a significant risk to health, and that he is not aware of any such issues from a health and safety perspective.

Dr. Robert McCunney

42 Dr. Robert McCunney is a medical doctor, board certified in occupational and environmental medicine, a research scientist at the Massachusetts Institute of Technology, a staff physician in occupational/environmental medicine at Brigham and Women's Hospital in Boston, and a co-author of a recent review of the peer-reviewed scientific literature with respect to wind turbines and human health. He is also lead author of an article published in the Journal of Occupational and Environmental Medicine, entitled "Wind Turbines and Health: A Critical Review of the Scientific Literature." He was qualified by the Tribunal to give expert opinion evidence as a medical doctor specializing in occupational and environmental medicine with particular expertise in health implications of noise exposure. The focus of his evidence was with respect to the potential health implications of the Project. Dr. McCunney's overall conclusion was that the Project operating in accordance with the REA will not cause harm to human health.

43 Regarding the concerns about shadow flicker from the Project affecting human health, Dr. McCunney testified that the major concern has to do with whether shadow flicker could trigger photosensitive epilepsy. He testified that, at the speed at which modern turbines rotate, this is not a concern.

44 In response to Ms. Morris' evidence, Dr. McCunney testified that the World Health Organization definition of health is a hypothetical ideal which is not used by physicians because it is so broad as to have no useful diagnostic application.

45 Dr. McCunney contradicted the evidence of Mr. Palmer with respect to several of the documents provided by Mr. Palmer to support his proposition that the Project's wind turbines could cause harm to human health through annoyance. Regarding the Health Canada Summary of Results, Dr. McCunney noted that it expressly indicates that the study should only be considered final following peer review and publication in the scientific literature, and that the authors of the summary were explicit that it did not permit any conclusions about causality. With respect to the Council of Canadian Academies study, his opinion was that while the evidence supports an association between wind turbine noise and annoyance, it does not support causation. Dr. McCunney also testified that annoyance is not an adverse health effect recognized by the international medical community, and not recognized in the International Classification of Diseases. He described annoyance as an "outcome measure" that has been used for many decades in the context of environmental noise regardless of the noise source, (highways, airports, construction, etc.) but not as a health effect.

Rochelle Rumney

46 Rochelle Rumney is the Environmental Coordinator at Prowind Canada Inc., and has been working in the wind energy industry since 2007. Gunn's Hill Wind Farm has been the primary focus of her work since mid-2012 and she is primarily responsible for environmental application preparation, including environmental permitting and managing environmental field work. Ms. Rumney testified as to her involvement in the design of the Project and the REA application process.

Juan Anderson

47 Juan Anderson is Vice President, Director and Secretary of Prowind Canada Inc., which is a limited partner in Gunn's Hill LP. Mr. Anderson has worked on 10 wind projects that are now in operation or construction in seven Canadian provinces. He oversaw the submission of the application for the REA that is under appeal, and worked on the preparation of the application from its inception in 2009. He testified regarding his involvement in the design of the Project and the REA application process.

48 Mr. Anderson also provided additional evidence on the issue of fire safety, confirming that the nearest fire hall to the Project is located between 1 and 3.2 kilometres ("km") from every entrance to the turbine access roads, with the closest being 800 m from the fire hall.

49 In response to the concerns raised by Mr. Rand, Ms. Poulin and Mr. McKay regarding air safety, Mr. Anderson provided evidence in his witness statement that the Approval Holder designed a Project turbine layout that:

> a. Allowed significant separation distance from turbines to the ends of runways (1.5 km from T3 to end of runway 35, 1.8 km from T1 to end of runway 35) to allow sufficient space for a pilot who is not comfortable with flying above or between turbines to make a slight turn to avoid them all together;
>
> b. Provided for optional use of a common right-hand approach circuit where desired so that each runway has an approach option that does not involve flying directly above turbines, should a pilot be uncomfortable with this permitted procedure of flying over obstacles;
>
> c. Allowed sufficient separation distance between T1 and T2/T3 to allow for flying between the turbines on takeoff/approach to runways 17/35 should it be deemed desirable or necessary;
>
> d. Allowed sufficient lateral separation of turbines T5, T8, and T9 from the runway 09/27 centre line to allow for unimpeded use of that runway.

Evidence of the Director

Denton Miller

50 Denton Miller is a Senior Review Engineer with MOECC's Environmental Assessment Branch, Renewable Energy Assessment Section, and has been employed by MOECC since 1991. He has reviewed over 800 applications involving various industrial sectors, including approximately 40 wind energy generation projects. Mr. Miller was qualified by the Tribunal as a noise engineer with specific expertise in the MOECC's Noise Guidelines and Compliance Protocols for Wind Turbines. His evidence focused on the noise implications of the Project.

51 In responding to Mr. Palmer's position with respect to amplitude modulation, that New Zealand imposes a penalty for amplitude modulation but Ontario does not, but should, Mr. Miller explained that the New Zealand standard imposes a 6 dB penalty where special audible characteristics of wind turbine sound are experienced. However, he said, this penalty is not applied in calculating predicted noise levels, but is applied when the project is in the operational stage and these characteristics are observed. Mr. Miller further explained that no jurisdiction currently requires a penalty for amplitude modulation in predicting noise levels, that this phenomenon happens very infrequently (about 0.25 percent of the time), and that if this phenomenon occurs, audits would be able to identify it, and the MOECC could impose a penalty if necessary.

52 Mr. Miller also responded to Mr. Palmer's comments regarding MOECC standard NPC-104, explaining that while NPC-104 requires proponents to account for beating or other amplitude modulation, this is not required by the Wind Turbine Noise Guidelines. He explained that an adjustment for special quality of sound in NPC-104 is typically not used for modelling, but rather for compliance purposes and that thumping sounds are not expected to occur in this Project as they are associated with older models of downwind turbines, not with the type that will be used in this Project.

Michael Lucking

53 Michael Lucking is the Technical Team Lead, Civil Aviation Safety Operations, Specialties, for Transport Canada, Civil Aviation — Ontario Region. In his previous position with Transport Canada he was an Aerodromes and Air Navigation Inspector for 7.5 years. Mr. Lucking was qualified by the Tribunal as an expert in civil aviation safety, with special expertise in aerodromes and air navigation. He testified with respect to the impacts of the Project on aviation safety.

54 Mr. Lucking testified that the Curries Aerodrome is not classified as an airport, and, therefore, is not subject to the strict regulations and standards applicable. He explained that the Curries Aerodrome is day use only in visual flight rules conditions and pilots are required to get prior permission to use the aerodrome. He further explained that pilots are responsible to contact the aerodrome operator for current conditions and ensure it is suitable for their intended flight. He stated that there are many aerodromes in Canada where obstacles, including wind farms, are located in close proximity, and that these obstacles are assessed to determine if they are a hazard to air navigation and if they require marking and lighting in accordance with the Canadian Aviation Regulations.

55 Mr. Lucking noted that the MOECC submitted a request to Transport Canada to review an assessment of the Curries Aerodrome, which was prepared on behalf of the Approval Holder and submitted in support of its application for the REA. Mr. Lucking stated that Transport Canada agreed with the assessment's recommendations for lighting and marking of eight wind turbines. He further observed that, recognizing that standard operating procedures are for left-hand circuits, Transport Canada also indicated that should the aerodrome operator request right-hand circuits as further mitigation to the proximity of the turbines, then Transport Canada would certainly consider authorizing them. He expressed his opinion that these mitigating measures as well as publication of the obstacles provide an effective means of indicating the presence of objects likely to present a hazard to aviation safety so that they may be visually detected and avoided by pilots of aircraft. He further stated that based on the above, Transport Canada advised that it has no concerns regarding the proposed wind farm and recommended that consultation with the aerodrome operator should proceed.

Evidence of the Presenter, the Township of Norwich

56 Wayne Buchanan made a presentation on behalf of the Township of Norwich. Mr. Buchanan's written and oral presentations focused on the Township of Norwich's past and ongoing objections to the Project. He provided the Tribunal with a copy of three letters:

- a letter dated October 14, 2011 to then Premier Dalton McGuinty, requesting a moratorium on industrial wind turbine projects until additional health studies are completed;
- a letter, dated September 27, 2012, to the Approval Holder requesting postponement of any development until noise and health studies are available; and
- a letter, dated April 15, 2013, to Premier Kathleen Wynne advising of the Township of Norwich's declaration, in 2011, that it is an unwilling host of industrial wind turbines.

Submissions of the Appellant

57 The Appellant relies on the evidence of its witnesses, and submits that this evidence established that the Project will cause harmful health effects which include:

> ...sleep disturbance, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration, memory and panic episodes associated with sensations of internal pulsation or quivering when awake or asleep, excessive tiredness, loss of quality of life and the further impacts that these effects can lead to, these being increased morbidity and significant chronic disease and health effects.

58 The Appellant, acknowledging that it has the onus of proving on a balance of probabilities that engaging in the Project in accordance with the REA will cause serious harm to human health, submits that an application of the facts to the law in this instance clearly dictates a finding of serious harm to human health. The Appellant submits that as such, it has led sufficient evidence to meet its onus, and, therefore, the REA should be revoked.

Submissions of the Director

59 The Director submits that none of the testimony of the Appellant's witnesses was supported by expert medical evidence to speak directly to the Health Test. The Director further submits that the Appellant has failed to prove on a balance of probabilities that engaging in the Project in accordance with the REA will cause the harm it alleges, and at its highest, the Appellant's evidence establishes that the Project may result in harm, not that it will result in harm, as is the Appellant's burden of proof under the *EPA*.

60 Finally, the Director submits that the expert evidence called by the Director and Approval Holder responds to all of the Appellant witnesses' concerns, and establishes that the Project will not result in serious harm to human health. Accordingly, the Director submits that the Tribunal should dismiss the appeal and confirm the decision of the Director to issue the REA.

Submissions of the Approval Holder

61 The Approval Holder submits that the Appellant has fallen far short of meeting its onus of proving on a balance of probabilities that proceeding with the Project in accordance with the REA will cause serious harm to human health. The Approval Holder further submits that "neither the expert evidence, nor the evidence of the fact witnesses establishes that the Project will result in any harm, much less serious harm, to health", and "the Appellant has not presented any evidence from a qualified medical professional to link any of the expressions of concerns with the Health Test".

62 The Approval Holder asks that the Tribunal confirm the decision of the Director to issue the REA, and dismiss the appeal.

Findings on Issue 1

63 The Appellant relies primarily on the testimony of Ms. Morris, Ms. Hopkins-Engberts, Ms. Poulin, Mr. McKay, and Mr. Palmer to support its position that noise from the Project will cause serious harm to human health. However, as noted by the Director and Approval Holder, with the exception of the evidence of Mr. Palmer, the Appellant has provided no expert opinion evidence to support the opinions expressed by its lay witnesses. The Tribunal clearly indicated that it would only accept these opinions as an expression of the witnesses' views, and would only accept the scientific/technical papers filed by them, as information which describes and informs their views. The Tribunal notes that all of the views and expressions of concerns expressed by the Appellant's witnesses in respect of the Health Test pertain to matters requiring expert or technical expertise. As no such supporting opinion evidence has been adduced by the Appellant, the Tribunal cannot rely on the lay opinions to make a finding of causation in respect of the health effects of noise and finds that the evidence adduced by Appellant's lay witnesses, at best, only rises to the level of an expression of concern.

64 The remaining evidence on which the Appellant relies, is the opinion evidence of Mr. Palmer. Most of Mr. Palmer's opinion evidence in this proceeding is similar to the opinion evidence he has given in previous proceedings, in particular, *Mothers Against Wind Turbines Inc. v. Ontario (Director, Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 19 (Ont. Environmental Review Trib.) ("*MAWT*"). In *MAWT*, the Tribunal provided specific analysis and findings respecting Mr. Palmer's evidence, as set out in paras. 229 to 235. The Tribunal finds that the analysis and findings in *MAWT*, apply equally in this case.

65 Although Mr. Palmer also raised the issue of turbine fires and questioned the capacity of local fire services to effectively deal with a fire should one occur, he provided no evidence to indicate the likelihood that such a fire will occur, and if so, the likelihood that it would result in injury. Therefore, the Tribunal finds that his evidence, again, raises only a concern, which falls short of establishing that the Health Test has been met.

66 In addition to his evidence respecting public safety risks, Mr. Palmer also testified respecting noise issues. His evidence refers to his views regarding deficiencies in the noise assessment submitted to the MOECC in support of the Approval Holder's application for the REA. However, the Tribunal notes that Mr. Palmer did not conduct his own modelling assessment. Instead, he referred to published papers by other authors. The problem with this evidence is that it does not address an evaluation of the noise levels to be produced by the wind turbines approved for *this* Project. He expresses his opinion that the noise assessment submitted by the Approval Holder under-estimates the noise levels that will be generated by the Project's wind turbines. However, the Health Test requires that the Tribunal consider only whether engaging in the Project, *in accordance with the REA*, will cause serious harm to human health. The REA includes a condition, generally referred to as the 40 dBA limit, which imposes limits on noise immissions, i.e. the permitted noise levels at a receptor. In previous decisions, the Tribunal has consistently found that the Health Test requires that an appellant must establish that serious harm to human health will be caused by noise immission levels at or below the 40 dBA limit, which is a requirement of the REA. The Tribunal finds that Mr. Palmer's evidence does not address this requirement. His evidence, if accepted, could only establish that noise immission levels would exceed 40dBA, which is not permitted under the conditions of the REA.

67 The Tribunal notes that Mr. Palmer's evidence does include reference to amplitude modulation which is not expressly governed by a condition in the REA. However, his evidence only includes discussion of papers on amplitude modulation, and his assertions that these papers indicate amplitude modulation explains why people find wind turbine noise particularly annoying. Even if Mr. Palmer's evidence respecting amplitude modulation and annoyance were to be accepted by the Tribunal, Mr. Palmer has clearly acknowledged that he is not a health expert, and this aspect of his evidence cannot be given the weight that could be ascribed to expert evidence. In his evidence, he refers only to the Health Canada Study, asserting that its findings support a *potential* link between long term annoyance and health. The Tribunal finds that, despite his reference to amplitude modulation as a mechanism whereby harm to human health could occur, there is nothing in his evidence to confirm that harm to human health *will* occur. Consequently, the Tribunal finds that his evidence falls short of establishing that the Health Test has been met.

68 With respect to the evidence of the Appellant's witnesses regarding the Project's potential impact on the safe operation of the Curries aerodrome, and the impact of wind turbines on radar services provided by NAV Canada, the Tribunal notes, again, that none of the Appellant's witnesses who testified respecting these issues were qualified to give opinion evidence. As such, the opinions they expressed rise only to the level of statements of concern. The Tribunal finds that their evidence did not undermine the evidence of Mr. Kelly and Mr. Lucking.

69 Regarding Mr. Buchanan's testimony on behalf of the presenter, the Township of Norwich, his testimony includes only a statement of the Township's position on the issues raised in this appeal, as well as the Township's agreement with the material facts set out in the Appellant's Notice of Appeal. As such, his testimony did not provide any probative evidence for the Tribunal to consider.

70 In determining whether the Health Test has been met, the Tribunal must also consider the evidence of the Director and the Approval Holder. In this case, the Tribunal notes that the expert evidence of the Director's and Approval Holder's witnesses directly contradict the assertions made by the Appellant's lay witnesses and Mr. Palmer.

71 In summary, in considering the totality of the evidence, the Tribunal finds that the Appellant's evidence, at best, rises only to the level of expressions of concern that harm could occur.

Conclusion on Issue 1

72 Based on the above analyses and findings in respect of Issue 1, the Tribunal finds that, in the circumstances of this case, the Appellant has failed to establish, on a balance of probabilities, that the Health Test has been met.

Issue 2: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

Discussion, Analysis and Findings

Evidence of the Appellant

John Eacott

73 Mr. Eacott testified that he has lived for some 40 years in the area where the Project will be situated. Mr. Eacott states that he is intimately familiar with the natural life of the area. He testified that he has planted endangered species of trees and created an amphibian pond on his property.

74 Mr. Eacott expressed his view respecting the anticipated rate at which wind turbines across Ontario are expected to kill birds, raptors and bats. He indicated that, to the best of his knowledge, the MOECC is ignoring the cumulative effect of these deaths on those affected species. He extrapolated the anticipated kill rate for his estimate of 7000 wind turbines proposed or existing in Ontario, expressing the view that in 20 years, renewable energy projects will kill some 1,400,000 bats and 2,000,000 birds.

75 Mr. Eacott expressed his view that the methodologies employed by those hired to carry out the studies for the Project are conflicting and inadequately detailed to provide for the protection of any endangered species. He stated that while there are two examples of endangered raptors given, he asserts that no mention is made of other birds on the list which are known to nest within the designated area of study, notably, Barn Swallow, and Eastern Meadowlark. He maintained that inadequate study and protective measures will leave species at risk vulnerable to serious harm from the Project construction and operation, asserting that Project plans have not accounted for their habitat and natural environment.

76 In cross-examination, Mr. Eacott stated that he could not say for sure whether he had reviewed the Species at Risk report prepared for the Project, and is not familiar with O. Reg. 359/09 or the MOECC's Natural Heritage Assessment Guide for Renewable Energy Projects.

77 Mr. Eacott confirmed that he did not have the benefit of reviewing the confidential Species at Risk report, but that he is very concerned that Barn Swallows, an endangered species, thrive in the area. He indicated that he has no confidence in the measures proposed by the Approval Holder to monitor the presence of this bird. As such, he expressed his view that it is quite likely that the destruction of Barn Swallows or their habitat will cause serious and irreversible harm to animal life.

78 Mr. Eacott also expressed his view that the alignment of the Project turbines will act like a screen that filters animal life coming and going from nearby wetlands. He expressed his concern that this screen will, in effect, kill animal life, including Canada Geese and Monarch Butterflies.

79 Mr. Eacott expressed his concern for a maternal colony of Little Brown Bat (an endangered species) which he stated exists within the Project area, but has remained unidentified because of the limitations in what the Approval Holder is required to include in its studies.

Ms. Morris and Ms. Wesseling

80 Both Ms. Morris and Ms. Wesseling referred to the effects of stray voltage or low level sound on cattle, attaching to their witness statements, articles which inform their views. Ms. Wesseling summarized their concerns as follows: "In summary, given the effects known to have occurred in the vicinity of operating wind turbine projects, lack of adequate safeguards, and the proximity of this project to homes and livestock, including ours, there is overwhelming evidence of the serious harm to human and animal health this project poses."

Evidence of the Director

81 The Director called no witnesses in respect of the Environmental Test.

Evidence of the Approval Holder

David Charlton

82 David Charlton is a Senior Principal, Environmental Management at Stantec, and certified as a Professional Agrologist. He has participated in environmental assessments for many proposed wind energy generating facilities across Ontario and has helped develop, implement, and monitor mitigation measures to minimize environmental impacts of wind power projects. Mr. Charlton was qualified by the Tribunal to provide expert opinion evidence as an ecologist with expertise in conducting environmental assessments including natural heritage assessments and species at risk assessments for wind energy projects.

83 In reviewing the evidence of Ms. Morris and Ms. Wesseling, Mr. Charlton expressed his opinion that they cite no evidence in support of their assertions. He noted that "much of the material presented by the appellants is not scientific peer reviewed papers and relates to anecdotal concerns with "stray voltage" or uncontrolled electricity...", and stated that he has "not seen any independent evidence that wind farm projects contribute to the on farm problem anymore than the rest of Ontario's electrical system, or that the problem could be considered 'serious and irreversible harm to animal life'."

84 Respecting Mr. Eacott's concerns that the natural environment studies completed for the Project were inadequate, Mr. Charlton disagreed, stating the Ministry of Natural Resources and Forestry ("MNRF") has confirmed that the Natural Heritage Assessment and Environmental Impact Studies:

> were conducted using procedures, methods and criteria established by, or accepted by, the MNRF. These measures are designed to ensure an acceptable standard of due diligence and consistency in planning for the protection of the natural environment during turbine location and impact mitigation.

85 Mr. Charlton further noted that Mr. Eacott's concerns regarding "study and protective measures" for species at risk are dealt with in the Species at Risk report, which includes the results of field studies and mitigation measures targeted specifically at Barn Swallow, Bobolink and Eastern Meadowlark. He noted that the Species at Risk report was accepted by the MNRF on June 10, 2014 and includes measures to prevent harm to individuals or habitat for Species at Risk.

86 Mr. Charlton emphasized that conditions I and J of the REA establish a complete range of natural environment thresholds and mitigation requirements to be implemented through a comprehensive monitoring program and regular reporting to the MNRF.

87 Regarding the Little Brown Bat, Mr. Charleton stated that, in his experience, the documentation in Ontario from multiple wind farms supports the ongoing position of the MNRF that the mortality rates of birds and bats is relatively low compared to other population pressures and can be controlled to stay below established mortality thresholds. Mr. Charleton responded to Carol Hopkins-Engbert's statement that there is "Documented proof of the destruction of birds, bats and insects that would be disseminated by the intrusion of the turbines." He stated that this does not reflect the way in which the rigorous post-construction mortality monitoring, mandated by the conditions of the REA, prevent serious harm to animal life, specifically birds and bats.

88 Mr. Charlton stated in cross-examination that he was aware that there are individuals of this species within the Project location, and expressed his opinion that, although some bat mortalities will occur, serious harm to this species will not occur, and would not be irreversible, considering the monitoring and mitigation measures required by the conditions of the REA. He also confirmed that a permit in respect of the Little Brown Bat is required under *Endangered Species Act, 2007*, S.O. 2007, c. 6 ("*ESA*") but he was unsure of how far the Approval Holder's permit application process had progressed in this regard.

Submissions of the Appellant

89 The Appellant relies on the evidence of Mr. Eacott, in submitting that the Environmental Test has been met. The Appellant maintains that there is no question Little Brown Bats live in the area, noting that the Approval Holder's expert, Mr. Charlton is

also of the opinion the Project will kill bats. The Appellant relies on Mr. Eacott's contention that those deaths alone are sufficient to meet the threshold for serious and irreversible harm to animal life.

90 The Appellant also asserts that the Project poses an immediate threat to certain species and also represents a cog in a province-wide mechanism that will bring certain species to the tipping point towards extinction from which it is impossible to recover.

91 The Appellant cites *Monture v. Ontario (Director, Ministry of the Environment)* (2012), 68 C.E.L.R. (3d) 191 (Ont. Environmental Review Trib.), in support of its assertions that: (i) the Environmental Test does not require a consideration of the harm caused to the sustainability of the plant population, animal population or the natural environment or the level of sustainability of a population; and (ii) although a single mortality does not automatically satisfy the Environmental Test, this does not preclude that a single mortality could, in some circumstances, meet this Test.

Submissions of the Director

92 The Director maintains that Mr. Eacott's evidence amounts to expressions of concern about the Project, and that his evidence is not supported by expert environmental evidence that speak directly to the Environmental Test. As such, the Director submits that the Appellant has failed to prove, on a balance of probabilities, that engaging in the Project in accordance with the REA will cause the environmental harm it alleges. The Director further submits that, at its highest, the Appellant's evidence establishes that the Project may result in harm, not that it will result in harm, the latter being the Appellant's burden of proof under the *EPA*.

93 The Director submits that the expert evidence called by the Approval Holder is extensive and responds to all of the Appellant witnesses' concerns and establishes that the Project will not result in serious and irreversible harm to plant life, animal life or the natural environment.

Submissions of the Approval Holder

94 The Approval Holder's submissions are essentially the same as the submissions of the Director.

Findings on Issue 2

95 As the Director and Approval Holder have correctly pointed out, the Appellant has adduced no expert opinion evidence to support the opinions advanced by its lay witnesses. As the Tribunal has already stated in its findings respecting the Health Test, the Tribunal clearly indicated that it would only accept the opinions expressed by lay witnesses as an expression of their views, and would only accept the scientific/technical papers filed by them, as information which describes and informs their views. The Tribunal notes that many of the views and expressions of concerns expressed by the Appellant's witnesses in respect of the Environmental Test pertain to matters requiring expert or technical expertise. No such supporting opinion evidence has been adduced by the Appellant. Furthermore, the relevant factual evidence that has been adduced by the Appellant' witnesses in this proceeding is limited, and in and of itself, is insufficient to establish that the Environmental Test has been met. For these reasons, the Tribunal finds that the evidence adduced by the Appellant's witnesses, at best, only rises to the level of an expression of concern. In this proceeding, the Tribunal must also consider the evidence of the Approval Holder's witness, which contradicts the assertions made by the Appellant's witnesses. The Tribunal finds that, having considered all of the opinion and factual evidence adduced in this proceeding, the Appellant has not established, on a balance of probabilities, that the Environmental Test has been met.

Conclusion on Issue 2

96 Based on the above analysis and findings in respect of Issue 2, the Tribunal finds that, in the circumstances of this case, the Appellant has failed to establish, on a balance of probabilities, that the Environmental Test has been met.

Issue 3: Should the Tribunal grant the Approval Holder's motion to dismiss the Appellant's appeal on the basis that the Appellant has failed to establish a prima facie case.

Introduction

97 After the Appellant had completed calling its witnesses, and the Township of Norwich had given its presentation, and before the Approval Holder and the Director called their witnesses, the Approval Holder, by way of motion, requested that the Tribunal dismiss the Appellant's appeal on the grounds that the Appellant had failed to establish a *prima facie* case. This motion is described by the Approval Holder as a "non-suit" motion. Due to the complexity of this motion, the Tribunal indicated that it could not rule on the motion based on brief oral submissions. Consequently, on consent of the parties, the Tribunal directed that this motion would be heard in writing. As the request for dismissal raises complex issues, the Tribunal directed the parties to file comprehensive written submissions in respect of this motion.

98 As the hearing of this motion could not be completed before the Approval Holder's witnesses were scheduled to testify, a question arose as to whether the Approval Holder would call these witnesses in accordance with the existing hearing schedule or seek an adjournment of the main hearing to call these witnesses at a later date, if its motion to dismiss was denied. The Tribunal questioned whether the Approval Holder's witnesses could be called at a later date that would provide the Hearing Members with sufficient time to complete their deliberations and issue a decision by October 23, 2015, following which, by operation of s. 145.2.1(6) of the *EPA*, there will be a deemed confirmation of the REA if no decision has been issued. The parties conferred, and counsel for the Approval Holder advised the Tribunal that, although the Approval Holder was proceeding with its motion to dismiss, the Approval Holder would proceed to call its witnesses in accordance with the existing hearing schedule.

Submissions of the Approval Holder

99 The Approval Holder submits that the Appellant has presented and closed its case, noting that the Appellant has the onus of proving that the Health and Environmental Tests have been met. The Approval Holder submits that the Appellant's evidence, together with the presentation of the presenter, the Township of Norwich, both taken at their highest, fail to make out a *prima facie* case for either of these tests and as such, the appeal should be dismissed without requiring the Approval Holder and Director to call evidence.

100 In support of its assertion that the Appellant has failed to make out a *prima facie* case, the Approval Holder submits that the Appellant's evidence before this Tribunal consists of expressions of concern from seven non-expert "pre-turbine witnesses", and evidence from a single expert, whose evidence has previously been considered by the Tribunal in other renewable energy approval hearings and found to be insufficient. The Approval Holder further asserts that the evidence presented by the presenter, the Township of Norwich, similarly constitutes expressions of concern without supporting expert opinion. The Approval Holder asserts that the Tribunal has consistently held that evidence of expressions of concern, without expert evidence capable of linking the concerns to the alleged harms, is not sufficient to meet either the Health Test or the Environmental Test.

101 In its submissions, the Approval Holder reviews the evidence of the witnesses who testified for the Appellant and the County of Norwich in support of the above submissions. The Approval Holder then asserts that the Appellant has fallen far short of meeting its onus of proving, on a balance of probabilities, that proceeding with the Project in accordance with the REA will cause serious harm to human health. The Approval Holder submits that neither the expert evidence, nor the evidence of the fact witnesses, establishes that the Project will result in any harm, much less serious harm, to health or establish that the Environmental Test has been met.

102 Regarding the legal test to be applied on a motion to dismiss, the Approval Holder refers to Rules 96 and 111 of the Tribunal's Rules, stating that, at this stage of the proceeding, its motion to dismiss is in effect a "non-suit" motion. The Approval Holder submits that the principles governing "non-suit" motions before administrative tribunals have recently been summarized by the Ontario Grievance Settlement Board in *Ontario (Ministry of Natural Resources and Forestry) and OPSEU (Bharti), Re*, [2015] O.G.S.B.A. No. 40 (Ont. Grievance S.B.) ("*OPSEU v. MNRF*") at paragraph 8 as follows:

> i. The Board will not put the moving party to an election of whether or not to call its own evidence as a matter of course. The appropriateness of putting the moving party to such an election will be determined based upon the considerations of expedition and fairness in the particular circumstances of each case.

ii. In a non-suit motion, the issue is whether the party responding to the motion has made out a *prima facie* case.

iii. In determining whether a *prima facie* case has been made out, the test is whether the evidence presented by the party responding to the motion is sufficient to allow the Board to rule that it has proven its case on a balance of probabilities, if the Board assumed its witnesses to be credible and drew in its favour all inferences reasonably supported by direct evidence. No weight, however, should be given to the evidence of a witness on a point about which he or she has given contradictory accounts. (See *Ontario Public Service Employees Union (Gareh) v. Ontario (Ministry of the Attorney General)*, 2002 CanLII 45791 at paragraphs 8 - 10.)

iv. In assessing the existence of a *prima facie* case, *viva voce* evidence as well as all documentary evidence before the Board must be considered.

v. Where a non-suit motion is granted, a written decision with reasons will follow. However, where a motion is denied, no reasons, oral or written, will be issued.

103 In its submissions, the Approval Holder then cites its understanding of the relevant Tribunal decisions which address the scope of the legal test under s. 145.2.1 of the *EPA*, as well as decisions in support of the Approval Holder's assertions that:

- evidence of expressions of concern without supporting expert opinion is insufficient to establish that either the Health or Environmental Tests have been met;
- without a connecting medical diagnosis, "post-turbine witness" evidence cannot prove that wind turbines have caused harm to human health;
- "pre-turbine witnesses" cannot rely on the evidence of "post-turbine witnesses" to establish that exposure to wind turbines will cause serious harm to human health;
- responding parties are not required to prove an alternate explanation for the symptoms experienced by "post-turbine" witnesses; and
- consistency in decision-making is a principle of administrative law applicable to appeals of renewable energy approvals.

Submissions of the Director

104 The Director agrees with the Approval Holder's submission that the Appellant has not established a *prima facie* case. The Director's submission also includes a review of the evidence of the witnesses who testified for the Appellant in support of this submission.

105 Regarding the legal test to be applied on a motion to dismiss, the Director submits that the Tribunal has the ability to dismiss an appeal mid-hearing. The Director notes that, Rule 111, which allows motions for dismissal, lists four grounds for such a motion. However, the Director emphasizes that Rule 111 states that the motion "may include" these grounds. The Director submits, therefore, that the grounds listed as (a) to (d) in Rule 111, are a non-exhaustive list of potential bases for dismissing an appeal. The Director submits that it is consistent with the purposes and interpretive principles of the Rules to interpret Rule 111 to include dismissing a hearing where no *prima facie* case has been established.

106 The Director also submits that the Approval Holder's "non-suit" motion falls within the ground set out in Rule 111 (c), namely that some aspect of the statutory requirements for bringing the proceeding has not been met. In this regard, the Director argues that, in failing to establish a *prima facie* case, the Appellant has not met the statutory requirement under the *EPA*, more specifically, that the Health and Environmental Tests have not been met.

107 The Director further submits that the Approval Holder's "non-suit" motion falls within Rule 111 (a), namely, that this proceeding is frivolous. The Director maintains that the Tribunal, in previous proceedings, has interpreted "frivolous" in the

context of Rule 111(a) as meaning lacking "a legal basis or legal merit" and raising "no genuine issue" or having "no foundation in fact or law." The Director maintains that this interpretation of "frivolous" as including "no genuine issue for a hearing" has been applied by the Tribunal in the context of motions to dismiss appeals in previous renewable energy appeals. In this regard, the Director notes that, while all of these motions in previous proceedings were dismissed, they were all brought before the start of the hearing, before the Tribunal had heard the appellant's evidence. The Director asserts that the Approval Holder's motion to dismiss was brought at an appropriate time. The Director maintains that, as the Tribunal has had the benefit of hearing the Appellant' evidence, and no experts in health or natural heritage issues have testified, it is clear that the Appellant cannot prove its case.

108 The Director also submits that, in the context of renewable energy appeals in particular, where any person in Ontario may appeal a renewable energy approval and leave to appeal is not required, and in practice where many of these appeals are brought on similar grounds, it is appropriate for Rule 111 to be interpreted in a manner that provides a mechanism whereby an appeal that lacks an adequate evidentiary base can be dismissed without a full hearing.

109 The Director cites Rule 1:

> The purposes of these Rules are: to provide a fair, open, accessible and understandable process for Parties and other interested persons; to *facilitate and enhance access and public participation*; to encourage co-operation among Parties; to *assure the efficiency and timeliness of proceedings*; and to assist the Tribunal in fulfilling its statutory mandate.
>
> [emphasis added]

110 The Director also cites Rule 4:

> These Rules shall be liberally construed to secure the *just, most expeditious and cost effective determination* of every proceeding on its merits.
>
> [emphasis added]

111 In light of these Rules, the Director submits that dismissing this appeal without requiring the responding parties to call evidence and prepare final submissions would save considerable time and resources. The Director asserts that a motion to dismiss at the close of the Appellant's case strikes the appropriate balance between the purposes of enhancing "access and public participation", arguing that the Appellant has had an opportunity to present its case. The Director further asserts that allowing "non-suit" motions will assure "efficiency and timeliness of proceedings", by allowing appeals to be dismissed without a full hearing where an appellant has not established a *prima facie* case. The Director submits that this interpretation is also consistent with Rule 4, in that it would provide a just, expeditious and cost effective determination of a proceeding based on the merits of an appellant's case.

Submissions of the Appellant

112 The Appellant submits that Approval Holder's motion to dismiss should be dismissed and the Tribunal should render its decision based on its weighing of the totality of the evidence.

113 The Appellant emphasizes that the Approval Holder was presented with a choice to adjourn the main hearing to accommodate written submissions on its Notice of Motion or arrive at another approach in discussion with counsel. The Appellant states that, on consent of the parties, the Approval Holder chose to continue with the hearing of evidence in spite of the allegation in its Notice of Motion that the Appellant had not met its evidentiary burden. The Appellant submits that, in so doing, the Approval Holder has effectively rendered its motion for dismissal moot, since the test for the appeal and the motion are identical for all intents and purposes.

114 The Appellant maintains that, although all counsel consented to the continuation of the hearing, while keeping the motion "alive" to respect the time constraint for issuing a decision in this proceeding, this should not preclude the conclusion that the motion is redundant to the question before the Tribunal.

115 The Appellant argues that, more importantly, it would be an absurd result for the Tribunal to pretend it has arrived at its findings on the motion as though it had not heard the Approval Holder's and the Director's cases. The Appellant submits that such a fictive weighing of the evidence would render the Tribunal's reasons meaningless without some way of knowing whether its conclusions were based solely on the Appellant's evidence or also on the contradictory evidence of the Director and Approval Holder.

Submissions of the Approval Holder in reply

116 The Approval Holder submits that, in light of the agreement reached by counsel, the Appellant's claim that the motion to dismiss is redundant or moot because the Approval Holder and the Director presented their evidence on the appeal, should be rejected as improper, unfair, and prejudicial. Instead, the Approval Holder submits that this Tribunal should proceed to hear the motion on its merits, in writing, as agreed to by counsel for the Appellant.

117 In determining whether the motion to dismiss is moot, the Approval Holder refers to the general principles stated by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.). The Approval Holder maintains that there is no hypothetical or abstract question before the Tribunal as to whether the Appellant has presented a *prima facie* case, and that the decision in respect of the motion to dismiss will have the effect of resolving a controversy which affects, or may affect, the rights of the parties.

118 The Approval Holder disputes the Appellant's assertion that proceeding with the motion to dismiss, where the witnesses for the Approval Holder and Director have been heard, would require fictive weighing of the evidence in support of the motion. The Approval Holder cites a decision of the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.), in support of its assertion that knowledge of the Approval Holder's evidence does not, at law, prejudice the Tribunal's ability to determine the motion to dismiss on the basis of the Appellant's evidence alone. The Approval Holder maintains that, "simply put, the Tribunal is fully capable of assigning no weight to the Approval Holder and Director's evidence for the purpose of determining the Motion."

Findings Respecting Motion to Dismiss

119 The Tribunal first turns to consideration of its jurisdiction to entertain a "non-suit" motion. Rule 111, which addresses motions to dismiss, states:

> A Party bringing a motion to dismiss a proceeding shall specify the basis for the motion, which may include that:
>
> (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
>
> (b) the proceeding relates to matters that are outside the jurisdiction of the Tribunal;
>
> (c) some aspect of the statutory requirements for bringing the proceeding has not been met; or
>
> (d) another Party has caused undue delay or has not complied with orders, undertakings, written requests from the Tribunal or these Rules.

120 The Director submits that the Approval Holder's "non-suit" motion falls within ground (a) of Rule 111, asserting that this proceeding is frivolous because the Appellant's case raises no genuine issue. In support of this submission the Director asserts that the Appellant cannot prove its case. For the following reasons, the Tribunal does not accept this submission. The Tribunal notes that frivolous conduct, though not necessarily accompanied by an improper motivation, involves putting forward groundless arguments. A frivolous argument is not synonymous with an unsuccessful argument (see *Spellman v. Ontario (Director, Ministry of the Environment)* (2007), 34 C.E.L.R. (3d) 83 (Ont. Environmental Review Trib.) at para 109). In this proceeding, it is not disputed that the Appellant has advanced proper grounds in support of its appeal. Rather, the Approval Holder and the Director argue that the Appellant has adduced insufficient evidence to establish the Health and Environmental Tests have been met. If that is so, all that can be said is that the Appellant's arguments will be unsuccessful. To repeat, a

frivolous argument is not synonymous with an unsuccessful argument. The Tribunal also notes that the Director advanced no other grounds for finding that the Appellant's appeal is frivolous.

121 The Director also submits that the Approval Holder's "non-suit" motion falls within ground (c) of Rule 111, asserting that the Appellant, in failing to establish a *prima facie* case, has not met the statutory requirement under s. 145.2.1 of the *EPA*, i.e. the Health and Environmental Tests. For the following reasons, the Tribunal does not accept this submission. The Tribunal notes that Rule 111 (c) states that "some aspect of the statutory requirements *for bringing the proceeding* has not been met [emphasis added]". Under s. 145.2.1 of the *EPA* the Health and Environmental Tests are not statutory requirements for bringing the proceeding. They are part of the grounds to be addressed in the proceeding. Consequently, the Tribunal finds that Rule 111(c) does not apply to the circumstances of this case.

122 The Tribunal now turns to the Director's submission that Rule 111 allows the Tribunal to consider motions to dismiss based on "non-suit". It is not disputed that the Tribunal's Rules do not include a rule which expressly governs motions to dismiss on the basis of "non-suit". As noted in the Director's submissions, Rule 111 provides that the moving party shall specify the basis for its motion to dismiss which "may include" the enumerated grounds (a) to (d). The Tribunal accepts the Director's submission that the phrase "may include", indicates that this is not an exhaustive list. In other words, the moving party may advance another basis in support of its motion to dismiss, which can include "non-suit". However, Rule 111 does not state that the Tribunal must entertain another basis. Under s. 25.0.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, c. S.22, a tribunal has the power to determine its own procedures and practices. Therefore, the first question which the Tribunal must address, is whether it should entertain a "non-suit" motion in this proceeding. This, in turn, requires consideration of what a "non-suit" motion means.

123 The Approval Holder relies on *Ontario (Ministry of Natural Resources and Forestry) and OPSEU (Bharti), Re*, in maintaining that a "non-suit" motion is a motion to dismiss a proceeding, which is made by a responding party, after an appellant has called its witnesses. In such a motion, an administrative tribunal may at its discretion, based on considerations of efficiency and fairness, decide that it will not put the moving party "to an election of whether or not to call its own evidence as a matter of course."

124 This definition raises several questions. First, it is unclear whether the "election" requires that the moving party must choose not to call its witnesses at all, thus relying solely on its motion to dismiss, or whether, if the motion to dismiss is denied, the moving party may then proceed to call its witnesses. Secondly, the Tribunal notes that the Approval Holder relies on the statement of principles which apply to "non-suit" motions as set out in the decision of the Ontario Grievance Settlement Board in *Ontario (Ministry of Natural Resources and Forestry) and OPSEU (Bharti), Re*. However, the Approval Holder has failed to point out that the decisions, on which the Board relied to formulate its statement of principles, are all decisions of that Board. The Tribunal is not bound by a decision of the Ontario Grievance Settlement Board. However, the Tribunal received no submissions on this point. In this proceeding, none of the parties provided the Tribunal with jurisprudence from the courts or other administrative boards or tribunals to indicate whether the approach taken by the Ontario Grievance Settlement Board is accepted practice and procedure, either in the courts, or under administrative law generally. In particular, none of the parties indicated whether such a "non-suit" motion has been previously considered by this Tribunal, or its predecessor boards. Similarly, the parties did not make submissions on whether the courts have addressed this issue in the context of an appeal or judicial review of a decision of an administrative tribunal. Furthermore, *Ontario (Ministry of Natural Resources and Forestry) and OPSEU (Bharti), Re* does not indicate the source of its jurisdiction to adopt such practice and procedure.

125 The Director, in referring to Rule 1, asserts that a motion to dismiss at the close of the Appellant's case strikes the appropriate balance between the purposes of enhancing "access and public participation" and argues that the Appellant has had an opportunity to present its case. The Tribunal finds that this is too narrow an interpretation of Rule 1. The Tribunal adjudicates in the public interest, which is why Tribunal practice and procedure includes the opportunity for members of the public to participate in proceedings as added parties, participants or presenters. In light of this public interest consideration, the question arises whether the public interest requires that all available evidence should be heard? If the answer is yes, this, in turn, raises the question whether the Tribunal should adopt such a "non-suit" motion procedure, and, if it does, whether the moving party should be allowed to proceed with its motion without calling its witnesses.

126 It must be emphasized that, in most appeals of renewable energy approvals, there are two responding parties, namely the MOECC director, and the approval holder. Where their positions align, for efficiency purposes, and to avoid repetition of evidence, they will often co-ordinate the witnesses to be called, i.e., one of them may not call its own witness, relying instead, on a witness to be called by the other. In such circumstances, if the Tribunal entertains a "non-suit" motion by one respondent which is unsuccessful, and that respondent has been put to its election and has decided not to call its witnesses, would this outcome be prejudicial to the other respondent's case?

127 Similarly, the Tribunal must also consider that an appellant's case is not based solely on the evidence adduced by its own witnesses, but on evidence obtained by cross-examining the witnesses testifying on behalf of the director and approval holder. Should the Tribunal have the benefit of hearing this evidence, when adjudicating in the public interest?

128 Assuming that the Tribunal would entertain motions for dismissal based on "non-suit", the Tribunal, when evaluating whether a *prima facie* case has been made out, would have to determine whether the evidence of added parties, participants, and presenters should be considered. The Approval Holder implicitly assumes that the Tribunal must do so, as its submissions addressed the evidence of the presenter (the County of Norfolk) in this proceeding. However, the submissions of the Director did not appear to take this evidence into account. It must be emphasized that participants and presenters have separate status from an appellant, and, while individual or group participants or presenters may wholly support an appellant's position, this is not always the case. In such circumstances, is the Tribunal is to consider the evidence of participants and presenters when evaluating whether a *prima facie* case has been made out, and, if so, is the Tribunal to exclude from this consideration, evidence which does not support the appellant's case?

129 The Tribunal notes again, that it received no submissions from the parties respecting any of these considerations of procedural fairness to be taken into account when adjudicating in the public interest.

130 Assuming that the Tribunal would entertain motions for dismissal based on "non-suit", the Tribunal would also have to determine the test to be applied in determining whether a "*prima facie*" case has been made out. The Approval Holder relies on the statement of the Ontario Grievance Settlement Board in *Ontario (Ministry of Natural Resources and Forestry) and OPSEU (Bharti), Re* that "In determining whether a *prima facie* case has been made out, the test is whether the evidence presented by the party responding to the motion is sufficient to allow the Board to rule that it has proven its case on a balance of probabilities, ...". Again, the authority cited by the Board in support of this conclusion is one of the Board's previous decisions. Therefore, the question arises whether the test to be applied by this Tribunal should be that an appellant must prove its case on a balance or probabilities, or should the appellant be required to meet a less onerous test, such as whether the appellant's case establishes a reasonable prospect of success, or, whether the appellant's case establishes a case for the responding parties to answer. None of the parties referred the Tribunal to decisions by the courts or other boards or tribunals to assist in answering this question. The parties also did not address whether the courts have addressed this question in the context of an appeal or application for judicial review of a decision of an administrative board or tribunal. Finally, the Tribunal was provided with no submissions on whether the expedited timelines for REA appeals is another factor that the Tribunal should consider when deciding whether or not to add procedures to allow for "non-suit" motions in REA hearings.

131 The onus is on the moving party to establish that its motion to dismiss should be granted. As noted above, the parties have not addressed the important questions which the Tribunal must consider in making a determination of this matter. As such, the Tribunal finds that it has insufficient information on which it can base a finding to grant the relief requested by the Approval Holder in its motion to dismiss. Consequently, the Tribunal finds that the Approval Holder has not met its onus to establish that its motion to dismiss should be granted, and, therefore, the motion is dismissed. For purposes of clarity, the Tribunal confirms that it has not made a general determination, one way or the other, whether a motion to dismiss, based on some form of "non-suit" procedure, would be appropriate in another hearing. Such a determination is left to be addressed in a future proceeding in which the parties provide more comprehensive and relevant authorities and properly address the expedited and public interest context in which renewable energy approval appeals take place.

Overall Conclusion

132 The Tribunal finds that the Appellant has failed to meet the onus required by the statutory test, to show that engaging the Project in accordance with the REA will cause serious harm to human health, or serious and irreversible harm to plant life, animal life or the natural environment, and that, therefore, the appeal should be dismissed.

Decision

133 The appeal by East Oxford Community Alliance Inc. is dismissed and the decision of the Director is confirmed.

Appeal and motion dismissed.

Her Majesty The Queen in right of Alberta, as represented by the Minister of Public Works, Supply and Services *Appellant*

and

The Minister of Transport and the Minister of Fisheries and Oceans *Appellants*

v.

Friends of the Oldman River Society *Respondent*

and

The Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General of Newfoundland, the Minister of Justice of the Northwest Territories, the National Indian Brotherhood/Assembly of First Nations, the Dene Nation and the Metis Association of the Northwest Territories, the Native Council of Canada (Alberta), the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), the Friends of the Earth and the Alberta Wilderness Association *Interveners*

Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Travaux publics, des Approvisionnements et des Services *Appelante*

et

Le ministre des Transports et le ministre des Pêches et des Océans *Appelants*

c.

Friends of the Oldman River Society *Intimée*

et

Le procureur général du Québec, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de Terre-Neuve, le ministre de la Justice des Territoires du Nord-Ouest, la Fraternité des Indiens du Canada/l'Assemblée des Premières Nations, la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest, le Conseil national des autochtones du Canada (Alberta), le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), les Amis de la Terre et l'Alberta Wilderness Association *Intervenants*

INDEXED AS: FRIENDS OF THE OLDMAN RIVER SOCIETY *v.* CANADA (MINISTER OF TRANSPORT)

File No.: 21890.

1991: February 19, 20; 1992: January 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

RÉPERTORIÉ: FRIENDS OF THE OLDMAN RIVER SOCIETY *c.* CANADA (MINISTRE DES TRANSPORTS)

N° du greffe: 21890.

1991: 19, 20 février; 1992: 23 janvier.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson et Iacobucci.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Distribution of legislative powers — Environment — Environmental assessment — Whether federal environmental guidelines order intra vires Parliament — Constitution Act, 1867, ss. 91, 92 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law — Environmental assessment — Statutory validity of federal environmental guidelines order — Whether guidelines order authorized by s. 6 of Department of the Environment Act — Whether guidelines order inconsistent with Navigable Waters Protection Act — Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6 — Navigable Waters Protection Act, R.S.C., 1985, c. N-22, ss. 5, 6 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law — Environmental assessment — Applicability of federal environmental guidelines order — Alberta building dam on Oldman River — Dam affecting areas of federal responsibility such as navigable waters and fisheries — Whether guidelines order applicable only to new federal projects — Whether Minister of Transport and Minister of Fisheries and Oceans must comply with guidelines order — Department of the Environment Act, R.S.C., 1985, c. E-10, ss. 4(1)(a), 5(a)(ii), 6 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2 "proposal", "initiating department", 6 — Navigable Waters Protection Act, R.S.C., 1985, c. N-22, s. 5 — Fisheries Act, R.S.C., 1985, c. F-14, ss. 35, 37.

Crown — Immunity — Provinces — Whether Crown in right of province bound by provisions of Navigable Waters Protection Act, R.S.C., 1985, c. N-22 — Interpretation Act, R.S.C., 1985, c. I-21, s. 17.

Administrative law — Judicial review — Remedies — Discretion — Alberta building dam on Oldman River — Dam affecting areas of federal responsibility such as navigable waters and fisheries — Environmental group applying for certiorari and mandamus in Federal Court to compel Minister of Transport and Minister of Fisheries and Oceans to comply with federal environmental

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Répartition des pouvoirs législatifs — Environnement — Évaluation environnementale — Les lignes directrices fédérales en matière d'environnement sont-elles intra vires du Parlement? — Loi constitutionnelle de 1867, art. 91, 92 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Droit de l'environnement — Évaluation environnementale — Validité législative du décret fédéral sur les lignes directrices en matière d'environnement — Le décret sur les lignes directrices est-il autorisé par l'art. 6 de la Loi sur le ministère de l'Environnement? — Le décret sur les lignes directrices est-il incompatible avec la Loi sur la protection des eaux navigables? — Loi sur le ministère de l'Environnement, L.R.C. (1985), ch. E-10, art. 6 — Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22, art. 5, 6 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Droit de l'environnement — Évaluation environnementale — Applicabilité du décret fédéral sur les lignes directrices en matière d'environnement — Construction d'un barrage par l'Alberta sur la rivière Oldman — Barrage touchant des domaines de compétence fédérale comme les eaux navigables et les pêches — Le décret sur les lignes directrices s'applique-t-il seulement aux nouveaux projets fédéraux? — Le ministre des Transports et le ministre des Pêches et des Océans sont-ils tenus de se conformer au décret sur les lignes directrices? — Loi sur le ministère de l'Environnement, L.R.C. (1985), ch. E-10, art. 4(1)a), 5a)(ii), 6 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467, art. 2 «proposition», «ministère responsable», 6 — Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22, art. 5 — Loi sur les pêches, L.R.C. (1985), ch. F-14, art. 35, 37.

Couronne — Immunité — Provinces — La Couronne du chef de la province est-elle liée par les dispositions de la Loi sur la protection des eaux navigables, L.R.C. (1985), ch. N-22? — Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 17.

Droit administratif — Contrôle judiciaire — Redressements — Pouvoir discrétionnaire — Construction d'un barrage par l'Alberta sur la rivière Oldman — Barrage touchant des domaines de compétence fédérale comme les eaux navigables et les pêches — Groupe environnemental, par demande de bref de certiorari et de bref de mandamus à la Cour fédérale, cherche à for-

guidelines order — Applications dismissed on grounds of unreasonable delay and futility — Whether Court of Appeal erred in interfering with motions judge's discretion not to grant remedy sought.

The respondent Society, an Alberta environmental group, brought applications for *certiorari* and mandamus in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta — a project which affects several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The Guidelines Order was established under s. 6 of the federal *Department of the Environment Act* and requires all federal departments and agencies that have a decision-making authority for any proposal (i.e., any initiative, undertaking or activity) that may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the *Navigable Waters Protection Act*. This section provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 percent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under s. 5 of the *Navigable Waters Protection Act*, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This appeal raises the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability. It also raises the

cer le ministre des Transports et le ministre des Pêches et des Océans à se conformer au décret fédéral sur les lignes directrices en matière d'environnement — Demandes rejetées en raison du retard déraisonnable et de la futilité de la procédure — La Cour d'appel a-t-elle commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation demandée?

L'intimée, la Friends of the Oldman River Society (la «Société»), un groupe environnemental de l'Alberta, par demande de bref de *certiorari* et de bref de *mandamus* présentée à la Cour fédérale, cherche à forcer deux ministères fédéraux, le ministère des Transports et le ministère des Pêches et des Océans, à procéder à une évaluation environnementale conformément au *Décret fédéral sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*, relativement à un barrage construit sur la rivière Oldman par la province d'Alberta—un projet qui touche plusieurs sphères de compétence fédérale, notamment les eaux navigables, les pêcheries, les Indiens et les terres indiennes. Le Décret sur les lignes directrices a été pris en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnement* et exige de tous les ministères et organismes fédéraux qui exercent un pouvoir de décision à l'égard d'une proposition (c'est-à-dire une entreprise ou activité) susceptible d'entraîner des répercussions environnementales sur une question de compétence fédérale, qu'ils procèdent à un examen initial de cette proposition afin de déterminer si elle peut éventuellement comporter des effets défavorables sur l'environnement. La province a elle-même procédé au cours des années à d'importantes études environnementales qui ont donné lieu à des consultations publiques, notamment auprès des bandes indiennes et des groupes environnementaux, et, en septembre 1987, avait obtenu du ministre des Transports une approbation de l'ouvrage en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables*. Cette disposition prévoit qu'il est interdit de construire un ouvrage dans les eaux navigables à moins qu'il n'ait préalablement été approuvé par le ministre. Dans l'évaluation de la demande de l'Alberta, le ministre n'a examiné que l'incidence du projet sur la navigation et aucune évaluation n'a été faite en vertu du Décret sur les lignes directrices. Les tentatives de l'intimée devant les tribunaux de l'Alberta pour faire arrêter le projet ont échoué et les ministres fédéraux de l'Environnement et des Pêches et des Océans ont refusé d'assujettir le projet à l'évaluation en vertu du Décret sur les lignes directrices. Le contrat de construction du barrage a été octroyé en 1988 et les travaux étaient achevés à 40 pour 100 lorsque la présente action a été intentée

question whether the motions judge properly exercised his discretion in deciding not to grant the remedy sought on grounds of unreasonable delay and futility.

Held (Stevenson J. dissenting): The appeal should be dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

Statutory Validity of the Guidelines Order

The Guidelines Order was validly enacted pursuant to s. 6 of the *Department of the Environment Act*, and is mandatory in nature. When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law", and amenable to enforcement through prerogative relief. The "guidelines" are not merely authorized by statute but must be formally enacted by "order" with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority.

The Guidelines Order, which requires the decision maker to take socio-economic considerations into account in the environmental impact assessment, does not go beyond what is authorized by the *Department of the Environment Act*. The concept of "environmental quality" in s. 6 of the Act is not confined to the biophysical environment alone. The environment is a diffuse subject matter and, subject to the constitutional imperatives, the potential consequences for a community's livelihood, health and other social matters from environ-

devant la Cour fédérale en avril 1989. La Section de première instance a rejeté les demandes. La Cour d'appel a infirmé le jugement, annulé l'approbation accordée en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables* et ordonné aux ministres des Transports et des Pêches et des Océans de se conformer au Décret sur les lignes directrices. Le présent pourvoi soulève la validité constitutionnelle et législative du Décret sur les lignes directrices et porte sur la nature et l'applicabilité de celui-ci. Il soulève aussi la question de savoir si le juge des requêtes a bien exercé son pouvoir discrétionnaire dans sa décision de ne pas accorder le redressement demandé en raison du retard déraisonnable et de la futilité de la procédure.

Arrêt (le juge Stevenson est dissident): Le pourvoi est rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer au Décret sur les lignes directrices.

La validité législative du Décret sur les lignes directrices

Le Décret sur les lignes directrices a été validement adopté conformément à l'art. 6 de la *Loi sur le ministère de l'Environnement* et il est de nature impérative. Lorsqu'on examine l'art. 6 dans son ensemble, plutôt que seulement le terme «directives» en vase clos, on se rend compte que le législateur fédéral a opté pour l'adoption d'un mécanisme de réglementation auquel on est soumis «légalement» et dont on peut obtenir l'exécution par bref de prérogative. Les «directives» ne sont pas simplement autorisées par une loi, mais elles doivent être officiellement adoptées par «arrêté», sur approbation du gouverneur en conseil. Ce processus contraste vivement avec le processus habituel d'établissement de directives de politique interne ministérielle destinées à exercer un contrôle sur les fonctionnaires relevant de l'autorité du ministre.

Le Décret sur les lignes directrices, qui exige du décideur qu'il tienne compte de facteurs socio-économiques dans l'évaluation des répercussions environnementales, ne va pas au-delà de ce qui est autorisé par la *Loi sur le ministère de l'Environnement*. Le concept de la «qualité de l'environnement» prévu à l'art. 6 de la Loi ne se limite pas à l'environnement biophysique seulement. L'environnement est un sujet diffus et, sous réserve des impératifs constitutionnels, les conséquences éventuelles d'un changement environnemental sur le gagne-pain, la santé et les autres préoccupations sociales d'une collectivité font partie intégrante de la prise de décisions

mental change, are integral to decision making on matters affecting environmental quality.

The Guidelines Order is consistent with the *Navigable Waters Protection Act*. There is nothing in the Act which explicitly or implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act. The Minister's duty under the Order is supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Order. There is also no conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in s. 3 of the Guidelines Order, and the remedial power under s. 6(4) of the Act to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the Order.

Applicability of the Guidelines Order

The scope of the Guidelines Order is not restricted to "new federal projects, programs and activities"; the Order is not engaged every time a project may have an environmental effect on an area of federal jurisdiction. However, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. "Responsibility" within the definition of "proposal" means a legal duty or obligation and should not be read as connoting matters falling generally within federal jurisdiction. Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision making authority" for the proposal and

concernant des questions ayant une incidence sur la qualité de l'environnement.

Le Décret sur les lignes directrices est compatible avec la *Loi sur la protection des eaux navigables*. La Loi n'a pas pour effet d'empêcher explicitement ou implicitement le ministre des Transports de tenir compte de facteurs autres que ceux touchant la navigation dans l'exercice de son pouvoir d'approbation en vertu de l'art. 5 de la Loi. La fonction confiée au ministre en vertu du Décret vient s'ajouter à la responsabilité qu'il a en vertu de la *Loi sur la protection des eaux navigables*, et il ne peut invoquer une interprétation trop étroite des pouvoirs qui lui sont conférés par des lois pour éviter de se conformer au Décret. Il n'existe pas non plus de conflit entre, d'une part, le fait d'exiger, à l'art. 3 du Décret sur les lignes directrices, qu'un examen soit effectué «le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables» et, d'autre part, le pouvoir de redressement, prévu au par. 6(4) de la Loi, permettant au ministre d'accorder une approbation après le début des travaux. Ce pouvoir constitue une exception à la règle générale énoncée à l'art. 5 de la Loi selon laquelle il faut obtenir une approbation avant le début de la construction et, dans l'exercice de son pouvoir discrétionnaire d'accorder une approbation après le début des travaux, rien n'empêche le ministre d'appliquer le Décret.

L'applicabilité du Décret sur les lignes directrices

L'application du Décret sur les lignes directrices n'est pas restreinte aux «nouveaux projets, programmes et activités fédéraux»; le Décret ne reçoit pas application chaque fois qu'un projet peut comporter des répercussions environnementales sur un domaine de compétence fédérale. Il doit toutefois s'agir tout d'abord d'une «proposition» qui vise une «entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions». L'interprétation qu'il faut donner à l'expression «participe à la prise de décisions» est que le gouvernement fédéral, se trouvant dans un domaine relevant de sa compétence en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*, doit avoir une obligation positive de réglementation en vertu d'une loi fédérale relativement à l'entreprise ou à l'activité proposée. L'expression «participe à la prise de décisions» dans la définition du terme «proposition» signifie une obligation légale et ne devrait pas être interprétée comme ayant trait à des questions relevant généralement de la compétence fédérale. Si cette obligation existe, il s'agit alors de déterminer qui est le «ministère responsable» en la matière, puisque c'est ce ministère qui exerce le «pouvoir de

thus responsible for initiating the process under the Guidelines Order.

The Oldman River Dam project falls within the ambit of the Guidelines Order. The project qualifies as a proposal for which the Minister of Transport alone is the "initiating department" under s. 2 of the Order. The *Navigable Waters Protection Act*, in particular s. 5, places an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water.

The Guidelines Order does not apply to the Minister of Fisheries and Oceans, however, because there is no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has only been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the Guidelines Order is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Under the Order, the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. The Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, must thus consider the environmental impact of the dam on such areas of federal jurisdiction as navigable waters, fisheries, Indians and Indian lands.

Crown Immunity

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Crown in right of Alberta is bound by the *Navigable Waters Protection Act* by necessary implication. The proprietary right the province may have in the bed of the Oldman River is subject to the public right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Alberta requires statutory

décision» à l'égard de la proposition et qui doit donc entamer le processus d'évaluation visé par le Décret sur les lignes directrices.

Le projet de barrage sur la rivière Oldman est visé par le Décret sur les lignes directrices. Il peut être qualifié de proposition dont le ministre des Transports seul est le «ministère responsable» en vertu de l'art. 2 du Décret. La *Loi sur la protection des eaux navigables*, notamment son art. 5, impose une obligation positive de réglementation au ministre des Transports. Cette loi a mis en place un mécanisme de réglementation qui prévoit qu'il est nécessaire d'obtenir l'approbation du ministre avant qu'un ouvrage qui gêne sérieusement la navigation puisse être placé dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux.

Cependant, le Décret sur les lignes directrices ne s'applique pas au ministre des Pêches et des Océans, puisque la *Loi sur les pêches* ne renferme pas de disposition de réglementation équivalente qui serait applicable au projet. Le fait que le ministre possède le pouvoir discrétionnaire de demander des renseignements visant à l'aider dans l'exercice d'une fonction législative ne signifie pas qu'il «participe à la prise de décisions» au sens du Décret. Le ministre des Pêches et des Océans a, en vertu de l'art. 37 de la *Loi sur les pêches*, un pouvoir législatif spécial limité qui ne constitue pas une obligation positive de réglementation.

L'étendue de l'évaluation en vertu du Décret sur les lignes directrices n'est pas limitée au domaine particulier de compétence à l'égard duquel le gouvernement du Canada participe à la prise de décisions au sens du terme «proposition». En vertu du Décret, le ministère responsable qui a reçu le pouvoir de procéder à l'évaluation doit tenir compte des répercussions environnementales dans tous les domaines de compétence fédérale. Le ministre des Transports, à titre de décideur en vertu de la *Loi sur la protection des eaux navigables*, doit examiner les incidences environnementales du barrage sur les domaines de compétence fédérale, comme les eaux navigables, les pêcheries, les Indiens et les terres indiennes.

L'immunité de la Couronne

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci: La Couronne du chef de l'Alberta est par déduction nécessaire liée par la *Loi sur la protection des eaux navigables*. Le droit de propriété que la province peut détenir sur le lit de la rivière Oldman est assujetti au droit public de navigation, sur lequel le Parlement exerce une compétence législative exclusive. L'Alberta

authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. The Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval. The purpose of the Act would be wholly frustrated if the province was not bound by the Act. The provinces are among the bodies that are likely to engage in projects that may interfere with navigation. Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would effectively be emasculated.

Per Stevenson J. (dissenting): The province of Alberta is not bound by the *Navigable Waters Protection Act*. The Crown is not bound by legislation unless it is mentioned or referred to in the legislation. Here, there are no words in the Act "expressly binding" the Crown and no clear intention to bind "is manifest from the very terms of the statute". As well, the failure to include the Crown would not wholly frustrate the purpose of the Act or produce an absurdity. There are many non-governmental agencies whose activities are subject to the Act and there is thus no emasculation of the Act. If the Crown interferes with a public right of navigation, that wrong is remediable by action. There is no significant benefit in approval under the Act. Tort actions may still lie.

Constitutional Validity of the Guidelines Order

The "environment" is not an independent matter of legislation under the *Constitution Act, 1867*. Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government. While both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power. Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction.

The Guidelines Order is *intra vires* Parliament. The Order does not attempt to regulate the environmental effects of matters within the control of the province but

doit obtenir l'autorisation législative du Parlement pour construire un ouvrage qui entraverait sérieusement la navigation dans la rivière Oldman; la *Loi sur la protection des eaux navigables* est le mécanisme qu'elle doit utiliser à cette fin. La Couronne du chef de l'Alberta est liée par la Loi, car il s'agit là du seul moyen pratique d'obtenir l'approbation requise. Par ailleurs, si la province n'était pas liée par la Loi, celle-ci serait privée de toute efficacité. Les provinces font partie des organismes susceptibles de participer à des projets qui peuvent obstruer la navigation. Si la Couronne du chef d'une province était habilitée à saper l'intégrité des réseaux essentiels de navigation dans les eaux canadiennes, l'objet de la *Loi sur la protection des eaux navigables* serait, en fait, annihilé.

Le juge Stevenson (dissident): La province d'Alberta n'est pas liée par la *Loi sur la protection des eaux navigables*. Nul texte législatif ne lie la Couronne, sauf dans la mesure qui y est mentionnée ou prévue. En l'espèce, la Loi ne renferme pas de termes qui «lient expressément» la Couronne et il n'existe pas d'intention claire de la lier qui «ressort du texte même de la loi». En outre, le fait que la Couronne ne soit pas liée ne priverait pas la Loi de toute efficacité ni ne donnerait lieu à une absurdité. Il existe de nombreux organismes non gouvernementaux dont les activités sont régies par la Loi et l'objet de la Loi n'est donc pas annihilé. Si la Couronne porte atteinte à un droit public de navigation, il est possible de la poursuivre en justice. Il n'y a pas d'avantage important lié à l'approbation en vertu de la Loi. Il peut toujours y avoir ouverture à responsabilité civile.

La validité constitutionnelle du Décret sur les lignes directrices

L'«environnement» n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867*. Dans son sens générique, il englobe l'environnement physique, économique et social touchant plusieurs domaines de compétence attribués aux deux paliers de gouvernement. Bien que les deux paliers puissent œuvrer dans le domaine de l'environnement, l'exercice d'une compétence législative, dans la mesure où elle se rapporte à l'environnement, doit se rattacher au domaine de compétence approprié. Les projets de nature locale relèvent généralement de la compétence provinciale, mais ils peuvent exiger la participation du fédéral dans le cas où ils empiètent sur un domaine de compétence fédérale comme en l'espèce.

Le Décret sur les lignes directrices est *intra vires* du Parlement. Il ne tente pas de réglementer les répercussions environnementales de matières qui relèvent de la

merely makes environmental impact assessment an essential component of federal decision making. The Order is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. In essence, the Order has two fundamental aspects. First, there is the substance of the Order dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the Order can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the Order is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating department"). This facet of the Order has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Guidelines Order cannot be used as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The "initiating department" is only given a mandate to examine matters directly related to the areas of federal responsibility potentially affected. Any intrusion under the Order into provincial matters is merely incidental to the pith and substance of the legislation.

Discretion

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Federal Court of Appeal did not err in interfering with the motions judge's discretion not to grant the remedies sought on the grounds of unreasonable delay and futility. Respondent made a sustained effort, through legal proceedings in the Alberta courts and through correspondence with federal departments, to challenge the legality of the process followed by the province to build the dam and the acquiescence of the appellant Ministers, and there is no evidence that Alberta has suffered any prejudice from any delay in taking the present action. Despite ongoing legal proceedings, the construction of the dam continued. The province was not prepared to

compétence de la province, mais fait simplement de l'évaluation des incidences environnementales un élément essentiel de la prise de décisions fédérales. De par son caractère véritable, le Décret n'est rien de plus qu'un instrument qui régit la façon dont les institutions fédérales doivent gérer leurs diverses fonctions. Essentiellement, le Décret comporte deux aspects fondamentaux. Il y a tout d'abord l'aspect de fond qui porte sur l'évaluation des incidences environnementales, dont l'objet est de faciliter la prise de décisions dans le domaine de compétence fédérale qui régit une proposition. Cet aspect du Décret peut être maintenu au motif qu'il s'agit d'un texte législatif se rapportant aux matières pertinentes énumérées à l'art. 91 de la *Loi constitutionnelle de 1867*. Le deuxième aspect est l'élément procédural ou organisationnel coordonnant le processus d'évaluation, qui peut dans un cas donné toucher plusieurs domaines de compétence fédérale, relevant d'un décideur désigné (le «ministère responsable»). Cette facette vise à réglementer la façon dont les institutions et organismes du gouvernement du Canada exercent leurs fonctions et responsabilités administratives. Cela est indiscutablement *intra vires* du Parlement. Cet aspect peut être considéré comme un pouvoir accessoire de la compétence législative en cause, ou de toute façon, être justifié en vertu du pouvoir résiduel prévu à l'art. 91.

Le Décret sur les lignes directrices ne peut être utilisé comme moyen déguisé d'envahir des champs de compétence provinciale qui ne se rapportent pas aux domaines de compétence fédérale concernés. Le «ministère responsable» n'a que le mandat d'examiner les questions se rapportant directement aux domaines de compétence fédérale concernés. Toute ingérence dans la sphère de compétence provinciale est simplement accessoire au caractère véritable du texte législatif.

Le pouvoir discrétionnaire

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci: La Cour d'appel fédérale n'a pas commis d'erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation sollicitée en raison du retard déraisonnable et de la futilité de la procédure. L'intimée s'est efforcée d'une façon soutenue de contester, dans le cadre des poursuites judiciaires devant les tribunaux de l'Alberta et dans les lettres envoyées aux ministères fédéraux, d'une part, la légalité des mesures prises par l'Alberta relativement à la construction du barrage, et d'autre part, l'acquiescement des ministres appelants; il n'existe pas de preuve que l'Alberta a subi

accede to an environmental impact assessment under the Order until it had exhausted all legal avenues. The motions judge did not weigh these considerations adequately, giving the Court of Appeal no choice but to intervene. Futility was also not a proper ground to refuse a remedy in the present circumstances. Prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory. It is not obvious in this case that the implementation of the Order even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

Per Stevenson J. (dissenting): The Federal Court of Appeal erred in interfering with the motions judge's discretion to refuse the prerogative remedy. The court was clearly wrong in overruling his conclusion on the question of delay. The common law has always imposed a duty on an applicant to act promptly in seeking prerogative relief. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the Minister of Transport's approval. It is impossible to conclude that Alberta was not prejudiced by the delay. The legal proceedings in the Alberta courts brought by the respondent and others need not have been taken into account by the motions judge. These proceedings were separate and distinct from the relief sought in this case and were irrelevant to the issues at hand. The present action centres on the constitutionality and applicability of the Guidelines Order. It raises new and different issues. In determining whether he should exercise his discretion against the respondent, the motions judge was obliged to look only at those factors which he considered were directly connected to the application before him. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. The test has not been met in this case.

Costs

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.:

un préjudice quelconque en raison d'un retard à intenter la présente action. Malgré les contestations judiciaires en cours, la construction du barrage s'est poursuivie. La province n'était pas disposée à consentir à une évaluation des incidences environnementales en vertu du Décret avant l'épuisement de tous les recours légaux. Le juge des requêtes n'a pas suffisamment accordé d'importance à ces considérations, ne laissant à la Cour d'appel d'autre choix que d'intervenir. Le motif de la futilité de la procédure ne pouvait justifier un refus dans les circonstances. On ne devrait refuser la délivrance d'un bref de prérogative pour ce motif que dans les rares cas où sa délivrance serait vraiment inefficace. En l'espèce, il n'est pas évident que l'application du Décret, même à cette étape tardive, n'aura pas un certain effet sur les mesures susceptibles d'être prises pour atténuer toute incidence environnementale néfaste que pourrait avoir le barrage sur un domaine de compétence fédérale.

Le juge Stevenson (dissident): La Cour d'appel fédérale a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder une réparation par voie de bref de prérogative. La cour a clairement commis une erreur en rejetant sa conclusion relativement à la question du retard. La common law a toujours exigé du requérant qu'il agisse avec diligence lorsqu'il sollicite un bref de prérogative. Compte tenu de l'envergure du projet et des intérêts en jeu, il n'était pas raisonnable que la Société intimée attende 14 mois avant de contester l'approbation du ministre des Transports. Il est impossible de conclure que l'Alberta n'a pas subi un préjudice en raison du retard. Le juge des requêtes n'avait pas à tenir compte des procédures judiciaires que l'intimée et d'autres parties avaient entamées devant les tribunaux de l'Alberta. Ces procédures constituaient des recours distincts et différents du redressement sollicité en l'espèce et n'étaient pas pertinentes quant aux questions en litige. La présente action porte sur la constitutionnalité et l'applicabilité du Décret sur les lignes directrices. Il soulève des questions nouvelles et différentes. Pour déterminer s'il devait exercer son pouvoir discrétionnaire contre l'intimée, le juge des requêtes devait examiner seulement les facteurs qui, selon lui, se rattachaient directement à la demande dont il était saisi. On n'est pas justifié de modifier la décision qu'il a prise dans l'exercice de son pouvoir discrétionnaire, sauf si l'on peut affirmer avec certitude qu'il a eu tort de procéder ainsi. L'on n'a pas répondu au critère en l'espèce.

Les dépens

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin

It is a proper case for awarding costs on a solicitor-client basis to the respondent, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court.

Per Stevenson J. (dissenting): The appellants should not be called upon to pay costs on a solicitor and client basis. There is no justification in departing from our own general rule that a successful party should recover costs on the usual party and party basis. Public interest groups must be prepared to abide by the same principles as apply to other litigants and be prepared to accept some responsibility for the costs.

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et Iacobucci: Il s'agit d'un cas où il est approprié d'accorder les dépens comme entre procureur et client à la Société intimée, compte tenu de la situation de cette dernière et du fait que les ministères fédéraux ont été joints comme appelants même s'ils n'avaient pas auparavant présenté une demande d'autorisation de pourvoi à notre Cour.

Le juge Stevenson (dissident): Les appelants ne devraient pas être contraints de payer les dépens comme entre procureur et client. Il n'y a pas de raison de déroger à notre règle générale que la partie qui a gain de cause a droit aux dépens sur la base des frais entre parties. Les groupes d'intérêt public doivent être disposés à se plier aux mêmes principes que les autres plaideurs et accepter une certaine responsabilité quant aux dépens.

Jurisprudence

Citée par le juge La Forest

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[1980] 2 S.C.R. 292; *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868; *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), 85 A.R. 321; *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), 89 A.R. 339; *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), 89 A.R. 280; *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216; *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459.

By Stevenson J. (dissenting)

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D. R. Thomas, Q.C., T. W. Wakeling and *G. D. Chipeur*, for the appellant Her Majesty the Queen in right of Alberta.

E. R. Sojonky, Q.C., B. J. Saunders and *J. de Pencier*, for the appellants the Minister of Transport and the Minister of Fisheries and Oceans.

B. A. Crane, Q.C., for the respondent.

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POURVOI contre un arrêt de la Cour d'appel fédérale, [1990] 2 C.F. 18, 68 D.L.R. (4th) 375, [1991] 1 W.W.R. 352, 108 N.R. 241, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, qui a infirmé un jugement de la Section de première instance, [1990] 1 C.F. 248, [1990] 2 W.W.R. 150, 30 F.T.R. 108, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137. Pourvoi rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer aux lignes directrices fédérales en matière d'environnement. Le juge Stevenson est dissident.

D. R. Thomas, c.r., T. W. Wakeling et *G. D. Chipeur*, pour l'appelante Sa Majesté la Reine du chef de l'Alberta.

E. R. Sojonky, c.r., B. J. Saunders et *J. de Pencier*, pour les appelants le ministre des Transports et le ministre des Pêches et des Océans.

B. A. Crane, c.r., pour l'intimée.

J.-K. Samson and *A. Gingras*, for the intervener the Attorney General of Quebec.

P. H. Blanchet, for the intervener the Attorney General for New Brunswick.

G. E. Hannon, for the intervener the Attorney General of Manitoba.

G. H. Copley, for the intervener the Attorney General of British Columbia.

R. G. Richards, for the intervener the Attorney General for Saskatchewan.

B. G. Welsh, for the intervener the Attorney General of Newfoundland.

R. A. Kasting and *J. Donihee*, for the intervener the Minister of Justice of the Northwest Territories.

P. W. Hutchins, *D. H. Soroka* and *F. S. Gertler*, for the intervener the National Indian Brotherhood/Assembly of First Nations.

J. J. Gill, for the interveners the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta).

G. J. McDade and *J. B. Hanebury*, for the interveners the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), and the Friends of the Earth.

M. W. Mason, for the intervener the Alberta Wilderness Association.

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J.—The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legis-

J.-K. Samson et *A. Gingras*, pour l'intervenant le procureur général du Québec.

P. H. Blanchet, pour l'intervenant le procureur général du Nouveau-Brunswick.

G. E. Hannon, pour l'intervenant le procureur général du Manitoba.

G. H. Copley, pour l'intervenant le procureur général de la Colombie-Britannique.

R. G. Richards, pour l'intervenant le procureur général de la Saskatchewan.

B. G. Welsh, pour l'intervenant le procureur général de Terre-Neuve.

R. A. Kasting et *J. Donihee*, pour l'intervenant le ministre de la Justice des Territoires du Nord-Ouest.

P. W. Hutchins, *D. H. Soroka* et *F. S. Gertler*, pour l'intervenante la Fraternité des Indiens du Canada/l'Assemblée des Premières Nations.

J. J. Gill, pour les intervenants la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest, et le Conseil national des autochtones du Canada (Alberta).

G. J. McDade et *J. B. Hanebury*, pour les intervenants le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), et les Amis de la Terre.

M. W. Mason, pour l'intervenante l'Alberta Wilderness Association.

Version française du jugement du juge en chef Lamer et des juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci rendu par

LE JUGE LA FOREST—La protection de l'environnement est devenue l'un des principaux défis de notre époque. Pour y faire face, les gouvernements et les organismes internationaux ont participé à la création d'un éventail important de

lative schemes and administrative structures. In Canada, both the federal and provincial governments have established Departments of the Environment, which have been in place for about 20 years. More recently, however, it was realized that a department of the environment was one among many other departments, many of which pursued policies that came into conflict with its goals. Accordingly at the federal level steps were taken to give a central role to that department, and to expand the role of other government departments and agencies so as to ensure that they took account of environmental concerns in taking decisions that could have an environmental impact.

To that end, s. 6 of the *Department of the Environment Act*, R.S.C., 1985, c. E-10, empowered the Minister for the purposes of carrying out his duties relating to environmental quality, by order, with the approval of the Governor in Council, to establish guidelines for use by federal departments, agencies and regulatory bodies in carrying out their duties, functions and powers. Pursuant to this provision the *Environmental Assessment and Review Process Guidelines Order* ("*Guidelines Order*") was established and approved in June 1984, SOR/84-467. In general terms, these guidelines require all federal departments and agencies that have a decision-making authority for any proposal, i.e., any initiative, undertaking or activity that may have an environmental effect on an area of federal responsibility, to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. If a proposal could have a significant adverse effect on the environment, provision is made for public review by an environmental assessment panel whose members must be unbiased, free of political influence and possessed of special knowledge and

régimes législatifs et de structures administratives. Au Canada, les gouvernements fédéral et provinciaux ont mis sur pied des ministères de l'environnement, qui existent maintenant depuis environ 20 ans. Cependant, on s'est récemment rendu compte qu'un ministère de l'environnement est entouré d'un grand nombre d'autres ministères dont les politiques entrent en conflit avec ses objectifs. En conséquence, le gouvernement fédéral a pris des mesures pour confier au ministère de l'Environnement un rôle central et élargir le rôle d'autres ministères et organismes gouvernementaux pour s'assurer qu'ils tiennent compte des préoccupations touchant l'environnement dans la prise de décisions susceptibles d'entraîner des incidences environnementales.

À cette fin, en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnement*, L.R.C. (1985), ch. E-10, le ministre peut par arrêté, au titre de celles de ses fonctions qui portent sur la qualité de l'environnement et avec l'approbation du gouverneur en conseil, établir des directives à l'usage des ministères et des organismes fédéraux dont ceux de réglementation dans l'exercice de leurs pouvoirs et fonctions. Conformément à cette disposition, le *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement* («*Décret sur les lignes directrices*») a été pris et approuvé en juin 1984, DORS/84-467. Dans l'ensemble, ces lignes directrices exigent de tous les ministères et organismes fédéraux qui exercent un pouvoir de décision à l'égard d'une proposition, c'est-à-dire une entreprise ou activité susceptible d'entraîner des répercussions environnementales sur une question de compétence fédérale, qu'ils procèdent à un examen initial de cette proposition afin de déterminer si elle peut éventuellement comporter des effets néfastes sur l'environnement. Advenant le cas où une proposition risque d'avoir un effet néfaste important sur l'environnement, on prévoit la tenue d'un examen public effectué par une commission d'évaluation environnementale dont les membres doivent faire preuve d'objectivité, être à l'abri de l'ingérence politique et posséder des connaissances et une expérience particulières se rapportant aux

experience relevant to the technical, environmental and social effects of the proposal.

The present case raises the constitutional and statutory validity of the *Guidelines Order* as well as its nature and applicability. These issues arise in a context where the respondent Society, an environmental group from Alberta, by applications for *certiorari* and mandamus, seeks to compel two federal departments, the Department of Transport and the Department of Fisheries and Oceans, to conduct a public environmental assessment pursuant to the *Guidelines Order* in respect of a dam constructed on the Oldman River by the Government of Alberta. That government had itself conducted extensive environmental studies which took into account public views. However, since the project affects navigable waters, fisheries, Indians and Indian lands, federal interests are involved. Specifically, the Society argues that the Minister of Transport must approve the project under the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22, and in doing so is required to provide for public assessment of the project pursuant to the *Guidelines Order*. It also argues that the Minister of Fisheries and Oceans has a similar duty in the performance of his functions under the *Fisheries Act*, R.S.C., 1985, c. F-14.

The case also raises the question whether the motions judge properly exercised his discretion in deciding whether or not to grant *certiorari* or mandamus. Accordingly the material background must be set forth in some detail.

Background

The history of the project begins in May 1958 when Alberta asked the Prairie Farm Rehabilitation Administration ("P.F.R.A.") of the federal Department of Agriculture to determine the feasibility of constructing a storage reservoir on the Oldman River, at a site called Livingstone Gap. In

effets de la proposition sur les plans technique, environnemental et social.

Le présent pourvoi soulève la validité constitutionnelle et législative du *Décret sur les lignes directrices* et porte sur la nature et l'applicabilité de celui-ci. Ces questions s'inscrivent dans un contexte où l'intimée, la Friends of the Oldman River Society (la «Société»), un groupe environnemental de l'Alberta, par demande de bref de *certiorari* et de bref de *mandamus*, cherche à forcer deux ministères fédéraux, le ministère des Transports et le ministère des Pêches et des Océans, à procéder à une évaluation environnementale publique conformément au *Décret sur les lignes directrices* relativement à un barrage construit sur la rivière Oldman par le gouvernement de l'Alberta. Ce dernier a lui-même procédé à d'importantes études environnementales qui ont donné lieu à des consultations publiques. Toutefois, puisque le projet touche des eaux navigables, des pêcheries, des Indiens et des terres indiennes, il comporte des questions de compétence fédérale. Plus particulièrement, la Société soutient que le ministre des Transports doit approuver le projet en vertu de la *Loi sur la protection des eaux navigables*, L.R.C. (1985), ch. N-22, et que, ce faisant, il doit prévoir la tenue d'une évaluation publique du projet conformément au *Décret sur les lignes directrices*. Elle soutient également que le ministre des Pêches et des Océans, a une obligation similaire dans l'exécution de ses fonctions en vertu de la *Loi sur les pêches*, L.R.C. (1985), ch. F-14.

Le présent pourvoi soulève aussi la question de savoir si le juge des requêtes a bien exercé son pouvoir discrétionnaire dans sa décision concernant la délivrance d'un bref de *certiorari* ou de *mandamus*. En conséquence, les faits pertinents doivent être présentés en détail.

Les faits

L'historique du projet débute en mai 1958 au moment où le gouvernement de l'Alberta a demandé à l'Administration du rétablissement agricole des Prairies («ARAP») du ministère fédéral de l'Agriculture d'évaluer la possibilité de la construction d'un réservoir pour le stockage de

December 1966 the P.F.R.A. submitted its report and proposed another location, the Three Rivers site on the Oldman River, for further study. There followed a federal-provincial water supply study which lasted from 1966 to 1974. After this, in July 1974, the Alberta Department of the Environment initiated an examination of water demand and potential storage sites on the Oldman River and its tributaries, to be conducted in two phases.

The first phase consisted of an initial evaluation of sites in the Oldman basin for water storage carried out by a Technical Advisory Committee comprised of representatives from several provincial government departments including Environment, Culture and Multiculturalism, Energy Resources Conservation Board, Fish and Wildlife Division, Agriculture, as well as representatives from local municipal districts and industry. The Committee's report was released on July 14, 1976 and was followed by a series of public consultations with local authorities and other groups and individuals. The responses received were evaluated and issues arising from them were identified for further study in the second phase.

The second phase began on February 4, 1977 when the Minister of the Environment announced the creation of the Oldman River Study Management Committee consisting of six representatives of the public and three representatives of the provincial government. Its task was to address the issues raised by the public during the first study, and to make recommendations concerning overall water management in the river basin, including the incorporation of the concerns of area residents. This it was required to do in a more comprehensive way than the first phase by, *inter alia*, studying issues affecting the whole of the river basin such as salinization, sedimentation, recreation, fish habitat and other environmental issues. Public par-

l'eau de la rivière Oldman à un endroit appelé Livingston Gap. En décembre 1966, l'ARAP a déposé son rapport et proposé la réalisation d'une étude plus poussée relativement à un autre emplacement le long de la rivière Oldman, en l'occurrence Three Rivers. Entre 1966 et 1974, une étude fédérale-provinciale sur l'approvisionnement en eau a été réalisée. Après quoi, en juillet 1974, le ministère de l'Environnement de l'Alberta a entrepris des études visant à examiner les besoins en eau et à déterminer quels emplacements sur la rivière Oldman et ses affluents seraient susceptibles de servir au stockage de l'eau. Ces études devaient se dérouler en deux étapes.

La première consistait en une évaluation initiale des emplacements dans le bassin de la rivière Oldman aux fins du stockage de l'eau et a été réalisée par un comité consultatif technique composé de représentants de plusieurs organismes et ministères du gouvernement provincial, notamment Environnement, Culture et Multiculturalisme, l'Energy Resources Conservation Board, la division du poisson et de la faune de l'Agriculture, ainsi que de représentants des districts municipaux et de l'industrie. Le comité a déposé son rapport le 14 juillet 1976; et, par la suite, une série de consultations publiques s'est tenue auprès des autorités locales et d'autres groupes et particuliers. On a procédé à l'évaluation des réponses reçues et déterminé les questions qui en découlaient en vue de les examiner au cours de la seconde étape.

La seconde étape a commencé le 4 février 1977 au moment de l'annonce par le ministre de l'Environnement de la mise sur pied du «Oldman River Study Management Committee» (le comité de gestion de l'étude sur la rivière Oldman), qui était formé de six représentants du public et de trois représentants du gouvernement provincial. Ce comité devait examiner les questions soulevées par le public au cours de la première étape et présenter des recommandations sur la gestion globale des eaux du bassin de la rivière, devant notamment tenir compte des préoccupations des résidents de la région. Cette étape devait être plus approfondie que la première et comporter notamment l'étude de questions touchant l'ensemble du bassin de la

ticipation was encouraged, a series of public meetings and public workshops was held, and oral and written submissions were made by a variety of interest groups including Indian bands and environmental groups. The Management Committee released its final report in 1978.

That same year, a panel of the Environment Council of Alberta was constituted to hold public hearings on the management of water resources within the Oldman basin. Again, several public hearings were held throughout southern Alberta and the Council received briefs from a wide cross-section of Albertans representing the interests of business, agriculture, local governments, Indian bands and others. The Council submitted its report to the Minister of the Environment in August 1979 and recommended yet another location, the Brocket site on the Peigan Indian Reserve, should a dam be needed.

The provincial government then reviewed this report and the 1978 report and on August 29, 1980 announced its decision to build a dam on the Oldman River. It also stated that the Three Rivers site was the preferred location, but added that the final decision would be deferred until the Peigan Indian Band had an opportunity to submit a proposal for construction at the Brocket site. In November 1983 the Peigan Band presented a position to the Minister of the Environment describing its expected economic compensation if the dam were to be built at the Brocket site.

On August 8, 1984 the Premier of Alberta announced the government's decision to proceed with construction of the dam at the Three Rivers site. Before that announcement was made, however, the dam proposal was reviewed by the Regional Screening and Co-ordinating Committee ("R.S.C.C."), a committee of the federal Department of the Environment. The purpose of the

rivière, savoir la salinisation, la sédimentation, les loisirs, l'habitat du poisson et d'autres questions environnementales. On a encouragé le public à participer, une série de rencontres et d'ateliers publics ont eu lieu et divers groupes d'intérêts, dont les bandes indiennes et les groupes environnementaux, ont présenté des observations orales et écrites. Le comité de gestion a soumis son rapport final en 1978.

La même année, un groupe a été constitué au sein de l'Environment Council of Alberta (le «conseil»); on lui a ordonné de tenir des audiences publiques sur la gestion des ressources en eau dans le bassin de la rivière Oldman. Plusieurs audiences publiques ont de nouveau eu lieu dans tout le sud de l'Alberta et le conseil a reçu de nombreux exposés représentant les vues d'un large échantillon de la population albertaine, notamment le milieu des affaires, le secteur agricole, les gouvernements locaux et les bandes indiennes. Le conseil a soumis son rapport au ministre de l'Environnement en août 1979 et a recommandé un nouvel emplacement, à Brocket, situé sur la réserve indienne de Peigan, dans l'hypothèse où un barrage serait nécessaire.

Le gouvernement provincial a ensuite examiné ce rapport et celui de 1978 et a annoncé le 29 août 1980 qu'il avait décidé de construire un barrage sur la rivière Oldman. Il a précisé que l'emplacement de Three Rivers était l'emplacement privilégié, mais qu'il reportait sa décision définitive quant à ce choix jusqu'à ce que la bande indienne de Peigan ait pu présenter une proposition concernant la construction du barrage à Brocket. En novembre 1983, la bande de Peigan a présenté sa position au ministre de l'Environnement et précisé l'indemnisation qu'elle prévoyait dans l'hypothèse où le barrage serait construit à Brocket.

Le 8 août 1984, le premier ministre de l'Alberta a annoncé que le gouvernement avait décidé de construire le barrage à l'emplacement de Three Rivers. Toutefois, avant cette annonce, le projet de construction du barrage avait été examiné par le Comité régional de sélection et de coordination («CRSC»), un comité du ministère fédéral de l'Environnement. Le CRSC devait s'assurer que

R.S.C.C. was to ensure that proposals that may affect federal areas of concern are subjected to environmental review, and it actively followed the progress of the dam proposal until it was decided that the dam would not be built on Indian land.

Following the Three Rivers site announcement, Alberta commenced the design of the dam and launched an "Environmental Mitigation/Opportunities Action Plan" which spawned further environmental studies and public meetings. The provincial Department of the Environment opened a project information office close to the Three Rivers site to answer public enquiries. Several subcommittees were established by the Municipal District of Pincher Creek to provide input to the Alberta Department of the Environment on areas of local concern, including land use, fish and wildlife, recreation, and agriculture. In addition, the provincial Minister of the Environment ordered the appointment of a Local Advisory Committee to advise the Minister on such matters as road relocation, fish and wildlife concerns, and recreational opportunities. After gathering information from public meetings, the Committee submitted a report to the Minister with recommendations concerning fisheries, wildlife, historical resources, agriculture, recreation and transportation systems.

In 1987 the federal R.S.C.C. once again became involved in the project at the request of the Department of Indian and Northern Affairs to study its impact on federal interests, particularly on the Peigan Indian Reserve located approximately 12 kilometres downstream from the dam site. Alberta had already provided the Peigans with funding to conduct an independent study of the project's effect on the Reserve and its inhabitants. The Peigan report was submitted to the provincial Minister of the Environment in February 1987. It addressed such subjects as irrigation, surface and ground water considerations, dam safety, fisheries

les projets susceptibles d'entraîner une incidence sur les domaines de compétence fédérale soient soumis à une évaluation environnementale, et il a suivi l'évolution du projet de construction du barrage jusqu'à ce qu'il soit décidé qu'il ne serait pas construit sur les terres indiennes.

Après l'annonce de la construction du barrage à Three Rivers, l'Alberta a entrepris la conception du barrage et l'élaboration d'un plan d'atténuation ou d'exploitation des incidences environnementales qui a donné lieu à d'autres études environnementales et à la tenue de rencontres publiques. Le ministère provincial de l'Environnement a alors ouvert un bureau d'information sur le projet, situé à proximité de Three Rivers, afin de répondre aux demandes de renseignements du public. Le district municipal de Pincher Creek a ensuite constitué plusieurs sous-comités afin de faire connaître au ministère albertain de l'Environnement les préoccupations d'intérêt local concernant notamment l'utilisation des terres, le poisson et la faune, les loisirs et l'agriculture. En outre, le ministre provincial de l'Environnement a demandé la constitution d'un comité consultatif local chargé de le conseiller sur des questions touchant le réaménagement des routes, les préoccupations dans le domaine de la pêche et de la faune et les possibilités offertes en matière de loisirs. Après avoir recueilli des renseignements au cours de rencontres publiques, le comité a soumis au ministre son rapport accompagné de recommandations au sujet des pêches, de la faune, des ressources historiques, de l'agriculture, des loisirs et du transport.

En 1987, le CRSC fédéral a de nouveau participé au projet, à la demande du ministère des Affaires indiennes et du Nord canadien, afin d'en examiner l'incidence sur les intérêts fédéraux, notamment sur la réserve indienne de Peigan située à environ 12 kilomètres en aval de l'emplacement du barrage. L'Alberta avait déjà octroyé à la bande indienne de Peigan des fonds pour qu'elle effectue une étude indépendante de l'incidence du projet sur la réserve et ses habitants. La bande de Peigan a soumis son rapport au ministre provincial de l'Environnement en février 1987. Il portait notamment sur l'irrigation, les questions des eaux de sur-

assessment, and spiritual and cultural assessment. The report prepared at the behest of the R.S.C.C. in July 1987 concluded that the project's effects on the Reserve would be either favourable or mitigable, but did note the possibility of negative environmental impacts affecting the Reserve—i.e., increased dust storms, increased mercury levels in fish and the extinction of flood plain cottonwood forests.

face et des eaux souterraines, la sécurité du barrage, l'évaluation des pêches et l'incidence du projet sur les plans spirituel et culturel. Le rapport préparé sur l'ordre du CRSC en juillet 1987 concluait que les effets du projet sur la réserve seraient favorables ou atténuables, mais faisait ressortir la possibilité de répercussions environnementales négatives sur la réserve, soit un accroissement des tourbillons de poussière, une augmentation du niveau de mercure dans le poisson et l'extinction des forêts de peupliers dans le périmètre d'inondation.

I come now to a step of prime importance in this action. On March 10, 1986 the Alberta Department of the Environment applied to the federal Minister of Transport for approval of the work under s. 5 of the *Navigable Waters Protection Act*. That provision provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing the application, the Minister considered the project's effect on marine navigation and approved the application on September 18, 1987 subject to certain conditions relating to marine navigation. I underline, however, that he did not subject the application to an assessment under the *Guidelines Order*. As we shall see, whether he should have done so raises several of the major issues in this appeal.

J'arrive maintenant à une étape d'importance primordiale. Le 10 mars 1986, le ministère de l'Environnement de l'Alberta a demandé au ministre fédéral des Transports d'approuver l'ouvrage en vertu de l'art. 5 de la *Loi sur la protection des eaux navigables*. Cette disposition prévoit qu'il est interdit de construire un ouvrage dans les eaux navigables à moins qu'il n'ait préalablement été approuvé par le ministre. Dans l'évaluation de la demande, le ministre a examiné l'incidence du projet sur la navigation et l'a approuvé, le 18 septembre 1987, sous réserve de certaines conditions relatives à la navigation. Je tiens toutefois à indiquer qu'il n'a pas assujetti la demande à une évaluation en vertu du *Décret sur les lignes directrices*. Comme nous le verrons, plusieurs des principales questions soulevées dans le présent pourvoi découle de la question de savoir s'il aurait dû le faire.

It is not until after this transpired that the respondent Society came into the picture. The Society was incorporated on September 8, 1987 to oppose the project and became aware of the approval granted by the Minister of Transport on February 16, 1988. However, earlier efforts to check the progress of the development had been made by certain individuals who later became members of the Society on its formation. Thus in the summer of 1987 the Southern Alberta Environmental Group had written a letter to the Minister of Fisheries and Oceans asking that an initial assessment be conducted under the *Guidelines Order*. The request was refused for the reason that the potential problems were being addressed and

Ce n'est qu'ensuite que la Société intimée commence à jouer un rôle. En effet, l'intimée a été constituée en société le 8 septembre 1987 pour s'opposer au projet et a été informée que le ministre des Transports avait approuvé le projet le 16 février 1988. Toutefois, certains particuliers, qui sont ensuite devenus membres de la Société lors de sa constitution, s'étaient efforcés d'empêcher l'évolution du projet. À l'été 1987, le Southern Alberta Environmental Group avait écrit au ministre des Pêches et des Océans pour lui demander de procéder à une évaluation initiale en vertu du *Décret sur les lignes directrices*. Cette demande fut refusée au motif que les problèmes possibles avaient été pris en charge et en raison de

because of the "long-standing administrative arrangements that are in place for the management of fisheries in Alberta". This, like the Minister of Transport's action described earlier, plays an important part in the legal arguments that were subsequently made. Another early effort came on December 3, 1987 when the respondent Society wrote to the Minister of the Environment asking that the matter be subjected to the *Guidelines Order* but again the request was declined, this time principally on the grounds that the dam project fell primarily within provincial jurisdiction and that Environment Canada was satisfied that Alberta's proposed mitigation plan would remedy any detrimental effects on the fisheries. The Society tried once again to have the Minister of the Environment invoke the *Guidelines Order* on February 22, 1988, but was turned down in June 1988 for the same jurisdictional reason.

The Society was also busy on the provincial front to have the project stopped. On October 26, 1987 it brought an application in the Court of Queen's Bench of Alberta to quash an interim licence granted under the *Water Resources Act*, R.S.A. 1980, c. W-5. The licence was, in fact, quashed by order on December 8, 1987. A second interim licence was granted on February 5, 1988 and the Society applied in the Court of Queen's Bench to have that one quashed as well. However, that application was dismissed on April 21, 1988. The Society also asked the Alberta Energy Resources Conservation Board to conduct a public hearing under the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13, but its request was refused. That decision was affirmed by the Alberta Court of Appeal. In August 1988 the vice-president of the Society swore an information before a justice of the peace alleging that an offence had been committed against the federal *Fisheries Act* but the Attorney General for Alberta stayed the proceedings.

The contract for construction of the dam was awarded in February 1988, and as of March 31, 1989 the dam was 40 percent complete. The pre-

l'existence des [TRADUCTION] «arrangements administratifs qui régissent depuis longtemps la gestion des pêches en Alberta». Ce refus, à l'instar des mesures susmentionnées prises par le ministre des Transports, joue un rôle important dans l'argumentation juridique qui a suivi. Dans une lettre du 3 décembre 1987, la Société intimée a demandé au ministre de l'Environnement d'assujettir le projet à l'évaluation en vertu du *Décret sur les lignes directrices*; cette demande a de nouveau été refusée, cette fois principalement au motif que le projet de barrage relevait fondamentalement de la compétence provinciale et qu'Environnement Canada était convaincu que le plan d'atténuation proposé par l'Alberta devait pallier tout effet néfaste sur les ressources halieutiques. Le 22 février 1988, la Société a de nouveau tenté d'inciter le ministre de l'Environnement à invoquer l'application du *Décret sur les lignes directrices*, mais a de nouveau essuyé un refus en juin 1988 pour le même motif de compétence.

La Société a également tenté à l'échelon provincial de faire arrêter le projet. Le 26 octobre 1987, elle a présenté une demande auprès de la Cour du Banc de la Reine de l'Alberta sollicitant l'annulation d'un permis provisoire délivré en vertu de la *Water Resources Act*, R.S.A. 1980, ch. W-5. Ce permis a été annulé le 8 décembre 1987 et un second permis provisoire délivré le 5 février 1988; la Société a de nouveau demandé à la Cour du Banc de la Reine d'annuler ce permis. Toutefois, cette demande a été rejetée le 21 avril 1988. La Société a également demandé à l'Alberta Energy Resources Conservation Board de tenir une audience publique en vertu de l'*Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, mais cette demande a été refusée. La Cour d'appel de l'Alberta a confirmé cette décision. En août 1988, la vice-présidente de la Société a déposé une plainte devant un juge de paix, alléguant qu'il y avait eu contravention à la *Loi sur les pêches* du fédéral; toutefois, le procureur général de l'Alberta a ordonné un arrêt des procédures.

Le contrat de construction du barrage a été octroyé en février 1988 et, le 31 mars 1989, les travaux étaient achevés à 40 pour 100. La présente

sent action was commenced on April 21, 1989 in the Trial Division of the Federal Court, [1990] 1 F.C. 248. In the action, the Society sought an order in the nature of *certiorari* to quash the approval granted by the Minister of Transport as well as an order in the nature of mandamus requiring the Minister of Transport and the Minister of Fisheries and Oceans to comply with the *Guidelines Order*. Jerome A.C.J. dismissed the application but the Society's appeal to the Federal Court of Appeal was successful, [1990] 2 F.C. 18. This Court granted leave to appeal on September 13, 1990, [1990] 2 S.C.R. x.

Legislation

Before going further, it will be useful to set forth the major parts of the relevant legislation. The *Department of the Environment Act* reads in relevant part:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(*a*) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

. . .

5. The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall

(*a*) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed

(i) to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution,

(ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account, and

action a été intentée le 21 avril 1989 devant la Section de première instance de la Cour fédérale, [1990] 1 C.F. 248. Dans cette action, la Société sollicitait une ordonnance cassant par voie de *certiorari* l'approbation donnée par le ministre des Transports ainsi qu'un bref de la nature d'un *mandamus* ordonnant au ministre des Transports et au ministre des Pêches et des Océans de se conformer au *Décret sur les lignes directrices*. Le juge en chef adjoint Jerome a rejeté la demande, mais la Société a eu gain de cause devant la Cour d'appel fédérale, [1990] 2 C.F. 18. Notre Cour a accordé l'autorisation de pourvoi le 13 septembre 1990, [1990] 2 R.C.S. x.

Les dispositions législatives

Avant de poursuivre, il est utile de présenter les principales parties des textes législatifs pertinents. La *Loi sur le ministère de l'Environnement*:

4. (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés:

a) à la conservation et l'amélioration de la qualité de l'environnement naturel, notamment celle de l'eau, de l'air et du sol;

. . .

5. Dans le cadre des pouvoirs et fonctions que lui confère l'article 4, le ministre:

a) lance, recommande ou entreprend à son initiative et coordonne à l'échelle fédérale des programmes visant à:

(i) favoriser la fixation ou l'adoption d'objectifs ou de normes relatifs à la qualité de l'environnement ou à la lutte contre la pollution,

(ii) faire en sorte que les nouveaux projets, programmes et activités fédéraux soient, dès les premières étapes de planification, évalués en fonction de leurs risques pour la qualité de l'environnement naturel, et que ceux d'entre eux dont on aura estimé qu'ils présentent probablement des risques graves fassent l'objet d'un réexamen dont les résultats devront être pris en considération,

(iii) to provide to Canadians environmental information in the public interest;

(*b*) promote and encourage the institution of practices and conduct leading to the better preservation and enhancement of environmental quality, and cooperate with provincial governments or agencies thereof, or any bodies, organization or persons, in any programs having similar objects; and

(*c*) advise the heads of departments, boards and agencies of the Government of Canada on all matters pertaining to the preservation and enhancement of the quality of the natural environment.

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

Pursuant to s. 6, the Minister, by order, with the approval of the Governor in Council, established the *Guidelines Order*. It reads in relevant part as follows:

2. In these Guidelines,

. . .

"initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal;

. . .

"proponent" means the organization or the initiating department intending to undertake a proposal;

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the impli-

(iii) fournir, dans l'intérêt public, de l'information sur l'environnement à la population;

b) favorise et encourage des comportements tendant à protéger et améliorer la qualité de l'environnement, et coopère avec les gouvernements provinciaux ou leurs organismes, ou avec tous autres organismes, groupes ou particuliers, à des programmes dont les objets sont analogues;

c) conseille les chefs des divers ministères ou organismes fédéraux en matière de conservation et d'amélioration de la qualité de l'environnement naturel.

6. Au titre de celles de ses fonctions qui portent sur la qualité de l'environnement, le ministre peut par arrêté, avec l'approbation du gouverneur en conseil, établir des directives à l'usage des ministères et organismes fédéraux et, s'il y a lieu, à celui des sociétés d'État énumérées à l'annexe III de la *Loi sur la gestion des finances publiques* et des organismes de réglementation dans l'exercice de leurs pouvoirs et fonctions.

Conformément à l'art. 6, le ministre a par arrêté, avec l'approbation du gouverneur en conseil, établi le *Décret sur les lignes directrices*, dont les dispositions pertinentes sont:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

. . .

«ministère responsable» Ministère qui, au nom du gouvernement du Canada, exerce le pouvoir de décision à l'égard d'une proposition.

. . .

«promoteur» L'organisme ou le ministère responsable qui se propose de réaliser une proposition.

«proposition» S'entend en outre de toute entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions.

3. Le processus est une méthode d'auto-évaluation selon laquelle le ministère responsable examine, le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables, les répercussions

cations are significant, refer the proposal to the Minister for public review by a Panel.

. . .

6. These Guidelines shall apply to any proposal

(*a*) that is to be undertaken directly by an initiating department;

(*b*) that may have an environmental effect on an area of federal responsibility;

(*c*) for which the Government of Canada makes a financial commitment; or

(*d*) that is located on lands, including the offshore, that are administered by the Government of Canada.

Reference must also be made to s. 5 of the *Navigable Waters Protection Act* which reads as follows:

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(*a*) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;

(*b*) the construction of the work is commenced within six months and completed within three years after the approval referred to in paragraph (*a*) or within such further period as the Minister may fix; and

(*c*) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (*a*).

environnementales de toutes les propositions à l'égard desquelles il exerce le pouvoir de décision.

. . .

6. Les présentes lignes directrices s'appliquent aux propositions

a) devant être réalisées directement par un ministère responsable;

b) pouvant avoir des répercussions environnementales sur une question de compétence fédérale;

c) pour lesquelles le gouvernement du Canada s'engage financièrement; ou

d) devant être réalisées sur des terres administrées par le gouvernement du Canada, y compris la haute mer.

On doit aussi mentionner l'art. 5 de la *Loi sur la protection des eaux navigables*:

5. (1) Il est interdit de construire ou de placer un ouvrage dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux à moins que:

a) préalablement au début des travaux, l'ouvrage, ainsi que son emplacement et ses plans, n'aient été approuvés par le ministre selon les modalités qu'il juge à propos;

b) la construction de l'ouvrage ne soit commencée dans les six mois et terminée dans les trois ans qui suivent l'approbation visée à l'alinéa *a*) ou dans le délai supplémentaire que peut fixer le ministre;

c) la construction, l'emplacement ou l'entretien de l'ouvrage ne soit conforme aux plans, aux règlements et aux modalités que renferme l'approbation visée à l'alinéa *a*).

Judicial History

Trial Division

Jerome A.C.J. identified the four main issues in the action as follows: (1) the standing of the applicant to bring the application; (2) whether the federal Ministers named were bound to invoke the *Guidelines Order*; (3) the applicability of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309 (T.D.), aff'd (1989), 99 N.R. 72 (F.C.A.), to the facts of this case; and (4) whether he should exercise his discretion to grant the remedies sought. He dealt

L'historique judiciaire

La Section de première instance

Le juge en chef adjoint Jerome a présenté les quatre questions principales de la façon suivante: (1) la requérante a-t-elle qualité pour présenter la demande en l'espèce? (2) les ministres fédéraux nommés sont-ils tenus d'invoquer le *Décret sur les lignes directrices*? (3) la décision *Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement)*, [1989] 3 C.F. 309 (1re inst.), confirmée par (1989), 99 N.R. 72 (C.A.F.), s'applique-t-elle aux faits de la présente espèce? (4) la

with the first issue by simply assuming, without deciding, that the Society had the requisite standing to bring the application.

With respect to the *Guidelines Order*, Jerome A.C.J. first held that the Minister of Transport was not bound to apply it in assessing the application under the *Navigable Waters Protection Act*, and indeed he found that the Minister would have exceeded his jurisdiction had he invoked the *Guidelines Order*. The reasoning was that the Act sets out no requirement for environmental review but instead confines the Minister to consider only factors affecting marine navigation. Similarly, the Minister of Fisheries and Oceans was without jurisdiction to apply the *Guidelines Order* because his department had not undertaken a project. In the alternative, if the *Guidelines Order* could be said to apply to provincially initiated projects, it would only apply where a federal department received a "proposal" requiring its approval. As the *Fisheries Act* did not contemplate an approval procedure for a permit or licence, the *Guidelines Order* did not apply. Nor were environmental factors raised under either the *Fisheries Act* or the *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15.

Jerome A.C.J. then turned to the *Canadian Wildlife* case. In that case, which I shall discuss with more particularity later, the Federal Court of Appeal had held that before the project in question there, the Rafferty-Alameda Dam, could be undertaken, it was necessary to obtain the approval of the Minister of the Environment. Jerome A.C.J. distinguished that case on two grounds. First, the case involved authorization under the *International River Improvements Act*, R.S.C., 1985, c. I-20, which required prior approval from the Minister of

cour devait-elle exercer son pouvoir discrétionnaire d'accorder les redressements demandés? En ce qui concerne la première question, il a simplement tenu pour acquis, sans en décider, que la Société avait la qualité voulue pour présenter la demande.

En ce qui concerne le *Décret sur les lignes directrices*, le juge en chef adjoint Jerome a tout d'abord statué que le ministre des Transports n'était pas tenu de l'appliquer dans l'évaluation de la demande présentée en vertu de la *Loi sur la protection des eaux navigables* et, en fait, il a conclu que, s'il avait invoqué le *Décret sur les lignes directrices*, le ministre aurait excédé les limites de sa compétence. Le raisonnement était que la Loi n'établit pas d'obligation de tenir un examen des incidences environnementales, mais limite plutôt le ministre à prendre en considération seulement les facteurs touchant la navigation. Par ailleurs, le ministre des Pêches et des Océans n'avait pas compétence pour appliquer le *Décret sur les lignes directrices* parce que son ministère n'avait pas entrepris de projet. Par contre, dans l'hypothèse où le *Décret sur les lignes directrices* pouvait être étendu aux projets lancés par les provinces, il ne se serait appliqué que dans les cas où un ministère fédéral aurait reçu une «proposition» exigeant son approbation. Comme la *Loi sur les pêches* ne prévoit pas de procédure d'approbation qui serait applicable à un permis ou à une licence, le *Décret sur les lignes directrices* ne s'applique pas. En outre, les facteurs environnementaux ne sont soulevés ni dans la *Loi sur les pêches* ni dans la *Loi sur le ministère des Pêches et des Océans*, L.R.C. (1985), ch. F-15.

Le juge en chef adjoint Jerome examine ensuite l'arrêt *Fédération canadienne de la faune*. Dans cette affaire, que j'analyserai plus à fond plus loin, la Cour d'appel fédérale a statué que le ministre de l'Environnement devait approuver le projet en question, le barrage Rafferty-Alameda, avant sa mise en œuvre. Le juge en chef adjoint Jerome estime que cette affaire se distingue de celle de l'espèce pour deux raisons. Premièrement, il était question d'une autorisation requise aux termes de la *Loi sur les ouvrages destinés à l'amélioration*

the Environment, as opposed to the instant case where approval may be granted under the *Navigable Waters Protection Act* after the project is commenced. Second, the Rafferty-Alameda project involved the Minister of the Environment whose statutory duties under the *Department of the Environment Act* included consideration of environmental factors.

Lastly, on the issue of the discretionary nature of the relief sought, Jerome A.C.J. found against the Society because of delay and the unnecessary duplication that would result. Between the grant of approval on September 18, 1987 and the commencement of this action on April 21, 1989, he noted, no steps had been taken to quash the approval and compel the application of the *Guidelines Order*. By the time the action was started the project was 40 percent complete. Furthermore, Alberta had already conducted an extensive environmental review of the project and had "identified every possible area of environmental social concern and ha[d] given every citizen, including the members of the applicant organization, ample opportunity to voice their views and to mobilize their opposition" (pp. 273-74). That being so, applying the *Guidelines Order* would be needlessly repetitive. Accordingly, he dismissed the application.

The Society then launched an appeal to the Federal Court of Appeal.

Court of Appeal

Stone J.A., writing for the court, began by noting that the Oldman River Dam may have an environmental effect on at least three areas of federal responsibility, namely fisheries, Indians and Indian lands. He disagreed with the view that the Minister of Transport was restricted to considering matters affecting marine navigation only. He found that the dam project fell within the ambit of the *Guidelines*

des cours d'eau internationaux, L.R.C. (1985), ch. I-20, nécessitant l'approbation préalable du ministre de l'Environnement; en l'espèce, l'approbation en vertu de la *Loi sur la protection des eaux navigables* peut être accordée une fois la réalisation du projet entamée. Deuxièmement, le projet de construction du barrage de Rafferty-Alameda faisait intervenir le ministre de l'Environnement à qui la *Loi sur le ministère de l'Environnement* imposait l'obligation de se prononcer sur des facteurs environnementaux.

Enfin, en ce qui concerne le caractère discrétionnaire du redressement recherché, le juge en chef adjoint Jerome n'a pas fait droit à la demande de la Société en raison du retard et du chevauchement inutile qui s'ensuivraient. Entre l'approbation accordée le 18 septembre 1987 et le début de la présente action le 21 avril 1989, il précise qu'aucune mesure n'a été prise pour faire annuler cette approbation et forcer l'application du *Décret sur les lignes directrices*. À la date où la présente action a été intentée, le projet était déjà complété à environ 40 pour 100. Par ailleurs, la province d'Alberta avait déjà procédé à un examen exhaustif des incidences environnementales du projet qui «a permis le recensement complet des questions pouvant faire l'objet de préoccupations sociales environnementales, en sorte de donner à tous les citoyens, y compris les membres de l'organisation requérante, l'entière possibilité d'exprimer leur opinion et de se mobiliser en vue de contester le projet» (pp. 273 et 274). Cela étant, l'application du *Décret sur les lignes directrices* serait inutilement répétitive. Il a donc rejeté la demande.

La Société a alors interjeté appel auprès de la Cour d'appel fédérale.

La Cour d'appel

Le juge Stone, s'exprimant au nom de la cour, a tout d'abord fait remarquer que la construction du barrage sur la rivière Oldman peut avoir des répercussions environnementales sur au moins trois domaines de compétence fédérale, soit les pêcheries, les Indiens et les terres indiennes. Il n'est pas d'accord avec la proposition selon laquelle le ministre des Transports pouvait seulement prendre

Order and that the Department of Transport was an "initiating department" for the purposes of the *Guidelines Order* thereby engaging the application of the *Guidelines Order*. Stone J.A. referred to the *Canadian Wildlife* case for authority that the *Guidelines Order* was a law of general application, and as such imposed on the Minister a "superadded" duty over and above his other statutory powers. Nor was there any conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in the *Guidelines Order*, and the remedial power under s. 6 of the *Navigable Waters Protection Act* to grant approval after the commencement of construction. That power, he held, is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the *Guidelines Order*.

Stone J.A. next turned to the question whether the Minister of Fisheries and Oceans was compelled to apply the *Guidelines Order*. He first considered whether the Minister had been seized with a "proposal" as defined in the Act so as to make him subject to the *Guidelines Order*. He concluded in the affirmative. "Proposal", in Stone J.A.'s view, is there used in a far broader sense than its ordinary meaning. In particular it is not limited to something in the nature of an application. An application is but one way in which an "initiative, undertaking or activity" can come to the attention of the Minister but it is not the only way. Another way is for an individual to request that the Minister take action under the appropriate statute, as was done here, and since the Minister was aware of an initiative within a federal area of responsibility, there was a "proposal" as defined in the *Guidelines Order*. Moreover, the Minister's decision not to intervene constituted him as a "decision making

en considération les facteurs touchant la navigation. Il a conclu que le projet de barrage était visé par le *Décret sur les lignes directrices* et que le ministère des Transports était le «ministère responsable» aux fins de l'application de ce décret, ce qui en déclenchait l'application. Le juge Stone s'appuie ensuite sur l'arrêt *Fédération canadienne de la faune* pour déclarer que le *Décret sur les lignes directrices* est une règle d'application générale et qu'il impose au ministre une fonction qui «s'ajoute» à l'exercice des autres pouvoirs qui lui sont conférés par des lois. Il n'existe pas de conflit entre, d'une part, le fait d'exiger dans le *Décret sur les lignes directrices* qu'un examen soit effectué «le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables» et, d'autre part, le pouvoir de redressement permettant au ministre d'accorder une approbation après le début des travaux, en vertu de l'art. 6 de la *Loi sur la protection des eaux navigables*. Selon le juge Stone, ce pouvoir constitue une exception à la règle générale énoncée à l'art. 5 de la Loi selon laquelle il faut obtenir une approbation avant le début de la construction et, dans l'exercice de son pouvoir discrétionnaire, rien n'empêche le ministre d'appliquer le *Décret sur les lignes directrices*.

Le juge Stone examine ensuite la question de savoir si le ministre des Pêches et des Océans était tenu d'appliquer le *Décret sur les lignes directrices*. Il tente tout d'abord de déterminer si le ministre était saisi d'une «proposition» au sens de la Loi de façon à déclencher l'application du *Décret sur les lignes directrices*. Il arrive à une conclusion affirmative. Selon le juge Stone, le terme «proposition» est un terme défini dont la portée est beaucoup plus large que sa portée courante. En particulier il n'est pas limité à quelque chose de la nature d'une demande. Une demande n'est qu'un moyen, parmi d'autres, d'attirer l'attention du ministre sur l'existence d'une «entreprise ou activité». Un ministre peut aussi être mis au courant par une démarche d'un particulier sollicitant des mesures spécifiques aux termes d'une loi, comme en l'espèce, et, puisque le ministre était au courant d'un projet dans un domaine de compétence fédérale, il existait une «proposition» au sens

authority" and thus triggered his obligations under the *Guidelines Order*.

Stone J.A. then dealt with the issue of discretion and reviewed the relevant principles which apply to an appellate court interfering with a trial judge's exercise of discretion. Shortly put, such interference is not warranted absent a finding that the trial judge proceeded on an erroneous principle or a misapprehension of the facts, or where the order is not just and reasonable. Parenthetically, and by way of footnote, Stone J.A. was of the view that refusing to grant prerogative relief on the ground of delay was not "well-founded in principle", because the delay was explained by the facts, especially that the respondent did not become aware of the approval granted by the Minister of Transport until only two months before the action was commenced. Further, the respondent was otherwise engaged in challenging the provincial licence issued, and it was not until the eve of this action that the Trial Division of the Federal Court handed down its decision in the *Canadian Wildlife* case holding that the *Guidelines Order* was binding on the Minister of the Environment.

As to the unnecessary duplication that could result from granting the relief sought, Stone J.A. found that the provincial environmental review process was deficient in two respects when contrasted with the environmental impact assessment required by the *Guidelines Order*. First, the provincial legislation did not place the same emphasis on public participation in the process as the *Guidelines Order*. Secondly, there was nothing in the provincial legislation requiring the same degree of independence of the review panel.

du *Décret sur les lignes directrices*. Par ailleurs, la décision du ministre de ne pas intervenir faisait de lui celui qui «exerce le pouvoir de décision», déclenchant ainsi ses obligations en vertu du *Décret sur les lignes directrices*.

Le juge Stone examine ensuite la question du pouvoir discrétionnaire et analyse les principes pertinents applicables à une cour d'appel quant à la modification d'une décision rendue par un juge de première instance dans l'exercice d'un pouvoir discrétionnaire. Bref, une cour d'appel ne serait pas justifiée de modifier en appel la décision, sauf si le juge de première instance a agi sur le fondement d'un principe erroné ou d'une appréciation fautive des faits ou si l'ordonnance prononcée n'est pas juste et raisonnable. Entre parenthèses, et dans la note en bas de page, le juge Stone se dit d'avis que la décision de refuser la délivrance du bref de prérogative parce que les procédures auraient été intentées trop tard n'est pas «bien fondée dans son principe», parce que les faits expliquent le retard, particulièrement que l'intimée n'a eu connaissance de la décision du ministre des Transports d'accorder l'approbation que deux mois avant le début des procédures. Par ailleurs, l'intimée avait tenté de contester le permis provincial délivré et ce n'est qu'à la veille du commencement des procédures que la Section de première instance de la Cour fédérale a décidé, dans l'affaire *Fédération canadienne de la faune*, que le ministre de l'Environnement était lié par le *Décret sur les lignes directrices*.

En ce qui concerne la répétition inutile à laquelle pourrait donner lieu l'octroi de la réparation demandée, le juge Stone a statué que le processus provincial d'examen en matière d'environnement échoue sous deux aspects lorsqu'on le compare au processus d'évaluation des incidences environnementales prévu dans le *Décret sur les lignes directrices*. Premièrement, les textes législatifs provinciaux n'accordent pas la même importance à la participation du public au processus que le *Décret sur les lignes directrices*. Deuxièmement, rien dans les textes législatifs provinciaux n'exige le même degré d'indépendance que celui qui est exigé de la commission d'examen.

The last issue addressed by Stone J.A. that has been raised in this appeal is whether the *Navigable Waters Protection Act* binds the Crown in right of Alberta. Referring to this Court's decision in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, he held that the Act, especially s. 4 when read in context, evidenced an intention to bind the Crown. Furthermore, the purpose of the Act would be wholly frustrated if the Crown were not bound, it being well known that many obstructions placed in navigable waters are sponsored by government.

As a result the appeal was allowed, the approval was quashed and the Ministers of Transport and Fisheries and Oceans ordered to comply with the *Guidelines Order*.

The Appeal to this Court

As earlier noted, leave to appeal to this Court was sought and granted, and the Chief Justice stated the following constitutional question on October 29, 1990:

> Is the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by the appellant, Her Majesty the Queen in right of Alberta?

Interventions were then filed by the Attorneys General of Quebec, New Brunswick, Manitoba, British Columbia, Saskatchewan and Newfoundland and the Minister of Justice of the Northwest Territories, and a number of environmental groups, namely the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), Friends of the Earth and the Alberta Wilderness Association, as well as several Indian organizations, namely, the National Indian Brotherhood and the Assembly of First Nations, the Dene Nation and the Metis Association of the

La dernière question analysée par le juge Stone et qui est aussi soulevée dans le présent pourvoi est celle de savoir si la *Loi sur la protection des eaux navigables* lie la Couronne du chef de l'Alberta. En se fondant sur la décision rendue par notre Cour dans *Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 2 R.C.S. 225, le juge Stone a statué que la Loi, tout particulièrement l'art. 4 examiné dans son contexte, permet de constater une intention de lier la Couronne. Par ailleurs, la Loi serait privée de toute efficacité si ses dispositions ne liaient pas la Couronne, puisqu'il est notoire qu'un grand nombre d'ouvrages obstruant des eaux navigables sont construits sous l'égide des gouvernements.

En conséquence, l'appel a été accueilli, l'approbation a été annulée et le ministre des Transports et celui des Pêches et des Océans ont été enjoints de se conformer au *Décret sur les lignes directrices*.

Le pourvoi devant notre Cour

Comme je l'ai déjà mentionné, une autorisation de pourvoi a été demandée à notre Cour, qui l'a accordée, et le Juge en chef a formulé la question constitutionnelle suivante le 29 octobre 1990:

> Le *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*, DORS/84-467, est-il général au point de contrevenir aux art. 92 et 92A de la *Loi constitutionnelle de 1867* et d'être, par conséquent, constitutionnellement inapplicable au barrage de la rivière Oldman appartenant à l'appelante Sa Majesté la Reine du chef de l'Alberta?

Des interventions ont ensuite été déposées par les procureurs généraux du Québec, du Nouveau-Brunswick, du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de Terre-Neuve, le ministre de la Justice des Territoires du Nord-Ouest et un certain nombre de groupes environnementaux, notamment le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), les Amis de la Terre et l'Alberta Wilderness Association, ainsi que par plusieurs organisations indiennes, notamment la Fraternité des Indiens du Canada et l'Assemblée

Northwest Territories, and the Native Council of Canada (Alberta).

Issues

The many issues arising in this appeal have been variously ordered by the parties in their written submissions, but I prefer to deal with them as follows:

1. Statutory Validity of the *Guidelines Order*

   a. Is the *Guidelines Order* authorized by s. 6 of the *Department of the Environment Act*?

   b. Is the *Guidelines Order* inconsistent with the *Navigable Waters Protection Act* and the *Fisheries Act*?

2. Obligation of the Ministers to Comply with the *Guidelines Order*

   a. Does s. 4(1) of the *Department of the Environment Act* preclude the application of the *Guidelines Order* to the Ministers?

   b. Does the *Guidelines Order* apply to projects other than new federal projects?

   c. Are the Ministers "initiating departments"?

   d. Is the *Navigable Waters Protection Act* binding on the Crown in right of Alberta?

3. Constitutional Question

   Is the *Guidelines Order* so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by Alberta?

des premières nations, la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest ainsi que le Conseil national des autochtones du Canada (Alberta).

Les questions en litige

Les parties ont présenté de diverses façons dans leur mémoire les nombreuses questions soulevées dans le présent pourvoi, mais je préfère les analyser dans l'ordre suivant:

1. La validité législative du *Décret sur les lignes directrices*

   a. Le *Décret sur les lignes directrices* est-il autorisé par l'art. 6 de la *Loi sur le ministère de l'Environnement*?

   b. Le *Décret sur les lignes directrices* est-il incompatible avec la *Loi sur la protection des eaux navigables* et la *Loi sur les pêches*?

2. L'obligation des ministres de se conformer au *Décret sur les lignes directrices*

   a. Le paragraphe 4(1) de la *Loi sur le ministère de l'Environnement* écarte-t-il l'application aux ministres du *Décret sur les lignes directrices*?

   b. Le *Décret sur les lignes directrices* s'applique-t-il aux projets autres que les nouveaux projets fédéraux?

   c. Les ministres sont-ils des «ministères responsables»?

   d. La *Loi sur la protection des eaux navigables* lie-t-elle la Couronne du chef de l'Alberta?

3. La question constitutionnelle

   Le *Décret sur les lignes directrices* est-il général au point de contrevenir aux art. 92 et 92A de la *Loi constitutionnelle de 1867*, et d'être, par conséquent, constitutionnellement inapplicable au barrage de la rivière Oldman appartenant à l'Alberta?

4. Discretion

Did the Federal Court of Appeal err in interfering with the discretion of Jerome A.C.J. whereby he declined to grant the remedies sought?

Statutory Validity of the Guidelines Order

Is the *Guidelines Order* Authorized by s. 6 of the *Department of the Environment Act*?

The appellant Alberta argued that the *Guidelines Order* is *ultra vires* because it does not fall within the scope of the powers conferred under its enabling legislation, s. 6 of the *Department of the Environment Act*. For convenience, I shall repeat this provision:

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

The principal ground on which it is contended that the *Guidelines Order* is invalid is that by using the term "guidelines" s. 6 does not empower the enactment of mandatory subordinate legislation, but instead only contemplates a purely administrative directive not intended to be legally binding on those to whom it is addressed. There is of course no doubt that the power to make subordinate legislation must be found within the four corners of its enabling statute, and it is there that one must turn to determine if the Act can support delegated legislation of a mandatory nature, the non-compliance with which can found prerogative relief.

This issue was addressed in *Canadian Wildlife*, *supra*. In that case the applicant challenged the issuance of a licence by the Minister of the Environment under the *International River Improvements Act* and sought an order in the nature of *cer-*

4. Le pouvoir discrétionnaire

La Cour d'appel fédérale a-t-elle commis une erreur en modifiant la décision de refuser d'accorder les réparations demandées, prise par le juge en chef adjoint Jerome dans l'exercice de son pouvoir discrétionnaire?

La validité législative du Décret sur les lignes directrices

Le *Décret sur les lignes directrices* est-il autorisé par l'art. 6 de la *Loi sur le ministère de l'Environnement*?

L'appelante l'Alberta soutient que le *Décret sur les lignes directrices* est *ultra vires* parce qu'il n'est pas compris dans les pouvoirs prévus dans le texte habilitant, soit l'art. 6 de la *Loi sur le ministère de l'Environnement*. Par souci de commodité, je reproduis la disposition en question:

6. Au titre de celles de ses fonctions qui portent sur la qualité de l'environnement, le ministre peut par arrêté, avec l'approbation du gouverneur en conseil, établir des directives à l'usage des ministères et organismes fédéraux et, s'il y a lieu, à celui des sociétés d'État énumérées à l'annexe III de la *Loi sur la gestion des finances publiques* et des organismes de réglementation dans l'exercice de leurs pouvoirs et fonctions.

Le principal motif invoqué à l'appui de la prétention que le *Décret sur les lignes directrices* n'est pas valide est que l'emploi du terme «directives» à l'art. 6 ne permet pas l'adoption de textes réglementaires impératifs, mais envisage seulement l'établissement de directives purement administratives qui ne visent pas à lier juridiquement ceux à qui elles s'adressent. Il n'y a pas de doute que le pouvoir d'adopter des textes réglementaires doit être prévu dans la loi habilitante et c'est celle-ci que l'on doit examiner pour déterminer si la Loi peut appuyer l'adoption d'un texte réglementaire impératif, dont la violation peut entraîner une demande de bref de prérogative.

Cette question a été analysée dans l'arrêt *Fédération canadienne de la faune*, précité. Dans cette affaire, la requérante contestait la délivrance d'un permis par le ministre de l'Environnement en vertu de la *Loi sur les ouvrages destinés à l'amélioration*

tiorari quashing the licence, and mandamus requiring the Minister to comply with the *Guidelines Order*. In the Trial Division, Cullen J. found that the *Guidelines Order* is an enactment or regulation as defined in s. 2(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21, which provides:

2. (1) In this Act,

. . .

"enactment" means an Act or regulation or any portion of an Act or regulation;

. . .

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council;

Cullen J. then concluded, at p. 322:

Therefore, EARP Guidelines Order is not a mere description of a policy or programme; it may create rights which may be enforceable by way of *mandamus* (see *Young v. Minister of Employment and Immigration* (1987), 8 F.T.R. 218 (F.C.T.D.) at page 221).

In the Court of Appeal, Hugessen J.A. relied on both the English and French versions of s. 6 of the *Department of the Environment Act* to find that it was capable of supporting a power to enact binding subordinate legislation. "The word 'guidelines'", he stated, "in itself is neutral in this regard." Turning then, to the question whether the Guidelines were so written as to make them mandatory, he observed, at pp. 73-74:

Finally, there is nothing in the text of the Guidelines themselves which indicates that they are not mandatory; on the contrary, the repeated use of the word "shall" . . . throughout, and particularly in ss. 6, 13 and 20, indicates a clear intention that the Guidelines shall bind all those to whom they are addressed, including the Minister of the Environment himself.

des cours d'eau internationaux et sollicitait une ordonnance de la nature d'un *certiorari* annulant le permis, et un *mandamus* enjoignant au ministre de l'Environnement de se conformer au *Décret sur les lignes directrices*. Le juge Cullen de la Section de première instance a statué que le *Décret sur les lignes directrices* est un texte ou un règlement au sens du par. 2(1) de la *Loi d'interprétation*, L.R.C. (1985) ch. I-21:

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

. . .

«règlement» Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris:

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité.

«texte» Tout ou partie d'une loi ou d'un règlement.

Le juge Cullen conclut à la p. 322:

Par conséquent, le Décret n'est pas un simple énoncé de politique ou de programme; il est susceptible de créer des droits qu'on peut faire respecter par voie de *mandamus* (voir *Young c. Ministre de l'emploi et de l'immigration* (1987), 8 F.T.R. 218 (C.F. 1re inst.), à la p. 221).

En Cour d'appel, le juge Hugessen s'est fondé sur les versions française et anglaise de l'art. 6 de la *Loi sur le ministère de l'Environnement* pour statuer que cette loi pouvait appuyer l'existence d'un pouvoir d'adopter un texte réglementaire impératif. «Le mot «directives» en lui-même, a-t-il précisé, est neutre à cet égard«. Quant à la question de savoir si les Lignes directrices avaient été rédigées de façon à les rendre impératives, il écrit aux pp. 73 et 74:

En dernier lieu, rien dans le textes des Directives elles-mêmes n'indique qu'elles ne sont pas impératives; au contraire, l'emploi répété du verbe «shall» [. . .] dans la version anglaise des Directives, et particulièrement aux articles 6, 13 et 20, montre l'intention évidente que les Directives aient force obligatoire pour tous ceux qu'elles visent, y compris le ministre de l'Environnement lui-même.

I would agree with him on both points. The first question depends on legislative intent. The guidelines under the Act reviewed by this Court in the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, for example, were clearly mandatory in nature. I am satisfied that s. 6 of the Act can sustain the enactment of mandatory guidelines, and that the Guidelines as framed are mandatory in nature.

There is nothing here to indicate that the *Guidelines Order* is merely another form of administrative directive which cannot confer enforceable rights, as was the case in *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118. In *Martineau* the issue was whether a directive concerning the discipline of inmates, authorized by s. 29(3) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, was "law" within the wording of s. 28 of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and thus gave the Federal Court jurisdiction to review a disciplinary order made by the Board. This Court, by majority, held that the directive was not "law" within s. 28, Pigeon J. noting, at p. 129:

> It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. [Emphasis added.]

There is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible; see for example *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law.

Je suis d'accord avec lui sur ces deux points. La première question dépend de l'intention du législateur. Les lignes directrices, établies en vertu de la Loi que notre Cour a analysée dans le *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373, par exemple, étaient clairement impératives. Je suis convaincu que l'art. 6 de la Loi permet l'adoption de lignes directrices impératives et que les Lignes directrices sont formulées de façon à les rendre impératives.

En l'espèce, rien n'indique que le *Décret sur les lignes directrices* ne constitue qu'une autre forme de directive administrative qui ne peut établir de droits exécutoires, comme dans l'arrêt *Martineau c. Comité de discipline des détenus de l'Institution de Matsqui*, [1978] 1 R.C.S. 118. Dans cette affaire, la question était de savoir si l'on était «légalement» soumis, au sens de l'art. 28 de la *Loi sur la Cour fédérale*, S.C. 1970-71-72, ch. 1, à une directive concernant les mesures disciplinaires prises contre les détenus, adoptée en vertu du par. 29(3) de la *Loi sur les pénitenciers*, S.R.C. 1970, ch. P-6, de façon que la Cour fédérale avait compétence pour examiner une décision disciplinaire prononcée par le Comité. Notre Cour à la majorité a statué que la décision du comité ne se trouvait pas, au sens de l'art. 28, «légalement» soumise au processus prescrit par la directive. Le juge Pigeon indique à la p. 129:

> Il est significatif qu'il n'est prévu aucune sanction pour elles et, bien qu'elles soient autorisées par la Loi, elles sont nettement de nature administrative et non législative. Ce n'est pas en qualité de législateur que le commissaire est habilité à établir des directives, mais en qualité d'administrateur. Je suis convaincu qu'il aurait l'autorité d'établir ces directives même en l'absence d'une disposition législative expresse. [Je souligne.]

Il y a peu de doute qu'un ministre possède habituellement un pouvoir implicite d'établir des directives visant l'application d'une loi dont il est responsable; voir, par exemple, l'arrêt *Maple Lodge Farms Ltd. c. Gouvernement du Canada*, [1982] 2 R.C.S. 2. Il est également évident que la violation de ces directives ne donnerait lieu qu'à une sanction administrative et non judiciaire puisque celles-ci n'ont pas force de loi.

Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. Its effect is thus described by R. Dussault and L. Borgeat in *Administrative Law* (2nd ed. 1985), vol. 1, at pp. 338-39:

When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

The word "guidelines" cannot be construed in isolation; s. 6 must be read as a whole. When so read it becomes clear that Parliament has elected to adopt a regulatory scheme that is "law", and thus amenable to enforcement through prerogative relief.

Alberta also argues that the *Guidelines Order* is *ultra vires* on the ground that the scope of the subject matter covered in the delegated legislation goes far beyond that authorized by the *Department of the Environment Act*. More specifically, it contends that the authority to establish guidelines for the purposes of carrying out the Minister's duties related to "environmental quality" does not comprehend a process of environmental impact assess-

Cependant, en l'espèce, il s'agit d'une directive qui n'est pas simplement autorisée par une loi, mais qui doit être officiellement adoptée par «arrêté» et promulguée en vertu de l'art. 6 de la *Loi sur le ministère de l'Environnement*, sur approbation du gouverneur en conseil. Ce processus contraste vivement avec le processus habituel d'établissement de directives de politique interne ministérielle destinées à exercer un contrôle sur les fonctionnaires relevant de l'autorité du ministre. À mon avis, il s'agit là d'une distinction essentielle. Voici comment R. Dussault et L. Borgeat décrivent l'effet de cette distinction dans *Traité de droit administratif* (2e éd. 1984), t. I, à la p. 429:

Lorsqu'un gouvernement juge nécessaire de régir une situation par des normes de comportement, il peut faire adopter une loi ou édicter lui-même un règlement, ou bien procéder administrativement par voie de directives. Dans le premier cas, il doit s'astreindre aux formalités de l'adoption des lois et des règlements; par contre, il sait que, une fois ces formalités respectées, les nouvelles normes entreront dans le cadre de la «légalité» et qu'en vertu de la *Rule of law* elles seront appliquées par les tribunaux. Dans le second cas, c'est-à-dire s'il choisit de procéder par directives, que celles-ci soient ou non autorisées législativement, il opte plutôt pour la voie moins formalisée de l'autorité hiérarchique, dont les tribunaux n'ont pas à assurer le respect. Attribuer à des directives l'effet de règlements, c'est aller au-delà de l'intention du législateur. Celui-ci ne parlant pas pour ne rien dire, il faut respecter sa volonté implicite de laisser une situation hors du cadre strict de la «légalité».

On ne doit pas examiner le terme «directives» en vase clos; il faut interpréter l'art. 6 dans son ensemble. On se rend alors compte que le législateur fédéral a opté pour l'adoption d'un mécanisme de réglementation auquel on est soumis «légalement» et dont on peut obtenir l'exécution par bref de prérogative.

L'Alberta prétend également que le *Décret sur les lignes directrices* est *ultra vires* au motif que l'étendue du sujet traité dans la législation déléguée va bien au-delà de ce qui est autorisée par la *Loi sur le ministère de l'Environnement*. Plus particulièrement, l'Alberta soutient que le pouvoir du ministre de prendre des directives au titre de celles de ses fonctions qui portent sur la «qualité de l'environnement» ne comprend pas l'établissement

ment, such as found in the *Guidelines Order*, in which the decision maker is required to take into account socio-economic considerations. Rather, it is argued, the Act only permits the enactment of delegated legislation that is strictly concerned with matters relating to environmental quality as understood in a physical sense.

I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter; see *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. The point was made by the Canadian Council of Resource and Environment Ministers, following the "Brundtland Report" of the World Commission on Environment and Development, in the *Report of the National Task Force on Environment and Economy*, September 24, 1987, at p. 2:

> Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.

Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision making on matters affecting environmental quality, subject, of course, to the constitutional imperatives, an issue I will address later.

I have therefore concluded that the *Guidelines Order* has been validly enacted pursuant to the

d'un processus d'évaluation des incidences environnementales, comme celui que prévoit le *Décret sur les lignes directrices*, dans l'exécution duquel le décideur doit tenir compte de facteurs socio-économiques. On fait valoir plutôt que la Loi permet seulement l'adoption de textes réglementaires qui visent strictement les questions portant sur la qualité de l'environnement, prise dans un sens physique.

Je ne puis accepter que le concept de la qualité de l'environnement se limite à l'environnement biophysique seulement; une telle interprétation est indûment étroite et contraire à l'idée généralement acceptée que l'«environnement» est un sujet diffus; voir l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401. Ce point a été énoncé par le Conseil canadien des ministres des Ressources et de l'Environnement, à la suite du «Rapport Brundtland» de la Commission mondiale sur l'environnement et le développement, dans le *Rapport du Groupe de Travail national sur l'environnement et l'économie*, 24 septembre 1987, à la p. 2:

> Nos recommandations reflètent des principes que nous partageons avec la Commission mondiale sur l'environnement et le développement. Nous croyons notamment que la planification environnementale et la planification économique ne peuvent pas se faire dans des milieux séparés. La croissance économique à long terme dépend de l'environnement. Elle affecte aussi l'environnement de bien des façons. Pour assurer un développement économique durable et compatible avec l'environnement, nous avons besoin de la technologie et de la richesse produites par une croissance économique soutenue. La planification et la gestion de l'économie et de l'environnement doivent donc être intégrées.

Certes, les conséquences éventuelles d'un changement environnemental sur le gagne-pain, la santé et les autres préoccupations sociales d'une collectivité font partie intégrante de la prise de décisions concernant des questions ayant une incidence sur la qualité de l'environnement, sous réserve, bien entendu, des impératifs constitutionnels, question que j'examinerai plus loin.

Je conclus en conséquence que le *Décret sur les lignes directrices* a été validement adopté confor-

Department of the Environment Act, and is mandatory in nature.

Inconsistency With the *Navigable Waters Protection Act* and *Fisheries Act*

The appellants Alberta and the federal Ministers argue that the *Guidelines Order* is inconsistent with and therefore must yield to the requirements of the *Navigable Waters Protection Act* for obtaining an approval under s. 5 of that Act. Specifically, they say, the Minister of Transport is confined by the Act to a consideration of matters pertaining to marine navigation alone, and that the *Guidelines Order* cannot displace or add to the criteria mentioned in the Act. Alberta also submits that the *Guidelines Order* is similarly inconsistent with the *Fisheries Act*, but for the reasons set out later I do not find it necessary to address that issue.

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re Gray* (1918), 57 S.C.R. 150). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see *Daniels v. White*, [1968] S.C.R. 517. The rule in that case was stated in respect of two inconsistent statutes where one was deemed to repeal the other by virtue of the inconsistency. However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament—there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where incon-

mément à la *Loi sur le ministère de l'Environnement* et qu'il est de nature impérative.

L'incompatibilité avec la *Loi sur la protection des eaux navigables* et la *Loi sur les pêches*

Les appelants, l'Alberta et les ministres fédéraux, prétendent que le *Décret sur les lignes directrices* est incompatible avec les exigences de la *Loi sur la protection des eaux navigables* pour ce qui est de l'obtention d'une approbation en vertu de l'art. 5 de cette loi et que celle-ci doit avoir préséance sur le Décret. Plus particulièrement, ils disent que le ministre des Transports ne peut, en vertu de la Loi, tenir compte que des facteurs touchant la navigation et que le *Décret sur les lignes directrices* ne peut remplacer les critères prévus dans la Loi ni ajouter à ceux-ci. L'Alberta soutient aussi que le *Décret sur les lignes directrices* est également incompatible avec la *Loi sur les pêches*; toutefois, pour les motifs exprimés plus loin, j'estime inutile d'analyser cette question.

On ne met pas en doute les principes fondamentaux du droit. Il ne peut y avoir incompatibilité entre le texte réglementaire et la loi en vertu duquel il est adoptée (*Belanger c. The King* (1916), 54 R.C.S. 265), pas plus qu'il ne peut y en avoir avec les autres lois fédérales (*R. & W. Paul, Ltd. c. Wheat Commission*, [1937] A.C. 139 (H.L.)), sauf si la loi l'autorise (*Re Gray* (1918), 57 R.C.S. 150). Normalement, la loi fédérale doit l'emporter sur le texte réglementaire incompatible. Toutefois, en matière d'interprétation, un tribunal préférera, dans la mesure du possible, une interprétation qui permet de concilier les deux textes. Dans ce contexte, l'«incompatibilité» renvoie à une situation où le texte législatif et le texte réglementaire ne peuvent être conciliés; voir l'arrêt *Daniels c. White*, [1968] R.C.S. 517. Dans cette affaire, la règle a été énoncée à l'égard de deux lois incompatibles dont l'une était réputée abroger l'autre en raison de l'incompatibilité. Toutefois, la justification fondamentale est la même que dans le cas où le texte réglementaire serait incompatible avec une autre loi fédérale—il existe une présomption que le législateur n'a pas eu l'intention d'adopter des textes contradictoires ou d'habiliter quiconque à le faire. Il existe également une ressemblance doctri-

sistency has also been defined in terms of contradiction—i.e., "compliance with one law involves breach of the other"; see *Smith v. The Queen*, [1960] S.C.R. 776, at p. 800.

The inconsistency contended for is that the *Navigable Waters Protection Act* implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act, whereas the *Guidelines Order* requires, at a minimum, an initial environmental impact assessment. The appellant Ministers concede that there is no explicit prohibition against his taking into account environmental factors, but argue that the focus and scheme of the Act limit him to considering nothing other than the potential effects on marine navigation. If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work, at least as regards other federal areas of jurisdiction, such as Indians or Indian land. However that may be, the *Guidelines Order* now formally mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5. As Stone J.A. put it in the Court of Appeal, it created a duty which is "superadded" to any other statutory

nale avec le principe de la prépondérance dans les affaires de partage constitutionnel des compétences dans lesquelles l'incompatibilité a aussi été définie dans le sens de contradiction—c'est-à-dire lorsque le fait de [TRADUCTION] «se conformer à une loi signifie que l'on enfreint l'autre»; voir l'arrêt *Smith c. The Queen*, [1960] R.C.S. 776, à la p. 800.

L'incompatibilité invoquée est que la *Loi sur la protection des eaux navigables* empêche implicitement le ministre des Transports de tenir compte de facteurs autres que ceux touchant la navigation dans l'exercice de son pouvoir d'approbation en vertu de l'art. 5 de la Loi, alors que le *Décret sur les lignes directrices* exige tout au moins l'établissement d'une évaluation initiale des incidences environnementales. Les ministres appelants reconnaissent qu'il n'existe pas d'interdiction explicite de tenir compte des facteurs environnementaux, mais prétendent que l'objet et l'esprit de la Loi limitent le ministre des Transports à l'examen des effets possibles d'un ouvrage sur la navigation seulement. Si les appelants ont raison, il me semble que le ministre approuverait très peu d'ouvrages parce que plusieurs des «ouvrages» visés par l'art. 5 ne favorisent pas la navigation en tant que telle, mais la gênent plutôt, ou y font obstacle, en raison même de leur nature, par exemple, les ponts, les estacades, les barrages et autres choses du même genre. Si l'importance de l'incidence sur la navigation constituait le seul critère, il est difficile d'envisager l'approbation d'un barrage du même type que celui en l'espèce. Il est donc évident que le ministre doit tenir compte de plusieurs éléments dans toute analyse coûts-avantages visant à déterminer s'il est justifié dans les circonstances de gêner d'une façon importante la navigation.

Il se peut que le ministre des Transports dans l'exercice de ses fonctions en vertu de l'art. 5 ait toujours tenu compte de l'incidence environnementale d'un ouvrage, tout au moins en ce qui concerne d'autres domaines de compétence fédérale, comme les Indiens ou les terres indiennes. Bien que cela puisse être le cas, le Décret sur les lignes directrices exige officiellement qu'il le fasse et, je ne vois rien là d'incompatible avec les fonctions que lui attribue l'art. 5. Comme le juge Stone de la

power residing in him which can stand with that power. In my view the Minister's duty under the *Guidelines Order* is indeed supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the *Guidelines Order*.

Cour d'appel l'a indiqué, le Décret a créé une fonction qui «s'ajoute» à tout autre pouvoir qui lui est conféré par des lois et qui n'entre pas en conflit avec ce pouvoir. À mon avis, la fonction confiée au ministre en vertu du *Décret sur les lignes directrices* vient en fait s'ajouter à la responsabilité qu'il a en vertu de la *Loi sur la protection des eaux navigables* et il ne peut invoquer une interprétation trop étroite des pouvoirs qui lui sont conférés par des lois pour éviter de se conformer au *Décret sur les lignes directrices*.

Section 8 of the *Guidelines Order* already recognizes that the environmental impact assessment thereunder will not apply where it would conflict with other statutory provisions. It reads:

L'article 8 du *Décret sur les lignes directrices* reconnaît déjà que l'évaluation des incidences environnementales ne recevra pas application s'il est incompatible avec les dispositions d'autres textes législatifs.

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

8. Lorsqu'une commission ou un organisme fédéral ou un organisme de réglementation exerce un pouvoir de réglementation à l'égard d'une proposition, les présentes lignes directrices ne s'appliquent à la commission ou à l'organisme que si aucun obstacle juridique ne l'empêche ou s'il n'en découle pas de chevauchement des responsabilités.

A broad interpretation of the application of the *Guidelines Order* is consistent with the objectives stated in both the Order itself and its parent legislation—to make environmental impact assessment an essential component of federal decision making. A similar approach has been followed in the United States with respect to their *National Environmental Policy Act*. As Pratt J. put it in *Environmental Defense Fund, Inc. v. Mathews*, 410 F.Supp. 336 (D.D.C. 1976), at p. 337:

Une interprétation libérale de l'application du *Décret sur les lignes directrices* est compatible avec les objectifs mentionnés à la fois dans le Décret et dans la loi en vertu de laquelle il a été adopté—faire de l'évaluation des incidences environnementales un élément essentiel de la prise de décisions fédérales. Une analyse similaire a été adoptée aux États-Unis relativement à la *National Environmental Policy Act*. Comme l'affirme le juge Pratt dans l'arrêt *Environmental Defense Fund, Inc. c. Mathews*, 410 F.Supp. 336 (D.D.C. 1976), à la p. 337:

NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties.

[TRADUCTION] La *National Environmental Policy Act* ne l'emporte pas sur les autres fonctions conférées par des lois mais, dans la mesure où cette loi est conciliable avec ces fonctions, elle vient les compléter. On ne peut éviter de se conformer pleinement aux exigences de cette loi, sauf si la conformité entrerait directement en conflit avec d'autres fonctions existantes conférées par des lois.

To hold otherwise would, in my view, set at naught the legislative scheme for the protection of the environment envisaged by Parliament in enacting

Toute autre interprétation ne tiendrait pas compte, à mon avis, du régime législatif de protection de l'environnement envisagé par le législateur lors-

the *Department of the Environment Act*, and in particular s. 6.

Nor do I think s. 3 of the *Guidelines Order*, which requires that the assessment process be initiated "as early in the planning process as possible and before irrevocable decisions are taken", is in any way inconsistent with s. 6 of the *Navigable Waters Protection Act*. Section 6 is largely concerned with empowering the Minister to remove or take other remedial action in relation to works constructed without complying with s. 5, but the appellants draw attention to s. 6(4) which permits the Minister to approve of a work that has already been built. On this point, I am in complete agreement with Stone J.A. where, at p. 41, he stated:

> As I see it, the provisions of section 6 of that Act pertain to the remedial powers of the Minister in deciding what action he might take in the event of a failure to secure a section 5 approval prior to the commencement of construction. Subsection (4) thereof is an exception to the general rule, is entirely discretionary and clearly subservient to the fundamental requirement set out in paragraph 5(1)(*a*) that an approval be obtained prior to the commencement of construction. Nor can I see anything in the Guidelines Order that would prevent the Minister from complying with its terms to the fullest extent possible in exercising his discretion under subsection 6(4) of the *Navigable Waters Protection Act*. That being so, I can find no inconsistency or conflict between these two pieces of federal legislation.

It is thus clear to me that the *Guidelines Order* not only falls within the powers given by the *Department of the Environment Act*, but is completely consistent with the *Navigable Waters Protection Act*. It therefore falls to be decided whether the Order applies in the instant case.

qu'il a adopté la *Loi sur le ministère de l'Environnement*, et, plus particulièrement, l'art. 6.

Je ne crois pas non plus que l'art. 3 du *Décret sur les lignes directrices*, qui exige que l'évaluation soit réalisée «le plus tôt possible au cours de l'étape de planification et avant de prendre des décisions irrévocables», soit d'une façon quelconque incompatible avec l'art. 6 de la *Loi sur la protection des eaux navigables*. L'article 6 vise principalement à habiliter le ministre qui constate qu'un ouvrage a été construit sans qu'aient été respectées les exigences de l'art. 5 à prendre des mesures pour le faire détruire ou toute autre mesure de redressement nécessaire; toutefois, les appelants ont attiré notre attention sur le par. 6(4) qui habilite le ministre à approuver un ouvrage qui a déjà été construit. Sur ce point, je suis entièrement d'accord avec le juge Stone de la Cour d'appel, qui mentionne à la p. 41:

> À mon avis, les dispositions de l'article 6 de la Loi concernent les pouvoirs de redressement que détient le ministre lorsqu'il détermine les mesures qu'il pourrait prendre advenant un défaut d'obtenir une approbation conformément à l'article 5 avant le début de la construction. Le pouvoir prévu au paragraphe (4) de l'article 6 constitue une exception à la règle générale; il est entièrement discrétionnaire et se trouve clairement subordonné à l'exigence fondamentale de l'alinéa 5(1)*a*) selon laquelle une approbation doit être obtenue avant le début de la construction. Je suis également incapable de trouver dans le Décret sur les lignes directrices une disposition qui empêcherait le ministre de se conformer à ses prescriptions dans toute la mesure du possible lorsqu'il exerce son pouvoir discrétionnaire sous le régime du paragraphe 6(4) de la *Loi sur la protection des eaux navigables*. Cela étant, je ne puis conclure à aucune incompatibilité et à aucun conflit entre ces deux textes de la législation fédérale.

Il me paraît donc évident non seulement que le *Décret sur les lignes directrices* s'inscrit dans le cadre des pouvoirs conférés par la *Loi sur le ministère de l'Environnement*, mais qu'il est entièrement compatible avec la *Loi sur la protection des eaux navigables*. Il faut donc se demander si le Décret s'applique en l'espèce.

Obligation of the Ministers to Comply with the Guidelines Order

Section 4(1) of the *Department of the Environment Act*

Section 4(1)(*a*) of the *Department of the Environment Act* reads as follows:

> **4.** (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
>
> (*a*) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

Alberta contends that by restricting the Minister of the Environment's jurisdiction to "matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada" (emphasis added), s. 4 has rendered the *Guidelines Order* inoperative in the present case. Because the *Fisheries Act* regulates the management of Canada's fisheries resource, it is argued, the Minister of the Environment's jurisdiction has been ousted in respect of all matters affecting fish habitat. This argument can be dealt with shortly. Its premise entirely misapprehends the "matters" covered by the respective pieces of legislation. The *Guidelines Order* establishes an environmental assessment process for use by all federal departments in the exercise of their powers and the performance of their duties and functions, whereas the *Fisheries Act* embraces the substantive matter of protecting fish and fish habitat. There is, of course, a connection between the two, but the crucial difference is that one is fundamentally procedural while the other is substantive in nature. Again, the approach suggested by the appellants would make the power given by s. 6 of the *Department of the Environment Act* virtually meaningless.

New Federal Projects

Alberta next takes issue with the purported application of the *Guidelines Order* to proposals

L'obligation des ministres de se conformer au Décret sur les lignes directrices

Le paragraphe 4(1) de la *Loi sur le ministère de l'Environnement*

Voici le texte de l'al. 4(1)*a*) de la *Loi sur le ministère de l'Environnement*:

> **4.** (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés:
>
> *a*) à la conservation et l'amélioration de la qualité de l'environnement naturel, notamment celle de l'eau, de l'air et du sol;

L'Alberta prétend qu'en restreignant la compétence du ministre de l'Environnement aux «domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux» (je souligne), l'art. 4 rend le *Décret sur les lignes directrices* inopérant en l'espèce. Parce que la *Loi sur les pêches* réglemente la gestion des ressources halieutiques du Canada, on soutient que la compétence du ministre de l'Environnement a été écartée à l'égard de toutes les questions concernant l'habitat du poisson. Cet argument peut être tranché rapidement. Il est fondé sur une interprétation tout à fait erronée des «domaines» visés par les divers textes législatifs. Le *Décret sur les lignes directrices* établit une méthode d'évaluation des incidences environnementales à l'intention de tous les ministères fédéraux dans l'exercice de leurs pouvoirs et dans l'exécution de leurs obligations et fonctions, alors que la *Loi sur les pêches* traite de la question de fond de la protection du poisson et de son habitat. Il existe certes un lien entre les deux, mais la différence essentielle est que l'une porte fondamentalement sur la procédure, alors que l'autre porte sur le fond. L'analyse proposée par les appelants rendrait pratiquement vide de sens le pouvoir conféré par l'art. 6 de la *Loi sur le ministère de l'Environnement.*

Les nouveaux projets fédéraux

L'Alberta s'attaque ensuite à la prétendue application du *Décret sur les lignes directrices* à des

other than "new federal projects, programs and activities" mentioned in s. 5(*a*)(ii) of the *Department of the Environment Act*. That provision reads:

> **5.** The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall
>
> (*a*) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed
>
> . . .
>
> (ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account . . . [Emphasis added.]

The wording of that subparagraph, it is argued, is determinative of Parliament's intention to restrict the scope of the *Guidelines Order* to new federal projects, and consequently cannot apply to any project that is provincially sponsored. Here again, as I see it, Alberta seeks to place an unduly narrow construction on the extent of the Minister of the Environment's duties and functions under s. 6 of the Act. The *Guidelines Order* was enacted under s. 6, not s. 5, and the powers, duties and functions of the Minister there referred to encompass matters found in s. 4 as well as s. 5, including, *inter alia*, "the preservation and enhancement of the quality of the natural environment" (s. 4(1)(*a*)). Section 6 is thus not confined to new projects, programs and activities. Section 5 merely defines the Minister's minimum duties under s. 4. Section 4 is much broader. It is there that one finds the true range of the Minister's duties and functions related to environmental quality for which guidelines may be established.

Initiating Departments

Central to the arguments of the appellant Ministers is whether the *Guidelines Order* by its own terms has any application to the Oldman River

propositions autres que les «nouveaux projets, programmes et activités fédéraux» visés au sous-al. 5*a*)(ii) de la *Loi sur le ministère de l'Environnement*:

> **5.** Dans le cadre des pouvoirs et fonctions que lui confère l'article 4, le ministre:
>
> *a*) lance, recommande ou entreprend à son initiative et coordonne à l'échelle fédérale des programmes visant à:
>
> . . .
>
> (ii) faire en sorte que les nouveaux projets, programmes et activités fédéraux soient, dès les premières étapes de planification, évalués en fonction de leurs risques pour la qualité de l'environnement naturel, et que ceux d'entre eux dont on aura estimé qu'ils présentent probablement des risques graves fassent l'objet d'un réexamen dont les résultats devront être pris en considération . . . [Je souligne.]

On soutient que le libellé de ce sous-alinéa permet d'établir que le législateur avait l'intention de restreindre l'application du *Décret sur les lignes directrices* aux nouveaux projets fédéraux et que celui-ci ne saurait en conséquence s'appliquer à un projet parrainé par une province. À mon avis, l'Alberta cherche encore ici à interpréter d'une façon trop étroite l'étendue des fonctions du ministre de l'Environnement en vertu de la l'art. 6 de la Loi. Le *Décret sur les lignes directrices* a été adopté en vertu de l'art. 6 et non de l'art. 5 et les pouvoirs et fonctions du ministre qui y sont mentionnés visent à englober des domaines qu'on trouve à l'art. 4 ainsi qu'à l'art. 5, y compris: «la conservation et l'amélioration de la qualité de l'environnement» (al. 4(1)*a*)). L'article 6 n'est donc pas limité aux nouveaux projets, programmes et activités. L'article 5 ne fait que décrire les fonctions minimales du ministre en vertu de l'art. 4, lequel est beaucoup plus vaste. C'est là que l'on trouve la véritable gamme des fonctions du ministre en matière de qualité de l'environnement relativement à laquelle des directives peuvent être établies.

Les ministères responsables

Au cœur des moyens invoqués par les ministres appelants est la question de savoir si le *Décret sur les lignes directrices*, de par son libellé, est appli-

Dam project. That question was not addressed by Alberta, and the Ministers concede that the Minister of Transport is an "initiating" department but argue that the *Guidelines Order* is inconsistent with and thus cannot stand with the *Navigable Waters Protection Act*. I have found the two enactments compatible for reasons already given, so there remains no issue between the parties that the provisions of the *Guidelines Order* govern the Minister of Transport. For the Minister of Fisheries and Oceans, it is argued that he is not bound to invoke the *Guidelines Order* in the instant case because he does not have "decision making authority" pursuant to the relevant provisions of the *Fisheries Act*. Because the matter of the *Guidelines Order*'s application was the subject of profound disagreement in the courts below, I feel that it is necessary to first consider the terms of the *Guidelines Order* to construe its general application provisions.

The starting point, in my view, must be s. 6 of the *Guidelines Order* which sets out its governing principle of application. It bears repeating here:

> 6. These Guidelines shall apply to any proposal
>
> (*a*) that is to be undertaken directly by an initiating department;
>
> (*b*) that may have an environmental effect on an area of federal responsibility;
>
> (*c*) for which the Government of Canada makes a financial commitment; or
>
> (*d*) that is located on lands, including the offshore, that are administered by the Government of Canada. [Emphasis added.]

There can be no serious doubt that the Oldman River Dam project may have an environmental effect on an area of federal responsibility, including the matters falling within s. 91 of the *Constitution Act, 1867* already identified—i.e., navigation, Indians, lands reserved for the Indians and inland fisheries. Thus, the *Guidelines Order*

cable au projet de construction d'un barrage sur la rivière Oldman. L'Alberta n'a pas soulevé cette question et les ministres reconnaissent que le ministre des Transports est un ministère «responsable» mais ils soutiennent que le *Décret sur les lignes directrices* est incompatible avec la *Loi sur la protection des eaux navigables* et ne peut recevoir application. J'ai conclu que les deux textes sont compatibles pour les motifs déjà énoncés; il n'existe donc plus de controverse entre les parties quant à savoir si le ministre des Transports est régi par les dispositions du *Décret sur les lignes directrices*. En ce qui concerne le ministre des Pêches et des Océans, on soutient qu'il n'est pas tenu d'invoquer l'application du *Décret sur les lignes directrices* en l'espèce parce qu'il n'exerce pas un «pouvoir de décision» conformément aux dispositions pertinentes de la *Loi sur les pêches*. Puisque la question de l'application du *Décret sur les lignes directrices* a donné lieu à un profond désaccord devant les tribunaux d'instance inférieure, j'estime nécessaire d'analyser tout d'abord le *Décret sur les lignes directrices* pour interpréter les dispositions qui en déterminent l'application.

À mon avis, le point de départ est l'art. 6 du *Décret sur les lignes directrices* qui énonce son principe d'application. Il vaut la peine de le reproduire de nouveau:

> 6. Les présentes lignes directrices s'appliquent aux propositions
>
> *a*) devant être réalisées directement par un ministère responsable;
>
> *b*) pouvant avoir des répercussions environnementales sur une question de compétence fédérale;
>
> *c*) pour lesquelles le gouvernement du Canada s'engage financièrement; ou
>
> *d*) devant être réalisées sur des terres administrées par le gouvernement du Canada, y compris la haute mer. [Je souligne.]

On ne peut sérieusement mettre en doute que le projet de barrage sur la rivière Oldman peut avoir des répercussions environnementales sur une question de compétence fédérale, notamment les domaines visés par l'art. 91 de la *Loi constitutionnelle de 1867* déjà mentionnés, soit la navigation, les Indiens, les terres réservées aux Indiens et les

applies if the project here is a "proposal" within the meaning of s. 2, which defines that term as follows:

2. In these Guidelines,

. . .

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility. [Emphasis added.]

If there is such a proposal, the *Guidelines Order* under ss. 3 and 10 allocates responsibility for the application of the process to the "initiating department" to ensure that it fully considers the environmental implications of a proposal properly before it and subjects such proposal to an initial assessment to determine whether there may be any potentially adverse environmental effects from it. The entity designated as an "initiating department" is also defined by s. 2. It provides that an:

2. In these Guidelines,

. . .

"initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal; [Emphasis added.]

It has been argued that the definite article "the" in the definition of "initiating department", as contrasted with the indefinite article "a" used in the definition of "proposal", may evince an intention to narrow the scope of the application of the *Guidelines Order* to projects where the federal government is the predominant or sole decision-making authority; see for example C. J. Gillespie, "Enforceable Rights from Administrative Guidelines?" (1989-1990), 3 *C.J.A.L.P.* 204. I do not agree. As I see it, the only consequence of shifting from the indefinite in "proposal" to the definite in "initiating department" is to designate the particular emanation of the Government of Canada that is charged with the implementation of the *Guidelines*

pêcheries de l'intérieur. En conséquence, le *Décret sur les lignes directrices* s'applique si le projet en l'espèce constitue une «proposition» au sens de l'art. 2:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

. . .

«proposition» S'entend en outre de toute entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions. [Je souligne.]

Si une telle proposition existe, les art. 3 et 10 du *Décret sur les lignes directrices* confient l'application de la méthode d'évaluation au «ministère responsable», qui doit s'assurer d'une part, d'examiner à fond les répercussions environnementales de toute proposition dont il est saisi et d'autre part, de soumettre cette proposition à une évaluation initiale afin de déterminer la nature des effets néfastes qu'elle peut avoir sur l'environnement. L'article 2 définit aussi l'entité désignée comme «ministère responsable»:

2. Les définitions qui suivent s'appliquent aux présentes lignes directrices.

. . .

«ministère responsable» Ministère qui, au nom du gouvernement du Canada, exerce le pouvoir de décision à l'égard d'une proposition. [Je souligne.]

On soutient que, dans la version anglaise, l'emploi de l'article défini «*the*» dans la définition de «*initiating department*», par opposition à l'emploi de l'article indéfini «*a*» dans la définition du terme «*proposal*», peut indiquer une intention de limiter l'application du *Décret sur les lignes directrices* aux projets sur lesquels le gouvernement fédéral exerce le principal ou le seul pouvoir de décision; voir, par exemple, C. J. Gillespie, «Enforceable Rights from Administrative Guidelines?» (1989-1990), 3 *C.J.A.L.P.* 204. Je ne suis pas d'accord avec cette interprétation. À mon avis, la seule conséquence qu'entraîne le fait de passer de l'emploi de l'article indéfini dans la définition du terme «*proposal*» à celui de l'article défini dans la définition de «*initiating department*» est de désigner de façon précise, une fois établi que le gouverne-

Order once it has been determined that the federal government has a decision-making responsibility.

In *Angus v. Canada*, [1990] 3 F.C. 410 (C.A.), Décary J.A. adopted a similar approach to construing the *Guidelines Order* but in a different context. There the issue was whether the *Guidelines Order* applied to an order in council issued by the Governor in Council under s. 64 of the *National Transportation Act, 1987*, R.S.C., 1985, c. 28 (3rd Supp.), which required VIA Rail to eliminate or reduce certain passenger services. Although the case turned on the narrow issue of whether the *Guidelines Order* was binding on the Governor in Council, which does not arise here, and Décary J.A. was dissenting on this point, his overall analysis of the application of the *Guidelines Order* is helpful where he stated, at p. 434:

> The emphasis has been put by the learned Trial Judge and by the respondents on the words "initiating department" which relate to the administration of the Guidelines. I would rather put the emphasis on the words "proposal" and "Government of Canada", which relate to the "application" of the Guidelines. There is no requirement, in the definition of "proposal", that it be made by an initiating department within the meaning of the Guidelines. The intention of the drafter seems to be that whenever there is an activity that may have an environmental effect on an area of federal responsibility and whoever the decision-maker may be on behalf of the Government of Canada, be it a department, a Minister, the Governor in Council, the Guidelines apply and it then becomes a matter of practical consideration, when the final decision-maker is not a department, to find which department or Minister is the effective original decision-maker or the effective decision-undertaker, for there is always a department or a Minister involved "in the planning process" and "before irrevocable decisions are taken" or in the "direct undertaking" of a proposal.

Since the issue does not arise, I do not wish to comment on the application of the *Guidelines Order* to the Governor in Council, but the foregoing

ment fédéral participe à la prise de décisions, l'autorité particulière au sein du gouvernement du Canada qui sera responsable de la mise en œuvre du *Décret sur les lignes directrices*.

Dans l'arrêt *Angus c. Canada*, [1990] 3 C.F. 410 (C.A.), le juge Décary a adopté une analyse similaire relativement à l'interprétation du *Décret sur les lignes directrices*, mais dans un contexte différent. Dans cette affaire, la question en litige était de savoir si le *Décret sur les lignes directrices* s'appliquait à un décret pris par le gouverneur en conseil en vertu de l'art. 64 de la *Loi de 1987 sur les transports nationaux*, L.R.C. (1985), ch. 28 (3e suppl.), qui ordonnait à VIA Rail d'éliminer ou de réduire certains services voyageurs. Bien que cette affaire ait porté sur la question précise de savoir si le gouverneur en conseil était tenu de se conformer au *Décret sur les lignes directrices*, ce qui n'est pas soulevé en l'espèce, et que le juge Décary ait été dissident sur ce point, l'analyse globale qu'il fait, à la p. 434, de l'application du *Décret sur les lignes directrices* est utile:

> Le juge de première instance et les intimés ont mis l'accent sur les mots «ministère responsable» qui ont trait à l'administration des Lignes directrices. Je mettrais plutôt l'accent sur les mots «proposition» et «gouvernement du Canada» qui ont trait au «champ d'application» des Lignes directrices. Rien n'exige dans la définition du mot «proposition» que celle-ci soit faite par un ministère responsable, au sens des Lignes directrices. L'intention du rédacteur semble être que les Lignes directrices doivent s'appliquer chaque fois qu'une activité peut avoir des répercussions environnementales sur une question de compétence fédérale et quel que soit le preneur de décision au nom du gouvernement, qu'il s'agisse d'un ministère, d'un ministre ou du gouverneur en conseil, et cela devient alors une question purement pratique, lorsque le preneur de décision ultime n'est pas un ministère, de déterminer quel ministère ou ministre est le preneur de décision originel ou celui qui va effectivement mettre la décision à exécution, car il se trouve toujours un ministère ou un ministre qui est présent «à l'étape de planification» et «avant» que ne soient prises «des décisions irrévocables» ou qui voit à la «réalisation directe» de la proposition.

Puisque cette question n'est pas soulevée, je ne vois pas l'intérêt de faire des observations sur l'application au gouverneur en conseil du *Décret sur*

ing passage does capture the essence of its framework.

That is not to say that the *Guidelines Order* is engaged every time a project may have an environmental effect on an area of federal jurisdiction. There must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". (Emphasis added.) In my view the proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. It cannot have been intended that the *Guidelines Order* would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction. Therefore, "responsibility" within the definition of "proposal" should not be read as connoting matters falling generally within federal jurisdiction. Rather, it is meant to signify a legal duty or obligation. Once such duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the decision-making authority for the proposal and thus responsible for initiating the process under the *Guidelines Order*.

That there must be an affirmative regulatory duty for a "decision making responsibility" to exist is evident from other provisions found in the *Guidelines Order* which suggest that the initiating department must have some degree of regulatory power over the project. For example s. 12 provides:

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

. . .

les lignes directrices; toutefois, le passage précité permet de bien saisir l'essence de son application.

Je ne veux pas dire pour autant que le *Décret sur les lignes directrices* reçoit application chaque fois qu'un projet peut comporter des répercussions environnementales sur un domaine de compétence fédérale. Il doit tout d'abord s'agir d'une «proposition» qui vise une «entreprise ou activité à l'égard de laquelle le gouvernement du Canada participe à la prise de décisions». (Je souligne.) À mon avis, l'interprétation qu'il faut donner à l'expression «participe à la prise de décisions» est que le gouvernement fédéral, se trouvant dans un domaine relevant de sa compétence en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*, doit avoir une obligation positive de réglementation en vertu d'une loi fédérale relativement à l'entreprise ou à l'activité proposée. On n'a pas pu vouloir que le *Décret sur les lignes directrices* soit invoqué chaque fois qu'il existe certaines possibilités de répercussions environnementales sur un domaine de compétence fédérale. En conséquence, l'expression «participe à la prise de décisions» dans la définition du terme «proposition» ne devrait pas être interprétée comme ayant trait à des questions relevant généralement de la compétence fédérale. Cette expression signifie plutôt une obligation légale. Si cette obligation existe, il s'agit alors de déterminer qui est le «ministère responsable» en la matière, puisque c'est ce ministère qui exerce le pouvoir de décision à l'égard de la proposition et qui doit donc entamer le processus d'évaluation visé par le *Décret sur les lignes directrices*.

La nécessité d'une obligation positive de réglementation pour que le gouvernement du Canada «participe à la prise de décisions» ressort d'autres dispositions du *Décret sur les lignes directrices*, qui laissent entendre que le ministère responsable doit détenir un certain pouvoir de réglementation sur le projet. Par exemple, l'art. 12 dispose que:

12. Le ministère responsable examine ou évalue chaque proposition à l'égard de laquelle il exerce le pouvoir de décision, afin de déterminer:

. . .

(*f*) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

Again, s. 14 reads:

14. Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.

Those provisions amplify the regulatory authority with which the Government of Canada must have clothed itself under an Act of Parliament before it will have the requisite decision-making responsibility.

Applying that interpretation to the present case, it will be seen that the Oldman River Dam project qualifies as a proposal for which the Minister of Transport alone is the initiating department. In my view the *Navigable Waters Protection Act* does place an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water. Section 5 gives the Minister the power to impose such terms and conditions as he deems fit on any approval granted, and if those terms are not complied with the Minister may order the owner to remove or alter the work. For these reasons I would hold that this is a "proposal" for which the Minister of Transport is an "initiating department".

There is, however, no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. Section 35 prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, and s. 40 lends its weight to that prohibition by penal sanction. The Minister of Fisheries and Oceans is given a discretion under s. 37(1) to

f) si les effets néfastes que la proposition peut avoir sur l'environnement sont inacceptables, auquel cas la proposition est soit annulée, soit modifiée et soumise à un nouvel examen ou évaluation initiale.

L'article 14:

14. Le ministère responsable voit à la mise en application de mesures d'atténuation et d'indemnisation, s'il est d'avis que celles-ci peuvent empêcher que les effets néfastes d'une proposition sur l'environnement prennent de l'ampleur.

Ces dispositions amplifient le pouvoir de réglementation que doit avoir le gouvernement du Canada en vertu d'une loi fédérale avant de pouvoir participer à la prise de décisions.

Si on applique cette interprétation à l'espèce, on se rendra compte que le projet de barrage sur la rivière Oldman peut être qualifié de proposition dont le ministre des Transports seul est le ministère responsable. À mon avis, la *Loi sur la protection des eaux navigables* impose une obligation positive de réglementation au ministre des Transports. Cette loi a mis en place un mécanisme de réglementation qui prévoit qu'il est nécessaire d'obtenir l'approbation du ministre avant qu'un ouvrage qui gêne sérieusement la navigation puisse être placé dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux. L'article 5 accorde au ministre le pouvoir de fixer les modalités qu'il juge à propos lorsqu'il approuve un ouvrage; si le propriétaire ne se conforme pas aux modalités, le ministre peut lui ordonner d'enlever l'ouvrage ou de le modifier. Pour ces motifs, je conclurais qu'il s'agit ici d'une «proposition» dont le ministre des Transports est un «ministère responsable».

La *Loi sur les pêches* ne renferme cependant pas de disposition de réglementation équivalente qui serait applicable au projet. L'article 35 interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson, et l'art. 40 assortit cette interdiction d'une sanction pénale. En vertu du par. 37(1), le ministre des Pêches et des Océans

request information from any person who carries on or proposes to carry on any work or undertaking that will or may result in the alteration, disruption or destruction of fish habitat. However, the purpose of making such a request is not to further a regulatory procedure, but is merely to assist the Minister in exercising an *ad hoc* delegated legislative power granted under s. 37(2) to allow an exemption from the general prohibition. That provision reads:

37. . . .

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(*b*), or, if there are no such regulations in force, with the approval of the Governor in Council,

(*a*) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

(*b*) restrict the operation of the work or undertaking,

and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances. [Emphasis added.]

In my view a discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a decision-making responsibility within the meaning of the *Guidelines Order*. Whereas the Minister of Transport is responsible under the terms of the *Navigable Waters Protection Act* in his capacity as regulator, the Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty. For that reason, I do not think the application

peut demander des renseignements à quiconque exploite ou se propose d'exploiter des ouvrages ou entreprises de nature à entraîner la détérioration, la perturbation ou la destruction de l'habitat du poisson. Toutefois, cette demande n'a pas pour objet la mise en œuvre d'une procédure de réglementation; elle aide simplement le ministre à exercer le pouvoir législatif spécial, qui lui a été délégué en vertu du par. 37(2), d'autoriser une exception à l'interdiction générale. En voici le libellé:

37. . . .

(2) Si, après examen des documents et des renseignements reçus et après avoir accordé aux personnes qui les lui ont fournis la possibilité de lui présenter leurs observations, il est d'avis qu'il y a infraction ou risque d'infraction au paragraphe 35(1) ou à l'article 36, le ministre ou son délégué peut, par arrêté et sous réserve des règlements d'application de l'alinéa (3)*b*) ou, à défaut, avec l'approbation du gouverneur en conseil:

a) soit exiger que soient apportées les modifications et adjonctions aux ouvrages ou entreprises, ou aux documents s'y rapportant, qu'il estime nécessaires dans les circonstances;

b) soit restreindre l'exploitation de l'ouvrage ou de l'entreprise.

Il peut en ouvre, avec l'approbation du gouverneur en conseil dans tous les cas, ordonner la fermeture de l'ouvrage ou de l'entreprise pour la période qu'il juge nécessaire en l'occurrence. [Je souligne.]

À mon avis, le fait que le ministre possède le pouvoir discrétionnaire de demander des renseignements visant à l'aider dans l'exercice d'une fonction législative ne signifie pas qu'il participe à la prise de décisions au sens du *Décret sur les lignes directrices*. Alors que le ministre des Transports a une responsabilité en vertu de la *Loi sur la protection des eaux navigables* à titre d'autorité réglementante, le ministre des Pêches et des Océans a, en vertu de l'art. 37 de la *Loi sur les pêches*, un pouvoir législatif spécial limité qui ne constitue pas une obligation positive de réglemen-

for mandamus to compel the Minister to act is well founded.

Crown Immunity

Alberta takes the position that even if the *Guidelines Order* could be said to apply to the project in its own terms, the Crown in right of Alberta is not bound by the *Navigable Waters Protection Act* and hence there can be no "decision making responsibility" on the part of the Government of Canada within the meaning of the *Guidelines Order* which could affect the province. The appellant Ministers agree that the Act is not binding on the Crown in right of a province, but argue that Alberta has waived its immunity by making application for approval under the Act.

The starting point on this issue is s. 17 of the *Interpretation Act* which codifies the presumption that the Crown is not bound by statute:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

It is agreed by all concerned that there are no express words in the *Navigable Waters Protection Act* binding the Crown, and it therefore remains to be decided whether the Crown is bound by necessary implication.

It is helpful to turn first to the common law. The leading case is the Privy Council decision in *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58. The issue there was whether the province of Bombay was exempt from the *City of Bombay Municipal Act*, 1888, which conferred power on the city to lay water-mains "into, through or under any land whatsoever within the city". The province owned land under which it was proposed to lay a water-main and it objected to the city's plans, unless the city complied with certain conditions which the city found unacceptable. Although there were no express words in the statute binding the Crown, the High Court of Bombay held that the Crown was bound by necessary implication

tation. Pour ce motif, je ne crois pas que la demande de bref de *mandamus* visant à forcer le ministre à agir soit bien fondée.

L'immunité de la Couronne

Selon l'Alberta, même si on pouvait dire que le *Décret sur les lignes directrices* s'applique de lui-même au projet, la Couronne du chef de l'Alberta n'est pas liée par la *Loi sur la protection des eaux navigables*. Dès lors, la participation «à la prise de décisions», au sens du *Décret sur les lignes directrices*, par le gouvernement du Canada, ne saurait avoir une incidence sur la province. Les ministres appelants conviennent que la Loi ne lie pas la Couronne du chef d'une province, mais prétendent que l'Alberta a renoncé à cette immunité en présentant une demande d'approbation en vertu de la Loi.

Le point de départ de cet argument est l'art. 17 de la *Loi d'interprétation* qui codifie la présomption que la Couronne n'est pas liée par un texte législatif.

17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

Toutes les parties intéressées reconnaissent que la *Loi sur la protection des eaux navigables* ne prévoit pas expressément qu'elle lie la Couronne; il reste donc à déterminer si la Couronne est liée par déduction nécessaire.

Il est utile d'examiner tout d'abord la situation en common law. L'arrêt de principe en la matière est *Province of Bombay c. Municipal Corporation of Bombay*, [1947] A.C. 58, rendu par le Conseil privé. Dans cette affaire, il s'agissait de savoir si la province de Bombay était exemptée de l'application de la *City of Bombay Municipal Act*, 1888, laquelle conférait à la ville le pouvoir d'installer des conduites d'eau [TRADUCTION] «sur, à travers ou sous tout bien-fonds situé à l'intérieur des limites de la ville». La province était propriétaire d'un bien-fonds sous lequel on se proposait d'installer une conduite d'eau et elle s'opposait aux plans de la ville, sauf si celle-ci acceptait de se conformer à certaines conditions, jugées inaccep-

because the statute "cannot operate with reasonable efficiency unless the Crown is bound".

The Privy Council agreed that the rule of Crown immunity admitted of at least one exception, necessary implication. Lord du Parcq explained the exception as follows, at p. 61:

> If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

Their Lordships then went on to consider the argument, supported by some early authority, that a statute enacted for the public good must be held to bind the Crown, because the Act was manifestly intended to secure the public welfare. That contention was rejected on the simple ground that all statutes are presumptively for the public good. That, however, did not necessarily mean that the purpose of an enactment is altogether irrelevant. At page 63, it is stated:

> Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

As I mentioned in *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1022, some doubt was expressed in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, and *Her Majesty in right of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61 (cf. *R. v. Ouellette*, [1980] 1 S.C.R. 568), as to whether the necessary implication exception survived the 1967 revision of what is now s. 17 of the *Interpretation Act*. There may also have been room for doubt as

tables par la ville. Même si le texte législatif ne renfermait pas de dispositions expresses liant la Couronne, la Haute Cour de Bombay a statué que la Couronne était liée par déduction nécessaire parce que la loi [TRADUCTION] «ne peut avoir une efficacité raisonnable si elle ne lie pas la Couronne».

Le Conseil privé a reconnu que la règle de l'immunité de la Couronne souffre au moins une exception, la déduction nécessaire. Lord du Parcq explique cette exception, à la p. 61:

> [TRADUCTION] C'est-à-dire que, s'il ressort du texte même de la Loi que le législateur entendait lier la Couronne, le résultat est le même que si cette dernière était expressément mentionnée. Il faut donc en déduire que la Couronne, en promulguant la loi, a accepté d'être liée par ses dispositions.

Leurs Seigneuries ont ensuite analysé l'argument, fondé sur une jurisprudence antérieure, qu'une loi adoptée pour le bien public doit recevoir une interprétation qui lie la Couronne parce que cette loi vise manifestement à garantir le bien-être public. Cette prétention a été rejetée pour le simple motif que toutes les lois sont présumées être adoptées pour le bien public. Toutefois, cela ne signifiait pas nécessairement que l'objet d'un texte législatif ne présente aucune pertinence (à la p. 63):

> [TRADUCTION] Leurs Seigneuries préfèrent dire que l'objet apparent de la loi constitue un élément, et peut être un élément important, à examiner lorsque l'on prétend que l'intention était de lier la Couronne. Si l'on peut affirmer qu'au moment où la Loi a été adoptée et a reçu la sanction royale, il ressortait clairement de son texte qu'elle serait privée de toute efficacité si elle ne liait pas la Couronne, on peut déduire que la Couronne a accepté d'être liée.

Comme je l'ai mentionné dans l'arrêt *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, à la p. 1022, certains doutes ont été exprimés dans l'arrêt *R. c. Eldorado Nucléaire Ltée*, [1983] 2 R.C.S. 551, et dans l'arrêt *Sa Majesté du chef de la province de l'Alberta c. Commission canadienne des transports*, [1978] 1 R.C.S. 61 (cf. *R. c. Ouellette*, [1980] 1 R.C.S. 568), quant à savoir si l'exception de la déduction nécessaire survivait à la révision de ce qui est

to whether the "wholly frustrated" test articulated in *Bombay* was determinative in finding the Crown bound by necessary implication. Professor Hogg in his text *Liability of the Crown* (2nd ed. 1989), argues that the necessary implication exception set out at the beginning of *Bombay* refers to a contextual analysis of the statute whereby one may discern an intention to bind the Crown by logical implication, and is thus a different species of necessary implication from that which arises when the purpose of the statute is wholly frustrated. He states, at p. 210:

> What is contemplated in this passage is that a statute, while lacking an express statement that the Crown is bound, may contain references to the Crown or to governmental activity which make no sense unless the Crown is bound. If these textual indications are sufficiently clear, the courts will hold that the presumption is rebutted and the Crown is bound.

However, any uncertainty in the law on these points was put to rest by this Court's recent decision in *Alberta Government Telephones*, *supra*. After reviewing the authorities, Dickson C.J. concluded, at p. 281:

> In my view, in light of *PWA* and *Eldorado*, the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay*, *supra*, are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a

maintenant l'art. 17 de la *Loi d'interprétation*, effectuée en 1967. On aurait également pu se demander si le critère de l'absence de toute efficacité de la loi énoncé dans l'arrêt *Bombay* était déterminant dans la décision que la Couronne était liée par déduction nécessaire. Le professeur Hogg dans son ouvrage intitulé *Liability of the Crown* (2e éd. 1989) soutient que l'exception de la déduction nécessaire énoncée au début de l'arrêt *Bombay* renvoie à une analyse contextuelle de la loi au terme de laquelle on peut dégager une intention de lier la Couronne par déduction logique; il s'agit donc là d'une espèce différente de déduction nécessaire de celle qui existe lorsque l'objet de la loi serait privé de toute efficacité. Il affirme à la p. 210:

> [TRADUCTION] Ce qui est envisagé dans ce passage est qu'une loi, en l'absence de termes qui lient expressément la Couronne, peut contenir des renvois à la Couronne ou à une activité gouvernementale, qui n'auraient aucun sens sauf si la Couronne était liée. Si ces indications dans le texte sont suffisamment claires, les tribunaux concluront que la présomption a été réfutée et que la Couronne est liée.

Toutefois, notre Cour a dissipé toute incertitude quant à la situation du droit dans l'arrêt récent *Alberta Government Telephones*, précité. Après une analyse de la jurisprudence, le juge en chef Dickson conclut à la p. 281:

> À mon avis, compte tenu des affaires *PWA* et *Eldorado*, la portée des termes «mentionnée ou prévue» doit s'interpréter indépendamment de la règle de *common law* supplantée. Toutefois, les réserves exprimées dans l'arrêt *Bombay*, précité, sont fondées sur de bons principes d'interprétation que le temps n'a pas complètement effacés. Il me semble que les termes «mentionnée ou prévue» contenus à l'art. 16 [maintenant l'art. 17 de la *Loi d'interprétation*] peuvent comprendre: (1) des termes qui lient expressément la Couronne («Sa Majesté est liée»); (2) une intention claire de lier qui, selon les termes de l'arrêt *Bombay*, «ressort du texte même de la loi», en d'autres termes, une intention qui ressorte lorsque les dispositions sont interprétées dans le contexte d'autres dispositions, comme dans l'arrêt *Ouellette*, précité; et (3) une intention de lier lorsque l'objet de la loi serait «privé [. . .] de toute efficacité» si l'État n'était pas lié ou, en d'autres termes, s'il donnait lieu à une absurdité (par opposition à un simple résultat non souhaité). Ces trois éléments devraient servir de guide lors-

guideline for when a statute has clearly conveyed an intention to bind the Crown.

In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

That analysis however cannot be made in a vacuum. Accordingly, the relevant "context" should not be too narrowly construed. Rather the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed. This view is consistent with the reasoning in *Bombay* as is evident from the passages quoted above where the test for necessary implication is expressed in terms of the time of enactment. In fact the approach taken by the High Court of Bombay in that case was criticized by the Privy Council for that very reason, at p. 62:

> Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the legislature, in the year 1888.

I begin then by examining the circumstances that existed when the legislation was first enacted, bearing in mind that the general subject matter of the statute concerns navigation.

In so doing, it is useful to return to some of the fundamental principles of water law in this area, particularly those pertaining to navigable waters. It is important to recall that the law of navigation in Canada has two fundamental dimensions—the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation—both of which are necessarily interrelated by virtue of s. 91(10) of the *Constitution Act, 1867* which assigns exclusive legislative authority over navigation to Parliament.

qu'une loi comporte clairement une intention de lier la Couronne.

À mon avis, ce passage fait clairement ressortir qu'une analyse du contexte d'une loi peut révéler une intention de lier la Couronne si cette conclusion s'impose immanquablement par déduction logique.

On ne doit cependant pas effectuer cette analyse dans l'abstrait. En conséquence, il ne faudrait pas interpréter le «contexte» pertinent de façon trop restreinte. Le contexte doit plutôt englober les circonstances qui ont donné lieu à l'adoption de la loi et la situation qu'elle voulait corriger. Ce point de vue est compatible avec le raisonnement énoncé dans l'arrêt *Bombay* comme l'indiquent les passages susmentionnés dans lesquels le critère de la déduction nécessaire est exprimé par rapport au moment de l'adoption de la loi. En fait, l'analyse adoptée par la Haute Cour de Bombay a été critiquée par le Conseil privé pour ce motif même, à la p. 62:

> [TRADUCTION] Même si la Haute Cour a interprété correctement le principe, sa façon de l'appliquer permet de soulever l'objection qu'elle aurait dû tenir compte non pas des conditions qui ont existé pendant de nombreuses années après l'adoption de la Loi, mais de l'état de chose qui existait en 1888 ou que la législature aurait pu prévoir.

J'examinerai tout d'abord les circonstances qui existaient au moment de l'adoption de la loi, en tenant compte du fait que le sujet général de la loi porte sur la navigation.

Ce faisant, il est utile de passer en revue certains des principes fondamentaux du droit maritime dans ce domaine, notamment ceux qui se rapportent aux eaux navigables. Il importe de se rappeler que le droit de la navigation au Canada comporte deux dimensions fondamentales—l'ancien droit public de navigation de la common law et la compétence constitutionnelle sur la navigation—qui sont nécessairement interdépendantes en vertu du par. 91(10) de la *Loi constitutionnelle de 1867* qui confère au Parlement une compétence législative exclusive sur la navigation.

The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; for a summary of the cases, see my book on *Water Law in Canada* (1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling v. Johnston* (1921), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province. There is no issue between the parties that the Oldman River is in fact navigable.

La common law d'Angleterre prévoit depuis longtemps que le public a un droit de navigation dans les eaux de marée; toutefois, bien que les eaux sans marée puissent être navigables, le public n'a pas le droit d'y naviguer, sous réserve de certaines exceptions qui ne sont pas pertinentes en l'espèce. Au Canada, la distinction entre les eaux de marée et les eaux sans marée a été abandonnée il y a longtemps, sauf dans les provinces de l'Atlantique où des considérations différentes pourraient bien s'appliquer; voir l'arrêt *In Re Provincial Fisheries* (1896), 26 R.C.S. 444; pour un sommaire des arrêts applicables, voir mon ouvrage intitulé *Water Law in Canada* (1973), aux pp. 178 à 180. La règle est plutôt la suivante: si les eaux sont navigables, que ce soient des eaux de marée ou sans marée, il existe un droit public de navigation. C'est le cas en Alberta où la Division d'appel de la Cour suprême, dans l'application de l'*Acte des territoires du Nord-Ouest*, S.R.C. 1886, ch. 50, a à bon droit statué dans l'arrêt *Flewelling c. Johnston* (1921), 59 D.L.R. 419, que la règle anglaise ne pouvait être appliquée à la province. Les parties ne contestent pas que la rivière Oldman est en fait navigable.

The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way; see *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 (H.L.), at p. 846. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. For example, in *Attorney-General v. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240, a relator action to enjoin a public nuisance causing an obstruction in the River Thames and an adjoining thoroughfare along its bank, the Lord Chancellor said, at p. 246:

La nature du droit public de navigation a donné lieu à beaucoup de jurisprudence au cours des années, mais certains principes sont toujours valables. Premièrement, le droit de navigation n'est pas un droit de propriété, mais simplement un droit public de passage; voir l'arrêt *Orr Ewing c. Colquhoun* (1877), 2 App. Cas. 839 (H.L.), à la p. 846. Ce n'est pas un droit absolu, mais il doit être exercé d'une façon raisonnable de manière à ne pas empiéter sur les droits équivalents des autres. Il est tout particulièrement important en l'espèce de préciser que le droit de navigation l'emporte sur les droits du propriétaire du lit, même si le propriétaire est la Couronne. Par exemple, dans l'arrêt *Attorney-General c. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240, concernant l'action d'une partie civile visant à éliminer une nuisance publique causant une obstruction dans la Tamise et sur une voie publique le long de la rive, le lord chancelier dit à la p. 246:

I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the

[TRADUCTION] J'estime qu'il n'est aucunement pertinent que le titre de propriété du sol entre la laisse des hautes

Crown, or in the City of *London*, or whether the City of *London* has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord *Grosvenor* or Mr. *Johnson* have any derivative title by grant from any one having the power to grant. . . . It is my present opinion, that the Crown has not the right either itself to use its title to the soil between high and low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the Crown has not such a right, it could not give it to the City of *London*, nor could the City transfer it to any other person.

This Court later came to the same conclusion in *Wood v. Esson* (1884), 9 S.C.R. 239. There, the plaintiffs had extended their wharf so as to interfere with access to the defendant's wharf. The defendant pulled up the piles and removed the obstruction to allow passage to his wharf, and the plaintiffs then brought an action in trespass on the ground that they enjoyed title under a grant from the province of Nova Scotia to the soil of the harbour on which the wharf was constructed. The Court held that the defendant was entitled to abate the nuisance created by the obstruction to navigation in the harbour. Strong J. remarked, at p. 243:

> The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right so to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. [Emphasis added.]

This passage also underscores another aspect of the paramountcy of the public right of navigation —that it can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation; see also *The Queen v. Fisher* (1891), 2 Ex. C.R. 365; *In Re Provincial Fisheries*, *supra*, at p. 549, *per* Girouard J.; and *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

eaux et celle des basses eaux appartienne à la Couronne ou à la ville de *Londres*, ou que la ville de *Londres* possède le droit d'administration, permettant ainsi de surveiller toute utilisation incorrecte du sol lorsque la Couronne en détient le titre, ou que lord *Grosvenor* ou M. *Johnson* possède un titre dérivé obtenu par concession de quiconque a le pouvoir de le faire [. . .] À mon avis, la Couronne n'a pas le droit de créer une nuisance lorsqu'elle utilise son droit de propriété du terrain situé entre la laisse des basses eaux et celle des hautes eaux ou de placer sur ce terrain quelque chose qui constituera une nuisance pour les sujets de la Couronne. Si la Couronne ne possède pas ce droit, elle ne pouvait pas l'accorder à la ville de *Londres*, et la ville de *Londres* ne pouvait pas le transférer à qui que ce soit.

Notre Cour est arrivée à la même conclusion dans l'arrêt *Wood c. Esson* (1884), 9 R.C.S. 239. Dans cette affaire, les demandeurs avaient allongé leur quai et entravaient ainsi l'accès au quai du défendeur. Celui-ci fit enlever la partie des travaux qui obstruait l'accès à son quai; les demandeurs ont ensuite intenté une poursuite pour violation de propriété au motif qu'ils jouissaient, en vertu d'une concession par la province de la Nouvelle-Écosse, du titre de propriété du sol à l'endroit dans le port où le quai était construit. La Cour a statué que le défendeur avait le droit d'éliminer l'obstacle créé par l'obstruction à la navigation dans le port. Le juge Strong indique à la p. 243:

> [TRADUCTION] Le titre de propriété du sol n'autorisait pas les demandeurs à allonger leur quai de façon à créer une nuisance publique qui, selon la preuve, constituait une obstruction à la navigation dans le port car la Couronne ne peut concéder le droit d'entraver ainsi les eaux navigables; seule une loi peut déterminer que quelque chose qui gêne la navigation n'est pas une nuisance. [Je souligne.]

Ce passage fait également ressortir un autre aspect de la suprématie du droit public de navigation: ce droit ne peut être modifié ou éteint que par une loi habilitante, et la concession d'un bien-fonds par la Couronne ne peut conférer le droit de gêner la navigation; voir aussi les arrêts *The Queen c. Fisher* (1891), 2 Ex. C.R. 365; *In Re Provincial Fisheries*, précité, à la p. 549, le juge Girouard; et *Reference re Waters and Water-Powers*, [1929] R.C.S. 200.

What is more, the provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation, since s. 91(10) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction to legislate respecting navigation. That was made clear by this Court in *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222, where an injunction was sought to restrain the defendant company from erecting piers and booms in the Queddy River in New Brunswick. The defendant relied on its constituent legislation, passed by the provincial legislature, which permitted a certain degree of interference with navigation. The only issue before the Court was the authority of the legislature to pass the Act incorporating the defendant. Ritchie C.J. concluded, at p. 232:

> ... the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of *New Brunswick*, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters. It is not disputed that this legislation interfered with the navigation of the river ...
>
> I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B.N.A. Act.

These cases served as an impetus for the enactment of what ultimately became the *Navigable Waters Protection Act*. Of relevance here is the enactment of one of the antecedent pieces of legislation—*An Act respecting booms and other works constructed in navigable waters whether under the authority of Provincial Acts or otherwise*, S.C. 1883, c. 43—preceding the consolidated Act which was to govern all aspects of the protection of navigable waters. Section 1 provided:

> **1.** No boom, dam or aboiteau shall be constructed whether under the authority of an Act of a Legislature of a Province of Canada, or under the authority of an Ordi-

Par ailleurs, les provinces ne sont pas habilitées, sur le plan constitutionnel, à adopter une loi autorisant l'établissement d'un obstacle à la navigation puisque le par. 91(10) de la *Loi constitutionnelle de 1867* confère au Parlement une compétence législative exclusive sur la navigation. Notre Cour a clairement établi ce point dans l'arrêt *Queddy River Driving Boom Co. c. Davidson* (1883), 10 R.C.S. 222. Dans cette affaire, le demandeur cherchait à obtenir une injonction visant à empêcher la société défenderesse de construire des jetées et des estacades dans la rivière Queddy au Nouveau-Brunswick. La défenderesse invoquait sa loi habilitante, adoptée par la législature provinciale, qui autorisait certaines entraves à la navigation. La seule question en litige devant la Cour était le pouvoir de la législature provinciale d'adopter la loi constitutive de la défenderesse. Le juge en chef Ritchie conclut, à la p. 232:

> [TRADUCTION] ... la question juridique dans cette affaire, savoir qui du Parlement du Dominion ou de l'Assemblée législative du *Nouveau-Brunswick* possède le pouvoir législatif d'autoriser l'obstruction, au moyen de jetées et d'estacades, d'une rivière à marée publique et navigable portant ainsi gravement atteinte au droit public de navigation dans ces eaux. Il n'est pas contesté en l'espèce que la loi gênait la navigation dans la rivière ...
>
> Je crois qu'il ne fait aucun doute que c'est le Parlement du Dominion qui a la compétence législative exclusive sur les eaux navigables, comme celles visées en l'espèce. Tout ce qui touche la navigation et les expéditions par eau semble avoir été soigneusement conféré au Parlement du Dominion par l'A.A.N.B.

Ces arrêts ont donné lieu à l'adoption de textes législatifs qui ont finalement abouti à la *Loi sur la protection des eaux navigables*. Il est pertinent ici de mentionner l'un des textes législatifs—l'*Acte concernant les bômes et autres ouvrages établis en eaux navigables soit sous l'autorité d'actes provinciaux soit autrement*, S.C. 1883, ch. 43—qui a précédé la Loi codifiée qui devait régir tous les aspects de la protection des eaux navigables. L'article premier dispose que:

> **1.** Aucun *bôme*, barrage ou *aboiteau* ne sera établi soit sous l'autorité d'un acte rendu par une législature provinciale du Canada, soit sous l'autorité d'une ordon-

nance of the North-West Territories or of the District of Keewatin or otherwise, so as to interfere with navigation, unless the site thereof has been approved, and unless the boom, dam or aboiteau has been built and is maintained in accordance with plans approved by the Governor General in Council.

The Act also provided a means whereby existing structures which interfered with navigation, and thus created a public nuisance, could be legalized by seeking approval from the Governor General in Council.

That statute was but one enactment in which Parliament exercised its jurisdiction to prevent the erection or continuation of impediments to navigation. It had already legislated, *inter alia*, in respect of bridges (*An Act respecting Bridges over navigable waters, constructed under the authority of Provincial Acts*, S.C. 1882, c. 37); the removal of obstructions and wrecks from navigable waters (*An Act for the removal of obstructions, by wreck and like causes, in Navigable Waters of Canada, and other purposes relative to wrecks*, S.C. 1874, c. 29); and effluent from sawmills into navigable waters (*An Act for the better protection of Navigable Streams and Rivers*, S.C. 1873, c. 65).

The consolidation process began with the passage of *An Act respecting certain works constructed in or over Navigable Waters*, S.C. 1886, c. 35, dealing with construction of any "work" in navigable waters, and its companion legislation *An Act respecting the protection of Navigable Waters*, S.C. 1886, c. 36, concerning obstruction of navigable waters by wrecks. Section 1 of the former compendiously defined the term "work" to mean:

> **1.** In this Act, unless the context otherwise requires, the expression "work" means and includes any bridge, boom, dam, aboiteau, wharf, dock, pier or other structure, and the approaches or other works necessary or appurtenant thereto; . . .

The definition was far more comprehensive in scope than its predecessors, and this aspect of the

nance des Territoires du Nord-Ouest ou du District de Kéwatin, ou autrement, de manière à gêner la navigation, à moins que l'emplacement n'en ait été approuvé, —et que l'ouvrage n'ait été construit et ne soit maintenu en état conformément à des plans qui auront été approuvés—par le Gouverneur général en conseil.

La Loi prévoyait aussi que les ouvrages existants qui gênaient la navigation, créant ainsi une nuisance publique, pouvaient être légalisés s'ils étaient approuvés par le gouverneur général en conseil.

Cette loi n'est qu'un des textes où le Parlement a exercé sa compétence pour empêcher la construction ou la continuation d'obstacles à la navigation. Il avait déjà notamment légiféré à l'égard des ponts (*Acte concernant les ponts établis en vertu d'actes provinciaux sur des eaux navigables*, S.C. 1882, ch. 37), de l'enlèvement d'obstructions et d'épaves dans les rivières navigables (*Acte pour pourvoir à l'enlèvement d'obstructions provenant de naufrages et autres causes semblables dans les rivières navigables du Canada, et pour d'autres objets relatifs aux naufrages*, S.C. 1874, ch. 29) et des effluents des moulins à scie dans les eaux navigables (*Acte à l'effet de mieux protéger les cours d'eau et rivières navigables*, S.C. 1873, ch. 65).

La codification a commencé avec l'adoption d'un *Acte concernant certaines constructions dans et sur les eaux navigables*, S.C. 1886, ch. 35, ayant trait à la construction de tout «ouvrage» dans les eaux navigables et de la loi d'accompagnement intitulée *Acte concernant la protection des eaux navigables*, S.C. 1886, ch. 36, portant sur les obstructions provenant de naufrages dans les eaux navigables. L'article premier de l'*Acte concernant certaines constructions dans et sur les eaux navigables* définissait succinctement le terme «ouvrage»:

> **1.** Dans le présent acte, à moins que le contexte n'exige une interprétation différente, l'expression «ouvrage» signifie et comprend tout pont, estacade, barrage, aboiteau, quai, dock, jetée, pilier ou autre construction, et leurs approches ou avenues et autres travaux nécessaires ou s'y rattachant; . . .

Cette définition était beaucoup plus large que celles qui l'ont précédée et cet aspect de la loi, con-

law, coupled with the requirement for approval from the Governor in Council of all such works, caused considerable consternation at the time as to the breadth of its potential retrospective effect for existing structures erected in navigable waters.

However, the statute was merely declaratory of the common law. To the extent that a structure interfered with the public right of navigation, it was a public nuisance, and the provinces were constitutionally powerless to authorize an interference of that nature. The retrospective effect of the law with respect to works built under the statutory authority of a provincial legislature, however, only went back as far as the time the province joined Confederation. Section 7 provided:

> **7.** Nothing hereinbefore contained, except the provisions of the first and fifth sections hereof, shall apply to any work constructed under the authority of any Act of the Parliament of Canada, or of the legislature of the late Province of Canada, or of the legislature of any Province now forming part of Canada, passed before such Province became a part thereof.

Thus, no permission would be required for a work authorized by the legislature of a province before it joined Canada. That is because the province would then have had the constitutional jurisdiction to authorize the work. Similarly, the Act did not apply to works constructed under any other Act of Parliament so that it was clear which Act governed. Parliament had already passed legislation authorizing certain works of that nature; see for example *An Act to authorize the Corporation of the Town of Emerson to construct a Free Passenger and Traffic Bridge over the Red River in the Province of Manitoba*, S.C. 1880, c. 44.

The 1886 Acts were re-enacted in R.S.C. 1886, cc. 91 and 92, and consolidated in R.S.C. 1906, c. 115, when they were given the short title *Navigable Waters' Protection Act*. The Act has remained substantially the same since. In particular, s. 7 of c. 35 of the 1886 statute has remained

jugué à la nécessité de faire approuver tous les ouvrages par le gouverneur en conseil, a causé une grande consternation à l'époque concernant l'ampleur de son effet rétroactif possible à l'égard des structures existantes construites dans les eaux navigables.

Toutefois, la loi constituait simplement une déclaration de la situation en common law. Dans la mesure où une structure portait atteinte au droit public de navigation, elle constituait une nuisance publique et les provinces n'étaient pas habilitées sur le plan constitutionnel à autoriser l'établissement d'un obstacle de cette nature. Toutefois, en ce qui concerne les ouvrages construits sous l'autorité d'un acte de la législature d'une province, la loi avait un effet rétroactif qui ne remontait pas au delà de la date d'adhésion de la province à la Confédération.

> **7.** Rien de contenu ci-dessus, excepté les dispositions du premier et du cinquième articles, ne s'appliquera à aucun ouvrage construit sous l'autorité d'un acte du parlement du Canada, ou de la législature de la ci-devant province du Canada, ou de la législature d'aucune des provinces formant actuellement partie du Canada, passé avant que cette province en soit devenue partie.

En conséquence, il n'était pas nécessaire de faire approuver un ouvrage autorisé par la législature d'une province avant que celle-ci ne fasse partie du Canada puisque la province était alors habilitée sur le plan constitutionnel à autoriser la construction de l'ouvrage en question. La Loi n'était pas non plus applicable aux ouvrages construits en vertu d'une autre loi du Parlement; on savait donc clairement quel acte était applicable. Le Parlement avait déjà adopté un texte législatif autorisant certains ouvrages de cette nature; voir, par exemple, l'*Acte à l'effet d'autoriser la corporation de la ville d'Emerson à construire un pont libre pour les voyageurs et le trafic sur la rivière Rouge, dans la province du Manitoba*, S.C. 1880, ch. 44.

Les Actes de 1886 furent adoptés de nouveau dans les S.R.C. de 1886, ch. 91 et 92, et codifiés dans les S.R.C. de 1906, ch. 115, où ils reçurent le titre abrégé de *Loi de la protection des eaux navigables*. Cette loi est demeurée pratiquement inchangée depuis. Plus particulièrement, l'art. 7 du

materially unaltered, and is now found in s. 4 of the present Act. It was this provision that the Court of Appeal relied upon to find that the Crown in right of Alberta was bound by necessary implication. I agree with this position. By expressly excepting from the operation of the Act works authorized by Parliament since Confederation and by pre-Confederation provincial legislatures, at a time these bodies had power to interfere with navigation, the statute by necessary implication must be taken to provide that post-Confederation works undertaken by the provinces are subject to the Act. There are, however, even more fundamental considerations that lead to the view that the conclusion arrived at by the Court of Appeal was correct. To these I now turn.

In my view, the circumstances surrounding the passage of the legislation, informing as they must the context of the statute, do lead to the logical inference that the Crown in right of a province is bound by the Act by necessary implication. Neither the Crown nor a grantee of the Crown may interfere with the public right of navigation without legislative authorization. The proprietary right the Crown in right of Alberta may have in the bed of the Oldman River is subject to that right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Parliament has entered the field principally through the passage of the *Navigable Waters Protection Act* which delegated to the Governor General in Council, and now the Minister of Transport, authority to permit construction of what would otherwise be a public nuisance in navigable waters. The Crown in right of Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. It follows that the Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval.

ch. 35 de la loi de 1886 est demeuré substantiellement le même et constitue maintenant l'art. 4 de la Loi actuelle. C'est cette disposition que la Cour d'appel a appliquée pour statuer que la Couronne du chef de l'Alberta était liée par déduction nécessaire. Je souscris à cette opinion. Puisque sont expressément exclus de l'application de la Loi les ouvrages autorisés par le Parlement depuis la Confédération et par les législatures provinciales auparavant, au moment où ces corps législatifs avaient le pouvoir d'intervenir en matière de navigation, il faut comprendre, par déduction nécessaire, que la Loi s'applique aux ouvrages entrepris par les provinces après la Confédération. Il existe toutefois des considérations encore plus fondamentales qui nous amènent à soutenir que la conclusion de la Cour d'appel était correcte. J'en ferai maintenant l'analyse.

À mon avis, les circonstances qui ont entouré l'adoption de la loi, aussi révélatrices qu'elles soient du contexte de l'adoption de la loi, nous amènent à conclure en toute logique que la Couronne du chef d'une province est, par déduction nécessaire, liée par la Loi. Ni la Couronne ni un cessionnaire de la Couronne ne peuvent porter atteinte au droit public de navigation sans y être autorisés par une loi. Le droit de propriété que la Couronne du chef de l'Alberta peut détenir sur le lit de la rivière Oldman est assujetti au droit de navigation, sur lequel le Parlement exerce une compétence législative exclusive. L'exercice de la compétence du Parlement s'est principalement manifesté par l'adoption de la *Loi sur la protection des eaux navigables* qui a délégué au gouverneur général en conseil, et maintenant au ministre des Transports, le pouvoir d'autoriser la construction dans les eaux navigables de travaux qui constitueraient par ailleurs une nuisance publique. La Couronne du chef de l'Alberta doit obtenir l'autorisation législative du Parlement pour construire un ouvrage qui gênerait sérieusement la navigation dans la rivière Oldman; la *Loi sur la protection des eaux navigables* est le mécanisme qu'elle doit utiliser à cette fin. Il s'ensuit que la Couronne du chef de l'Alberta est liée par la Loi, car il s'agit là du seul moyen pratique d'obtenir l'approbation requise.

My colleague, Stevenson J., has however referred to the statement of Fitzpatrick C.J. in *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216 (S.C.C.), to the effect that the Act was merely permissive and did not prevent a third party from bringing action for an interference with the public right of navigation despite the Minister's approval of the work. This statement, however, was mere dicta. The issue there was whether the structure concerned interfered with the plaintiffs' private right of access. The other two majority judges confined their remarks to this matter, and the two minority judges *a fortiori* did not agree with the statement. For my part, I prefer the view expressed in *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459 (Div. Ct.), that the Act does permit interference with the public right of navigation but does not interfere with the private rights of individuals. That is the proposition for which *Champion* is authority.

Mon collègue le juge Stevenson a cependant fait mention de la déclaration du juge en chef Fitzpatrick dans *Champion c. City of Vancouver*, [1918] 1 W.W.R. 216 (C.S.C.), selon laquelle la Loi ne faisait qu'accorder une permission et n'empêchait pas un tiers d'intenter une action pour atteinte au droit public de navigation malgré l'approbation de l'ouvrage par le Ministre. Toutefois, cette déclaration n'était qu'incidente. Il s'agissait de déterminer si la structure en cause portait atteinte au droit d'accès privé des demandeurs. Les deux autres juges de la majorité ont limité leurs remarques à cette question et les deux juges de la minorité n'ont pas, à plus forte raison, approuvé la déclaration. Pour ma part, je préfère l'opinion exprimée dans *Isherwood c. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459 (C. div.), selon laquelle la Loi permet de porter atteinte au droit public de navigation mais non aux droits privés des particuliers. C'est la proposition pour laquelle l'arrêt *Champion* fait autorité.

For these reasons I have concluded that the Crown in right of Alberta is, as a matter of necessary or logical implication, bound by the *Navigable Waters Protection Act*. I am also of the view that the purpose of the Act would be wholly frustrated if this were not the case. I am affected by the considerations referred to by Stone J.A. that the provinces are among the bodies that are likely to engage in projects—bridges, for example—that may interfere with navigation, and that this was the case in this country well before the passage of the Act, but here again I am affected as well by even more fundamental considerations, namely the nature of navigation in this country and of Parliament's legislative power over this activity.

Pour ces motifs, j'ai conclu que la Couronne du chef de l'Alberta est, par déduction nécessaire ou logique, liée par la *Loi sur la protection des eaux navigables*. Je suis également d'avis que, s'il n'en était pas ainsi, la Loi serait privée de toute efficacité. J'ai pris note des considérations soulevées par le juge Stone, savoir que les provinces font partie des organismes susceptibles de participer à des projets, par exemple, la construction de ponts, qui peuvent gêner la navigation, ce qui était le cas au Canada bien avant l'adoption de la Loi; toutefois, je m'intéresse également à des considérations encore plus fondamentales, savoir la nature de la navigation au Canada et la compétence législative du législateur fédéral sur ce domaine.

Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. With respect to the contrary view, it makes little sense to suggest that any semblance of Parliament's legislative objective in exercising its jurisdiction for the conservancy of navigable waters would be achieved were the Crown to be excluded from the operation of the Act. The regulation of navigable waters must be

Certains cours d'eau navigables constituent une partie cruciale des réseaux de transport interprovincial, essentiels aux échanges internationaux et à l'activité commerciale au Canada. En ce qui concerne l'opinion contraire, il n'est pas très logique de prétendre qu'il serait possible d'atteindre en quoi que ce soit l'objectif du Parlement dans l'exercice de sa compétence sur l'administration des eaux navigables si la Couronne n'était pas liée par l'effet de la Loi. La réglementation des eaux

viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.

The practical necessity for a uniform regulatory regime for navigable waters has already been recognized by this Court in *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, and the reasoning given there in support of a single body of maritime law within federal jurisdiction is equally applicable to this case. At pages 1294-95, it is stated:

> Quite apart from judicial authority, the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. Much of the navigational and shipping activity that takes place on Canada's inland waterways is closely connected with that which takes place within the traditional geographic sphere of maritime law. This is most obviously the case when one looks to the Great Lakes and the St. Lawrence Seaway, which are to a very large degree an extension, or alternatively the beginning, of the shipping lanes by which this country does business with the world. But it is also apparent when one looks to the many smaller rivers and waterways that serve as ports of call for ocean going vessels and as the points of departure for some of Canada's most important exports. This is undoubtedly one of the considerations that led the courts of British North America to rule that the public right of navigation, in contradistinction to the English position, extended to all navigable rivers regardless of whether or not they were within the ebb and flow of the tide .... It probably also explains why the Fathers of Confederation thought it necessary to assign the broad and general power over navigation and shipping to the central rather than the provincial governments ....

Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative

navigables doit être analysée dans son ensemble et ce serait une situation absurde si la Couronne du chef d'une province pouvait impunément entraver la navigation à un endroit le long d'un cours d'eau navigable, alors que le Parlement travaille assidûment à en préserver la navigabilité à un autre.

La nécessité en pratique d'avoir un régime de réglementation uniforme pour les eaux navigables a déjà été reconnue par notre Cour dans l'arrêt *Whitbread c. Walley*, [1990] 3 R.C.S. 1273; le raisonnement présenté dans cet arrêt en faveur d'un régime de règles de droit maritime uniformes relevant de la compétence fédérale est également applicable en l'espèce. Aux pages 1294 et 1295, on dit:

> Mise à part la jurisprudence, la nature même des activités relatives à la navigation et aux expéditions par eau, du moins telles qu'elles sont exercées ici, fait que des règles de droit maritime uniformes s'appliquant aux voies navigables intérieures sont nécessaires en pratique. La plupart des activités relatives à la navigation et aux expéditions par eau ayant lieu sur les voies navigables intérieures du Canada sont étroitement liées avec celles qui sont exercées dans la sphère géographique traditionnelle du droit maritime. Cela est particulièrement évident lorsque l'on considère les Grands Lacs et la Voie maritime du Saint-Laurent, qui sont dans une très large mesure une extension, sinon le commencement, des voies de transport maritime grâce auxquelles le pays fait du commerce avec le monde. Mais cela est également manifeste lorsque l'on examine les nombreux fleuves, rivières et voies d'eau moins importants qui servent de port d'escale aux océaniques et de point de départ pour quelques-unes des plus importantes exportations du Canada. C'est à n'en pas douter l'une des considérations qui ont amené les tribunaux de l'Amérique du Nord britannique à décider que le droit public de navigation, contrairement à ce que prétendaient les Anglais, s'étend à tous les fleuves et rivières navigables, peu importe qu'ils soient ou non à l'intérieur de l'aire de flux et de reflux; [. . .] Cela explique probablement aussi pourquoi les Pères de la Confédération ont estimé nécessaire d'attribuer le pouvoir général sur la navigation et les expéditions par eau au gouvernement central plutôt qu'à celui des provinces . . .

Si la Couronne du chef d'une province était habilitée à saper l'intégrité des réseaux essentiels de navigation dans les eaux canadiennes, à mon avis,

purpose of the *Navigable Waters Protection Act* would, in my view, effectively be emasculated. In light of these findings, it is unnecessary to comment on the issue of waiver that was raised by the appellant Ministers.

Constitutional Question

The constitutional question asks whether the *Guidelines Order* is so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867*. However, no argument was made with respect to s. 92A for the apparent reason that the Oldman River Dam project does not, in the appellants' view, fall within the ambit of that provision. At all events, the matter is of no moment. The process of judicial review of legislation which is impugned as *ultra vires* Parliament was recently elaborated on in *Whitbread v. Walley*, *supra*, and does not bear repetition here, save to remark that if the *Guidelines Order* is found to be legislation that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction, that is the end of the matter. It would be immaterial that it also affects matters of property and civil rights (*Whitbread*, at p. 1286). The analysis proceeds first by identifying whether in pith and substance the legislation falls within a matter assigned to one or more of the heads of legislative power.

While various expressions have been used to describe what is meant by the "pith and substance" of a legislative provision, in *Whitbread v. Walley* I expressed a preference for the description "the dominant or most important characteristic of the challenged law". Naturally, the parties have advanced quite different features of the *Guidelines Order* as representing its most important characteristic. For Alberta, it is the manner in which it is said to encroach on provincial rights, although no specific matter has been identified other than general references to the environment. Alberta argues that Parliament has no plenary jurisdiction over the environment, it being a matter of legislative jurisdiction shared by both levels of government, and that the *Guidelines Order* has crossed the line

l'objet de la *Loi sur la protection des eaux navigables* serait, en fait, annihilé. Vu ces conclusions, je n'ai pas à examiner la question de la renonciation soulevée par les ministres appelants.

La question constitutionnelle

La question constitutionnelle vise à savoir si le *Décret sur les lignes directrices* est général au point de contrevenir aux art. 92 et 92A de la *Loi constitutionnelle de 1867*. Toutefois, aucun moyen n'a été présenté relativement à l'art. 92A au motif apparent que le projet de construction d'un barrage sur la rivière Oldman n'est pas, selon les appelants, visé par cette disposition. Quoi qu'il en soit, la question n'a pas d'importance. Le processus de révision judiciaire d'un texte législatif contesté parce qu'il serait *ultra vires* du Parlement a récemment fait l'objet d'une analyse dans l'arrêt *Whitbread c. Walley*, précité, et je n'ai pas besoin de la reprendre ici, sauf pour dire que si l'on conclut que, de par son caractère véritable, le *Décret sur les lignes directrices* est un texte législatif lié à des matières relevant de la compétence exclusive du Parlement, la question est épuisée. Il serait alors indifférent qu'il touche également des matières liées à la propriété et aux droits civils (*Whitbread*, à la p. 1286). L'analyse consiste tout d'abord à déterminer si, de par son caractère véritable, le texte législatif est lié à une matière relevant d'un ou plusieurs domaines de compétence législative.

Bien que diverses expressions aient été utilisées pour décrire ce que l'on entend par le «caractère véritable» d'une disposition législative, j'ai exprimé dans l'arrêt *Whitbread c. Walley* une préférence pour la détermination de «la caractéristique principale ou la plus importante de la loi contestée». Il va sans dire que les parties ont fait valoir des aspects fort différents comme caractéristique la plus importante du *Décret sur les lignes directrices*. Pour l'Alberta, c'est la façon dont le Décret empiéterait sur les droits provinciaux; toutefois, elle n'a pas mentionné de matière spécifique autre que des renvois généraux à l'environnement. L'Alberta soutient, d'une part, que le Parlement n'a pas une compétence absolue sur l'environnement, s'agissant là d'une matière relevant de la compé-

which circumscribes Parliament's authority over the environment. The appellant Ministers argue that in pith and substance the *Guidelines Order* is merely a process to facilitate federal decision making on matters that fall within Parliament's jurisdiction—a proposition with which the respondent substantially agrees.

The substance of Alberta's argument is that the *Guidelines Order* purports to give the Government of Canada general authority over the environment in such a way as to trench on the province's exclusive legislative domain. Alberta argues that the *Guidelines Order* attempts to regulate the environmental effects of matters largely within the control of the province and, consequently, cannot constitutionally be a concern of Parliament. In particular, it is said that Parliament is incompetent to deal with the environmental effects of provincial works such as the Oldman River Dam.

I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government. Professor Gibson put it succinctly several years ago in his article "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85:

> ... "environmental management" does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution

tence législative des deux paliers de gouvernement et, d'autre part, que le *Décret sur les lignes directrices* est exorbitant de la compétence du Parlement sur l'environnement. Les ministres appelants soutiennent que, de par son caractère véritable, le *Décret sur les lignes directrices* n'est qu'un moyen d'aider le gouvernement fédéral à prendre des décisions dans des domaines qui relèvent de la compétence du Parlement; l'intimée est en grande partie d'accord avec cette proposition.

L'essentiel de la thèse de l'Alberta est que le *Décret sur les lignes directrices* prétend conférer au gouvernement du Canada une compétence générale sur l'environnement d'une façon qui empiète sur la compétence législative exclusive de la province. L'Alberta soutient que le *Décret sur les lignes directrices* tente de réglementer les répercussions environnementales de matières qui relèvent en grande partie de la compétence de la province et qui, par conséquent, ne peuvent, en vertu de la Constitution, constituer une préoccupation du Parlement. Elle est d'avis tout particulièrement que le Parlement n'a pas de compétence à l'égard des répercussions environnementales d'ouvrages provinciaux comme le barrage sur la rivière Oldman.

Je suis d'accord que la *Loi constitutionnelle de 1867* n'a pas conféré le domaine de l'«environnement» comme tel aux provinces ou au Parlement. L'environnement, dans son sens générique, englobe l'environnement physique, économique et social touchant plusieurs domaines de compétence attribués aux deux paliers de gouvernement. Le professeur Gibson a succinctement résumé ce point il y a plusieurs années dans son article intitulé: «Constitutionnal Jurisdiction over Environmental Management in Canada» (1973), 23 *U.T.L.J.* 54, à la p. 85:

> [TRADUCTION] ... la «gestion de l'environnement» ne constitue pas dans la situation actuelle une unité constitutionnelle homogène. Elle touche plutôt différents domaines de responsabilité constitutionnelle, certains relevant du fédéral, d'autres des provinces. Il est par ailleurs fort évident que la «gestion de l'environnement» ne pourrait jamais être considérée comme une unité constitutionnelle relevant d'un seul palier de gouvernement à l'intérieur d'une constitution de type fédéral

that claimed to be federal, because no system in which one government was so powerful would be federal.

I earlier referred to the environment as a diffuse subject, echoing what I said in *R. v. Crown Zellerbach Canada Ltd.*, *supra*, to the effect that environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the "national concern" doctrine as articulated by Beetz J. in *Reference re Anti-Inflation Act*, *supra*. Although I was writing for the minority in *Crown Zellerbach*, this opinion was not contested by the majority. The majority simply decided that marine pollution was a matter of national concern because it was predominately extra-provincial and international in character and implications, and possessed sufficiently distinct and separate characteristics as to make it subject to Parliament's residual power.

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. A variety of analytical constructs have been developed to grapple with the problem, although no single method will be suitable in every instance. Some have taken a functional approach by describing specific environmental concerns and then allocating responsibility by reference to the different heads of power; see, for example, Gibson, *supra*. Others have looked at the problem from the perspective of testing the ambit of federal powers according to their general description as "conceptual" or "global" (e.g., criminal law, taxation, trade and commerce, spending and the general residuary power) as opposed to "functional" (e.g., navigation and fisheries); see P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972), 10 *Osgoode Hall L.J.* 647, and M. E. Hatherly, *Constitutional Jurisdiction in Relation to Environmental Law*, background paper

parce qu'aucun système à l'intérieur duquel un seul gouvernement serait aussi puissant ne serait fédéral.

J'ai déjà mentionné que l'environnement est un sujet diffus, reprenant ainsi ce que j'ai dit dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, précité, que le contrôle de l'environnement, en tant que sujet, ne possède pas la particularité requise pour satisfaire au critère en vertu de la théorie de l'intérêt «national» formulée par le juge Beetz dans le *Renvoi relatif à la Loi anti-inflation*, précité. Bien que j'aie exprimé l'opinion minoritaire dans l'arrêt *Crown Zellerbach*, elle n'a pas été contestée sur ce point par les juges de la majorité. La majorité a simplement décidé que la pollution des mers est une question d'intérêt national à cause de son caractère et de ses incidences surtout extra-provinciales et internationales, et parce que ses caractéristiques sont suffisamment distinctes pour en faire un sujet relevant du pouvoir résiduel du Parlement.

Il faut reconnaître que l'environnement n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867* et que c'est, au sens constitutionnel, une matière obscure qui ne peut être facilement classée dans le partage actuel des compétences, sans un grand chevauchement et une grande incertitude. On a élaboré diverses méthodes analytiques pour régler ce problème; toutefois, il n'en existe pas une seule qui conviendra dans tous les cas. Certains envisagent une analyse fonctionnelle en décrivant des préoccupations environnementales spécifiques et en attribuant ensuite la responsabilité en fonction des divers domaines de compétence; voir par exemple Gibson, *loc. cit.* D'autres abordent le problème du point de vue de l'étendue des pouvoirs fédéraux en distinguant ceux qui peuvent être considérés comme «conceptuels» ou «globaux» (par exemple, le droit criminel, la taxation, les échanges et le commerce, le pouvoir de dépenser et le pouvoir résiduel général) par opposition à ceux qui sont «fonctionnels» (la navigation et les pêcheries); voir P. Emond, «The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution» (1972), 10 *Osgoode Hall L.J.* 647, et M. E. Hatherly, *Constitutional Jurisdiction in*

prepared for the Protection of Life Project, Law Reform Commission of Canada (1984).

In my view the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting. This can best be understood by looking at specific powers. A revealing example is the federal Parliament's exclusive legislative power over interprovincial railways under ss. 92(10)(*a*) and 91(29) of the *Constitution Act, 1867*. The regulation of federal railways has been entrusted to the National Transportation Agency pursuant to the *National Transportation Act, 1987*, which enjoys a broad mandate as summarized in the declaration found in s. 3, which reads in part:

> **3.** (1) It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,
>
> . . .
>
> (*d*) transportation is recognized as a key to regional economic development and commercial viability of transportation links is balanced with regional economic development objectives in order that the potential economic strengths of each region may be realized, . . .

This gives some insight into the scope of Parliament's legislative jurisdiction over railways and

Relation to Environmental Law, document d'étude rédigé dans le cadre du projet de la protection de la vie, Commission de réforme du droit du Canada (1984).

À mon avis, on peut plus facilement trouver la solution applicable à l'espèce en examinant tout d'abord l'énumération des pouvoirs dans la *Loi constitutionnelle de 1867* et en analysant comment ils peuvent être utilisés pour répondre aux problèmes environnementaux ou pour les éviter. On pourra alors se rendre compte que, dans l'exercice de leurs pouvoirs respectifs, les deux paliers de gouvernement peuvent toucher l'environnement, tant par leur action que par leur inaction. Pour mieux comprendre, on doit examiner des pouvoirs spécifiques. Un exemple intéressant est la compétence législative exclusive du Parlement fédéral sur le transport ferroviaire interprovincial en vertu de l'al. 92(10)*a*) et du par. 91(29) de la *Loi constitutionnelle de 1867*. La réglementation du transport ferroviaire fédéral a été confiée à l'Office national des transports conformément à la *Loi de 1987 sur les transports nationaux*; le mandat de cet office est vaste, comme le résume la déclaration figurant à l'art. 3 qui prévoit notamment:

> **3.** (1) Il est déclaré que, d'une part, la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, utilisant au mieux et aux moindres frais globaux tous les modes de transport existants, est essentielle à la satisfaction des besoins des expéditeurs et des voyageurs en matière de transports comme à la prospérité et à la croissance économique du Canada et de ses régions, d'autre part, ces objectifs ont le plus de chances de se réaliser en situation de concurrence, dans et parmi les divers modes de transport, entre tous les transporteurs, à condition que, compte dûment tenu de la politique nationale et du contexte juridique et constitutionnel:
>
> . . .
>
> *d*) les transports soient reconnus comme un facteur primordial du développement économique régional et que soit maintenu un équilibre entre les objectifs de rentabilité des liaisons de transport et ceux de développement économique régional en vue de la réalisation du potentiel économique de chaque région; . . .

Cette déclaration nous éclaire sur l'étendue de la compétence législative du Parlement en matière de

the manner in which it is charged with the responsibility of weighing both the national and local socio-economic ramifications of its decisions. Moreover, it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways. This could involve issues such as emission standards or noise abatement provisions.

transport ferroviaire et sur la façon dont on lui impose de tenir compte des ramifications socio-économiques à la fois nationales et locales de ses décisions. Par ailleurs, on ne peut sérieusement mettre en doute que le Parlement puisse s'occuper de questions biophysiques environnementales ayant une incidence sur l'exploitation des chemins de fer dans la mesure où il le fait dans le cadre d'une loi sur les chemins de fer. Il pourrait notamment s'agir de questions touchant les normes d'émission ou les mesures de réduction du bruit.

To continue with the example, one might postulate the location and construction of a new line which would require approval under the relevant provisions of the *Railway Act*, R.S.C., 1985, c. R-3. That line may cut through ecologically sensitive habitats such as wetlands and forests. The possibility of derailment may pose a serious hazard to the health and safety of nearby communities if dangerous commodities are to be carried on the line. On the other hand, it may bring considerable economic benefit to those communities through job creation and the multiplier effect that will have in the local economy. The regulatory authority might require that the line circumvent residential districts in the interests of noise abatement and safety. In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval. To suggest otherwise would lead to the most astonishing results, and it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature.

Pour poursuivre avec le même exemple, on peut proposer l'emplacement et la construction d'une nouvelle voie ferrée, qui devraient être approuvés en vertu des dispositions pertinentes de la *Loi sur les chemins de fer*, L.R.C. (1985), ch. R-3. En effet, cette voie pourrait traverser des habitats fragiles du point de vue écologique comme des marécages et des forêts. En outre, le risque de déraillement peut présenter un grave danger pour la santé et la sécurité des collectivités avoisinantes dans le cas de transport de marchandises dangereuses. Par contre, cette voie peut entraîner d'importantes retombées économiques locales grâce à la création d'emplois et à l'effet de multiplication qui s'ensuivra. L'autorité réglementante peut exiger que la voie soit construite à l'extérieur des districts résidentiels eu égard à la suppression du bruit et par souci de sécurité. À mon avis, on peut validement tenir compte de toutes ces considérations dans la décision finale d'accorder ou non l'approbation nécessaire. Prétendre le contraire nous conduirait à des résultats étonnants et il ne serait pas logique d'affirmer que la Constitution ne permet pas au Parlement de tenir compte des vastes répercussions environnementales, y compris des préoccupations socio-économiques, lorsqu'il légifère relativement à des décisions de cette nature.

The same can be said for several other subject matters of legislation, including one of those before the Court, namely navigation and shipping. Some provisions of the *Navigable Waters Protection Act* are aimed directly at biophysical environmental concerns that affect navigation. Sections 21 and 22 read:

Le même raisonnement peut être appliqué à plusieurs autres matières, y compris une de celles dont nous sommes saisis, savoir la navigation et les expéditions par eau. Certaines dispositions de la *Loi sur la protection des eaux navigables* visent directement les préoccupations environnementales biophysiques qui touchent la navigation. Les articles 21 et 22 disposent:

21. No person shall throw or deposit or cause, suffer or permit to be thrown or deposited any sawdust, edgings, slabs, bark or like rubbish of any description whatever that is liable to interfere with navigation in any water, any part of which is navigable or that flows into any navigable water.

22. No person shall throw or deposit or cause, suffer or permit to be thrown or deposited any stone, gravel, earth, cinders, ashes or other material or rubbish that is liable to sink to the bottom in any water, any part of which is navigable or that flows into any navigable water, where there are not at least twenty fathoms of water at all times, but nothing in this section shall be construed so as to permit the throwing or depositing of any substance in any part of a navigable water where that throwing or depositing is prohibited by or under any other Act.

21. Il est interdit de jeter ou déposer, de faire jeter ou déposer ou de permettre ou tolérer que soient jetés ou déposés des sciures, rognures, dosses, écorces, ou des déchets semblables de quelque nature susceptibles de gêner la navigation dans des eaux dont une partie est navigable ou qui se déversent dans des eaux navigables.

22. Il est interdit de jeter ou déposer, de faire jeter ou déposer ou de permettre ou tolérer que soient jetés ou déposés de la pierre, du gravier, de la terre, des escarbilles, cendres ou autres matières ou déchets submersibles dans des eaux dont une partie est navigable ou qui se déversent dans des eaux navigables et où il n'y a pas continuellement au moins vingt brasses d'eau; le présent article n'a toutefois pas pour effet de permettre de jeter ou déposer une substance dans des eaux navigables là où une autre loi interdit de le faire.

As I mentioned earlier in these reasons, the Act has a more expansive environmental dimension, given the common law context in which it was enacted. The common law proscribed obstructions that interfered with the paramount right of public navigation. Several of the "works" referred to in the Act do not in any way improve navigation. Bridges do not assist navigation, nor do many dams. Thus, in deciding whether a work of that nature is to be permitted, the Minister would almost surely have to weigh the advantages and disadvantages resulting from the interference with navigation. This could involve environmental concerns such as the destruction to fisheries, and all the *Guidelines Order* does then is to extend the ambit of his concerns.

Comme je l'ai mentionné, cette loi a une dimension environnementale de plus grande envergure, compte tenu du contexte de common law dans lequel elle a été adoptée. La common law interdit les obstacles qui portent atteinte au droit public suprême de navigation. Plusieurs des «ouvrages» mentionnés dans la Loi ne visent pas à améliorer la navigation. Les ponts ne favorisent pas la navigation ni d'ailleurs un grand nombre de barrages. Par conséquent, lorsqu'il s'agit de décider d'autoriser un ouvrage de cette nature, le ministre devrait presque certainement tenir compte des avantages et désavantages résultant de l'entrave à la navigation. Cela pourrait nécessiter un examen des préoccupations environnementales comme la destruction de la pêche; le *Décret sur les lignes directrices* ne vise donc qu'à étendre la portée de ses préoccupations.

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental rôle can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource,

On doit rappeler que l'exercice d'une compétence législative, dans la mesure où elle se rapporte à l'environnement, doit, comme toute autre préoccupation, se rattacher au domaine de compétence approprié; puisque la nature des divers domaines de compétence en vertu de la *Loi constitutionnelle de 1867* diffère, l'importance qui pourra être accordée aux préoccupations environnementales dans l'exercice d'une compétence donnée pourra varier d'un domaine à l'autre. Par exemple, le Parlement peut jouer, en matière d'environnement, dans l'exercice de sa compétence sur les pêcheries, un rôle quelque peu différent de celui qu'il a en

the others activities. The foregoing observations may be demonstrated by reference to two cases involving fisheries. In *Fowler v. The Queen*, [1980] 2 S.C.R. 213, the Court found that s. 33(3) of the *Fisheries Act* was *ultra vires* Parliament because its broad prohibition enjoining the deposit of "slash, stumps or other debris" into water frequented by fish was not sufficiently linked to any actual or potential harm to fisheries. However, s. 33(2), prohibiting the deposit of deleterious substances in any place where they might enter waters frequented by fish, was found *intra vires* Parliament under s. 91(12) in *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292.

The provinces may similarly act in relation to the environment under any legislative power in s. 92. Legislation in relation to local works or undertakings, for example, will often take into account environmental concerns. What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation. As Dickson C.J. remarked in *Alberta Government Telephones*, *supra*, at p. 275:

It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which

vertu de sa compétence sur les chemins de fer ou la navigation puisque dans le premier cas il gère une ressource, alors que dans les deux autres, il gère des activités. Ces observations peuvent être illustrées par deux arrêts sur les pêches. Dans *Fowler c. La Reine*, [1980] 2 R.C.S. 213, la Cour a statué que le par. 33(3) de la *Loi sur les pêches* excédait les pouvoirs du Parlement parce que l'interdiction générale de déposer «des déchets de bois, souches ou autres débris» dans une eau fréquentée par le poisson n'était pas suffisamment liée aux dommages, réels ou probables, que les pêches pourraient subir. Toutefois, dans l'arrêt *Northwest Falling Contractors Ltd. c. La Reine*, [1980] 2 R.C.S. 292, la Cour a statué que le par. 33(2), qui interdit à qui que ce soit de déposer une substance nocive en quelque lieu dans des conditions où cette substance nocive pourrait pénétrer dans des eaux poissonneuses, était de la compétence du Parlement du Canada en vertu du par. 91(12).

Les provinces peuvent de la même façon œuvrer dans le domaine de l'environnement dans l'exercice de leur compétence législative en vertu de l'art. 92. Par exemple, les lois ayant trait aux ouvrages et entreprises de nature locale tiendront souvent compte de préoccupations environnementales. Toutefois, dans la détermination de la compétence constitutionnelle de chacun des paliers de gouvernement sur un projet comme le barrage de la rivière Oldman, il n'est pas particulièrement utile de qualifier cet ouvrage de [TRADUCTION] «projet provincial» ou d'entreprise [TRADUCTION] «principalement assujettie à la réglementation provinciale» comme a tenté de le faire l'appelante l'Alberta. C'est présumer de la réponse et poser un principe erroné qui semble accepter l'existence d'une théorie générale de l'exclusivité des compétences visant à exempter les ouvrages ou entreprises de nature provinciale de l'application de lois fédérales par ailleurs valides. Comme le fait remarquer le juge en chef Dickson dans l'arrêt *Alberta Government Telephones*, précité, à la p. 275:

Il faut se rappeler que l'un des aspects de la théorie du caractère véritable est qu'une loi relative à un chef de compétence d'un palier de gouvernement peut validement toucher un chef de compétence de l'autre palier. Le fédéralisme canadien a évolué de façon à tolérer à

tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here.

There is, however, an even more fundamental fallacy in Alberta's argument, and that concerns the manner in which constitutional powers may be exercised. In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of *bona fides*, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.

An Australian case, *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.), illustrates the point well in a context similar to the present. There the plaintiffs carried on the business of mining for mineral sands from which they produced zircon and rutile concentrates. The export of those substances was regulated by the *Customs (Prohibited Exports) Regulations* (passed pursuant to the Commonwealth's trade and commerce power) and approval from the Minister of Minerals and Energy was required for their export. The issue in the case arose when an inquiry was directed to be made under the *Environment Protection (Impact of Proposals) Act* 1974-1975 (Cth), into the environmental impact of mineral extraction from the area in which the plaintiffs had their mining leases. The Minister responsible informed the plaintiffs that

plusieurs égards le chevauchement des lois fédérales et provinciales et, à mon avis, une théorie de l'immunité constitutionnelle n'est ni souhaitable ni nécessaire à la réalisation d'objectifs provinciaux réguliers.

Il importe de déterminer quel palier de gouvernement peut légiférer. Un palier peut légiférer à l'égard des aspects provinciaux et l'autre, à l'égard des aspects fédéraux. Bien que les projets de nature locale relèvent généralement de la compétence provinciale, ils peuvent exiger la participation du fédéral dans le cas où le projet empiète sur un domaine de compétence fédérale comme en l'espèce.

Toutefois, le raisonnement de l'Alberta recèle un sophisme encore plus fondamental, qui touche la façon d'exercer les pouvoirs constitutionnels. Lorsqu'il légifère sur une matière, l'organe législatif doit s'en tenir à cette matière. L'objet pratique à la base de la loi et les répercussions dont l'organe doit tenir compte dans sa prise de décision sont une toute autre chose. En l'absence d'un objet déguisé ou d'un manque de bonne foi, ces considérations ne porteront pas atteinte à la nature fondamentale de la loi. On peut exiger qu'une voie ferrée soit construite à un endroit où la fumée ou le bruit ne constituera pas une nuisance pour la municipalité, mais il s'agit néanmoins d'un règlement sur les chemins de fer.

Un arrêt australien, *Murphyores Incorporated Pty Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.), illustre bien le point dans un contexte semblable à celui de l'espèce. Dans cette affaire, les demandeurs exploitaient une carrière qui servait à la production de concentrés de zircon et de rutile. L'exportation de ces substances était régie par le *Customs (Prohibited Exports) Regulations* (adopté en vertu de la compétence du Commonwealth (c'est-à-dire le pouvoir fédéral) en matière d'échanges et de commerce) et devait être approuvée par le ministre des mines et de l'énergie. Le litige a pris naissance dans le cadre d'une enquête devant être réalisée en vertu de l'*Environment Protection (Impact of Proposals) Act* 1974-1975 (Cth) sur l'incidence environnementale de l'extraction minière à l'endroit où les demandeurs détenaient leurs baux miniers. Le ministre respon-

the report of that inquiry would have to be considered before allowing any further export of concentrates.

The plaintiffs contended that the Minister could only consider matters relevant to "trading policy" within the scope of the Commonwealth's trade and commerce power, rather than the environmental concerns arising from the anterior mining activity which was predominantly a state interest. That argument was unanimously rejected, Stephen J. putting it as follows, at p. 12:

> The administrative decision whether or not to relax a prohibition against the export of goods will necessarily be made in the light of considerations affecting the mind of the administrator; but whatever their nature the consequence will necessarily be expressed in terms of trade and commerce, consisting of the approval or rejection of an application to relax the prohibition on exports. It will therefore fall within constitutional power. The considerations in the light of which the decision is made may not themselves relate to matters of trade and commerce but that will not deprive the decision which they induce of its inherent constitutionality for the decision will be directly on the subject matter of exportation and the considerations actuating that decision will not detract from the character which its subject matter confers upon it.

I hasten to add that I do not mean to draw any parallels between the Commonwealth's trade and commerce power as framed in the Australian Constitution and that found in the Canadian Constitution. Obviously there are important differences in the two documents, but the general point made in *Murphyores* is nonetheless valid in the present case. The case points out the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions. Clearly, this cannot be the case. Quite simply, the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment.

sable informa alors les demandeurs qu'il devrait faire analyser le rapport d'enquête avant d'autoriser toute autre exportation de concentrés.

Les demandeurs prétendaient que le ministre pouvait seulement tenir compte des questions se rapportant à la [TRADUCTION] «politique relative aux échanges» adoptée en vertu de la compétence des pays du Commonwealth en matière d'échanges et de commerce, plutôt que des préoccupations environnementales se rattachant à l'exploitation minière antérieure, qui relevait principalement de la compétence de l'État. Cette prétention a été unanimement rejetée; le juge Stephen indique à la p. 12:

> [TRADUCTION] La décision administrative d'assouplir ou non l'interdiction d'exporter des marchandises tiendra nécessairement compte des considérations qui intéressent l'administrateur; toutefois, quelle que soit la nature de ces considérations, la conséquence sera nécessairement exprimée en fonction des échanges et du commerce, soit l'approbation ou le rejet d'une demande visant à assouplir l'interdiction des exportations. Ce sera alors une décision prise dans le cadre d'un pouvoir constitutionnel. Les considérations à la base de la prise de décisions peuvent ne pas avoir trait aux questions d'échanges et de commerce, mais la décision ne sera pas inconstitutionnelle pour autant puisqu'elle porte directement sur le sujet de l'exportation et les considérations qui la sous-tendent ne portent pas atteinte au caractère que le sujet de compétence lui confère.

Je m'empresse d'ajouter que je ne veux pas établir de comparaison entre la compétence des pays du Commonwealth en matière d'échanges et de commerce prévue par la Constitution australienne et celle qui existe dans la Constitution canadienne. Certes, il y a des différences importantes entre les deux documents, mais l'idée générale qui ressort de l'arrêt *Murphyores* est néanmoins valide en l'espèce. Cet arrêt souligne le risque de croire à tort que l'environnement est une question accessoire lorsqu'il s'agit de faire des choix législatifs ou de prendre des décisions administratives. De toute évidence, cela ne peut être le cas. Tout simplement, l'environnement comprend tout ce qui nous entoure et, comme tel, doit être à la base d'un grand nombre de décisions courantes.

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

> The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2, § 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision making.

The *Guidelines Order* has merely added to the matters that federal decision makers should consider. If the Minister of Transport was specifically assigned the task of weighing concerns regarding fisheries in weighing applications to construct works in navigable waters, could there be any complaint that this was *ultra vires*? All that it would mean is that a decision maker charged with making one decision must also consider other matters that fall within federal power. I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the *Guidelines Order* as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial

L'évaluation des incidences environnementales est, sous sa forme la plus simple, un outil de planification que l'on considère généralement comme faisant partie intégrante d'un processus éclairé de prise de décisions. R. Cotton et D. P. Emond, dans un ouvrage intitulé «Environmental Impact Assessment», dans J. Swaigen, dir., *Environmental Rights in Canada* (1981), 245, à la p. 247, résument l'objet fondamental de cette évaluation:

> [TRADUCTION] Les concepts fondamentaux à la base de l'évaluation environnementale peuvent être énoncés en termes simples: (1) déterminer et évaluer avant coup toutes les conséquences environnementales possibles d'une entreprise proposée; (2) permettre une prise de décisions qui à la fois garantira l'à-propos du processus et conciliera le plus possible les désirs d'aménagement du promoteur et la protection et la préservation de l'environnement.

En tant qu'outil de planification, le processus d'évaluation renferme un mécanisme de collecte de renseignements et de prise de décisions, qui fournit au décideur une base objective sur laquelle il pourra s'appuyer pour autoriser ou refuser un projet d'aménagement; voir M. I. Jeffery, *Environmental Approvals in Canada* (1989), à la p. 1.2, § 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), à la p. 5. Bref, l'évaluation des incidences environnementales constitue simplement une description du processus de prise de décisions.

Le *Décret sur les lignes directrices* vient simplement s'ajouter aux questions dont les décideurs fédéraux doivent tenir compte. Si le ministre des Transports devait spécifiquement tenir compte des préoccupations en matière de pêche dans l'examen des demandes de construction d'ouvrages dans les eaux navigables, pourrait-on soulever que cette attribution de compétence est *ultra vires*? Tout ce que cela signifierait est que le décideur doit aussi prendre en considération d'autres questions qui relèvent de la compétence fédérale. Je ne suis pas indifférent aux propos du substitut du procureur général de la Saskatchewan qui a cherché à qualifier le *Décret sur les lignes directrices* de cheval de Troie constitutionnel permettant au gouvernement fédéral, sous prétexte de l'existence de quelque champ restreint de compétence fédérale, de procé-

jurisdiction. However, on my reading of the *Guidelines Order* the "initiating department" assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the *Guidelines Order* as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.

Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction"; see *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 808. Given the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of federal power invoked in each instance. In particular, the *Guidelines Order* prescribes a close nexus between the social effects that may be examined and the environmental effects generally. Section 4 requires that the social effects examined at the initial assessment stage be "directly related" to the potential environmental effects of a proposal, as does s. 25 in respect of the terms of reference under which an environmental assessment panel may operate. Moreover, where the *Guidelines Order* has application to a proposal because it affects an area of federal jurisdiction, as opposed to the other three bases for application enumerated in s. 6, the environmental effects to be studied can only be those which may have an impact on the areas of federal responsibility affected.

I should make it clear, however, that the scope of assessment is not confined to the particular head

der à un examen approfondi de questions qui relèvent exclusivement de la compétence des provinces. Toutefois, suivant mon interprétation du *Décret sur les lignes directrices*, le «ministère responsable» qui procède à l'évaluation initiale et, au besoin, la Commission d'évaluation environnementale n'ont que le mandat d'examiner les questions se rapportant directement aux domaines de compétence fédérale concernés. En conséquence, le ministère responsable ou la commission ne peuvent se servir du *Décret sur les lignes directrices* comme moyen déguisé d'envahir des champs de compétence provinciale qui ne se rapportent pas aux domaines de compétence fédérale concernés.

À cause de son caractère accessoire, l'évaluation des incidences environnementales doit «véritablement viser une institution ou une activité qui relève de la compétence législative [fédérale]»; voir l'arrêt *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790, à la p. 808. Compte tenu de l'élément nécessaire de proximité qui doit exister entre le processus d'évaluation environnementale et le domaine de compétence fédérale concerné, ce texte législatif peut, à mon avis, s'appuyer sur le domaine particulier de compétence fédérale invoqué dans chaque cas. Plus particulièrement, le *Décret sur les lignes directrices* exige un rapport étroit entre les répercussions sociales susceptibles d'être examinées et les répercussions environnementales en général. Aux termes de l'art. 4, les répercussions sociales examinées, au cours de l'étape initiale d'évaluation, doivent être «directement liées» aux effets possibles de la proposition sur l'environnement, à l'instar de l'art. 25 portant sur le mandat en vertu duquel une commission d'évaluation environnementale peut agir. Par ailleurs, dans le cas où le *Décret sur les lignes directrices* s'applique à une proposition parce qu'elle a des répercussions sur un domaine de compétence fédérale, par opposition aux trois autres cas d'application prévus à l'art. 6, les répercussions environnementales à examiner sont seulement celles qui peuvent avoir une incidence sur les domaines de compétence fédérale touchés.

Toutefois, je dois préciser que l'étendue de l'évaluation n'est pas limitée au domaine particu-

of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Such a responsibility, as I stated earlier, is a necessary condition to engage the process, but once the initiating department has thus been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction. There is no constitutional obstacle preventing Parliament from enacting legislation under several heads of power at the same time; see *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, and *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 350. In the case of the *Guidelines Order*, Parliament has conferred upon one institution (the "initiating department") the responsibility, in the exercise of its decision-making authority, for assessing the environmental implications on all areas of federal jurisdiction potentially affected. Here, the Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, is directed to consider the environmental impact of the dam on such areas of federal responsibility as navigable waters, fisheries, Indians and Indian lands, to name those most obviously relevant in the circumstances here.

In essence, then, the *Guidelines Order* has two fundamental aspects. First, there is the substance of the *Guidelines Order* dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. As I mentioned earlier, this aspect of the *Guidelines Order* can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the legislation is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker, or in the vernacular of the *Guidelines Order*, the "initiating department". This facet of the legislation has as its object the regulation of the institutions and agencies of

lier de compétence à l'égard duquel le gouvernement du Canada participe à la prise de décisions au sens du terme «proposition». Cette participation, comme je l'ai déjà mentionné, est une condition nécessaire à l'application du processus; toutefois, lorsque le ministère responsable a reçu le pouvoir de procéder à l'évaluation, cet examen doit tenir compte des répercussions environnementales dans tous les domaines de compétence fédérale. Aucun obstacle constitutionnel n'empêche le Parlement d'adopter un texte législatif en vertu de plusieurs domaines de compétence en même temps; voir les arrêts *Jones c. Procureur général du Nouveau-Brunswick*, [1975] 2 R.C.S. 182, et *Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338, à la p. 350. Dans le cas du *Décret sur les lignes directrices*, le Parlement a conféré à une institution (le «ministère responsable») la responsabilité, dans l'exercice de son pouvoir de décision, d'évaluer les répercussions environnementales sur tous les domaines de compétence fédérale susceptibles d'être touchés. En l'espèce, le ministre des Transports, à titre de décideur en vertu de la *Loi sur la protection des eaux navigables*, doit examiner les incidences environnementales du barrage sur les domaines de compétence fédérale, comme les eaux navigables, les pêcheries, les Indiens et les terres indiennes, pour ne nommer que ceux qui sont le plus pertinents dans les circonstances.

Essentiellement, le *Décret sur les lignes directrices* comporte deux aspects fondamentaux. Il y a tout d'abord l'aspect de fond qui porte sur l'évaluation des incidences environnementales, dont l'objet est de faciliter la prise de décisions dans le domaine de compétence fédérale qui régit une proposition. Comme je l'ai mentionné, cet aspect du *Décret sur les lignes directrices* peut être maintenu au motif qu'il s'agit d'un texte législatif se rapportant aux matières pertinentes énumérées à l'art. 91 de la *Loi constitutionnelle de 1867*. Le deuxième aspect est l'élément procédural ou organisationnel coordonnant le processus d'évaluation, qui peut dans un cas donné toucher plusieurs domaines de compétence fédérale, relevant d'un décideur désigné ou, pour employer le jargon du *Décret sur les lignes directrices*, le «ministère responsable». Cette facette vise à réglementer la façon dont les

the Government of Canada as to the manner in which they perform their administrative functions and duties. This, in my view, is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Court adopted a similar approach in the related situation that arose in *Jones v. Attorney General of New Brunswick*, *supra*. There this Court dealt with the constitutional validity, on a division of powers basis, of certain provisions of the *Official Languages Act*, R.S.C. 1970, c. O-2, the *Evidence Act* of New Brunswick, R.S.N.B. 1952, c. 74, and the *Official Languages of New Brunswick Act*, S.N.B. 1969, c. 14. The federal legislation made English and French the official languages of Canada, and the impugned provisions recognized both languages in the federal courts and in criminal proceedings. Laskin C.J. held, at p. 189:

> . . . I am in no doubt that it was open to the Parliament of Canada to enact the *Official Languages Act* (limited as it is to the purposes of the Parliament and Government of Canada and to the institutions of that Parliament and Government) as being a law "for the peace, order and good government of Canada in relation to [a matter] not coming within the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces". The quoted words are in the opening paragraph of s. 91 of the *British North America Act*; and, in relying on them as constitutional support for the *Official Languages Act*, I do so on the basis of the purely residuary character of the legislative power thereby conferred. No authority need be cited for the exclusive power of the Parliament of Canada to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and Government of Canada. Those institutions and agencies are clearly beyond provincial reach. [Emphasis added.]

The Court went on to uphold the federal legislation on the additional grounds that it was valid under Parliament's criminal jurisdiction (s. 91(27)) and

institutions et organismes du gouvernement du Canada exercent leurs fonctions et responsabilités administratives. Cela, à mon avis, est indiscutablement *intra vires* du Parlement. Cet aspect peut être considéré comme un pouvoir accessoire de la compétence législative en cause, ou de toute façon, être justifié en vertu du pouvoir résiduel prévu à l'art. 91.

Dans une situation connexe, la Cour a adopté une analyse similaire dans l'arrêt *Jones c. Procureur général du Nouveau-Brunswick*, précité. Dans cette affaire, la Cour devait trancher la question de la constitutionnalité, en fonction du partage des compétences, de certaines dispositions de la *Loi sur les langues officielles*, S.R.C. 1970, ch. O-2, de l'*Evidence Act* du Nouveau-Brunswick, R.S.N.B. 1952, ch. 74, et de la *Loi sur les langues officielles du Nouveau-Brunswick*, S.N.B. 1969, ch. 14. La loi fédérale faisait du français et de l'anglais les langues officielles du Canada; les dispositions attaquées reconnaissaient l'utilisation des deux langues officielles devant les tribunaux fédéraux et dans les procédures criminelles. Le juge en chef Laskin affirme à la p. 189:

> . . . je ne doute aucunement qu'il était loisible au Parlement du Canada d'édicter la *Loi sur les langues officielles* (restreinte qu'elle est à ce qui relève du Parlement et du gouvernement du Canada, et aux institutions de ces Parlement et gouvernement) à titre de loi «pour la paix, l'ordre et le bon gouvernement du Canada, relativement à [une matière] ne tombant pas dans les catégories de sujets . . . exclusivement assignés aux législatures des provinces». Les termes en question sont extraits de l'alinéa liminaire de l'art. 91 de l'*Acte de l'Amérique du Nord britannique*; et, en me basant sur eux comme fondement constitutionnel de la *Loi sur les langues officielles*, je ne tiens compte que du caractère purement résiduaire du pouvoir législatif qu'ils confèrent. Point n'est besoin de citer de précédent à l'appui du pouvoir exclusif du Parlement du Canada de légiférer relativement au fonctionnement et à l'administration des institutions et organismes du Parlement et du gouvernement du Canada. Ces institutions et organismes sont de toute évidence hors de la portée des provinces. [Je souligne.]

La Cour a également confirmé la loi fédérale en vertu de la compétence du Parlement en matière de droit criminel (par. 91(27)) et d'établissement de

federal power over federal courts (s. 101). Laskin C.J. also remarked that there was no constitutional impediment preventing Parliament from adding to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal control. For similar reasons, the provincial legislation providing for the use of both official languages in the courts of New Brunswick was upheld on the basis of its power over the administration of justice in the province (s. 92(14)).

In the end, I am satisfied that the *Guidelines Order* is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. Consequently, it is nothing more than an adjunct of the federal legislative powers affected. In any event, it falls within the purely residuary aspect of the "Peace, Order, and good Government" power under s. 91 of the *Constitution Act, 1867*. Any intrusion into provincial matters is merely incidental to the pith and substance of the legislation. It must also be remembered that what is involved is essentially an information gathering process in furtherance of a decision-making function within federal jurisdiction, and the recommendations made at the conclusion of the information gathering stage are not binding on the decision maker. Neither the initiating department nor the panel are given power to subpoena witnesses, as was the case in *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, where the Court held that certain provisions of the *Act respecting occupational health and safety*, S.Q. 1979, c. 63, which, *inter alia*, allowed the province to investigate accidents and issue remedial orders, were inapplicable to an interprovincial railway undertaking. I should add that Alberta's extensive reliance on that decision is misplaced. It is wholly distinguishable from the present case on several grounds, most importantly that the impugned provincial legislation there was made compulsory against a federal undertaking

tribunaux fédéraux (art. 101). Le juge en chef Laskin indique aussi que rien dans la Constitution n'empêche le Parlement d'étendre le champ de l'emploi privilégié ou obligatoire du français et de l'anglais dans les institutions ou les activités qui relèvent du contrôle fédéral. Pour des motifs semblables, la loi provinciale prévoyant l'utilisation des deux langues officielles devant les tribunaux du Nouveau-Brunswick a été jugée valide en raison de la compétence des provinces en matière d'administration de la justice (par. 92(14)).

En fin de compte, je suis convaincu que, de par son caractère véritable, le *Décret sur les lignes directrices* n'est rien de plus qu'un instrument qui régit la façon dont les institutions fédérales doivent gérer leurs diverses fonctions. En conséquence, il n'est rien de plus qu'un ajout à l'exercice des compétences législatives fédérales concernées. Quoi qu'il en soit, ce texte peut être adopté en vertu du pouvoir purement résiduel à titre de loi «pour la paix, l'ordre et le bon gouvernement du Canada» en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*. Toute ingérence dans la sphère de compétence provinciale est simplement accessoire au caractère véritable du texte législatif. On doit aussi rappeler, d'une part, que le processus d'évaluation est essentiellement un processus de collecte de renseignements destiné à faciliter la prise de décisions relevant du fédéral et, d'autre part, que les recommandations présentées à la fin de l'étape de collecte de renseignements ne lient pas le décideur. Ni le ministère responsable ni la commission ne peuvent assigner des témoins à comparaître, comme c'était le cas dans l'arrêt *Compagnie des Chemins de fer nationaux du Canada c. Courtois*, [1988] 1 R.C.S. 868, dans lequel, la Cour a statué que certaines dispositions de la *Loi sur la santé et la sécurité du travail*, L.Q. 1979, ch. 63, qui permettaient notamment à la province d'enquêter sur les accidents et d'émettre des avis de correction, étaient inapplicables à une entreprise ferroviaire interprovinciale. Je tiens à préciser que l'Alberta a, à tort, accordé une trop grande importance à cet arrêt. Celui-ci se distingue de la présente affaire pour plusieurs motifs, le plus important étant que le texte législatif provincial attaqué dans cet arrêt était impératif à l'égard d'une entreprise fédérale

and was interpreted by the Court as regulating the undertaking.

For the foregoing reasons I find that the *Guidelines Order* is *intra vires* Parliament and would thus answer the constitutional question in the negative.

Discretion

The last substantive issue raised in this appeal is whether the Federal Court of Appeal erred in interfering with the motions judge's discretion not to grant the remedies sought, namely orders in the nature of *certiorari* and mandamus, on the grounds of unreasonable delay and futility. Stone J.A. found that the motions judge had erred in a way that warranted interference with the exercise of his discretion on both grounds.

The principles governing appellate review of a lower court's exercise of discretion were not extensively considered, only their application to this case. Stone J.A. cited *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.), which in turn approved of the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, at p. 138:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such

et a été interprété par la Cour comme réglementant l'entreprise.

Pour ces motifs, je conclus que le *Décret sur les lignes directrices* est *intra vires* du Parlement et je répondrais par la négative à la question constitutionnelle.

Le pouvoir discrétionnaire

La dernière question de fond soulevée dans le présent pourvoi est de savoir si la Cour d'appel fédérale a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder la réparation sollicitée, en l'occurrence un bref de la nature d'un *certiorari* et un bref de la nature d'un *mandamus*, en raison du retard déraisonnable et de la futilité de la procédure. Le juge Stone a statué que le juge des requêtes avait commis un type d'erreur justifiant la Cour d'appel de modifier l'exercice de son pouvoir discrétionnaire sur les deux motifs.

Les principes qui régissent l'examen en appel de l'exercice du pouvoir discrétionnaire d'un tribunal d'instance inférieure n'ont pas été examinés en profondeur, seule leur application aux faits de l'espèce l'a été. Le juge Stone a cité l'arrêt *Polylok Corp. c. Montreal Fast Print (1975) Ltd.*, [1984] 1 C.F. 713 (C.A.), qui approuve l'énoncé suivant du vicomte Simon, lord Chancelier, dans *Charles Osenton & Co. c. Johnston*, [1942] A.C. 130, à la p. 138:

> [TRADUCTION] La règle relative à l'annulation par une cour d'appel d'une ordonnance rendue par un juge d'une instance inférieure dans l'exercice de son pouvoir discrétionnaire est bien établie, et tous les problèmes qui se présentent résultent seulement de l'application de principes déterminés à un cas particulier. Le tribunal d'appel n'a pas la liberté de simplement substituer l'exercice de son propre pouvoir discrétionnaire à celui déjà exercé par le juge. En d'autres termes, les juridictions d'appel ne devraient pas annuler une ordonnance pour la simple raison qu'elles auraient exercé le pouvoir discrétionnaire original, s'il leur avait appartenu, d'une manière différente. Toutefois, si le tribunal d'appel conclut que le pouvoir discrétionnaire a été exercé de façon erronée, parce qu'on n'a pas accordé suffisamment d'importance, ou qu'on en n'a pas accordé du tout, à des consi-

as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

That was essentially the standard adopted by this Court in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, where Beetz J. said, at p. 588:

> Second, in declining to evaluate, difficult as it may have been, whether or not the failure to render natural justice could be cured in the appeal, the learned trial judge refused to take into consideration a major element for the determination of the case, thereby failing to exercise his discretion on relevant grounds and giving no choice to the Court of Appeal but to intervene. [Emphasis added.]

What, then, are the relevant considerations that should have been weighed by the motions judge in exercising his discretion? The first ground on which the motions judge exercised his discretion to refuse prerogative relief was delay. There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case; see S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 423, and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (1985), at pp. 373-74. The motions judge took cognizance of the period of time that elapsed between approval being granted by the Minister of Transport on September 18, 1987 and the filing of the notice of motion in this action on April 21, 1989, and the fact that the project was approximately 40 percent complete by that time. With respect, however, he ignored a considerable amount of activity undertaken by the respondent Society before taking this action, some of which was referred to by Stone J.A. I should note at this point that Stone J.A. was mistaken when he stated that this action was taken only two months after the Society became aware that approval had been granted. During cross-examination on her affidavit in support of the application, Ms. Kostuch, the vice-president of the Society, admitted that the Society became aware of the

dérations pertinentes comme celles que l'appelante a fait valoir devant nous, il est alors possible de justifier l'annulation de l'ordonnance.

C'était essentiellement le critère adopté par notre Cour dans l'arrêt *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, dans lequel, le juge Beetz affirme à la p. 588:

> Deuxièmement, en refusant d'évaluer, malgré la difficulté, si le défaut de respecter la justice naturelle pouvait être corrigé en appel, le savant juge de première instance a refusé de tenir compte d'un élément prépondérant en l'espèce; de ce fait, il n'exerçait pas son pouvoir discrétionnaire pour des motifs pertinents et ne laissait à la Cour d'appel d'autre choix que d'intervenir. [Je souligne.]

Quelles sont alors les considérations pertinentes dont le juge des requêtes aurait dû tenir compte dans l'exercice de son pouvoir discrétionnaire? La question du retard est le premier motif invoqué par le juge des requêtes lorsqu'il a, dans l'exercice de son pouvoir discrétionnaire, refusé d'accorder le bref de prérogative. Il n'y a pas de doute qu'un retard déraisonnable peut empêcher un requérant d'obtenir un redressement assujetti à l'exercice d'un pouvoir discrétionnaire, notamment dans le cas où ce retard risquerait d'être préjudiciable à d'autres parties qui se seraient fiées, à leur détriment, à la décision contestée; la question du caractère déraisonnable dépendra des faits de chaque affaire; voir S. A. de Smith, *Judicial Review of Administrative Action* (4e éd. 1980), à la p. 423, et D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (1985), aux pp. 373 et 374. Le juge des requêtes a, d'une part, tenu compte du délai qui s'est écoulé entre l'approbation accordée par le ministre des Transports le 18 septembre 1987 et le dépôt de l'avis de requête dans la présente action le 21 avril 1989 et, d'autre part, du fait que le projet était déjà complété à environ 40 pour 100 à cette date. Toutefois, en toute déférence, il n'a pas tenu compte d'un grand nombre de mesures que la Société intimée a prises avant d'entamer la présente contestation, dont certaines ont été mentionnées par le juge Stone. Je tiens à faire remarquer que le juge Stone s'est trompé lorsqu'il a affirmé que les procédures avaient été intentées deux mois seulement après que la Société

approval on February 16, 1988, some 14 months before the present action was launched.

This was not the only action taken by the Society in opposition to the dam, however. The Society first brought an action in October 1987 seeking *certiorari* with prohibition in aid to quash an interim licence issued by the Minister of the Environment of Alberta pursuant to the *Water Resources Act*. On December 8, 1987 Moore C.J.Q.B. quashed all licences and permits issued by the Minister on the grounds that the department had not filed the requisite approvals with its application, that it had not referred the matter to the Energy Resources Conservation Board as required by s. 17 of the Act, and that the Minister's delegate had wrongfully exercised his discretion in waiving the public notice requirements set out in the Act: *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), 85 A.R. 321. Another interim licence was issued on February 5, 1988 and again the respondent brought an application to quash that licence, principally on the ground that the requirement for giving public notice had been improperly waived. The application was dismissed by Picard J. who held that the appropriate material had been filed with the application for the licence and that the Minister's delegate had acted within his jurisdiction in waiving public notice: *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), 89 A.R. 339 (Q.B.).

In the meantime, the respondent Society had been petitioning the Alberta Energy Resources Conservation Board to conduct a public hearing into the hydro-electric aspects of the dam pursuant to the *Hydro and Electric Energy Act*. The Board replied on December 18, 1987 refusing the Society's request for the reason that the dam did

eut été mise au courant de la décision d'accorder l'approbation. Au cours du contre-interrogatoire relatif à son affidavit à l'appui de la demande, M^me^ Kostuch, vice-présidente, a reconnu que la Société avait été mise au courant de l'approbation le 16 février 1988, soit quelque 14 mois avant le début de la présente action.

Toutefois, la présente action n'est pas la seule engagée par la Société relativement à la construction du barrage. La Société a tout d'abord intenté une action en octobre 1987, sollicitant la délivrance d'un bref de *certiorari* assorti d'un bref de prohibition visant à annuler un permis provisoire délivré par le ministre de l'Environnement de l'Alberta conformément à la *Water Resources Act*. Le 8 décembre 1987, le juge en chef Moore de la Cour du Banc de la Reine a annulé tous les permis qui avaient été délivrés par le ministre parce que le ministère n'avait pas déposé les approbations nécessaires avec sa demande, qu'il n'avait pas soumis la question à l'examen de l'Energy Resources Conservation Board conformément à l'art. 17 de la Loi et que le délégué du ministre avait mal exercé son pouvoir discrétionnaire en renonçant aux exigences prévues dans la Loi relativement aux avis publics: *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), 85 A.R. 321. Un autre permis provisoire a été délivré le 5 février 1988; l'intimée a de nouveau présenté une demande d'annulation de ce permis, principalement au motif que l'on avait à tort renoncé aux avis publics. La demande a été rejetée par le juge Picard, qui a statué que les documents appropriés avaient été déposés en même temps que la demande de permis et que le délégué du ministre avait le pouvoir de renoncer à l'avis public: *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), 89 A.R. 339 (B.R.).

Entretemps, la Société intimée avait demandé à l'Energy Resources Conservation Board de l'Alberta de tenir une audience publique aux fins de l'examen des aspects hydro-électriques du barrage conformément à l'*Hydro and Electric Energy Act*. Dans sa réponse du 18 décembre 1987, le Board a refusé d'acquiescer à la demande de la Société au

not constitute a "hydro development" within the meaning of the Act. An application was taken for leave to appeal that decision to the Alberta Court of Appeal which refused leave, agreeing with the Board that the project was not a hydro development, even though it was designed to allow for the future installation of a power generating facility: *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), 89 A.R. 280. Finally, Ms. Kostuch swore an information before a justice of the peace alleging that an offence had been committed under s. 35 of the *Fisheries Act*. After summonses were issued, the Attorney General for Alberta intervened and stayed the proceedings on August 19, 1988. I have already documented the correspondence directed to the federal Minister of the Environment and Minister of Fisheries and Oceans through 1987 and 1988 in which members of the Society sought to have the *Guidelines Order* invoked, all to no avail. This action was taken shortly after the Trial Division of the Federal Court in *Canadian Wildlife* held that the *Guidelines Order* was binding on the Minister of the Environment.

In my view, this chronology of events represents a concerted and sustained effort on the part of the Society to challenge the legality of the process followed by Alberta to build this dam and the acquiescence of the appellant Ministers. While these events were taking place, construction of the dam continued, despite ongoing legal proceedings; and as at the date of the hearing before this Court, counsel for Alberta advised that the dam had been substantially completed. I can find no evidence that Alberta has suffered any prejudice from any delay in taking this action; there is no indication whatever that the province was prepared to accede to an environmental impact assessment under the *Guidelines Order* until it had exhausted all legal avenues, including an appeal to this Court. The motions judge did not weigh these considerations adequately or at all. Accordingly, the Court of

motif que le barrage ne constituait pas un [TRADUCTION] «développement hydro-électrique» au sens de la Loi. Une demande d'autorisation d'appel a été présentée à la Cour d'appel de l'Alberta, qui a rejeté la demande, souscrivant à l'opinion du Board qu'il ne s'agissait pas d'un projet hydro-électrique, même s'il devait permettre l'installation future d'une centrale électrique: *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), 89 A.R. 280. Enfin, M^me^ Kostuch a déposé une dénonciation devant un juge de paix dans laquelle elle allègue qu'une infraction a été commise en contravention de l'art. 35 de la *Loi sur les pêches*. Après les assignations, le procureur général de l'Alberta est intervenu et a ordonné un arrêt des procédures le 19 août 1988. J'ai déjà examiné les lettres adressées au ministre fédéral de l'Environnement et au ministre des Pêches et des Océans en 1987 et 1988, dans lesquelles des membres de la Société ont cherché en vain à faire appliquer le *Décret sur les lignes directrices*. La présente action a été intentée peu de temps après que la Section de première instance de la Cour fédérale eut décidé dans l'affaire *Fédération canadienne de la faune* que le ministre de l'Environnement était lié par le *Décret sur les lignes directrices*.

À mon avis, cette chronologie indique que la Société s'est efforcée d'une façon soutenue et concertée de contester d'une part, la légalité des mesures prises par l'Alberta relativement à la construction du barrage et d'autre part, l'acquiescement des ministres appelants. Pendant tout ce temps, la construction du barrage s'est poursuivie, en dépit des contestations judiciaires en cours; à la date de l'audience devant notre Cour, l'avocat de l'Alberta nous a informés que la construction du barrage était en grande partie achevée. Je ne crois pas qu'il existe une preuve que l'Alberta a subi un préjudice quelconque en raison d'un retard à intenter la présente action; rien n'indique que la province était disposée à consentir à une évaluation des incidences environnementales en vertu du *Décret sur les lignes directrices* avant l'épuisement de tous les recours légaux, y compris le pourvoi devant notre Cour. Le juge des requêtes n'a pas suffisamment accordé d'importance à ces considé-

Appeal was justified in interfering with the exercise of his discretion on this point.

The remaining ground for refusing to grant prerogative relief was on the basis of futility, namely that environmental impact assessment under the *Guidelines Order* would be needlessly repetitive in view of the studies that were conducted in the past. In my view this was not a proper ground to refuse a remedy in these circumstances. Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order could not possibly be implemented, such as an order of prohibition to a tribunal if nothing is left for it to do that can be prohibited; see de Smith, *supra*, at pp. 427-28. It is a different matter, though, where it cannot be determined *a priori* that an order in the nature of prerogative relief will have no practical effect. In the present case, aside from what Stone J.A. has already said concerning the qualitative differences between the process mandated by the *Guidelines Order* and what has gone before, it is not at all obvious that the implementation of the *Guidelines Order* even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction. I have therefore concluded that the Court of Appeal did not err in interfering with the motions judge's exercise of discretion to deny the relief sought.

On the matter of costs, it is my view that this is a proper case for awarding costs on a solicitor-client basis to the respondent Society, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court.

rations ou les a ignorées. En conséquence, la Cour d'appel était justifiée de modifier l'exercice de son pouvoir discrétionnaire sur ce point.

L'autre motif du refus de délivrer un bref de prérogative se fondait sur la futilité de la procédure, savoir que l'évaluation des incidences environnementales en vertu du *Décret sur les lignes directrices* serait inutilement répétitive en raison des études réalisées dans le passé. À mon avis, ce motif ne pouvait justifier un refus dans les circonstances. La délivrance d'un bref de prérogative devrait être refusée pour motif de futilité seulement dans les rares cas où sa délivrance serait vraiment inefficace. Par exemple, le cas où l'ordonnance ne pourrait pas être exécutée, savoir une ordonnance de prohibition à l'encontre d'un tribunal s'il ne lui reste rien à faire qui puisse être interdit; voir de Smith, *op. cit.*, aux pp. 427 et 428. Ce n'est pas du tout la même situation lorsque l'on ne peut déterminer à priori qu'une ordonnance de la nature d'un bref de prérogative n'aura aucune incidence sur le plan pratique. En l'espèce, mis à part ce que le juge Stone a déjà dit relativement aux différences du point de vue qualitatif entre l'évaluation prévue par le *Décret sur les lignes directrices* et les études antérieures, il n'est pas du tout évident que l'application du *Décret sur les lignes directrices*, même à cette étape tardive, n'aura pas un certain effet sur les mesures susceptibles d'être prises pour atténuer toute incidence environnementale néfaste que pourrait avoir le barrage sur un domaine de compétence fédérale. En conséquence, je conclus que la Cour d'appel n'a pas commis d'erreur en modifiant la décision du juge des requêtes de refuser, dans l'exercice de son pouvoir discrétionnaire, le redressement sollicité.

En ce qui concerne les dépens, à mon avis, il s'agit d'un cas où il est approprié d'accorder les dépens comme entre procureur et client à la Société intimée, compte tenu de la situation de cette dernière et du fait que les ministères fédéraux ont été joints comme appelants même s'ils n'avaient pas auparavant présenté une demande d'autorisation de pourvoi à notre Cour.

Disposition

For these reasons, I would dismiss the appeal, with the exception that there shall be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the *Guidelines Order*, with solicitor and client costs to the respondent throughout. I would answer the constitutional question in the negative.

The following are the reasons delivered by

STEVENSON J. (dissenting)—I have had the benefit of reading the judgment of my colleague La Forest J. and respectfully disagree with him on three points. In my view:

1. The Crown is not bound by the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22 ("*N.W.P.A.*").

2. The Federal Court of Appeal, [1990] 2 F.C. 18, wrongly interfered with the discretion exercised by the motions judge in refusing the prerogative remedy.

3. The appellants should not be called upon to pay costs on a solicitor and client basis.

I agree with his analysis of the constitutional questions and with his interpretation of the provisions implementing the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467.

1. Crown Immunity

The question here is a simple one: is the Crown bound by the *N.W.P.A.*? For the purposes of this discussion, no distinction is to be drawn between the federal and provincial Crowns. The Crown is indivisible for this purpose: *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at pp. 272-73.

Dispositif

Pour ces motifs, je suis d'avis de rejeter le pourvoi, sauf qu'il ne sera pas délivré de bref de la nature d'un *mandamus* ordonnant au ministre des Pêches et des Océans de se conformer au *Décret sur les lignes directrices*, avec dépens comme entre procureur et client en faveur de l'intimée dans toutes les cours. Je suis d'avis de répondre par la négative à la question constitutionnelle.

Version française des motifs rendus par

LE JUGE STEVENSON (dissident)—J'ai eu l'avantage de lire les motifs de mon collègue le juge La Forest et, avec égards, je ne suis pas d'accord avec lui sur trois points. À mon avis:

1. La Couronne n'est pas liée par la *Loi sur la protection des eaux navigables*, L.R.C. (1985), ch. N-22 («*L.P.E.N.*»).

2. La Cour d'appel fédérale, [1990] 2 C.F. 18, a commis une erreur en modifiant la décision du juge des requêtes, prise dans l'exercice de son pouvoir discrétionnaire, de ne pas accorder le bref de prérogative.

3. Les appelants ne devraient pas être contraints de payer les dépens comme entre procureur et client.

Je suis d'accord avec son analyse des questions constitutionnelles et avec son interprétation des dispositions de mise en œuvre du *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*, DORS/84-467.

1. L'immunité de la Couronne

En l'espèce, la question est simple: la Couronne est-elle liée par la *L.P.E.N.*? Pour les fins de la présente analyse, je n'établis pas de distinction entre les Couronnes fédérale et provinciales. La Couronne est indivisible à cette fin: *Alberta Government Telephones c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes*, [1989] 2 R.C.S. 225, aux pp. 272 et 273.

Pursuant to the *Interpretation Act*, R.S.C., 1985, c. I-21 (formerly R.S.C. 1970, c. I-23), the Crown is not bound by legislation unless it is mentioned or referred to in the legislation. This has been interpreted in *Alberta Government Telephones*, at p. 281, as follows:

> It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

All parties agree that there are no words in the *N.W.P.A.* "expressly binding" the Crown. In my view, it also cannot be said that a clear intention to bind the Crown "is manifest from the very terms of the statute". In making that determination, one is confined to the four corners of the statute. We must not forget that *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58 (P.C.), is no longer applicable in light of the express provisions of the *Interpretation Act*, except to the extent that it is adopted as it was in *Alberta Government Telephones*, which I take to be governing.

The respondent Society must therefore show that excluding the Crown would wholly frustrate the purpose of the *N.W.P.A.* or produce an absurdity. I am reminded by the Privy Council in *Bombay* that if the intention is to bind the Crown, "nothing is easier than to say so in plain words" (p. 63).

Does the failure to include the Crown work an absurdity? It is not enough that there be a gap: *Alberta Government Telephones*, at p. 283. The *N.W.P.A.* applies to private and municipal under-

Conformément à la *Loi d'interprétation*, L.R.C. (1985), ch. I-21 (auparavant S.R.C. 1970, ch. I-23), nul texte législatif ne lie la Couronne, sauf dans la mesure qui y est mentionnée ou prévue. La portée de ces termes a été interprétée dans l'arrêt *Alberta Government Telephones*, à la p. 281:

> Il me semble que les termes «mentionnée ou prévue» contenus à l'art. 16 [maintenant l'art. 17] peuvent comprendre: (1) des termes qui lient expressément la Couronne («Sa Majesté est liée»); (2) une intention claire de lier qui, selon les termes de l'arrêt *Bombay*, «ressort du texte même de la loi», en d'autres termes, une intention qui ressorte lorsque les dispositions sont interprétées dans le contexte d'autres dispositions, comme dans l'arrêt *Ouellette*, précité; et (3) une intention de lier lorsque l'objet de la loi serait «privé [. . .] de toute efficacité» si l'État n'était pas lié ou, en d'autres termes, s'il donnait lieu à une absurdité (par opposition à un simple résultat non souhaité). Ces trois éléments devraient servir de guide lorsqu'une loi comporte clairement une intention de lier la Couronne.

Toutes les parties sont d'avis que la *L.P.E.N.* ne renferme pas de termes qui «lient expressément» la Couronne. À mon avis, on ne peut soutenir qu'il existe une intention claire de lier la Couronne, qui «ressort du texte même de la loi». En prenant cette décision, on doit se limiter à ce que dit le texte législatif. Nous ne devons pas oublier que l'arrêt *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58 (C.P.), n'est plus applicable compte tenu des dispositions expresses de la *Loi d'interprétation*, sauf dans la mesure où il est adopté comme dans l'arrêt *Alberta Government Telephones*, qui, à mon avis, est l'arrêt de principe.

La Société intimée doit en conséquence démontrer que la *L.P.E.N.* serait privée de toute efficacité ou donnerait lieu à une absurdité si la Couronne n'était pas liée. Je dois garder à l'esprit l'arrêt *Bombay*, dans lequel le Conseil privé a dit que si l'intention du législateur est de lier la Couronne, [TRADUCTION] «rien de plus facile que de le dire en toutes lettres» (p. 63).

Si la Couronne n'est pas liée, cette situation donne-t-elle lieu à une absurdité? L'existence d'un vide ne suffit pas: *Alberta Government Telephones*, à la p. 283. La *L.P.E.N.* s'applique aux entreprises

takings and a moment's reflection reveals that there are many non-governmental agencies whose activities are thus subject to the *N.W.P.A.* There is thus no emasculation of the *N.W.P.A.*

Nor are the courts to assume bad faith on the part of the Crown in carrying out activities which might otherwise be regulated.

If the Crown interferes with public rights of navigation, that wrong is remediable by action. In short, there is no ground for saying that the *N.W.P.A.* will be frustrated by actions of government. There is ample scope in the regulation of non-governmental activities, and it cannot be said the object of the *N.W.P.A.* is frustrated.

I must mention briefly an argument that in invoking the *N.W.P.A.*, the appellant Alberta accepted the burden of the environmental regulation regime. There is no significant benefit in approval under the *N.W.P.A.* Tort actions may still lie. The *N.W.P.A.* does not expressly confer benefits of any type. Moreover, it is not clear that approval under s. 5 of the *N.W.P.A.* would necessarily provide any protection from possible actions in tort. In *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216 (S.C.C.), Fitzpatrick C.J. of this Court held at pp. 218-19 that:

In considering the interpretation to be put upon this Act [the *N.W.P.A.*, R.S.C. 1906, c. 115], it must be borne in mind that every work constructed in navigable waters is not necessarily such an interference with navigation as to constitute an illegal obstruction. It may, however, be so and, as such, liable to be removed by the proper authority. It is therefore of great advantage to persons proposing to construct works for which there is no sanction to be able to obtain beforehand the approval of the Governor-in-Council under sec. 7; the provision is, however, purely permissive and the section does not provide for any consequences following upon the approval, certainly not that it shall render legal anything which would be illegal. Any interference with a public right of navigation is a nuisance which the Courts can

privées et municipales; réflexion faite, on se rend compte qu'il existe de nombreux organismes non gouvernementaux dont les activités sont régies par la *L.P.E.N.* L'objet de la *L.P.E.N.* n'est donc pas annihilé.

Par ailleurs, les tribunaux ne concluront pas à la mauvaise foi de la Couronne lorsqu'elle exerce des activités qui pourraient à d'autres égards être réglementées.

Si la Couronne porte atteinte aux droits publics de navigation, il est possible de la poursuivre en justice. Bref, on ne peut soutenir que la *L.P.E.N.* sera privée d'efficacité en raison des actes de l'État. La réglementation des activités non gouvernementales est vaste et on ne peut soutenir que l'objet de la *L.P.E.N.* est privé d'efficacité.

Il me faut mentionner brièvement l'argument que l'appelante l'Alberta, en invoquant l'application de la *L.P.E.N.*, aurait accepté d'être assujettie à la réglementation en matière environnementale. Il n'y a pas d'avantage important lié à l'approbation en vertu de la *L.P.E.N.* Il peut y avoir ouverture à responsabilité civile. La *L.P.E.N.* ne confère pas expressément d'avantages. Par ailleurs, il n'est pas évident que l'approbation accordée en vertu de l'art. 5 de la *L.P.E.N.* écarterait la possibilité de responsabilité civile. Dans l'arrêt *Champion c. City of Vancouver*, [1918] 1 W.W.R. 216 (C.S.C.), le juge en chef Fitzpatrick de notre Cour a statué, aux pp. 218 et 219, que:

[TRADUCTION] Dans l'examen de l'interprétation à donner à cette loi [la *L.P.E.N.*, S.R.C. 1906, ch. 115], on doit se rappeler que tout ouvrage construit dans les eaux navigables ne gêne pas nécessairement la navigation de façon à constituer une obstruction illégale. Cependant, dans l'affirmative, l'ouvrage pourrait être enlevé par l'autorité compétente. En conséquence, il est à l'avantage des personnes qui se proposent de construire des ouvrages, pour lesquels il n'existe pas de sanction, de pouvoir obtenir, préalablement au début des travaux, l'approbation du gouverneur en conseil en vertu de l'art. 7; cette disposition ne fait toutefois qu'accorder une permission et ne prévoit pas de conséquences une fois l'approbation obtenue; elle ne rendrait certainement pas légal un ouvrage qui serait illégal. Toute atteinte à

order abated notwithstanding any approval by the Governor-in-Council under sec. 7. [Emphasis added.]

un droit public de navigation est une nuisance à laquelle les tribunaux peuvent mettre fin, nonobstant l'approbation qu'aurait pu donner le gouverneur en conseil en vertu de l'art. 7. [Je souligne.]

2. Discretion

2. Le pouvoir discrétionnaire

The remedies sought by the respondent Society are discretionary: *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561, at p. 574: "The principle that *certiorari* and *mandamus* are discretionary remedies by nature cannot be disputed", and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (1985), at pp. 372-73.

Les redressements sollicités par la Société intimée sont discrétionnaires: *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, à la p. 574: «On ne peut contester le principe que le *certiorari* et le *mandamus* sont par nature des recours discrétionnaires», et D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (1985), aux pp. 372 et 373.

Interference by an appellate court is only warranted when a lower court has "gone wrong in principle" or "has given no weight (or no sufficient weight) to those considerations which ought to have weighed with [it]": *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.), at p. 724.

Une cour d'appel est justifiée d'intervenir seulement lorsque le tribunal d'instance inférieure a «commis une erreur de principe» ou «n'a pas accordé d'importance (ou qu'il n'a pas accordé suffisamment d'importance) aux considérations dont il aurait dû tenir compte.»: *Polylok Corp. c. Montreal Fast Print (1975) Ltd.*, [1984] 1 C.F. 713 (C.A.), aux pp. 724 et 725.

The Federal Court of Appeal was clearly wrong in dismissing the motions judge's conclusion on the question of delay, which it was "not persuaded" was well-founded in principle. The Court of Appeal says the respondent Society did not become aware of the grant of the approval under the *N.W.P.A.* until some two months before the proceedings were actually launched. In fact, it knew of the approval some 14 months beforehand and the principal promoters of the Society knew even before then.

La Cour d'appel fédérale a clairement commis une erreur en rejetant la conclusion du juge des requêtes relativement à la question du retard, conclusion dont elle «doute» qu'elle soit bien fondée dans son principe. La Cour d'appel affirme que la Société intimée n'a eu connaissance de la décision d'accorder l'approbation en vertu de la *L.P.E.N.* qu'environ deux mois avant que les procédures ne soient entamées. En fait, l'intimée avait été mise au courant de l'approbation quelque 14 mois auparavant et les principaux promoteurs de la Société le savaient même avant.

The common law has always imposed a duty on an applicant to act promptly in seeking extraordinary remedies:

La common law a toujours exigé du requérant qu'il agisse avec diligence lorsqu'il sollicite des recours extraordinaires:

Owing to their discretionary nature, extraordinary and ordinary review remedies must be exercised promptly. Donaldson J. of the Court of Appeal of England aptly explained the principle in *R.* v. *Aston University Senate*

En raison de leur caractère discrétionnaire, les recours en révision judiciaire, extraordinaires ou ordinaires, doivent être exercés avec diligence. Comme le rappelait dans un langage imagé le juge Donaldson, de la Cour

[[1969] 2 Q.B. 538, at p. 555]: "The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights".

(R. Dussault and L. Borgeat, *Administrative Law* (2nd ed. 1990), vol. 4, at pp. 468-69.)

That duty was recognized by Laskin C.J. on behalf of this Court in *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1976] 2 S.C.R. 739, at p. 749:

> In my opinion, discretionary bars are as applicable to the Attorney General on motions to quash as they admittedly are on motions by him for prohibition or in actions for declaratory orders. The present case is an eminently proper one for the exercise of discretion to refuse the relief sought by the Attorney General. Foremost among the factors which persuade me to this view is the unexplained two year delay in moving against the Anti-dumpting Tribunal's decision. [Emphasis added.]

The importance of acting promptly when seeking prerogative relief has also been recognized in much of the legislation now governing judicial review. For example, Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, empowers a court to extend the prescribed time for initiating an application for judicial review, but only where it is satisfied that there are *prima facie* grounds for relief and no substantial prejudice or hardship will result to those who would be affected by the delay (s. 5). Under British Columbia's *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, an application for judicial review may be barred by the affluxion of time if a court considers that substantial prejudice or hardship will result by reason of the delay (s. 11). The *Federal Court Act*, R.S.C., 1985, c. F-7, s. 28(2) stipulates than an application for judicial review before the Federal Court of Appeal must be made within ten days from the time the impugned decision or order is first communicated. That time limit can only be extended with leave of the court. In Alberta, Rule 753.11(1) of the *Alberta Rules of Court* (Alta. Reg. 390/68) stipulates that where the relief sought is the setting aside of a decision or act, the application for judicial review

d'appel de l'Angleterre, dans *R.* v. *Aston University Senate* [[1969] 2 Q.B. 538, à la p. 555]: [TRADUCTION] «Les réparations par voie de brefs de prérogative sont de nature exceptionnelle et ils ne devraient pas être mis à la disposition de ceux qui tardent à exercer leurs droits».

(R. Dussault et L. Borgeat, *Traité de droit administratif* (2e éd. 1989), t. III, à la p. 660.)

Le juge en chef Laskin de notre Cour a reconnu cette obligation dans l'arrêt *P.P.G. Industries Canada Ltd. c. Procureur général du Canada*, [1976] 2 R.C.S. 739, aux pp. 749 et 750:

> À mon avis, les requêtes en annulation déposées par le procureur général sont sujettes au pouvoir discrétionnaire des tribunaux tout autant que le sont sans conteste ses requêtes pour l'obtention d'un bref de prohibition ou ses demandes de jugement déclaratoire. La présente cause est éminemment propice à l'exercice du pouvoir discrétionnaire qui permet de refuser le redressement demandé par le procureur général. Au premier rang des facteurs qui m'inclinent en ce sens il y a le retard inexpliqué de deux ans qui a précédé la contestation de la décision du Tribunal antidumping. [Je souligne.]

L'importance d'agir avec diligence dans les demandes de bref de prérogative a également été reconnue dans la plupart des textes législatifs qui régissent maintenant la révision judiciaire. Par exemple, la *Loi sur la procédure de révision judiciaire* de l'Ontario, L.R.O. 1990, ch. J.1, permet à un tribunal de proroger le délai fixé pour présenter une requête en révision judiciaire, mais seulement s'il est convaincu qu'il existe à première vue un motif pour accorder le redressement et qu'aucune personne touchée par la prorogation ne subira de préjudice grave (art. 5). En vertu de la *Judicial Review Procedure Act* de la Colombie-Britannique, R.S.B.C. 1979, ch. 209, une demande de révision judiciaire peut être prescrite par l'écoulement du temps dans le cas où un tribunal estime que le retard causerait un préjudice important (art. 11). Le paragraphe 28(2) de la *Loi sur la Cour fédérale*, L.R.C. (1985), ch. F-7, dispose que toute demande de révision judiciaire devant la Cour d'appel fédérale doit être présentée dans les dix jours qui suivent la première communication de la décision ou de l'ordonnance attaquée. Ce délai ne peut être prorogé qu'avec l'autorisation de la cour. En Alberta, le par. 753.11(1) des *Alberta Rules of*

must be filed and served within six months after that decision or act. Finally, in art. 835.1 of Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25, which applies to all extraordinary remedies, it is stipulated that motions must be served "within a reasonable time". The Court of Appeal of Quebec held in *Syndicat des employés du commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) v. Turcotte*, [1984] C.A. 316, at p. 318, that: [TRANSLATION] "This article [835.1] merely codified the common law rule that the remedy must be exercised within a reasonable time".

Court (Alta. Reg. 390/68) dispose que si le redressement sollicité est l'annulation d'une décision ou d'un acte, la demande de révision judiciaire doit être déposée et signifiée dans les six mois qui suivent la décision ou l'acte en question. Enfin, l'art. 835.1 du *Code de procédure civile* du Québec, L.R.Q., ch. C-25, qui s'applique à tous les recours extraordinaires, dispose que la requête doit être signifiée «dans un délai raisonnable». La Cour d'appel du Québec a statué dans l'arrêt *Syndicat des employés du commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) c. Turcotte*, [1984] C.A. 316, à la p. 318: «Cet article [835.1] n'a fait que codifier la règle de la *common law* que ce recours doit être exercé dans un délai raisonnable.»

By the time this application was brought, the dam was 40 percent complete. A significant amount of public money had already been spent. It is a matter of public record that individual members of the respondent Society were aware of the approval issued under the *N.W.P.A.* prior to February, 1988. Even if such were not the case, the respondent Society still could have launched its action in early 1988. At that time, major construction had not yet taken place. Had the respondent Society initiated proceedings then as compared to April of 1989, the appellant Alberta would have been in a much better position objectively to assess any potential legal risk associated with continuing. Faced with the possibility of invalid federal approval, it may well have chosen at that point not to put out the public funds that it did.

Au moment où le présent recours a été exercé, le barrage était complété à 40 pour 100. Un bon montant de deniers publics avait déjà été dépensé. Il est établi que les membres de la Société intimée étaient au courant de l'approbation accordée sous le régime de la *L.P.E.N.* avant le mois de février 1988. Même s'ils ne l'étaient pas, la Société intimée aurait pu intenter son action au début de 1988. À cette époque, les travaux importants de construction n'avaient pas encore commencé. Si la Société intimée avait alors intenté ses poursuites au lieu de le faire en avril 1989, l'appelante l'Alberta aurait été en bien meilleure position pour évaluer objectivement tout risque juridique lié à la poursuite des travaux. Face à l'éventuelle invalidité de l'approbation du fédéral, elle aurait bien pu décider alors de ne pas investir les deniers publics comme elle l'a fait.

After years of extensive planning, innumerable public hearings, environmental studies and reports, and after the establishment of various councils and committees for the purpose of reviewing proposals that were put forward, the appellant Alberta embarked upon an enormous undertaking to meet the needs of its constituents. It did so at the expense of the public. And it did so after having been advised by the federal government that it could legitimately proceed. The Oldman River dam no doubt necessitates comprehensive administration. Its construction also involves a significant

Après avoir consacré de nombreuses années à une planification intense, tenu d'innombrables audiences publiques, réalisé un grand nombre d'études et de rapports en matière d'environnement et établi divers conseils et comités chargés de l'examen des propositions présentées, l'appelante l'Alberta s'est lancée dans une entreprise d'envergure pour répondre aux besoins de ses électeurs. Elle l'a fait aux frais du public, mais après avoir été avisée par le gouvernement fédéral qu'elle pouvait légitimement le faire. Le barrage de la rivière Oldman nécessite certes une administration glo-

number of contracts with third parties. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the decision of the Minister of Transport. In the context of this case, it was imperative that the respondent Society respect the common law duty to act promptly.

Had the respondent Society acted more promptly, the appellant Alberta would have been able to assess its position without regard to the economic and administrative commitment that was a reality by the time these proceedings were launched. It is impossible to conclude that the appellant Alberta was not prejudiced by the delay. Moreover, the motions judge made a finding on prejudice, and found that there was no justification for waiting to launch the attack until the dam was nearly 40 percent completed.

The rationale for requiring applicants for prerogative relief to act promptly is to enable their erstwhile respondents to act upon the authority given to them. The applicant cannot invoke the fact that the respondent did what he or she was legally entitled to do as an answer to its own delay. Such a view would put a premium on delay and deliver the wrong message to those who plan prerogative challenges.

My colleague, La Forest J., would also give some weight to the fact that the appellant Alberta was aware of the opposition of the respondent Society and others because of the other unsuccessful challenges by the Society and others. In my view, those challenges are completely irrelevant to this question. Those attacks were all ill-founded, and the appellant Alberta was not bound to expect that these peripheral and collateral proceedings presaged a fundamental attack on the original permit. The fact that detractors are harassing a travelling train does not put one on guard against the proposition that they are going to attack the authority to depart in the first instance. In my opinion, those activities need not have been taken into consideration by the motions judge. None of the activities undertaken by the Society or its

bale. Sa construction comporte également un nombre important de contrats avec des tiers. Compte tenu de l'envergure du projet et des intérêts en jeu, il n'était pas raisonnable que la Société intimée attende 14 mois avant de contester la décision du ministre des Transports. Dans le présent contexte, la Société intimée devait absolument respecter l'obligation de diligence de la common law.

Si la Société intimée avait agi d'une façon plus diligente, l'appelante l'Alberta aurait pu évaluer sa position sans tenir compte de l'engagement économique et administratif qui était mis en œuvre au moment où les présentes procédures ont été intentées. Il est impossible de conclure que l'appelante l'Alberta n'a pas subi de préjudice en raison du retard. Par ailleurs, le juge des requêtes a évalué le préjudice et a statué que rien ne justifiait d'attendre pour entamer la présente contestation que le barrage soit complété pour près de 40 pour 100.

On exige que les auteurs d'une demande de bref de prérogative agissent avec diligence pour permettre aux intimés de donner suite au pouvoir qui leur est conféré. Le requérant ne peut justifier son retard en soutenant que l'intimé a fait ce qu'il avait légalement le droit de faire. Ce point de vue favoriserait les retards et induirait en erreur les personnes qui ont l'intention de présenter une demande de bref de prérogative.

Mon collègue le juge La Forest accorderait également une certaine importance au fait que l'appelante l'Alberta était au courant de l'opposition de la Société intimée et des autres parties en raison des autres contestations infructueuses intentées par celles-ci. À mon avis, ces contestations ne sont aucunement pertinentes en l'espèce. Elles étaient toutes mal fondées et l'appelante l'Alberta n'avait pas à s'attendre que ces poursuites connexes et incidentes laissaient présager une contestation fondamentale du permis initial. Le fait que des détracteurs manifestent du mécontentement au sujet d'un train en marche ne nous met pas en garde contre la possibilité qu'ils en contestent l'autorisation de mise en route. À mon avis, le juge des requêtes n'avait pas à tenir compte de ces activités. Aucune des activités de la Société ou de ses membres

members precluded the respondent Society from undertaking this challenge.

The activities referred to by my colleague were qualitatively different from that which is sought in this action, and irrelevant to the issue at hand. The applications for *certiorari* brought by the respondent Society in October 1987 and early 1988 respectively, were directed at interim licences issued by Alberta's Minister of Environment pursuant to that province's *Water Resources Act*, R.S.A. 1980, c. W-5. The petitioning of the Alberta Energy Resources Conservation Board focused on the hydro-electric aspects of the dam. The information sworn before a justice of the peace alleged an offence pursuant to the federal *Fisheries Act*, R.S.C., 1985, c. F-14.

This action centres on the constitutionality and applicability of the *Environmental Assessment and Review Process Guidelines Order*. It raises new and different issues. The previous efforts of the respondent Society were not necessary preliminaries; they were separate and distinct from the relief sought here. It is my view that in determining whether he should exercise his discretion against the respondent Society, Jerome A.C.J. was obliged to look only at those factors which he considered were directly connected to the application before him. He was clearly in the best position to assess the relevancy of that put forward by the parties. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. For the reasons stated above, I am of the opinion that the test has not been met in this case.

3. Costs

I see no justification for awarding the respondent Society costs on a solicitor and client basis. The general rule in this Court is that a successful party recovers costs on the usual party and party basis. That was the rule applied by the courts below. My colleague proposes an award of solici-

n'empêchait la Société intimée d'entamer la présente contestation.

Les activités mentionnées par mon collègue étaient qualitativement différentes de celles visées par la présente action et n'ont aucune pertinence en l'espèce. Les demandes de bref de *certiorari* présentées par la Société intimée en octobre 1987 et au début de 1988 visaient des permis provisoires délivrés par le ministre de l'Environnement de l'Alberta, sous le régime de la *Water Resources Act*, R.S.A. 1980, ch. W-5, de cette province. La demande auprès de l'Energy Resources Conservation Board de l'Alberta portait sur les aspects hydroélectriques du barrage. La dénonciation faite sous serment devant un juge de paix mentionnait une infraction de la *Loi sur les pêches*, L.R.C. (1985), ch. F-14.

Le présent pourvoi porte sur la constitutionnalité et l'applicabilité du *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*. Il soulève des questions nouvelles et différentes. Les efforts déployés auparavant par la Société intimée n'étaient pas des préliminaires nécessaires; il s'agissait là de recours distincts et différents du redressement sollicité en l'espèce. À mon avis, pour déterminer s'il devait exercer son pouvoir discrétionnaire contre la Société intimée, le juge en chef adjoint Jerome devait examiner seulement les facteurs qui, selon lui, se rattachaient directement à la demande dont il était saisi. Il était clairement le mieux placé pour évaluer la pertinence de ce que les parties lui ont présenté. On n'est justifié d'intervenir à l'égard de l'exercice de son pouvoir discrétionnaire, que si l'on peut affirmer avec certitude qu'il a eu tort de procéder ainsi. Pour les motifs qui précèdent, je suis d'avis de conclure que l'on n'a pas satisfait à ce critère en l'espèce.

3. Les dépens

À mon avis, il n'est pas justifié d'adjuger les dépens comme entre procureur et client en faveur de la Société intimée. En règle générale devant notre Cour, la partie qui a gain de cause a droit aux dépens sur la base des frais entre parties. C'est la règle que les tribunaux d'instance inférieure ont

tor and client costs extending to the courts below. I see no ground for suggesting they were in error, and I see no ground for our departing from our own general rule. Public interest groups must be prepared to abide by the same principles as apply to other litigants. Were we to produce special rules for such litigants, we would jeopardize an important principle: those undertaking litigation must be prepared to accept some responsibility for the costs. I see nothing here to justify calling upon the taxpayers to meet the solicitor and client costs of this party.

4. Conclusion

I would allow the appeal with costs.

Appeal dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the federal environmental guidelines order. STEVENSON J. *is dissenting.*

Solicitors for the appellant Her Majesty the Queen in right of Alberta: Milner & Steer, Edmonton.

Solicitor for the appellants the Minister of Transport and the Minister of Fisheries and Oceans: John C. Tait, Ottawa.

Solicitors for the respondent: Gowling, Strathy & Henderson, Ottawa.

Solicitors for the intervener the Attorney General of Quebec: Jean-K. Samson, Alain Gingras and Denis Lemieux, Ste-Foy.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

appliquée. Mon collègue propose une adjudication des dépens comme entre procureur et client dans toutes les cours. Rien n'indique que les tribunaux d'instance inférieure ont commis une erreur et je ne vois pas pourquoi il faudrait déroger à notre règle générale. Les groupes d'intérêt public doivent être disposés à se plier aux mêmes principes que les autres plaideurs. Si l'on établissait des règles spéciales pour ces groupes, on mettrait en danger l'application d'un important principe: ceux qui intentent des poursuites doivent être disposés à accepter une certaine responsabilité quant aux dépens. En l'espèce, je ne vois rien qui justifie d'imposer aux contribuables qu'ils assument les dépens comme entre procureur et client pour le compte de cette partie.

4. Conclusion

Je suis d'avis d'accueillir le pourvoi avec dépens.

Pourvoi rejeté, sauf qu'il ne sera pas délivré de bref de la nature d'un mandamus ordonnant au ministre des Pêches et des Océans de se conformer aux lignes directrices fédérales en matière d'environnement. Le juge STEVENSON *est dissident.*

Procureurs de l'appelante Sa Majesté la Reine du chef de l'Alberta: Milner & Steer, Edmonton.

Procureur des appelants le ministre des Transports et le ministre des Pêches et des Océans: John C. Tait, Ottawa.

Procureurs de l'intimée: Gowling, Strathy & Henderson, Ottawa.

Procureurs de l'intervenant le procureur général du Québec: Jean-K. Samson, Alain Gingras et Denis Lemieux, Ste-Foy.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général du Manitoba: Le procureur général du Manitoba, Winnipeg.

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

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener the Attorney General of Newfoundland: Paul D. Dicks, St. John's.

Solicitor for the intervener the Minister of Justice of the Northwest Territories: The Department of Justice, Yellowknife.

Solicitors for the intervener National Brotherhood/Assembly of First Nations: Hutchins, Soroka & Dionne, Montréal.

Solicitors for the intervener the Dene Nation and the Metis Association of the Northwest Territories: McCuaig Desrochers, Edmonton.

Solicitors for the intervener the Native Council of Canada (Alberta): McCuaig Desrochers, Edmonton.

Solicitors for the interveners the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), and the Friends of the Earth: Gregory J. McDade, Vancouver; Judith B. Hanebury, Calgary.

Solicitor for the intervener the Alberta Wilderness Association: Martin W. Mason, Ottawa.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan: Brian Barrington-Foote, Regina.

Procureur de l'intervenant le procureur général de Terre-Neuve: Paul D. Dicks, St. John's.

Procureur de l'intervenant le ministre de la Justice des Territoires du Nord-Ouest: Le ministère de la Justice, Yellowknife.

Procureurs de l'intervenante la Fraternité des Indiens du Canada/l'Assemblée des Premières Nations: Hutchins, Soroka & Dionne, Montréal.

Procureurs de l'intervenante la Nation dénée et l'Association des Métis des Territoires du Nord-Ouest: McCuaig Desrochers, Edmonton.

Procureurs de l'intervenant le Conseil national des autochtones du Canada (Alberta): McCuaig Desrochers, Edmonton.

Procureurs des intervenants le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, le Sierra Club of Western Canada, Survie culturelle (Canada), et les Amis de la Terre: Gregory J. McDade, Vancouver; Judith B. Hanebury, Calgary.

Procureur de l'intervenante l'Alberta Wilderness Association: Martin W. Mason, Ottawa.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Prophet River First Nation v. British Columbia (Minister of the Environment) | 2017 BCCA 58, 2017 CarswellBC 224, 7 C.E.L.R. (4th) 1, [2017] B.C.W.L.D. 1279, [2017] B.C.W.L.D. 1283, 408 D.L.R. (4th) 201, 94 B.C.L.R. (5th) 232, [2017] 7 W.W.R. 698, 275 A.C.W.S. (3d) 95 | (B.C. C.A., Feb 2, 2017)

2016 CAF 187, 2016 FCA 187
Federal Court of Appeal

Gitxaala Nation v. Canada

2016 CarswellNat 2576, 2016 CarswellNat 2577, 2016 CAF 187, 2016 FCA 187,
[2016] F.C.J. No. 705, 1 C.E.L.R. (4th) 183, 269 A.C.W.S. (3d) 85, 485 N.R. 258

GITXAALA NATION, GITGA'AT FIRST NATION, HAISLA NATION, THE COUNCIL OF THE HAIDA NATION and PETER LANTIN suing on his own behalf and on behalf of all citizens of the Haida Nation, KITASOO XAI'XAIS BAND COUNCIL on behalf of all members of the Kitasoo Xai'Xais Nation and HEILTSUK TRIBAL COUNCIL on behalf of all members of the Heiltsuk Nation, MARTIN LOUIE, on his own behalf, and on behalf of Nadleh Whut'en and on behalf of the Nadleh Whut'en Band, FRED SAM, on his own behalf, on behalf of all Nak'azdli Whut'en, and on behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY, RAINCOAST CONSERVATION FOUNDATION, FEDERATION OF BRITISH COLUMBIA NATURALISTS carrying on business as BC NATURE (Applicants and Appellants) and HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, NORTHERN GATEWAY PIPELINES INC., NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP and NATIONAL ENERGY BOARD (Respondents) and THE ATTORNEY GENERAL OF BRITISH COLUMBIA, AMNESTY INTERNATIONAL and THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS (Interveners)

Eleanor R. Dawson, David Stratas, C. Michael Ryer JJ.A.

Heard: October 1-2, 5-8, 2015
Judgment: June 23, 2016
Docket: A-437-14, A-56-14, A-59-14, A-63-14, A-64-14, A-67-14, A-439-14, A-440-14, A-442-14, A-443-14, A-445-14, A-446-14, A-447-14, A-448-14, A-514-14, A-517-14, A-520-14, A-522-14

Counsel: Robert J.M. Janes, Elin R.S. Sigurdson, Virginia V. Mathers, Christopher J. Evans, for Applicant / Appellant, Gitxaala Nation
Michael Lee Ross, Grace A. Jackson, Benjamin Ralston, for Applicant / Appellant, Gitga'at First Nation
Jennifer Griffith, Allan Donovan, Mary Anne Vallianatos, for Applicant / Appellant, Haisla Nation
Terri-Lynn Williams-Davidson, Michael Jackson, David Paterson, Elizabeth Bulbrook (Articled Student), for Applicants / Appellants, Council of Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation
Lisa Fong, Julia Hincks, for Applicants / Appellants, Kitasoo Xai-Xais Band Council and Heiltsuk Tribal Council
Cheryl Sharvit, Gavin Smith, for Applicants / Appellants, Martin Louie, on his own behalf, and on behalf of Nadleh Whut'En and on behalf of the Nadleh Whut'En Band, Fred Sam, on his own behalf, and on behalf of all Nak'Azdli Whut'En, and on behalf of Nak'Azdli Band
Steven Shrybman, for Applicant / Appellant, Unifor

Barry Robinson, Karen Campbell, for Applicants / Appellants, Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation
Chris D. Tollefson, Anthony Ho, for Applicant / Appellant, Federation of Bc Naturalists, carrying on business as BC Nature
Jan Brongers, Ken Manning, Dayna Anderson, Liliane Bantourakis, Sarah Bird, for Respondents, Her Majesty the Queen, Attorney General of Canada and Minister of the Environment
E. David D. Tevender, Q.C., Bernard J. Roth, Laura K. Estep, for Respondents, Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership
Andrew R. Hudson, for Respondent, National Energy Board
Angela Cousins, for Intervener, Attorney General of British Columbia
Colleen Bauman, Justin Safayeni, for Intervener, Amnesty International
Lewis L. Manning, Keith B. Bergner, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers

Subject: Civil Practice and Procedure; Environmental; Natural Resources; Public
Related Abridgment Classifications
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.p Aboriginal interests
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.s Practice and procedure
Headnote
Environmental law --- Statutory protection of environment — Approvals, licences and orders — Aboriginal interests
Applicants were several Aboriginal bands and others who opposed pipeline development — Joint review panel found that project was in public interest and recommended that it go forward subject to 209 conditions — Two certificates of public convenience and necessity were issued — Several appeals and applications for judicial review regarding various aspects of proceedings were brought, and were consolidated into single application — Application granted — Order in council was reasonable and defensible, however, Canada did not fulfill its obligation to consult Aboriginal peoples to standard of reasonable satisfaction — Good faith was shown and proper framework was put in place for consultation but consultation aspect of process fell short — Order in council was quashed as well as certificates that were issued under them, and matter remitted — Governor in council's determination was reasonable in light of administrative law principles — Government did not prejudge result of process, and bias on part of governor in council was not shown — Framework of consultation process was not unilaterally imposed on first nations — Level of funding provided constrained participation in joint review process, but there was no evidence that funding available was so inadequate it made process unreasonable — Canada fell well short of its deep duty to make reasonable efforts to inform and consult — Canada assessed strength of claim of certain bands, but acted improperly in failing to share assessment with affected first nations — Not all items of interest were discussed in consultation process — During consultation meetings, Aboriginal groups were repeatedly told that Canada's representatives were working on assumption that governor in council needed to make its decision by particular date, and were tasked with information gathering, and were not authorized to make decisions — Requirement to give adequate reasons was not shown to be met.
Environmental law --- Statutory protection of environment — Approvals, licences and orders — Practice and procedure
Standing; evidence from affidavits.
The applicants were several Aboriginal bands and others who opposed a pipeline development. A joint review panel found that the project was in the public interest and recommended that it go forward subject to 209 conditions. After the recommendation, a phase of consultation with the applicants including Aboriginal bands was conducted. Two certificates of public convenience and necessity were issued.
Nine applications for judicial review of the orders were brought, as well as five applications for judicial review of the review panel's report, and four appeals of certificates issued related to the project. All related to the report of the joint review panel, the Order in Council made by the Governor in Council and the Certificates made by the National Energy Board The proceedings were consolidated.

Held: The application for judicial review was granted.

Per Dawson and Stratas JJ.A.: The order in council was reasonable and was defensible. However, Canada did not fulfill its obligation to consult Aboriginal peoples to a standard of reasonable satisfaction. Good faith was shown and a proper framework was put in place for consultation. However, the consultation aspect of the process fell short. The order in council was quashed as well as the certificates that were issued under them. The matter was remitted back to the governor in council for redetermination.

The legislative scheme was a complete code. The only effective decision maker was the governor in council. Under the legislative regime, the primary attack was against the governor in council's order in council, which prompted the issuance of the certificates.

The governor in council's determination was reasonable in the light of administrative law principles.

Canada fell well short of its duty to make reasonable efforts to inform and consult. The duty was a deep one. The honour of the crown was not maintained. Canada did not meet its duty regarding the 45 day consultation period that followed the release of the joint review panel's report.

The government did not prejudge the result of the process. Bias on the part of the governor in council was not shown. It must be shown that the decision-maker's mind was closed such that representations to the contrary would be futile.

The framework of the consultation process was not unilaterally imposed on the first nations. The Crown has discretion as to how it constructs its process. The level of funding provided constrained participation in the joint review process, but there was no evidence that the funding available was so inadequate it made the process unreasonable. It was not unreasonable for Canada to integrate the review process into the Crown consultation process, and the process was not over-delegated.

Canada assessed the strength of the claim of certain bands, but failed to share with affected first nations the assessment. Canada was not obliged to share its legal assessment, which was subject to solicitor-client privilege. Privilege barred Canada from disclosing factual information relevant to the consultation process. However, information on the strength of the claim was a necessary part of meaningful consultation. The information was not shared with any first nation. It was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert that the project's impact would be mitigated without first discussing the nature and extent of the rights at stake.

Not all items of interest were discussed in the consultation process. In certain instances, information was put before the governor in council that did not accurately portray the concerns of the affected first nations, and these errors were not corrected or brought to the attention of the governor in council.

During the consultation meetings, Aboriginal groups were repeatedly told that Canada's representatives were working on the assumption that the governor in council needed to make its decision by a particular date, were tasked with information gathering, and were not authorized to make decisions. These actions fell short of the duty to consult. Canada's representatives repeatedly stated that they had to accept the findings of the joint review panel as set out in its report, when the consultation process was an opportunity to address errors and admissions in the report. Canada failed to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant first nations. There was no indication Canada intended to amend or supplement the conditions imposed by the panel, to correct any errors or omissions in its report, or to provide meaningful feedback on material concerns raised. There was no real effort to pursue meaningful two-way dialogue. There was no one from Canada's side to do more than take notes, and no one able to respond meaningfully.

Certain letters relied on by Canada did not fully respond to the concerns of the applicants. The letters centered on accommodation measures and were generic. The letters did not engage with the repeatedly expressed concern that insufficient evidence was available to allow for an informed dialogue about the potential impacts of the project on Aboriginal and treaty rights. During the process, the parties were entitled to much more information, consideration and explanation from Canada regarding the specific concerns they had put to Canada.

The requirement to give adequate reasons was not shown to be met.

The deficiencies might have been rectified with an extension of time but Canada did not request such an extension.

Per Ryer J.A. (dissenting): The applications should be dismissed. Imperfections in the process were not sufficient to render the consultation process inadequate. The Crown met its duty to consult with the applicants. The only Aboriginal rights engaged by the project were each first nation's asserted rights in relation to the use and benefits of the lands and waterways that the project would cross. The project did not affect governance rights or Aboriginal title.

The timelines for the consultations were statutorily imposed. The Crown had no obligation to make a request for an extension of time.

Any inaccuracies in the Crown consultation report were insufficient to render the Crown's consultations inadequate. The information requested by the applicants mostly related to matters that were considered by the joint review panel or matters that were never placed before the panel, but should have been.

The Crown made no error in failing to disclose the strength of its claim assessments. The Crown, as a matter of law, had no obligation to share its assessment of the strength of each First Nation's claim in respect of asserted rights. The Crown's legal assessment of the strength of a First Nation's claim is inherently subject to solicitor-client privilege, which extends to the Crown's information upon which its legal assessment is based.

The Crown's participation in the consultations was sufficient to fulfill the honour of the Crown, particularly in a process that dealt with a project of large duration, size and scope.

The Governor in Council's reasons were adequate. The Crown's reasoning was, adequately demonstrated by the report, the consultation meetings, the Crown consultation report and the correspondence from the Crown to the first nations who engaged in the consultations.

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Statutes considered by *Eleanor R. Dawson, David Stratas JJ.A.*:

Canada Evidence Act, R.S.C. 1985, c. C-5

s. 39 — considered

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52

Generally — referred to

s. 2(1) "designated project" — considered

s. 5 — considered

s. 5(1) — considered

s. 5(2) — considered

s. 19 — considered

s. 29 — considered

s. 29(1) — referred to

s. 29(3) — considered

s. 30 — considered

s. 30(1) — referred to

s. 30(2) — referred to

s. 31 — referred to

s. 31(1)(a) — considered

s. 31(5) — referred to

s. 37 — considered

s. 53(1) — considered

s. 53(2) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 9 — referred to

s. 10 — referred to

s. 13 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35(1) — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 31(2) — considered

Jobs, Growth and Long-term Prosperity Act, S.C. 2012, c. 19
Generally — referred to
National Energy Board Act, R.S.C. 1985, c. N-7
Generally — referred to

Pt. IV — referred to

s. 2 "Minister" — considered

ss. 33-40 — referred to

s. 52(1) — considered

s. 52(2) — considered

s. 52(3) — considered

s. 52(4)-52(10) — considered

s. 52(11) — referred to

s. 53 — considered

s. 54 — considered

s. 54(1) — considered

s. 54(1)(a) — referred to

s. 54(1)(b) — referred to

s. 54(2) — considered

s. 54(3) — considered

s. 54(5) — considered

s. 75 — referred to

s. 77 — referred to

s. 84 — referred to

ss. 87-103 — referred to

Statutes considered by *C. Michael Ryer J.A.* (dissenting):
Canada Evidence Act, R.S.C. 1985, c. C-5
s. 39 — considered
Rules considered:
Federal Courts Rules, SOR/98-106
R. 81 — considered

APPLICATION for judicial review of determination regarding pipeline development project.

***Dawson, Stratas JJ.A.*:**

1 Before the Court are nine applicav.tions for judicial review of Order in Council P.C. 2014-809. That Order required the National Energy Board to issue two Certificates of Public Convenience and Necessity, on certain conditions, concerning the Northern Gateway Project. That Project, proposed by Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership, consists of two pipelines transporting oil and condensate, and related facilities.

2 Also before the Court are five applications for judicial review of a Report issued by a review panel, known as the Joint Review Panel, acting under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, section 52 and the *National Energy Board Act*, R.S.C. 1985, c. N-7, as amended. The Governor in Council considered the Joint Review Panel's Report when making its Order in Council.

3 And also before the Court are four appeals of the Certificates issued by the National Energy Board.

4 All of these proceedings have been consolidated. These are our reasons for judgment in the consolidated proceedings. In conformity with the order consolidating the proceedings, the original of these reasons will be placed in the lead file, file A-437-14, and a copy will be placed in each of the other files.

5 As seen above, three administrative acts — the Order in Council, the Report and the Certificates — are all subject to challenge. But, as explained below, for our purposes, the Order in Council is legally the decision under review and is the focus of our analysis.

6 Applying the principles of administrative law, we find that the Order in Council is acceptable and defensible on the facts and the law and is reasonable. The Order in Council was within the margin of appreciation of the Governor in Council, a margin of appreciation that, as we shall explain, in these circumstances is broad.

7 However, the Governor in Council could not make the Order in Council unless Canada has also fulfilled the duty to consult owed to Aboriginal peoples.

8 When considering whether that duty has been fulfilled — *i.e.*, the adequacy of consultation — we are not to insist on a standard of perfection; rather, only reasonable satisfaction is required. Bearing in mind that standard, we conclude that Canada has not fulfilled its duty to consult. While Canada exercised good faith and designed a good framework to fulfil its duty to consult, execution of that framework — in particular, one critical part of that framework known as Phase IV — fell well short of the mark. A summary of our reasons in support of this conclusion can be found at paragraphs 325-332, below.

9 In reaching this conclusion, we rely to a large extent on facts not in dispute, including Canada's own factual assessments and its own officials' words. Further, in reaching this conclusion, we have not extended any existing legal principles or fashioned new ones. Our conclusion follows from the application of legal principles previously settled by the Supreme Court of Canada to the undisputed facts of this case.

10 Thus, for the following reasons, we would quash the Order in Council and the Certificates that were issued under them. We would remit the matter back to the Governor in Council for prompt redetermination.

11 For the convenience of the reader, we offer an index to these reasons:

A. The Project

12 The Northern Gateway Project consists of two 1,178 kilometer pipelines and associated facilities. One pipeline is intended to transport oil from Bruderheim, Alberta to Kitimat, British Columbia. At Kitimat, the oil would be loaded onto tankers for delivery to export markets. The other pipeline would carry condensate removed from tankers at Kitimat to Bruderheim, for distribution to Alberta markets.

13 The associated facilities include both tank and marine terminals in Kitimat consisting of a number of oil storage tanks, condensate storage tanks, tanker berths and a utility berth. Kitimat would be a much busier place, with 190-250 tanker calls a year, some tankers up to 320,000 tons deadweight in size.

14 If built, the Project could operate for 50 years or more.

15 Behind the Project are Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc. For the purposes of these reasons, it is not necessary to distinguish between the two and so the term "Northern Gateway" shall be used throughout for both or either.

16 Northern Gateway is not alone behind the Project. It has 26 Aboriginal equity partners representing almost 60% of the Aboriginal communities along the pipelines' right-of-way, representing 60% of the area's First Nations' population and 80% of the area's combined First Nations and Métis population. Northern Gateway continues to discuss long term partnerships with a number of Aboriginal groups and expects that the number of equity partners will increase.

B. The parties

17 The Project significantly affects a number of the First Nations who are parties to these proceedings. In no particular order, these parties are as follows:

- *Gitxaala Nation*. Portions of the oil and condensate tanker routes for the Project are located within the Gitxaala's asserted traditional territory. The Gitxaala maintain that the tanker traffic resulting from the Project would affect its Aboriginal rights, including title and self-governance rights. Its main community, Lach Klan, is roughly 10 kilometres from the tanker routes. Also near the tanker routes are fifteen of its reserves, several harvesting areas, traditional village sites, and spiritual sites.

- *Haisla Nation*. A portion of the pipelines, the entire Kitimat terminal and a portion of the tanker route are within territory claimed by the Haisla upon which they assert rights to hunt, fish, trap, gather, use timber resources and govern. Canada accepted the Haisla's comprehensive claim for negotiations decades ago and twenty years ago, Canada entered into a framework agreement with the Haisla for treaty negotiations.

- *Gitga'at First Nation.* All ships coming or going from the Kitimat terminal must pass through the Gitga'at's asserted territory. They have fourteen reserves along the proposed shipping route; indeed, the route is just two kilometres from the main Gitga'at community at Hartley Bay, British Columbia.

- *Kitasoo Xai'Xais Band Council.* This party is the body that governs the Kitasoo Xai'Xais Nation, a band of Aboriginal peoples comprised of the Tsimshian Kitasoo people and Heiltsuk language speaking Xai'Xais people. Their asserted territory includes a number of coastal islands and surrounding waters and mainland territory next to inlets and fjords. Tankers will cross their territory.

- *Heiltsuk Tribal Council.* This party governs the Heiltsuk Nation. The Heiltsuk Nation is a band of Aboriginal peoples amalgamated from five tribal groups located on the central coast of British Columbia. They assert a claim to 16,658 square kilometres of land and nearshore and offshore waters on the central coast of British Columbia. Their main community is Bella Bella, on Campbell Island. Tankers approaching Kitimat from the southern approach will travel through the Heiltsuk's asserted territory.

• *Nadleh Whut'en and Nak'azdli Whut'en*. They are part of the Yinka Dene or Dakelh people. Yinka Dene means "people of the earth" or "people for the land." Dakelh means "travellers on water." They have a governance system founded in ancestral laws, key elements of which include the affiliation of Dakelh people with clans that include hereditary leaders, land and resource management territories known as "keyoh" or "keyah," and a system of governance known as "bahlats" as an institution to govern the keyoh/keyah and clans. The pipelines would cross approximately 50 kilometres of the Nadleh's asserted territory and cross 86 watercourses on their land, 21 of which are fish-bearing waters. The pipelines would cross approximately 110 kilometres of the Nak'azdli's asserted territory and cross 167 watercourses on their land, 60 of which are fish-bearing waters. A pumping station would also be located on the Nak'azdli's asserted territory. The Nadleh and the Nak'azdli are members of the Carrier Sekani Tribal Council, whose comprehensive claim has been accepted by Canada for negotiation.

• *Haida Nation.* The Haida Nation is the Indigenous Peoples of Haida Gwaii. Haida Gwaii means "islands of the people," and is an archipelago of more than 150 islands, extending roughly 250 kilometres, with roughly 4,700 kilometres of shoreline. No place is further than 20 kilometres from the sea. All proposed tanker routes go through or are next to the marine portion of the territory asserted by the Haida. In the southern portion of Haida Gwaii is Gwaii Haanas, a Haida protected area and national park reserve that contains a UNESCO World Heritage Site called "sGan gwaay" or "nansdins." Northern Gateway identified nine ecosections and twelve oceanographic areas of significance for the Project and a number of these surround Haida Gwaii.

18 Other parties before the Court claim a strong interest in the Project:

• *ForestEthics Advocacy Association*. This non-profit environmental protection society has a long history of advocating for changes in the extraction of natural resources, protecting endangered forests and wild places, educating and informing the public and working with governments and others in pursuit of these objectives.

• *Living Oceans Society*. This non-profit society advances science-based policy recommendations to achieve the conservation of oceans and the communities that depend upon them. It has been involved in researching and proposing policy for oil and gas development as it affects the marine environment.

• *Raincoast Conservation Foundation.* This is a group of conservationists and scientists dedicated to protecting the lands, waters and wildlife of coastal British Columbia through peer-reviewed science and grassroots advocacy and the use of a full-time university lab, a research station and a research vessel.

• *B.C. Nature.* This is a federation of naturalists and naturalist clubs representing more than 5,000 people. It wishes to maintain the integrity of British Columbia's ecosystems and rich biodiversity. To this end, it engages in public education and coordinates a science-based program that identifies, conserves and monitors a network of habitats for bird populations.

• *Unifor*. This is a labour union that represents many energy and fisheries workers in Canada. The energy workers it represents are employed in oil and gas exploration, transportation, refining and conservation in petrochemical and plastics industries. A number of its members work in production and refining facilities in Alberta and British Columbia that are to be served by the Project. The fisheries workers are located across Canada. On the west coast, Unifor represents commercial fishers and fish plant workers who rely on healthy fish stocks and fish habitats.

C. The approval process for the Project

(1) Introduction

19 The challenges associated with the approval process for the Project were immense. Massive in size and affecting so many diverse groups and geographic habitats in so many different ways, the Project had to be assessed in a sensitive, structured, efficient, yet inclusive manner.

20 By and large — with the exception of certain aspects of Canada's execution of the duty to consult, to which we return later in these reasons — the assessment and approval process was set up well and operated well. Given the challenges, this was no small achievement.

(2) The beginning

21 In late 2005, Northern Gateway Pipeline submitted a preliminary information package to the National Energy Board and the Canadian Environmental Assessment Agency.

22 In early 2006, the Board, after consulting with various federal authorities, recommended that the Minister of the Environment refer the Project to a review panel. In the autumn, the Minister of the Environment referred the Project to a review panel to be conducted jointly under the *National Energy Board Act* and the *Canadian Environmental Assessment Act*. That review panel was known as the Joint Review Panel because it had two tasks. First, it was to prepare a report under section 52 of the *National Energy Board Act* for the consideration of the Governor in Council. Second, owing to the fact that the Project was a "designated project" within the meaning of section 2 of the *Canadian Environmental Assessment Act*, the Joint Review Panel was to conduct an environmental assessment of the Project and provide recommendations to the Governor in Council under section 30 of the *Canadian Environmental Assessment Act*.

23 The terms of reference for the Joint Review Panel needed to be settled. Those terms of reference were to appear in an agreement between the National Energy Board and the Minister of the Environment. In September 2006, the Canadian Environmental Assessment Agency released a draft of that agreement for comment. This was an opportunity for the public and, specifically, Aboriginal groups, to provide their views.

24 The review process was paused in late 2006 at the request of Northern Gateway which wanted time to complete various commercially necessary tasks. Those tasks were completed by mid-2008 when Northern Gateway requested the review process resume. In particular, it requested that the draft agreement setting the terms for the Joint Review Panel be finalized.

25 Throughout this time, Aboriginal groups continued to have an opportunity to comment on the draft agreement. And in late 2008-early 2009, the Canadian Environmental Assessment Agency specifically contacted Aboriginal groups to advise them about the Project and to inform them of opportunities to participate in proceedings before the Joint Review Panel and the related process of consultation with the Crown. Much more on this will be discussed below.

26 In February 2009, the Agency released the Government of Canada's framework for consulting with Aboriginal groups regarding the Project. This framework, found in a document entitled *Approach to Crown Consultation for the Northern Gateway Project*, outlined a comprehensive five phase consultation process:

- *Phase I: Preliminary Phase.* During this Phase, there would be consultation on the draft Joint Review Panel agreement and information would be provided to Aboriginal Groups on the mandates of the National Energy Board and the Canadian Environmental Agency and the Joint Review Panel process.

- *Phase II: Pre-hearing Phase.* Information would be given to Aboriginal groups concerning the Joint Review Panel process and groups would be encouraged to participate in the process.

- *Phase III: The Hearing Phase.* During this time, the Joint Review Panel would hold its hearings. Aboriginal groups would be encouraged to participate and to provide information to help the Joint Review Panel in its process and deliberations. During this phase, the Crown was to participate and to facilitate the process by providing expert scientific and regulatory advice.

- *Phase IV: The Post-Report Phase.* Following the release of the Report of the Joint Review Panel, the Crown was to engage in consultation concerning the Report and on any project-related concerns that were outside of the Joint Review Panel's mandate. For this purpose, the Canadian Environmental Assessment Agency was to be the contact point. This was

to take place before the Governor in Council's decision whether certificates for the Project should be issued under section 54 of the *National Energy Board Act*.

• *Phase V: The Regulatory/Permitting Phase.* During this phase, further consultation was contemplated concerning permits and authorizations to be granted for the Project, if approved.

27 In February 2009, the Canadian Environmental Assessment Agency also released a new draft Joint Review Panel agreement, amended to respond to concerns raised during the initial comment period. A public comment period regarding the new draft agreement followed. Although the public comment period closed in mid-April 2009, submissions and comments from Aboriginal groups continued to be accepted until August 2009. During this time, the Crown offered to meet with Aboriginal groups to discuss the draft Joint Review Panel agreement and how consultation with them would be carried out. In particular, the Gitga'at, the Gitxaala and the Haisla met with the Crown.

28 Near the end of 2009, the mandate of the Joint Review Panel and the process for the assessment of the Project began to be finalized. The National Energy Board and all federal "responsible authorities" within the meaning of the *Canadian Environment Assessment Act* signed an agreement entitled *Project Agreement for the Northern Gateway Pipelines Project in Alberta and British Columbia*. The Canadian Environmental Assessment Agency issued a document entitled *Scope of the Factors - Northern Gateway Pipeline Project, Guidance for the assessment of the environmental effects of the Northern Gateway Project*. Finally, the Agency issued letters to certain Aboriginal groups providing all of these documents and a table setting out the consideration given to comments made by Aboriginal groups.

29 Shortly afterward, the Canadian Environmental Assessment Agency and the National Energy Board issued the Agreement Between the National Energy Board and the Minister of the Environment concerning the Joint Review of the Northern Gateway Pipeline Project. In this agreement, Canada committed to a "whole of government" approach to Aboriginal engagement and consultation, including reliance, to the extent possible, on the consultation efforts of Northern Gateway and the Joint Review Panel.

30 Also appended to this agreement as an appendix were the terms of reference for the Joint Review Panel. These terms of reference included process requirements for the Joint Review Panel to follow during its review of the Project. And in January 2010, in accordance with that agreement, the Minister of the Environment and the Chair of the National Energy Board appointed three persons to serve on the Joint Review Panel.

31 The National Energy Board also established a Joint Review Panel Secretariat working in concert with the Canadian Environmental Assessment Agency to provide support to the Joint Review Panel.

32 The Canadian Environmental Assessment Agency acted as Canada's "Crown Consultation Coordinator" for the Project.

(3) The process gets underway

33 With these preliminary matters completed, the approval process formally began.

34 In May 2010, Northern Gateway filed an application requesting certificates from the National Energy Board for the Project, an order under Part IV of the *National Energy Board Act* approving the toll principles for service on the pipelines and such further relief as required.

35 In July 2010, the Joint Review Panel issued its first procedural direction. It sought comment from the public, including Aboriginal groups, concerning a draft list of issues, the information that Northern Gateway should be required to file over and above that submitted with its application, and locations for the Joint Review Panel's oral hearings. To this end, the Joint Review Panel received written comments and received oral comments at hearings held at three locations.

36 The Joint Review Panel considered what it had heard and decided certain things. It required Northern Gateway to file additional information to address certain issues specific to the Project and certain risks posed by the Project. The Joint Review

Panel stated that this information had to be provided before it could issue a hearing order. It also revised the list of issues and commented on the locations for its hearings.

37 Staff for the Joint Review Panel conducted public information sessions between 2010 and July 2011 and online workshops from November 2011 to April 2013. By March 31, 2011, Northern Gateway submitted additional information in response to the Joint Review Panel's decision.

38 In May 2011, the Joint Review Panel issued a hearing order. In that order, it described the procedures to be followed in the joint review process and gave notice that the hearings would start on January 10, 2012.

39 Around the same time, the Crown consulted with representatives of some of the Aboriginal groups who are applicants/appellants in these proceedings, including the Gitga'at, the Gitxaala, the Haida, the Haisla and the Heiltsuk. Also in 2011, a number of Aboriginal groups, including most of the Aboriginal groups who are parties to these proceedings, and a number of public interest groups registered to intervene in the proceedings before the Joint Review Panel.

40 A number of government agencies — Natural Resources Canada, Aboriginal Affairs and Northern Development Canada, Fisheries and Oceans Canada, the Canadian Coast Guard, Transport Canada, and Environment Canada — also registered as government participants in the proceedings. All interveners and government agencies had to file written evidence with the Joint Review Panel by one week before the start date for the hearings.

41 Through its Participant Funding Program, the Canadian Environmental Assessment Agency provided funding to certain public and Aboriginal groups to facilitate their participation in the Joint Review Panel process and Crown consultation activities.

42 As scheduled, on January 10, 2012, the Joint Review Panel's hearings began. The first set of hearings was known as the "community hearings." The Joint Review Panel travelled to many local communities and received letters of comment and oral statements, including statements from representatives of Aboriginal groups. At one point, the Joint Review Panel and other interveners accompanied representatives of the Gitxaala on a boat tour of a portion of their asserted traditional territory.

43 Around this time, the Joint Review Panel received a report setting out a technical review of marine aspects of the Project. Initiated in 2004 at the request of Northern Gateway, this technical review, known as the Technical Review Process of Marine Terminal Systems and Transshipment Sites or "TERMPOL", was conducted by a review committee chaired by Transport Canada, staffed by representatives of other federal departments and, among other things, assisted by a technical consultant acting on behalf of the Haisla and the Kitimat Village Council.

44 Also around this time, there were some legislative changes. Originally, the environmental assessment was to be conducted in accordance with the *Canadian Environmental Assessment Act* that was introduced in 1992. But in mid-2012, the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19 became law, repealing the 1992 version of the *Canadian Environmental Assessment Act*, enacting the *Canadian Environmental Assessment Act, 2012*, and amending the *National Energy Board Act*. The joint review process for the Project, already underway, was continued under these amended provisions. Hereafter, in these reasons, unless otherwise noted, references to the *Canadian Environmental Assessment Act, 2012* and the *National Energy Board Act* refer to the 2012 versions of these statutes.

45 A month after those statutory amendments became law, and in accordance with those amendments, the Minister of the Environment and the Chair of the National Energy Board directed that the Joint Review Panel submit its environmental assessment as part of the recommendation report under section 52 of the *National Energy Board Act* no later than December 31, 2013. They also finalized amendments to some of the agreements discussed above and the terms of reference of the Joint Review Panel.

46 Proceeding under the 2012 legislation, the Joint Review Panel had two main tasks. First, it had to provide a report under section 52 of the *National Energy Board Act*. Second, in that report it was also to include recommendations flowing from the environmental assessment conducted under *Canadian Environment Assessment Act, 2012*: subsection 29(1). Overall, the report was to:

• recommend whether the requested certificates should be issued;

• outline the terms and conditions that should be attached to any certificates issued by the Board for the Project;

• present recommendations based on the environmental assessment.

47 In September 2012, the Joint Review Panel conducted what it called "final hearings." This last phase of the hearing process ended in June 2013. During this stage, the parties asked questions, filed written argument and made oral argument.

(4) The parties' participation in the approval process

48 Overall, the parties had ample opportunity to participate in the Joint Review Panel process and generally availed themselves of it:

• *Gitxaala Nation*. The Gitxaala participated in all parts of the Joint Review Panel process, including making information requests, submitting technical reports, written and oral Aboriginal evidence, and attending hearings in many localities. Overall, the Gitxaala submitted 7,400 pages of written material, oral testimony from 27 community members and 11 expert reports on various subjects, including Northern Gateway's risk assessment methodology, oil spill modelling, and the fate and behaviour of spilled diluted bitumen. Among other things, the Gitxaala expressed deep concern about the specific effects the Project could have on asserted rights and title.

• *Haisla Nation*. The Haisla also participated in all parts of the Joint Review Panel process, including submitting technical and Aboriginal evidence, oral traditional evidence, attending hearings, and participating extensively in the final round of submissions. During the process, the Haisla filed a traditional use study that describes their culture, property ownership system and laws and how the Project will interfere with their use and occupation of their lands, water and resources. The Haisla also submitted a historic and ethnographic report and an archaeological site summary supporting their claim to exclusive use and occupation of their asserted lands. The Haisla also tendered statements and oral histories from hereditary and elected chiefs and elders outlining the Haisla's history, their use and occupation of their asserted lands, and their efforts to protect their lands, waters and resources for the benefit of future generations. The Haisla also expressed their concerns about the Project.

• *Kitasoo Xai'Xais Band Council.* The Kitasoo submitted brief written evidence, oral evidence at a community hearing and filed final written argument.

• *Heiltsuk Tribal Council.* The Heiltsuk submitted written evidence, answered an information request, gave oral evidence at a community hearing, conducted some cross-examination of witnesses for Northern Gateway and Canada, and submitted final argument.

• *Nadleh Whut'en and Nak'azdli Whut'en*. These parties made submissions to the Crown regarding the draft joint review agreement and the manner in which Canada was engaging in consultation during Phase I of the consultation process. The Yinka Dene Alliance, of which the Nadleh and the Nak'azdli were a part, elected not to intervene before the Joint Review Panel, but a keyoh within the Nak'azdli Whut'en system of governance did intervene.

• *Haida Nation.* The Haida participated in all parts of the Joint Review Panel process. They made information requests, submitted written technical and Aboriginal evidence, provided oral Aboriginal evidence, attended hearings to question Northern Gateway witnesses, submitted a final written argument with comments on proposed conditions, and made oral reply argument. They submitted a 336-page Marine Traditional Knowledge Study describing traditional harvesting activities, both historically and currently, locations of harvesting, and the time of year that harvesting is undertaken for various species throughout Haida Gwaii. The Haida and Canada collaborated on Living Marine Legacy Reports over six years culminating in 2006. These reports, totalling 1,247 pages, provide baseline inventories of marine plants, invertebrates, birds and mammals along the coastline of Haida Gwaii.

• *ForestEthics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation* (hereafter, the "Coalition"). The Coalition participated in the Joint Review Panel process as interveners, providing written evidence and written responses to information requests regarding that evidence, submitting written information requests to other parties, offering witnesses, questioning other parties' witnesses and making submissions.

• *B.C. Nature.* B.C. Nature participated in the Joint Review Panel process as a joint intervener with Nature Canada. It tendered written evidence, provided written responses to information requests regarding that evidence, questioned the witnesses of other parties, provided late written evidence, offered witnesses on that evidence, filed several motions and made submissions.

• *Unifor.* The predecessor unions of this national union participated in the Joint Review Panel process as interveners. They adduced expert evidence, exchanged information requests and responses, presented witnesses for questioning, and offered final argument.

49 Needless to say, the involvement of Northern Gateway and Canada throughout the Joint Review Panel process was massive. In Canada's case, as mentioned above, a number of departments and agencies registered with the Joint Review Panel process as government participants. They filed written evidence, information requests and responses to information requests. They also offered witnesses for questioning on the evidence provided.

(5) The Report of the Joint Review Panel

50 On December 19, 2013, the Joint Review Panel issued a two volume report: *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol. 1 and *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol. 2.

51 The Joint Review Panel found that the Project was in the public interest. It recommended that the applied-for certificates be issued subject to 209 conditions. The conditions require a number of plans, studies and assessments to be considered and assessed by the National Energy Board and other regulators in the future. The 209 conditions include requirements that Northern Gateway provide ongoing and enduring opportunities for affected Aboriginal groups to have input into the continuing planning, construction and operation of the Project through a variety of plans, programs and benefits. A number of the conditions were offered by Northern Gateway during the process. Along with those 209 conditions, Northern Gateway made over 450 voluntary commitments.

52 The conditions deal with such matters as environmental management and monitoring, emergency preparedness and response, and the delivery of economic benefits. Northern Gateway says that these conditions represent an investment of $2 billion on its part. Aboriginal groups, including the First Nations parties in these proceedings will continue to have opportunities to provide input and participate in fulfilment of these conditions.

53 The Joint Review Panel also recommended that the Governor in Council conclude that:

• potential adverse environmental effects from the Project alone are not likely to be significant;

• adverse effects of the Project, in combination with effects of past, present and reasonably foreseeable activities or actions are likely to be significant for certain woodland caribou herds and grizzly bear populations; and

• the significant adverse cumulative effects in relation to the caribou and grizzly bear populations are justified in the circumstances.

(6) Consultation with Aboriginal groups: Phase IV

54 Following the release of the Report of the Joint Review Panel, the process of consultation with Aboriginal groups entered Phase IV of the consultation framework. A detailed description of what happened during this phase is set out below.

55 For present purposes, Phase IV began with the Crown sending letters to representatives of Aboriginal groups in December 2013, seeking input on how the Joint Review Panel's recommendations and conclusions addressed their concerns. Officials from the Canadian Environmental Assessment Agency and other federal departments held meetings with representatives from Aboriginal groups to discuss concerns. Federal representatives met with a number of Aboriginal groups including the Gitga'at, the Gitxaala, the Haida, the Haisla, the Heiltsuk, the Kitasoo and the Yinka Dene Alliance (which includes the Nak'azdli and the Nadleh).

56 Following these meetings and discussions, on May 22, 2014, Canada issued a report concerning its consultation: *Report on Aboriginal Consultation Associated with the Environmental Assessment*.

57 At this point, it is perhaps appropriate to note that this is not a case where the proponent of the Project, Northern Gateway, declined to work with Aboriginal groups. Far from it. Once the pipeline corridor for the Project was defined in 2005, Northern Gateway engaged with all Aboriginal groups, both First Nations and Métis, with communities located within 80 kilometres of the Project corridor and the marine terminal. Northern Gateway engaged with other Aboriginal groups beyond that area to the extent that they self-identified as having an interest because the corridor crossed their traditional territory.

58 In all, Northern Gateway engaged with over 80 different Aboriginal Groups across various regions of Alberta and British Columbia. It employed many methods of engagement, giving $10.8 million in capacity funding to interested Aboriginal groups. It also implemented an Aboriginal Traditional Knowledge program, spending $5 million to fund studies in that area.

(7) The Order and the Certificates

59 The Governor in Council had before it the Report of the Joint Review Panel. It also had other material before it that was not disclosed in these proceedings. Canada asserted privilege over that material under section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

60 On June 17, 2014, the Governor in Council issued Order in Council P.C. 2014-809. On June 28, 2014, the Order in Council was published in the *Canada Gazette*.

61 Balancing all of the competing considerations before it, the Governor in Council accepted "the [Joint Review] Panel's finding that the Project, if constructed and operated in full compliance with the conditions set out in Appendix 1 of Volume 2 of the [Joint Review Panel's] Report, is and will be required by the present and future public convenience and necessity." It "accept[ed] the Panel's recommendation." It added that "the Project would diversify Canada's energy export markets and would contribute to Canada's long-term economic prosperity."

62 As for matters raised by the environmental assessment, the Governor in Council found that, taking into account the implementation of mitigation measures, "the Project is not likely to cause significant environmental effects" within the meaning of subsection 5(1) of the *Canadian Environmental Assessment Act, 2012*. However, the Project would cause significant adverse environmental effects to certain populations of woodland caribou and grizzly bear within the meaning of subsection 5(2) of the *Canadian Environmental Assessment Act, 2012* but these effects were "justified in the circumstances." Exercising its authority under subsections 53(1) and 53(2) of the *Canadian Environmental Assessment Act, 2012*, the Governor in Council established conditions with which Northern Gateway must comply, which conditions were set out in Appendix 1 of *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol. 2.

63 In light of the foregoing, exercising its power under section 54 of the *National Energy Board Act*, the Governor in Council directed the National Energy Board to issue Certificates of Public Convenience and Necessity to Northern Gateway for the Project in accordance with the terms and conditions set out in the Joint Review Panel's Report.

64 On the same day, at the behest of the Governor in Council, the National Energy Board issued a decision statement under subsection 54(1) of the *National Energy Board Act*. The Decision Statement summarized what the Governor in Council

had decided on the Joint Review Panel's recommendations made as a result of the environmental assessment. The Decision Statement reads as follows:

> The Governor in Council has decided, after considering the [Joint Review Panel's] report together with the conditions proposed in it, that the [Project] is not likely to cause significant adverse environmental effects referred to in subsection 5(1) of [the *Canadian Environmental Assessment Act*], but it is likely to cause significant environmental effects referred to in subsection 5(2) of [the *Canadian Environmental Assessment Act*] to certain populations of woodland caribou and grizzly bear as described in the [Joint Review Panel's] report.
>
> The Governor in Council has also decided that, pursuant to subsection 52(4) of [the *Canadian Environmental Assessment Act*], the significant adverse environmental effects that the [Project] is likely to cause to certain populations of woodland caribou and grizzly bear are justified in the circumstances.
>
> The Governor in Council has established the 209 conditions set out by the [Joint Review Panel] in its report as the conditions in relation to the environmental effects referred to in subsections 53(1) and (2) of [the *Canadian Environmental Assessment Act*] with which [Northern Gateway] must comply.

65 A day later, on June 18, 2014, following the direction of the Governor in Council, the National Energy Board issued to Northern Gateway two certificates: Certificate OC-060 for the oil pipeline and associated facilities and Certificate OC-061 for the condensate pipeline and associated facilities.

66 In July 2014, a month after the Governor in Council made its Order in Council and the Board issued its two Certificates, as part of Phase IV of the consultation framework, the Crown wrote a number of Aboriginal groups, including some of the parties to these proceedings, offering explanations concerning the comments they had made and the Governor in Council's Order in Council. To the same effect was an earlier letter written in June 2014, just before the Governor in Council made its Order in Council approving the Project. We will consider these letters, along with other facts concerning what took place during Phase IV, in more detail below.

(8) Future regulatory processes

67 The issuance of the Certificates by the National Energy Board is not the final step before construction of the Project starts. Further regulatory processes will have to be pursued. Northern Gateway must obtain:

- *Routing approval.* Northern Gateway must apply for and receive approval from the National Energy Board for the detailed route of the Project. Owners of land and those whose interests may be adversely affected will have an opportunity to file objections. In approving a route, the National Energy Board must take into account all representations made to it at a public hearing and consider the most appropriate methods of construction and its timing. The National Energy Board has the power to attach conditions to its approval. See generally sections 33-40 of the *National Energy Board Act*.

- *Acquisition of land rights.* Northern Gateway must acquire land rights for the Project in Alberta and British Columbia from private landowners or provincial Crowns by voluntary agreements, right-of-entry orders or Governor-in-Council consent. In some instances, it must pay compensation for acquisition of or damage to land. See generally sections 75, 77, 84, 87-103 of the *National Energy Board Act*.

- *Approval to start construction.* Northern Gateway must apply for and receive leave from the National Energy Board to start construction of the Project. Under this process, Northern Gateway must satisfy all of the pre-construction conditions contained in the Certificates granted by the National Energy Board. As a practical matter, during this process, the detailed design and operation of the Project will be refined. Out of the 209 conditions attached to the Certificates, roughly 120 involve the preparation and filing of further information with the Board before construction can begin. Some of the conditions require Northern Gateway to report on its consultations with Aboriginal groups as part of its application for approval submitted to the National Energy Board.

• *Approval to start operations.* Before the Project can be operated, Northern Gateway must apply to the National Energy Board for approval. Among other things, it must satisfy the National Energy Board that the pipelines can be opened safely for transmission.

• *Other approvals under federal and provincial legislation.* Northern Gateway will also have to apply for these. The application process may involve the need for further consultation with Aboriginal groups. Much of this may take place under Phase V of the consultation framework.

D. Legal proceedings

68 The following notices of application for judicial review challenge the Report of the Joint Review Panel:

• *Federation of British Columbia Naturalists d.b.a. BC Nature v. Attorney General of Canada et al.* (A-59-14);

• *ForestEthics Advocacy Association et al. v. Attorney General of Canada et al.* (A-56-14);

• *Gitxaala Nation v. Minister of the Environment et al.* (A-64-14);

• *Haisla Nation v. Canada (Minister of Environment) et al.* (A-63-14) (later amended);

• *Gitga'at First Nation v. Attorney General of Canada et al.* (A-67-14).

69 The following notices of application for judicial review challenge the decision of the Governor in Council, namely Order in Council P.C. 2014-809:

• *Gitxaala Nation v. Attorney General of Canada et al.* (A-437-14);

• *Federation of British Columbia Naturalists d.b.a. BC Nature v. Attorney General of Canada et al.* (A-443-14);

• *ForestEthics Advocacy Association et al. v. Attorney General of Canada et al.* (A-440-14);

• *Gitga'at First Nation v. Attorney General of Canada et al.* (A-445-14);

• *The Council of the Haida Nation et al. v. Attorney General of Canada et al.* (A-446-14);

• *Haisla Nation v. Attorney General of Canada et al.* (A-447-14);

• *Kitasoo Xai'Xais Band Council et al. v. Her Majesty the Queen et al.* (A-448-14);

• *Nadleh Whut'en Band et al. v. Attorney General of Canada et al.* (A-439-14);

• *Unifor v. Attorney General of Canada et al.* (A-442-14).

70 The following notices of appeal were filed against the National Energy Board's decision to issue the Certificates (Certificate OC-060 and Certificate OC-061):

• *ForestEthics Advocacy Association et al. v. Northern Gateway Pipelines et al.* (A-514-14);

• *Gitxaala Nation v. Attorney General of Canada et al.* (A-520-14);

• *Haisla Nation v. Attorney General of Canada et al.* (A-522-14);

• *Unifor v. Attorney General of Canada et al.* (A-517-14).

71 As mentioned above, these proceedings were all consolidated. This consolidated matter was one of the largest proceedings ever prosecuted in this Court, with approximately 250,000 documents and multiple parties before the Court. Seven months after the proceedings were consolidated and after several motions to resolve minor disputes, the consolidated proceedings were ready for hearing. This Court wishes to express its appreciation to the parties for their exemplary conduct in prosecuting the consolidated proceedings in an efficient and expeditious manner.

72 Broadly speaking, the consolidated proceedings, taken together, seek an order quashing the administrative decisions in this case because, under administrative law principles, they are unreasonable or incorrect. They also seek an order quashing the Order in Council and the Certificates because Canada has not fulfilled its duty to consult with Aboriginal peoples concerning the Project.

73 Thus, we shall review the administrative decisions following administrative law principles and then assess whether Canada fulfilled its duty to consult with Aboriginal peoples.

E. Reviewing the administrative decisions following administrative law principles

(1) Introduction

74 This is a complicated case, with appeals and judicial reviews concerning three different administrative decisions: the Report of the Joint Review Panel, the Order in Council made by the Governor in Council and the Certificates made by the National Energy Board.

75 In complicated cases such as this, it is prudent to have front of mind the proper methodology for reviewing administrative decisions.

76 Some of the administrative decisions have been challenged by way of appeal, others by way of application for judicial review. Regardless of how they have been challenged, we are to review them in the same way, namely the way we proceed when considering applications for judicial review: *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.).

77 Broadly speaking, in judicial reviews, we deal with any preliminary issues, determine the standard of review, use that standard of review to assess the administrative decisions to see if the court should interfere, and then, if we consider interference to be warranted, decide what remedy, if any, should be granted. See generally *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 87 Admin. L.R. (5th) 175 (F.C.A.), at paragraphs 35-37; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.), at paragraph 26; *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283 (F.C.A.), at paragraphs 27-28.

78 However, in complicated cases with many moving parts like this one, often it is useful to begin at a more basic level. What exactly is being reviewed?

79 In this case, we have a statutory scheme for the approval of projects, such as the Project in this case, involving the participation of a Joint Review Panel, the Governor in Council, and the National Energy Board. As part of their participation, each makes a decision of sorts. But in the end, are there really three decisions for the purposes of review?

80 Before pursuing the methodology of review, it is often useful to characterize the decision or decisions in issue in light of the legislative scheme within which they rest. After all, the legislative scheme is the law of the land. Absent constitutional objection, the legislative scheme must always bind us and guide the analysis.

81 Therefore, we shall examine certain preliminary issues raised by the parties. Then we shall analyze the legislative regime with a view to understanding the nature of the administrative decisions made here. Then we shall proceed to the substance of review and, if necessary, proceed to remedy.

(2) Preliminary issues

(a) The standing of certain parties

82 Northern Gateway challenges the standing of the Coalition, BC Nature and Unifor to maintain their proceedings.

83 To have direct standing in a proceeding challenging an administrative decision, a party must show that the decision affects its legal rights, imposes legal obligations upon it, or prejudicially affects it in some way: *League for Human Rights of B'Nai Brith Canada v. R.*, 2010 FCA 307, 409 N.R. 298 (F.C.A.) [herinafter Odynsky]; *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 (Fed. C.A.); *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 (F.C.A.).

84 On the evidence before us, we are persuaded that the legal or practical interests of these parties are sufficient to maintain proceedings. Above, at paragraph 18, we have set out these parties' interests. We also note that they were all active interveners before the Joint Review Panel, participating in much of its process. In our view, these parties have direct standing to maintain their proceedings.

85 In support of its submission that these parties did not have standing, Northern Gateway invokes this Court's decision in *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, [2015] 4 F.C.R. 75 (F.C.A.).

86 In that case, this Court held that ForestEthics did not have standing to apply for judicial review of interlocutory National Energy Board decisions concerning who could participate in its hearing, the relevancy of certain issues, and the participation of an individual in the hearing. In the circumstances of that case, the National Energy Board's decisions did not affect ForestEthics' rights, impose legal obligations upon it, or prejudicially affect it in any way and so it did not have direct standing. Nor did it have standing as a public interest litigant under *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.). Instead, it was a classic "busybody" as that term is understood in the jurisprudence (at paragraph 33):

> ForestEthics asks this Court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It did not seek any status from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning the three interlocutory decisions.

87 The circumstances are completely different in the case at bar. Therefore, we reject Northern Gateway's challenge to the standing of the Coalition, BC Nature and Unifor to maintain proceedings.

(b) The admissibility of affidavits

88 In their memoranda, the Heiltsuk and the Kitasoo submit that the affidavits of Northern Gateway are "substantially submissions in affidavit form, and the whole of each...or alternatively the offending parts of each should be struck out." The Gitxaala have adopted these submissions.

89 Under Rule 81 of the *Federal Courts Rules*, S.O.R./98-106, affidavits offered in support of proceedings are to be "confined to facts within the deponent's personal knowledge."

90 We agree that some portions of the affidavits filed by Northern Gateway smack of submissions that should appear in a memorandum of fact and law, not an affidavit. In considering this consolidated proceeding, we disregarded the offending portions of Northern Gateway's affidavits. Northern Gateway's affidavits do contain admissible evidence that we have considered.

91 Northern Gateway also submitted that there were argumentative portions in other affidavits filed with the Court, such as the Affidavit of Chief Councillor Ellis and most of the exhibits to the Affidavit of Acting Chief Clarence Innis. We agree. Again, in determining this matter, we disregarded argumentative portions in the evidence, and this did not affect our determination.

(3) The legislative scheme in detail

92 This is the first case to consider this legislative scheme, one that integrates elements from the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012* and culminates in substantial decision-making by the Governor in Council. It is unique; there is no analogue in the statute book. Accordingly, cases that have considered other legislative schemes are not relevant to our analysis.

93 We must assess this legislative scheme on its own terms in light of the legislative text, the surrounding context, and Parliament's purpose in enacting the legislation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.). Where the legislative text is clear, as it is here, it will predominate in the analysis: *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.).

94 Broadly speaking, under this legislative scheme, the proponent of a project applies for a certificate approving the project.

95 In response to the application, information is gathered, evaluations are made, an environmental assessment is conducted and recommendations are prepared and presented to the Governor in Council in a report. Overall, on the basis of everything put before it, the Governor in Council decides whether or not the certificate should be issued.

96 If the Governor in Council decides that a certificate may be issued, the Governor in Council may also cause the Board to issue a decision statement setting out conditions relating to the mitigation of environmental effects and follow-up measures. The decision statement becomes part of the certificate, *i.e.*, the mitigation and follow-up measures must be complied with.

97 In cases of uncertainty, the Governor in Council may remit the matter back for reconsideration of the recommendations. After reconsideration, recommendations are sent back to the Governor in Council for decision.

98 We turn now to a more detailed analysis of the legislative scheme.

99 In this case, the decision-making process under the *National Energy Board Act* was triggered by Northern Gateway applying for certificates for the Project.

100 In response to an application, there are two stages: a report stage and a decision stage. During the former, a report is prepared under the *National Energy Board Act*. In cases like this involving a "designated project" within the meaning of the *Canadian Environmental Assessment Act, 2012*, the report must include a report of an environmental assessment prepared under the Act. In short, in a case such as this, the report stage requires fulfilment of requirements under the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*.

101 Under this legislative scheme, the National Energy Board is assigned many responsibilities, particularly at the report stage. In this case, as mentioned, a Joint Review Panel was established. It was a "review panel" for the purposes of the *Canadian Environmental Assessment Act, 2012* and stood in the shoes of the National Energy Board for the purposes of the report stage under the *National Energy Board Act*. So in this case, references in the legislation to the Board should be seen as references to the Joint Review Panel for the purposes of the report stage.

(a) The report stage: the National Energy Board Act requirements

102 First, under subsection 52(1) of the *National Energy Board Act*, a report has to be prepared and submitted to a coordinating Minister for transmission to the Governor in Council. Subsection 52(1) provides that the report is to set out a recommendation as to whether the certificates should be granted and, if so, what conditions, if any, ought to be attached to the certificates:

> **52.** (1) If the Board [here the Joint Review Panel] is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

(a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

(b) regardless of the recommendation that the Board [here the Joint Review Panel] makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

52. (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit et présente au ministre un rapport, qu'il doit rendre public, où figurent:

a) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;

b) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.

103 Under subsection 52(2), the recommendation of the Board (here the Joint Review Panel) contained in its report must be based on certain criteria:

52. (2) In making its recommendation, the Board [here the Joint Review Panel] shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

(a) the availability of oil, gas or any other commodity to the pipeline;

(b) the existence of markets, actual or potential;

(c) the economic feasibility of the pipeline;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

52. (2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :

a) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;

b) l'existence de marchés, réels ou potentiels;

c) la faisabilité économique du pipeline;

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

104 Subsections 52(4) to 54(10) place the Board (here the Joint Review Panel) on a strict time line to issue its report:

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

(5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

(6) The Board shall make public the dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

(7) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

(8) To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(a) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

(b) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

(c) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

(10) A copy of each order made under subsection (8) must be published in the Canada Gazette within 15 days after it is made.

(4) Le rapport est présenté dans le délai fixé par le président. Ce délai ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office.

(5) Si l'Office exige du demandeur, relativement au pipeline, la communication de renseignements ou la réalisation d'études et déclare publiquement, avec l'approbation du président, que le présent paragraphe s'applique, la période prise par le demandeur pour remplir l'exigence n'est pas comprise dans le calcul du délai.

(6) L'Office rend publiques, sans délai, la date où commence la période visée au paragraphe (5) et celle où elle se termine.

(7) Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.

(8) Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

a) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué dans l'arrêté;

b) de donner, en vertu du paragraphe 6(2.1), les instructions qui figurent dans l'arrêté, ou de prendre, en vertu du paragraphe 6(2.2), les mesures qui figurent dans l'arrêté;

c) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.

(9) Les décrets et arrêtés pris en vertu du paragraphe (7) lient l'Office et les arrêtés pris en vertu du paragraphe (8) lient le président.

(10) Une copie de l'arrêté pris en vertu du paragraphe (8) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

105 In this case, as noted above, the Joint Review Panel was under an order requiring it to finish its report by December 31, 2013.

106 As subsection 52(1) of the *National Energy Board Act* makes clear, the report is submitted to the "Minister," who is defined in section 2 of the *National Energy Board Act* as "such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act." The role of that coordinating Minister is to place the report before the Governor in Council for its consideration under sections 53 and 54.

107 Once made, the report is "final and conclusive" but this is "[s]ubject to sections 53 and 54" of the *National Energy Board Act*. These sections empower the Governor in Council to consider the report and decide what to do with it: subsection 52(11) of the *National Energy Board Act*.

(b) The report stage: the Canadian Environmental Assessment Act, 2012 requirements

108 The second thing that happened after Northern Gateway applied for the certificates was an environmental assessment process. In this case, this was required. The Project was a "designated project" within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*. Accordingly, under subsection 52(3), the report also had to set out an environmental assessment conducted under that Act:

52. (3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act*, 2012, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

52. (3) Si la demande vise un projet désigné au sens de l'article 2 de la *Loi canadienne sur l'évaluation environnementale* (2012), le rapport contient aussi l'évaluation environnementale de ce projet établi par l'Office sous le régime de cette loi.

109 Environmental assessments are to include assessments of the matters set out in sections 5 and 19 of the *Canadian Environmental Assessment Act, 2012*. For present purposes, we need only offer a general summary of these matters. They include changes caused to the air, land or sea and the lifeforms that inhabit those areas. They also include consideration of matters specific to the Project and its specific effects on the environment and lifeforms who inhabit it. And they include the effects upon Aboriginal peoples' health and socio-economic conditions, physical and cultural heritage, the use of lands and resources for traditional purposes, and any structures, sites or things that are of historical, archaeological, palaeontological, or architectural significance.

110 What is submitted to the Governor in Council is not the whole environmental assessment but rather only a report of it. Under section 29 of the *Canadian Environmental Assessment Act, 2012*, the report must offer recommendations concerning the subject matter found in paragraph 31(1)(*a*) of the *Canadian Environmental Assessment Act, 2012* — *i.e.*, the existence of significant adverse environmental effects and whether or not those effects can be justified.

111 Section 29 of the *Canadian Environmental Assessment Act, 2012* provides as follows:

29. (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

(a) its recommendation with respect to the decision that may be made under paragraph 31(1)(*a*) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

(b) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

(2) The responsible authority submits its report to the Minister within the meaning of section 2 of *the National Energy Board Act* at the same time as it submits the report referred to in subsection 52(1) of that Act.

(3) Subject to sections 30 and 31, the report with respect to the environmental assessment is final and conclusive.

29. (1) Si la réalisation d'un projet désigné requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, l'autorité responsable à l'égard du projet veille à ce que figure dans le rapport d'évaluation environnementale relatif au projet:

a) sa recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)*a*) relativement au projet, compte tenu de l'application des mesures d'atténuation qu'elle précise dans le rapport;

b) sa recommandation quant au programme de suivi devant être mis en oeuvre relativement au projet.

(2) Elle présente son rapport au ministre au sens de l'article 2 de la *Loi sur l'Office national de l'énergie* au même moment où elle lui présente le rapport visé au paragraphe 52(1) de cette loi.

(3) Sous réserve des articles 30 et 31, le rapport d'évaluation environnementale est définitif et sans appel.

(c) Consideration by the Governor in Council

112 Armed with the report prepared in accordance with the foregoing provisions of the *National Energy Board Act* and *Canadian Environmental Assessment Act, 2012*, the Governor in Council may make its decision concerning the application for the certificate by the proponent, here Northern Gateway.

113 Overall, the Governor in Council has three options:

(1) It can "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report": paragraph 54(1)(*a*) of the *National Energy Board Act*. If this option is pursued, the Board has no discretion. It must grant the certificates within seven days: subsection 54(5) of the *National Energy Board Act*.

As part of its consideration, the Governor in Council must consider whether significant adverse environmental effects will be caused and, if so, whether the effects "can be justified in the circumstances." Depending on its decision, it may have to impose conditions that must be complied with: section 53 of the *Canadian Environmental Assessment Act, 2012*. It does this through the mechanism of a "decision statement" it can cause the Board to issue: section 31 of the *Canadian Environmental Assessment Act, 2012*. The Board must issue the decision statement within seven days and it forms part of the certificate: subsection 31(5) of the *Canadian Environmental Assessment Act, 2012*.

(2) It can "direct the Board to dismiss the application for a certificate": paragraph 54(1)(*b*) of the *National Energy Board Act*. If this option is pursued, the Board has no discretion. It must dismiss the certificates within seven days: subsection 54(5) of the *National Energy Board Act*.

(3) It can ask the Board to reconsider its recommendations in its report or any terms and conditions, or both: subsection 53(1) of the *National Energy Board Act*; subsection 30(1) of the *Canadian Environmental Assessment Act, 2012*. It can specify exactly what issue or issues are to be reconsidered and specify a time limit for the reconsideration: subsection 53(2) of the *National Energy Board Act*; subsection 30(2) of the *Canadian Environmental Assessment Act, 2012*. After its reconsideration is completed, the Board submits its reconsideration report. Then the Governor in Council considers the reconsideration report and decides again among these three options.

114 By law, the Governor in Council must choose one of these options within three months and only can take longer if it passes a specific order to that effect: subsection 54(3) of the *National Energy Board Act*.

115 For reference, section 31 of the *Canadian Environmental Assessment Act, 2012*, referred to above, provides as follows:

> 31. (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*
>
> (a) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project
>
> (i) is not likely to cause significant adverse environmental effects,
>
> (ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or
>
> (iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and
>
> (b) direct the responsible authority to issue a decision statement to the proponent of the designated project that
>
> (i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,
>
> (ii) if the decision is referred to in subparagraph (*a*)(i) or (ii), sets out conditions — which are the implementation of the mitigation measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.
>
> (2) The conditions that are included in the decision statement regarding the environmental effects referred to in subsection 5(2), that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority and that would permit the designated project to be carried out, in whole or in part, take effect only if the federal authority exercises the power or performs the duty or function.
>
> (3) The responsible authority must issue to the proponent of the designated project the decision statement that is required in accordance with the order relating to the designated project within seven days after the day on which that order is made.
>
> (4) The responsible authority must ensure that the decision statement is posted on the Internet site.
>
> (5) The decision statement issued in relation to the designated project under subsection (3) is considered to be a part of the certificate issued in accordance with the order made under section 54 of the *National Energy Board Act* in relation to the designated project.
>
> 31. (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale ou son rapport de réexamen en application des articles 29 ou 30, le gouverneur en conseil peut, par décret pris en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*:
>
> a) décider, compte tenu de l'application des mesures d'atténuation précisées dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen, que la réalisation du projet, selon le cas:
>
> (i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,

(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances,

(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

b) donner à l'autorité responsable instruction de faire une déclaration qu'elle remet au promoteur du projet dans laquelle:

(i) elle donne avis de la décision prise par le gouverneur en conseil en vertu de l'alinéa a) relativement au projet,

(ii) si cette décision est celle visée aux sous-alinéas *a*)(i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au projet, à savoir la mise en oeuvre des mesures d'atténuation et du programme de suivi précisés dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen.

(2) Les conditions énoncées dans la déclaration qui sont relatives aux effets environnementaux visés au paragraphe 5(2) et qui sont directement liées ou nécessairement accessoires aux attributions qu'une autorité fédérale doit exercer pour permettre la réalisation en tout ou en partie du projet désigné sont subordonnées à l'exercice par l'autorité fédérale des attributions en cause.

(3) Dans les sept jours suivant la prise du décret, l'autorité responsable fait la déclaration exigée aux termes de celui-ci relativement au projet désigné et la remet au promoteur du projet.

(4) Elle veille à ce que la déclaration soit affichée sur le site Internet.

(5) La déclaration faite au titre du paragraphe (3) relativement au projet désigné est réputée faire partie du certificat délivré au titre du décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie* relativement au projet.

116 For reference, section 54 of the *National Energy Board Act*, referred to above, provides as follows:

54. (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

(a) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

(b) direct the Board to dismiss the application for a certificate.

(2) The order must set out the reasons for making the order.

(3) The order must be made within three months after the Board's report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

(4) Every order made under subsection (1) or (3) is final and conclusive and is binding on the Board.

(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.

(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.

54. (1) Une fois que l'Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret:

a) donner à l'Office instruction de délivrer un certificat à l'égard du pipeline ou d'une partie de celui-ci et de l'assortir des conditions figurant dans le rapport;

b) donner à l'Office instruction de rejeter la demande de certificat.

(2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci.

(3) Le décret est pris dans les trois mois suivant la remise, au titre de l'article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l'Office pour effectuer le réexamen et faire rapport n'est pas comprise dans le calcul du délai imposé pour prendre le décret.

(4) Les décrets pris en vertu des paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.

(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.

(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

117 For reference, section 30 of the *Canadian Environmental Assessment Act, 2012*, referred to above, which provides for consideration of the environmental recommendations set out in the report, provides as follows:

30. (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment under section 29, the Governor in Council may, by order made under section 53 of the *National Energy Board Act*, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration.

(2) The order may direct the responsible authority to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the responsible authority must complete its reconsideration.

(3) The responsible authority must, before the expiry of the time limit specified in the order, if one was specified, reconsider any recommendation specified in the order and prepare and submit to the Minister within the meaning of section 2 of the *National Energy Board Act* a report on its reconsideration.

(4) In the reconsideration report, the responsible authority must

(a) if the order refers to the recommendation referred to in paragraph 29(1)(*a*)

(i) confirm the recommendation or set out a different one with respect to the decision that may be made under paragraph 31(1)(*a*) in relation to the designated project, and

(ii) confirm, modify or replace the mitigation measures set out in the report with respect to the environmental assessment; and

(b) if the order refers to the recommendation referred to in paragraph 29(1)(*b*), confirm the recommendation or set out a different one with respect to the follow-up program that is to be implemented in respect of the designated project.

(5) Subject to section 31, the responsible authority reconsideration report is final and conclusive.

(6) After the responsible authority has submitted its report under subsection (3), the Governor in Council may, by order made under section 53 of the *National Energy Board Act*, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration. If it does so, subsections (2) to (5) apply. However, in subparagraph (4)(*a*)(ii), the reference to the mitigation measures set out in the report with respect to the environmental assessment is to be read as a reference to the mitigation measures set out in the reconsideration report.

30. (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale en vertu de l'article 29, le gouverneur en conseil peut, par décret pris en vertu de l'article 53 de la *Loi sur l'Office national de l'énergie*, renvoyer toute recommandation figurant au rapport à l'autorité responsable pour réexamen.

(2) Le décret peut préciser tout facteur dont l'autorité responsable doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

(3) L'autorité responsable, dans le délai précisé — le cas échéant — dans le décret, réexamine toute recommandation visée par le décret, établit un rapport de réexamen et le présente au ministre au sens de l'article 2 de la *Loi sur l'Office national de l'énergie*.

(4) Dans son rapport de réexamen, l'autorité responsable:

a) si le décret vise la recommandation prévue à l'alinéa 29(1)*a*):

(i) d'une part, confirme celle-ci ou formule une autre recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)*a*) relativement au projet,

(ii) d'autre part, confirme, modifie ou remplace les mesures d'atténuation précisées dans le rapport d'évaluation environnementale;

b) si le décret vise la recommandation prévue à l'alinéa 29(1)*b*), confirme celle-ci ou formule une autre recommandation quant au programme de suivi devant être mis en oeuvre relativement au projet.

(5) Sous réserve de l'article 31, le rapport de réexamen est définitif et sans appel.

(6) Une fois que l'autorité responsable a présenté son rapport de réexamen en vertu du paragraphe (3), le gouverneur en conseil peut, par décret pris en vertu de l'article 53 de la *Loi sur l'Office national de l'énergie*, renvoyer toute recommandation figurant au rapport à l'autorité responsable pour réexamen. Les paragraphes (2) à (5) s'appliquent alors mais, au sous-alinéa (4)*a*)(ii), la mention des mesures d'atténuation précisées dans le rapport d'évaluation environnementale vaut mention des mesures d'atténuation précisées dans le rapport de réexamen.

118 And, finally, for reference, here is the reconsideration power under section 53 of the *National Energy Board Act*, referred to above:

53. (1) After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

(2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.

(3) The order is binding on the Board.

(4) A copy of the order must be published in the Canada Gazette within 15 days after it is made.

(5) The Board shall, before the expiry of the time limit specified in the order, if one was specified, reconsider its recommendation or any term or condition referred back to it, as the case may be, and prepare and submit to the Minister a report on its reconsideration.

(6) In the reconsideration report, the Board shall

(a) if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and

(b) if a term or condition was referred back, confirm the term or condition, state that it no longer supports it or replace it with another one.

(7) Regardless of what the Board sets out in the reconsideration report, the Board shall also set out in the report all the terms and conditions, that it considers necessary or desirable in the public interest, to which the certificate would be subject if the Governor in Council were to direct the Board to issue the certificate.

(8) Subject to section 54, the Board's reconsideration report is final and conclusive.

(9) After the Board has submitted its report under subsection (5), the Governor in Council may, by order, refer the Board's recommendation, or any of the terms or conditions, set out in the report, back to the Board for reconsideration. If it does so, subsections (2) to (8) apply.

53. (1) Une fois que l'Office a présenté son rapport en vertu de l' article 52, le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

(2) Le décret peut préciser tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

(3) Le décret lie l'Office.

(4) Une copie du décret est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

(5) L'Office, dans le délai précisé — le cas échéant — dans le décret, réexamine la recommandation ou toute condition visée par le décret, établit un rapport de réexamen et le présente au ministre.

(6) Dans son rapport de réexamen, l'Office:

a) si le décret vise la recommandation, confirme celle-ci ou en formule une autre;

b) si le décret vise une condition, confirme la condition visée par le décret, déclare qu'il ne la propose plus ou la remplace par une autre.

(7) Peu importe ce qu'il mentionne dans le rapport de réexamen, l'Office y mentionne aussi toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de délivrer le certificat.

(8) Sous réserve de l'article 54, le rapport de réexamen est définitif et sans appel.

(9) Une fois que l'Office a présenté son rapport au titre du paragraphe (5), le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen. Les paragraphes (2) à (8) s'appliquent alors.

(4) Characterization of the legislative scheme

119 This legislative scheme is a complete code for decision-making regarding certificate applications. Other statutory regimes are not relevant unless they are specifically incorporated into this code, and then only to the extent they are incorporated into the code.

120 The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council.

121 Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.

122 In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.

123 This is a different role — a much attenuated role — from the role played by environmental assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.

124 Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:

- In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive," but this is "[s]ubject to sections 30 and 31." Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.

- In the case of the report under section 52 of the *National Energy Board Act*, subsection 52(11) of the *National Energy Board Act* provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.

125 In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.

126 Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent decision to make after the Governor in Council has decided the matter. It simply does what the Governor in Council has directed in its Order in Council.

127 In the matter before us, some parties filed notices of appeal against the Certificates issued by the National Energy Board. They, along with others, filed notices of application against the Governor in Council's Order in Council directing the

National Energy Board to grant the Certificates. In our view, under this legislative regime, the primary attack must be against the Governor in Council's Order in Council, as it prompts the automatic issuance of the Certificates. If the Governor in Council's Order in Council falls, then in our view the Certificates issued by the National Energy Board automatically fall as a consequence. As mentioned at the start of these reasons, since we would quash the Order in Council, the Certificates issued as a result of the Order in Council must also be quashed.

(5) Standard of review

128 With a full appreciation of the legislative scheme and our conclusion that the Governor in Council's Order in Council is the decision that is to be reviewed, we can now consider the standard of review.

129 Some of the parties before us submitted that the standard of review of the Order in Council made by the Governor in Council in this case has already been determined by this Court: *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 376 D.L.R. (4th) 348 (F.C.A.).

130 In *Innu of Ekuanitshit*, the Governor in Council made an order in council approving a governmental response to a joint review panel established under the 1992 version of the *Canadian Environmental Assessment Act*. Among other things, this Court found that a failure to properly follow the earlier processes under the *Canadian Environmental Assessment Act* could invalidate the later order in council.

131 Many of the applicant/appellant First Nations argue that the processes under the *Canadian Environmental Assessment Act, 2012* in this case were not properly followed and so, on the authority of *Innu of Ekuanitshit*, the Order in Council in this case should be quashed.

132 On the surface, *Innu of Ekuanitshit* seems analogous to the case before us. In both cases, an order in council was made after a process under federal environmental assessment legislation had been followed. However, a closer inspection reveals that, in fact, *Innu of Ekuanitshit* was based on a fundamentally different statutory framework. To understand the differences, *Innu of Ekuanitshit* must be examined more closely.

133 In *Innu of Ekuanitshit*, this Court considered a decision made by three federal departments and a later order made by the Governor in Council approving the decision. The order and the decision came after an environmental assessment process had been followed concerning a hydroelectric project.

134 The Governor in Council's order in council approved the federal government's response to a report of a joint review panel established under the 1992 version of the *Canadian Environmental Assessment Act*. The order in council was made under section 37 of that legislation.

135 In considering the Governor in Council's order in council, this Court asked itself whether the Governor in Council and the departments "had respected the requirements of the [1992 version of the Canadian Environmental Assessment Act] before making their decisions" (at paragraph 39). It held (at paragraphs 40-41) that it could interfere with the Governor in Council's order only if it found that the legislative process was not properly followed before it made its decision, it made its decision without regard for the purposes of the Act or its decision had no basis in fact.

136 Of course, we are bound by this Court's decision in *Ekuanitshit*. However, in our view, it does not set out a standard of review that must be applied to the Governor in Council's decision under the different and unique legislative scheme in this case.

137 In assessing the standard of review, we cannot adopt a one-size-fits-all approach to a particular administrative decision-maker. Instead, in assessing the standard of review, it is necessary to understand the specific decision made in light of the provision authorizing it, the structure of the legislation and the overall purposes of the legislation.

138 The standard of review of the decision of the Governor in Council in *Ekuanitshit* may make sense where this Court is reviewing a decision by the Governor in Council to approve a decision made by others based on an environmental assessment.

The Governor in Council's decision is based largely on the environmental assessment. A broader range of policy and other diffuse considerations do not bear significantly in the decision.

139 In the case at bar, however, the Governor in Council's decision — the Order in Council — is the product of its consideration of recommendations made to it in the report. The decision is not simply a consideration of an environmental assessment. And the recommendations made to the Governor in Council cover much more than matters disclosed by the environmental assessment — instead, a number of matters of a polycentric and diffuse kind.

140 In conducting its assessment, the Governor in Council has to balance a broad variety of matters, most of which are more properly within the realm of the executive, such as economic, social, cultural, environmental and political matters. It will be recalled that under subsection 52(2), matters such as these must be included in the report that is reviewed by the Governor in Council.

141 The amorphous nature and the breadth of the discretion that the Governor in Council must exercise is shown by the fact that the section 52 report it receives can include "any public interest that in the National Energy Board's opinion may be affected by the issuance of the certificate or the dismissal of the application": subsection 52(2) of the *National Energy Board Act*.

142 In assessing the scope of an administrative decision-maker's discretion, it is sometimes helpful to consider the nature of the body that is exercising the discretion: *Odynsky*, above, at paragraph 76. In section 54 of the *National Energy Board Act* and in section 30 of the *Canadian Environmental Assessment Act, 2012*, Parliament has designated the Governor in Council as the body to receive and consider the section 52 report. The Governor in Council is the Governor General, acting on the advice of the Prime Minister and the Cabinet. (For that reason, throughout these reasons, we have referred to the Governor in Council as "it," in recognition of its practical status as a body of persons.) In Canada, executive authority is vested in the Crown — the Crown also being subject to the duty to consult Aboriginal peoples — and the Governor in Council is the advisory body, some might say the real initiator, for the exercise of much of that executive authority. See generally A. O'Brien and M. Bosc, *House of Commons Procedure and Practice*, 2d ed. (Cowansville: Éditions Yvon Blais, 2009) at pages 18-23 and 28-32; *Constitution Act, 1867*, sections 9, 10 and 13.

143 In *Odynsky*, this Court described the practical nature of the Governor in Council as follows (at paragraph 77):

> The Governor in Council is the "Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada": *Interpretation Act*, R.S.C. 1985, c. I-23, subsection 35(1), and see also the *Constitution Act, 1867*, sections 11 and 13. All the Ministers of the Crown, not just the Minister, are active members of the Queen's Privy Council for Canada. They meet in a body known as Cabinet. Cabinet is "to a unique degree the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation" and, by convention, it attempts to represent different geographic, linguistic, religious, and ethnic groups: Norman Ward, *Dawson's The Government of Canada*, 6th ed., (Toronto: University of Toronto Press,1987) at pages 203-204; Richard French, "The Privy Council Office: Support for Cabinet Decision Making" in Richard Schultz, Orest M. Kruhlak and John C. Terry, eds., *The Canadian Political Process*, 3rd ed. (Toronto: Holt Rinehart and Winston of Canada, 1979) at pages 363-394.

144 In the case before us, by vesting decision-making in the Governor in Council, Parliament implicated the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government. And by defining broadly what can go into the report upon which it is to make its decision — literally anything relevant to the public interest — Parliament must be taken to have intended that the decision in issue here be made on the broadest possible basis, a basis that can include the broadest considerations of public policy.

145 The standard of review for decisions such as this — discretionary decisions founded upon the widest considerations of policy and public interest — is reasonableness: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paragraph 53.

146 Reasonableness has been described as a range of acceptable and defensible decisions on the facts and the law or a margin of appreciation over the problem before it: *Dunsmuir*, at paragraph 47. The notion of a range or margin suggests that different decisions, by their nature, will admit of a larger or smaller number of acceptable and defensible solutions: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.) at paragraphs 17-18 and 23; *Khosa*, at paragraph 59; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at paragraphs 37-41. For example, an issue of statutory interpretation where the statutory language is precise admits of fewer acceptable or defensible solutions than one where the language is wider and more amorphous, where policy may inform the proper interpretation to a larger extent.

147 Similarly, some decisions made by administrative decision-makers lie more within the expertise and experience of the executive rather than the courts. On these, courts must afford administrative decision-makers a greater margin of appreciation: see, *e.g.*, *Delios*, at paragraph 21; *Boogaard*, at paragraph 62; *Forest Ethics*, at paragraph 82.

148 Recently, this Court usefully contrasted two types of administrative decisions, the former inviting courts to review decision-making intensely, the latter less so:

> For present purposes, one might usefully contrast two types of administrative proceedings. At one end are matters where an administrative decision-maker assesses the conduct of an individual or known group of individuals against concrete criteria, the potential effects upon the legal or practical interests of the individual(s) are large, and the matters lie somewhat within the ken of the courts. A good example is a professional disciplinary proceeding where an individual is charged with violations of a disciplinary code and the individual faces serious legal or practical consequences such as restrictions, prohibitions or penalties. At the other end are matters where an administrative decision-maker assesses something broader and more diffuse, using polycentric, subjective or fuzzy criteria to decide the matter, criteria that are more typically within the ken of the executive and less so the courts.

(*Kabul Farms Inc. v. R.*, 2016 FCA 143 (F.C.A.), at paragraph 25)

149 To similar effect, a majority of this Court recently said the following:

> [W]here the decision is clear-cut or constrained by judge-made law or clear statutory standards, the margin of appreciation is narrow: see, *e.g.*, [*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895]; *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C. 203; *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228, 464 N.R. 112....On the other hand, where the decision is suffused with subjective judgment calls, policy considerations and regulatory experience or is a matter uniquely within the ken of the executive, the margin of appreciation will be broader: see, *e.g.*, [*Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006]; *Rotherham Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills*, 2015 UKSC 6.

(*Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89, 382 D.L.R. (4th) 720 (F.C.A.), at paragraph 136.)

150 Although the legislative scheme in this case is unique, some administrative decision-makers, like the Governor in Council here, are empowered to make decisions on the basis of broad public interest considerations, along with economic and policy considerations, and weigh them against detrimental effects. A good example is the decision of the Alberta Utilities Commission in *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2015 ABCA 295, 389 D.L.R. (4th) 1 (Alta. C.A.). In words apposite to this case, the Alberta Court of Appeal upheld the Commission's decision, giving it a very broad margin of appreciation (at paragraphs 171-172):

> The legislature has entrusted the Commission with a policy-laden role, which includes a strong public interest mandate: see, for example, ss. 16(1) and 17(1) of the *Alberta Utilities Commission Act*. Its mandate includes the creation of a balanced and predictable application of principles to the relationship between revenues, expenses and assets (both depreciable and

> non-depreciable) of utilities on the one hand, and the reasonable expectations of the ratepayers who receive and pay for services on the other. The treatment of stranded assets is, at its foundation, a policy issue informed by public interest considerations. The Commission's policy choice, as expressed in the [decision], is a legitimate and defensible one, and well within its legislated power.
>
> One must also bear in mind that the questions raised have political and economic aspects. Courts are poorly positioned to opine on such matters. Judicial review considers the scope or breadth of jurisdiction, but by legislative design the selection of a policy choice from among a range of options lies with the Commission empowered and mandated to make that selection.

(See also *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1 (Ont. Div. Ct.), at paragraph 37; *Odynsky*, above, at paragraphs 81-82 and 86.)

151 The Supreme Court itself has recognized that "[a]s a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies." In its view, "[a] statutory purpose that requires a tribunal to select from a range of remedial options or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court." See *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.), at paragraphs 30-31.

152 The words of all these courts are apposite here: the Governor in Council is entitled to a very broad margin of appreciation in making its discretionary decision upon the widest considerations of policy and public interest under sections 53 and 54 of the *National Energy Board Act*.

153 We acknowledge that on some occasions, the Governor in Council makes decisions that have some legal content. On these occasions, signalled by specific legislative language, the margin of appreciation courts afford to the Governor in Council will be narrow: see, *e.g.*, *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.); *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194, [2011] 3 F.C.R. 344 (F.C.A.).

154 But in this case, the Governor in Council's discretionary decision was based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest.

155 Does the economic benefit associated with the construction and operation of a transportation system that will help to unlock Alberta's oil resources and make those resources more readily available worldwide outweigh the detrimental effects, actual or potential, including those effects on the environment and, in particular, the matters under the *Canadian Environmental Assessment Act, 2012*? To what extent will the conditions that Northern Gateway must satisfy — many concerning technical matters that can be evaluated and weighed only with expertise — alleviate those concerns? And in light of all of these considerations, was there enough high-quality information for the Governor in Council to balance all the considerations and properly assess the matter? These are the sorts of questions this legislative scheme remits to the Governor in Council. Under the authorities set out above that are binding upon us, we must give the Governor in Council the widest margin of appreciation over these questions.

(6) The Governor in Council's decision was reasonable under administrative law principles

156 In our view, for the foregoing reasons and based on the record before the Governor in Council, we are not persuaded that the Governor in Council's decision was unreasonable on the basis of administrative law principles.

157 The Governor in Council was entitled to assess the sufficiency of the information and recommendations it had received, balance all the considerations — economic, cultural, environmental and otherwise — and come to the conclusion it did. To rule otherwise would be to second-guess the Governor in Council's appreciation of the facts, its choice of policy, its access

to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts.

158 This conclusion, however, does not end the analysis.

159 Before us, all parties accepted that Canada owes a duty of consultation to Aboriginal peoples concerning the Project. All parties accepted that if that duty were not fulfilled, the Order in Council cannot stand. In our view, these concessions are appropriate.

160 Section 54 of the *National Energy Board Act* does not refer to the duty to consult. However, in 2012, when Parliament enacted section 54 in its current form, the duty to consult was well-established in our law. As all parties before us recognized, it is inconceivable that section 54 could operate in a manner that ousts the duty to consult. Very express language would be required to bring about that effect. And if that express language were present in section 54, tenable arguments could be made that section 54 is inconsistent with the recognition and affirmation of Aboriginal rights under subsection 35(1) of the *Constitution Act, 1982* and, thus, invalid. A number of the First Nations before us were prepared, if necessary, to assert those arguments and they filed Notices of Constitutional Question to that effect.

161 It is a well-recognized principle of statutory interpretation that statutory provisions that are capable of multiple meanings should be interpreted in a manner that preserves their constitutionality: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 (S.C.C.), at paragraph 32; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612 (S.C.C.), at paragraphs 14-15. Parliament is presumed to wish its legislation to be valid and have force; it does not intend to legislate provisions that are invalid and of no force.

162 Further, it is a well-recognized principle of statutory interpretation that interpretations that lead to absurd or inequitable results should be avoided: *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385 (S.C.C.), at paragraph 65.

163 Section 54 of the *National Energy Board Act* and the associated sections constituting the legislative scheme we have described above can be interpreted in such a way as to respect Canada's duty to consult and to remain valid. We interpret these sections in that way.

164 Under section 52 of the *National Energy Board Act*, the National Energy Board, or here the Joint Review Panel, submits its report to a coordinating Minister who brings the report before the Governor in Council, along with any other memoranda or information. There is nothing that prevents that coordinating Minister, or any other Minister who is assigned responsibility for the matter, from bringing to the Governor in Council information necessary for it to satisfy itself that the duty to consult has been fulfilled, to recommend that further conditions be added to any certificate for the project issued under section 54 to accommodate Aboriginal peoples or to ask the National Energy Board to redetermine the matter and consider making further conditions under section 53.

165 Here, subsection 31(2) of the *Interpretation Act*, R.S.C. 1985, I-21 is relevant. It provides that where a statute gives to a public official the power to do a thing, all powers necessary to allow that person to do the thing are also given. Subsection 31(2) provides as follows:

> **31.** (2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.
>
> **31.** (2) Le pouvoir donné à quiconque, notamment à un agent ou fonctionnaire, de prendre des mesures ou de les faire exécuter comporte les pouvoirs nécessaires à l'exercice de celui-ci.

166 The Governor in Council's ability to consider whether Canada has fulfilled its duty to consult and to impose conditions is a power necessary for the Governor in Council to exercise its power under sections 53 and 54 of the *National Energy Board Act*.

Similarly, the activities of the coordinating Minister and other Ministers concerning the duty to consult are necessary matters that they can exercise in accordance with subsection 31(2) of the *Interpretation Act*.

167 We are fortified in this conclusion by the relationship between the Crown and the Governor in Council. The duty to consult is imposed upon the Crown. As explained in paragraph 142, above, the Governor in Council is frequently the initiator of the Crown's exercise of executive authority. Given the Governor in Council's relationship with the Crown, it stands to reason that that Parliament gave the Governor in Council the necessary power in section 54 of the *National Energy Board Act* to consider whether the Crown has fulfilled its duty to consult and, if necessary, to impose conditions.

168 Thus, we are satisfied that under this legislative scheme the Governor in Council, when considering a project under the *National Energy Board Act*, must consider whether Canada has fulfilled its duty to consult. Further, in order to accommodate Aboriginal concerns as part of its duty to consult, the Governor in Council must necessarily have the power to impose conditions on any certificate it directs the National Energy Board to issue.

169 While the parties did not seriously dispute whether the duty to consult could co-exist and be accommodated under the *National Energy Board Act*, they did dispute whether Canada has fulfilled its duty to consult on the facts of this case. We turn to this issue now.

F. The duty to consult Aboriginal peoples

(1) Legal principles

170 At this point, it is helpful to discuss briefly the existing jurisprudence which has considered the scope and content of the duty to consult. As mentioned at the outset of these reasons, insofar as that jurisprudence applies to these proceedings, it is not in dispute.

171 The duty to consult is grounded in the honour of the Crown. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at paragraph 32.

172 The duty arises when the Crown has actual or constructive knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect those rights or title: *Haida Nation*, at paragraph 35.

173 The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the potentially adverse effect upon the claimed right or title: *Haida Nation*, at paragraph 39; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) [hereinafter Rio Tinto], at paragraph 36.

174 When the claim to title is weak, the Aboriginal interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice: *Haida Nation*, at paragraph 43. When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, in this type of case a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Aboriginal concerns were considered and how those concerns were factored into the decision: *Haida Nation*, at paragraph 44.

175 It is now settled law that Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal. Tribunals that consider resource issues that impinge on Aboriginal interests may be given: the duty to consult; the duty to determine whether adequate consultation has taken place; both duties; or, no duty at all. In order to determine the mandate of any particular tribunal, it is relevant to consider the powers conferred on the Tribunal by its constituent legislation, whether the

tribunal is empowered to consider questions of law and what remedial powers the tribunal possesses: *Rio Tinto*, at paragraphs 55 to 65.

176 Thus, for example in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.), the Supreme Court accepted that an environmental assessment process was sufficient to satisfy the procedural requirements of the duty to consult. At paragraph 40 of the Court's reasons, the Chief Justice wrote that the province did not have to develop special consultation measures to address the First Nation's concerns "outside of the process provided for by the [B.C. environmental legislation], which specifically set out a scheme that required consultation with affected Aboriginal peoples." Subsequently, in *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.), at paragraph 39, the Supreme Court interpreted *Taku River* as saying that participation in a forum created for other purposes may satisfy the duty to consult "if *in substance* an appropriate level of consultation is provided" [emphasis in original].

177 In *Taku River*, the Supreme Court also recognized that project approval is "simply one stage in the process by which the development moves forward": at paragraph 45. Thus, outstanding First Nation concerns could be more effectively considered at later stages of the development process. It was expected that throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to fulfil its duty to consult, and if required, accommodate.

178 When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's duty. Rather, it is a means by which the Crown can be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: *Haida Nation*, at paragraph 53.

179 The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation. Put another way, perfect satisfaction is not required. The question to be answered is whether the regulatory scheme, when viewed as a whole, accommodates the Aboriginal right in question: *Haida Nation*, at paragraphs 42, 48 and 62.

180 Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement: *Haida Nation*, at paragraph 47.

181 Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised [...] through a meaningful process of consultation": *Haida Nation*, at paragraph 42. At the same time, Aboriginal claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: *Haida Nation*, at paragraph 42.

(2) The standard to which Canada is to be held in fulfilling the duty

182 Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.

183 In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 (F.C.A.), at paragraph 54; *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 (F.C.A.), at paragraph 133; *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350 (F.C.A.), at paragraph 56; *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA*, 2015 FCA 179, 474 N.R. 96 (F.C.A.), at paragraph 47.

184 The Supreme Court of Canada has expressed it this way:

> Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": [*R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648, at paragraph 170]. What is required is not perfection, but reasonableness. As stated in [*R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658, at paragraph 110], "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

(*Haida Nation*, at paragraph 62.)

185 Therefore, the question is whether "reasonable efforts to inform and consult" were made. In applying this standard, we have been careful not to hold Canada to anything approaching a standard of perfection.

186 But here, in executing Phase IV of its consultation framework, Canada failed to make reasonable efforts to inform and consult. It fell well short of the mark.

(3) The consultation process

187 As explained above, from the outset of the Project, Canada acknowledged its duty to engage in deep consultation with the First Nations potentially affected by the Project owing to the significance of the rights and interests affected. Canada submits that, consistent with its duty, it offered a deep, consultation process consisting of five phases to more than 80 Aboriginal groups, including all of the First Nations in this proceeding.

188 The First Nations agree that Canada was obliged to provide deep consultation. However, they assert a number of flaws in the consultation process that rendered it inadequate. In this section of the reasons, we will review the nature of the consultation process, briefly describe the most salient concerns expressed about the process, and consider whether Canada fulfilled its duty to consult.

189 Canada describes the consultation process to include:

- Direct engagement by Canada with affected Aboriginal groups, both before and after the Joint Review Panel process. This consultation included consideration of the mandate of the Joint Review Panel.

- Participation by Canada in the Joint Review Panel process in order to effectively and meaningfully:

  i. gather, distribute and assess information concerning the Project's potential adverse impacts on Aboriginal rights and interests;

  ii. address adverse impacts to Aboriginal rights and interests by assessing potential environmental effects and identifying mitigation and avoidance measures; and

  iii. ensure, to the extent possible, that specific Aboriginal concerns were heard and, where appropriate, accommodated.

- The provision of almost $4,000,000 in participant funding by Canada to 46 Aboriginal groups to assist their involvement in the Joint Review Panel process and related Crown consultations.

- The provision of written reasons to Aboriginal groups explaining how their concerns were considered and addressed.

190 As noted above, and to reiterate, Canada's framework for consultation had five distinct phases:

1. Phase I provided for Canada's direct engagement with Aboriginal groups before the Joint Review Panel process, including consultation on the draft Joint Review Panel Agreement and the mandate of the Joint Review Panel.

2. Phase II required Canada to provide information to Aboriginal groups about the pending Joint Review Panel process.

3. Phase III provided for participation in the Joint Review Panel process by Canada and Aboriginal groups.

4. Phase IV provided for additional, direct consultations between Canada and Aboriginal groups after the Joint Review Panel process, but before the Governor in Council considered the Project.

5. Phase V would provide additional consultation on permits or authorizations that Canada might be requested to issue after the Governor in Council's decision on the Project.

(4) The alleged flaws in the consultation process

191 Briefly, the most salient concerns about the nature of the consultation asserted by the applicant/appellant First Nations are:

(a) The Governor in Council prejudged the approval of the Project.

(b) Canada's consultation framework was unilaterally imposed on the First Nations; there was no consultation on it.

(c) Canada provided inadequate funding to facilitate the participation of First Nations in the Joint Review Panel process and other consultation processes.

(d) The consultation process was over-delegated: the Joint Review Panel was not a legitimate forum for consultation and it did not allow for discussions between Canada and affected First Nations.

(e) Canada either failed to conduct or failed to share its assessment of the strength of the First Nations' claims to Aboriginal rights or title.

(f) The Crown consultation did not reflect the terms, spirit and intent of certain agreements between Canada and the Haida.

(g) The Report of the Joint Review Panel left too many issues affecting First Nations to be decided after the Project was approved.

(h) The consultation process was too generic. Canada and the Joint Review Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations.

(i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns; it also failed to give reasons showing that Canada considered and factored them into the Governor in Council's decision to approve the Project.

(j) Canada did not assess or discuss First Nations' title or governance rights, nor was the impact on those rights factored into the Governor in Council's decision to approve the Project.

We shall examine each of these in turn.

(a) The Governor in Council prejudged the approval of the Project

192 The Gitxaala argue that Canada did not consult in good faith and one manifestation of this is that the outcome of the approval process was pre-ordained. In support of this submission, the Gitxaala point to:

• Statements made by the then Minister of Natural Resources reported in the *Globe and Mail* in July, 2011 that the Project "is in the national interest" and that discussions among Ministers will touch on ways of "improving the regulatory system so it is less duplicative, so it is more fair, transparent and independent — but takes into account the need for expeditious review."

• The adoption of a process that excluded real consideration of title and governance rights.

• The legislative change in 2012 after the review process had begun that modified the powers of the National Energy Board, giving the Governor in Council the final decision-making power.

193 The Haida adopt this submission.

194 In our view, the second and third concerns raised by the Gitxaala do not support its submission that Canada had prejudged the outcome. This is so because there are many possible explanations as to why the process was adopted and the powers of the National Energy Board were modified; many of those possible explanations do not lead to the conclusion that results were predetermined. Equivocal evidence cannot support an assertion of bias.

195 Of greater concern are the remarks attributed to the then Minister of Natural Resources. Notwithstanding the concern, the remarks are insufficient to establish bias.

196 In *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.), the Supreme Court observed that the content of the duty of impartiality varies according to the decision-maker's activities and the nature of the question it must decide.

197 In the present case, the decision-maker is the Governor in Council and the decision whether to approve the Project is politically charged, involving an appreciation of many, sometimes conflicting, considerations of policy and the public interest. The decision is not judicial or quasi-judicial.

198 In this circumstance, we accept that the duty of impartiality owed by the Governor in Council is not co-extensive with that imposed upon judicial or quasi-judicial decision-makers.

199 Thus, statements by individual members of Cabinet will not establish bias unless the person alleging such bias demonstrates that the statements are the expression of a final opinion on the question at issue. Put another way, it must be shown that the decision-maker's mind was closed such that representations to the contrary would be futile: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385 (S.C.C.).

200 The evidence of one Minister's comment made years before the decision at issue is insufficient to establish that the outcome of the Governor in Council's decision was predetermined.

(b) The framework of the consultation process was unilaterally imposed upon the First Nations

201 The Haisla argue that while it was given the opportunity to comment on the draft Joint Review Panel Agreement, it was not consulted on the Crown consultation process itself. Instead, they argue, Canada unilaterally chose to integrate consultation into the Joint Review Panel process. The Haida adopt this submission.

202 The Kitasoo and the Heiltsuk argue that the Crown failed to consult with them about the five-phase review process, the impact of using a hearing process to engage in consultation, and the timing or scope of Canada's consultation in Phase IV of the consultation framework.

203 We disagree that the initial engagement with affected First Nations and the subsequent consultation on the draft Joint Review Panel Agreement (*i.e.*, Phase I) were flawed or unreasonable. As a matter of law, the Crown has discretion as to how it structures the consultation process and how the duty to consult is met: *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2013 ABCA 443, 566 A.R. 259 (Alta. C.A.), at paragraph 39. What is required is a reasonable process, not perfect consultation: *Haida Nation*, at paragraph 62.

204 Phase I consultation included the following steps:

• Following receipt of a preliminary information package submitted by Northern Gateway, the National Energy Board, in consultation with other responsible federal authorities, requested that the then Minister of the Environment refer the

Project to a review panel. On September 29, 2006, the Minister referred the Project to a review panel and released the draft Joint Review Panel agreement for a 60-day comment period. A number of comments were received from Aboriginal groups. Thereafter, Northern Gateway put the Project on hold.

• Following resubmission of the Project by Northern Gateway, Canada, through the Canadian Environmental Assessment Agency, contacted over 80 Aboriginal groups to advise them of the Project and of opportunities to participate in the Joint Review Panel process and the related Crown consultation process. The Agency provided information to groups for whom Canada had a duty to consult. Other Aboriginal groups subsequently contacted the Agency expressing interest in the Project and were provided with information. Some Aboriginal groups were contacted but chose not to participate in the Joint Review Panel or Crown consultation process. The Agency communicated with Aboriginal groups throughout the consultation process. It requested input on the draft Joint Review Panel Agreement, provided information on opportunities for participation in the Joint Review Panel and subsequent consultation on the Report of the Joint Review Panel, advised on the availability of participant funding and met with Aboriginal groups to provide further clarification. Canada's approach to consultation was outlined in a document entitled "Aboriginal Consultation Framework," which was made available to Aboriginal groups in November 2009.

• Canada significantly modified the Joint Review Panel process in response to concerns expressed by affected Aboriginal groups. Examples of such modifications include:

  • in response to concerns raised by the Haisla and the Gitga'at that the Project's marine components, including marine shipping, were not within the mandate of the Joint Review Panel, Canada changed the scope of its review to include the marine transportation of oil and condensate;

  • in response to concerns raised by the Haisla respecting the capacity and expertise of the Joint Review Panel to undertake the environmental assessment review, Canada modified the Joint Review Panel selection process to ensure that the Joint Review Panel could retain expert consultants or special advisors if required; and

  • in response to concerns raised by the Haisla, the Nak'azdli, the Gitga'at, the Gitxaala and the Nadleh about Aboriginal involvement in the Joint Review Panel process, Canada modified the Joint Review Panel Agreement so as to include provisions requiring that the Joint Review Panel conduct its review to facilitate the participation of Aboriginal peoples and that Northern Gateway provide evidence setting out the concerns of Aboriginal groups.

205 The final Joint Review Panel Agreement required the Joint Review Panel to:

• consider and address all Project-related Aboriginal issues and concerns within its mandate;

• conduct its review in a manner that facilitated the participation of Aboriginal peoples;

• receive evidence from Northern Gateway regarding the concerns of Aboriginal groups;

• receive information from Aboriginal peoples related to the nature and scope of potentially affected Aboriginal and treaty rights; and

• include recommendations in its report for appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal and treaty rights and interests.

206 Finally, Canada communicated with all of the Aboriginal applicants/appellants in this proceeding in November and December 2009 so as to ensure that they were aware of the modifications made to the Joint Review Panel process, the ongoing consultation activities and the ongoing availability of funding.

207 In our view, the evidence establishes that from the outset Canada acknowledged its duty of deep consultation with all affected First Nations. In Phase I, it provided information about the Project to affected First Nations, sought and obtained

comments on the proposed consultation process as initially outlined in the draft Joint Review Panel Agreement, and reasonably addressed concerns expressed by First Nations by incorporating significant revisions into the Joint Review Panel Agreement.

208 We will address in more detail below the submission that the Joint Review Panel was not a legitimate forum for consultation. However, we are satisfied that there was consultation about Canada's framework for consultation. It was not unilaterally imposed. It was reasonable.

(c) Inadequate funding for participation in the Joint Review Panel and consultation processes

209 The Kitasoo and the Heiltsuk argue that the process required significant legal assistance and significant travel expenses because the Joint Review Panel hearings were held in Prince Rupert and Terrace, British Columbia. They point to the fact that even though approximately 35 Aboriginal communities registered as interveners, only 12 First Nations cross-examined witness panels and only two First Nations substantially participated in the cross-examination hearings. The Kitasoo and the Heiltsuk say they could not afford to provide expert reports or retain experts to review the Proponent's extensive data. The Heiltsuk sought funding of $421,877 for all phases, but received $96,000. In Phase IV, the Kitasoo sought funding of $110,410 but received $14,000.

210 We have carefully reviewed the second affidavits of Douglas Neasloss and Marilyn Slett, which contain the evidence filed in support of the submissions. Without doubt, the level of funding provided constrained participation in the Joint Review Panel process. However, the affidavits do not explain how the amounts sought were calculated, or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable.

(d) The consultation process was over-delegated

211 The Haisla point to many asserted flaws flowing from the Crown's reliance on the Joint Review Panel process to discharge, at least in part, its duty to consult. The Haisla submit that:

- meaningful consultation requires a two-way dialogue whereas the Joint Review Panel process was a quasi-judicial process in which the Crown and Haisla had no direct engagement; and

- the Joint Review Panel did not assess the nature and strength of each First Nation's claimed Aboriginal rights and it did not assess the potential infringement of Aboriginal rights by the Project.

212 To this, the Heiltsuk add that the formalities of the quasi-judicial tribunal process led to friction between them and the Joint Review Panel and restrictions on the Heiltsuk's ability to provide all of the information they wished to provide for consultation purposes.

213 We have not been persuaded that the consultation process was over-delegated or that it was unreasonable for Canada to integrate the Joint Review Panel process into the Crown consultation process for the following reasons.

214 First, in *Rio Tinto*, at paragraph 56, the Supreme Court confirmed that participation by affected First Nations in a forum created for other purposes, such as an environmental assessment, can fulfil the Crown's duty to consult. The issue to be decided in every case is whether an appropriate level of consultation is provided through the totality of measures the Crown brings to bear on its duty of consultation.

215 In the present case, we are satisfied that Canada did not inappropriately delegate its obligation to consult to the Joint Review Panel - as evidenced by the existence of Phase IV of the consultation process in which there was to be direct consultation between Canada and affected Aboriginal groups following the Joint Review Panel process and before the Governor in Council considered the Project.

216 The Joint Review Panel process provided affected Aboriginal groups with the opportunity to learn in detail about the nature of the Project and its potential impact on their interests, while at the same time affording an opportunity to Aboriginal

groups to voice their concerns. As noted above, the Joint Review Panel Agreement gave the Panel the mandate to receive information regarding potential impacts of the Project on Aboriginal rights and title, consider mitigation where appropriate and report on information received directly from Aboriginal groups about impacts upon their rights.

217 Additionally, we accept the submission of the Attorney General that the Joint Review Panel had the experience and statutory mandate to address mitigation, avoidance and environmental issues relating to the Project.

(e) Canada either failed to conduct or failed to share with affected First Nations its legal assessment of the strength of their claims to Aboriginal rights or title

218 In this section of the reasons, we consider the assertion that Canada failed to conduct an assessment of the strength of the applicant/appellant First Nations' claims to Aboriginal rights and title. We also consider the assertion that Canada was obliged to disclose the analysis that led to its assessment of the strength of each First Nation's claim.

219 For example, the Gitxaala state that despite repeated requests, government officials responsible for consultation did not assess the strength of their claims to governance and title rights. Nor did they ever receive Canada's assessment of the strength of its claims. They submit this is an error of law that wholly undermined the consultation process. This argument is echoed by the Gitga'at and the Haisla.

220 The Haisla make the additional point that by letter dated April 18, 2012, the then Minister of the Environment advised their counsel that:

> Based on the significant evidence filed by the Haisla Nation in the joint review panel process, the federal government is currently updating its strength of claim and depth of consultation assessment and will provide a description of this analysis to the Haisla Nation once this work is completed and ready to be released. The results of this updated assessment will be shared with potentially affected groups prior to consultation on the Panel's environmental assessment report (Phase IV of the consultation process).
>
> [Emphasis added]

221 Canada never provided the Haisla with a copy of its updated strength of claim and depth of consultation analysis and assessment.

222 However, as set out in the portion of the letter extracted above, the Minister made no commitment to provide the actual legal analysis to the Haisla. He committed to providing only a description of the analysis, which we construe to be an informational component. In Phase IV, the Haisla were advised only in a general sense of the informational component. They were told that the preliminary strength of claim assessment "supports the Haisla Nation as having strong *prime* [*sic*] *facie* claim to both Aboriginal rights and title within lands claimed as part of the Haisla traditional territory": Exhibit H to the affidavit of Ellis Ross, at page 152 of Haisla's Compendium.

223 We reject the assertion that Canada failed to assess the strength of the First Nations' claims. The assertion is unsupported by the evidence.

224 We also conclude that Canada was not obliged to share its *legal* assessment of the strength of claim. In *Halalt First Nation v. British Columbia (Minister of Environment)*, 2012 BCCA 472, [2013] 1 W.W.R. 791 (B.C. C.A.), at paragraph 123, the British Columbia Court of Appeal observed that, inherently, a legal assessment of the strength of a claim is subject to solicitor-client privilege.

225 It is to be remembered that the strength of claim plays an important role in the nature and content of the duty to consult. Canada must disclose information on this and discuss it with affected First Nations. On this, Canada fell short. We say more about this below. But for present purposes we do not accept that Canada was obligated to share its *legal* analyses.

(f) The Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements

226 The Haida have concluded a number of agreements with Canada and British Columbia to establish collaborative management of all of the terrestrial and portions of the marine area in Haida Gwaii. These agreements are:

- the 1993 Gwaii Haanas Agreement;
- the 2010 Gwaii Haanas Marine Agreement;
- the 2007 Strategic Land Use Plan Agreement;
- the 2009 Kunst'aa Guu-Kunst'aayah Reconciliation Protocol;
- the Memoranda of Understanding with Canada for cooperative management and planning of the s*G*aan *K*inghlas (Bowie Seamount).

227 The Haida argue that these agreements reinforce and individualize Canada's obligation to engage in a deep and specific level of consultation and accommodation with it. They submit that Canada followed only a "generic" consultation process, with the result that the Governor in Council's decision to approve the Project failed to respect the Haida Agreements.

228 In our view, Canada correctly acknowledged its obligation to consult deeply with the applicant/appellant First Nations, including the Haida. This deep consultation required the highest level of consultation possible, short of consent. The Haida Agreements do not, in our view, modify or add to that obligation.

229 There are four more concerns expressed by the applicant/appellant First Nations. We view these as overlapping and interrelated. They all focus primarily on Canada's execution of Phase IV of the consultation framework. Therefore, it is convenient to deal with them together.

(g) The Joint Review Panel Report left too many issues affecting First Nations to be decided after the Project was approved

(h) The consultation process was too generic: Canada and the Joint Review Panel looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations

(i) After the Report of the Joint Review Panel was finalized, Canada failed to consult adequately with First Nations about their concerns and failed to give adequate reasons

(j) Canada did not assess or discuss title or governance rights and the impact on those rights

230 To this point we have rejected the arguments advanced by the applicant/appellant First Nations that Canada's execution of the consultation process was unacceptable or unreasonable. However, for the reasons developed below, Canada's execution of the Phase IV consultation process was unacceptably flawed and fell well short of the mark. Canada's execution of Phase IV failed to maintain the honour of the Crown.

231 We begin our analysis on this point by briefly setting forth some of the relevant legal principles that speak to what constitutes a meaningful process of consultation.

232 As explained above, the duty to consult is a procedural duty grounded in the honour of the Crown. The "common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns as they are raised ... through a meaningful process of consultation": *Haida Nation*, at paragraph 42. The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake": *Haida Nation*, at paragraph 45.

233 Meaningful consultation is not intended simply to allow Aboriginal peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of

accommodation: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), at paragraph 54.

234 As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." As submitted by Kitasoo and Heiltsuk, where deep consultation is required, a dialogue must ensue that "leads to a *demonstrably* serious consideration of accommodation (as manifested by the Crown's consultation-related duty to provide written reasons)..." [Emphasis added].

235 Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation and communicate its findings to the First Nation: *Mikisew Cree First Nation*, at paragraph 55.

236 Two final points are to be made. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Aboriginal right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it.

237 Second, where the duty to consult arises in a project like this, the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the National Energy Board. This is because the Governor in Council's decision is a high-level strategic decision that sets into motion risks to the applicant/appellant First Nations' Aboriginal rights: *Haida*, at paragraph 76. Further, future consultation, as contemplated by the Joint Review Panel conditions, would not involve the Crown and future decision-making lies with the National Energy Board. Canada advised in the consultation process that the National Energy Board does not consult with First Nations at the leave to open stage.

238 Against this legal framework, we turn to the execution of Phase IV of the consultation process. We begin with a general comment about the importance of consultation at the beginning of Phase IV and the status of the consultation process at that time.

239 Phase IV was a very important part of the overall consultation framework. It began as soon as the Joint Review Panel released its Report. That Report set out specific evaluations on matters of great interest and effect upon Aboriginal peoples, for example matters involving their traditional culture, the environment around them, and, in some cases, their livelihoods. Specific evaluations call for specific responses and due consideration of those responses by Canada. Specific feedback regarding specific matters dealt with in the Report may be more important than earlier opinions offered in the abstract.

240 Further, the Report of the Joint Review Panel covers only some of the subjects on which consultation was required. Its terms of reference were narrower than the scope of Canada's duty to consult. One example of this is the fact that Aboriginal subjects that, by virtue of section 5 of the *Canadian Environmental Assessment Act, 2012*, must be considered in an environmental assessment are a small subset of the subjects that make up Canada's duty to consult.

241 In addition, in the Joint Review Panel's process:

- The proponent, Northern Gateway, made no assessment of the Project's impact on Aboriginal title: Cross-examination of Enbridge witness, Haisla Compendium, at pages 973, 975 and 976.

- Similarly, the Joint Review Panel made no determination regarding Aboriginal rights or the strength of an Aboriginal group's claim to an Aboriginal right or title: Report of the Joint Review Panel, at page 47.

- Northern Gateway confined its assessment of the Project's impact on Aboriginal and treaty rights to an assessment of the potential impacts upon the rights to harvest and use land and resources: Cross-examination of Enbridge witness, transcript, v. 149, line 22890; Report of the Joint Review Panel, at page 42.

- In assessing the various rights that Aboriginal peoples enjoy, including hunting, fishing and gathering rights, Northern Gateway did not look specifically at a single community's right. Rather it looked at rights "generally speaking": Cross-examination of Enbridge witness, transcript, v. 112, lines 9990-9993.

• The Joint Review Panel accepted this approach and relied upon it to conclude that the Project would not significantly adversely affect the interests of Aboriginal groups that use lands, waters or resources in the Project area: Report of the Joint Review Panel, at pages 49-50.

242 As for the status of the consultation process at the start of Phase IV, this was Canada's first opportunity — and its last opportunity before the Governor in Council's decision — to engage in direct consultation and dialogue with affected First Nations on matters of substance, not procedure, concerning the Project: Crown Consultation Report, Exhibit A to the affidavit of Jim Clarke (the Director General, Operations of the Major Project Management Office, Natural Resources Canada).

243 It is in this context that Canada entered Phase IV of the consultation process. Its goal was stated, in Canada's Aboriginal Consultation Framework, to be to:

> ...seek to establish whether all concerns about potential project impacts on potential or established Aboriginal and treaty rights have been characterized accurately. It will also consult on the manner and extent to which any recommended mitigation measures might serve to accommodate these concerns, and whether there remain any outstanding issues.

244 We turn now to consider Canada's execution of the process of consultation under Phase IV — a process we would characterize as falling well short of the minimum standards prescribed by the Supreme Court in its jurisprudence.

245 Canada initiated Phase IV shortly before the Joint Review Panel issued its Report. In a letter dated December 5, 2013, Canada advised that:

• consultation meetings would begin shortly after the release of the Report of the Joint Review Panel;

• 45 days was allotted to meet with all affected Aboriginal groups;

• the Report of the Joint Review Panel and a Crown Consultation Report would be used to inform the Governor in Council about whether to order the National Energy Board to issue a Certificate;

• affected First Nations were given 45 days to advise Canada in writing of their concerns by responding to the following three questions:

  • Does the Panel Report appropriately characterize the concerns you raised during the Joint Review Panel process?

  • Do the recommendations and conditions in the Panel Report address some/all of your concerns?

  • Are there any "outstanding" concerns that are not addressed in the Panel Report? If so, do you have recommendations (*i.e.*, proposed accommodation measures) on how to address them?

• Such responses "must not exceed 2-3 pages in length and must be received by April 16, 2014."

246 The First Nations responded that the timelines were arbitrarily short and insufficient to provide for meaningful consultation: see, for example, the Haisla's letter of December 12, 2013, Exhibit H to the affidavit of Chief Councillor Ellis Ross, at page 787.

247 At consultation meetings, the First Nations requested that the timelines for consultation be extended. Evidence illustrating this is found in the affidavit of Chief Ellis Ross of the Haisla:

> 107. During the March Meeting, the Haisla Nation asked the Crown representatives to extend the timeline for consultation. Mr. Clarke advised that the timelines were driven by legislation which they themselves were not authorized to extend. We pointed out that the relevant legislation provided the Crown with an ability to extend the timelines. Mr. Clarke conceded that this was correct. The Haisla Nation therefore asked the Crown representatives to ask the Minister to extend the timelines for the Decision to allow meaningful consultation. Mr. Clarke agreed to do so.

> 108. During the April Meeting, Mr. Clarke told us that he had communicated the Haisla Nation's request to extend the deadlines to the Minister of Natural Resources, but the Minister had failed to respond to this request. In our May 7, 2014 letter we requested again that a decision on the Project be delayed to allow meaningful consultation to take place. The Crown refused.
>
> [Emphasis added]

248 The Haisla Phase IV consultation meeting notes of March 3, 2014 and April 8-9, 2014 are consistent with this evidence.

249 As the Haisla observed at their consultation meeting, no explanation "from anyone at all" was ever provided for the rush "and that's a problem."

250 Throughout the consultation, the Haisla asked that Canada defer consideration of the Project. Specifically, the Haisla requested that the decision be delayed to allow for scientific studies. Taylor Cross, Deputy Chief Councillor of the Haisla, gave evidence that:

> 15. We further identified the lack of certainty surrounding the Crown's preparedness for potential spills of diluted bitumen as a reason to consider delaying Project approval. The Coast Guard Canada representative, Mr. Roger Girouard, could not say how long it would take Canada to be prepared to provide effective ocean-based spill response, even with an unlimited budget. Mr. Girouard further stated that ocean-based spill response requires additional information about the relevant waters, the nature of the products to be transported, and appropriate governance, management, and equipment requirements before it can be effective. We asked for a delay of the decision to allow for the proper scientific studies to take place. Canada's representatives told us they would place this request before decision-makers. If they did, it was ignored. [Emphasis added]
>
> 16. Ms. Maclean [of Environment Canada] stated that the spill modelling done conducted [*sic*] by Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership (collectively "Northern Gateway") did not include stochastic modelling, which would have provided a better understanding about how environmental conditions would influence a spill. We asked for a delay of the decision until this modelling had been provided. Canada's representatives told us they would place this request before decision-makers. If they did, it was ignored.
>
> [Emphasis added]

251 While the Governor in Council was subject to a deadline for decision under subsection 54(3) of the National Energy Board Act, that subsection allows the Governor in Council, by order, to extend that deadline. The importance and constitutional significance of the duty to consult provides ample reason for the Governor in Council, in appropriate circumstances, to extend the deadline. There is no evidence that Canada gave any thought to asking the Governor in Council to extend the deadline.

252 But even if Canada did not wish to ask the Governor in Council for an extension, we consider that a pre-planned, organized process of Phase IV consultation would have allowed Canada to receive in time all relevant views, discuss and consider them, provide any necessary explanations and, if appropriate, make suitable recommendations to the Governor in Council, including any further conditions to be added to any approval of the Project.

253 By and large, many of the First Nations' concerns were specific, focused and brief; Canada's actions in response equally could have been specific, focused and brief.

254 Jim Clarke was involved in Phase IV and "acted as Canada's lead" on issues that involved the mandates of two or more government departments. Under cross-examination on his affidavit by counsel for Haisla, Mr. Clarke himself acknowledged that consultation on some issues fell well short of the mark:

> 323. Q. Now you indicated yesterday that you had to review the meeting notes to assess whether Canada and Haisla had been able to address the agenda items.

Generally is it your conclusion that Haisla and Canada had a full discussion of the items on the two agendas?

A. I focused my efforts in looking at the notes on the second agenda, and I apologize if that was not the understanding yesterday.

I looked at specifically all the items under 7(c) of the second agenda, all the issues, the extent to which panel terms and conditions addressed concerns of potential impacts, those 20 items.

324. Q. And generally is it your conclusion that Haisla and Canada had a full discussion of those 20 items?

A. I would say the general conclusion is that there was not a full discussion of those 20 items. There was discussion of a majority of those items. My assessment last evening was that there was discussion of 12 of 20 items.

. . .

327. Q. Would you say that the Haisla's concerns about potential impacts on hunting is one of the items that was fully discussed?

A. I would say, no, it wasn't.

328. Q. What about trapping?

A. I would say, no, it wasn't.

329. Q. How about marine spills? Was there a discussion about how marine spills may have negative effects on the marine environment?

A. Yes, in many different parts of the meeting.

330. Q. Was there a discussion of how Haisla rely on marine resources in the exercise of their Aboriginal rights?

A. I believe so.

331. Q. Could you point me to that in the meeting notes?

A. I have multiple Adobe references to where marine spills were discussed but that specific item I can't point you to right now.

332. Q. Was there a discussion of how the negative effects on the environment might impact the marine resources Haisla relies on in a way that might infringe its Aboriginal rights?

A. I don't recall if that was specifically part of the discussion.

333. Q. So you do not recall going into that level of detail?

A. I don't.

[Emphasis added]

255 A further problem in Phase IV was that, in at least three instances, information was put before the Governor in Council that did not accurately portray the concerns of the affected First Nations. Canada was less than willing to hear the First Nations on this and to consider and, if necessary, correct the information.

256 The first instance involved the Kitasoo. On June 9, 2014, Messrs. Maracle (the Crown Consultation Coordinator) and Clarke wrote acknowledging some of the Kitasoo's concerns expressed during Phase IV and enclosing that portion of the Crown Consultation Report that outlined its position and summarized its concerns.

257 Counsel for Kitasoo responded by letter dated June 17, 2014, identifying several inaccuracies in the letter of Messrs. Maracle and Clarke and the Consultation Report. Points made included the following:

- The Crown's letter incorrectly represented the Kitasoo's position respecting mitigation.

- The Consultation Report states "[t]he shipping route would cross the northwestern portion of the Kitasoo/Xai'xais First Nation for approximately 45 km. The confined channel assessment area is approximately 56 km from the proposed shipping route." This was incorrect and inconsistent with the Kitasoo's evidence that its territory extended into the confined channel assessment area.

- The information provided in the Crown Consultation Report was insufficient. By presenting the Kitasoo's concerns in a summary and high-level fashion, the decision-maker had insufficient information to assess the Kitasoo's outstanding concerns respecting the Project.

258 As counsel's information was conveyed to Canada only on the date the decision to approve the Project was made, the record before us does not demonstrate that these errors were corrected or brought to the attention of the Governor in Council.

259 On June 9, 2014, a similar letter was sent to the Heiltsuk. Again, its counsel responded by letter dated June 17, 2014. Errors and omissions identified by counsel included:

- an incorrect representation of the Heiltsuk's positon on mitigation.

- an incorrect statement that the "proposed shipping lane would be between 30 and 70 km north of the northern and western boundaries of the traditional territories." The Heiltsuk's evidence was that the proposed southern approach shipping lane intersected with a significant portion of the Heiltsuk's traditional territory.

- an incorrect representation of the Heiltsuk's position on equity participation.

- a failure to identify the central issue raised by the Heiltsuk regarding the lack of baseline work and the lack of spill modelling in the Open Water Area.

260 In the letter of June 17, 2014, counsel argued insufficient information was provided to the decision-maker that would allow assessment of the Heiltsuk's outstanding concerns. As was the case with the letter sent by counsel for the Kitasoo, this letter was only received the day the decision to approve the Project was made.

261 The final example comes from the June 9, 2014 letter with appended extracts of the Crown Consultation Report received by the Nadleh and the Nak'azdli. In a letter dated June 16, 2014, the Yinka Dene Alliance Coordinator highlighted issues and inaccuracies in this letter:

- The letter inaccurately stated that, at the Phase IV consultation meeting, federal officials discussed Canada's priorities regarding oil spill prevention and response and discussed the opportunity for future involvement in oil spill planning and response when such dialogue did not occur.

- The Crown failed to respond to the key concerns and impacts raised by the Nadleh and the Nak'azdli regarding the risks of an oil spill in their territory.

262 As with the Kitasoo and the Heiltsuk, the Nadleh and the Nak'azdli also responded to Canada asserting that the Governor in Council did not have sufficient information to make a decision. The record does not demonstrate that the Governor in Council had this information before making its decision. While Canada did respond acknowledging the errors in the Phase IV discussions,

it did not indicate any steps taken to correct the errors or state what effect, if any, this had on the Governor in Council's decision: July 14 letter, Major Book of Documents, page 469.

263 Also of significant concern is the lack of meaningful dialogue that took place in Phase IV.

264 During the consultation meetings, Aboriginal groups were repeatedly told that Canada's representatives were:

- working on the assumption that the Governor in Council needed to make the decision by June 17, 2014;
- tasked with information gathering, so that their goal was to get the best information to the decision-makers;
- not authorized to make decisions;
- required to complete the Crown Consultation Report by April 16, 2014.

265 When the role of Canada's representatives is seen in this light, it is of no surprise that a number of concerns raised by Aboriginal groups — in our view, concerns very central to their legitimate interests — were left unconsidered and undiscussed. This fell well short of the conduct necessary to meet the duty to consult. There are several examples.

266 At the consultation meeting on April 22, 2014, the Kitasoo made detailed submissions about why the Project's impacts on their Aboriginal rights could not be assessed without what they referred to as the "missing information." The Kitasoo representatives explained that they required information about spill modelling and assessment, the behaviour (or fate) of bitumen in the water, a baseline marine inventory and what the spill recovery would look like. Thereafter, Chief Clark Robinson asked Canada's representatives "who will engage in consultation, will you?" Canada's response was delivered by two of its representatives: Joseph Whiteside, a senior policy analyst with Natural Resources, and Brett Maracle, the Crown Consultation Coordinator. Their response shows little in terms of facilitating consultation; indeed, it shows just how short of the mark the Phase IV consultation was:

> Joseph Whiteside: Building on what I just said - we're not decision makers, our job is to collect information to make sure that within the individual expertise of Environment Canada, Transport Canada, my department Natural Resources and others, we fully understand what you're trying to tell us, and so the decision making is at a different level. Particularly on the matter of funding. They haven't given us funding approval authority yet - maybe they will. But, our job is to take the best recommendations forward that we can. We may have some questions as the afternoon unfolds, to detail more of what was in your slide presentation - I assume we have a copy of the slide presentation. That will help our analysis as well.
>
> So, part of our responsibility today is not to make decisions, or to tell you we have decisions that we can make. It is to tell you we will do the best job we can in taking your recommendations forward so that they are properly understood within our respective departments.
>
> Brett Maracle: And considered.
>
> Joseph Whiteside: and considered.
>
> Chief Clark Robinson: Will [you]make a recommendation on consultation?
>
> Joseph Whiteside: Well one of the things we can look at is, based on what your community and others have said - is that they are seeking, I think [it's] fair from the hereditary chiefs said this morning, you're looking for an additional level of consultation beyond what has already been engaged in prior to panel, through the panel, which Canada continues to say we rely on, to the extent possible to meet the duty to consult, and then using this phase IV to build on the work of the Panel to make sure we fully understood what Aboriginal communities are saying.
>
> To identify where you believes [there] are gaps, and I think [it's] fair to describe a lot of the presentation is talking about gaps in the analytical framework that you believe critically need to be filled, and then to see what more can be done. It

> may well be possible to take - to put forward a recommendation, and I can't say what's in the Cabinet submission because I don't make that decision. As to whether [Cabinet] feels there is ongoing consultation work that needs to be engaged [in regardless] of the whether the decision is pro or con on the particular project, that may well be an issue Ministers may wish to bring forward further information about consultation, I can't say the door is closed, and I can't say what the door on consultation may be, that part of the analysis, we as a team may have to do some work on to assist to assist our seniors.
>
> Chief Clark Robinson: We don't agree that there has been any consultation.
>
> [Emphasis added] [*sic* throughout]

267 In our view, the Kitasoo never received Canada's explanation why the missing information was not required and why Canada rejected the assertion that the Kitasoo had not been adequately consulted.

268 The Heiltsuk made similar submissions to the Kitasoo at their Phase IV consultation meeting with Canada in terms of requiring additional information to assess the impacts on their Aboriginal rights. Particularly concerning for the Heiltsuk was that there was insufficient information regarding the risk of an oil spill to herring-spawn-on-kelp — a resource over which the Heiltsuk have an Aboriginal right to fish on a commercial basis: see the Heiltsuk's closing submissions to the Joint Review Panel, extract book, Tab 19.

269 During the consultation meeting, elected leader and Chief Councillor Cecil Reid described the importance of the herring industry to the Heiltsuk and the "horrific" consequences that an oil spill would have on their livelihood. He then asked Canada's representative "[...] why did you come without the authority to discuss our concerns and react to them in a positive way so that we have some comfort that this thing is being taken seriously? ... How can you make a decision until all the information is in?"

270 Joseph Whiteside, a senior policy analyst with Natural Resources, responded along the same lines as he did at the Kitasoo meeting:

> Our responsibility is to collect the information we have and be as responsive to the questions and issues we've heard in the last day and a half, and to be as responsive back to, within the time that we have, to provide some information and try and build some understanding. Our main responsibility is to take your views back and integrate them into the report that we have to prepare, so that our senior managers and all up to the Ministers are fully aware of the perspective of the Heiltsuk Nation brings forward on the proposal that will be before the Cabinet by mid-June.

271 When Chief Councillor Marilyn Slett asked Canada's representatives if Canada would be available for further consultations with the Heiltsuk on this matter, Canada's Crown Consultation Coordinator, Brett Maracle, replied, "I can't say, because that would be basically the [M]inister's agreeing to [a] delay of the process." The Heiltsuk never received an explanation why the missing information concerning a resource necessary for their sustenance was not required.

272 Deputy Chief Counselor Taylor Cross of the Haisla also provided evidence of the following unaddressed concerns:

> 7. Despite a representative from Transport Canada attending the March and April Meetings, we did not have time to discuss Canada's Tanker Safety Expert Panel Report or our concerns with that report. We therefore requested that the Crown reply to our concerns regarding that report in writing. To the best of my knowledge, Transport Canada has not yet replied to our concerns in writing or otherwise.

273 The Haisla fared no better when they raised concerns about errors in the Report of the Joint Review Panel. For example, during the consultation meetings, Canada's representative agreed that hundreds of culturally modified trees exist at the proposed terminal site, notwithstanding that the Report of the Joint Review Panel stated that there were none. He agreed that many culturally modified trees would be destroyed by the Project and that this would have an impact on the Haisla. Canada then offered no suggestion as to how the impacts to the Haisla's culturally modified trees could be avoided or accommodated.

274 Deputy Chief Councillor of the Haisla, Taylor Cross, also gave evidence that Canada's representatives, including Jim Clarke, repeatedly stated that they had to accept the findings of the Joint Review Panel as set out in its Report. This was not so.

Phase IV in part was an opportunity to address errors and omissions in the Report on subjects of vital concern to Aboriginal Peoples. The consequence of Canada's position was to severely limit its ability to consult meaningfully on accommodation measures.

275 The Gitxaala encountered the same problems with Canada during Phase IV. It also took the position that approval of the Project was premature and that further studies on matters arising from the Report of the Joint Review Panel were required. The notes of the April 3, 2014 consultation meeting show that Canada was asked "[c]an we get any response, any reasons why the additional work that we're asking for can't be undertaken? Can we talk about what can or can't be undertaken? We invite any discussion?"

276 Jim Clarke, for Canada, replied that "I don't want to raise your expectations. Typically we just use the Joint Review Panel as information for the decision. It is not typical to delay the legislative timeframe for decision. It doesn't mean it can't happen it's just not routinely done."

277 During this April 2014 consultation meeting, Canada acknowledged to the Gitxaala that an oil spill could have a catastrophic effect on the Gitxaala's interests. The Gitxaala's representatives went on to observe that the Gitxaala had filed many expert reports in the Joint Review Panel process. The Gitxaala's representatives asked what Canada's views were on a specific report dealing with navigation issues, and how Canada intended to take such report into account. Transport Canada's representative answered, "If we can get more answers we'll try." Answers on this critical issue were never forthcoming.

278 One final example occurred during the March 3, 2014, consultation meeting with the Haisla. The Haisla's representatives expressed concern at the extent to which paid lobbyists were talking to government officials and affecting the consideration of their concerns and asked for disclosure of lobbying efforts. Mr. Maracle responded that it was "hard for us to get [information] from Ministers, [and it would be] better if you [used] an [access to information request]." If information was available through an access request, it is difficult to see why it would not be provided through the consultation process — particularly in light of the timelines Canada had imposed.

279 Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.

280 Canada places great reliance on two letters sent to each affected First Nation on June 9, 2014 and July 14, 2014, the former roughly a week before the Governor in Council approved the Project, the other after. In our view, for the following reasons, these letters were insufficient to discharge Canada's obligation to enter into a meaningful dialogue.

281 Aside from the errors found in the June 9, 2014 letter sent to the Kitasoo, the Heiltsuk, the Nadleh and the Nak'azdli, the content of the letters can at best be characterized as summarizing at a high level of generality the nature of some of the concerns expressed by the affected First Nation. Thus, the letter explained that during Phase IV, officials "noted [their] perspective on the extent which [your] concerns could be mitigated by various measures" without setting out what the Nations suggested mitigation measures were. To the limited extent the June 9, 2014 letter responded to a concern, it did so only in a generic fashion. In substance, no explanation was provided about what, if any, consideration had been given to the suggested mitigation measures.

282 To illustrate, to the extent a First Nation had raised a concern about the consequence of an oil spill, Canada responded that it "place[d] a high priority on preventative measures to avoid the occurrence of spills in the first place, and on enhancing response and recovery measures in the unlikely event of a spill." The letter went on to inform that "the Government of Canada has recently announced new measures to further enhance Canada's world-class pipeline safety and tanker safety systems."

283 The July 14, 2014 letters were lengthier and were intended "to respond to the many important issues you have raised, and to describe some of the next steps related to the Project." Given that the decision to approve the Project had already been

made, and that consultation is to be complete prior to making the decision at issue, it is difficult to see these letters as fulfilling Canada's obligation to consult.

284 Moreover, again we characterize the content of the July letters as generic in nature, explaining that the Joint Review Panel had subjected the Project proposal "to a rigorous science-based review by an independent Panel." To the extent the letter addressed concerns expressed by the First Nation, those concerns were summarized at a general level and then responded to by reference to conditions imposed by the Joint Review Panel, by reliance upon the current marine safety regime, the possibility "there may be further interest in conducting geological and geotechnical sampling to gather additional information to better evaluate" hazards posed by geo-hazards, additional research and development on the fate of diluted bitumen and ongoing research.

285 It is fair to say the letters centered on accommodation measures.

286 However, the letters did not engage with the stated concerns that the Phase IV consultation process was rushed and lacked any meaningful dialogue. Nor did the letters engage with the repeatedly expressed concern that insufficient evidence was available to allow for an informed dialogue about the potential impacts of the Project on Aboriginal and treaty rights.

287 Following the authorities of the Supreme Court of Canada on the duty to consult, we conclude that during the Phase IV process, the parties were entitled to much more in the nature of information, consideration and explanation from Canada regarding the specific and legitimate concerns they put to Canada.

288 The dialogue necessary to fulfil the duty to consult was also frustrated by Canada's failure to disclose necessary information it had about the affected First Nations' strength of claims to rights and title. We stress information, as opposed to the legal assessments we discussed above at paragraphs 218-225. Canada's attitude to the sharing of information about this is troubling. Strength of claims was an important matter that had to be considered in order for the consultation in Phase IV to be meaningful. We wish to explain why.

289 The consultation process in Phase IV was not to be a forum for the final determination and resolution of Aboriginal claims to rights and title. We agree, based on the Supreme Court's reasoning in *Haida Nation*, that this was appropriate: the duty to consult is not a duty to determine unresolved claims. But disclosure by Canada of information concerning the affected First Nations' strength of claims to rights and title was needed for another reason.

290 In law, the extent and strength of the claims of affected First Nations affect Canada's level of obligation to consult and, if necessary, accommodate. It also defines the subjects over which dialogue must take place: a broad and strong claim to rights and title over an asserted territory means that broad subjects within that territory must be discussed and, perhaps, must be accommodated. Looking specifically at the case before us, Canada accepted that the obligation to consult was deep. But dialogue had to take place regarding what that meant. What subjects were on the table? How deep did the dialogue and, if necessary, accommodation have to go?

291 The case law is clear that Canada, acting under the duty to consult, must dialogue concerning the impacts that the proposed project will have on affected First Nations and to communicate its findings to the First Nations: *Mikisew Cree First Nation*, at paragraph 55. But contrary to that case law, Canada repeatedly told the affected First Nations that it would not share a matter fundamental to identifying the relevant impacts — information concerning the strength of the affected First Nations' claims to Aboriginal rights and title.

292 For discussions during Phase IV to be fruitful and the dialogue to be meaningful, this had to happen. And, as we noted above, in a letter dated April 18, 2012, the then Minister of the Environment committed to do just that — to provide a description of its strength of claim and depth of consultation assessment.

293 But Canada never provided the Haisla with that description. The evidence of Chief Ross of the Haisla shows that during Phase IV Canada resiled from that commitment and avoided defining exactly what was in play during the consultations:

99. There was no genuine discussion of the Haisla Nation's strength of claim at the March and April Meetings. At the March Meeting, the Haisla Nation raised the importance of openly discussing Aboriginal rights and title - a topic [the Joint Review Panel] had avoided entirely - and asked the Crown representatives to share the Crown's views of the strength of claim. In his letter dated April 18, 2012 the Minister of Environment had committed to sharing the Crown's results of its analysis of our strength of claim prior to the commencement of Phase IV of its Consultation Framework. We stressed that we needed to know of any disagreements regarding strength of claim in order for consultation to be meaningful, and so that we were not speaking at cross purposes.

100. The Environment Canada representatives, Mr. Brett Maracle and Analise Saely, stated that, based on a preliminary assessment, they were of the view that the Haisla Nation had a strong Aboriginal title claim to the terminal site, a strong Aboriginal title claim to portions of the pipeline right-of-way within Haisla Territory, as well as a strong claim to Aboriginal rights to fish and harvest marine resources in parts of the Kitamaat River, Kitamaat River or Estuary, and in the Douglas Channel. We asked that the Crown provide detail as to what portions of the pipeline route they conceded Haisla Nation has a strong Aboriginal title claim to and what areas of water the Crown has conceded Haisla Nation has a strong claim of aboriginal rights in. The Crown representatives told us they would seek permission to disclose the Crown's actual strength of claim analysis, including further analysis of strength of claim along the pipeline route. A copy of a March 11, 2014 letter to the Crown documenting at page 4 some of what the Crown admitted in terms of the Haisla Nation's strength of claim is found at pages 920 to 929 of Exhibit H to this my Affidavit. This letter, however, contains an error. At page 4, the letter incorrectly states that the Crown explicitly agreed that the Haisla Nation has a high strength of claim to its entire Traditional Territory. In fact, the Crown representatives only explicitly admitted that the Haisla Nation has a strong claim to title at the terminal site and portions of the pipeline route, as well as a strong claim to fishing and harvesting rights in the aforementioned waters.

101. Shortly after the March Meeting, the Crown sent a letter to the Haisla Nation with a generic and deliberately vague statement about our Nation's strength of claim that was divorced from the Project area. The letter states as follows at page 2:

> As discussed during our meetings on March 4 and 5, Canada's preliminary strength of claim assessment is based on the information the Haisla Nation have provided to the Panel and in correspondence with government officials. Without making any determination of the Haisla Nation's Aboriginal rights or title claims, our preliminary assessment of that information, for the sole purpose of the consultation process for this proposed project, is that it supports the Haisla Nation as a having strong *prime* [sic] *facie* claim to both aboriginal rights and title within lands claimed as part of the Haisla traditional territory.

A copy of the Crown's letter dated March 24, 2014 with this statement is found at pages 931 to 1,052 of Exhibit H to this my Affidavit.

102. This carefully crafted statement came as a surprise to me, given that the Crown representatives had previously conceded the Crown's view that the Haisla Nation has a high strength of claim to Aboriginal title to the terminal site itself and to portions of the pipeline right-of-way. Our request for clarity and for disclosure of the Crown's strength of claim analysis had resulted in a statement which effectively told us nothing about the Crown's view of the strength of our claim in relation to the Project.

103. At the April Meeting, the issue of strength of claim was again raised, as was the deliberately vague strength of claim language in the March 24 letter. We expressed concern that such language was entirely unhelpful for the consultation process. Mr. Maracle and Mr. Jim Clarke, of the Major Projects Management Office, told us that they were limited in what they were authorized to disclose. Specifically, Mr. Maracle stated that he had sought to disclose more and had drafted a letter that did in fact disclose more regarding our strength of claim, but that his supervisors had directed him to disclose nothing beyond what was set out in the March 24 letter. Mr. Clarke told us that the Minister of Natural Resources himself had directed that the consultation team disclose nothing more than what was in the letter quoted above. Mr. Clarke stated that he had done his best to seek the disclosure of the Crown's strength of claim analysis. He explicitly confirmed that the

> Minister of Natural Resources rejected this plea for disclosure and ordered that no further disclosure be made. We asked Mr. Clarke if he could explain the rationale behind the Crown's refusal to share its analysis of the Haisla Nation strength of claim. He stated that he could not. We stated that the effect of Canada's failure to share its strength of claim analysis was that Minister Kent's promise would be broken. The Crown representatives had no explanation. A copy of our letter of May 7, 2014 expressing frustration with the Crown's approach to Phase IV consultation is found at pages 1,054 to 1,066 of Exhibit H to this my Affidavit.
>
> [Emphasis added]

294 The experience of the Gitxaala was not dissimilar. By letter dated March 28, 2014, they were informed that Canada accepted the Gitxaala had a strong *prima facie* claim "to an Aboriginal right to fish and harvest shellfish and other marine resources for food, social and ceremonial purposes in the area claimed as part of the Gitxaala Nation traditional territory."

295 Thereafter, the notes of the Phase IV consultation meeting held on April 3, 2014 show that the Gitxaala asked, not for an adjudication of their rights, but for Canada's assessment of the strength of their claim as they had asserted governance and title rights, *i.e.* far more than just harvesting rights. Brett Maracle responded that Canada had already gone through many ministerial levels to get approval for the statement about the strength of claim that was provided in Canada's correspondence. Jim Clarke also advised they had pushed very hard to get this disclosure.

296 When asked if Canada agreed that the Gitxaala was owed a deep level of consultation, Mr. Maracle advised that he didn't have approval to say so. When further pressed, he repeated that Canada had tried to give as much information as it could about the rights of the Gitxaala, and what Canada's representatives were able to share they did share.

297 Chief Moody then observed that somewhere a determination had been made that their rights were focused on subsistence harvesting. In answer to the question of whether the discussion would be limited to this determination of their rights he was told, "No, but that's all we are allowed to share."

298 Again, at the April 22, 2014 consultation meeting with the Kitasoo, Mr. Maracle repeated that Canada was not at that time sharing the strength of claim assessments. Aynslie Saely of Environment Canada then added that they were still getting information which would allow them to complete the depth of consultation assessment. When asked if Canada would share its ultimate conclusion and the information it relied on for assessing the strength of claim, Ms. Saely responded that such conclusion would be a cabinet confidence, and as such it was not information that could be shared.

299 Three days later, the transcript of the April 25, 2014 consultation meeting with the Heiltsuk records Ms. Saely of Environment Canada advising that Canada had a strength of claim assessment but it was not something that could be shared. The stated rationale was that, as it had been prepared by the Department of Justice, it was protected by solicitor client privilege. When counsel for the Heiltsuk observed that while legal advice could not be disclosed, the result of the assessment could be disclosed, Ms. Saely responded that "[i]n terms of the directions that we received - that it is part of Cabinet confidence."

300 We do not accept that privileges in this case barred Canada's from disclosing factual information relevant to the consultation process.

301 At the consultation meeting with the Gitxaala held on April 2, 3 and 4, 2014, in response to questions about the impacts of oil spills upon governance and other concerns, Canada's representatives advised that "Phase IV consultations are an opportunity to carefully consider the concerns of Gitxaala Nation regarding the potential adverse impacts of the propose (*sic*) Project." The question was then asked if that was the only answer the Gitxaala was going to get. Mr. Maracle responded "[t]his is the answer that's being provided, and some of this will form part of our impact assessment, which we cannot share."

302 On cross-examination, Jim Clarke confirmed "Canada has not provided a detailed impact assessment to the Gitxaala, nor would Canada consider that to be a normal part of an environmental assessment process." Perhaps such information is not part of an environmental assessment process — but the Supreme Court has held it to be a necessary part of meaningful consultation.

303 Again, we refer to the affidavit of Chief Ross on this point:

> 106. At the March Meeting, we asked the Crown representatives to provide us with a list of the infringements of the Haisla Nation's Aboriginal rights and title that the Crown had identified as flowing from the Project. Mr. Maracle stated that this was a work in progress but that he would try to get that information to us as soon as possible. However, at the April Meeting, Mr. Maracle stated that his supervisors had prohibited any discussion of the Crown's assessment of infringements. In fact, Mr. Maracle told us that Canada had a document that sets out the Haisla Nation strength of claim, the severity of impacts from the Project, and the depth of consultation required, but that the Crown representatives had been forbidden from sharing that. We asked Mr. Maracle if he knew what the rationale was for his supervisors directing him to not provide this information. Mr. Maracle stated that he did not know.
>
> [Emphasis added]

304 This evidence is again consistent with the notes of the consultation meeting held on April 8 and 9, 2014, except that at the meeting Mr. Maracle stated that the direction precluding disclosure came from the Ministerial level.

305 We are satisfied that neither the Gitxaala nor the Haisla were singled out. Rather, the highest level of government directed that information vital to the assessment of the required depth of consultation (Canada's understanding of the strength of the right claimed and the potential impact of that right) not be shared with any First Nation.

306 We note that Canada does not argue that it was not obliged to consult with respect to title and governance matters. Rather, it argues that it reasonably accommodated potential impacts on assertions of Aboriginal title and governance claims to the point of Project development.

307 This is similar to the strategy that Canada employed with respect to disclosing its strength of claim assessments at the Phase IV consultation meetings. It was Canada's view that a dialogue regarding the content and extent of a particular right claim was unnecessary and it attempted to focus the meetings on mitigation and minimization of impacts. For example, at the April 3 meeting, the Gitxaala asked Canada "When Canada says it's taking the rights at face value, what does that mean? That it accepts Gitxaala has these rights?" Brett Maracle for Canada responded "No, it means considering whether there are measures that could address these impacts."

308 In our view, it was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert the Project's impact would be mitigated without first discussing the nature and extent of the rights that were to be impacted. In order for the applicant/appellant First Nations to assess and consult upon the impacts of the Project on their rights there must first be a respectful dialogue about the asserted rights. Once the duty to consult is acknowledged, a failure to consult cannot be justified by moving directly to accommodation. To do so is inconsistent with the principle of fair dealing and reconciliation.

309 While we agree with Canada that the consultation process was not a proper forum for the negotiation of title and governance matters, similar to other asserted rights, affected First Nations were entitled to a meaningful dialogue about the strength of their claim. They were entitled to know Canada's information and views concerning the content and strength of their claims so they would know and would be able to discuss with Canada what was in play in the consultations, the subjects on which Canada might have to accommodate, and the extent to which Canada might have to accommodate. Canada's failure to be candid on this point, particularly in light of the initial commitments made in the letter of the Minister of the Environment dated April18, 2012 (discussed at paragraphs 220 and 292, above), was legally unacceptable. Canada's failure frustrated the sort of genuine dialogue the duty to consult is meant to foster.

310 We now consider the adequacy of Canada's reasons.

311 In the present case, Canada was obliged at law to give reasons for its decision directing the National Energy Board to issue the Certificates. The source of this obligation was two-fold. As we develop in more detail below, in the present circumstances where a requirement of deep consultation existed, the Crown was obliged to give reasons. Additionally, subsection 54(2) of the

National Energy Board Act requires that where the Governor in Council orders the National Energy Board to issue a certificate, the order "must set out the reasons for making the order."

312 Canada argues that the requirement to give reasons was met for the following reasons:

- Neither the *National Energy Board Act* nor the *Canadian Environmental Assessment Act, 2012* require the Governor in Council to expressly address the adequacy of consultation in the order, nor to provide reasons in relation thereto.

- To the extent that the fulfilment of the duty to consult required reasons to be provided with respect to Canada's assessment of Aboriginal concerns and the impact those concerns had, the June and July letters addressed the information and issues arising in the consultation process to the point of the Governor in Council's decision.

- "Added to the other aspects of the record and the lengthy consultation process in this case that unfolded over several years, the June and July letters amply accomplish this purpose."

- Read together with the findings and recommendations found in the Report of the Joint Review Panel, the Order in Council allows the parties and the Court to understand the decision and to determine whether it falls within the range of acceptable outcomes.

313 We accept the submission of the Attorney General that the Order in Council allows us to understand that the Governor in Council made its decision on the basis that it accepted the Joint Review Panel's finding that the Project will be required by present and future public convenience and necessity, and that the Project will diversify Canada's energy export markets and will contribute to Canada's long-term economic prosperity. This was sufficient to comply with the statutory requirement to give reasons in so far as the issues covered by the Joint Review Panel were concerned. But as far as the independent duty to consult is concerned, it fell well short of the mark.

314 Canada elected in these proceedings not to challenge, but to take at face value, assertions of Aboriginal rights and title. In some instances it has expressly acknowledged the existence of a strong *prima facie* case for a claim. For example, it has acknowledged the Heiltsuk's right to a commercial herring-spawn-on-kelp fishery as recognized by the Supreme Court in *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 (S.C.C.). Given this, the importance of the claimed rights to Aboriginal groups, and the significance of the potential infringement of those rights, this is a case where deep consultation required written explanations of the sort described below to show that the Aboriginal groups' concerns were considered and to reveal the impact those concerns had on the Governor in Council's decision: *Haida Nation*, at paragraph 44.

315 We accept the submissions of counsel for the Kitasoo and the Heiltsuk that where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to set out the impacts of Aboriginal concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of the impacts on Aboriginal rights.

316 Nor is the requirement to give reasons met by the Report of the Joint Review Panel or the June and July letters.

317 In its Report, the Joint Review Panel did not determine anything about Aboriginal rights or title and gave no explanation on how those non-assessed rights affected, if at all, its decision that the Project would not significantly adversely affect the interests of Aboriginal groups that use lands, waters or resources in the Project area. Thus, the Report of the Joint Review Panel — under this legislative scheme, nothing more than a guidance document — can shed no light on Canada's assessment of how the Project would impact upon asserted rights and title.

318 Similarly, as the Attorney General correctly conceded, the June and July letters are only capable of addressing issues up to the point of the Governor in Council's decision. Additionally, we addressed above the deficiencies of these letters as part of the consultation process. The letters' contents are not sufficient to show that the Governor in Council had proper regard for the asserted rights and how that appreciation of those rights factored into its decision to approve the Project.

319 The balance of the record that could shed light on this, *i.e.*, the staff recommendations flowing from the Phase IV consultation process, the ministerial recommendation to the Governor in Council and the information before the Governor in Council when it made his decision, are all the subject of Canada's claim to Cabinet confidence under section 39 of the *Canada Evidence Act* and thus do not form part of the record. Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council.

320 Finally and most importantly, on the subject of reasons, we note that the Order in Council contains only a single recital on the duty to consult. It records only that a process of consultation was pursued, nothing more:

> Whereas the Crown has undertaken a process of consultation and accommodation with Aboriginal groups relying on the work of the Panel and additional consultations with Aboriginal groups;

321 Nowhere in the Order in Council does the Governor in Council express itself on whether Canada had fulfilled the duty to consult. This raises the serious question whether the Governor in Council actually considered that issue and whether it actually concluded that it was satisfied that Canada had fulfilled its duty to consult. All parties acknowledge that the Governor in Council had to consider and be satisfied on the issue of the duty to consult before it made the Order in Council.

322 Similarly, the Order in Council does not suggest that the Governor in Council received information from the consultations and considered it.

323 There is nothing in the record before us to assist us on these matters. This is a troubling and unacceptable gap.

324 Had the Phase IV consultation process been adequate, had the reasons given by Canada's officials during the consultation process been adequate and had the Order in Council referred to and adopted, even generically, that process and the reasons given in it, the reasons requirement might have been met. But that is not what happened. Here too, Canada fell short of the mark.

(5) Conclusion

325 We have applied the Supreme Court's authorities on the duty to consult to the uncontested evidence before us. We conclude that Canada offered only a brief, hurried and inadequate opportunity in Phase IV — a critical part of Canada's consultation framework — to exchange and discuss information and to dialogue. The inadequacies — more than just a handful and more than mere imperfections — left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project — some identified in the Report of the Joint Review Panel, some not — were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.

326 The Project is large and has been in the works for many years. But the largeness of the Project means that its effects are also large. Here, laudably, many of the potentially-detrimental effects appear to have been eliminated or mitigated as a result of Northern Gateway's design of the Project, the voluntary undertakings it has made, and the 209 conditions imposed on the Project. But by the time of Phase IV consultations, legitimate and serious concerns about the effect of the Project upon the interests of affected First Nations remained. Some of these were considered by the Joint Review Panel but many of these were not, given the Joint Review Panel's terms of reference. The Phase IV consultations after the Report of the Joint Review Panel were meant to provide an opportunity for dialogue about the Report and to fill the gaps.

327 However, the Phase IV consultations did not sufficiently allow for dialogue, nor did they fill the gaps. In order to comply with the law, Canada's officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.

328 In our view, this problem likely would have been solved if the Governor in Council granted a short extension of time to allow these steps to be pursued. But in the face of the requests of affected First Nations for more time, there was silence. As best as we can tell from the record, these requests were never conveyed to the Governor in Council, let alone considered.

329 Based on this record, we believe that an extension of time in the neighbourhood of four months — just a fraction of the time that has passed since the Project was first proposed — might have sufficed. Consultation to a level of reasonable fulfilment might have further reduced some of the detrimental effects of the Project identified by the Joint Review Panel. And it would have furthered the constitutionally-significant goals the Supreme Court has identified behind the duty to consult — the honourable treatment of Canada's Aboriginal peoples and Canada's reconciliation with them.

330 At the end of Phase IV of the consultation process is the Governor in Council. As we have explained above at paragraphs 159-168, under this legislative scheme the ultimate responsibility for considering whether the duty to consult has been fulfilled and whether necessary action must be taken in response to it rests with the Governor in Council and no one else. As a matter of law, the Governor in Council had to receive and consider any new information or new recommendations stemming from the concerns expressed by Aboriginal peoples during the consultation and, if necessary or appropriate, react, for example by imposing further conditions on any certificates it was inclined to grant.

331 Did the Governor in Council fulfil this legal obligation? In its Order in Council, the Governor in Council decided to acknowledge only the existence of consultations by others during the process. It did not say more despite the requirement to provide reasons under section 54 of the *National Energy Board Act* and under the duty to consult. The Governor in Council had to provide reasons to show that it fulfilled its legal obligation. It did not do so.

332 Overall, bearing in mind that only reasonable fulfilment of the duty to consult is required, we conclude that in Phase IV of the consultation process — including the execution of the Governor in Council's role at the end of Phase IV — Canada fell short of the mark.

G. Remedy

333 For the foregoing reasons, the Order in Council must be quashed. The Order in Council directed that the National Energy Board issue the Certificates. Now that the basis for the Certificates is a nullity, the Certificates are also a nullity and must be quashed. The matter is remitted to the Governor in Council for redetermination.

334 In that redetermination, the Governor in Council is entitled to make a fresh decision — one of the three options identified at paragraph 113 above, including the making of additional conditions discussed at paragraphs 159-168 above — on the basis of the information and recommendations before it based on its current views of the broad policies, public interests and other considerations that bear upon the matter. For example, if the Governor in Council, in looking at the matter afresh, considers that the environmental recommendations are unsatisfactory because the environmental assessment should have been conducted differently, it may exercise its discretion under section 53 to have the National Energy Board redetermine the matter.

335 But if the Governor in Council decides in that redetermination to have Certificates issue for the Project, it can only make that decision after Canada has fulfilled its duty to consult with Aboriginal peoples, in particular, at a minimum, only after Canada has re-done its Phase IV consultation, a matter that, if well-organized and well-executed, need not take long.

336 As a result of that consultation, Canada may obtain new information that affects the Governor in Council's assessment whether Canada has fulfilled its duty to consult. It may prompt Canada to accommodate Aboriginal concerns by recommending that additional conditions be added to the Project. It may also affect the balancing of considerations under section 54 of the *National Energy Board Act*. Thus, any new information and new recommendations must be placed before the Governor in Council.

337 It goes without saying that as a matter of procedural fairness, all affected parties must have an opportunity to comment on any new recommendations that the coordinating Minister proposes to make to the Governor in Council.

338 This leaves the Governor in Council in the same position as it was immediately before it first issued the Order in Council. All the powers that were available to it before are available to it now.

339 This means that on redetermination, the Governor in Council will have the three options available to it, summarized at paragraph 113 above, as well as the discretionary power, as explained at paragraphs 159-168 above, to impose further conditions on the Certificates in order to accommodate the concerns of Aboriginal peoples.

340 This also means that upon receipt of any new information or any new recommendations, the Governor in Council is subject to the strict time limits for making its decision under subsection 54(3) of the Act.

341 Finally, we note that the Governor in Council must provide reasons for its decision in order to fulfil its obligations under subsection 54(2) and the duty to consult.

H. Proposed disposition

342 For the foregoing reasons, we would dismiss the applications for judicial review of the Report of the Joint Review Panel in files A-59-14, A-56-14, A-64-14, A-63-14 and A-67-14.

343 We would also allow the applications for judicial review of the Order in Council, P.C. 2014-809 in files A-437-14, A-443-14, A-440-14, A-445-14, A-446-14, A-447-14, A-448-14, A-439-14 and A-442-14 and quash the Order in Council. We would also allow the appeals in files A-514-14, A-520-14, A-522-14 and A-517-14 and quash the National Energy Board's Certificates OC-060 and OC-061.

344 We would further order that:

(a) The matter is remitted to the Governor in Council for redetermination;

(b) At its option, the Governor in Council may receive submissions on the current record and, within the timeframe under subsection 54(3) of the *National Energy Board Act* calculated from the date submissions are complete, may redetermine the matter by causing it to be dismissed under paragraph 54(1)(*b*) of the *National Energy Board Act*;

(c) If the Governor in Council does not pursue the option in paragraph (b) or if it pursues that option but does cause the matter to be dismissed at that time, the matter will remain pending before it; in that case, Phase IV consultation shall be redone promptly along with any other necessary consultation with a view to fulfilling the duty to consult with Aboriginal peoples in accordance with these reasons;

(d) When the Attorney General of Canada is of the view that the duty under paragraph (c) and any procedural fairness obligations are fulfilled, she shall cause this matter to be placed as soon as practicable before the Governor in Council for redetermination, along with any new recommendations and any new relevant information; and

(e) The Governor in Council shall then redetermine this matter in accordance with these reasons within the timeframe set out in subsection 54(3) of the *National Energy Board Act*, running from the time it has received any new recommendations and any new relevant information.

345 If the parties are unable to agree on costs, we invite them to provide us with submissions of no more than five pages.

346 We thank the parties for the great assistance they have provided to the Court throughout.

C. Michael Ryer J.A. **(dissenting):**

347 I have read the thorough reasons of the majority (the "Majority Reasons") and am in agreement with much of them. In particular, I agree that the Order in Council is unimpeachable from an administrative law perspective. However, with respect, I do not agree that it should be set aside on the basis that the Crown's execution of the Phase IV consultations was inadequate

to meet its duty to consult. In my view, in the context of the overall Project-approval process, the execution of the Phase IV consultations was adequate, and I would dismiss the applications and appeals with costs.

348 In preparing these reasons, I have adopted all of the defined terms contained in the Majority Reasons, except where otherwise stipulated.

349 As a starting point, it is my view that the only Aboriginal rights that are engaged by the Project are each First Nation's asserted rights in relation to the use and benefits of the lands and waterways that the Project will cross. Additionally, the Project may engage the Heiltsuk Nation's established right to use a portion of the offshore waters to conduct commercial herring-spawn-on-kelp fishery operations. In these reasons, I refer to each of these engaged asserted or established Aboriginal rights as a "Usage Right".

350 I reject any assertion that the construction and operation of the Project could affect the asserted governance rights or asserted Aboriginal title. These are purely legal rights that could not be damaged or extinguished by the activities undertaken in the course of the Project. An action that has the effect of sterilizing land near the Project right of way would, no doubt, damage a First Nation's ability to use and enjoy the flora and fauna that would otherwise have been situated on the sterilized land. However, the sterilizing action would have no impact upon the First Nation's ability to establish, at some future time, a right to Aboriginal title to, and governance rights in respect of, such land.

351 A detailed description of the history, size and scope of the Project is contained in the Majority Reasons and does not bear repeating. Suffice it to say that the Project is a massive undertaking, with an estimated cost of over $7.9 billion. It also has the support of a majority of the affected First Nations, 26 of which accepted the Project proponent's offer to acquire an equity interest in the Project. In assessing the adequacy of the execution of the Phase IV consultations, it is important to consider these consultations in the context of the Project's duration, size and scope.

352 The Majority Reasons describe a number of alleged imperfections in the Crown's execution of the Phase IV consultations and conclude that such imperfections establish the Crown's failure to meet its duty to consult obligations. However, as acknowledged in the Majority Reasons, the standard to be met is that of adequacy and not perfection (*Haida Nation v. British Columbia (Minister of Forests)* [2004 CarswellBC 2656 (S.C.C.)], at paragraphs 60-63).

353 In essence, the alleged imperfections are as follows:

(a) the timelines for the Phase IV consultations were too short;

(b) the Crown Consultation Report contained inaccuracies in its portrayal of the First Nations' concerns, with the result that the Governor in Council had insufficient information to render its decision;

(c) the dialogue that occurred in the Phase IV consultations was not meaningful; and

(d) the Crown did not share its strength of claim information.

354 With respect, even assuming that these imperfections have been established, it is my view that taken together, in the context of such a large and complex project that has taken over 18 years to reach the present stage, they are insufficient to render the Phase IV consultations inadequate.

355 I wish to briefly address each of the four alleged imperfections. First, the timelines for the Phase IV consultations were statutorily imposed. The Majority Reasons criticize the Crown for failing to request an extension from the Governor in Council, but the Crown had no obligation to make such a request. Moreover, there has been no challenge, by way of judicial review, of the Crown's alleged failure to request an extension of the statutory timelines. The Majority Reasons offer the view that a short relaxation of the timelines — in the neighbourhood of four months — would have been sufficient to permit sufficient dialogue to take place and to fill any informational gaps. With respect, this view is speculative.

356 Secondly, because of the claim of Cabinet confidence, under section 39 of the *Canada Evidence Act*, this Court is unaware of the entirety of the materials that were before the Governor in Council when it made its decision. Accordingly, with respect, it is not possible for this Court to make any assessment of the adequacy of the materials that were before the Governor in Council when it made its decision. In any event, it is apparent that the Crown's summaries in the Crown Consultation Report, which contained the alleged inaccuracies, were not the only documents that were before the Governor in Council. Any such inaccuracies would have been apparent from a review of the Report, and the letters from First Nations which were appended to the Crown Consultation Report, both of which are presumed to have been reviewed by the Governor in Council. Thus, in my view, any inaccuracies in the Crown Consultation Report are insufficient to render the Crown's Phase IV consultations inadequate.

357 Thirdly, the Majority Reasons appear to conclude that the Crown failed to engage in a meaningful dialogue because some First Nations stated that they required further information regarding the Project's impacts, and the letters sent by the Crown following the Phase IV consultations addressed accommodation but not the First Nations' concerns regarding consultation. With respect, in my view, the requested information, by and large, related to matters that were considered by the Joint Review Panel or, in some instances, matters that were never placed before the Joint Review Panel, but should have been. The assertion of such imperfections in the Phase IV consultations represented an attack on the Report in a forum neither designed nor equipped to adjudicate its merits. Indeed, those First Nations have challenged the adequacy of the Report in this appeal, but to no avail. In addition, it is my view that a focus on accommodation in the letters is consistent with the Phase IV mandate to consider the efficacy of the "mitigation measures" put forth by the Joint Review Panel (Aboriginal Consultation Framework at page 8). Moreover, one may question the practical utility of engaging in ongoing discussions with respect to a concern that has been accommodated.

358 Finally, it is my view that the Crown made no error in failing to disclose its strength of claim assessments. It seems incongruous to stipulate that the consultation process was "not a proper forum for the negotiation of title and governance matters" (Majority Reasons at paragraph 309) and then to conclude that the Crown's "attitude to the sharing of information" regarding its assessment of the strength of the First Nations' claims in respect of such asserted rights was "troubling" (Majority Reasons at paragraph 288). This is especially so in light of the conclusion that the Crown, as a matter of law, had no obligation to share its assessment of the strength of each First Nation's claim in respect of asserted rights (Majority Reasons at paragraph 224). In my view, there is little, if anything, to distinguish between the Crown's "legal" assessment of a First Nation's claim and "information" the Crown has about the strength of such a claim. As the Majority Reasons stipulate, the Crown's legal assessment of the strength of a First Nation's claim is inherently subject to solicitor-client privilege. In my view, that privilege extends to the Crown's information upon which its legal assessment is based. To the extent that issues as to governance rights and Aboriginal title are live as between the Crown and any of the applicant/appellant First Nations, such issues ought to be pursued elsewhere as they are not, in my view, properly engaged by the Project-approval process. I agree that the Crown had no obligation to share its strength of claim assessments and, as a result, it is my view that this alleged failure does not establish the inadequacy of the Crown's Phase IV consultations.

359 In my view, the Crown's participation in the Phase IV consultations was sufficient to fulfill the honour of the Crown, particularly in a process that dealt with a project of this duration, size and scope. In conclusion, it is my view that the alleged imperfections in the execution of the Phase IV consultations, which are stipulated in the Majority Reasons, are insufficient to demonstrate that the Crown's consultations were inadequate.

360 The Majority Reasons also conclude that the Governor in Council's reasons were inadequate. In my view, there is no error in the Governor in Council's reasons that warrants this Court's intervention. In the Project-approval process, the Crown had the obligation to fulfill the duty to consult. As a result, any obligation to explain why the duty to consult was adequately discharged rested with the Crown, not the Governor in Council. The Majority Reasons (paragraph 331) appear to take issue with the Governor in Council's reference in the Order in Council to "consultations by others". I do not accept this as a valid criticism because, at least implicitly, it places an obligation on the Governor in Council to directly engage in *Haida* consultations with respect to the Project, rather than to simply determine the adequacy of the consultations that were undertaken by the Crown.

361 In my view, the Crown's reasons for concluding that it had met its duty to consult are readily apparent:

- an extensive consultation process was created, documented and implemented through the Aboriginal Consultation Framework, the Joint Review Panel Project-approval process and the Phase IV consultations;

- all of the applicant/appellant First Nations were encouraged to participate in the process and received, or were entitled to receive, funding in respect of their participation;

- the Crown acknowledged the potential impacts of the Project on the Usage Rights; and

- many of the First Nations' concerns were accommodated through the 209 conditions detailed in the Report.

362 The Crown's reasoning was, in my view, adequately demonstrated by the Report, the Phase IV consultation meetings, the Crown Consultation Report and the correspondence from the Crown to the First Nations who engaged in the Phase IV consultations. A more explicit explanation from the Crown was not required. Furthermore, in my view, the Governor in Council had no obligation to repeat the reason-providing exercise.

363 In my view, it is apparent from the Order in Council that the Governor in Council determined that the Crown's duty to consult had been met, thereby satisfying the condition precedent to the exercise of its power to issue the Order in Council. With respect, I find it difficult to accept that, notwithstanding the brevity of the reference to Crown consultation in the Order in Council, there is any doubt that the Governor in Council considered and determined the critical issue of whether or not the Crown had met its duty to consult obligations. As discussed above, at a minimum, the Governor in Council had the Report and the Crown Consultation Report before it, both of which clearly addressed this issue and both of which the Governor in Council is presumed to have reviewed. For the reasons that I have given, I conclude that the duty to consult was met in the circumstances and the Governor in Council was correct in so acknowledging. As no other defect has been demonstrated, the Order in Council should stand.

364 For the foregoing reasons, I would dismiss the applications and appeals with costs.

Application granted.

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

v.

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

and between

Weyerhaeuser Company Limited *Appellant*

v.

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

and

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

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

c.

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

et entre

Weyerhaeuser Company Limited *Appelante*

c.

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

et

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

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

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

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

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

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

Répertorié : Nation haïda *c.* Colombie-Britannique (Ministre des Forêts)

Référence neutre : 2004 CSC 73.

N° du greffe : 29419.

2004 : 24 mars; 2004 : 18 novembre.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jurisprudence

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

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

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

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

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

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

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

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

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

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

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

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

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

Allan Donovan, for the intervener the Haisla Nation.

supplémentaires (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, qui a infirmé une décision de la Cour suprême de la Colombie-Britannique (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Pourvoi de la Couronne rejeté. Pourvoi de Weyerhaeuser Co. accueilli.

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

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

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

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

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

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

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

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

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

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

Allan Donovan, pour l'intervenante la Nation haisla.

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

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

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

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

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

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

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

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

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

II. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *The Province's Duty*

F. *L'obligation de la province*

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

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

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

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

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

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

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

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

G. *Administrative Review*

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

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

G. *L'examen administratif*

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

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

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

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

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

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

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

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

H. *Application to the Facts*

(1) Existence of the Duty

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

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

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

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

H. *L'application aux faits*

(1) L'existence de l'obligation

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

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

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

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

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

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

(2) Scope of the Duty

(2) L'étendue de l'obligation

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

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

(i) *Strength of the Case*

(i) *Solidité de la preuve*

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

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

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

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

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

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

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

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

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

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

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

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

(ii) *Seriousness of the Potential Impact*

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

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

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

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

(ii) *Gravité des conséquences potentielles*

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

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

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

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

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

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

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

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

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

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

(3) Did the Crown Fulfill its Duty?

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

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

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

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

III. Conclusion

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

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

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

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

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

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

III. Conclusion

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

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

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

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

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

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

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

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

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

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

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

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

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

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

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

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

Procureurs des intimés : EAGLE, Surrey.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

INDEXED AS: HOUSEN *v.* NIKOLAISEN

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook nº 493 *Intimée*

RÉPERTORIÉ : HOUSEN *c.* NIKOLAISEN

Référence neutre : 2002 CSC 33.

Nº du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

municipalité intimée. N a été incapable de prendre un virage serré et il a perdu la maîtrise de son véhicule. L'appelant est devenu quadriplégique à la suite des blessures subies dans l'accident. Les parties ont convenu avant le procès du montant des dommages-intérêts, qui ont été fixés à 2,5 millions de dollars. La question en litige était celle de savoir si la municipalité, N et l'appelant étaient responsables et, dans l'affirmative, dans quelles proportions. Le jour qui a précédé l'accident, N avait assisté à une fête à la résidence des T, non loin de la scène de l'accident. Durant la nuit, il a continué de boire à une autre fête, où il a rencontré l'appelant. Le matin, les deux hommes sont retournés en automobile à la résidence des T, où N a continué de boire, cessant de le faire quelques heures avant de prendre la route dans sa camionnette en compagnie de l'appelant. N n'était pas familier avec le chemin en question, mais il l'avait emprunté à trois reprises au cours des 24 heures qui avaient précédé l'accident pour aller et venir de la résidence des T. À l'approche de l'endroit de l'accident, la distance de visibilité était réduite en raison du rayon de courbure du virage et de la présence de broussailles poussant jusqu'au bord du chemin Une faible pluie tombait lorsque N s'est engagé sur le chemin en quittant la résidence des T. L'arrière de la camionnette a zigzagué à plusieurs reprises avant que le véhicule n'arrive aux abords du virage serré où l'accident est survenu. Selon le témoignage d'un expert, N roulait à une vitesse se situant entre 53 et 65 km/h lorsque le véhicule s'est engagé dans la courbe, soit une vitesse légèrement supérieure à celle à laquelle le virage pouvait être pris en sécurité eu égard aux conditions qui existaient au moment de l'accident.

Le chemin, qui était entretenu par la municipalité, appartenait à la catégorie des voies d'accès locales non désignées. La municipalité installe des panneaux de signalisation sur ces chemins si elle constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Elle n'avait installé aucune signalisation le long de cette portion du chemin. On a signalé trois autres accidents survenus de 1978 à 1987 à l'est du lieu de l'accident dont a été victime l'appelant. La juge de première instance a estimé que l'appelant était responsable de négligence concourante dans une proportion de 15 p. 100, du fait qu'il avait omis de prendre des précautions raisonnables pour assurer sa propre sécurité en acceptant de monter à bord du véhicule de N, et elle a réparti le reste de la responsabilité solidairement entre N (50 p. 100) et la municipalité (35 p. 100). La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente.

Arrêt (les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major et Arbour : Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le pourvoi. La norme de contrôle applicable aux pures questions de droit est celle de la décision correcte et, en conséquence, il est loisible aux cours d'appel de substituer leur opinion à celle des juges de première instance. Les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit pour être en mesure de s'acquitter de leur rôle premier, qui consiste à préciser et à raffiner les règles de droit et à veiller à leur application universelle.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante ». Une erreur manifeste est une erreur qui est évidente. Les diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous trois principes de base. Premièrement, vu la rareté des ressources dont disposent les tribunaux, le fait de limiter la portée du contrôle judiciaire a pour effet de réduire le nombre, la durée et le coût des appels. Deuxièmement, le respect du principe de la retenue envers les conclusions favorise l'autonomie et l'intégrité du procès. Enfin, ce principe permet de reconnaître l'expertise du juge de première instance et la position avantageuse dans laquelle il se trouve pour tirer des conclusions de fait, étant donné qu'il a l'occasion d'examiner la preuve en profondeur et d'entendre les témoignages de vive voix. Il faut faire preuve du même degré de retenue envers les inférences de fait, car nombre de raisons justifiant de faire preuve de retenue à l'égard des constatations de fait du juge de première instance valent autant pour toutes ses conclusions factuelles. La norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte. Une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle.

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising

Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits. Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, il y a lieu de faire preuve de retenue à l'égard de cette conclusion en l'absence d'erreur de droit ou d'erreur manifeste et dominante. Le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys. Si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. La question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est alors assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit, qui est assujettie à la norme de la décision correcte.

En l'espèce, la norme de diligence à laquelle devait se conformer la municipalité consistait à tenir le chemin dans un état raisonnable d'entretien, de façon que ceux qui devaient l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté cette norme et sa décision ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante. La juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen puisqu'elle a commencé son examen de la norme de diligence en formulant dès le départ le critère approprié, puis elle s'est interrogée, tant explicitement qu'implicitement, sur la façon dont conduirait l'automobiliste raisonnable en s'approchant du virage. De plus, le fait qu'elle a imputé une partie de la responsabilité à N indique qu'elle a évalué sa conduite au regard du critère du conducteur moyen, tout comme l'indique le fait qu'elle a utilisé l'expression « danger caché » et qu'elle s'est demandé à quelle vitesse les automobilistes auraient dû approcher du virage.

La conclusion de la Cour d'appel portant que la juge de première instance avait commis une erreur manifeste et dominante reposait sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, alors que dans les faits

ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves

elle a estimé qu'il était possible qu'un automobiliste prenant des précautions normales s'approche du virage à une vitesse supérieure à la vitesse sécuritaire pour effectuer la manœuvre. Loin de constituer une erreur manifeste et dominante, cette conclusion découlait d'une évaluation raisonnable et réaliste de l'ensemble de la preuve par la juge de première instance.

La juge de première instance n'a pas commis d'erreur en concluant que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin. Étant donné que, en l'espèce, le danger était une caractéristique permanente du chemin, il était loisible à la juge de première instance d'inférer que le conseiller municipal prudent aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Les accidents survenus antérieurement sur le chemin ne constituent pas une preuve directe permettant de conclure que la municipalité connaissait l'existence du danger particulier en cause, mais ce facteur, conjugué à la connaissance du type de conducteurs utilisant le chemin, aurait dû inciter la municipalité à faire enquête à l'égard du chemin en question, ce qui lui aurait permis de prendre connaissance concrètement de l'existence du danger. Exiger du demandeur qu'il apporte la preuve concrète de la connaissance par la municipalité du mauvais état d'entretien de ses chemins revient à imposer à ce dernier un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

La conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait assujettie à la norme de contrôle de l'« erreur manifeste et dominante ». Le caractère théorique de l'analyse de la question de savoir si N aurait aperçu un panneau de signalisation installé avant la courbe justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance. Les constatations factuelles de cette dernière relativement à la causalité étaient raisonnables et la Cour d'appel n'aurait donc pas dû les modifier.

Les juges Gonthier, Bastarache, Binnie et LeBel (dissidents) : Les conclusions de fait du juge de première instance ne sont pas modifiées en l'absence d'erreur manifeste ou dominante, principalement parce qu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, et qu'il est, de ce fait, plus à même de choisir entre deux versions

not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident

divergentes d'un même événement. Le processus de constatation des faits exige non seulement du juge qu'il dégage le nœud factuel de l'affaire, mais également qu'il tire des inférences des faits. Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Des inférences peuvent être rejetées pour d'autres raisons que le fait que le processus qui les a produites est lui-même déficient. Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée, question de droit qui relève autant des cours de première instance que des cours d'appel.

En l'espèce, la question de savoir si la municipalité connaissait ou aurait dû connaître le danger dont on alléguait l'existence était une question mixte de fait et de droit. Le juge de première instance doit examiner cette question eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Même en supposant que le juge de première instance détermine correctement la norme juridique applicable, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique, processus qui implique notamment l'établissement de politiques d'intérêt général. Par exemple, il doit se demander si le fait que des accidents se soient déjà produits à d'autres endroits du chemin alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents, question normative qui est contrôlable selon la norme de la décision correcte. Les questions mixtes de fait et de droit ne sont pas toutes contrôlables suivant cette norme, mais elles ne commandent pas systématiquement une attitude empreinte de retenue.

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, la juge de première instance devait se demander si le tronçon du chemin sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. En l'espèce, la juge de première instance a omis de se demander si un tel conducteur aurait pu rouler

occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is

en sécurité sur le tronçon en question. Il s'agissait d'une erreur de droit. Les municipalités ont l'obligation de tenir les chemins dans un état raisonnable d'entretien de façon que ceux qui doivent les emprunter puissent, en prenant des précautions normales, y circuler en sécurité. Il s'agit d'une obligation de portée limitée, car les municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues. Bien que la juge de première instance ait conclu que la portion du chemin où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. La cour d'appel qui décèle une erreur de droit a compétence pour reprendre telles quelles les conclusions de fait du juge de première instance et les réévaluer au regard du critère juridique approprié. En l'espèce, la portion du chemin où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général avertissait l'automobiliste raisonnable que la prudence s'imposait.

La juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétendait-on, le chemin. La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le prétendu mauvais état du chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Il répond ensuite à cette question en appréciant les faits de l'espèce dont il est saisi. Dans la présente affaire, la juge de première instance a fait erreur en droit en examinant la question de la connaissance requise du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent et en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a commis une erreur de fait manifeste et dominante en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur ce chemin. La municipalité n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers, puisqu'elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des courbes ou à la présence d'arbres et de végétation en bordure du

a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

chemin. La question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, on ne pouvait attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où l'accident est survenu, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière, erreur manifeste en l'absence de quelque élément de preuve indiquant ce qui aurait pu constituer un système raisonnable.

Relativement aux conclusions de la juge de première instance sur le lien de causalité, qui sont des conclusions de fait, celle-ci a fait abstraction de la preuve que le véhicule de N avait fait une embardée dans la première courbe et que ce dernier avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident. La juge de première instance a également omis de tenir compte de l'importance du témoignage du spécialiste judiciaire en matière d'alcool, qui menait irrésistiblement à la conclusion que l'alcool avait été le facteur causal de l'accident, et elle a erronément invoqué une déclaration de celui-ci au soutien de sa conclusion que N aurait réagi à un panneau de signalisation. La conclusion que le résultat aurait été différent si N avait été prévenu de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur le lien de causalité n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. Le tribunal d'appel est habilité à se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse.

Indépendamment de l'approche choisie à l'égard de la question de l'obligation de diligence, il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle.

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Gary D. Young, *Q.C.*, *Denis I. Quon* and *M. Kim Anderson*, for the appellant.

Michael Morris and *G. L. Gerrand*, *Q.C.*, for the respondent.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI AND MAJOR JJ. —

I. Introduction

A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

Gary D. Young, *c.r.*, *Denis I. Quon* et *M. Kim Anderson*, pour l'appelant.

Michael Morris et *G. L. Gerrand*, *c.r.*, pour l'intimée.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Iacobucci, Major et Arbour rendu par

LES JUGES IACOBUCCI ET MAJOR —

I. Introduction

Il va sans dire qu'une cour d'appel ne devrait modifier les conclusions d'un juge de première instance qu'en cas d'erreur manifeste et dominante. On reformule parfois cette proposition en disant qu'une cour d'appel ne peut réviser la décision du juge de première instance dans les cas où il existait des éléments de preuve qui pouvaient étayer cette décision. 1

Il existe une abondante jurisprudence étayant cette proposition, particulièrement des décisions émanant de cours d'appel, tant au Canada qu'à l'étranger (voir *Gottardo Properties (Dome) Inc. c. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (C.A. Ont.); *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60). En outre, des auteurs, tant à l'échelle nationale qu'internationale, y souscrivent (voir C. A. Wright, « The Doubtful Omniscience of Appellate Courts » (1957), 41 *Minn. L. Rev.* 751, p. 780; l'honorable R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994); et American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), p. 24-25). 2

Le rôle des tribunaux d'appel a été défini de manière judicieuse dans l'arrêt *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), p. 204, où la cour a dit ceci : 3

[TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

Quoique cette théorie soit généralement acceptée, elle n'est pas appliquée de manière systématique. Le fondement de cette théorie est aussi valide aujourd'hui qu'il l'était il y a 100 ans. Cette théorie repose sur l'idée que le caractère définitif des décisions est un aspect important du processus judiciaire. Personne ne prétend que les juges des cours d'appel seraient, d'une manière ou d'une autre, plus intelligents que les autres et donc capables d'arriver à un meilleur résultat. Leur rôle n'est pas de rédiger de meilleurs jugements, mais de contrôler les motifs à la lumière des arguments des parties et de la preuve pertinente, puis de confirmer la décision à moins que le juge de première instance n'ait commis une erreur manifeste ayant conduit à un résultat erroné.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

Qu'est-ce qu'une erreur manifeste? Le *Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « . . . Qui est tout à fait évident, qui ne peut être contesté dans sa nature ou son existence. [. . .] *erreur manifeste* » (p. 317). *Le Grand Robert de la langue française* (2e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évidente. [. . .] Qui est clairement, évidemment tel. [. . .] *Erreur, injustice manifeste* » (p. 1139). Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « . . . Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* » (p. 3213).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ». Si l'on applique ce critère au présent pourvoi, il faut que l'« erreur manifeste et dominante » décelée par le juge Cameron soit évidente pour que la Cour d'appel de la Saskatchewan puisse infirmer la décision de la juge de première instance. Comme nous le verrons plus loin, nous ne croyons pas qu'on a satisfait à ce critère en l'espèce.

II. The Role of the Appellate Court in the Case at Bar

II. Le rôle de la Cour d'appel en l'espèce

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant

Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le présent pourvoi. Nous estimons donc utile d'examiner brièvement

to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

8 Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

9 Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. *Standard of Review for Findings of Fact*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in particular, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

Ainsi, alors que le rôle premier des tribunaux de première instance consiste à résoudre des litiges sur la base des faits dont ils disposent et du droit établi, celui des cours d'appel est de préciser et de raffiner les règles de droit et de veiller à leur application universelle. Pour s'acquitter de ces rôles, les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit.

B. *La norme de contrôle applicable aux questions de fait*

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante » : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12, par. 42; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 57. On cite souvent cette norme, mais rarement les principes justifiant ce degré élevé de retenue. Pour les besoins du présent pourvoi, nous estimons qu'il est utile d'examiner brièvement les diverses considérations de principe qui incitent les cours d'appel à faire preuve d'un degré élevé de retenue à l'égard des conclusions de fait.

L'une des raisons fondamentales de cette retenue générale à l'égard des conclusions des juges de première instance tient à la présomption d'aptitude à juger — présomption selon laquelle les juges de première instance sont tout aussi aptes que les juges d'appel à apporter des solutions justes aux litiges. Kerans, *op. cit.*, dit ceci aux p. 10-11 :

> [TRADUCTION] Si nous nous fions à ces systèmes pour régler les différends, il nous faut présumer que les décisions qu'ils produisent sont justes. La procédure d'appel ne fait en conséquence partie du processus décisionnel que parce que nous reconnaissons que, malgré tous les efforts déployés, des erreurs se produisent. L'appel devrait être l'exception plutôt que la règle, ce qui est d'ailleurs le cas au Canada.

Pour ce qui est des conclusions de fait en particulier, dans *Gottardo Properties*, précité, le juge Laskin de la Cour d'appel de l'Ontario a résumé ainsi les objectifs qui sous-tendent le principe de la retenue judiciaire (au par. 48) :

Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. . . . Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504, at p. 537.

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate

[TRADUCTION] La retenue est souhaitable pour diverses raisons : pour limiter le nombre et la durée des appels, pour promouvoir l'autonomie et l'intégrité des procédures devant le tribunal de première instance ou la cour des requêtes auxquelles de nombreuses ressources ont été consacrées, pour maintenir la confiance des plaideurs, pour reconnaître la compétence du juge de première instance ou du juge des requêtes, et pour réduire la multiplication inutile des procédures qui n'entraînent aucune amélioration correspondante de la qualité de la justice.

Le juge La Forest a exprimé des préoccupations semblables dans l'arrêt *Schwartz*, précité, par. 32 :

Il est établi depuis longtemps que les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait d'un juge de première instance. La règle se justifie principalement par la situation avantageuse dont bénéficie le juge des faits pour ce qui est d'évaluer la crédibilité des témoignages entendus au procès. [. . .] D'autres préoccupations liées à la politique judiciaire ont par ailleurs été invoquées pour justifier la règle. Une intervention illimitée des cours d'appel ferait augmenter considérablement le nombre et la durée des appels en général. D'importantes ressources sont mises à la disposition des tribunaux de première instance pour qu'ils puissent évaluer les faits. Il faut préserver l'autonomie et l'intégrité du procès en faisant preuve de retenue à l'égard des conclusions de fait des tribunaux de première instance; voir R. D. Gibbens, « Appellate Review of Findings of Fact » (1992), 13 *Adv. Q.* 445, aux pp. 445 à 448; *Fletcher c. Société d'assurance publique du Manitoba*, [1990] 3 R.C.S. 191, à la p. 204.

Voir aussi, dans le contexte d'une poursuite touchant un brevet, *Consolboard Inc. c. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 R.C.S. 504, p. 537.

13 Dans *Anderson c. Bessemer City*, 470 U.S. 564 (1985), p. 574-575, la Cour suprême des États-Unis a aussi dressé une liste de raisons qui justifient de faire preuve de retenue à l'égard des conclusions de fait des juges de première instance :

[TRADUCTION] La raison d'être de la retenue à l'égard des conclusions de fait du juge de première instance ne se limite pas au fait que ce dernier est mieux placé pour statuer sur la crédibilité. Le rôle principal du juge de première instance est de constater les faits, et l'expérience qu'il acquiert en s'acquittant de ce rôle lui confère son expertise à cet égard. Si les cours d'appel refaisaient le travail du juge de première instance, il est fort possible que ces efforts n'amélioreraient que marginalement l'exactitude des conclusions de fait, malgré

their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" . . . For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.
>
> The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be

les ressources judiciaires considérables qui devraient être réaffectées à cette fin. En outre, les parties à un appel ont déjà dû consacrer énergies et ressources à convaincre le juge de première instance de la justesse de leur version des faits; ce serait abuser que de leur demander de convaincre trois autres juges en appel. Comme l'a dit notre Cour dans un contexte différent, le procès sur le fond devrait être considéré comme « "l'épreuve principale" [. . .] plutôt que comme un "banc d'essai" ». [. . .] Pour ces motifs, le contrôle des décisions de fait selon la norme de la décision manifestement erronée — et la retenue envers le juge de première instance qu'elle suppose — est la règle, et non l'exception.

D'autres observations sur les avantages dont disposent le juge de première instance ont été formulées par R. D. Gibbens dans « Appellate Review of Findings of Fact » (1991-92), 13 *Advocates' Q.* 445, p. 446 :

> [TRADUCTION] On dit que le juge de première instance possède de l'expertise dans l'évaluation et l'appréciation des faits présentés au procès. Il a également entendu l'affaire au complet. Il a assisté à toute la cause et son jugement final reflète cette connaissance intime de la preuve. Cette connaissance, acquise par le juge au fil des jours, des semaines voire des mois qu'a durés l'affaire, peut se révéler beaucoup plus profonde que celle de la cour d'appel, dont la perception est beaucoup plus limitée et étroite, et souvent déterminée et déformée par les diverses ordonnances et décisions qui sont contestées.
>
> Cet avantage reconnu des tribunaux et des juges de première instance a pour corollaire que les cours d'appel ne sont pas dans une position favorable pour évaluer et apprécier les questions de fait. Les juges des cours d'appel n'examinent que la transcription des témoignages. De plus, les appels ne se prêtent pas à l'examen de dossiers volumineux. Enfin, les appels ont un caractère « focalisateur », en ce qu'ils s'attachent à des questions particulières plutôt qu'à l'ensemble de l'affaire.

À notre avis, ces diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous les trois principes de base suivants.

(1) Réduire le nombre, la durée et le coût des appels

Vu la rareté des ressources dont disposent les tribunaux, il faut encourager l'établissement

encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. *Standard of Review for Inferences of Fact*

We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our

de limites à la portée du contrôle judiciaire. La retenue à l'égard des conclusions de fait du juge de première instance sert cet objectif d'une manière rationnelle. D'importantes ressources sont allouées aux tribunaux de première instance aux fins d'évaluation des faits. Permettre un large contrôle des conclusions factuelles des juges de première instance entraîne une inutile répétition de procédures judiciaires, tout en n'améliorant que peu ou pas le résultat. En outre, de longs appels causent préjudice aux plaideurs moins bien nantis et compromettent l'objectif qui consiste à mettre à leur disposition des recours efficients et efficaces.

(2) Favoriser l'autonomie du procès et son intégrité

17 L'organisation de notre système judiciaire repose sur la présomption que le juge de première instance est qualifié pour trancher l'affaire dont il est saisi et qu'une solution juste et équitable résultera du procès. Des appels fréquents et illimités affaibliraient cette présomption et saperait la confiance du public dans le processus judiciaire. L'appel est l'exception, non la règle.

(3) Reconnaître l'expertise du juge de première instance et sa position avantageuse

18 Le juge de première instance est celui qui est le mieux placé pour tirer des conclusions de fait, parce qu'il a l'occasion d'examiner la preuve en profondeur, d'entendre les témoignages de vive voix et de se familiariser avec l'affaire dans son ensemble. Étant donné que le rôle principal du juge de première instance est d'apprécier et de soupeser d'abondantes quantités d'éléments de preuve, son expertise dans ce domaine et sa connaissance intime du dossier doivent être respectées.

C. *La norme de contrôle applicable aux inférences de fait*

19 Nous estimons nécessaire de nous pencher sur la question de la norme de contrôle appropriée quant aux inférences de fait des juges de première instance, parce que les motifs de notre collègue suggèrent qu'une norme de contrôle moins exigeante peut

view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts . . . . Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. . . .
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580, at p. 583; *Schwartz*, *supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, *per* La Forest J.; *Toneguzzo-Norvell*, *supra*. The United States Supreme Court has taken a similar position: see *Anderson*, *supra*, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

être appliquée à cet égard. En toute déférence, nous sommes d'avis que l'application d'une telle norme de contrôle romprait avec la jurisprudence établie de notre Cour en la matière et serait contraire aux principes justifiant le respect d'une attitude empreinte de retenue à l'égard des constatations de fait.

Notre collègue reconnaît que dans l'arrêt *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353, notre Cour a jugé qu'il fallait faire preuve du même degré de retenue à l'égard des inférences de fait du juge de première instance qu'à l'égard de ses constatations de fait. Voici le passage pertinent des motifs de madame le juge Wilson (aux p. 388-389) :

> C'est maintenant un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne soit prouvé que le juge de première instance a commis une erreur manifeste et dominante qui a faussé son appréciation des faits [. . .] Même si une constatation de fait ne dépend pas de la crédibilité, notre Cour a pour principe de ne pas intervenir pour réviser les constatations des tribunaux de première instance . . .
>
> Et même dans les cas où une constatation de fait n'est ni liée inextricablement à la crédibilité du témoin ni fondée sur une mauvaise compréhension de la preuve, la règle reste la même : l'examen en appel devrait se limiter aux cas où une erreur manifeste a été commise. C'est pourquoi, dans l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, notre Cour a refusé d'infirmer la conclusion du juge de première instance que certaines marchandises étaient défectueuses, disant, aux pp. 84 et 85, qu'une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve (citant *Métivier c. Cadorette*, [1977] 1 R.C.S. 371).

Notre Cour a réitéré cette opinion à maintes reprises : voir *Palsky c. Humphrey*, [1964] R.C.S. 580, p. 583; *Schwartz*, précité, par. 32; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, p. 426, le juge La Forest; *Toneguzzo-Norvell*, précité. La Cour suprême des États-Unis a adopté une position semblable : voir *Anderson*, précité, p. 577.

Dans son examen de la norme de contrôle applicable aux inférences de fait du juge de première instance, notre collègue dit ce qui suit, au par. 103 :

In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. . . . While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. [. . .] Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait. [Nous soulignons.]

En toute déférence, nous estimons que ce passage comporte deux erreurs. Premièrement, selon nous, la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte.

22

Deuxièmement, nous croyons en toute déférence qu'en faisant une distinction analytique entre les conclusions factuelles et les inférences factuelles, le passage précité pourrait amener les cours d'appel à soupeser la preuve à nouveau et sans raison. Bien que nous partagions l'opinion selon laquelle il est loisible à une cour d'appel de conclure qu'une inférence de fait tirée par le juge de première instance est manifestement erronée, nous tenons toutefois à faire la mise en garde suivante : lorsque des éléments de preuve étayent cette inférence, il sera difficile à une cour d'appel de conclure à l'existence d'une erreur manifeste et dominante. Comme nous l'avons dit précédemment, les tribunaux de première instance sont dans une position avantageuse pour apprécier et soupeser de vastes quantités d'éléments de preuve. Pour tirer une inférence factuelle, le juge de première instance doit passer les faits pertinents au crible, en apprécier la valeur probante et tirer une conclusion factuelle. En conséquence, lorsque cette conclusion est étayée par des éléments de preuve, modifier cette conclusion équivaut à modifier le poids accordé à ces éléments par le juge de première instance.

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

Nous rappelons qu'il n'appartient pas aux cours d'appel de remettre en question le poids attribué aux différents éléments de preuve. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle. La cour d'appel n'est pas habilitée à modifier une conclusion factuelle avec laquelle elle n'est pas d'accord, lorsque ce désaccord résulte d'une divergence d'opinion sur le poids à attribuer aux faits à la base de la conclusion. Comme nous le verrons plus loin, nous estimons en toute déférence que constitue un exemple de ce genre d'intervention inadmissible à l'égard d'une inférence de fait la conclusion de notre collègue selon laquelle la juge de première instance a commis une erreur en prêtant à la municipalité la connaissance du danger dans la présente affaire.

De plus, en établissant une distinction entre les inférences de fait et les conclusions de fait, notre collègue dit, au par. 102, que la retenue à l'égard des secondes « repose principalement sur le fait que, puisqu'il [le juge de première instance] est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix », justification non pertinente dans le cas des inférences de fait. En toute déférence, nous ne partageons pas cette opinion. Comme nous l'avons dit plus tôt, il existe de nombreuses raisons de faire preuve de retenue à l'égard des constatations de fait du juge de première instance, dont plusieurs valent autant pour toutes ses conclusions factuelles. Cette observation a été faite dans l'arrêt *Schwartz*, précité. Après avoir énuméré les nombreuses considérations de politique judiciaire invoquées pour justifier la règle de la retenue à l'égard des constatations de fait, le juge La Forest, au par. 32, ajoute :

> Cela explique pourquoi la règle [selon laquelle les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait des juges de première instance] s'applique non seulement lorsque la crédibilité des témoins est en cause, quoiqu'elle puisse alors s'appliquer plus strictement, mais également à toutes les conclusions de fait tirées par le juge de première instance. [Nous soulignons.]

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell*, *supra.* McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

Although the trial judge will always be in a distinctly privileged position when it comes to

Notre Cour a récemment donné son appui à la règle de la retenue judiciaire à l'égard de l'ensemble des conclusions factuelles du juge de première instance dans l'arrêt *Toneguzzo-Norvell*, précité. Madame le juge McLachlin (maintenant Juge en chef), qui a rédigé le jugement unanime de notre Cour, a dit ceci, aux p. 121-122 :

> Une cour d'appel n'est manifestement pas autorisée à intervenir pour le simple motif qu'elle perçoit la preuve différemment. Il appartient au juge de première instance, et non à la cour d'appel, de tirer des conclusions de fait en matière de preuve.
>
> . . .
>
> Je reconnais que le principe de non-intervention d'une cour d'appel dans les conclusions de fait d'un juge de première instance ne s'applique pas avec la même vigueur aux conclusions tirées de témoignages d'expert contradictoires lorsque la crédibilité de ces derniers n'est pas en cause. Il n'en demeure pas moins que, selon notre système de procès, il appartient essentiellement au juge des faits, en l'espèce le juge de première instance, d'attribuer un poids aux différents éléments de preuve. [Nous soulignons.]

Nous considérons que ces propos du juge McLachlin signifient que, bien que le même degré élevé de retenue s'applique à l'ensemble des décisions factuelles du juge de première instance, lorsqu'une telle conclusion factuelle repose sur l'appréciation de la crédibilité d'un témoin, il faut reconnaître l'énorme avantage dont jouit le juge de première instance à cet égard. Cela ne veut toutefois pas dire qu'une norme de contrôle moins rigoureuse s'applique lorsque la question en jeu ne porte pas sur la crédibilité d'un témoin, ni qu'il n'existe pas de nombreuses considérations de principe justifiant de faire montre de retenue à l'égard de toutes les conclusions factuelles. À notre avis, cela ressort clairement du passage souligné dans l'extrait précité. Le point essentiel est qu'une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue.

25

Bien que le juge de première instance soit toujours dans une position privilégiée pour apprécier

assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

la crédibilité des témoins, ce n'est pas là le seul domaine où il bénéficie d'un avantage sur les juges des cours d'appel. Parmi les avantages dont jouit le juge de première instance sur le plan des inférences factuelles, mentionnons son expertise relative en matière d'appréciation et d'évaluation de la preuve, de même que la connaissance unique qu'il possède de la preuve souvent abondante produite par les parties. Cette familiarité avec toute la trame factuelle lui est d'une grande utilité lorsque vient le moment de tirer des conclusions de fait. En outre, les considérations relatives au coût, au nombre et à la durée des appels sont tout aussi pertinentes pour ce qui est des inférences de fait que pour ce qui est des conclusions de fait, et justifient l'application aux unes comme aux autres d'une norme empreinte de retenue. En conséquence, nous ne partageons pas l'opinion de notre collègue selon laquelle la raison principale justifiant de faire montre de retenue à l'égard des conclusions de fait est la possibilité qu'a le juge de première instance d'observer les témoins directement. Nous sommes d'avis que le juge de première instance jouit, par rapport aux juges d'appel, de nombreux avantages qui influent sur toutes les conclusions de fait et que, même si ces avantages n'existaient pas, d'autres considérations impérieuses justifient de faire montre de retenue à l'égard des inférences de fait. Par conséquent, nous concluons en soulignant qu'il n'y a qu'une seule et unique norme de contrôle applicable à toutes les conclusions factuelles tirées par le juge de première instance, soit celle de l'erreur manifeste et dominante.

D. *Standard of Review for Questions of Mixed Fact and Law*

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal

D. *La norme de contrôle applicable aux questions mixtes de fait et de droit*

D'entrée de jeu, il importe de distinguer les questions mixtes de fait et de droit des conclusions factuelles (qu'il s'agisse de conclusions directes ou d'inférences). Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits : *Canada (Directeur des enquêtes et des recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35. Par contre, les conclusions ou les inférences de fait exigent que soit tirée une conclusion factuelle d'un ensemble de faits. Tant les questions mixtes de fait et de droit que les questions

or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the *Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the

de fait exigent souvent du tribunal qu'il tire des inférences; la différence réside dans le caractère — juridique ou factuel — de ces inférences. En raison de cette similitude, on confond parfois les deux catégories de questions. Cette confusion a été soulignée par A. L. Goodhart dans « Appeals on Questions of Fact » (1955), 71 *L.Q.R.* 402, p. 405 :

> [TRADUCTION] La distinction entre [la perception des faits et l'appréciation de ceux-ci] a tendance à être embrouillée parce que nous utilisons la formule « le juge a conclu au fait que le défendeur avait été négligent », alors que ce que nous voulons dire, c'est que « le juge a constaté le fait que le défendeur a commis les actes A et B et, suivant son opinion, il a conclu qu'il n'était pas raisonnable pour ce dernier d'avoir agi ainsi ».

L'affaire qui nous occupe présente des exemples des deux catégories de questions. Pour répondre à la question de savoir si la municipalité aurait dû connaître le danger présenté par le chemin, il faut apprécier les faits à l'origine de l'affaire et tirer des conclusions factuelles relativement à la connaissance de la municipalité. Il faut appliquer à ces conclusions factuelles une norme juridique qui, en l'occurrence, est énoncée au par. 192(3) de la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. De même, pour pouvoir conclure à la négligence, il faut apprécier les faits essentiels, en tirer des conclusions factuelles puis en dégager une inférence, c'est-à-dire se demander si la municipalité a oui ou non omis de respecter la norme de diligence raisonnable et si elle a, par conséquent, été négligente ou non.

27

Une fois établi que la question examinée exige l'application d'une norme juridique à un ensemble de faits et qu'il s'agit donc d'une question mixte de fait et de droit, il faut alors déterminer quelle est la norme de contrôle appropriée et l'appliquer. Vu les diverses normes de contrôle qui s'appliquent aux questions de droit et aux questions de fait, il est souvent difficile de déterminer celle qui s'applique. Dans l'arrêt *Southam*, précité, par. 39, notre Cour a expliqué comment une erreur touchant une question mixte de fait et de droit peut constituer une pure erreur de droit, assujettie à la norme de la décision correcte :

> . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les

decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, at para. 37:

> . . . the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that

faits, il ne prend en considération que A, B, et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Par conséquent, ce qui peut paraître une question mixte de fait et de droit peut, après plus ample examen, se révéler en réalité une pure erreur de droit.

Cependant, lorsque l'erreur ne constitue pas une erreur de droit, une norme de contrôle plus exigeante s'impose. Dans les cas où le juge des faits examine tous les éléments de preuve que le droit lui commande de prendre en considération mais en tire néanmoins une conclusion erronée, il commet alors une erreur mixte de fait et de droit, qui est assujettie à une norme de contrôle plus rigoureuse : *Southam*, précité, par. 41 et 45. Bien que facile à énoncer, cette distinction peut s'avérer difficile à établir en pratique parce que les questions mixtes de fait et de droit s'étalent le long d'un spectre comportant des degrés variables de particularité. Cette difficulté a été soulignée dans l'arrêt *Southam*, par. 37 :

> . . . il arrive que les faits dans certaines affaires soient si particuliers, de fait qu'ils soient si uniques, que les décisions concernant la question de savoir s'ils satisfont aux critères juridiques n'ont pas une grande valeur comme précédents. Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir.

Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, notre

a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84).

Cour a jugé que les cours d'appel devaient faire preuve de retenue à l'égard de la conclusion du juge de première instance. Dans l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, p. 4, le juge Dickson (plus tard Juge en chef) a infirmé la décision de la Cour d'appel de la Colombie-Britannique portant que le juge de première instance avait erronément conclu à la négligence, pour le motif qu'« une cour d'appel commet une erreur lorsqu'elle infirme un jugement de première instance s'il n'y a pas une erreur manifeste et dominante, et si l'interprétation de l'ensemble de la preuve est le seul point en litige » (voir aussi l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, p. 84).

This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

30

Il convient d'appliquer cette norme de contrôle plus exigeante aux conclusions de négligence, étant donné que de telles conclusions peuvent également être tirées par des jurys en première instance. Si la norme applicable était celle de la décision correcte, il s'ensuivrait que les cours d'appel appliqueraient cette norme pour contrôler même des conclusions de négligence tirées par jurys. Actuellement, il n'y a ouverture à un tel contrôle que si le juge du procès a donné des directives erronées au jury sur le droit applicable. Suivant la règle générale, les tribunaux font montre d'une grande retenue envers les conclusions des jurys dans les procès civils pour négligence :

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.
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> (*McCannell v. McLean*, [1937] S.C.R. 341, at p. 343)

> [TRADUCTION] Le principe pertinent a été énoncé dans bon nombre d'arrêts de notre Cour, à savoir qu'il n'y a pas lieu d'écarter le verdict d'un jury parce qu'il va à l'encontre du poids de la preuve, à moins que le verdict en question ne soit nettement déraisonnable et injuste au point de convaincre le tribunal qu'aucun jury examinant la preuve dans son ensemble et agissant de façon judiciaire n'aurait pu le prononcer.
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> (*McCannell c. McLean*, [1937] R.C.S. 341, p. 343)

See also *Dube v. Labar*, [1986] 1 S.C.R. 649, at p. 662, and *C.N.R. v. Muller*, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury rein-

Voir également *Dube c. Labar*, [1986] 1 R.C.S. 649, p. 662, et *C.N.R. c. Muller*, [1934] 1 D.L.R. 768 (C.S.C.). Adopter la norme de la décision correcte aurait pour effet de modifier le droit et de porter atteinte au rôle traditionnel du jury. Par conséquent, le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux

forces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing

fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys.

Toutefois, lorsque le juge du procès conclut erronément à la négligence par suite d'une formulation incorrecte de la norme juridique, cela peut constituer une erreur de droit. Cette distinction a été faite par le juge Cory dans l'arrêt *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670, p. 690-691 :

> La définition de la norme de diligence est une question mixte de droit et de fait. Il incombera habituellement au juge du procès de déterminer, compte tenu des circonstances de l'espèce, ce qui constituerait une conduite raisonnable de la part de la personne raisonnable légendaire placée dans la même situation. Dans certains cas, un simple rappel suffira, tandis que dans d'autres, par exemple lorsqu'un très jeune enfant est passager, le conducteur peut avoir à attacher lui-même la ceinture de sécurité de l'enfant. Cependant, en l'espèce, le conducteur n'a pris aucune mesure pour veiller à ce que l'enfant porte sa ceinture de sécurité. Il s'ensuit que la décision du juge du procès sur la question équivalait à une conclusion qu'aucune obligation n'incombait au conducteur, ce qui constituait une erreur de droit.

L'arrêt *Galaske*, précité, illustre bien l'idée exposée dans l'arrêt *Southam*, précité, selon laquelle il est possible de dégager une pure question de droit de ce qui paraît être une question mixte de fait et de droit. Toutefois, en l'absence d'erreur de droit ou d'une erreur manifeste et dominante, la conclusion de négligence tirée par un juge de première instance ne doit pas être modifiée.

L'analogie qui peut être établie entre les inférences de fait et les questions mixtes de fait et de droit étaye notre conclusion. Comme nous l'avons dit précédemment, dans les deux cas des inférences doivent être tirées des faits à l'origine de l'affaire. La différence dépend de la question de savoir si l'inférence se rapporte à une norme juridique ou non. Parce que le résultat des deux processus est tributaire du poids accordé à la preuve, les diverses considérations de principe justifiant de faire montre de retenue à l'égard des inférences de

deference to the trial judge's inferences of mixed fact and law.

Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

A good example of this subtle principle can be found in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an

fait du juge de première instance justifient également, dans une certaine mesure, de faire de même à l'égard de ses inférences mixtes de fait et de droit.

33 Par contre, lorsqu'il peut être établi que la conclusion erronée du juge de première instance découle d'une erreur quant à la norme juridique à appliquer, ce facteur touche au rôle de création du droit de la cour d'appel, et une retenue moins élevée s'impose, conformément à la norme de la décision « correcte ». Notre Cour a apporté cette nuance dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 48-49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou, en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. [Nous soulignons.]

34 Un bon exemple de ce principe subtil est l'arrêt *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497, p. 515-516. La question en litige dans cette affaire consistait à déterminer si certaines personnes faisaient partie des âmes dirigeantes d'une société. Il s'agit d'une question mixte de droit et de fait. Toutefois, la conclusion erronée des juridictions inférieures était facilement imputable à une erreur de droit qui pouvait être dégagée de la question mixte de droit et de fait. La question de droit ainsi isolable était celle des fonctions que devait remplir une personne pour qu'on puisse à bon droit la considérer comme une « âme dirigeante » de la société (p. 515-516). Le juge Iacobucci s'est exprimé ainsi au nom des juges de la majorité, à la p. 526 :

> En toute déférence, je crois que les juridictions inférieures ont trop insisté sur l'importance de la subdélégation en l'espèce. Le facteur clé qui permet de distinguer les âmes dirigeantes des employés ordinaires est la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale, plutôt que

operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d'autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de qualifier une personne d'« âme dirigeante » d'une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s'imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l'application d'une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l'arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante.

In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. *The Appropriate Standard of Review*

We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule

37 À cet égard, nous ne pouvons en toute déférence pas souscrire à l'opinion de notre collègue lorsqu'il affirme, au par. 106, qu'« [u]ne fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel ». À notre avis, il est bien établi en droit que la question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe isolable en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit.

III. Application des principes qui précèdent à l'espèce : la norme de diligence applicable à la municipalité

A. *La norme de contrôle appropriée*

38 À l'instar de notre collègue, nous sommes d'avis que la norme de diligence applicable à la municipalité a été convenablement énoncée par le juge Martin dans l'arrêt *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (C.A. Sask.), p. 558-559 :

> [TRADUCTION] L'étendue de l'obligation légale d'entretien qui incombe aux corporations municipales à l'égard des routes qui se trouvent sur leur territoire a été énoncée de diverses façons dans nombre de décisions publiées. Il est toutefois possible de dégager la règle générale suivante de ces décisions : le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La question de savoir en quoi consiste un état raisonnable d'entretien est une question de fait, qui est fonction de toutes

by which to determine another case where the facts are different . . . .

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in *Southam*, *supra*. The trial judge applied all the elements of the *Partridge* standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

B. *The Trial Judge Did Not Commit an Error of Law*

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, *supra*, where Bastarache J. says, at para. 15:

. . . omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

les circonstances de l'espèce; le terme « entretien » est une notion relative et, par conséquent, les faits propres à une affaire donnée ne permettent pas de dégager de règle déterminée permettant de trancher une autre affaire présentant des circonstances différentes . . .

Toutefois, contrairement à notre collègue, nous estimons que la juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté la norme de diligence à laquelle elle était tenue, et que la juge n'a donc pas commis une erreur de droit du genre de celle décrite dans l'arrêt *Southam*, précité. La juge de première instance a appliqué aux faits de l'espèce tous les éléments du critère énoncé dans l'arrêt *Partridge*, et sa conclusion que la municipalité défenderesse n'a pas respecté ce critère ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante.

B. *La juge de première instance n'a pas commis d'erreur de droit*

Nous soulignons que notre collègue fonde sa décision que la municipalité a respecté la norme de diligence sur sa conclusion que la juge de première instance a négligé de prendre en compte le comportement de l'automobiliste moyen et n'a donc pas appliqué la bonne norme de diligence, commettant ainsi une erreur de droit le justifiant de réexaminer la preuve (par. 114). Pour les besoins de l'analyse du critère de l'automobiliste moyen ou raisonnable, nous tenons au départ à signaler que l'omission d'examiner en profondeur un facteur pertinent, voire de ne pas l'examiner du tout, n'est pas en soi un fondement suffisant pour justifier une cour d'appel de réexaminer la preuve. Ce principe a été clairement énoncé dans l'arrêt récent *Van de Perre*, précité, où le juge Bastarache a dit ceci, au par. 15 :

. . . des omissions dans les motifs ne signifieront pas nécessairement que la cour d'appel a compétence pour examiner la preuve entendue au procès. Comme le dit l'arrêt *Van Mol (Guardian ad Litem of) c. Ashmore* (1999), 168 D.L.R. (4th) 637 (C.A.C.-B.), autorisation d'appel refusée [2000] 1 R.C.S. vi, une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée. Faute d'une telle conviction rationnelle, la cour d'appel ne peut pas réexaminer la preuve.

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge*, *supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

À notre avis, comme nous allons le voir, la présente espèce ne peut faire naître la conviction rationnelle que la juge de première instance a oublié d'examiner la question du conducteur moyen, en a fait abstraction ou l'a mal interprétée. Il serait donc erroné de réexaminer la preuve relative à cette question.

40 Le fait que, dès le départ, la juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen ressort clairement du fait qu'elle a commencé son examen de la norme de diligence en formulant le critère approprié, c'est-à-dire en citant le passage susmentionné de l'arrêt *Partridge*, précité. En l'absence d'indications claires qu'elle a subséquemment modifié sa méthode d'analyse, cette mention initiale de la norme juridique appropriée constitue un indice solide qu'il s'agit bien de la norme qu'elle a appliquée. Non seulement rien n'indique qu'elle s'est écartée du critère énoncé, mais d'autres indices étayent la conclusion qu'elle a appliqué le critère de l'arrêt *Partridge*. Le premier de ces indices est que la juge s'est bel et bien interrogée, tant explicitement qu'implicitement, sur la conduite de l'automobiliste moyen ou raisonnable s'approchant du virage. Le deuxième indice est qu'elle a fait état des témoignages des experts, MM. Anderson et Werner, qui ont tous deux analysé le comportement de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait que la juge de première instance ait imputé une partie de la responsabilité à M. Nikolaisen indique qu'elle a évalué sa conduite eu égard au critère du conducteur moyen, et qu'elle a donc pris en compte la conduite de ce dernier.

41 On trouve l'analyse relative à l'automobiliste moyen dans cet extrait du jugement de première instance qui suit immédiatement l'énoncé de la norme de diligence requise :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.

. . . where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Underlining added; italics in original.]

([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide.

. . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Nous soulignons; en italique dans l'original.]

([1998] 5 W.W.R. 523, par. 84-86)

À notre avis, cet extrait indique que la juge de première instance a effectivement pris en compte la façon dont l'automobiliste prenant des précautions normales s'approcherait du virage en question. Qualifier le virage de [TRADUCTION] « danger caché », danger qui « n'est pas facilement décelable par les usagers du chemin », implique que le danger en est un qu'il est impossible de prévoir. Il s'ensuit que, même si l'automobiliste prend des précautions normales, il ne pourra pas réagir à la présence du virage. Par ailleurs, la juge de première instance a explicitement fait état de la conduite de l'automobiliste prenant des précautions normales : [TRADUCTION] « [I]l est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86 (nous soulignons)).

With respect to the speed of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 kilometres an hour road until you are too far into the tight curve to be able to respond".

43 Relativement à la vitesse à laquelle les automobilistes s'approchent du virage, il existe également un indice confirmant que la juge de première instance a pris en compte la conduite de l'automobiliste moyen. Premièrement, elle a dit qu'elle acceptait les témoignages de MM. Anderson et de Werner en ce qui concerne la conclusion que la courbe constituait un danger pour le public. Leurs témoignages suggèrent qu'une vitesse de 60 à 80 km/h est une vitesse raisonnable à certains endroits de ce chemin et que, à cette vitesse, la courbe constitue un danger. Leurs témoignages indiquent également qu'ils estiment de façon générale que la courbe est dangereuse. De dire M. Anderson, le virage est difficile à prendre à des [TRADUCTION] « vitesses normales ». Il ajoute que, [TRADUCTION] « si on ne connaît pas la présence de ce virage à cet endroit, le caractère prononcé du virage, et qu'on ne s'aperçoit pas qu'il y a un virage avant de s'être déjà engagé trop loin dans celui-ci, il faut tourner dans un rayon inférieur à 118 mètres pour corriger sa trajectoire afin d'être en mesure de prendre le deuxième virage ». Il affirme également qu' [TRADUCTION] « on peut être amené à croire qu'on se trouve sur une route où il est possible de rouler à 80 km/h, jusqu'à ce qu'on soit engagé trop loin dans le virage serré pour être capable de réagir ».

The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the ordinary

44 La Cour d'appel a jugé que, vu la nature et l'état du chemin Snake Hill, la prétention selon laquelle l'automobiliste moyen roulerait sur cette route rurale à 80 km/h était insoutenable. Toutefois, il ressort clairement des motifs de la juge de première instance qu'elle ne considérait pas que l'automobiliste moyen s'approcherait du virage à 80 km/h. Elle a plutôt conclu, à partir des témoignages des experts, que [TRADUCTION] « ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide » (par. 85 (en italique dans l'original)). De cette constatation, conjuguée à celle que le virage était caché et imprévu, il est logique de conclure que la juge de première instance a estimé que l'automobiliste prenant des précautions normales pouvait aisément être amené à s'approcher du virage à des vitesses supérieures à la vitesse sécuritaire pour le prendre, et se retrouver ensuite pris au dépourvu. La juge de première

motorist and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre*, *supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the *Partridge* test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others:

instance a donc conclu que le virage était dangereux pour l'automobiliste moyen et il s'ensuit qu'elle a appliqué la norme de diligence appropriée.

En toute déférence, notre collègue commet une erreur en souscrivant à la conclusion de la Cour d'appel selon laquelle la juge de première instance aurait dû examiner de manière plus approfondie la conduite de l'automobiliste moyen (par. 124). Il écrit ceci, au par. 119 :

> Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d'« intrinsèquement » dangereux ne vide pas la question.

Plus loin, il dit : « À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin » (par. 125). En toute déférence, considérer que la juge de première instance aurait dû faire cette analyse particulière dans ses motifs est incompatible avec l'arrêt *Van de Perre*, précité, lequel établit clairement que l'omission ou le défaut d'analyser un facteur en profondeur ne constitue pas, en soi, une raison justifiant de modifier les conclusions du juge de première instance et de réexaminer la preuve. Comme nous l'avons dit précédemment, il est clair que, quoique la juge de première instance n'ait peut-être pas fait une analyse approfondie de ce volet du critère énoncé dans l'arrêt *Partridge*, elle a effectivement tenu compte de ce facteur en formulant le critère approprié puis en l'appliquant aux faits de l'espèce.

Nous tenons à souligner que, en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins. Toutefois, cela ne suffit pas pour établir qu'elle a « oublié, négligé d'examiner ou mal interprété » la preuve. La juge de première instance disposait de l'ensemble du dossier et on peut présumer qu'elle l'a étudié d'un bout à l'autre, en l'absence d'autre indication qu'elle a oublié, négligé d'examiner ou mal interprété la preuve, commettant ainsi une erreur de droit. Le juge de première

Toneguzzo-Norvell, *supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the ordinary driver, not the negligent driver.

To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from *Partridge*, *supra*, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the

instance peut retenir la déposition de certains témoins de préférence à d'autres : *Toneguzzo-Norvell*, précité, p. 123. Le fait pour le juge de première instance de s'appuyer sur certains témoignages plutôt que sur d'autres ne peut à lui seul fournir l'assise d'une « conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). Cette conclusion est compatible avec la portée restreinte de l'examen qu'il convient de faire en appel dans la présente affaire.

47 Une autre indication que la juge de première instance s'est interrogée sur la façon dont conduit l'automobiliste moyen sur le chemin Snake Hill est sa conclusion que M. Nikolaisen et la municipalité ont tous deux manqué à leur obligation de diligence envers M. Housen, et que le défendeur Nikolaisen était responsable de négligence concourante dans une proportion de 50 p. 100. Comme une conclusion de négligence implique un manquement à la norme de diligence habituelle, et comme la négligence de M. Nikolaisen était liée à sa manière de conduire dans le virage, la conclusion que sa conduite à cet endroit ne respectait pas le critère du conducteur moyen suppose qu'on s'est demandé comment ce conducteur s'approcherait du virage. La distinction qu'a établie la juge de première instance entre la négligence dont a fait preuve M. Nikolaisen lorsqu'il roulait sur le chemin et celle dont la municipalité a fait montre en omettant d'installer un panneau d'avertissement prouve qu'elle n'a pas perdu de vue la norme juridique régissant la municipalité et l'application de cette norme aux faits, et que la juge a appliqué cette norme au conducteur moyen, et non au conducteur négligent.

48 En résumé, dans ses motifs la juge de première instance a d'abord énoncé la norme de diligence requise par l'arrêt *Partridge*, précité, relativement à la conduite de l'automobiliste moyen. Elle a ensuite appliqué cette norme aux faits, se reportant encore une fois à la conduite de l'automobiliste moyen. Enfin, vu sa conclusion que la municipalité avait manqué à cette norme de diligence, elle a réparti la responsabilité entre le conducteur

ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-42) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

C. *The Trial Judge Did Not Commit A Palpable or Overriding Error*

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge ([2000] 4 W.W.R. 173, 2000 SKCA 12, at para. 84). With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than

et la municipalité d'une manière qui, une fois de plus, atteste la prise en compte du critère du conducteur moyen. En conséquence, nous en venons irrésistiblement à la conclusion que la juge de première instance a pris en compte et appliqué ce critère.

Par conséquent, nous estimons que la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne la norme de diligence à laquelle était tenue la municipalité. Sur ce point, nous ne souscrivons pas aux raisons sur lesquelles se fondent notre collègue pour réexaminer la preuve (aux par. 122 à 142) et nous considérons ce réexamen comme une intervention injustifiée relativement à la conclusion de la juge de première instance portant que la municipalité a manqué à la norme de diligence à laquelle elle était tenue. Cette conclusion porte sur une question mixte de droit et de fait et elle ne peut pas être infirmée en l'absence d'erreur manifeste et dominante. Comme nous le verrons plus loin, nous sommes d'avis qu'aucune erreur de cette nature n'a été commise, car la juge de première instance a fait une analyse raisonnable, fondée sur son appréciation de la preuve.

C. *La juge de première instance n'a pas commis d'erreur manifeste ou dominante*

Malgré cette norme de contrôle sévère, la Cour d'appel a jugé que la juge de première instance avait commis une erreur manifeste et dominante ([2000] 4 W.W.R. 173, 2000 SKCA 12, par. 84). En toute déférence, cette conclusion repose sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, présomption qu'adopte également notre collègue dans ses motifs (par. 133).

Comme nous l'avons vu plus tôt, la conclusion de la juge de première instance était que l'automobiliste moyen pourrait s'approcher du virage à une vitesse supérieure à 60 km/h sur chaussée sèche, et 50 km/h sur chaussée humide, mais qu'à ces vitesses le virage était dangereux. Cette conclusion n'était pas fondée sur une vitesse précise à laquelle l'automobiliste moyen s'approcherait du virage. La juge de première instance a plutôt estimé que, parce que le virage est caché et plus serré que ce à quoi on

the speed at which it would be safe to negotiate the curve.

As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a *de facto* speed limit of 80 km/h taken from *The Highway Traffic Act*, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be

s'attend normalement, il était possible qu'un automobiliste prenant des précautions normales s'en approche à une vitesse supérieure à la vitesse sécuritaire pour prendre le virage.

52 Comme nous allons le préciser plus loin, nous sommes d'avis que non seulement cette appréciation est-elle loin de constituer une erreur manifeste et dominante, mais elle est une réponse judicieuse et logique eu égard à l'abondance d'éléments de preuve contradictoires. Il serait irréaliste de fixer une quelconque vitesse à laquelle l'automobiliste moyen s'approcherait vraisemblablement du virage. Les conclusions de la juge de première instance à cet égard découlent d'une évaluation raisonnable et réaliste de l'ensemble de la preuve.

53 En concluant à l'existence d'une erreur manifeste et dominante, le juge Cameron de la Cour d'appel s'est appuyé sur le fait que la juge de première instance avait retenu les témoignages d'expert de MM. Anderson et Werner, lesquels étaient fondés sur la vitesse limite *de facto* de 80 km/h prévue par la *Highway Traffic Act*, S.S. 1986, ch. H-3.1. Toutefois, que le témoignage des experts ait été ou non fondé sur cette limite, la juge de première instance n'a pas retenu cette vitesse comme étant celle à laquelle l'automobiliste moyen s'approche du virage. Rappelons que la juge de première instance a estimé qu'il n'était pas possible d'aborder le virage en sécurité à une vitesse supérieure à 60 km/h sur chaussée sèche et 50 km/h sur chaussée humide, et il existe au dossier des éléments étayant cette conclusion. Par exemple, M. Anderson a dit ceci :

[TRADUCTION] Si vous ne prévoyez pas l'arrivée du virage et que vous vous engagez trop loin dans celui-ci avant d'amorcer votre manœuvre correctrice, vous risquez d'avoir des ennuis même à, probablement à 60. À cinquante il faudrait que vous soyez engagé assez loin, mais à 60 vous pourriez certainement en avoir.

Il convient également de signaler que MM. Anderson et Werner auraient tous deux recommandé l'installation d'un panneau avertissant les automobilistes de l'imminence du virage et fixé la vitesse maximale permise à 50 km/h.

54 Le virage ne pouvait manifestement pas être pris en sécurité à 80 km/h, mais il ne pouvait l'être non

negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner in its entirety. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a *de facto* speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a *de facto* speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 129-42) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 129). However, the trial judge, basing her assessment on other portions of the expert evidence, found that the nature of the road was such that a motorist could be

plus à des vitesses beaucoup plus réduites. Il convient également de souligner que la juge de première instance n'a pas retenu intégralement les témoignages d'expert de MM. Anderson et Werner. Elle a dit : [TRADUCTION] « Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner » (par. 85 (nous soulignons)). Ces propos ne permettent pas de présumer qu'elle acceptait une vitesse limite *de facto* de 80 km/h, particulièrement si l'on se rappelle (1) qu'elle a dit qu'on pouvait rouler en sécurité à des vitesses de 50 et de 60 km/h, et (2) que ces deux experts ont considéré que le chemin n'était pas sûr même à des vitesses bien inférieures à 80 km/h.

Puisque la juge de première instance n'a pas fondé son analyse de la norme de diligence sur une vitesse limite *de facto* de 80 km/h, il s'ensuit que la conclusion de la Cour d'appel relativement à l'existence d'une erreur manifeste et dominante ne saurait être confirmée.

En outre, vu la portée restreinte de la révision en appel, on ne saurait conclure qu'un juge de première instance a négligé d'examiner la preuve, l'a mal interprétée ou est arrivé à des conclusions erronées, simplement parce que le tribunal d'appel tire des inférences divergentes de la preuve et décide d'accorder plus d'importance à certains éléments qu'à d'autres. Étant d'avis que la juge de première instance n'a pas commis d'erreur de droit en concluant que la municipalité avait violé la norme de diligence à laquelle elle était tenue, nous estimons aussi, en toute déférence, que le réexamen de la preuve auquel procède notre collègue sur cette question (aux par. 129 à 142) constitue une intervention injustifiée relativement aux conclusions de la juge de première instance, fondée sur une divergence d'opinions quant aux inférences devant être tirées de la preuve et au poids qu'il convient d'accorder à divers éléments. Par exemple, notre collègue est d'avis, sur la foi de certaines parties des témoignages d'expert, qu'un conducteur raisonnable prenant des précautions normales roulerait sur une route rurale à une vitesse maximale de 50 km/h, parce qu'il aurait de la difficulté à voir que le virage est serré et s'il vient des véhicules en sens inverse (par. 129). Or, se

deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal . . . that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

As noted by McLachlin J. in *Toneguzzo-Norvell*, *supra*, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell*, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach

fondant sur d'autres parties des témoignages d'expert, la juge de première instance a estimé que la nature du chemin était telle qu'un automobiliste pourrait être amené à croire que le chemin ne comporte pas de virage serré et, de ce fait, à y rouler normalement, sans soupçonner l'existence du danger caché.

57 En l'espèce, nous sommes en présence de témoignages d'expert contradictoires sur la question de la vitesse à laquelle l'automobiliste moyen s'approcherait du virage du chemin Snake Hill. Les inférences différentes que la juge de première instance et la Cour d'appel tirent de la preuve équivalent à une divergence d'opinion quant au poids à accorder à divers éléments de preuve contradictoires. Le témoin Sparks a émis l'opinion suivante, que cite également notre collègue : [TRADUCTION] « [Si] vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs [. . .] que l'attention et la prudence s'imposent ». M. Nikolaisen, et même MM. Anderson et Werner ont d'ailleurs témoigné au même effet. Cela contraste avec l'affirmation de MM. Anderson et Werner selon laquelle un conducteur raisonnable serait [TRADUCTION] « amené » à croire qu'il se trouve sur un chemin où l'on peut rouler à 80 km/h.

58 Comme l'a souligné madame le juge McLachlin, à la p. 122 de l'arrêt *Toneguzzo-Norvell*, précité, « selon notre système de procès, il appartient essentiellement au juge des faits [. . .] d'attribuer un poids aux différents éléments de preuve ». Dans cette affaire, notre Cour a conclu à l'unanimité que la Cour d'appel avait commis une erreur en modifiant les conclusions de fait du juge de première instance, au motif qu'il était loisible à celui-ci d'accorder un poids moins grand à certains éléments de preuve et à accepter d'autres éléments contradictoires, qu'il considérait plus convaincants. (*Toneguzzo-Norvell*, p. 122-123). De même, en l'espèce, il n'y a pas lieu de modifier les conclusions de fait de la juge de première instance au sujet de la vitesse à laquelle il faudrait approcher du virage. Il lui était loisible d'accorder plus de poids à certaines parties des témoignages de MM. Anderson et Werner, dans les cas où la preuve était contradictoire. Son

the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

IV. Knowledge of the Municipality

59 We agree with our colleague that s. 192(3) of *The Rural Municipality Act*, *1989*, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

appréciation de la vitesse appropriée constituait une inférence raisonnable, fondée sur la preuve, et elle ne constitue pas une erreur manifeste et dominante. Dans ce contexte, il n'y a pas lieu d'écarter ses conclusions concernant la norme de diligence.

IV. Connaissance de la municipalité

À l'instar de notre collègue, nous estimons que le par. 192(3) de la *Rural Municipality Act, 1989*, oblige le demandeur à démontrer que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill pour qu'il soit possible de conclure qu'elle a manqué à l'obligation de diligence qui lui incombe en vertu de l'art. 192. Nous sommes nous aussi d'avis que la preuve des accidents antérieurs n'est pas, en soi, suffisante pour prêter cette connaissance à la municipalité. Cependant, nous arrivons à la conclusion que la juge de première instance n'a pas commis d'erreur lorsqu'elle a conclu que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin.

Comme nous l'avons vu, la question de savoir si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill est une question mixte de droit et de fait. Il s'agit, d'une part, d'une question de droit en ce que la municipalité est tenue à une norme juridique qui lui impose de connaître la nature du chemin, et, d'autre part, d'une question de fait en ce qu'il faut déterminer si, eu égard aux faits de l'espèce, elle avait la connaissance requise. Comme nous l'avons dit précédemment, en l'absence d'erreur de droit ou de principe isolable, une telle conclusion est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». En l'espèce, notre collègue conclut que la juge de première instance a commis une erreur de droit en ne considérant pas la question de la connaissance du point de vue du conseiller municipal prudent, et il estime qu'on ne pouvait s'attendre à ce qu'un conseiller municipal prudent s'aperçoive du risque que le danger en question faisait courir au conducteur moyen. Il est également d'avis que la juge de première instance a commis une erreur de droit en ne reconnaissant pas que la charge de prouver la connaissance incombait au demandeur. En toute déférence, nous ne pouvons souscrire à ces conclusions.

The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 149). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

61 Le danger en question est une courbe serrée et soudaine, qui n'est annoncée par aucune signalisation. À notre avis, lorsqu'un danger constitue, comme celui-ci qui nous intéresse, une caractéristique permanente qui, a-t-on jugé, présente un risque pour le conducteur moyen, le juge de première instance peut, pour ce seul motif, inférer qu'un conseiller municipal prudent aurait dû connaître l'existence d'un danger. Pour étayer sa conclusion sur la question de la connaissance, notre collègue affirme que la connaissance de la municipalité est intimement liée à celle de la norme de diligence, et il lie sa conclusion sur la connaissance à sa conclusion selon laquelle la courbe ne constituait pas un danger pour l'automobiliste moyen (par. 149). Nous reconnaissons que la question de la connaissance est étroitement liée à celle de la norme de diligence, et, comme nous estimons que la juge de première instance a eu raison de conclure que la courbe présentait un danger pour l'automobiliste moyen, elle pouvait dès lors juger que la municipalité aurait dû connaître ce danger. Soulignons également que cette conclusion visant une question mixte de fait et de droit est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». Sur ce point, toutefois, nous limitons la portée de notre opinion aux situations analogues à celle qui nous occupe, où le danger constitue une caractéristique permanente du chemin, par opposition à un danger temporaire dont une municipalité pourrait raisonnablement ne pas être informée en temps utile pour empêcher un accident de survenir.

In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 149). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above,

62 Par ailleurs, notre collègue se fonde sur les dépositions de témoins ordinaires, Craig et Toby Thiel, qui habitaient sur le chemin Snake Hill et qui ont témoigné n'avoir jamais éprouvé de difficulté à conduire à cet endroit (par. 149). En toute déférence, nous estimons que le fait de se fonder sur ces témoignages pose trois problèmes. D'abord, vu la conclusion que la courbe constituait un danger à cause de sa nature cachée et imprévue, ce n'est pas en se basant sur le témoignage de ceux qui empruntent quotidiennement le chemin qu'il est possible, à notre avis, de déterminer si cette courbe présentait un danger pour l'automobiliste moyen, ou si la municipalité aurait dû connaître l'existence du danger. De plus, en concluant que la municipalité

it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In *Ryan*, *supra*, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

aurait dû connaître le mauvais état du chemin, la juge de première instance a clairement choisi de ne pas se fonder sur les témoignages susmentionnés. Comme nous l'avons dit précédemment, le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge du procès.

Qui plus est, étant donné que la question de la connaissance doit être considérée du point de vue du conseiller municipal prudent, nous estimons que le témoignage des témoins ordinaires est peu utile. Dans l'arrêt *Ryan*, précité, par. 28, le juge Major a dit que la norme de diligence qui s'applique est celle de la personne agissant aussi diligemment que « le ferait une personne ordinaire, raisonnable et prudente placée dans la même situation » (nous soulignons). Les conseillers municipaux sont élus pour gérer les affaires de la municipalité. Pour s'acquitter de cette tâche, il leur faut, dans un cas donné, examiner la situation et recueillir de l'information, faire davantage que ce que fait le simple citoyen de la municipalité. De fait, ils peuvent avoir à consulter des experts pour respecter leur obligation d'être informés. Bien que les conseillers municipaux ne soient pas des experts, il est à notre avis erroné d'assimiler le point de vue du « conseiller municipal prudent » à l'opinion de témoins ordinaires qui habitent sur le chemin.

C'est à la lumière de ce contexte que nous interprétons les commentaires suivants de la juge de première instance (au par. 90) :

> [TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

Selon notre interprétation, la juge de première instance a voulu dire que, compte tenu des accidents antérieurs sur ce chemin à faible débit de circulation, de la présence de résidents permanents et du type de conducteurs qui empruntent le chemin, la municipalité n'a pas pris les mesures raisonnables qu'elle aurait dû prendre pour faire en sorte que le chemin Snake Hill ne comporte pas de danger comme celui en cause. À partir de ces éléments, la juge de première instance a inféré que la municipalité aurait dû être informée de la situation sur le chemin Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger. Cette inférence factuelle, qui repose sur l'appréciation de la preuve faite par la juge de première instance, était selon nous fondée et loin de constituer l'erreur manifeste et dominante requise par la norme pertinente.

Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1987 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

65 À l'instar de notre collègue, nous estimons que les circonstances des accidents survenus antérieurement, en l'espèce, ne constituent pas une preuve directe que la municipalité aurait dû avoir connaissance du danger particulier en cause, mais, selon la juge de première instance, ces circonstances auraient dû inciter la municipalité à faire enquête à l'égard du chemin Snake Hill, ce qui lui aurait permis de prendre connaissance concrètement du danger. Dans la présente affaire, les accidents antérieurs sont loin d'avoir incité la municipalité à faire enquête. D'ailleurs, M. Danger, administrateur de la municipalité pendant 20 ans, a témoigné que, jusqu'au procès, il n'était même pas au fait des trois accidents survenus entre 1978 et 1987 sur le chemin Snake Hill. En conséquence, nous n'estimons pas que la juge de première instance a fondé sa conclusion sur quelque autre point de vue autre que celui du conseiller municipal prudent, et elle n'a donc pas commis d'erreur de droit à cet égard. De plus, nous sommes d'avis qu'elle n'a pas prêté à la municipalité la connaissance requise sur la base des accidents antérieurs. L'existence de ces accidents ne constituait rien de plus qu'un des éléments qui l'ont amenée à conclure que la municipalité aurait dû être au fait de l'état du chemin Snake Hill (par. 90).

We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality

66 Nous tenons à souligner que la juge de première instance n'a pas, à notre avis, transféré le fardeau de

on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the

la preuve à la municipalité sur cette question. Dès lors qu'elle a conclu qu'il existait sur le chemin Snake Hill une caractéristique permanente présentant un danger pour l'automobiliste moyen, il lui était loisible d'inférer que la municipalité aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Selon nous, c'est ce que la juge de première instance a fait dans l'extrait précité lorsqu'elle dit : [TRADUCTION] « Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill » (par. 90 (nous soulignons)). L'existence de cette inférence ressort clairement du fait que le passage précité suit immédiatement la conclusion de la juge de première instance selon laquelle, pour les raisons qu'elle énumère, la municipalité aurait dû connaître l'existence du danger. Par conséquent, nous sommes d'avis que la juge de première instance n'a pas fait erreur et transféré le fardeau de la preuve à la municipalité en l'espèce.

De même, bien que les accidents survenus antérieurement en l'espèce ne constituent pas une preuve solide que la municipalité aurait dû connaître l'existence du danger, la preuve d'accidents antérieurs n'est pas une condition nécessaire pour qu'un tribunal puisse conclure à la violation de l'obligation de diligence prévue par l'art. 192 de la *Rural Municipality Act, 1989*. Si c'était le cas, la première victime d'un accident sur une route négligemment entretenue ne pourrait obtenir réparation, alors que les victimes subséquentes d'accidents survenant dans des circonstances identiques le pourraient. Bien que, au regard du par. 192(3), la municipalité ne puisse être tenue responsable du mauvais état d'une route dont elle n'aurait pu avoir connaissance, elle ne saurait se contenter d'attendre qu'un accident se produise avant de remédier au mauvais état de la route et, si un demandeur n'apporte pas la preuve de l'existence d'accidents antérieurs, soutenir qu'elle n'aurait pu connaître l'existence du danger. Dans cette hypothèse, non seulement imposerait-on à la première victime d'un accident un fardeau de preuve disproportionné, mais on encouragerait aussi

municipality knew or ought to have known of the disrepair.

Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

V. Causation

We agree with our colleague's statement at para. 159 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

les municipalités à ne pas recueillir d'informations concernant les accidents survenant sur leurs routes, puisqu'il serait en conséquence plus difficile à la victime d'un accident d'automobile qui intente des poursuites de prouver que la municipalité visée connaissait le mauvais état de la route ou aurait dû le connaître.

68 Bien que, en l'espèce, la juge de première instance ait souligné les accidents antérieurs dont le demandeur a effectivement prouvé l'existence, nous sommes d'avis qu'il n'est pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3). Exiger du demandeur qu'il fournisse une preuve substantielle et tangible de la connaissance par la municipalité du mauvais état de ses routes revient à lui imposer un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

69 Pour résumer notre position sur cette question, nous ne pouvons conclure que la juge de première instance a commis une erreur de droit soit parce qu'elle aurait omis d'examiner la question du point de vue du conseiller municipal prudent, soit parce qu'elle aurait à tort transféré le fardeau de la preuve à la défenderesse. Par conséquent, il faudrait une erreur manifeste et dominante pour écarter sa conclusion que la municipalité connaissait le danger ou aurait dû le connaître et, selon nous, aucune erreur de cette nature n'a été commise.

V. Lien de causalité

70 Nous faisons nôtres les propos énoncés par notre collègue, au par. 159, selon lesquels la conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait : *Cork c. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), p. 407; cité et approuvé dans *Matthews c. MacLaren* (1969), 4 D.L.R. (3d) 557 (H.C. Ont.), p. 566. En conséquence, cette conclusion ne doit pas être modifiée en l'absence d'erreur manifeste et dominante.

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings

La juge de première instance a fondé ses conclusions au sujet du lien de causalité sur trois éléments (au par. 101) :

> (1) l'accident est survenu à un endroit dangereux du chemin, où un panneau de signalisation aurait dû être installé pour avertir les automobilistes du danger caché;
>
> (2) même s'il y avait eu un panneau de signalisation, le degré d'ébriété de M. Nikolaisen avait accru chez lui le risque qu'il ne réagisse pas du tout ou de façon inappropriée à une signalisation;
>
> (3) malgré cela, M. Nikolaisen ne conduisait pas de façon si téméraire qu'il était à prévoir qu'il ne voit pas un panneau de signalisation ou n'en tienne pas compte. Quelques instants plus tôt, à son départ de la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

La juge de première instance a estimé que, selon la prépondérance des probabilités, M. Nikolaisen aurait réagi et peut-être évité l'accident si on lui avait signalé à l'avance la présence de la courbe. Toutefois, elle a également conclu que l'accident avait été causé en partie par la conduite de M. Nikolaisen, et elle a réparti la responsabilité en conséquence, soit dans une proportion de 50 p. 100 à M. Nikolaisen et de 35 p. 100 à la municipalité rurale (par. 102).

Comme nous l'avons indiqué précédemment, notre Cour a jugé, dans une autre affaire, qu'« une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). En l'espèce, les motifs de la juge de première instance n'indiquent pas clairement sur quelles parties des témoignages de M. Laughlin, de Craig et Toby Thiel et de Paul Housen elle s'est appuyée, ni dans quelle mesure elle l'a fait. Cependant, comme nous l'avons dit plus tôt, la juge de première instance disposait de l'ensemble de la preuve et, en l'absence d'autre élément

on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para. 15.

indiquant que cette omission dans ses motifs résulte du fait qu'elle aurait mal interprété des éléments de la preuve ou négligé d'en examiner certains, nous pouvons présumer qu'elle a examiné l'ensemble de la preuve et que ses conclusions de fait reposaient sur cet examen. En l'absence de preuve établissant de façon suffisante qu'il y a eu mauvaise interprétation d'éléments de preuve ou négligence d'examiner certains de ceux-ci, cette présomption permet de conclure à l'absence d'erreur importante du type de celle requise pour satisfaire au critère de l'erreur « manifeste et dominante ». Nous tenons à rappeler que le juge de première instance peut préférer le témoignage de certains témoins et accorder plus de poids à certaines parties de la preuve qu'à d'autres, particulièrement en présence de preuves contradictoires : *Toneguzzo-Norvell*, précité, p. 122-123. Le simple fait que la juge de première instance n'a pas analysé en profondeur un point donné ou un élément de preuve particulier ne constitue pas un motif suffisant pour justifier l'intervention des tribunaux d'appel : *Van de Perre*, précité, par. 15.

For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

73 Pour ces motifs, nous n'estimons pas opportun d'examiner à nouveau les dépositions de M. Laughlin et des témoins ordinaires. Comme nous l'avons affirmé précédemment, il n'y a pas lieu de modifier la conclusion de fait de la juge de première instance selon laquelle la courbe présentait un danger caché. Ses conclusions touchant le lien de causalité reposent en partie sur cette conclusion relative à l'existence d'un danger caché nécessitant l'installation d'un panneau d'avertissement. Tout comme ses conclusions relatives à l'existence d'un danger caché, celles touchant le lien de causalité — fondées en partie sur le danger caché — avaient elles aussi des assises dans la preuve.

As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the

74 Pour ce qui est du silence de la juge de première instance concernant le témoignage de M. Laughlin, signalons simplement que ce témoignage paraît être de nature générale et, partant, d'une utilité limitée. M. Laughlin a reconnu qu'il ne pouvait faire que des observations générales quant aux effets de l'alcool sur les automobilistes, et non apporter une expertise particulière sur l'effet concret de l'alcool sur un conducteur donné. Il s'agit d'un point important, puisque le seuil de tolérance d'un conducteur donné

motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under *The Rural Municipality Act, 1989*, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying

joue un rôle essentiel dans la détermination de l'effet concret de l'alcool sur cet automobiliste; bien que dangereuse, la personne qui a l'habitude de boire se débrouillera probablement mieux sur la route qu'une personne qui n'en a pas l'habitude. Il convient de souligner que la juge de première instance a cru le témoignage de M. Anderson selon lequel le véhicule de M. Nikolaisen roulait à une vitesse relativement faible, soit entre 53 et 65 km/h, au moment de l'impact avec le remblai. Il lui était également permis de retenir les dépositions des témoins ordinaires selon lesquelles M. Nikolaisen avait réussi à prendre un virage apparemment serré quelques instants avant l'accident, plutôt que le témoignage de M. Laughlin, lequel était de nature hypothétique et générale. De fait, la nature hypothétique du témoignage de M. Laughlin est représentative de toute l'analyse de la question de savoir si M. Nikolaisen aurait aperçu un panneau de signalisation et aurait réagi en conséquence, ou à quelle vitesse précise un conducteur raisonnable s'approcherait du virage. Le caractère théorique de ces analyses justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance et permet d'affirmer qu'on n'a pas satisfait à la norme rigoureuse imposée par l'expression « erreur manifeste et dominante ».

Par conséquent, nous estimons que les constatations factuelles de la juge de première instance concernant la causalité étaient raisonnables, qu'elles ne constituent donc pas une erreur manifeste et dominante et, partant, que la Cour d'appel n'aurait pas dû les modifier.

VI. Obligation de diligence prévue par la common law

Puisque nous concluons à la responsabilité de la municipalité en vertu de la *Rural Municipality Act, 1989*, nous n'estimons pas nécessaire de nous demander s'il existe en l'espèce une obligation de diligence prévue par la common law.

VII. Dispositif

Comme nous l'avons dit au départ, d'importantes raisons et d'importants principes commandent aux tribunaux d'appel de ne pas modifier indûment

these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

The reasons of Gonthier, Bastarache, Binnie and LeBel JJ. were delivered by

BASTARACHE J. (dissenting) —

I. Introduction

This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook, Saskatchewan. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

les décisions des tribunaux de première instance. Appliquant ces raisons et principes à la présente espèce, nous sommes d'avis d'accueillir le pourvoi, d'infirmer le jugement de la Cour d'appel de la Saskatchewan et de rétablir la décision de la juge de première instance, avec dépens devant toutes les cours.

Version française des motifs des juges Gonthier, Bastarache, Binnie et LeBel rendus par

LE JUGE BASTARACHE (dissident) —

I. Introduction

78 Le présent pourvoi découle d'un accident impliquant un seul véhicule survenu le 18 juillet 1992 sur le chemin Snake Hill, route rurale située dans la municipalité de Shellbrook, en Saskatchewan. L'appelant, Paul Housen, qui était passager dans le véhicule, est devenu quadriplégique à la suite de cet accident. Au procès, la juge a conclu que le conducteur du véhicule, Douglas Nikolaisen, avait fait preuve de négligence en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant que ses facultés étaient affaiblies. La juge de première instance a également estimé que l'intimée, la municipalité de Shellbrook, avait commis une faute en manquant à l'obligation de tenir le chemin dans un état raisonnable d'entretien comme le lui impose l'art. 192 de la loi intitulée la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. La Cour d'appel a infirmé la décision de la juge de première instance concluant à la négligence de la municipalité intimée. La question en litige dans le présent pourvoi consiste à déterminer si la Cour d'appel avait des motifs suffisants pour modifier la décision du tribunal de première instance. L'intimée demande également à notre Cour d'infirmer les conclusions de la juge de première instance portant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, et que l'accident a été causé en partie par sa négligence. Il faut également répondre à la question incidente de savoir si une obligation de diligence de common law coexiste avec l'obligation légale imposée à l'intimée par l'art. 192.

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

J'estime que la Cour d'appel a eu raison d'infirmer la conclusion de la juge de première instance selon laquelle la municipalité intimée a été négligente. Je ne modifierais pas les conclusions de fait de la juge de première instance sur cette question, mais je suis d'avis qu'elle a commis une erreur de droit en n'appliquant pas la norme de diligence appropriée. J'infirmerais également ses conclusions en ce qui concerne la question de la connaissance et le lien de causalité. En concluant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, la juge de première instance a commis une erreur de droit en n'appréciant pas l'exigence relative à la connaissance du point de vue du conseiller municipal prudent et en ne tenant pas compte du fait que le fardeau de la preuve incombait à l'appelant. De plus, la juge de première instance a tiré une inférence déraisonnable en prêtant à l'intimée la connaissance requise, en raison d'accidents survenus sur d'autres tronçons du chemin alors que des automobilistes circulaient en sens inverse. La juge de première instance a également commis une erreur relativement au lien de causalité. Elle a mal interprété la preuve qui lui était soumise, elle en a tiré des conclusions erronées et elle n'a pas tenu compte d'éléments de preuve pertinents. Enfin, je ne modifierais pas la décision des juridictions inférieures ayant rejeté l'argument de l'appelant selon lequel il existait une obligation de diligence de common law. Il est inutile d'imposer une obligation de common law lorsqu'il existe une obligation légale. Qui plus est, l'application des principes de la common law en matière de négligence n'aurait aucune incidence sur l'issue de la présente instance.

II. Factual Background

80 The sequence of` events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately

II. Les faits

La suite d'événements ayant abouti au tragique accident a commencé quelque 19 heures avant l'accident lui-même, dans l'après-midi du 18 juillet 1992. Le 17 juillet, M. Nikolaisen a participé à un barbecue à la résidence de Craig et Toby Thiel, sur le chemin Snake Hill. Arrivé en fin d'après-midi, il a pris son premier verre de la journée vers 18 h. Il en a pris quatre ou cinq avant de quitter la résidence des Thiel vers 22 h ou 22 h 30. Après avoir passé

10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be

quelques heures chez lui, M. Nikolaisen s'est rendu au jamboree de Sturgeon Lake, où il a rencontré l'appelant. Sur les lieux du jamboree, M. Nikolaisen a consommé huit ou neuf ryes doubles et plusieurs bières. L'appelant buvait lui aussi. L'appelant et M. Nikolaisen ont fait la fête sur les lieux du jamboree pendant plusieurs heures. Vers 4 h 30, l'appelant a quitté le jamboree en compagnie de M. Nikolaisen. Après avoir roulé sur des routes de campagne pendant un certain temps, ils sont retournés à la résidence des Thiel. Il était environ 8 h. L'appelant et M. Nikolaisen ont pris plusieurs autres verres au cours de la matinée. M. Nikolaisen a cessé de boire deux ou trois heures avant de quitter la résidence des Thiel en compagnie de l'appelant vers 14 h.

81 Une faible pluie tombait lorsque l'appelant et M. Nikolaisen ont quitté la résidence des Thiel et pris la route, en direction est, à bord d'une camionnette Ford conduite par M. Nikolaisen. L'arrière de la camionnette a zigzagué lorsque le véhicule a tourné à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Alors que M. Nikolaisen prenait un léger virage d'une longueur de quelque 300 mètres, tout en accélérant à 65 km/h environ, l'arrière de sa camionnette a zigzagué à nouveau à plusieurs reprises. La camionnette s'est mise à déraper lorsque M. Nikolaisen a amorcé un virage plus serré vers la droite. Il a donné un coup de volant, mais n'a pas réussi à prendre le virage. La roue arrière gauche de la camionnette a heurté un remblai situé du côté gauche du chemin. Le véhicule a continué sa course sur une distance d'environ 30 mètres, puis sa roue avant gauche est montée sur un remblai de 18 pouces du côté gauche du chemin, après l'avoir heurté. Sous la force du second impact, la camionnette a fait un tonneau complet, le toit du côté du passager touchant le sol en premier.

82 Lorsque le véhicule s'est immobilisé, l'appelant n'éprouvait plus aucune sensation. M. Nikolaisen s'est hissé hors du véhicule par la fenêtre arrière et a couru chez les Thiel pour demander de l'aide. Plus tard, la police a accompagné M. Nikolaisen à l'hôpital de Shellbrook, où un échantillon de sang a été prélevé. Le témoignage d'expert a révélé

between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The

que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 milligrammes par 100 milligrammes, taux largement supérieur à la limite permise par la loi intitulée la *Highway Traffic Act*, S.S. 1986 ch. H-3.1, et par le *Code criminel*, L.R.C. 1985, ch. C-46.

M. Nikolaisen avait emprunté le chemin Snake Hill à trois reprises au cours des 24 heures ayant précédé l'accident, mais il n'y avait jamais circulé auparavant. Ce chemin, flanqué de routes au nord et à l'est, fait environ un mille et trois quarts de longueur. À partir de son extrémité nord, il franchit une courte distance en direction sud, traverse des champs, puis tourne vers le sud-est pour ensuite descendre en lacet vers le sud autour du mont Snake Hill, passant devant des arbres, buissons et pâturages, jusqu'au fond de la vallée. De là, il tourne brusquement vers le sud-est devant l'entrée de la résidence des Thiel. Tout de suite après, il tourne doucement vers le sud-est sur une distance d'environ 300 mètres, puis décrit une courbe plus prononcée vers le sud. C'est à cet endroit que l'accident s'est produit. De là, le chemin traverse un ruisseau, tourne encore, puis monte une pente raide vers l'est, se redresse et continue vers l'est sur une distance d'un peu plus d'un demi mille et passe devant des champs bordés d'arbres et une autre ferme, jusqu'à une voie d'accès à la route.

Construit en 1923, le chemin Snake Hill est entretenu par la municipalité intimée dans le but premier de permettre aux fermiers de la région d'accéder à leurs champs et pâturages. Il sert également de voie d'accès à deux résidences permanentes et à une clinique vétérinaire. Le tronçon nord du chemin, dont l'extrémité part de la route, est considéré comme un chemin d'accès local de « type C » selon le système provincial de classification des routes. Cela signifie qu'il est nivelé, gravelé et possède une chaussée surélevée. Le tronçon du chemin situé à l'est de la résidence des Thiel et sur lequel l'accident s'est produit est considéré comme un chemin nivelé de « type B », c'est-à-dire essentiellement un chemin dont les ornières ont été remplies pour le rendre carrossable. Les chemins nivelés suivent le tracé qui présente le moins d'obstacle à travers le terrain environnant et ne sont ni surélevés ni gravelés. La

province of Saskatchewan has some 45,000 kilometres of bladed trails.

According to the provincial scheme of road classification, both bladed trails and local access roads are "non-designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

province de Saskatchewan compte quelque 45 000 kilomètres de chemins nivelés.

85 Selon le système de classification des routes, tant les chemins nivelés que les chemins d'accès local sont [TRADUCTION] « non désignés », c'est-à-dire qu'ils ne sont pas visés par le document intitulé *Saskatchewan Rural Development Sign Policy and Standards* (« Politique et normes de signalisation routière en milieu rural en Saskatchewan »). Le conseil de la municipalité rurale installe des panneaux de signalisation sur ces chemins s'il constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Trois accidents sont survenus sur le chemin Snake Hill de 1978 à 1987. Tous ces accidents se sont produits à l'est de l'endroit où la camionnette de Nikolaisen a fait un tonneau et les véhicules concernés circulaient en direction ouest. Un quatrième accident s'est produit sur le chemin Snake Hill en 1990, mais aucune preuve indiquant l'endroit exact de l'accident n'a été présentée. Rien ne permettait de conclure que la topographie des lieux était à l'origine de l'un ou l'autre de ces accidents. La municipalité intimée n'avait installé aucun panneau signalisateur le long du chemin Snake Hill.

III. Relevant Statutory Provisions

The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

192(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.

. . .

(2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.

III. Les dispositions législatives pertinentes

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1

[TRADUCTION]

192(1) Le conseil tient dans un état raisonnable d'entretien tous les chemins municipaux, barrages et réservoirs, ainsi que les accès à ces ouvrages qui ont été construits ou sont fournis par la municipalité ou par toute autre personne avec la permission du conseil ou qui ont été construits ou sont fournis par le gouvernement de la province, eu égard à la nature de l'ouvrage en question et à la localité où il est situé ou qu'il traverse.

. . .

(2) Lorsque le conseil omet de s'acquitter des obligations qui lui incombent en vertu des paragraphes (1) et (1.1), la municipalité est, sous réserve de la *Contributory Negligence Act* [*Loi sur le partage de la responsabilité*], civilement responsable des dommages subis par toute personne à la suite de ce manquement.

(3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, S.S. 1986, c. H-3.1

33(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or

(b) at a speed greater than the maximum speed indicated by any signs that are erected on the highway . . . .

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44(1) No person shall drive a vehicle on a highway without due care and attention.

(3) En cas d'action reprochant un manquement visé aux paragraphes (1) et (1.1) la responsabilité de la municipalité concernée n'est engagée que si le demandeur établit que cette dernière connaissait ou aurait dû connaître le mauvais état du chemin municipal ou autre ouvrage mentionné aux paragraphes (1) et (1.1).

The Highway Traffic Act, S.S. 1986, ch. H-3.1

[TRADUCTION]

33(1) Sous réserve des autres dispositions de la présente loi, il est interdit de conduire sur une voie publique à une vitesse supérieure, selon le cas :

a) à 80 kilomètres à l'heure;

b) à la vitesse maximale indiquée par la signalisation routière le long de la voie publique en question . . .

(2) Il est interdit de conduire un véhicule sur une voie publique à une vitesse supérieure à celle qui est raisonnable et sécuritaire dans les circonstances.

44(1) Il est interdit de conduire un véhicule sur une voie publique sans faire preuve de la prudence et de l'attention nécessaires.

IV. Judicial History

A. *Saskatchewan Court of Queen's Bench*, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in

IV. L'historique des procédures judiciaires

A. *Cour du Banc de la Reine de la Saskatchewan*, [1998] 5 W.W.R. 523

La juge Wright a conclu que l'intimée avait fait preuve de négligence en omettant d'installer un panneau signalant aux automobilistes l'existence du virage à droite serré sur le chemin Snake Hill, virage qu'elle a qualifié de [TRADUCTION] « danger caché ». Elle a également estimé que M. Nikolaisen avait été négligent en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant qu'il avait les facultés affaiblies. L'appelant a été tenu responsable de négligence concourante parce qu'il avait accepté de monter à bord du véhicule de M. Nikolaisen. La responsabilité a été partagée ainsi : 15 p. 100 à l'appelant, le reste étant réparti solidairement entre M. Nikolaisen (50 p. 100) et l'intimée (35 p. 100).

La juge Wright a d'abord conclu que l'art. 192 de la *Rural Municipality Act, 1989* imposait à l'intimée une obligation légale de diligence envers les personnes circulant sur le chemin Snake Hill. Elle s'est ensuite demandée si l'intimée s'était

s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality . . . the situation of the road therein, whether required to be used by many or by few; . . . to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

conformée à la norme de diligence énoncée à l'art. 192 et dans la jurisprudence portant sur l'interprétation de cet article. Elle a fait état, en particulier, de l'arrêt *Partridge c. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555, dans lequel la Cour d'appel de la Saskatchewan a déclaré, à la p. 558, que [TRADUCTION] « le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité ». Elle a également cité le passage suivant de l'affaire *Shupe c. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (C.A. Sask.), p. 630 : [TRADUCTION] « [I]l faut tenir compte de la localité où est situé le chemin, [. . .] de son emplacement dans celle-ci, se demander s'il sera beaucoup ou peu fréquenté; [. . .] du nombre de chemins à entretenir; des ressources budgétaires dont dispose le conseil à cette fin et des besoins du public qui emprunte ce chemin ». Se fondant sur l'affaire *Galbiati c. City of Regina*, [1972] 2 W.W.R. 40 (B.R. Sask.), la juge Wright a fait observer que, bien que la Loi ne mentionne pas explicitement l'obligation d'installer des panneaux d'avertissement, l'obligation générale d'entretien comporte néanmoins celle de signaler aux automobilistes l'existence d'un danger caché.

Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

89

Après avoir fait état de la jurisprudence pertinente, la juge Wright a poursuivi en examinant la nature du chemin. S'appuyant principalement sur les témoignages donnés par deux experts au procès, MM. Anderson et Werner, elle a conclu que le virage à droite serré constituait un danger que les usagers du chemin ne pouvaient voir aisément. De leurs témoignages, elle a tiré la conclusion suivante (au par. 85) :

It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater

[TRADUCTION] Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce

than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

virage ne peut être pris en sécurité à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide. [En italique dans l'original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

La juge Wright a ensuite précisé que, bien qu'on ne puisse raisonnablement exiger de l'intimée qu'elle construise le chemin selon une norme plus élevée ou qu'elle enlève toutes les broussailles, il était raisonnable de s'attendre à ce qu'elle installe et maintienne un panneau d'avertissement ou de signalisation [TRADUCTION] « afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para. 90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

La juge Wright a ensuite analysé le par. 192(3) de la Loi, qui prévoit qu'il n'y a manquement à l'obligation de diligence que si la municipalité connaissait ou aurait dû connaître l'existence du danger. Elle a rappelé que quatre accidents étaient survenus sur le chemin Snake Hill de 1978 à 1990. Trois de ceux-ci se sont produits [TRADUCTION] « aux environs » de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, et deux ont été signalés aux autorités. Sur la base de cette information, elle a conclu que [TRADUCTION] « [s]i la M.R. [municipalité rurale] ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître » (par. 90). La juge Wright a également accordé de l'importance au débit relativement faible de la circulation sur le chemin, au fait que des résidences permanentes étaient situées en bordure de celui-ci et au fait que le chemin était fréquenté par des conducteurs jeunes et peut-être moins expérimentés.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

En ce qui concerne le lien de causalité, la juge Wright a estimé qu'un panneau de signalisation aurait probablement permis à M. Nikolaisen de prendre des mesures correctives et de conserver la maîtrise de son véhicule, même si ses facultés étaient affaiblies. Elle a aussi tiré la conclusion suivante, au par. 101 :

Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded

[TRADUCTION] Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il

a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

B. *Saskatchewan Court of Appeal*, [2000] 4 W.W.R. 173, 2000 SKCA 12

On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings

aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

92 La juge Wright s'est également penchée sur l'argument de l'appelant voulant que la municipalité ait manqué à une obligation de diligence de common law qui ne serait pas atténuée ou restreinte par l'une ou l'autre des dispositions de l'art. 192. Elle a estimé que l'arrêt *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228, ainsi que la jurisprudence antérieure et postérieure à cette décision ne s'appliquaient pas à l'affaire dont elle était saisie, vu l'existence de l'obligation légale de diligence. Elle a également jugé que les termes restrictifs de l'art. 192 de la Loi visaient la norme de diligence et n'avaient pas pour effet de limiter la portée de l'obligation légale de diligence.

B. *Cour d'appel de la Saskatchewan*, [2000] 4 W.W.R. 173, 2000 SKCA 12

93 En appel, exprimant la décision unanime de la cour, le juge Cameron s'est attaché principalement à la conclusion de la juge de première instance portant que, en omettant d'installer un panneau d'avertissement ou de signalisation à l'endroit de l'accident, l'intimée avait manqué à son obligation légale d'entretien des routes. Il n'a pas jugé nécessaire de se prononcer sur la question du lien de causalité, vu sa conclusion que la juge de première instance avait commis une erreur en déclarant l'intimée responsable de négligence.

94 Le juge Cameron a qualifié la conclusion de la juge de première instance que l'intimée avait manqué à son obligation légale de diligence de conclusion portant sur une question mixte de fait et de droit. Il a souligné qu'une cour d'appel ne doit pas modifier les conclusions de fait du juge de première instance à moins que ce dernier n'ait commis une « erreur manifeste et dominante » ayant faussé son appréciation des faits. Pour ce qui est des erreurs de droit, toutefois, le juge Cameron a fait remarquer que le pouvoir d'une cour d'appel d'infirmer la conclusion du juge de première instance est [TRADUCTION] « presque illimité ». En ce qui concerne les erreurs

of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.

2. To assess the issue of whether persons requiring to use the road, exercising ordinary car[e], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a

mixtes de fait et de droit, le juge Cameron a précisé qu'elles sont normalement assujetties à la même norme de contrôle que les conclusions de fait. Selon le juge Cameron, cette règle générale souffre une exception, qui s'applique dans les cas où, bien que le juge du procès ait retenu le bon critère juridique applicable, il omet d'en appliquer un élément aux faits de l'affaire dont il est saisi. Au soutien de cette affirmation, le juge Cameron a cité, au par. 41, les propos suivants du juge Iacobucci dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 39 :

> [Si] un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Relativement au droit applicable en l'espèce, le juge Cameron a reconnu que la norme de diligence énoncée dans la Loi et dans la jurisprudence portant sur l'interprétation de cette loi exige des municipalités qu'elles installent des panneaux de mise en garde pour signaler les dangers que les conducteurs prudents et prenant des précautions normales ne pourraient vraisemblablement pas mesurer. Se fondant sur la jurisprudence, le juge Cameron a établi, au par. 50, un cadre analytique permettant de déterminer si une municipalité a manqué à son obligation à cet égard. Suivant ce cadre, le juge doit examiner les aspects suivants :

[TRADUCTION]

1. Le juge doit déterminer la nature et l'état du chemin au moment de l'accident. Il s'agit, bien sûr, d'une question de fait, qui nécessite une appréciation des caractéristiques physiques du chemin à l'endroit où l'accident s'est produit, ainsi que de tous les facteurs se rapportant à la norme d'entretien, à savoir l'emplacement du chemin, le type de chemin dont il s'agit, les utilisations habituelles de celui-ci, et ainsi de suite.

2. Il soit se demander si les personnes qui devaient emprunter le chemin pouvaient généralement, en prenant des précautions normales, y circuler en sécurité. Il s'agit essentiellement du critère de la

reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.

3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam*, *supra.* In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it" (para. 57).

Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise

personne raisonnable, qui sert à déterminer comment se serait comporté un conducteur raisonnable sur ce chemin en particulier. À cette étape, il faut tenir compte des nombreux facteurs énoncés dans la jurisprudence mentionnée précédemment, c'est-à-dire l'emplacement du chemin, la nature et le type du chemin, la norme d'entretien à laquelle on pouvait raisonnablement s'attendre d'une municipalité, et ainsi de suite. Ces facteurs doivent être soupesés dans le contexte de la question suivante : Comment un conducteur raisonnable aurait-il conduit son véhicule sur ce chemin en particulier? Puisque cette question suppose l'application d'une norme juridique à un ensemble donné de faits, elle constitue une question mixte de fait et de droit.

3. Il doit déterminer si le chemin était dans un état raisonnable d'entretien, compte tenu des conclusions tirées à la deuxième étape. S'il est établi que le chemin ne se trouvait pas dans un état raisonnable d'entretien, il faut alors déterminer si la municipalité connaissait ou aurait dû connaître le mauvais état d'entretien avant de conclure à la responsabilité de celle-ci.

96 Selon le juge Cameron, la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne le critère juridique applicable. Elle a cependant commis une erreur de droit du genre de celle exposée par le juge Iacobucci dans l'arrêt *Southam*, précité. À son avis, lorsqu'elle a appliqué le droit aux faits de l'espèce, la juge de première instance a omis, d'une part, de se demander comment un conducteur raisonnable, faisant montre de prudence normale, aurait conduit son véhicule sur ce chemin, et, d'autre part, d'évaluer le risque, s'il en est, que le virage non annoncé aurait pu constituer pour le conducteur moyen. Comme l'a souligné le juge Cameron de la Cour d'appel, la juge de première instance [TRADUCTION] « a évoqué la question à deux reprises, mais elle ne l'a pas abordée » (par. 57).

97 Le juge Cameron a également estimé que la juge de première instance avait commis une erreur de fait « manifeste et dominante » en concluant que l'intimée n'avait pas exercé le degré de diligence requis. Selon le juge Cameron, cette erreur de fait découlait de l'importance accordée par la juge Wright aux témoignages d'experts de MM. Werner et Anderson. À son avis, les témoignages de ces deux experts

that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had the trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V. Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

reposaient sur la prémisse fondamentale qu'on pouvait s'attendre à ce que le conducteur moyen circule sur le chemin à une vitesse de 80 km/h. Selon lui, cette prémisse était erronée et n'était pas étayée par la preuve.

Le juge Cameron a conclu que, bien qu'il fût loisible à la juge de première instance d'accorder davantage foi à certains témoignages qu'à d'autres, il ne lui était pas loisible de retenir un témoignage d'expert fondé sur une prémisse factuelle erronée. Selon lui, si la juge de première instance avait estimé qu'un conducteur prudent prenant des précautions normales pour assurer sa sécurité n'aurait généralement pas roulé sur cette portion du chemin Snake Hill à plus de 60 km/h, alors elle aurait dû conclure à l'absence de danger caché puisque le virage pouvait être pris en sécurité à cette vitesse.

Le juge Cameron a souscrit à l'opinion de la juge de première instance que l'obligation de diligence de common law ne s'appliquait pas en l'espèce. Il a fait les commentaires suivants à ce sujet, au par. 44 de ses motifs :

> [TRADUCTION] En ce qui concerne l'obligation de diligence, il convient de préciser que, contrairement aux dispositions législatives qui habilitent les municipalités à entretenir les chemins, sans toutefois leur imposer l'obligation de le faire, en l'espèce l'obligation doit son existence à une loi, plutôt qu'au principe de common law fondé sur la proximité : *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228. On saisit immédiatement que l'obligation de diligence existe en faveur de tous ceux qui circulent sur les routes.

V. Les questions en litige

A. La Cour d'appel a-t-elle eu raison de modifier la conclusion de la juge de première instance portant que l'intimée avait manqué à son obligation légale de diligence?

B. La juge de première instance a-t-elle commis une erreur en concluant que l'intimée connaissait ou aurait dû connaître le danger allégué?

C. La juge de première instance a-t-elle commis une erreur en concluant que l'accident a été en partie causé par la négligence de l'intimée?

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI. Analysis

A. *Did the Court of Appeal Properly Interfere with the Decision at Trial?*

(1) The Standard of Review

Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam*, *supra*, at para. 35).

Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam*, *supra*, at para. 60; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 32). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road

D. Est-ce qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence?

VI. L'analyse

A. *La Cour d'appel a-t-elle eu raison de modifier la décision de la juge de première instance?*

(1) La norme de contrôle

101 Bien qu'elles ne soient pas toujours faciles à distinguer, les questions auxquelles doit répondre un tribunal de première instance se classent généralement en trois catégories : les questions de droit, les questions de fait et les questions mixtes de fait et de droit. En résumé, les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties et les questions mixtes de fait et de droit consistent à déterminer si les faits satisfont au critère juridique (*Southam*, précité, par. 35).

102 De ces trois catégories, ce sont les conclusions de fait du juge de première instance qui commandent le degré le plus élevé de retenue. La Cour ne modifie les conclusions de fait du juge de première instance que si celui-ci a commis une erreur manifeste ou dominante ou si la conclusion est manifestement erronée (*Southam*, précité, par. 60; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114, p. 121). Cette retenue repose principalement sur le fait que, puisqu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, le juge de première instance est en conséquence plus à même de choisir entre deux versions divergentes d'un même événement (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 32). Cependant, il est important de reconnaître que tirer une conclusion de fait implique souvent davantage que le simple fait de déterminer qui a fait quoi, ainsi que où et quand il l'a fait. Le juge de première instance est très souvent appelé à faire des inférences à partir des faits qui lui sont

that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

présentés. En l'espèce, par exemple, la juge de première instance a inféré du fait que des accidents s'étaient produits sur le chemin Snake Hill que l'intimée connaissait ou aurait dû connaître l'existence du danger caché.

Notre Cour a jugé qu'il fallait appliquer aux inférences de fait du juge de première instance le même degré de retenue qu'à ses conclusions de fait (*Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353). La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. En toute déférence, je ne partage pas l'opinion de la majorité selon laquelle des inférences ne peuvent être rejetées que dans les cas où le processus qui les a produites est lui-même déficient : voir *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 45 :

> Lorsqu'une cour de justice contrôle les conclusions de fait d'un tribunal administratif ou les inférences qu'il a tirées de la preuve, elle ne peut intervenir que « lorsque les éléments de preuve, perçus de façon raisonnable, ne peuvent étayer les conclusions de fait du tribunal » : *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644, à la p. 669, le juge McLachlin.

Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Mes collègues eux-mêmes reconnaissent qu'un juge est souvent appelé à tirer des inférences mixtes de fait et droit (par. 26). Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait.

My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

104 Mes collègues ne sont pas d'accord avec l'énoncé susmentionné — savoir celui portant que la cour d'appel se demande si une inférence peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance — estimant qu'il s'agit d'une norme de contrôle moins exigeante que celle de l'erreur « manifeste et dominante ». Pour ma part, je ne crois pas que cet énoncé implique l'application d'une norme moins exigeante. À mon avis, il n'y a aucune différence entre le fait de conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits. La distinction est purement sémantique.

By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 833; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90. The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

105 En revanche, une cour d'appel ne contrôle pas les conclusions tirées par le juge de première instance à l'égard des questions de droit simplement pour déterminer si elles sont raisonnables, mais plutôt pour déterminer si elles sont correctes : *Moge c. Moge*, [1992] 3 R.C.S. 813, p. 833; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), p. 90. Un des rôles principaux d'une cour d'appel consiste à corriger les erreurs de droit et, par conséquent, cette cour peut et doit vérifier si les conclusions juridiques de la juridiction inférieure sont correctes.

In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of

106 Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est forcément une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel. Comme l'a dit Kerans, *op. cit.*, p. 103, [TRADUCTION] « [l]'examen de la

facts involves some measure of interpretation of that rule, and thus more law-making" (emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

question de savoir si les faits satisfont ou non à un critère juridique donné est un processus qui implique une fonction créatrice de droit. Qui plus est, il est probablement exact d'affirmer que *chaque* nouvelle tentative d'appliquer une règle de droit à un ensemble de faits emporte une certaine interprétation de cette règle et, partant, l'élaboration de règles de droit additionnelles » (en italique dans l'original).

Dans une affaire de négligence, le juge de première instance est appelé à décider si la conduite du défendeur était raisonnable eu égard à toutes les circonstances. Bien que la prise de cette décision demande l'examen de questions de fait, elle exige également du juge de première instance qu'il établisse ce qui est raisonnable. Comme il a été mentionné plus tôt, dans bien des cas cette décision implique l'établissement de politiques d'intérêt général ou la « création de règles de droit », rôle qu'une cour d'appel est mieux placée pour remplir (Kerans, *op. cit.*, p. 5 à 10). En l'espèce, par exemple, le degré de connaissance que la juge de première instance aurait dû prêter au conseiller municipal raisonnablement prudent soulevait une considération participant d'une politique d'intérêt général, savoir le genre de système d'information sur les accidents qu'une petite municipalité rurale aux ressources budgétaires limitées est censée tenir. Ce rôle créateur de droit a été reconnu par la Cour suprême des États-Unis dans l'arrêt *Bose Corp. c. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), à la note 17, dans le contexte d'une action en diffamation :

> [TRADUCTION] Une conclusion de fait est, dans certains cas, indissociable des principes qui ont été appliqués pour y arriver. À un point donné, le raisonnement menant à la « constatation d'un fait » cesse d'être l'application des principes ordinaires de logique et d'expérience générale, qui est généralement l'apanage du juge de première instance, pour devenir l'application d'une règle de droit, tâche où le tribunal de révision doit exercer son propre jugement. Cette ligne de démarcation se déplace selon la nature de la règle de droit substantiel en litige. Dans quelques branches du droit, certaines questions largement factuelles soulèvent des enjeux — incidence sur d'éventuelles affaires et le comportement futur — qui sont trop importants pour être confiés en premier et dernier ressort au juge de première instance.

My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

108 Mes collègues affirment que la question de savoir si, dans une affaire de négligence, le défendeur a respecté ou non la norme de diligence appropriée est assujettie au critère de l'erreur manifeste et dominante, sauf si le juge de première instance a clairement commis une erreur de principe isolable relativement à la détermination de la norme à appliquer ou à son application, auquel cas l'erreur peut constituer une erreur de droit (par. 36). Je ne suis pas d'accord. Dans bon nombre de cas, il ne sera pas possible d'« isoler » une question de droit pur de l'analyse de la norme de diligence applicable en matière de négligence, qui est une question mixte de fait et de droit. En outre, bien que certaines questions mixtes de fait et de droit puissent ne pas avoir « une grande valeur comme précédents » (*Southam*, précité, par. 37), ces questions impliquent souvent une analyse normative que devrait pouvoir contrôler une cour d'appel.

Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge

109 Revenons maintenant à la question de savoir si la municipalité connaissait ou aurait dû connaître le danger allégué. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de prêter cette connaissance à la municipalité eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Si le juge de première instance applique une autre norme juridique, par exemple celle de la personne raisonnable, il commet une erreur de droit. Cependant, même en supposant que le juge de première instance détermine correctement la norme juridique à appliquer, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique. Par exemple, il peut exister une preuve indiquant qu'un accident s'était déjà produit sur le tronçon de chemin en cause. Le juge de première instance qui se demande si ce fait satisfait ou non au critère juridique applicable à la question de la connaissance doit poser un certain nombre d'hypothèses normatives. Il doit se demander si le fait qu'un accident se soit déjà produit au même endroit alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents. Selon moi, la question de savoir si le fait qu'un accident se soit produit antérieurement

requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, is authority for the proposition that when the question

satisfait à l'exigence de connaissance applicable est une question mixte de fait et de droit, et il serait artificiel de la qualifier autrement. Comme l'indique clairement l'exemple qui précède, cette question peut également soulever des questions normatives que devrait pouvoir contrôler une cour d'appel selon la norme de la décision correcte.

Je partage l'opinion de mes collègues selon laquelle on ne peut poser comme principe général que toutes les questions mixtes de fait et de droit sont assujetties à la norme de la décision correcte : citant *Southam*, précité, par. 37 (par. 28). Cependant, je ne crois pas que l'opinion formulée dans *Southam* signifie que, dans une affaire de négligence, les conclusions du juge de première instance sur des questions mixtes de fait et de droit commandent systématiquement une attitude empreinte de retenue. Dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, affaire de négligence médicale, notre Cour a différencié cette affaire de l'arrêt *Southam* sur la question de la norme de contrôle applicable aux questions mixtes de fait et de droit dans les cas où le tribunal ne possède d'expertise particulière. Exposant la décision unanime de la Cour, le juge Gonthier a dit ceci, aux par. 48 et 49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. C'est la norme applicable à la négligence médicale. Il n'est pas question de l'expertise d'un tribunal spécialisé dans un domaine particulier, pouvant toucher la détermination des faits et avoir une incidence sur la définition de la norme appropriée et exiger de ce fait une certaine déférence de la part d'une cour générale d'appel (*Southam*, par. 45; *Nova Scotia Pharmaceutical Society*, précité, p. 647).

Je ne peux non plus me ranger à l'avis de mes collègues selon lequel l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, permet d'affirmer

of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (*Taylor v. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Taylor (Guardian ad litem of) v. British Columbia* (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident" (p. 307). On the issue of causation, a question of fact, Seaton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiffs' claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks in *Jaegli Enterprises*, *supra*, at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he

que, lorsque la question mixte de fait et de droit en litige est la conclusion de négligence tirée par le juge de première instance, les cours d'appel doivent faire preuve de retenue à l'égard de cette conclusion. Dans cette affaire, le juge de première instance avait conclu que le défendeur, un instructeur de ski, avait respecté la norme de diligence à laquelle il était tenu. Il avait aussi conclu que l'accident serait survenu, indépendamment de la conduite de l'instructeur de ski (*Taylor c. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Le juge Seaton de la Cour d'appel de la Colombie-Britannique a exprimé son désaccord avec la conclusion du juge de première instance que l'instructeur de ski avait respecté la norme de diligence applicable (*Taylor (Guardian ad litem of) c. British Columbia* (1980), 112 D.L.R. (3d) 297). Il a néanmoins reconnu que [TRADUCTION] « l'ultime question » consistait à se demander si « l'omission de l'instructeur de rester près de la demanderesse avait été une cause de l'accident » (p. 307). Sur la question du lien de causalité, qui est une question de fait, le juge Seaton a clairement substitué son opinion à celle du juge de première instance sans tenir compte de la norme de contrôle appropriée. Ses remarques finales sur la question de la causalité, à la p. 308, font ressortir son absence de retenue à l'égard de la conclusion du juge de première instance sur ce point :

> [TRADUCTION] Tout bien considéré, j'estime que la preuve étaye la prétention des demandeurs voulant que la conduite de l'instructeur, qui l'a laissée seule sous la crête de la butte, a été l'une des causes de l'accident.

112 En rétablissant la décision du juge de première instance, notre Cour n'a pas précisé si elle le faisait parce que la cour d'appel avait eu tort de modifier la conclusion de ce dernier sur la négligence ou parce qu'elle avait erronément modifié ses conclusions sur la causalité. Les motifs donnent à penser que la dernière proposition est la bonne. La seule partie du jugement de première instance mentionnée par notre Cour se rapporte à la conclusion sur le lien de causalité. Le juge Dickson (plus tard Juge en chef) a fait les remarques suivantes dans l'arrêt *Jaegli Enterprises*, précité, à la p. 4 :

> À la fin d'un procès de neuf jours, le juge Meredith, qui a présidé le procès, a rendu un jugement dans lequel il a

very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli Enterprises* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli Enterprises* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam*, *supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

examiné soigneusement toute la preuve et a conclu que l'accident était imputable uniquement à Larry LaCasse et que les demandeurs pouvaient recouvrer de LaCasse des dommages-intérêts pour un montant à déterminer. Les réclamations contre Paul Ankenman, Jaegli Enterprises Limited et les autres défendeurs ont été rejetées avec dépens.

La Cour a ensuite cité quelques décisions, dont certaines ne traitent pas de négligence (voir *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78), au soutien de la proposition générale qu'« une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve » (p. 84). Étant donné que la Cour s'est attachée à la question du lien de causalité, question de fait seulement, je ne crois pas que l'arrêt *Jaegli Enterprises* établisse que les cours d'appel doivent faire montre de retenue lorsque le juge de première instance conclut à la négligence. À mon avis, dans l'arrêt *Jaegli Enterprises*, la Cour n'a fait que confirmer le principe bien établi portant qu'une cour d'appel ne doit pas modifier une conclusion de fait du juge de première instance en l'absence d'erreur manifeste et dominante.

(2) L'erreur de droit dans les motifs de la Cour du Banc de la Reine

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée dans la jurisprudence, la juge de première instance devait se demander si le tronçon du chemin Snake Hill sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. Après avoir déterminé quel était le critère juridique applicable, la juge de première instance a toutefois omis de se demander si un tel conducteur aurait pu rouler en sécurité sur le tronçon en question. Le fait d'omettre entièrement une étape d'un critère juridique, dans l'application de celui-ci aux faits de l'espèce, équivaut à mal interpréter le droit (*Southam*, précité, par. 39). Par conséquent, la Cour d'appel de la Saskatchewan a donc eu raison de qualifier cette omission d'erreur de droit et de contrôler les conclusions de fait tirées par la juge de première instance à la lumière du critère juridique approprié.

The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act, 1989* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge*, *supra*, at p. 558; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*R. v. Jennings*, [1966] S.C.R. 532, at p. 537; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 892; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in *Jennings*, *supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety".

115 La jurisprudence de longue date portant sur l'interprétation de l'art. 192 de la *Rural Municipality Act, 1989* et des dispositions qu'il a remplacées établit clairement que les municipalités ont l'obligation de tenir les chemins [TRADUCTION] « dans un état raisonnable d'entretien de façon que ceux qui doivent l[es] emprunter puissent, en prenant des précautions normales, y circuler en sécurité » (*Partridge*, précité, p. 558; *Levey c. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (C.A. Sask.), p. 766; *Diebel Estate c. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (B.R.), p. 71 et 72). Plusieurs autres provinces ont adopté des lois établissant une obligation de diligence semblable, et les tribunaux de ces provinces ont interprété cette obligation de la même façon (*R. c. Jennings*, [1966] R.C.S. 532, p. 537; *Comté de Parkland n^o^ 31 c. Stetar*, [1975] 2 R.C.S. 884, p. 892; *Fafard c. City of Quebec* (1917), 39 D.L.R. 717 (C.S.C.), p. 718). Interprétant une disposition similaire de la *Highway Improvement Act* de l'Ontario, R.S.O. 1960, ch. 171, notre Cour a indiqué, dans l'arrêt *Jennings*, précité, p. 537, qu'[TRADUCTION] « [i]l a été décidé à maintes reprises en Ontario que, lorsque l'obligation de maintenir une route en bon état d'entretien est légalement imposée à un organisme, celui-ci doit maintenir la route dans un état permettant à ceux qui l'empruntent en prenant des précautions normales d'y circuler en sécurité ».

There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard*, *supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v.*

116 Il existe de bonnes raisons de limiter l'obligation d'entretien des routes incombant aux municipalités au respect d'une norme suffisante pour permettre aux conducteurs qui prennent des précautions normales d'y circuler en sécurité. Comme l'a dit notre Cour dans l'arrêt *Fafard*, précité, p. 718 : [TRADUCTION] « [l]es municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues; leur obligation consiste à faire preuve de diligence raisonnable et de maintenir leurs rues dans un état raisonnablement sécuritaire pour la circulation normale des personnes qui prennent des précautions normales en vue d'assurer leur propre sécurité ». En conséquence, les cours d'appel estiment depuis longtemps que le juge de première instance commet une erreur s'il conclut qu'une municipalité

Town of North Battleford (1911), 4 Sask. L.R. 75 (*en banc*), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact . . . I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient . . . . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved

manque à son obligation du seul fait qu'un danger existe, indépendamment de la question de savoir si ce danger présente ou non un risque pour l'usager ordinaire du chemin. Le genre d'erreur qu'il faut éviter a été décrit ainsi par le juge en chef Wetmore dans l'affaire *Williams c. Town of North Battleford* (1911), 4 Sask. L.R. 75 (*in banco*), p. 81 :

> [TRADUCTION] Il me semble que la question qui se pose dans ce genre d'action — soit celle de savoir si le chemin est tenu dans un état d'entretien tel que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité — est essentiellement une question de fait [. . .] j'hésiterais à écarter une conclusion de fait du juge de première instance s'il avait relevé l'existence des faits nécessaires pour trancher l'affaire, mais il ne l'a pas fait. Il a conclu que l'intersection était « un endroit dangereux non éclairé, et qu'aucun accident ne s'y produirait si on faisait preuve d'une prudence extrême, mais que cet endroit n'était pas tenu dans un état d'entretien propre à rendre improbable un tel accident ». Il n'a pas examiné la question en se demandant si ceux qui doivent emprunter ce chemin peuvent, en prenant des précautions normales, y circuler en sécurité. Le seul fait que l'intersection soit dangereuse n'est pas suffisant . . . [Je souligne.]

Il ressort clairement de la jurisprudence susmentionnée que la simple existence d'un risque ou danger ne fait pas en soi naître pour la municipalité l'obligation d'installer un panneau de signalisation. Même si, à partir des faits, le juge de première instance arrive à la conclusion que l'état du chemin crée effectivement un risque, il doit poursuivre son analyse et se demander si ce risque présente un danger pour le conducteur raisonnable prenant des précautions normales. Le conducteur moyen rencontre souvent des conditions de conduite intrinsèquement dangereuses. Les automobilistes conduisent leur véhicule sur des chaussées glacées ou humides. Ils roulent la nuit sur des chemins de campagne mal éclairés. Ils rencontrent des obstacles comme des bancs de neige et des nids-de-poule. Souvent ces obstacles ne sont pas visibles, car ils sont dissimulés ou « cachés ». Le bon sens suggère que les automobilistes font toutefois preuve d'une certaine prudence en présence de conditions de conduite dangereuses. On n'attend de la municipalité qu'elle prenne des mesures d'avertissement supplémentaires que lorsque l'état du chemin et l'ensemble des

bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

The appellant in this case argued, at para. 27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. . . .
>
> . . . where the existence of . . . bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not

autres circonstances ne signalent pas au conducteur la possibilité qu'un danger existe. Par exemple, le conducteur moyen s'attend à ce qu'un chemin de terre devienne glissant lorsqu'il est mouillé. À l'opposé, les tabliers de pont asphaltés qui se trouvent sur les routes sont souvent glissants, bien qu'ils paraissent complètement secs. Par conséquent, des panneaux sont installés pour alerter les conducteurs de cette possibilité non apparente.

118 En l'espèce, l'appelant a plaidé, au par. 27 de son mémoire, que la juge de première instance s'était, en fait, demandé si un conducteur raisonnable prenant des précautions normales considérerait que le tronçon du chemin Snake Hill où s'est produit l'accident constitue un risque. Il souligne en particulier les commentaires suivants de la juge de première instance, aux par. 85 et 86 :

> [TRADUCTION] Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché . . .
>
> . . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Je souligne.]

119 L'appelant semble prétendre que la juge de première instance s'est acquittée de son devoir d'appliquer le droit aux faits simplement en intégrant les faits de l'espèce à la formulation du critère juridique. Ce n'était toutefois pas suffisant. Bien qu'il ressorte clairement des passages précités que la juge de première instance a, à partir des faits, conclu que la portion du chemin Snake Hill où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien dans cette partie de ses motifs qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. Le fait de conclure à l'existence d'un danger, même caché, n'implique pas forcément que le conducteur

travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate lookout considering the maintenance that was being performed on the road. In *Diebel Estate*, *supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on

raisonnable prenant des précautions normales ne peut pas y circuler en sécurité. Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d' « intrinsèquement » dangereux ne vide pas la question. Mes collègues affirment que la juge de première instance pouvait inférer la connaissance du danger du seul fait que la courbe serrée constituait une caractéristique permanente du chemin (par. 61). Ici encore, rien dans les motifs de la juge de première instance n'indique qu'elle a tiré une telle inférence ou n'explique en quoi une telle inférence satisfaisait aux conditions juridiques relatives à l'obligation de diligence.

La juge de première instance n'a pas non plus examiné cette question ailleurs dans ses motifs. Son omission à cet égard devient encore plus évidente lorsqu'on compare son analyse (ou son absence d'analyse) à celle des affaires où les tribunaux ont appliqué la bonne démarche. La Cour d'appel a donné comme exemple deux de ces affaires. Dans *Nelson c. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (B.R.), le demandeur prétendait que la municipalité défenderesse aurait dû installer des panneaux signalant la présence, au milieu du chemin, d'un sillon résultant de travaux municipaux de nivellement. Le juge de première instance a estimé que, si le conducteur avait pris des précautions normales, il aurait pu rouler en sécurité sur la chaussée. Au lieu de cela, il a roulé trop vite et manqué de vigilance compte tenu des travaux d'entretien qui étaient effectués sur le chemin. Dans *Diebel Estate*, précité, il s'agissait de déterminer si la municipalité avait, en vertu de l'art. 192, l'obligation d'installer un panneau avertissant les automobilistes qu'une route rurale se terminait de façon abrupte à un croisement en T. Le juge de première instance s'est demandé comment un conducteur raisonnable prenant des précautions normales aurait roulé sur ce chemin, et il a répondu ainsi à cette question, à la p. 74 :

[TRADUCTION] Ses conclusions [celles de l'expert] pour ce qui concerne l'arrêt des automobiles découlent

the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added; emphasis in original deleted.]

toutefois d'opérations mathématiques et bien que je n'aie jamais emprunté le chemin en question, d'après les descriptions faites au procès, je suis d'avis que le croisement pourrait constituer un danger la nuit pour quelqu'un qui ne connaît absolument pas l'endroit, eu égard à la vitesse de réaction de chacun et à la possibilité que quelqu'un confonde le croisement en T avec quelque chose d'autre. Par ailleurs, j'estime que quelqu'un ne connaissant aucunement l'endroit agirait de façon tout à fait téméraire en roulant à 80 kilomètres à l'heure la nuit sur un chemin de terre comme celui qui nous intéresse. [Je souligne; soulignement dans l'original omis.]

The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

121 Le fait de conclure que la juge Wright a commis une erreur de droit en omettant d'appliquer un élément essentiel du critère juridique n'invalide pas forcément ses conclusions de fait. En effet, la compétence de notre Cour en matière d'examen des questions de droit l'autorise, lorsqu'une telle erreur est décelée, à reprendre telles quelles les conclusions de fait du juge de première instance et à les réévaluer au regard du critère juridique approprié.

In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

122 Selon moi, ni les faits retenus par la juge Wright ni aucun autre élément de preuve au dossier qu'elle aurait pu prendre en considération si elle s'était posé la bonne question n'appuient sa conclusion que l'intimée a manqué à son obligation. La portion du chemin Snake Hill où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général et les conditions auxquelles les automobilistes doivent faire face à l'endroit précis de l'accident avertissent l'automobiliste raisonnable que la prudence s'impose. Les automobilistes sachant reconnaître les divers facteurs qui appellent à la prudence auraient pu franchir le soi-disant [TRADUCTION] « danger caché » sans l'aide d'un panneau de signalisation.

The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a

123 Pour savoir comment un conducteur raisonnable prenant des précautions normales aurait conduit son véhicule sur le chemin Snake Hill, il faut tenir compte de la nature du chemin et de la configuration des lieux. Un automobiliste raisonnable ne roulera pas sur une étroite route de campagne gravelée de la même façon que sur une route asphaltée. Il est raisonnable de s'attendre à ce qu'un automobiliste conduise moins vite et soit plus attentif à la présence

road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on . . . " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

de dangers potentiels sur un chemin de catégorie inférieure, particulièrement s'il n'est pas familier avec celui-ci.

Bien que, en l'espèce, la juge de première instance ait fait certains commentaires sur la nature du chemin, je souscris à la conclusion de la Cour d'appel selon laquelle [TRADUCTION] « [e]lle aurait pu examiner la question de manière plus approfondie, en tenant davantage compte du type de terrain que le chemin traversait, de la nature et de la désignation du chemin selon le système de classification des routes et ainsi de suite . . . » (par. 55). Au lieu de cela, son analyse s'est limitée aux commentaires suivants, au par. 84 de ses motifs :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin. Dans son analyse, la juge de première instance s'est attachée presque exclusivement à l'utilisation qui est faite du chemin, sans prendre en compte le genre de conditions qu'il présente aux conducteurs. Il n'est peut-être pas surprenant qu'elle ne se soit pas livrée à cette analyse approfondie, puisqu'elle ne s'est pas demandé comment un conducteur raisonnable aurait roulé sur ce chemin. Si elle s'était posé cette question, elle aurait vraisemblablement procédé à une évaluation analogue à celle qu'a faite la Cour d'appel au par. 13 de son jugement :

> [TRADUCTION] Le chemin, d'une largeur de 20 pieds environ, a été qualifié de « chemin nivelé », qu'on appelle aussi parfois « chemin d'accès », soit tout juste une catégorie au-dessus d'un « chemin de prairie ». Comme tel, il n'a été ni renforcé ni revêtu de gravier, sauf légèrement à l'une de ses extrémités, il s'agit tout simplement d'un chemin nivelé à même le terrain, suivant le tracé présentant le mois d'obstacles. On n'y a installé aucune signalisation.

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

Comme le chemin Snake Hill est une route de catégorie inférieure, à peine un ou deux niveaux au-dessus d'un chemin de prairie, on peut présumer qu'un conducteur raisonnable prenant des précautions normales y roulerait avec une certaine prudence.

Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

126 Après avoir examiné la nature générale du chemin et avoir conclu que, du fait de cette nature même, une certaine prudence s'imposait, il faut néanmoins prendre en considération les caractéristiques physiques du chemin à l'endroit où l'accident s'est produit. Même sur des chemins de catégorie inférieure, un conducteur raisonnable prenant des précautions normales pourrait être pris par surprise sur un tronçon particulièrement dangereux. Il s'agit là, en fait, de l'argument central présenté par l'appelant en l'espèce. Selon sa thèse, dite de la « nature hybride » du chemin, au par. 8 de son mémoire, le fait que la courbe où est survenu l'accident se trouve entre des tronçons en ligne droite risquait d'amener les automobilistes à croire que les virages pouvaient être pris à des vitesses supérieures à celles auxquelles ils pouvaient l'être en réalité.

While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

127 Bien que les motifs de la juge de première instance n'indiquent pas clairement si elle a retenu la thèse de la « nature hybride » du chemin, il semble que sa conclusion selon laquelle la municipalité a manqué à son obligation d'entretien ait reposé largement sur son examen des caractéristiques physiques du chemin, à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. S'appuyant sur les témoignages de deux experts, MM. Anderson et Werner, elle a estimé que la portion du chemin où s'est produit l'accident constituait un [TRADUCTION] « danger pour le public ». Selon elle, le fait que la distance de visibilité ait été réduite par la présence de broussailles empêchait les automobilistes de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Sur la base des témoignages d'experts, elle a conclu que le virage ne pouvait être pris à une vitesse supérieure à 60 km/h dans des conditions favorables, ou 50 km/h sur chaussée humide.

Again, I would not reject the trial judge's factual finding that the curve presented motorists with an

128 Je ne rejetterais pas, je le répète, la conclusion de fait selon laquelle la courbe présentait un risque

inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution (Respondent's Record, vol. II, at pp. 373-76). The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed

intrinsèque pour les automobilistes. Toutefois, il n'y a rien dans la preuve qui permette de conclure qu'un conducteur raisonnable prenant des précautions normales aurait été incapable de prendre le virage en sécurité. Comme je l'ai expliqué plus tôt, l'obligation d'entretien des municipalités n'est en cause que lorsqu'il existe une situation objectivement dangereuse et qu'il est établi qu'un conducteur raisonnable s'approchant du danger serait incapable d'assurer sa sécurité en raison des caractéristiques de ce danger.

Je partage l'opinion de la juge de première instance selon laquelle une partie du danger créé par les broussailles se trouvant en bordure de la route tenait au fait qu'un conducteur ne pourrait deviner le rayon de courbure prononcé du virage à droite serré qu'elles dissimulaient. À mon sens, toutefois, le véritable danger intrinsèque de ce tronçon du chemin résidait dans le fait que les broussailles, ainsi que le court rayon de courbure du virage, empêchent les automobilistes circulant en direction est de voir si un véhicule s'approche en sens inverse. Par conséquent, il est très peu probable qu'un conducteur raisonnable prenant des précautions normales approcherait de ce virage à une vitesse supérieure à 50 km/h, vitesse à laquelle la juge de première instance a conclu qu'il était possible de le prendre en sécurité. Étant donné qu'un conducteur raisonnable n'approcherait pas de ce virage à une vitesse supérieure à celle lui permettant de le prendre en sécurité, je conclus que le virage ne constituait pas un risque pour le conducteur raisonnable.

Il suffit d'examiner les photos du tronçon du chemin Snake Hill où l'accident est survenu pour constater à quel point il existait des indices visuels propres à inciter les conducteurs à s'approcher du virage avec prudence (dossier de l'intimée, vol. II, p. 373-376). Les photos, qui montrent ce que voit le conducteur sur le point d'amorcer le virage, laissent voir la présence de broussailles s'avançant considérablement au-dessus du chemin. Il ressort clairement de ces photographies qu'un automobiliste approchant du virage ne manquerait pas pressentir le risque que présente celui-ci, savoir qu'il est tout simplement impossible de voir de l'autre côté de la courbe ce qui peut arriver en sens inverse. De plus,

by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> . . . if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. . . . You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

le danger que constitue l'incapacité de voir ce qui arrive en sens inverse est d'une certaine manière exacerbé par le fait que le chemin est utilisé par des exploitants agricoles. Au procès, ce risque a été décrit ainsi par M. Sparks, ingénieur, qui témoignait à titre d'expert :

> [TRADUCTION] . . . si vous ne pouvez pas voir, si vous ne pouvez pas voir assez loin sur le chemin pour, vous savez, savoir si quelqu'un arrive en sens inverse avec un tracteur tirant une herse et que vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs, selon moi, que l'attention et la prudence s'imposent.

131 Le témoignage d'expert retenu par la juge de première instance n'étaye pas sa conclusion que la portion du chemin Snake Hill où s'est produit l'accident présente un risque pour un conducteur raisonnable prenant des précautions normales. Lorsqu'on lui a demandé si un automobiliste prenant des précautions normales amorcerait le virage à vitesse réduite étant donné qu'il ne peut voir ce qui l'attend au détour du chemin, M. Werner a reconnu que lui-même prend le virage [TRADUCTION] « à vitesse réduite » et qu'il serait prudent que les conducteurs ralentissent en raison de la distance de visibilité limitée. De même, M. Anderson a admis avoir pris le virage à 40-45 km/h la première fois qu'il est passé par là, car il [TRADUCTION] « ne voulait pas se placer dans une situation difficile ». Lorsqu'on lui a demandé s'il avait pris le virage à cette vitesse parce qu'il ne pouvait pas voir ce qui l'attendait, il a répondu par l'affirmative : [TRADUCTION] « [c']est la raison pour laquelle je l'ai approché comme je l'ai fait. »

132 Fait encore plus révélateur peut-être, M. Nikolaisen lui-même a témoigné qu'il ne pouvait pas savoir si un véhicule venait en sens inverse lorsqu'il s'approchait du virage. L'échange suivant, durant le contre-interrogatoire de M. Nikolaisen au procès par l'avocat de la partie adverse, est éclairant :

[TRADUCTION]

> Q. . . . Vous avez dit à mon savant collègue, M. Logue, que votre visibilité était plutôt réduite, est-ce exact? La visibilité sur le chemin est plutôt réduite, n'est-ce pas?

A. As in regards to travelling through the curves, yes, that's right, yeah.

Q. Yes. And you did not know what was coming as you approached the curve, that is correct?

A. That's correct, yes.

Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?

A. Or a tractor or a cultivator or something, that's right.

Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?

A. That's right, yeah, that is correct.

R. Lorsqu'on se trouve dans les courbes, oui, c'est exact.

Q. Oui. Et vous ne saviez pas ce qui s'en venait lorsque vous approchiez du virage, est-ce exact?

R. C'est exact, oui.

Q. Il aurait pu y avoir un véhicule venant dans votre direction de l'autre côté de la courbe ou quelqu'un se promenant à cheval sur le chemin, est-ce exact?

R. Ou un tracteur, un cultivateur ou autre chose, c'est vrai.

Q. Ou un tracteur ou un cultivateur. Vous savez, puisque vous avez grandi en milieu rural en Saskatchewan, que toutes ces situations sont autant de possibilités, n'est-ce pas?

R. C'est vrai, oui.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

Je ne retiens pas non plus l'argument de l'appelant portant que la « nature hybride » du chemin avait pour effet d'amener les conducteurs à prendre le virage à une vitesse inappropriée. Cette théorie repose sur l'hypothèse que les automobilistes roulent sur les portions en ligne droite du chemin à une vitesse pouvant atteindre 80 km/h, et qu'ils se trouvent en conséquence pris de court lorsqu'ils doivent prendre un virage soudain. Pourtant, bien que la vitesse permise sur le chemin soit 80 km/h, rien dans la preuve n'indiquait qu'un conducteur raisonnable aurait roulé à cette vitesse à quelque endroit du chemin. Après avoir témoigné que les conducteurs [TRADUCTION] « étaient autorisés » à rouler à une vitesse maximale de 80 km/h, cette vitesse étant la vitesse permise par défaut (et non la vitesse affichée), M. Werner a reconnu que les chemins nivelés de la province ne sont pas conçus pour permettre la circulation à une vitesse de 80 km/h. À l'instar de la Cour d'appel, je suis d'avis que la preuve établit que [TRADUCTION] « le chemin Snake Hill était manifestement un chemin de terre ou un chemin nivelé » et qu'il « n'était clairement pas conçu pour permettre une vitesse générale de 80 kilomètres à l'heure ». Comme je l'ai souligné précédemment, la configuration du chemin, de même que sa nature et sa catégorie doivent être prises en considération pour décider si le conducteur raisonnable aurait pu y rouler en sécurité.

134

Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?

A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.

Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see -- you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?

A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.

Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?

A. Yes, it changed, yes.

Q. Now you were faced with something other than a straight road?

A. M'hm. Yes.

Q. Now you were on -- and at some point along there the surface of the road changed, did it not?

A. Yes.

Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?

A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.

Q. Yes. And all those differences were obvious, were they not?

En outre, rien dans la preuve présentée au procès n'indiquait que les conducteurs avaient été trompés de quelque façon par la soi-disant « nature hybride » du chemin. L'échange suivant, entre l'avocat de l'intimée et M. Werner, illustre bien la façon dont les automobilistes perçoivent le chemin :

[TRADUCTION]

Q. Maintenant M. Werner, ne seriez-vous pas d'accord pour dire que le changement dans la nature de ce chemin lorsque vous rouliez d'est en ouest était très évident?

R. On roulait en ligne droite, puis on descendait une colline, et on ne savait vraiment pas ce qui pouvait se trouver de l'autre côté de la colline.

Q. C'est vrai. Mais je veux dire, le fait que le chemin suivait d'abord un tracé horizontal et en ligne droite pour soudainement devenir une colline et que vous ne pouviez pas voir -- vous pouviez voir du haut de la colline que le chemin ne continuait pas en ligne droite, n'est-ce pas?

R. Oui, vous pouviez, du haut de la colline, c'est une colline très abrupte, oui.

Q. Et au fur et à mesure que vous descendiez la colline il devenait assez évident, n'est-ce pas, que la nature du chemin changeait?

R. Oui, ça changeait, oui.

Q. Vous vous trouviez alors devant autre chose qu'un chemin en ligne droite?

R. M'hm. Oui.

Q. Vous étiez maintenant sur -- et à un moment donné la surface du chemin changeait, n'est-ce pas?

R. Oui.

Q. Et, évidemment, le chemin n'était plus, j'utilise le terme aménagé pour désigner un chemin possédant une certaine élévation et qui est dans une certaine mesure drainé. Au fur et à mesure que vous rouliez d'ouest en est, vous constatiez, vous pouviez voir, il était évident, qu'il ne s'agissait plus d'un chemin aménagé?

R. Il s'agit essentiellement d'un chemin tracé suivant la topographie des lieux et sans fossés, et il y avait un accotement à droite du conducteur. C'était différent de la portion précédente.

Q. Oui. Et toutes ces différences étaient évidentes, n'est-ce pas?

A. Well, I -- they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

R. Bien, je -- elles étaient évidentes, suffisamment évidentes pour moi, oui. [Je souligne.]

Bien qu'ils puissent constituer des facteurs concluants dans d'autres affaires, la « nature hybride » du chemin, le rayon de courbure du virage, le revêtement du chemin et l'absence d'élévation n'étayent pas en l'espèce la conclusion de la juge de première instance. Pour répondre à la question de savoir comment un conducteur raisonnable prenant des précautions normales roulerait sur ce chemin, il faut faire appel au bon sens. Il n'était pas nécessaire d'installer un panneau de signalisation en l'espèce, et ce pour la simple raison que n'importe quel conducteur raisonnable aurait réagi aux indices naturels l'invitant à ralentir. Le droit n'oblige pas les municipalités à installer des panneaux signalant aux automobilistes des dangers qui ne font pas courir de risque véritable aux conducteurs prudents. Imposer à la municipalité l'obligation d'installer un panneau dans un cas comme celui qui nous occupe équivaut à modifier la nature de l'obligation qu'ont les municipalités envers les conducteurs. Les municipalités ne sont pas tenues d'aménager des panneaux d'avertissement à l'intention des conducteurs en état d'ébriété et, ainsi, de remédier à leur incapacité de réagir aux indices qui alertent le conducteur moyen de la présence d'un danger.

Mes collègues affirment que la juge de première instance a dûment pris en considération tous les aspects du critère juridique applicable, y compris la question de savoir si la courbe présentait un risque pour le conducteur moyen qui prend des précautions normales. Ils disent que la juge de première instance a effectivement examiné, explicitement et implicitement, la conduite de l'automobiliste moyen ou raisonnable qui s'approche du virage. Ils font ensuite remarquer qu'elle a fait état du témoignage des experts MM. Anderson et Werner, qui ont tous deux analysé la conduite de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait qu'elle ait imputé une partie de la responsabilité à M. Nikolaisen indique, à leur avis, qu'elle a évalué sa conduite au regard à la norme du conducteur moyen, et qu'elle a donc pris en compte la façon dont ce dernier aurait conduit (par. 40).

I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

137 En toute déférence, je ne crois pas qu'il ressorte explicitement des motifs de la juge de première instance qu'elle s'est demandé si la portion du chemin où s'est produit l'accident constituait un risque pour le conducteur raisonnable prenant des précautions normales. Comme je l'ai expliqué précédemment, le fait que la juge de première instance ait reformulé le critère juridique sous forme de conclusion n'indique aucunement qu'elle s'est demandé si le conducteur moyen aurait considéré la courbe comme dangereuse.

Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

138 Je n'estime pas non plus que l'examen de la façon de conduire de l'automobiliste moyen dans cette situation ressorte « implicitement » des motifs de la juge de première instance. À mon avis, il est très problématique de présumer qu'un juge de première instance a tiré des conclusions de fait à l'égard d'une question précise alors qu'il n'y a aucune indication dans ses motifs quant à la nature de ces conclusions. Bien que le juge de première instance soit censé connaître le droit, on ne peut présumer qu'il a tiré à une conclusion factuelle en l'absence d'indication dans ses motifs qu'il est effectivement arrivé à cette conclusion. Si le tribunal de révision est prêt à supposer que le juge de première instance a tiré certaines conclusions, sur la foi de la preuve figurant au dossier, bien que rien dans les motifs n'indique qu'il a vraiment tiré ces conclusions, alors le tribunal de révision ne saurait conclure que le juge de première instance a mal interprété des éléments de preuve ou a négligé d'en tenir compte.

In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if

139 À mon avis, tout au long de leurs motifs, mes collègues ont à tort présumé que la juge de première instance était arrivée à certaines conclusions de fait fondées sur la preuve, malgré le fait que ces conclusions ne soient pas formulées dans ses motifs. Quant à la question de savoir si le virage présentait un risque pour le conducteur moyen, mes collègues ont fait remarquer qu'« en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins » (par. 46). Le problème que pose cet énoncé est que, même si la juge de première instance s'est appuyée sur les témoignages de MM. Anderson et Werner

any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court" (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65). They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge only to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

pour conclure que la portion du chemin Snake Hill où s'est produit l'accident constituait un danger, il est impossible, à partir de ses motifs, de dire si elle s'est appuyée sur un témoignage — et, dans l'affirmative, sur lequel de ceux-ci — pour conclure que la courbe présentait un risque pour le conducteur moyen qui prend des précautions raisonnables. En l'absence de toute indication que la juge de première instance s'est penchée sur cette question, je ne suis pas disposé à présumer qu'elle l'a fait.

De même, mes collègues supposent l'existence de conclusions factuelles dans leur examen de la question de la connaissance incombant à la municipalité. Sur ce point, ils réitèrent que « le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge de procès » (par. 62). Au paragraphe 64 de leurs motifs, mes collègues examinent les conclusions de la juge de première instance sur la question de la connaissance et concluent qu'elle « a inféré que la municipalité aurait dû être informée de la situation sur le chemin à Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger ». Je ne crois pas qu'on puisse à juste titre conclure que la juge de première instance est arrivée à la conclusion que le système d'inspection routière de la municipalité était inadéquat, alors que rien dans ses motifs n'indique qu'elle a tiré cette conclusion. Mes collègues estiment en outre que la juge de première instance n'a pas prêté à la municipalité la connaissance requise sur la base des accidents survenus antérieurement sur le chemin Snake Hill (par. 65). Ils disent même qu'il n'était pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3) (par. 67). À mon avis, ils donnent à ces conclusions une nouvelle interprétation, qui contredit directement les motifs qu'elle a exposés. La juge de première instance examine d'autres facteurs qui touchent à la connaissance requise, uniquement pour souligner l'importance qu'elle accorde au fait que des accidents sont survenus antérieurement ailleurs sur le chemin (au par. 90) :

If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. [Emphasis added.]

[TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que ce chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. [Je souligne.]

My colleagues refer to the decision of *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from *Van de Perre*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

141 Mes collègues citent l'arrêt *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60, dans lequel j'ai dit, au par. 15, qu'« une omission [dans les motifs du juge de première instance] ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée ». Cependant, le présent pourvoi peut être distingué de l'affaire *Van de Perre*. Dans cette affaire, la Cour d'appel avait irrégulièrement substitué ses propres conclusions de fait aux conclusions factuelles évidentes du juge de première instance, au motif que celui-ci n'avait pas pris en compte tous les éléments de preuve. Par contraste, dans le présent pourvoi, mes collègues affirment que notre Cour ne doit pas modifier les « conclusions de la juge de première instance », même si aucune conclusion n'a été tirée et s'il faut supposer leur existence à partir de la preuve. En l'espèce, je suis d'avis que l'omission de la juge de première instance de tirer quelque conclusion que ce soit quant à la question de savoir si le conducteur moyen aurait considéré comme dangereux le tronçon du chemin où s'est produit l'accident fait naître la conviction rationnelle que, sur ce point, elle a négligé d'examiner la preuve de telle manière que sa conclusion en a été affectée.

Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an

142 Enfin, je ne peux souscrire à l'opinion que la conclusion de la juge de première instance selon laquelle M. Nikolaisen a fait preuve de négligence vaut examen de la question de savoir si l'automobiliste moyen prenant des précautions normales aurait estimé que la courbe où s'est produit l'accident était dangereuse. Il ressort clairement des motifs de la juge de première instance qu'elle a tiré les conclusions de fait suivantes : il était possible de prendre

excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

B. *Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?*

143 Pursuant to s. 192(3) of *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of the *Rural Municipality Act*, *supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous — where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance

le virage en sécurité à 60 km/h à l'heure sur chaussée sèche et à 50 km/h sur chaussée humide, et M. Nikolaisen s'est approché du virage à une vitesse excessive. Comme je l'ai indiqué plus tôt, elle a omis de se demander si le conducteur moyen qui prend des précautions normales se serait approché du virage à une vitesse qui lui aurait permis de le prendre en sécurité ou, autrement dit, si la courbe présentait un danger réel pour le conducteur moyen.

B. *La juge de première instance a-t-elle commis une erreur en concluant que la municipalité intimée connaissait ou aurait dû connaître le danger que présentait le chemin municipal?*

Conformément au par. 192(3) de la *Rural Municipality Act, 1989*, aucune faute n'est imputée à la municipalité à moins que le demandeur n'établisse que celle-ci « connaissait ou aurait dû connaître le mauvais état du chemin ».

La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le mauvais état dans lequel se trouvait, prétend-on, le chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. C'est ce qui ressort de ses conclusions à cet égard, aux par. 89 à 91 de ses motifs :

> [TRADUCTION] On ne peut reprocher à la municipalité rurale d'avoir manqué à l'obligation légale de diligence imposée par l'art. 192 de la loi intitulée la *Rural Municipality Act*, précitée, que si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill. De 1978 à 1990, quatre accidents sont survenus sur ce chemin. Trois de ces accidents ont eu lieu dans le même secteur que celui où le véhicule de Nikolaisen a fait un tonneau. On ne connaît pas le lieu précis du quatrième accident. Bien que, dans au moins trois de ces accidents, les automobilistes aient circulé en sens inverse du véhicule de Nikolaisen, les accidents se sont produits dans la partie la plus dangereuse du chemin Snake Hill — là où commencent les courbes, et non dans la partie où le chemin est généralement droit et plat. Au moins deux de ces accidents ont été signalés aux autorités.
>
> Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas

given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular. [Emphasis added.]

Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

J'estime que, en omettant d'installer et de maintenir un panneau d'avertissement ou de signalisation dans cette partie du chemin Snake Hill, la M.R. n'a pas satisfait à la norme de diligence qui est raisonnable dans les circonstances. Par conséquent, elle ne s'est pas acquittée de son obligation de diligence à l'égard des automobilistes en général et à l'égard de M. Housen en particulier. [Je souligne.]

145 La question de savoir si la municipalité aurait dû connaître le mauvais état du chemin (en l'occurrence, le risque que présentait l'absence de signalisation) soulève à la fois des questions de droit et des questions de fait. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, au regard des obligations qui incombent au conseiller municipal ordinaire, raisonnable et prudent (*Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 28). Le juge de première instance répond ensuite à la question en appréciant les faits de l'espèce dont il est saisi.

146 J'estime que la juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin. Elle a commis une erreur de droit lorsqu'elle a examiné la question de la connaissance du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent. Elle a commis une autre erreur de droit en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a clairement commis une erreur de fait en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur le chemin Snake Hill.

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

Il ressort implicitement des motifs de la juge de première instance qu'elle n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue du conseiller municipal prudent. Pour trancher la question de la connaissance requise suivant le critère prévu par la loi, l'intimée ne pouvait être tenue aux mêmes normes qu'un spécialiste analysant la courbe après l'accident. Pourtant, c'est exactement ce qu'a fait la juge de première instance. Elle s'est fondée sur les témoignages d'expert donnés par MM. Anderson et Werner pour conclure que la courbe présentait un danger caché. Elle a également reconnu implicitement que le risque visé par la courbe n'était pas un risque facilement décelable par un profane. Cela ressort clairement du passage de son jugement où elle considère comme une excuse valable pour justifier le dépôt tardif de l'action contre l'intimée l'explication de l'avocat de l'appelant selon laquelle il ne croyait pas que l'intimée était dans son tort jusqu'à ce qu'il prenne connaissance des opinions des experts. La juge de première instance a dit ceci à cet égard : [TRADUCTION] « [c]e n'est que plus tard, après avoir obtenu l'opinion des experts, que la possibilité que la nature du chemin Snake Hill puisse avoir été un facteur ayant contribué à l'accident a été sérieusement envisagée » (par. 64). Son omission de s'interroger sur le risque que courrait le conducteur prudent apparaît elle aussi clairement, lorsqu'on considère qu'elle n'a pas tenu compte de la preuve concernant la façon dont les deux experts avaient eux-mêmes pris le virage dangereux (voir le par. 54 qui précède).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of

Si la juge de première instance avait répondu à la question de savoir si la municipalité aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin en se plaçant du point de vue du conseiller municipal prudent, elle serait nécessairement arrivée à une conclusion différente. Il n'y avait aucune preuve établissant que le danger existant créait un risque que l'intimée aurait dû connaître. Cette dernière n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers. Elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des

trees and vegetation which grew up along the sides of the road.

In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, at pp. 503-4:

. . . "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge

courbes ou à la présence d'arbres et de végétation en bordure du chemin.

149 En outre, la question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, la juge de première instance n'aurait pas dû attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Outre les éléments de preuve examinés précédemment relativement à la norme de diligence, les témoignages de plusieurs témoins ordinaires qui ont déposé au procès étayent cette conclusion. Craig Thiel, qui habite le long de ce chemin, a témoigné qu'il ne savait pas que le chemin Snake Hill avait la réputation d'être dangereux et qu'il n'avait lui-même jamais éprouvé de difficulté à conduire à l'endroit du chemin où est survenu l'accident. Sa conjointe, Toby, a également dit ne pas avoir connu de problème sur ce chemin.

150 La juge de première instance a clairement commis une autre erreur de fait en présumant, sur la foi des quatre accidents survenus auparavant sur le chemin Snake Hill, que la municipalité connaissait l'existence du danger. Bien que ses conclusions de fait relativement aux accidents eux-mêmes soient solidement étayées par la preuve, elles n'appuient tout simplement pas sa conclusion qu'un conseiller municipal prudent aurait dû savoir qu'il existait un risque pour le conducteur prudent. En conséquence, la juge de première instance a fait erreur en tirant une inférence déraisonnable de la preuve qui lui était soumise. Comme il a été indiqué plus tôt, la norme de contrôle applicable aux inférences de fait est, d'abord et avant tout, celle de la décision raisonnable. Les propos suivants du juge Spence dans l'arrêt *Joseph Brant Memorial Hospital c. Koziol*, [1978] 1 R.C.S. 491, p. 503-504, illustrent bien ce principe :

. . . « c'est un principe bien connu que les tribunaux d'appel ne doivent pas remettre en cause les conclusions

if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system**.** The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the *The Rural Municipality Act, 1989* was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity

de fait du juge de première instance, s'il existait des témoignages dignes de foi sur lesquels le juge pouvait raisonnablement fonder ses conclusions ». [Je souligne.]

Comme je l'ai mentionné précédemment, il n'y avait aucune preuve indiquant que l'intimée savait concrètement que d'autres accidents étaient survenus auparavant sur le chemin Snake Hill. Au contraire, M. Danger, l'administrateur de la municipalité, a témoigné qu'il avait entendu parler de ces accidents pour la première fois au procès.

Par conséquent, il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière. L'appelant a expressément plaidé cet argument devant notre Cour, insistant fortement sur le fait que l'intimée [TRADUCTION] « ne dispose pas d'un mécanisme structuré de collecte de cette information, que ce soit par l'entremise des conseillers ou d'autres personnes ». Suivant cet argument, on prétend que, si la municipalité avait établi un système officiel lui permettant de savoir si des accidents sont survenus sur une route donnée, elle aurait su que des accidents s'étaient produits sur le chemin Snake Hill et elle aurait pris les mesures correctives appropriées pour faire en sorte que le chemin soit sécuritaire pour les usagers.

J'estime que l'argument susmentionné présente deux lacunes importantes. Premièrement, l'argument selon lequel les autres accidents survenus sur le chemin Snake Hill étaient pertinents en l'espèce repose sur la présomption que la municipalité intimée avait l'obligation d'avoir un système « structuré » d'information sur les accidents, et que le système informel en place était d'une certaine manière déficient. À mon avis, l'appelant ne s'est pas acquitté du fardeau qui lui incombait de démontrer que le système sur lequel la municipalité se fondait pour remplir ses obligations au titre de l'art. 192 de la *Rural Municipality Act, 1989*, était déficient. La preuve établit que, avant 1988, il n'existait pas de système officiel d'information sur les accidents. Il existait néanmoins, un système informel dans le cadre duquel les conseillers municipaux étaient chargés de s'enquérir de l'existence de dangers

with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

sur les routes. Les conseillers étaient informés de l'existence de dangers par suite des plaintes qu'ils recevaient et par leur propre expérience des routes situées dans les cantons qu'ils représentaient. La juge de première instance a commis une erreur manifeste en concluant que ce système informel était déficient, alors qu'aucune preuve n'indiquait quelles étaient les pratiques suivies par d'autres municipalités à cet égard au moment des accidents, ni n'expliquait en quoi aurait consisté un système raisonnable, compte tenu particulièrement du fait que la municipalité rurale concernée ne comptait que six conseillers. Il n'y a aucune preuve indiquant qu'une municipalité rurale de ce genre a besoin du genre de mécanisme élaboré de collecte de renseignements dont peut avoir besoin une grande ville, où les accidents sont plus fréquents et où il est peu probable que le bouche à oreille soit suffisant pour porter les dangers à l'attention des conseillers.

The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

154 La municipalité intimée possède maintenant un système plus officiel d'information sur les accidents. Depuis 1988, en effet, le ministère de la Voirie et du Transport de la Saskatchewan communique annuellement à chaque municipalité la liste de tous les accidents d'automobile survenus sur son territoire et signalés aux policiers. Bien que ce système puisse, j'en conviens, permettre aux municipalités de mieux repérer les dangers dans certaines circonstances, je ne crois pas que son adoption soit pertinente eu égard aux faits de l'espèce. Un seul accident, survenu en 1990, a été signalé à l'intimée par le truchement de ce système. L'appelant n'a produit aucun élément de preuve indiquant que cet accident est survenu au même endroit que celui où le véhicule de M. Nikolaisen a fait un tonneau, ou qu'il était attribuable à l'état de la route plutôt qu'à la négligence du conducteur.

Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite

155 Deuxièmement, élément peut-être plus important encore, il était tout simplement illogique pour la juge de première instance d'inférer de l'existence des accidents antérieurs que l'intimée aurait dû savoir que l'endroit où le véhicule de M. Nikolaisen a fait un tonneau présentait un risque pour les conducteurs prudents. Les trois accidents — qui sont survenus en 1978, 1985 et 1987

direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

— se sont produits dans des courbes différentes, et les véhicules concernés circulaient en sens inverse. L'accident de 1978 et celui de 1987 ont eu lieu dans le premier virage à droite au pied de la colline, les automobilistes roulant alors en direction ouest. L'accident de 1985 s'est produit dans la deuxième courbe, toujours en direction ouest, encore une fois dans une courbe différente de celle où le véhicule de M. Nikolaisen a fait un tonneau. Si ces accidents indiquent quoi que ce soit, c'est plutôt que la municipalité aurait dû se préoccuper des courbes qui, pour les véhicules circulant en direction ouest, se trouvent à l'est de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. La preuve n'a révélé aucun accident qui se serait produit à l'endroit précis où est survenu l'accident qui nous intéresse.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

Qui plus est, le simple fait qu'un accident se produise n'emporte pas en soi l'obligation d'installer un panneau signalisateur. Dans bien des cas, les accidents surviennent non pas à cause de l'état de la route, mais plutôt à cause de la négligence du conducteur. Un bon exemple de cela est l'accident dont a été victime M. Agrey sur le chemin Snake Hill en 1978. Ce dernier a témoigné que, juste avant l'accident, il avait quitté des yeux la route pour parler à l'un des passagers du véhicule. Un autre passager lui a crié de faire attention, mais il était déjà trop tard pour bien exécuter le virage. Accusé de conduite imprudente, M. Agrey a été déclaré coupable et condamné à une amende. Comme on l'a vu plus tôt, dans le contexte de la norme de diligence, une municipalité n'a pas l'obligation de rendre les chemins sécuritaires pour tous les conducteurs, indépendamment de la prudence et de l'attention avec lesquelles ils conduisent. Elle est seulement tenue de maintenir les chemins dans un état propre à permettre au conducteur raisonnable qui prend des précautions normales d'y circuler en sécurité.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked, at para. 31: "Cst. Forbes does not recall

Outre les erreurs substantielles examinées précédemment, je tiens également à souligner que, selon moi, la juge de première instance ne s'est pas souciée du fardeau de preuve sur cette question. Lorsqu'elle a examiné la preuve relative aux autres accidents survenus sur le chemin Snake Hill, la juge

any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healey are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the RCMP members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

de première instance a fait les remarques suivantes au par. 31 : [TRADUCTION] « La gendarme Forbes ne se souvient pas de quelque autre accident sur le chemin Snake Hill durant la période où elle était affectée au détachement de la GRC de Shellbrook, de 1987 à 1996. Le caporal Healey avait entendu parler d'un autre accident. Forbes et Healey ne sont que deux des neuf membres du détachement de la GRC à Shellbrook » (je souligne). Par cette remarque, la juge de première instance semble laisser entendre que d'autres accidents sur le chemin Snake Hill ont pu avoir été signalés et que l'intimée aurait dû le savoir. En toute déférence pour la juge de première instance, s'il y avait eu d'autres accidents que ceux qui ont été mentionnés au procès, il appartenait à l'appelant d'en faire la preuve, soit en faisant témoigner les membres de la GRC à qui les accidents avaient été signalés ou encore les personnes en cause dans ces accidents, soit en utilisant tout autre moyen à sa disposition. En outre, l'importance que la juge de première instance a accordée aux autres accidents survenus sur le chemin Snake Hill dépendait du postulat que l'intimée aurait dû posséder un système officiel d'information sur les accidents. L'intimée n'était pas tenue de prouver qu'elle n'avait pas l'obligation de disposer d'un tel système. Il incombait plutôt à l'appelant d'établir que ce genre de système était nécessaire et que le système informel existant était insuffisant.

C. *Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?*

C. *La juge de première instance a-t-elle commis une erreur en concluant que l'accident avait été causé, en partie, par le défaut de la municipalité intimée d'installer un panneau de signalisation près de la courbe?*

The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

Les conclusions de la juge de première instance au sujet du lien de causalité figurent au par. 101 de son jugement, où elle dit ceci : 158

> I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only

> [TRADUCTION] J'estime que l'accident s'est produit parce que M. Nikolaisen s'est engagé dans le virage sur le chemin Snake Hill à une vitesse légèrement supérieure à celle qui lui aurait permis de réussir la manœuvre. L'accident est survenu dans la portion la plus dangereuse du chemin Snake Hill, à un endroit où un panneau d'avertissement ou de signalisation aurait dû être installé et maintenu pour avertir les automobilistes de

served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

l'imminence d'un danger caché. Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir. Je suis convaincue, selon la prépondérance des probabilités, que si on avait prévenu M. Nikolaisen de l'existence de la courbe, il aurait réagi et pris des mesures appropriées, qui l'auraient empêché de perdre la maîtrise de son véhicule en s'engageant dans le virage.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

Les conclusions susmentionnées de la juge de première instance touchant le lien de causalité sont des conclusions portant sur des questions de fait. Par conséquent, notre Cour n'interviendra que si elle estime que, pour arriver à ses conclusions, la juge a commis une erreur manifeste, n'a pas tenu compte d'un élément de preuve déterminant ou pertinent, a mal compris la preuve ou en a tiré des conclusions erronées (*Toneguzzo-Norvell*, précité, p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the

En arrivant à sa conclusion sur le lien de causalité, la juge de première instance a commis plusieurs des erreurs mentionnées par notre Cour dans l'arrêt *Toneguzzo-Norvell*, précité. Dans la mesure où la juge de première instance s'est fondée sur le témoignage de M. Laughlin, le seul expert à avoir témoigné sur la question du lien de causalité, j'estime qu'elle a mal interprété son témoignage ou qu'elle en a tiré des conclusions erronées. Les éléments anecdotiques des témoignages de Craig Thiel, Toby Thiel et Paul Housen concernant le degré d'ébriété de M. Nikolaisen constituent la seule autre preuve testimoniale sur le lien de causalité. Bien que leurs témoignages aient fourni quelques éléments de preuve touchant cette question, il ne s'agit pas, pour des raisons que j'examinerai plus loin, d'éléments sur lesquels la juge de première instance pouvait raisonnablement s'appuyer. Je n'estime pas non plus qu'elle pouvait se fonder sur la preuve que M. Nikolaisen avait réussi à prendre le virage permettant d'accéder au chemin Snake Hill depuis l'entrée des Thiel. L'inférence que la juge de première instance a tirée de ce fait était déraisonnable et faisait abstraction de la preuve selon laquelle

road three times in the 18 to 20 hours preceding the accident.

I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the RCMP supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties [that] are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

le véhicule de M. Nikolaisen avait fait une embardée même dans cette courbe. En outre, la juge de première instance a clairement commis une erreur en ne prenant pas en considération d'autres éléments de preuve pertinents concernant le lien de causalité, en particulier le fait que M. Nikolaisen avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident.

161 Je ne partage pas l'avis de la juge de première instance voulant que le témoignage de M. Laughlin, spécialiste judiciaire en matière d'alcool au service de la GRC, étaye la conclusion que M. Nikolaisen aurait réagi à un panneau lui signalant l'imminence du virage droite où s'est produit l'accident. Le témoignage de M. Laughlin établit de façon prépondérante que des personnes dans un état d'ébriété aussi avancé que celui de M. Nikolaisen au moment de l'accident ne réagiraient vraisemblablement pas à un panneau d'avertissement. De plus, le témoignage de M. Laughlin mène irrésistiblement à la conclusion que l'alcool a été le facteur causal de l'accident. La juge de première instance a commis une erreur à cet égard, car elle a mal interprété un élément de la déposition de M. Laughlin et elle a omis de tenir compte de l'importance de son témoignage, considéré globalement.

162 À la lumière des échantillons de sang prélevés par la gendarme Forbes environ trois heures après l'accident, M. Laughlin a estimé que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 mg par 100 ml de sang. Dans son témoignage, M. Laughlin a commenté en détail l'incidence d'une telle alcoolémie sur la capacité d'une personne de conduire :

[TRADUCTION] Bien, Madame, l'alcoolémie que j'ai calculée en l'espèce est très élevée. Les facultés mentales essentielles qui jouent un rôle important dans la conduite d'un véhicule automobile sont affaiblies par l'alcool. Et toute habileté tributaire de ces facultés mentales est affectée, notamment l'anticipation, le jugement, l'attention, la concentration, la capacité de partager son attention entre deux choses ou plus. Et parce qu'elles sont affectées à ce point, il serait risqué pour quiconque possède un tel taux d'alcool dans son sang de conduire un véhicule automobile.

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. . . . if an impaired person is an experienced drinker there — it won't be that high. However, there will be an increased risk compared to a sober state. . . . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Interrogé sur l'état des recherches touchant l'incidence de l'alcool sur le risque d'accident automobile, voici ce qu'a dit M. Laughlin :

> [TRADUCTION] À ce taux-là, le risque qu'une personne qui consomme modérément de l'alcool provoque un accident est extrêmement élevé, probablement 100 fois plus élevé que le conducteur à jeun, ou plus encore. Et dans certains cas, à ce taux-là, j'ai lu des textes scientifiques dans lesquels on indiquait que le risque de provoquer un accident mortel est de 200 à 300 fois plus élevé que celui d'un conducteur à jeun. [. . .] [S]i la personne en état d'ébriété est quelqu'un qui a l'habitude de boire, le risque n'est pas aussi élevé. Cependant, il est plus grand que si la personne avait été à jeun. [. . .] Mais au dessus de 100 mg par 100 ml de sang, peu importe le degré de tolérance à l'alcool, une personne a les facultés affaiblies pour ce qui concerne sa capacité de conduire.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

Après avoir fait ces remarques, M. Laughlin a décrit la capacité d'une personne en état d'ébriété avancé de réagir à la présence d'un danger lorsqu'elle conduit.

> [TRADUCTION] Madame, j'aimerais ajouter que conduire un véhicule est une activité exigeante, qui demande d'accomplir une multiplicité de tâches simultanément. Le danger pour la personne qui conduit en état d'ébriété réside dans le fait qu'il lui faut plus de temps pour déceler la présence d'un risque ou d'un danger; il lui faut plus de temps pour décider quelle mesure corrective est requise, et elle prend plus de temps à mettre cette décision à exécution; de plus, une telle personne peut avoir tendance à prendre de mauvaises décisions. Ce processus accroît donc le risque. Aussi, si l'ébriété est avancée au point où les habiletés motrices sont affaiblies, l'exécution de la décision s'en trouve compromise. Il s'ensuit donc une tentative plutôt malhabile de corriger la situation. De plus, certaines personnes tendent à prendre davantage de risques lorsqu'elles sont en état d'ébriété. Elles ne font pas preuve de discernement et de jugement. Elles sont incapables d'évaluer correctement les changements dans l'état de la route et les conditions météorologiques et d'adapter leur conduite en conséquence. Mais même si elles reconnaissent qu'il s'agit effectivement de dangers, elles peuvent avoir tendance à prendre davantage de risques que le conducteur à jeun.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied

Les remarques qui précèdent étayent la conclusion que l'accident s'est produit en raison de l'état d'ébriété de M. Nikolaisen et non de quelque manquement de la part de l'intimée. De fait, lorsque les extraits du témoignage de M. Laughlin sur lesquels

on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence.

s'est fondée la juge de première instance sont examinés dans leur contexte, ils n'appuient pas la conclusion de cette dernière que M. Nikolaisen aurait été capable de réagir à un panneau de signalisation s'il y en avait eu un. Répondant à la question d'un avocat lui demandant s'il était possible qu'une personne ayant l'alcoolémie de M. Nikolaisen voit un panneau de signalisation et y réagisse, M. Laughlin a dit ceci :

> [TRADUCTION] Oui, il est possible qu'une personne le voit et y réagisse et peut-être qu'elle réagisse adéquatement. Il est possible qu'elle ne réagisse pas adéquatement ou qu'elle ne le voit même pas. J'estime que l'élément fondamental à retenir ici est qu'il est probable que la personne ayant atteint cette alcoolémie ne voit pas le panneau, ou ne réagisse pas adéquatement, comparativement au conducteur à jeun. Que le conducteur avec cette alcoolémie commette plus d'erreurs que le conducteur à jeun. [Je souligne.]

Il est clair, dans le passage qui précède, que M. Laughlin reconnaît simplement que tout est possible, tout en avançant avec conviction qu'il y a une plus forte probabilité que les conducteurs ayant atteint ce degré d'ébriété ne réagissent pas à un panneau de signalisation ou à une autre mesure d'avertissement. Cette opinion ressort également clairement de l'extrait suivant, où il donne des précisions supplémentaires sur la capacité d'une personne en état d'ébriété de réagir aux panneaux de signalisation et à d'autres éléments sur les routes :

> [TRADUCTION] Sur le plan de la perception, le conducteur en état d'ébriété a tendance à se concentrer sur son champ visuel central et à manquer certains indices en périphérie, c'est ce qu'on appelle la vision tubulaire. En outre, les conducteurs ont tendance à se concentrer sur la partie inférieure de ce champ visuel central et, en conséquence, ils ne voient pas très loin devant eux sur la route lorsqu'il sont au volant. Et, par conséquent, les recherches indiquent que les conducteurs en état d'ébriété ont tendance à manquer davantage de panneaux de signalisation, d'avertissements, d'indices, particulièrement ceux situés dans leur champ visuel périphérique ou plus loin sur la route. [Je souligne.]

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Au cours des plaidoiries devant notre Cour, l'appelant a souligné que, bien que M. Laughlin ait été le seul expert entendu au sujet du lien de causalité, les témoins ordinaires ont attesté que M. Nikolaisen n'avait pas les facultés visiblement

It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the *Criminal Code* process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may

affaiblies avant de quitter la résidence des Thiel. Les motifs de la juge de première instance n'indiquent pas clairement si elle s'est appuyée sur les témoignages de Craig Thiel, Toby Thiel et Paul Housen à cet égard. Dans la mesure où elle se serait fondée sur cette preuve pour conclure que l'accident avait été causé en partie par la négligence de l'intimée, j'estime qu'il était déraisonnable de le faire. En l'espèce, bien que compétents pour exprimer leur opinion sur la question de savoir s'ils pourraient, en tant que conducteurs moyens, manœuvrer en toute sécurité sur le tronçon du chemin Snake Hill où l'accident s'est produit, les témoins ordinaires n'étaient pas compétents pour évaluer le degré d'ébriété de M. Nikolaisen. La raison de leur absence de compétence à cet égard a été expliquée en ces termes par M. Laughlin, dans la réponse suivante qu'il a donnée à l'un des avocats qui lui demandait s'il était possible de tirer des conclusions du fait qu'une personne ne démontre ni signe d'affaiblissement de ses habiletés motrices ni problème d'élocution :

> [TRADUCTION] Non, votre Honneur, puisque, Madame, lorsqu'on vérifie s'il y a affaiblissement des habiletés motrices ou des signes de cet affaiblissement, on cherche des indices d'ébriété, et non d'affaiblissement des facultés. Rappelez-vous que j'ai dit que les premières facultés affectées par l'alcool sont les facultés cognitives et mentales. Elles sont toutes importantes lorsqu'il s'agit de conduire un véhicule. Cependant, lorsqu'on examine une personne qui a consommé de l'alcool, il est très difficile de dire si son attention ou sa capacité de diviser son attention, ou si sa concentration ou son jugement sont réduits. En conséquence les habiletés motrices ne sont pas des indices fiables d'affaiblissement des facultés. Et si on pense au processus prévu par le *Code criminel*, on a cessé d'y recourir depuis 30 ans en tant qu'indices utiles de l'affaiblissement des facultés. On ne se fie plus à l'appréciation subjective policier quant aux habiletés motrices d'une personne pour déterminer si les facultés de celle-ci sont affaiblies. [Je souligne.]

Il appert également des motifs de la juge de première instance qu'elle s'est dans une certaine mesure fondée sur la preuve indiquant que M. Nikolaisen avait réussi à prendre le virage à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Je partage l'avis de l'intimée selon lequel ce fait n'est tout simplement pas pertinent. La capacité de M. Nikolaisen de prendre ce virage n'établit pas que sa capacité de conduire

have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

n'était pas affaiblie. Comme l'a souligné l'intimée, au par. 101 de son mémoire, il a pu réduire sa vitesse à cet endroit, ou simplement avoir eu de la chance. Facteur plus important encore cette preuve n'aide d'aucune façon à déterminer si M. Nikolaisen aurait réagi à un panneau placé à l'approche de la courbe où s'est produit l'accident, si un tel panneau avait existé. Il n'y avait aucun panneau aux abords de la courbe située à la sortie de l'entrée, tout comme il n'y en avait pas aux abords de celle où s'est produit l'accident.

At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

166 Quoi qu'il en soit, en se fondant sur le fait que M. Nikolaisen avait pris avec succès le virage devant l'entrée des Thiel, la juge de première instance a fait abstraction de l'élément de preuve pertinent indiquant que l'arrière de son véhicule avait zigzagué à son départ de la résidence des Thiel. On peut raisonnablement inférer de cette preuve que, quoique M. Nikolaisen ait été en mesure de prendre ce virage, il n'y est pas parvenu sans difficulté. Bien que cette preuve ne soit pas nécessairement importante en soi, elle aurait dû néanmoins alerter la juge de première instance quant aux problèmes intrinsèques de l'inférence qu'elle tirait de la capacité de M. Nikolaisen de prendre ce premier virage.

In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

167 En plus de ne pas avoir tenu compte de la preuve pertinente que constituaient les traces des zigzags, la juge de première instance n'a pas considéré pertinent le fait que M. Nikolaisen avait circulé sur le chemin Snake Hill à trois reprises au cours des 18 à 20 heures ayant précédé l'accident. Dans son examen de la preuve, elle a souligné, au par. 8 de ses motifs, que [TRADUCTION] « M. Nikolaisen ne connaissait pas bien le chemin Snake Hill. Bien qu'il ait emprunté ce chemin à trois reprises au cours des 24 heures précédentes, il ne l'a fait qu'une seule fois dans la même direction que celle qu'il a prise en quittant la résidence des Thiel. »

I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether

168 Je ne vois tout simplement pas comment la juge de première instance a pu conclure que les accidents qu'ont eu des automobilistes circulant en sens inverse étaient pertinents pour statuer sur la connaissance par l'intimée de l'existence d'un risque d'accident, tout en suggérant du même souffle que le fait que M. Nikolaisen ait roulé à deux reprises

or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other

en sens inverse sur le chemin en question n'était pas pertinent pour déterminer s'il aurait reconnu que la courbe présentait un risque ou s'il aurait réagi à un panneau d'avertissement. Indépendamment de cette contradiction, j'estime que le fait que M. Nikolaisen ait roulé dans la même direction sur le chemin Snake Hill après avoir quitté la résidence des Thiel pour se rendre au jamboree, la veille de l'accident, est fort pertinent en ce qui concerne le lien de causalité. La conclusion que le résultat aurait été différent si une signalisation avait prévenu M. Nikolaisen de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Je souscris à l'opinion de l'intimée que la raison évidente pour laquelle M. Nikolaisen n'a pas réussi à prendre le virage en toute sécurité dans l'après-midi du 18, alors qu'il avait déjà pris ce virage et d'autres sans difficulté au cours des 18 à 20 heures précédentes, était l'effet combiné de sa consommation d'alcool, de son manque de sommeil et du fait qu'il n'avait pas mangé.

Pour conclure sur la question du lien de causalité, j'aimerais préciser que le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur ce point n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. La norme de contrôle applicable aux conclusions de fait est celle de la décision raisonnable et non celle de la retenue absolue. Cette norme permet au tribunal d'appel de se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse. Kerans, *op. cit.*, p. 44, a habilement exposé la logique de cette démarche dans le passage suivant :

> [TRADUCTION] La solution au problème réside dans la réponse à la question de savoir si le tribunal de révision doit simplement se demander s'il existe « des éléments de preuve étayant » la conclusion. Il est possible que certains éléments de preuve étayent effectivement la conclusion alors que d'autres éléments conduisent irrésistiblement à la conclusion inverse. Un tribunal pourrait être en mesure de dire qu'un juge des faits raisonnable ne s'appuierait pas sur « certains » éléments vu l'existence des « autres »; de fait, il pourrait dire que, eu égard à

evidence" is to turn one's back on review for reasonableness.

D. *Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of The Rural Municipality Act, 1989?*

The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989*. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown*

l'ensemble des circonstances, il est convaincu qu'il était tout à fait déraisonnable de se fonder sur certains éléments compte tenu des autres. En conséquence, affirmer que « certains éléments de preuve » suffisent, sans égard aux « autres éléments », revient à abandonner l'examen du caractère raisonnable.

D. *Les juridictions inférieures ont-elles commis une erreur en concluant qu'aucune obligation de diligence de common law ne coexiste avec l'obligation légale imposée par l'art. 192 de la Rural Municipality Act, 1989?*

170 L'appelant invite notre Cour à conclure qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence imposée à l'intimée par l'art. 192 de la *Rural Municipality Act, 1989*. Selon l'appelant, l'application de l'obligation de diligence de common law dispenserait la Cour de la nécessité de se demander comment un conducteur raisonnable prenant des précautions normales aurait roulé sur le chemin en cause. L'appelant soutient que la Cour pourrait plutôt appliquer le [TRADUCTION] « critère classique de la conduite raisonnable », lequel, à son avis, l'obligerait à tenir compte des éléments suivants : la probabilité qu'un préjudice connu ou prévisible survienne, la gravité de ce préjudice et le fardeau ou le coût qu'il faudrait assumer pour le prévenir. L'appelant prétend que, suivant ce critère, l'intimée serait tenue responsable.

171 Les juridictions inférieures ont rejeté l'argument susmentionné de l'appelant. Je ne modifierais pas leur décision sur cette question, car il est inutile que notre Cour impose une obligation de diligence de common law lorsqu'il existe clairement une obligation d'origine législative. Quoi qu'il en soit, l'application du critère prévu par la common law ne modifierait pas l'issue de la présente instance.

172 Je souscris à l'argument de l'intimée selon lequel, en l'espèce, il serait redondant et inutile de conclure qu'elle est assujettie à une obligation de diligence de common law alors que le législateur lui a clairement imposé une obligation légale de diligence. Le critère à deux volets énoncé dans l'arrêt *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, pour statuer sur l'existence d'une obligation de diligence de common law, ne s'applique tout

v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, at p. 424:

> . . . if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only rea-

simplement pas lorsque le législateur a prescrit l'obligation dans la loi. Comme l'a indiqué notre Cour dans l'arrêt *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420, p. 424 :

> . . . s'il existait une obligation d'entretien imposée par la loi comme c'est le cas dans certaines provinces, il serait inutile de rechercher une obligation en droit privé en se fondant sur le principe du prochain établi dans l'arrêt *Anns c. Merton London Borough Council*, [1978] A.C. 728. En outre, il est nécessaire d'examiner la dichotomie politique générale-opérations seulement en ce qui concerne la recherche d'une obligation de diligence en droit privé.

Tous les arrêts invoqués par l'appelant pour justifier sa prétention que la municipalité devrait être assujettie à une obligation indépendante de diligence de common law peuvent être distingués de la présente affaire, étant donné qu'il n'existait aucune obligation légale de diligence dans ces affaires (*Just*, précitée; *Brown*, précitée; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Ryan*, précitée).

En outre, j'estime que le résultat serait le même en l'espèce si l'affaire était tranchée d'après les principes ordinaires de la négligence. Tout d'abord, si la Cour faisait l'analyse prévue par la common law, elle appliquerait quand même la norme légale de diligence établie dans la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée par la jurisprudence, pour déterminer l'étendue de la responsabilité de l'intimée envers l'appelant. Comme l'a dit notre Cour dans l'arrêt *Ryan*, précité, par. 29 :

> Cependant, les normes législatives peuvent être hautement pertinentes pour déterminer ce qui constitue une conduite raisonnable dans un cas particulier, et elles peuvent, en fait, rendre raisonnable un acte ou une omission qui, autrement, paraîtrait négligent. En conséquence, les tribunaux peuvent examiner le cadre législatif dans lequel les personnes et les sociétés doivent agir, tout en reconnaissant qu'il est impossible de se soustraire à l'obligation sous-jacente de diligence raisonnable simplement en s'acquittant de ses obligations légales.

De plus, même dans le cadre de l'analyse requise par la common law, notre Cour devrait s'interroger sur le type de dangers que l'intimée aurait dû prévoir en l'espèce. Indépendamment de l'approche choisie,

sonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

The courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur.

175 Depuis longtemps, les tribunaux limitent l'étendue de la norme de diligence découlant de l'existence d'un devoir légal de diligence à l'obligation pour les municipalités d'éliminer seulement les dangers qui présenteraient un risque pour le conducteur raisonnable prenant des précautions normales. Des raisons impérieuses militent en faveur du maintien de cette interprétation. Les municipalités de la province de la Saskatchewan assument l'entretien et la surveillance de quelque 175 000 kilomètres de route, dont 45 000 kilomètres font partie de la catégorie des « chemins nivelés ». La plupart de ces municipalités ne disposent ni d'effectifs permanents considérables ni de ressources importantes en temps et en argent. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle. Il s'agit en conséquent d'un changement que je ne serais pas disposé à apporter.

VII. Disposition

In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

Appeal allowed with costs, GONTHIER, BASTARACHE, BINNIE *and* LEBEL JJ. *dissenting.*

Solicitors for the appellant: Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Solicitors for the respondent: Gerrand Rath Johnson, Regina.

VII. Dispositif

176 En définitive, le jugement de la Cour de l'appel de la Saskatchewan est confirmé et le pourvoi est rejeté avec dépens.

Pourvoi accueilli avec dépens, les juges GONTHIER, BASTARACHE, BINNIE *et* LEBEL *sont dissidents.*

Procureurs de l'appelant : Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Procureurs de l'intimée : Gerrand Rath Johnson, Regina.

2008 FC 302, 2008 CF 302
Federal Court

Pembina Institute for Appropriate Development v. Canada (Attorney General)

2008 CarswellNat 2389, 2008 CarswellNat 508, 2008 FC 302, 2008 CF 302, [2008] F.C.J. No. 324, 165 A.C.W.S. (3d) 857, 323 F.T.R. 297 (Eng.), 35 C.E.L.R. (3d) 254, 80 Admin. L.R. (4th) 74

Pembina Institute for Appropriate Development, Prairie Acid Rain Coalition, Sierra Club of Canada, and Toxics Watch Society of Alberta (Applicants) and Attorney General of Canada, Minister of Fisheries and Oceans, Minister of Environment, and Imperial Oil Resources Ventures Limited (Respondents)

D. Tremblay-Lamer J.

Heard: January 15-17, 2008
Judgment: March 5, 2008
Docket: T-535-07

Counsel: Mr. Sean Nixon, Mr. Devon Page for Applicants
Mr. James Shaw for Respondent, Attorney General of Canada
Gerald F. Scott, Q.C., Martin Ignasiak for Respondent, Imperial Oil

Subject: Environmental
Related Abridgment Classifications
Environmental law
III Statutory protection of environment
III.1 Environmental assessment
III.1.j Practice and procedure
Headnote
Environmental law --- Statutory protection of environment — Environmental assessment — Practice and procedure
Proposed oil sands mining project required environmental assessment under Canadian Environmental Assessment Act before receiving federal approval — Project was referred to joint review panel due to its potential to cause significant adverse environmental effects — Panel issued report recommending that responsible federal authority approve project — Panel was of view that provided proposed mitigation measures and recommendations were implemented; project was not likely to cause significant adverse environmental effects — Applicants, non-profit organizations, applied for judicial review — Application allowed in part — Scope of duties incumbent on panel must be viewed through prism of guiding tenets of precautionary principle and adaptive management — Mitigation measures must be both technically and economically feasible as opposed to solely technically feasible — Panel did not view voluntary partnership of stakeholders as mitigation measure, but rather as proper vehicle for development of environmental management frameworks — Panel considered mitigation measures that were both technically and economically feasible with respect to watershed management — While uncertainties with respect to reclamation of wetlands remained, they could be addressed through adaptive management — Panel's assessment of significance of environmental effects on endangered species were reasonable and consistent with dynamic nature of assessment process — Panel erred by failing to provide cogent rationale for its conclusion that adverse environmental effects of greenhouse gas emissions of project would be insignificant — Matter remitted back to same panel with direction to provide rationale for its conclusion that proposed mitigation measures would reduce potentially adverse effects of greenhouse gas emissions to insignificant level.
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Cases considered by *D. Tremblay-Lamer J.*:

Alberta Wilderness Assn. v. Cardinal River Coals Ltd. (1999), 165 F.T.R. 1, 15 Admin. L.R. (3d) 25, 1999 CarswellNat 2487, 1999 CarswellNat 511, [1999] 3 F.C. 425, 30 C.E.L.R. (N.S.) 175 (Fed. T.D.) — considered

Alberta Wilderness Assn. v. Express Pipelines Ltd. (1996), 1996 CarswellNat 961, 201 N.R. 336, 137 D.L.R. (4th) 177, 42 Admin. L.R. (2d) 296 (Fed. C.A.) — considered

Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage) (2001), 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2001 CarswellNat 39, 27 Admin. L.R. (3d) 229 (Fed. C.A.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage) (2003), 2003 FCA 197, 2003 CarswellNat 1232, 1 Admin. L.R. (4th) 103, 303 N.R. 365, [2003] 4 F.C. 672, 240 F.T.R. 318 (note), 2003 CAF 197, 1 C.E.L.R. (3d) 20, 2003 CarswellNat 2196 (Fed. C.A.) — considered

Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment) (1989), 4 C.E.L.R. (N.S.) 201, 31 F.T.R. 1, 1989 CarswellNat 11 (Fed. T.D.) — considered

Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment) (1990), 6 C.E.L.R. (N.S.) 89, [1991] 1 F.C. 641, 121 N.R. 385, 41 F.T.R. 318 (note), 1990 CarswellNat 725, 1990 CarswellNat 18 (Fed. C.A.) — considered

Cantwell v. Canada (Minister of the Environment) (1991), 6 C.E.L.R. (N.S.) 16, 41 F.T.R. 18, 1991 CarswellNat 5 (Fed. T.D.) — considered

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — considered

Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans) (1999), 169 F.T.R. 298 (note), 248 N.R. 25, 1999 CarswellNat 2081, 31 C.E.L.R. (N.S.) 239, 1999 CarswellNat 3037, [2000] 2 F.C. 263 (Fed. C.A.) — referred to

Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment) (2001), 206 F.T.R. 318 (note), 39 C.E.L.R. (N.S.) 161, 273 N.R. 62, 2001 FCA 203, 2001 CarswellNat 1343 (Fed. C.A.) — considered

Nanda v. Canada (Public Service Commission Appeal Board) (1972), [1972] F.C. 277, 34 D.L.R. (3d) 51, 1972 CarswellNat 13 (Fed. C.A.) — referred to

Union of Nova Scotia Indians v. Canada (Attorney General) (1996), 1996 CarswellNat 1755, 1996 CarswellNat 2623, (sub nom. *Union of Nova Scotia Indians v. Canada (Minister of Fisheries & Oceans))* [1997] 4 C.N.L.R. 280, 122 F.T.R. 81, [1997] 1 F.C. 325, 22 C.E.L.R. (N.S.) 293 (Fed. T.D.) — considered

114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville) (2001), (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town))* 200 D.L.R. (4th) 419, 19 M.P.L.R. (3d) 1, 40 C.E.L.R. (N.S.) 1, 271 N.R. 201, 2001 SCC 40, 2001 CarswellQue 1268, 2001 CarswellQue 1269, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town))* [2001] 2 S.C.R. 241 (S.C.C.) — considered

Statutes considered:

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — referred to

s. 2(1) — referred to

s. 4 — referred to

s. 4(2) — referred to

s. 5 — referred to

s. 16(1) — considered

s. 16(1)(d) — referred to

s. 16(2) — considered

s. 16(3) — referred to

s. 16(3)(b) — referred to

ss. 18-20 — referred to

s. 20 — referred to

s. 20(1) — referred to

ss. 21-24 — referred to

s. 25 — referred to

ss. 29-36 — referred to

s. 34 — referred to

s. 34(a) — referred to

s. 34(b) — referred to

s. 34(c) — referred to

s. 34(c)(i) — considered

s. 34(d) — referred to

s. 35(1) — referred to

s. 35(2) — referred to

s. 37 — referred to

s. 37(1) — referred to

s. 37(1)(a)(ii) — referred to

s. 37(1.1) [en. 1994, c. 46, s. 3(2)] — referred to

s. 38 — referred to

s. 38(1) — referred to

s. 38(2) — referred to

s. 38(5) — referred to

s. 40 — referred to

s. 40(1) — referred to

s. 40(2) — referred to

s. 41 — referred to

s. 41(c) — referred to
Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12
Generally — referred to
Federal Courts Act, R.S.C. 1985, c. F-7
s. 18 — pursuant to

s. 18.1 [en. 1990, c. 8, s. 5] — pursuant to
Fisheries Act, R.S.C. 1985, c. F-14
s. 35(2) — referred to
Species at Risk Act, S.C. 2002, c. 29
Generally — referred to

s. 79 — referred to
Regulations considered:
Government Organization Act, 1979, S.C. 1978-79, c. 13
Environmental Assessment and Review Process Guidelines Order, SOR/84-467

Generally — referred to

s. 12(c) — considered

APPLICATION by non-profit organizations for judicial review of decision recommending that oil sands project receive authorization.

***D. Tremblay-Lamer J.*:**

1 This is an application for judicial review brought by the applicants pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, respecting a report dated February 27, 2007 by the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada (the "Panel") concerning an environmental impact assessment of the Kearl Oil Sands Project (the "Kearl Project" or the "Project"), wherein the Panel recommended to the responsible federal authority, the Department of Fisheries and Oceans ("DFO"), that the Project receive authorization.

2 The applicants, various non-profit organizations concerned about the environmental effects of the Kearl Project, submit that the environmental assessment conducted by the Panel did not comply with the mandatory steps in the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA") and in the Panel's Terms of Reference.

Background

3 Imperial Oil wishes to construct and operate the Kearl Project, an oil sands mine, in northern Alberta. This project includes the design, construction, operation and reclamation of four open pit truck and shovel mines and three trains of ore preparation and bitumen extraction facilities, as well as tailings management facilities and other supporting infrastructure. It will be capable of producing over 48,000 cubic metres of bitumen per day at full production in 2018, and will terminate mining operations in 2060.

4 The Kearl Project will be located approximately 70 kilometres north of Fort McMurray. Further, it is situated in the upper Muskeg River Watershed, a tributary of the Athabasca River, which flows through Wood Buffalo National Park to the Mackenzie River drainage basin in the Northwest Territories.

5 The Kearl Project requires an authorization from the federal Minister of Fisheries and Oceans under section 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14. Before any federal approval can be given, an environmental assessment under the CEAA is required.

6 Pursuant to the Canada-Alberta Agreement for Environmental Assessment Cooperation, the Canadian Environmental Assessment Agency notified Alberta that it wished to participate with Alberta in a cooperative environmental assessment of the Kearl Project. Federally, the Canadian Environmental Assessment Agency confirmed it would carry out the role of Federal Environmental Assessment coordinator, and DFO would be the responsible authority, with Environment Canada (EC), Health Canada (HC) and Natural Resources Canada (NRCan) providing DFO with specialist advice.

7 Imperial Oil filed its Environmental Impact Assessment (EIA) relating to the Kearl Project in July 2005. Representatives of DFO, EC, HC and NRCan assessed the information provided by Imperial Oil as part of the joint environmental assessment with Alberta.

8 On January 18, 2006, DFO recommended to the Minister of the Environment that the Kearl Project be referred to a review panel due to the potential for the proposed project to cause significant adverse environmental effects, including cumulative effects, over large areas and on a number of valued ecosystem components. Canada entered into an agreement with the government of Alberta to conduct a joint review panel. The Joint Panel would render a project approval *decision* on behalf of Alberta authorities and make an approval *recommendation* to the responsible federal authority.

9 The Panel held 16 days of public hearings in November 2006. In addition to the EIA report filed by Imperial Oil, 20 parties filed submissions with the Panel, a number of which also gave oral evidence and were cross-examined at the hearing.

The Panel Report

10 On February 27, 2007, the Panel issued its report, setting out its decision for the Alberta authorities and making recommendations to DFO regarding project authorization.

11 The Panel reviewed the project as well as its purpose, need, project alternatives, and alternative means of implementation. The Panel reviewed the views of various stakeholder groups and summarized issues relating to social and economic effects, mine plan and resource conservation, tailings management, reclamation, air emissions, surface water, aquatic resources, Cumulative Environmental Management Association (CEMA) (a voluntary partnership of stakeholders charged with identifying environmental thresholds before irreversible damage occurs from oil sands development), traditional land use and traditional ecological knowledge, the need for follow-up, and human health.

12 The Panel recommended that DFO approve the Project given its view that provided proposed mitigation measures and recommendations were implemented, the Project was not likely to cause significant adverse environmental effects.

Legislative Context

13 The law governing Environmental Impact Assessments is set out by the provisions of the CEAA as interpreted in the jurisprudence of the Federal Court, Federal Court of Appeal, and the Supreme Court of Canada.

14 The CEAA establishes a two-step decision-making process. The first step is an environmental assessment where potentially adverse environmental effects of a project are analysed (s. 5). The second step involves decision-making and follow-up where a federal authority decides, taking into consideration that assessment, if a particular project should be authorized and what follow-up measures, if any, are required to verify the accuracy of the assessment and the effectiveness of mitigation measures (ss. 37 and 38).

15 The purpose of environmental assessment was described by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 (S.C.C.), at para. 95. While the case involved assessment under the *Environmental Assessment and Review Process Guidelines Order*, S.O.R./84-467 (the "EARPGO", predecessor to the current CEAA), I find the general principles espoused to be particularly instructive:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., Environmental Rights in Canada (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, Environmental Approvals in Canada (1989), at p. 1.2, (SS) 1.4; D. P. Emond, Environmental Assessment Law in Canada (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making. [...]

The First Step: Environmental Assessment

16 With respect to the first step, the CEAA contemplates three "levels" of assessment: screening (ss. 18-20), comprehensive study (ss. 21-24), and mediation and panel reviews (ss. 29-36).

17 Mediation and panel reviews are the most stringent level of assessment and are to be carried out upon a referral to the Minister by the responsible authority *after consideration of a screening report and any comments filed* where: 1) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects; 2) the responsible authority is of the opinion that, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects; or 3) public concerns warrant a reference to this type of procedure (s. 20).

18 Further, s. 25 of the CEAA indicates that the responsible authority may also refer the project to the Minister for a panel review *at any time* where it is of the opinion that the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or where public concerns warrant a reference to this type of procedure.

19 Pursuant to s. 40 of the CEAA, joint review panels involving federal and provincial authorities may be constituted by agreement or arrangement. This agreement or arrangement shall provide that the "environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement" (s. 41). Further, s. 41(c) indicates that "the Minister shall fix or approve the terms of reference for the panel." The "terms of reference" shall determine the scope of certain factors to be taken into consideration by a review panel in its assessment (s. 16(3)(b)). These terms of reference may significantly increase the obligations incumbent upon the Panel (see *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, [1999] F.C.J. No. 441 (Fed. T.D.)).

20 Specifically, the general duties that a review panel is mandated to fulfill are four-fold (s. 34). First, it must ensure that the information required for an assessment is obtained and made available to the public (s. 34(a)). Second, the panel is required to hold hearings in a manner that offers the public an opportunity to participate in the assessment (s. 34(b)). Third, the panel is charged with fulfilling a reporting function whereby it must prepare a report setting out "the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program" as well as a summary of public comments received (s. 34(c)). Finally, it must submit that report to the Minister and the responsible authority (s. 34(d)).

21 Within the ambit of these general duties, a review panel shall include a consideration of the various specific factors enumerated in ss. 16(1) and (2). These factors include the environmental effects of a project including effects of accidents and

malfunctions, cumulative environmental effects, the significance of environmental and cumulative effects, public comments, technically and economically feasible mitigation measures, and any other matter relevant to a review panel assessment that the Minister, after consulting with the responsible authority, may require to be considered (s. 16(1)). Furthermore, the purpose of the project, alternative means of carrying it out, the need for and requirement of any follow-up programs, and the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future are also to be considered (s. 16(2)).

22 With respect to assessing the significance of environmental effects, the jurisprudence reveals that this assessment is not a wholly objective exercise but rather contains "a large measure of opinion and judgement." The Federal Court of Appeal has asserted that "[r]easonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results [...]" (*Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (Fed. C.A.) at para. 10).

23 The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines*, *supra*, at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:

> The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

This view was echoed in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (Fed. C.A.), at para. 55, by Sexton J.A. Therefore, given the predictive function of an environmental assessment and the existence of follow-up mechanisms envisioned by the CEAA, the Panel's assessment of significance does not extend to the elimination of uncertainty surrounding project effects.

24 Similarly, it is evident that the assessment of environmental effects, including mitigation measures, is not to be conceptualized as a single, discrete event. Instructively, in *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), [1997] 1 F.C. 325, [1996] F.C.J. No. 1373 (Fed. T.D.), Mackay J. indicated, at para. 32 that he was not persuaded that the CEAA requires that all the details of mitigating measures be resolved before the acceptance of a screening report. He further asserted that the nature of the process of assessment was "ongoing and dynamic" with continuing dialogue between the proponent, the responsible authorities and interested community groups.

25 Moreover, jurisprudence relating to the EARPGO is also instructive as to the content of the legal duty to consider mitigation measures. In *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1990), [1991] 1 F.C. 641 (Fed. C.A.) [hereinafter Tetzlaff], at p. 657, Iacobucci C.J.A. described the assessment of mitigation measures in s. 12(c) of the EARPGO in the following terms: "If the initial assessment procedure reveals that the potentially adverse environmental effects that may be caused by the proposal "are insignificant or mitigable with known technologies" the proposal [...] may proceed or proceed with mitigation, as the case may be." In the case of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 31 F.T.R. 1 (Fed. T.D.), at p. 12, the decision which was upheld by the Court in *Tetzlaff*, Muldoon J. analysed s. 12(c) of the EARPGO and asserted that "since the Minister did not identify any known technologies but only vague hopes for future technology, it is not possible to consider that the recited adverse water quality effects are mitigable". Thus, in the context of a panel assessment, the possibilities of future research and development do not constitute mitigation measures.

26 I note also that s. 16(1)(d) of the CEAA (the equivalent of s. 12(c) of the EARPGO), the provision mandating consideration of mitigation measures, adds the proviso that mitigation measures must be technically *and economically* feasible as opposed to solely technically feasible ("known technologies" in the wording of the EARPGO). This second condition, in effect, imposes an additional requirement for measures to be classified as mitigating under the CEAA: under the current Act mitigation measures must also be economically feasible in order to qualify as such.

The Second Step: Decision and Follow-up

27 Once the panel report is completed, the federal authority responsible for the decision must take the report into consideration, and shall take a course of action that is in conformity with the approval of the Governor in Council (s. 37(1.1)). The responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part, either where the project is not likely to cause significant adverse environmental effects, or where it is likely to cause significant adverse environmental effects that can be justified in the circumstances (s. 37(1)).

28 Where a federal authority decides to authorize a project following a panel review, it is mandated to design a follow-up program for the project and ensure its implementation (s. 38(2)). The results of the follow-up program may be used to implement adaptive management measures or to improve the quality of future environmental assessments (s. 38(5)).

Guiding Tenets

29 The powers associated with the administration of the CEAA are to be exercised "in a manner that protects the environment and human health and applies the precautionary principle" (s. 4(2)).

30 In recent amendments to the CEAA, acting in a manner consistent with the precautionary principle was specifically introduced in s. 4 as a duty bearing upon "the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities" in the administration of the CEAA.

31 In the case of *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42 (S.C.C.), at para. 31, the Supreme Court of Canada cited the definition of the precautionary principle from the Bergen Ministerial Declaration on Sustainable Development (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

32 An approach that has developed in conjunction with the precautionary principle is that of "adaptive management". In *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] F.C.J. No. 703 (Fed. C.A.), at para. 24, Evans J.A. stated that "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge" and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.

33 Accordingly, the scope of the duties incumbent upon a panel must be viewed through the prism of these guiding tenets: the precautionary principle and adaptive management. As an early planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.

34 In sum, the CEAA represents a sophisticated legislative system for addressing the uncertainty surrounding environmental effects. To this end, it mandates early assessment of adverse environmental consequences as well as mitigation measures, coupled with the flexibility of followup processes capable of adapting to new information and changed circumstances. The dynamic and fluid nature of the process means that perfect certainty regarding environmental effects is not required.

Issues

35 This application involves the determination of whether the Panel committed reviewable errors by failing to consider the factors enumerated in ss. 16(1) and 16(2) of the CEAA, more particularly by relying on mitigation measures that were

not technically and economically feasible and by failing to comply with the requirement to provide a rationale for its recommendations pursuant to s. 34(c)(i) of the CEAA.

36 The applicants focus on these reviewable errors in relation to the following three issues:

A) Cumulative Effects Management Association (CEMA), Watershed Management and Landscape Reclamation;

B) Endangered Species; and

C) Greenhouse Gas Emissions

Standard of Review

37 All parties agree that to the extent that the issues posed involve the interpretation of the CEAA, as questions of law, they are reviewable on a standard of correctness (*Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* (1999), [2000] 2 F.C. 263, [1999] F.C.J. No. 1515 (Fed. C.A.), at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (Fed. C.A.), at para. 55). However, issues relating to weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect are reviewed on the standard of reasonableness *simpliciter* (*Bow Valley*, *supra*, at para. 55; *Inverhuron*, *supra*, at paras. 39-40).

38 The crux of the standard of review determination in the present case involves the *characterization* of the alleged errors. According to the applicants, the Panel report contains numerous legal errors relating to the interpretation of the CEAA that are reviewable on the standard of correctness. However, the respondents indicate that these alleged errors are in fact errors relating to the conclusions drawn from the evidence before the Panel and therefore are reviewable on the standard of reasonableness.

39 As noted by Campbell J. in *Cardinal River Coals Ltd.*, *supra*, at para. 24, "it is important to appropriately characterize a perceived failure to comply [with the requirements of the CEAA] as a question of law or merely an attack on the "quality" of the evidence and, therefore the "correctness" of the conclusions drawn on that evidence" (see also *Express Pipelines Ltd.*, *supra*, at para. 10).

40 With respect to the arguments relating to the Panel's reliance on mitigation measures that were not technically and economically feasible, there is no indication in the Report that the Panel misunderstood the legal interpretation of technically and economically feasible mitigation measures. In essence, what the applicants are challenging is the underlying completeness or quality of the evidence which in their view was not sufficient to allow the Panel to conclude as it did given the uncertainties that still remained regarding the Project. Thus, this question is reviewable on the standard of reasonableness *simpliciter*.

41 With respect to the question of providing a "rationale" for the conclusions and recommendations of the Panel, this question relates to the interpretation of the requirements of s. 34(c)(i) of CEAA. The applicants do not attack the rationale provided but rather question whether any rationale at all was put forth by the Panel. Whether or not the Panel has provided a rationale for its conclusions and recommendations is question of law, reviewable on a standard of correctness.

Analysis

A) CEMA, Watershed Management and Landscape Reclamation

i. CEMA

42 The applicants submit that while the Panel recognized that CEMA was vital in addressing the cumulative impacts of oil sands development and had the responsibility to address most of the critical cumulative effects challenges in the Athabasca oil sands region, it also expressed deep concern at the inability of CEMA "to establish and maintain priority for critical items such as the Water Management Framework for the Athabasca River, the Muskeg River Watershed Integrated Management Plan, and the Regional Terrestrial and Wildlife Management Framework" and cited specific examples of CEMA failing to meet timelines and complete its work.

43 The respondent, Imperial Oil, argues that the applicants' assertion is based on a narrow reading of the Report restricted to that portion dealing solely with integrated watershed planning which is only one of the many issues addressed by the Panel. I agree.

44 The Panel's discussion of CEMA was tied closely to regional watershed management planning. As a regional association comprised of industry and government representatives as well as community and civil society stakeholders, CEMA is expected to address the objectives of watershed management planning. Given this important role in regional effects management, it was therefore appropriate for the Panel to raise concerns regarding CEMA's functioning. Based on the Report, I could not conclude that the Panel considered CEMA as a mitigation measure, but rather as the proper vehicle for the development of environmental management frameworks.

45 While the Panel discussed CEMA extensively and highlighted the numerous problems associated with its functioning, it also made detailed recommendations regarding its operation in order to ensure that CEMA would function properly in years to come, and to provide the ultimate decision-maker with a concrete evaluation of this key stakeholder association. I note also the Panel's comments with respect to regulatory backstopping by Alberta Environment ("AENV") in the event that CEMA is unable to meet its timelines for management frameworks. I find this to be consistent with the precautionary principle in that if CEMA is unable to complete a management plan by March 2008, the regulator should be engaged to prevent potentially adverse environmental consequences.

ii. Watershed Management

46 With respect to Watershed Management, I am satisfied that the Panel took into consideration mitigation measures that were both technically and economically feasible. A fair reading of the Report shows that the Panel addressed the issue of surface water extensively. In fact, the Panel considered the issue under three distinct subheadings: in-stream flow needs, integrated watershed planning, and water quality, and additionally under fish and fish habitat.

47 Contrary to the applicants' assertion that there was no evidence or the scantest evidence upon which to evaluate the existence, nature and effectiveness of the mitigation measures, the Panel's recommendations on the issue of water quality refer to mitigation measures contained in Imperial Oil's EIA as well as the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "EPEA") approval conditions. The Panel concludes:

> [...] the Joint Panel believes that by implementing a comprehensive monitoring plan, the suggested *EPEA* approval conditions, the Joint Panel's recommendation, and the mitigations identified by Imperial Oil in its EIA, the KOS [Kearl Oil Sands] Project is unlikely to result in significant adverse environmental effects on water quality. [Emphasis added] (p. 83 of the Report)

Further, as pertains to aquatic resources, the Panel concluded:

> [...] The Joint Panel concludes that with the implementation of Imperial Oil's mitigation measures, the completion of an NNLP [No Net Loss Plan] satisfactory to DFO, and the Joint Panel's recommendations, the KOS Project is unlikely to result in significant adverse environmental effects on aquatic resources. [Emphasis added] (p. 86 of the Report)

48 Specifically, the mitigation measures identified by Imperial Oil in its EIA for managing groundwater include the following:

> (a) Recycling of process-affected waters and runoff within the Kearl Project footprint in a closed-circuit system during operations;
>
> (b) Directing Muskeg drainage and overburden waters to polishing ponds equipped with oil separation capability, if required;
>
> (c) Diverting natural headwater flow around construction and mining areas and discharging it into receiving streams without contact with oil sands or process-affected waters;

(d) Using a perimeter ditch and pumping system to capture seepage and runoff from the external tailings area and pumping back into the process during operations;

(e) Using a drainage system to capture and direct seepage and runoff from the external tailings area to wetlands and terminal lakes with sufficient residence time after reclaiming the external tailings area;

(f) Using wetlands and pit lakes during and after closure to provide biological remediation and settling of particulate materials in reclamation waters prior to discharge;

(g) Designing pit lakes with sufficient residence time to enhance settling and biological remediation of reclamation waters;

(h) Using reclamation waters that collect in the pit as process water until the start of the closure management system;

(i) Placing of tailings only in the central pit lake which has a large volume and long residence time;

(j) Maintaining naturally occurring, low permeability material between Kearl Lake and its surrounding mine pits to minimize seepage into the lake.

• EIA, Volume 6, at p. 5-38 and 5-39 [Imperial's Record, Vol 2, Tab 4(b) at pp. 312 and 313]

49 Further, with respect to aquatic resources, Imperial Oil identified mitigation measures in its EIA which included the following:

a) Compensation habitat will be provided by the development of new habitat area in accordance with requirements and guidance through the appropriate regulators, such as DFO;

b) Potential changes in flow sections of the Muskeg River downstream of the Project development area will be minimized during the operational phases of the Project by flow augmentation;

c) Permanent diversion channels and drainage systems will be designed to facilitate development of sustainable aquatic ecosystems in order to mitigate losses of natural water courses habitats;

d) Drainage patterns in Wapasu Creek will be designed to mitigate flows that could change channel regime or increase downstream sedimentation or total suspended solids; and

e) The Kearl Project will include a system of environmental management protocols and construction practices designed to minimize possible effects to the aquatic environment.

• EIA, Volume 6, at p. 6-36 to 6-38 [Imperial's Record, Vol. 2, Tab 4(c) at pp. 314 to 316]

50 Thus, contrary to the applicants' submissions, I am satisfied that there was evidence upon which the Panel could reasonably assess technically and economically feasible measures that would mitigate any significant adverse environmental effects arising from the Project on the Muskeg watershed and fish and fish habitat.

51 When pressed at the hearing to provide specific cases of mitigation measures considered by the Panel that were not technically and economically feasible, the applicants pointed to the consolidated tailings technology and end pit lakes as two such examples.

52 First, with respect to consolidated tailings, the applicants contend that the Panel found this measure to be technically viable but not economically feasible; nevertheless, it proceeded to rely on this technology in its assessment, in contravention of the CEAA.

53 However, as explained by Imperial Oil's counsel, Mr. Ignasiak, and as indicated by a fair reading of the hearing transcript, it is clear that the Panel was concerned not by the tailings technology, but by one of the enhancements, a tailings thickener, proposed by Imperial Oil in order to improve on the existing technology that is used at other facilities. It is this tailings thickener, not the underlying consolidated tailings technology that has not been commercially demonstrated. The Panel then concluded that by implementing the tailings technology, of which a thickener was but a proposed enhancement, significant adverse environmental effects were unlikely to occur.

54 Thus, I disagree with the applicants that the Panel was relying on a technology that was yet to be developed. As the respondent, Imperial Oil, aptly pointed out, if the applicants' arguments are to be accepted, it would mean that under the CEAA process, proponents must provide the Panel with only those technologies that have been used in the past. In my view this would stifle innovation in the field, which could potentially result in future benefits to the environment.

55 Second, with respect to end pit lakes, the applicants submit that by recommending further testing of modelling predictions, the Panel erred in determining that this mitigation measure was technically and economically feasible. I cannot accept this argument. In my view, the Panel took a precautionary approach by demanding that an operator validate modelling predictions by testing end pit lake technology.

56 Indeed, this approach is broadly consistent with the principles of adaptive management. As Evans J.A asserted in *Canadian Parks & Wilderness Society*, *supra*, at para. 24, "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge." The same holds true for the assessment of mitigation measures. While there does exist some uncertainty with respect to end pit lake technology, the existing level of uncertainty is not such that it should paralyze the entire project.

57 Thus, based on the information that was before it, including the modelling predictions, the Panel accepted the measure as technically and economically feasible. The fact that uncertainty remained regarding end pit lakes in the oil sands region is understandable given that they will only become operational upon mine site closures. Thus, the Panel recommended the validation of modelling results, including a physical test case and continued research, well in advance of the slated closure date in 60 years.

58 In my opinion, the Panel is permitted and indeed mandated to make these kinds of recommendations regarding the proposed Project, which should include recommendations for continued study of potential impacts on valued environmental components and the development of further mitigation strategies. This is consistent with the ongoing and dynamic nature of environmental assessment referred to above and ensures that new information is obtained which facilitates the adaptation of project implementation as required.

iii. Reclamation

59 The applicants further submit that the mitigation of certain aspects of oil sands mining, e.g., reclamation of peatlands, is not even known in general terms. Follow-up programs are not intended to replace mitigation measures under the CEAA or to be treated as vehicles for designing future mitigation measures. The applicants find support in the case of *Union of Nova Scotia Indians*, *supra*. In that particular case, mitigation measures were generally known, but the details of the specific measures had yet to be determined. For the applicants, relying on adaptive management to address uncertainty and future risk requires at least some general understanding initially of the mitigation system in play.

60 The respondents submit that the dynamic nature of follow-up measures and adaptive management will resolve initial uncertainties. Further, sufficient information was available to the Panel which enabled it to reasonably conclude as it did. I agree. The recommendations are not necessarily flawed because the evidence was insufficient to eliminate all uncertainty. The Panel had before it information indicating that while the reclamation of peat-accumulating wetlands remained uncertain, there is considerable experience with respect to wetland and marsh reconstruction and that Imperial Oil's closure plan called for the reconstruction of approximately 900 hectares of marsh. This type of replacement is consistent with s. 2(1) of the CEAA which

defines mitigation as including "restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means".

61 Again, I note that the Federal Court of Appeal explained in *Express Pipelines Ltd.*, *supra*, that as the nature of the Panel's task is predictive, finality and certainty in environmental assessment can never be achieved. Hugessen J. stated at para. 10:

> No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

And further at para. 14, he states:

> Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

It would be impossible for a review panel to conduct the environmental assessment early in the planning stages of a project if the Panel was required to eliminate all uncertainty and precluded from commenting on follow-up activities.

62 Thus, while uncertainties with respect to reclamation of peat-accumulating wetlands remained, they could be addressed through adaptive management given the existence of generally known replacement measures contained in Imperial Oil's mine closure plan. Indeed, it is worth noting that the Panel cited with approval the reclamation milestones from Imperial Oil's Project Application in its Report.

B) Endangered Species

63 The applicants argue that the Panel failed to consider the significance of adverse environmental effects on endangered species, particularly the Yellow Rail (listed in the *Species at Risk Act*, S.C. 2002, c.29 ("SARA")), failed to provide the responsible authority with the requisite information in this regard, failed to consider mitigation measures that were technically and economically feasible, and failed to provide a rationale for its conclusion.

64 The applicants reference the Federal Government's written submission to the Kearl Panel wherein it indicated that:

> There are 1093 [hectares] of graminoid fen within the Kearl Project area that could provide suitable habitat for Yellow Rails. It is not known how large or widely distributed the local population is, and therefore it is difficult to draw conclusions on potential impacts to the species, or to make recommendations for mitigation actions.

Based on the information before it, the Panel recommended that Alberta conduct a regional review of cumulative impacts on Yellow Rail within the next two years.

65 For the applicants s. 79 of the SARA imposes requirements, in addition to those contained in the CEAA, on authorities mandated to ensure that an environmental assessment is conducted to "identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, [to] ensure that measures are taken to avoid or lessen those effects and to monitor them."

66 The federal respondent submits that the Panel clearly set out its concerns regarding the Yellow Rail and made recommendations for a regional review of cumulative impacts to determine mitigation options as well as the implementation of predevelopment surveys by Imperial Oil. Given the ongoing and dynamic nature of the environmental assessment process, complete details need not be provided at this stage: the Panel raised concerns, provided information, and made recommendations, and the final decision rested with DFO. Imperial Oil echoes the federal respondent and indicates that based on the evidence, the Panel's conclusions and recommendations were informed and rational.

67 While I note that the Panel could have included more information regarding Environment Canada's concerns with respect to the Yellow Rail, particularly, that suitable habitat for the Yellow Rail is found in localized patches throughout the region and that this habitat cannot be reclaimed with current technology, I find the assessment of the significance of environmental effects in the Panel report to be reasonable. In my view, the Panel met its duty in the present case by acknowledging that Environment Canada expressed concern regarding the effect on the Yellow Rail due to the intensity of regional development. It made no further assessment as the information upon which such assessment could be based was not before it.

68 The Panel recommended that in the next two years AENV in collaboration with Environment Canada, coordinate a regional review of the cumulative impacts on the Yellow Rail in the oil sands region, using appropriate regional nocturnal surveys in areas of potentially suitable habitat and that this initiative should determine the mitigation options to minimize impacts on the Yellow Rail. The Panel went on to recommend that AENV establish requirements within any *EPEA* approval to implement the findings of the Yellow Rail initiative for surveys, determination of effects, and mitigation strategies where appropriate. The Panel expressed its expectation that Imperial Oil would implement effective Yellow Rail predevelopment surveys and habitat mitigation strategies in its reclamation plans, unless these matters were dealt with on a regional basis. Finally, the Panel recommended that AENV require Imperial Oil to avoid land clearing during the period of April 1 to August 30 of each year due to potential impacts on migratory bird species.

69 Thus, while I agree with the applicants' assertion that further studies of the Yellow Rail population do not constitute mitigation measures, I do not believe that the Panel's recommendation was meant to be a mitigation measure. The Panel adopted an approach that was consistent with the dynamic nature of the assessment process; it highlighted concerns and made recommendations consistent with the information before it. I find the approach employed to manage the existing uncertainty to be reasonable.

C) Greenhouse Gas Emissions

70 The applicants submit that the Panel erred by failing to provide a cogent rationale for its conclusion that the adverse environmental effects of the greenhouse gas emissions of the Project would be insignificant, and by failing to comment on the effectiveness of intensity-based "mitigation". According to Imperial Oil's EIA, the Project will be responsible for average emissions of 3.7 million tonnes of carbon dioxide equivalent per year, which equals the annual greenhouse gas emissions of 800,000 passenger vehicles in Canada, and will contribute 0.51% and 1.7% respectively, of Canada and Alberta's annual greenhouse gas emissions (based on 2002 data).

71 The respondent, Imperial Oil, argues that the EIA that was before the Panel set out the annual greenhouse gas emissions, as well as the intensity of greenhouse gas emissions on a per barrel basis for the Project during the operating period. Further, the Project Application sets out Imperial Oil's approach to greenhouse gas management including the requirement that the most energy efficient, commercially proven and economic technology be selected to minimize emissions. There is no evidence to suggest that the Panel failed to consider all the evidence that was before it, and while it did not comment specifically on the effects of the greenhouse gas emissions, pursuant to *Cantwell v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 27 (Fed. T.D.), the EARPGO (predecessor to the CEAA) does not specify a particular form for the report and thus, it is not the role of this Court to insist on a particular form in the present case. At the hearing, Imperial Oil's counsel added that for the Panel to comment on the proposed intensity based mitigation measures would shift its role into the realm of policy recommendation.

72 While I agree that the Panel is not to engage in policy recommendation, nevertheless, it is tasked with conducting a science and fact-based assessment of the potential adverse environmental effects of a proposed project. In the absence of this fact-based approach, the political determinations made by final decision-makers are left to occur in a vacuum.

73 I recognize that placing an administrative burden on the Panel to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations would be disproportionately high. However, given that the Report is to serve as an objective basis for a final decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant.

74 Should the Panel determine that the proposed mitigation measures are incapable of reducing the potential adverse environmental effects of a project to insignificance, it has a duty to say so as well. The assessment of the environmental effects of a project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.

75 I am fully aware of the level of expertise possessed by the Panel. The record shows that they had ample material before them relating to the issue of greenhouse gas emissions and climate change, and thus any articulated conclusions drawn from the evidence should be accorded a high measure of deference. However, this deference to expertise is only triggered when those conclusions are articulated. Instructively, in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116 (S.C.C.), at para. 62, Iacobucci J. cited with approval the following excerpt from Kerans, R. P., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), p. 17 which dealt with deference to "expertise":

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [Emphasis added]

Thus, deference to expertise is based on the cogent articulation of the rationale basis for conclusions reached.

76 In the present case, the Panel indicated its expectation that Imperial Oil would follow through on its commitment to:

- reduce NO_x emissions through combustion controls using low-NO_x burners for stationary sources,
- purchase and operate low-NO_x mine equipment as soon as it is commercially available, and
- participate in AENV's BATEA [Best Available Technology Economically Available] study and implement its findings. (p. 58 of the Report)

Further, the Panel agreed with EC and encouraged Imperial Oil to implement the use of ultra-lowsulphur diesel fuel for all of its construction and mining activities ahead of any mandatory requirements (p. 59 of the Report).

77 Finally, the Panel supported Alberta developing appropriate *EPEA* approval requirements to address greenhouse gas emission intensity targets:

> The Joint Panel supports Alberta developing appropriate *EPEA* approval requirements to address:
>
> - fugitive emissions control (LDAR [leak detection and repair] program),

> • continuous benzene and acrolein monitoring,
>
> • VOC [volatile organic compounds] emissions monitoring,
>
> • participation in CEMA and WBEA [Wood Buffalo Environmental Association] work to address trace air contaminants, including but not limited to benzene and acrolein,
>
> • participation in regional acid deposition and eutrophication monitoring programs, and
>
> • GHG [greenhouse gas] emission intensity targets.

The Panel then concluded that:

> The KOS Project is not likely to result in significant adverse environmental effects to air quality, provided that the mitigation measures and recommendations proposed are implemented. (p. 60 of the Report)

78 The evidence shows that intensity-based targets place limits on the amount of greenhouse gas emissions per barrel of bitumen produced. The absolute amount of greenhouse gas pollution from oil sands development will continue to rise under intensity-based targets because of the planned increase in total production of bitumen. The Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of the reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered.

79 While I agree that the Panel is not required to comment specifically on each and every detail of the Project, given the amount of greenhouse gases that will be emitted to the atmosphere and given the evidence presented that the intensity based targets will not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on this particular issue. By its silence, the Panel short circuits the two step decision making process envisioned by the CEAA which calls for an *informed decision* by a responsible authority. For the decision to be informed it must be nourished by a robust understanding of Project effects. Accordingly, given the absence of an explanation or rationale, I am of the view that the Panel erred in law by failing to provide reasoned basis for its conclusion as mandated by s. 34(c)(i) of the CEAA.

80 As this error relates solely to one of the many issues that the Panel was mandated to consider, I find that it would be inappropriate and ineffective to require the entire Panel review to be conducted a second time (*Nanda v. Canada (Public Service Commission Appeal Board)*, [1972] F.C. 277 (Fed. C.A.), at para. 55). Accordingly, the application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

81 As it was agreed upon at the hearing, the parties shall make representations in writing on the issue of costs. The applicants should file and serve their representation within 15 days from the date of this judgement. The respondents should file and serve their representations within 15 days from the date of service of the applicants' representations.

Judgment

THIS COURT ORDERS that

The application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

Application allowed in part.

Annex

Canadian Environmental Assessment Act, S.C. 1992, c.37

[...]

Purposes

Purposes

4. (1) The purposes of this Act are

(a) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;

(b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

(b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

(b.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(b.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

(d) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

Duties of the Government of Canada

(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

1992, c. 37, s. 4; 1993, c. 34, s. 19(F); 1994, c. 46, s. 1; 2003, c. 9, s. 2.

Projects requiring environmental assessment

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance

is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Projects requiring approval of Governor in Council

(2) Notwithstanding any other provision of this Act,

(a) an environmental assessment of a project is required before the Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(g), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part; and

(b) the federal authority that, directly or through a Minister of the Crown in right of Canada, recommends that the Governor in Council take an action referred to in paragraph (a) in relation to that project

(i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made,

(ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the project,

(iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and

(iv) where applicable, shall perform the duties of the responsible authority in relation to the project under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(*a*) and 37(1)(*a*).

[...]

Factors to be considered

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the purpose of the project;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Determination of factors

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(*a*), (*b*) and (*d*) and (2)(*b*), (*c*) and (*d*) shall be determined

(a) by the responsible authority; or

(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

[...]

Decision of responsible authority following a screening

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

[...]

Referral to Minister

25. Subject to paragraphs 20(1)(*b*) and (*c*), where at any time a responsible authority is of the opinion that

(a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or

(b) public concerns warrant a reference to a mediator or a review panel, the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.

[...]

Assessment by review panel

34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;

(b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;

(c) prepare a report setting out

(i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and

(ii) a summary of any comments received from the public; and

(d) submit the report to the Minister and the responsible authority.

Powers of review panel

35. (1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to

(a) give evidence, orally or in writing; and

(b) produce such documents and things as the panel considers necessary for conducting its assessment of the project.

Enforcement powers

(2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and other things as is vested in a court of record.

[...]

Decision of responsible authority

37. (1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

Approval of Governor in Council

(1.1) Where a report is submitted by a mediator or review panel,

(a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (*a*).

[...]

Follow-up Program

Consideration of follow-up — decision under paragraph 20(1)(*a*)

38. (1) Where a responsible authority takes a course of action under paragraph 20(1)(*a*), it shall consider whether a follow-up program for the project is appropriate in the circumstances and, if so, shall design a follow-up program and ensure its implementation.

Mandatory follow-up — decision under paragraph 37(1)(a)

(2) Where a responsible authority takes a course of action under paragraph 37(1)(a), it shall design a follow-up program for the project and ensure its implementation.

[...]

Joint Review Panels Definition of "jurisdiction"

40. (1) For the purposes of this section and sections 41 and 42, "jurisdiction" includes

(a) a federal authority;

(b) the government of a province;

(c) any other agency or body established pursuant to an Act of Parliament or the legislature of a province and having powers, duties or functions in relation to an assessment of the environmental effects of a project;

(d) any body established pursuant to a land claims agreement referred to in section 35 of the Constitution Act, 1982 and having powers, duties or functions in relation to an assessment of the environmental effects of a project;

(e) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and

(f) an international organization of states or any institution of such an organization.

Review panels established jointly with another jurisdiction

(2) Subject to section 41, where the referral of a project to a review panel is required or permitted by this Act, the Minister

(a) may enter into an agreement or arrangement with a jurisdiction referred to in paragraph (1)(a), (b), (c) or (d) that has powers, duties or functions in relation to the assessment of the environmental effects of the project, respecting the joint establishment of a review panel and the manner in which the environmental assessment of the project is to be conducted by the review panel; and

(b) shall, in the case of a jurisdiction within the meaning of subsection 12(5) that has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part of it, offer to consult and cooperate with that other jurisdiction respecting the environmental assessment of the project.

[...]

Conditions

41. An agreement or arrangement entered into pursuant to subsection 40(2) or (3), and any document establishing a review panel under subsection 40(2.1), shall provide that the environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement and shall provide that

(a) the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson, and shall appoint at least one other member of the panel;

(b) the members of the panel are to be unbiased and free from any conflict of interest relative to the project and are to have knowledge or experience relevant to the anticipated environmental effects of the project;

(c) the Minister shall fix or approve the terms of reference for the panel;

(d) the review panel is to have the powers and immunities provided for in section 35;

(e) the public will be given an opportunity to participate in the assessment conducted by the panel;

(f) on completion of the assessment, the report of the panel will be submitted to the Minister; and

(g) the panel's report will be published.

1992, c. 37, s. 41; 1993, c. 34, s. 32(F);

1998, c. 25, s. 164; 2003, c. 9, s. 20.

[...]

Loi canadienne sur l'évaluation environnementale, 1992, ch. 37

[...]

Objet

Objet

4. (1) La présente loi a pour objet:

a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;

b) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

b.1) de faire en sorte que les autorités responsables s'acquittent de leurs obligations afin d'éviter tout double emploi dans le processus d'évaluation environnementale;

b.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d'évaluation environnementale de projets;

b.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d'évaluation environnementale;

c) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites du Canada ou du territoire domanial ne débordent pas ces limites;

d) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l'évaluation environnementale.

Mission du gouvernement du Canada

(2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les organismes assujettis aux dispositions de celle-ci, y compris les autorités fédérales et les autorités responsables, doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de la prudence.

1992, ch. 37, art. 4; 1993, ch. 34, art. 19(F); 1994, ch. 46, art. 1; 2003, ch. 9, art. 2.

Projets visés

5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes:

a) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;

b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre le projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement — notamment réduction, évitement, report, remboursement, annulation ou remise — d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement;

c) une autorité fédérale administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en oeuvre du projet en tout ou en partie;

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.

Projets nécessitant l'approbation du gouverneur en conseil

(2) Par dérogation à toute autre disposition de la présente loi:

a) l'évaluation environnementale d'un projet est obligatoire, avant que le gouverneur en conseil, en vertu d'une disposition désignée par règlement aux termes de l'alinéa 59g), prenne une mesure, notamment délivre un permis ou une licence ou accorde une approbation, autorisant la réalisation du projet en tout ou en partie;

b) l'autorité fédérale qui, directement ou par l'intermédiaire d'un ministre fédéral, recommande au gouverneur en conseil la prise d'une mesure visée à l'alinéa a) à l'égard du projet:

(i) est tenue de veiller à ce que l'évaluation environnementale du projet soit effectuée le plus tôt possible au stade de la planification de celui-ci, avant la prise d'une décision irrévocable,

(ii) est l'autorité responsable à l'égard du projet pour l'application de la présente loi — à l'exception du paragraphe 11(2) et des articles 20 et 37 — et de ses règlements,

(iii) est tenue de prendre en compte les rapports et observations pertinents visés aux articles 20 et 37,

(iv) le cas échéant, est tenue d'exercer à l'égard du projet les attributions de l'autorité responsable prévues à l'article 38 comme si celle-ci était l'autorité responsable à l'égard du projet pour l'application des alinéas 20(1)*a*) et 37(1)*a*).

[...]

Éléments à examiner

16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants:

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

b) l'importance des effets visés à l'alinéa a);

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

Éléments supplémentaires

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants:

a) les raisons d'être du projet;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

Obligations

(3) L'évaluation de la portée des éléments visés aux alinéas (1)*a*), *b*) et *d*) et (2)*b*), *c*) et *d*) incombe:

a) à l'autorité responsable;

b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

[...]

Décision de l'autorité responsable

20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3):

a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet;

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;

c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29:

(i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,

(iii) si les préoccupations du public le justifient.

[...]

Examen par une commission

25. Sous réserve des alinéas 20(1)*b*) et *c*), à tout moment, si elle estime soit que le projet, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, peut entraîner des effets environnementaux négatifs importants, soit que les préoccupations du public justifient une médiation ou un examen par une commission, l'autorité responsable peut demander au ministre d'y faire procéder conformément à l'article 29.

[...]

Commission d'évaluation environnementale

34. La commission, conformément à son mandat et aux règlements pris à cette fin:

a) veille à l'obtention des renseignements nécessaires à l'évaluation environnementale d'un projet et veille à ce que le public y ait accès;

b) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet;

c) établit un rapport assorti de sa justification, de ses conclusions et recommandations relativement à l'évaluation environnementale du projet, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public;

d) présente son rapport au ministre et à l'autorité responsable.

Pouvoirs de la commission

35. (1) La commission a le pouvoir d'assigner devant elle des témoins et de leur ordonner de:

a) déposer oralement ou par écrit;

b) produire les documents et autres pièces qu'elle juge nécessaires en vue de procéder à l'examen dont elle est chargée.

Pouvoirs de contrainte

(2) La commission a, pour contraindre les témoins à comparaître, à déposer et à produire des pièces, les pouvoirs d'une cour d'archives.

[...]

Autorité responsable

37. (1) Sous réserve des paragraphes (1.1) à (1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, prend l'une des décisions suivantes:

a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet;

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en oeuvre du projet en tout ou en partie.

Agrément du gouverneur en conseil

(1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du gouverneur en conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément.

[...]

Programme de suivi Décision au titre de l'al. 20(1)a): suivi

38. (1) Si elle décide de la mise en oeuvre conformément à l'alinéa 20(1)*a*), l'autorité responsable examine l'opportunité d'un programme de suivi dans les circonstances; le cas échéant, elle procède à l'élaboration d'un tel programme et veille à son application.

Décision au titre de l'al. 37(1)a): suivi

(2) Si elle décide de la mise en oeuvre conformément à l'alinéa 37(1)a), l'autorité responsable élabore un programme de suivi et veille à son application.

[...]

Examen conjoint Définition d'« instance »

40. (1) Pour l'application du présent article et des articles 41 et 42, « instance » s'entend notamment:

a) d'une autorité fédérale;

b) du gouvernement d'une province;

c) de tout autre organisme établi sous le régime d'une loi provinciale ou fédérale ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

d) de tout organisme, constitué aux termes d'un accord sur des revendications territoriales visé à l'article 35 de la Loi constitutionnelle de 1982, ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

e) du gouvernement d'un État étranger, d'une subdivision politique d'un État étranger ou de l'un de leurs organismes;

f) d'une organisation internationale d'États ou de l'un de ses organismes.

Examen conjoint

(2) Sous réserve de l'article 41, dans le cas où il estime qu'un examen par une commission est nécessaire ou possible, le ministre:

a) peut conclure avec l'instance visée à l'alinéa (1)a), b), c) ou d) exerçant des attributions relatives à l'évaluation des effets environnementaux du projet un accord relatif à la constitution conjointe d'une commission et aux modalités de l'évaluation environnementale du projet par celle-ci;

b) est tenu, dans le cas d'une instance, au sens du paragraphe 12(5), qui a la responsabilité ou le pouvoir d'entreprendre l'évaluation des effets environnementaux de tout ou partie du projet, d'offrir de consulter et de coopérer avec celle-ci à l'égard de l'évaluation environnementale du projet.

[...]

Conditions de l'examen conjoint

41. Les accords conclus aux termes des paragraphes 40(2) ou (3) et les documents visés au paragraphe 40(2.1) contiennent une disposition selon laquelle l'évaluation environnementale du projet prend en compte les éléments prévus aux paragraphes 16(1) et (2) et est effectuée conformément aux exigences et modalités supplémentaires qui y sont contenues ainsi que les conditions suivantes:

a) le ministre nomme le président, ou approuve sa nomination, ou nomme le coprésident et nomme au moins un autre membre de la commission;

b) les membres de la commission sont impartiaux, non en conflit d'intérêts avec le projet et pourvus des connaissances et de l'expérience voulues touchant les effets environnementaux prévus du projet;

c) le ministre fixe ou approuve le mandat de la commission;

d) les pouvoirs et immunités prévus à l'article 35 sont conférés à la commission;

e) le public aura la possibilité de participer à l'examen;

f) dès l'achèvement de l'examen, la commission lui présentera un rapport;

g) le rapport sera publié.

1992, ch. 37, art. 41; 1993, ch. 34, art. 32(F);

1998, ch. 25, art. 164; 2003, ch. 9, art. 20.

[...]

Pickford v. British Columbia (Ministry of Environment)

British Columbia Environmental Appeal Board Decisions

British Columbia Environmental Appeal Board

Panel: Alan Andison, Chair

Heard: May 22, 2018 by written submissions.

Decision: July 27, 2018.

Decision Nos. 2016-EMA-130(b), 2016-EMA-144(b),

145(b), 146(b), 147(b) and

149(b), (Group File: 2016-EMA-G05)

[2018] B.C.E.A. No. 14 | 20 C.E.L.R. (4th) 181 | 2018 CarswellBC 2092

IN THE MATTER OF six appeals under section 100 of the Environmental Management Act, S.B.C. 2003, c. 53. Between John Pickford, John Henry Dressler, Rodger Hamilton, Ellis O'Toole, Angie Delainey, Tricia McLellan, Appellants, and Director, Environmental Management Act, Respondent, and Atlantic Power Preferred Equity Ltd., Applicant/ Third Party

(136 paras.)

Appearances

For the Appellants: John Pickford, John Henry Dressler, Rodger Hamilton.

For the Appellants:

Ellis O'Toole, Angie Delainey, Tricia McLellan, William J. Andrews, Counsel.

For the Respondent: Johnny Van Camp, Counsel, Meghan Butler, Counsel.

For the Third Party: Jonathan McLean, Counsel, Jonathan Buysen, Counsel.

PRELIMINARY APPLICATION

Mitchell Horkoff

1 On April 13, 2018, Atlantic Power Preferred Equity Ltd. ("Atlantic") applied to the Board to request dismissal of six appeals filed against the September 6, 2016 decision (the "Amendment Decision") of Brady Nelless, Delegate of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry"), to amend Air Emissions Permit #8808 (the "Air Permit") held by Atlantic.

2 Atlantic submits that the appeals should be dismissed on the basis that:

* the Appellants have failed to introduce any evidence from which a reasonable trier of fact could find in the Appellants' favour; and
* alternatively, pursuant to section 31(1)(f) of the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45* (the "*ATA*"), there is no reasonable prospect that the appeals will succeed.

3 The application was heard by way of written submissions.

BACKGROUND

Atlantic's facility and air emissions permit

4 Atlantic owns and operates a 66 megawatt biomass-fired electricity generating facility located at 4455 Mackenzie Avenue North in Williams Lake, BC. The facility has operated since 1993, and has been using a combination of wood waste from sawmill operations and other waste wood as its fuel source.

5 Atlantic is authorized to discharge specified emissions from the facility to the air under the Air Permit, which was originally issued by the Ministry in 1991. The Air Permit addresses a number of subjects including: the operating parameters of the discharge, the authorized works, monitoring and reporting requirements, and the authorized fuel.

6 Prior to the Amendment Decision, the authorized fuel was "untreated wood residue", and "wood residue treated with creosote and/or a creosote- pentachlorophenol blended preservative (treated wood)" (e.g., rail ties), provided that:

* the treated wood component did not exceed 5% of the total biomass fuel supply calculated on an annual basis;1
* the treated wood was well mixed with untreated wood waste prior to incineration; and
* none of the wood residue had been treated with metal derived preservatives.

[underlining added]

7 Other authorized fuels were, and still are, set out in clause 2.7.1 of the Air Permit.

8 According to a "Frequently Asked Questions" sheet issued by Atlantic (updated June 2016), the facility burned rail ties between 2004 and 2010, and rail ties accounted for 4% of the fuel supply in 2009.

9 According to a "Fact Sheet" issued by Atlantic, and provided in evidence to the Board, Atlantic supplies power to BC Hydro under a long-term energy purchase agreement. In support of negotiations to renew that agreement, Atlantic wanted to secure additional fibre (feedstock) for the facility to supplement a diminishing local fibre supply. It determined that rail ties, among other alternative fuels, would be a viable option.

10 Atlantic decided to pursue an amendment to its Air Permit that would allow it to burn a 50/50 mix of rail ties and traditional wood fibre on a periodic basis.

Application to amend the Air Permit

11 On or about October 15, 2015, Atlantic applied to the Director for an amendment to its Air Permit to allow up to 50% treated rail ties of the total biomass fuel supply on an annual basis. The Ministry considered the application to be a "significant amendment", which triggered broad public notification requirements under the *Public Notification Regulation*, B.C. Reg. 2002/94 (the "*Regulation*"). Atlantic notified the public that, among other things, it was applying to raise the limit on waste rail ties as a proportion of the authorized fuel from 5% to 50%. Atlantic's Fact Sheet appears to have been produced as part of the notification/information distribution process.

12 Pursuant to section 7 of the *Regulation*, "a person who may be adversely affected" by the application may notify the Director, in writing, stating how that person is affected. Under subsection 7(2) of the *Regulation*, the Director "may" take that information into consideration.

13 Over the course of late 2015 and early-to-mid-2016, members of the public provided the Director with numerous comments and concerns regarding the proposed amendments. Some of the Appellants sent emails to the Director raising concerns about the adverse impact that burning rail ties may have on local air quality and the environment, as well as concerns with the impact of the resulting ash on the landfill and surrounding area.

The Director's decision

14 On September 6, 2016, the Director issued the Amendment Decision pursuant to section 16(1)(b) of the *Environmental Management Act* (the "*Act*"). The Amendment Decision allows Atlantic to increase the quantity of treated rail ties that can be incinerated at the facility, subject to various terms and conditions. Specifically, the Amendment Decision allows the "incineration of up to 50% by wet weight of rail tie material and clean, non-hazardous construction and demolition debris", and includes new clauses in relation to rail tie burning, handling, and storage. For example, the Amendment Decision requires that: rail tie material must be received at the facility in

an un-shredded state unless prior written permission is obtained from the Director; Atlantic must implement both a waste acceptance plan and a fire control and prevention plan, each certified by a qualified professional, before it may accept rail ties at the facility; un-shredded rail ties must be stored separately from clean biomass and must be protected from precipitation and storm water runoff; a maximum of 3,000 tonnes of shredded rail tie material may be stored at the site and must be in an enclosed bin, protected from the elements; and fugitive odour and polyaromatic hydrocarbons ("PAH") emissions, within the boundaries of the City of Williams Lake, from the transport, storage and processing of rail tie material, must be controlled and suppressed.

15 In addition, the Amendment Decision reduces the Total Particulate Matter maximum to 20 mg per cubic metre, from the previous maximum of 50 mg per cubic metre, and sets limits for the discharge of certain substances including hydrogen chloride (HCl), sulphur dioxide (SO_2), and PAH, which were not previously regulated in the Air Permit.

16 The Amendment Decision also sets out new emission monitoring and reporting requirements. In addition to continuously monitoring NO_2 emissions and opacity at the boiler's stack, which the Air Permit previously required to be monitored, Atlantic must continuously monitor SO_2 and HCl emissions at the stack. Particulates, which were previously required to be monitored in the stack on an annual basis, are now included in requirements for quarterly and annual stack testing. Atlantic must submit an ambient air quality monitoring plan, prepared by a qualified professional, to the Director for approval, and implement that plan before incinerating rail tie material at the facility. Annual reports of monitoring data must be provided to the Director by March 31 of each year, and must be made available to the public at the Williams Lake Public Library within 30 days of submission to the Ministry.

The Appeals

17 Nine individuals filed separate appeals against the Amendment Decision. Subsequently, three appeals were withdrawn and dismissed pursuant to section 17(1) of the *ATA*; namely, the appeals of Beverly Haskins (2016-EMA-131), Peter Luscombe (2016-EMA-133), and Becky Bravi (2016-EMA-148).

18 Of the six remaining Appellants, three (Ellis O'Toole, Angie Delainey, and Tricia McLellan) are represented by counsel, and made joint submissions on the appeals and the present application. They are referred to in this decision as the "Represented Appellants". John Pickford, John Henry Dressler, and Rodger Hamilton, are self-represented in the appeals and in this application.

19 On December 9, 2016, the Director applied to dismiss all nine appeals on the basis that the Appellants lacked standing to appeal the Amendment Decision under section 100(1) of the *Act*. The Director also applied to strike certain grounds for appeal and Notices of Appeal.

20 On March 29, 2017, the Board issued a decision denying the Director's application to dismiss the appeals for

lack of standing, but granting, in part, the application to strike portions of some Notices of Appeal (*John Pickford et al v. Director, Environmental Management Act*, Decision Nos. 2016-EMA-130(a), 131(a), 133(1), 144(a) to 149(a)).

21 In general, the remaining grounds for appeal raise concerns regarding whether the Amendment Decision adequately protects human health and the environment. The Appellants' specific concerns include: whether the Amendment Decision will adversely affect air quality in Williams Lake due to increases in the emission of SO_2, HCl, and PAH; whether the Amendment Decision provides adequate controls over the transportation and handling of rail ties; whether the Director erred by relying on the results of a trial burn conducted in 2001; and, whether the monitoring and reporting requirements in the Amendment Decision are adequate. The Appellants request that the Amendment Decision be reversed, or alternatively, that the Amendment Decision be varied to include numerous amendments to address their concerns regarding the storage, handling and incineration of rail ties.

Procedural matters

22 On June 1, 2017, the Board held a pre-hearing teleconference, and ruled that the appeals should be heard by way of an oral hearing. However, the Board advised that its ruling may be reviewed once the Appellants provided more information about the evidence and arguments they intended to rely on in support of their appeals.

23 On June 26, 2017, Mr. Hamilton provided his Statement of Points and supporting documents. Those documents include letters written by Mr. Hamilton, portions of a technical assessment report and consultation report that Atlantic had prepared in support of its application for the permit amendment, part of a Ministry technical report regarding the permit amendment application, and part of the "Williams Lake Airshed Management Plan: 2006 - 2016" dated June 2006.

24 On June 29, 2017, the Board received the Represented Appellants' Statement of Points and supporting documents. Their documents included the technical assessment report and a consultation report that Atlantic had prepared in support of its amendment application, the Ministry technical report regarding the amendment application, and a one-page report by Dr. Peter Jackman (together with his *curriculum vitae*) critiquing the air dispersion modelling that Atlantic relied on in support of its amendment application.

25 On July 2, 2017, the Board received Mr. Dressler's Statement of Points.

26 On July 7, 2017, the Board received Mr. Pickford's Statement of Points and supporting documents, including the Ministry's technical report regarding the amendment application.

27 On October 12, 2017, the Board held another pre-hearing teleconference. At that time, the oral hearing of the appeals was tentatively scheduled for four weeks commencing on April 30, 2018. The Board set a schedule for the parties to exchange their expert reports and Statements of Points prior to the oral hearing. The Board's letter setting

out the results of the teleconference stated that, in accordance with the Board's Rule 25, expert reports were due on February 5, 2018, 84 days before the oral hearing commenced, and reply expert reports were due on March 19, 2018, 42 days before the oral hearing commenced.

28 On December 21, 2017, the Director provided copies of his Statement of Points, the documents that he intended to tender as evidence at the oral hearing, and legal authorities.

29 On January 30, 2018, Atlantic provided copies of its Statement of Points, the documents that it intended to tender as evidence at the oral hearing, and legal authorities.

30 On February 2, 2018, the Director and Atlantic provided notices of their intentions to call expert witnesses, and provided copies of their expert witnesses' qualifications and the reports containing expert opinion evidence.

31 By that time, numerous documents had been provided by the Director and Atlantic. According to the Director, he produced 48 relevant documents. According to Atlantic, it provided five binders of documents including four expert reports.

32 On February 8, 2018, the Director advised that he was willing to attempt to resolve the appeals through mediation, and he requested that the Board facilitate the mediation. That same day, Atlantic advised that it agreed with the Director's proposal and was willing to participate in a mediation.

33 On February 16, 2018, Mr. Pickford advised that he was willing to participate in a mediation. However, that same day, Mr. Hamilton, Mr. Dressler, and the Represented Appellants advised that they were unwilling to participate in a mediation, and they requested that the appeals be heard by way of written submissions.

34 On February 19, 2018, the Board advised the parties that it would not convene a mediation, given that not all parties agreed to participate.

35 In a letter dated March 1, 2018, after considering submissions from the parties, the Board directed that the appeals would be heard by way of written submissions. Several of the Appellants had advised that they could not afford to participate in a four-week oral hearing, and were prepared to argue their appeals without the benefit of cross-examining the witnesses who would have appeared for the Director and Atlantic. However, the Director and Atlantic opposed proceeding by way of written submissions.

36 The Board's March 1, 2018 letter states, in part:

> In these appeals, the Board notes that there are complicated technical matters that will require the Board to understand and adjudicate matters that are best explained by experts in the field. The parties have filed expert reports, and other technical documentation, in support of their individual cases.

> Except for the reports submitted by the Represented Appellants, no further expert evidence will be tendered by the Appellants. Furthermore, the Represented Appellants advise that they are prepared to rely upon the information provided to date, without the benefit of cross-examining the witnesses for [Atlantic] or the [Director]. The other Appellants have submitted their relevant documents with their Statements of Points, and all believe that they can put in their cases -- present their information -- in writing. This suggests that, like the Represented Appellants, they are not seeking -- do not require -- an opportunity to cross-examine the witnesses for [Atlantic] or the [Director].
>
> While the Board notes that [Atlantic] intends to call 5 fact witnesses to address the issues under appeal, given that the Appellants are willing to forego cross-examination in order to secure a written hearing, such evidence may be provided in affidavit form. Similarly, any oral evidence that the Appellants would have given at the hearing, may be provided by affidavit.

37 The Board's March 1, 2018 letter established a schedule for the parties to provide written submissions and any affidavit evidence. The Appellants were directed to provide their written submissions and any affidavit evidence by no later than April 3, 2018.

38 In a letter dated March 16, 2018, Atlantic advised that it intended to "rely on and tender" as evidence numerous documents by four authors (who Atlantic had intended to tender as expert witnesses), including expert reports, which were originally disclosed with Atlantic's Statement of Points and notice of expert evidence. Atlantic also requested that the Board advise whether Atlantic need not file additional copies of those documents with its written submissions.

39 In a letter dated March 19, 2018, the Board confirmed that Atlantic's documents would be provided to the hearing panel, and Atlantic need not provide further copies of the documents that it intended to rely on.

40 On March 21, 2018, Mr. Hamilton provided his written submissions and supporting documents. The documents included his Notice of Appeal, which refers to several documents available on the internet, Atlantic's 2017 Annual Report for the Air Permit, and a January 6, 2017 letter from Mr. Hamilton to the Board.

41 On March 26, 2018, Mr. Pickford provided his written submissions and supporting documents. The documents included: a letter dated October 28, 2015 from the Interior Health Authority to Atlantic regarding the proposed permit amendment; a letter dated August 26, 2016 from the Interior Health Authority to the Director commenting on the proposed permit amendment; an email dated August 31, 2016 from the Ministry to the Interior Health Authority in response to the August 26, 2016 letter; and, excerpts of several documents including the Ministry's technical report on the amendment application, and a report titled "TransCanada Power Emission Survey Report", prepared in 2001 by A. Lanfranco and Associates Inc. (the "Lanfranco Report"). The Lanfranco Report documented the concentrations of certain air pollutants at the (then) TransCanada Power facility in Williams Lake, when burning normal hog fuel (wood waste), and alternatively, when burning 100% chipped railway ties. The information from the

2001 "trial burn" of rail ties was used in the emission modelling that Atlantic submitted to the Ministry in support of its application for a permit amendment.

42 On March 29, 2018, Mr. Dressler provided his written submissions. He provided no documents or internet links to documents, but his submissions refer to a June 2016 report titled "A Summary of Recent Trends in Levels of Particulate Matter", prepared for the Williams Lake Air Quality Roundtable, which appears to be a document that is available on the Ministry's website.

43 On April 3, 2018, the Represented Appellants provided their written submissions. They provided no documents with their submissions, but their submissions refer to several of the documents that were previously submitted with their Statement of Points, as well as several documents that the Director and Atlantic disclosed with their Statements of Points.

Atlantic's application

44 In a letter dated April 6, 2018, Atlantic noted that the Appellants had filed no affidavits with their written submissions, and advised that it intended to apply for an order that the appeals be dismissed on the basis that:

* the Appellants had failed to introduce any evidence from which a reasonable trier of fact could find in the Appellants' favour (i.e., a "no evidence" motion); and
* alternatively, pursuant to section 31(1)(f) of the *ATA*, there was "no reasonable prospect" that the appeals will succeed (i.e., a "summary dismissal" motion).

45 On April 13, 2018, Atlantic submitted its application.

46 The Director supports and consents to Atlantic's application.

47 All of the Appellants oppose the application.

ISSUES

48 The issues to be decided in this application are:

1. Whether the appeals should be dismissed on the basis of Atlantic's "no evidence" motion.
2. Alternatively, whether the appeals should be summarily dismissed pursuant to section 31(1)(f) of the *ATA*, on the basis that there is no reasonable prospect that the appeals will succeed.

RELEVANT LEGISLATION

49 Section 31(1)(f) of the *ATA* states as follows:

> **Summary dismissal**
>
> **31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> ...
>
> (f) there is no reasonable prospect the application will succeed;
>
> ...

50 Section 1 of the *ATA* defines "application" as follows:

> **"application"** includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court

51 Thus, for the Board's purposes, the word "application" in section 31 of the *ATA* effectively means "appeal".

52 The Amendment Decision was issued under section 16 of the *Act*, which states, in part, as follows:

> **Amendment of permits and approvals**
>
> **16** (1) A director may, subject to section 14(3), this section and the regulations, for the protection of the environment,
>
> (a) on the director's own initiative if he or she considers it necessary, or
>
> (b) on application by a holder of a permit or an approval, amend the requirements of the permit or approval.
>
> ...
>
> (4) A director's power to amend a permit or an approval includes all of the following:
>
> (a) authorizing or requiring the construction of new works in addition to or instead of works previously authorized or required;
>
> (b) authorizing or requiring the repair of, alteration to, improvement of, removal of or addition to existing works;
>
> (c) requiring security, altering the security required or changing the type of security required or the conditions of giving security;
>
> (d) extending or reducing the term of or renewing the permit or approval;
>
> (e) authorizing or requiring a change in the characteristics or components of waste discharged, treated, handled or transported;

(f) authorizing or requiring a change in the quantity of waste discharged, treated, handled or transported;

(g) authorizing or requiring a change in the location of the discharge, treatment, handling or transportation of the waste;

(h) altering the time specified for the construction of works or the time in which to meet other requirements imposed on the holder of the permit or approval;

(i) authorizing or requiring a change in the method of discharging, treating, handling or transporting the waste;

(j) changing or imposing any procedure or requirement that was imposed or could have been imposed under section 14 or 15.

53 Other relevant legislation is set out in the text of this decision, where it is referred to.

DISCUSSION AND ANALYSIS

1. Whether the appeals should be dismissed on the basis of Atlantic's "no evidence" motion.

The parties' submissions

54 Atlantic submits that the legal test for a "no evidence" motion is "whether the plaintiff [or Appellant, in this case] had led any evidence from which a reasonable trier of fact could find in the plaintiff's favour if the evidence were believed" (*Cost Plus Computer Solutions Ltd. v. VKI Studios*, *2015 BCCA 467*, at para. 44) [*Cost Plus*].

55 Atlantic submits that in *David Avren v. Regional Water Manager*, Decision No. 2006-WAT-003(a), June 29, 2007 [*Avren*], at paras. 65 - 67, the Board dismissed an appeal on the basis that:

* to meet the burden of proof, the appellants needed to deliver some expert evidence to support their concerns; and
* the appellants delivered no such evidence; rather, they expressed their own "concerns" about possible harm occurring.

56 Atlantic argues that the present appeals are analogous to *Avren*.

57 Atlantic submits that the Appellants provided no affidavit evidence, and none of the Appellants have been tendered as expert witnesses, yet some of them make unsworn statements that purport to give evidence in the nature of expert opinions on topics such as stack testing, air modelling, and secondary particulate formation.

Atlantic argues that such statements are inadmissible as expert opinion evidence or any other form of opinion evidence.

58 In addition, Atlantic submits that the Appellants have submitted or referred to documents that purport to give expert evidence, but the Appellants failed to provide proper notice of expert evidence, and in some cases the authors of the documents are unknown. Atlantic maintains that such documents cannot be admissible for any purpose.

59 Atlantic submits that the Appellants bear the evidentiary burden to establish each ground of appeal on a balance of probabilities, as stated on p. 31 of the Board's *Practice and Procedure Manual* and in previous Board decisions (e.g., *Avren*, at paras. 52 - 45; *Wilfred Boardman v. Regional Manager*, Decision No. 2013-WIL-021(a), September 9, 2014 [*Boardman*], at paras. 52 - 43; and, *City of Cranbrook v. Assistant Regional Waste Manager*, Decision No. 1999-WAS-023(c), April 9, 2009 [*Cranbrook*], at paras. 55 - 56).

60 In particular, Atlantic submits that the Appellants have the burden of establishing, on a balance of probabilities, that the Amendment Decision does not adequately protect human health and the environment, taking into account the legislative scheme in the *Act*, which authorizes the discharge of waste into the environment (*Shawnigan Residents Association v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-015(c), 019(d), 020(b), 021(b), March 20, 2015, at para. 284; *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(g) and 2013-EMA- 010(g), December 23, 2015, at paras. 232 - 235; and, *Lynda Gagne et al v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-005(a), 007(a) to 012(a), October 31, 2013, at para. 54).

61 Regarding each document that the Appellants provided or referred to, Atlantic provided the Board with a document titled "Schedule A" which addresses each issue raised by the appeals, and contains Atlantic's submissions regarding why each document that the Appellants rely on is not evidence, is inadmissible, and/or is insufficient to meet the burden of proof.

62 The Director adopts Atlantic's legal analysis regarding the Appellants' evidentiary burden to prove their grounds of appeal. In addition, the Director submits that the Appellants' grounds and arguments imply that the Director and other Ministry staff failed to ensure that the Amendment Decision adequately protects human health and the environment. The Director maintains that the Appellants must present evidence to support such allegations, but they have failed to do so.

63 The Director notes that the appeals proceeded by way of written submissions at the Appellants' request. The Director submits that, having successfully applied to change from an oral hearing to a written hearing, it was incumbent upon the Appellants to provide evidence with their written submissions, and explain how the evidence proves their case. The Director maintains that some of the Appellants have improperly replied to the Director's

Statement of Points and supporting documents, rather than making submissions in support of their grounds of appeal. The Director submits that the parties' Statements of Points were merely statements of the arguments they intended to present at the oral hearing; they were not substitutes for written submissions on the merits, nor were the documents filed with the Statements of Points properly considered "evidence". Such documents were simply those that the parties intended to rely on at the oral hearing, at which time they would have been tendered as evidence subject to any objections.

64 Moreover, the Director submits that none of the Appellants provided sworn affidavits, and Mr. Dressler and the Represented Appellants adduced no evidence with their written submissions. Only Mr. Pickford and Mr. Hamilton provided document evidence with their written submissions.

65 Additionally, the Director objects to the admissibility of the documents that Mr. Pickford provided. The Director argues that some of those documents are inadmissible hearsay, one is an expert report that Mr. Pickford is not qualified to interpret or opine on, and one is unreliable because it appears to consist of excerpts of Ministry documents that were compiled by Mr. Pickford. The Director argues that, even if the hearsay documents and excerpted documents are admitted as evidence under the Board's less formal rules of evidence, they would not prove, on a balance of probabilities, that that the Amendment Decision unacceptably affects the environment and human health.

66 Similarly, the Director objects to the admissibility of the documents provided by Mr. Hamilton, on the basis that one is a report that Mr. Hamilton is not qualified to interpret or opine on, two of the documents consist of argument and not evidence, and those same two documents refer to, but do not include, other documents that consist of inadmissible expert and/or opinion evidence.

67 In particular, the Director submits that it would be an error for the Board to admit as evidence the Lanfranco Report (portions of which were provided by Mr. Pickford) or Atlantic's 2017 Annual Report for the Air Permit (portions of which were provided by Mr. Hamilton), given the procedural fairness that attaches to the Board's notice requirements regarding expert evidence (*Shawnigan Residents Association v. British Columbia*, *2017 BCSC 107*, at paras. 105 - 110). The Director submits that the LanFranco Report was listed as a reliance document in the Director's notice of expert evidence, and Mr. Pickford is improperly attempting to rely on it as expert evidence without giving notice as required by the Board's Rule 25. However, the Director maintains that even if the Lanfranco Report or Atlantic's 2017 Annual Report for the Air Permit were admitted into evidence, they would not prove, on a balance of probabilities, that the Amendment Decision did not adequately protect human health and the environment.

68 Similarly, the Director objects to any expert evidence relied on by the Represented Appellants, due to their failure to provide notice of expert evidence as required by Rule 25.

69 In addition, the Director submits that even if the unsworn statements in the Appellants' written submissions are accepted as evidence, they would amount to insufficient evidence because the Appellants need to provide expert evidence to prove their assertions regarding the Amendment Decision. The Director notes that the Board's March 1, 2018 letter stated, in part, "In these appeals, the Board notes that there are complicated technical matters that will require the Board to understand and adjudicate matters that are best explained by experts in the field." The Director argues that the Appellants have attempted to rely on the Director's documents to prove their cases, rather than providing their own evidence, and none of the Appellants are qualified to substantiate their assertions regarding technical matters. The Director argues that, as in *Avren*, the Appellants have simply stated their objections to the Amendment Decision and asserted that the Director should justify why and how the decision was made.

70 Finally, the Director submits that it would be untenable and unfair to require him to substantively respond to all 31 of the Appellants' grounds of appeal, when the Appellants have adduced no admissible evidence capable of supporting the grounds of appeal.

71 The Represented Appellants submit that the Board has abundant evidence on record from which the Board can determine the merits of the appeals. They submit that the Board should complete the written hearing process and decide the appeals on their merits. They further submit that the Board's March 1, 2018 letter stated that "The parties have filed expert reports, and other technical documentation, in support of their individual cases." The Represented Appellants maintain that, at the core of the Board's decision to hold a written hearing was the concept that the written information that was before the Board, along with the information that the parties might file later, would be the basis for the parties' submissions. They submit that it is unimportant who has filed the evidence that is now before the Board; what is important is whether the Board finds merits in the appeals, based on all of the parties' information and submissions.

72 The Represented Appellants submit that Atlantic and the Director filed substantial volumes of evidence, and all of the Appellants filed written arguments based on the evidence; therefore, the present circumstances are distinguishable from those in the Board's previous decisions in which "no evidence" motions were granted. In particular, the Represented Appellants submit that, in those cases, the respondent and/or third party moved for dismissal of the appeals before tendering their own evidence.

73 Moreover, the Represented Appellants argue that it would be wrong for the Board to reject the appeals without considering the evidence that has been tendered, regardless of which party filed the evidence, or to dismiss the appeals for lack of evidence. They submit that Atlantic's "no evidence" motion depends on the position that the only fair way to present the evidence would be at an oral hearing, whereby information does not become "evidence" until it is tendered by a witness. They also submit that Atlantic confuses the burden of proof with the method of proof. Although the Appellants bear the burden of showing that the Director erred, that does not mean that the Appellants must meet this burden only by relying on evidence tendered by them.

74 Additionally, the Represented Appellants submit that the decision in *Cost Plus* demonstrates that a no evidence motion is unavailable where, as here, the decision-maker has evidence from both the party (or parties) with the burden of proof as well as from the party (or parties) opposed. The Represented Appellants also submit that *Cost Plus* is distinguishable from the present case because it involved a civil trial where the plaintiff had to prove the facts comprising the essential elements of the cause of action, and the defendant could request dismissal, before presenting any evidence of its own, on the basis that the plaintiff failed to establish a *prima facie* case that required a response from the defendant. The Represented Appellants emphasize that the test for a no evidence motion does not involve the trier of fact weighing evidence, as the test includes the phrase "... if the evidence were believed." They submit that, in the present case, the evidence of the parties opposed (i.e., the Director and Atlantic) is already on the record, the Appellants made their written submissions based on all of the evidence, and the Board should proceed to weigh the evidence after receiving the remaining written submissions.

75 Mr. Pickford argues that his written submissions refer to documents provided by the Director and Atlantic which are publicly available on the internet. Regarding the excerpted documents that his written submissions refer to, he maintains that they were created by Atlantic and were posted online, in their entirety, by the Director. In these circumstances, he argues that it is disingenuous to claim that such documents are unreliable or inadmissible. He submits that it is unfair, and contrary to a full discussion of the issues, to claim that that the Appellants cannot discuss documents that were provided by the Director or Atlantic. He also submits that a person need not be an expert to read and interpret the Lanfranco Report, which he obtained from the internet.

76 Mr. Hamilton submits that none of his points of appeal challenge any technical facts, and a person need not be an expert to test the opinions in expert reports. Mr. Hamilton also submits that it is unreasonable to suggest that the documents provided with the Director's and Atlantic's Statements of Points are not "evidence" simply because the hearing was changed from an oral hearing to a written hearing, or because Mr. Hamilton did not give proper notice that he intended to rely on documents that the Director considered during the permit amendment application process. He argues that the Director and Atlantic rely on the same documents from the permit amendment application process as he does.

77 Mr. Dressler submits that there is evidence in this case, including evidence provided by the Director and Atlantic, that was considered by the Director before making the Amendment Decision. He objects to the suggestion that such information in inadmissible for any purpose.

78 In reply, Atlantic submits that the Board's March 1, 2018 letter did not amount to a decision regarding what was (and was not) evidence, nor did it decide any evidentiary issues. Atlantic also submits that neither it nor the Director have provided any "evidence" to the Board so far; rather, they have provided their Statements of Points, the supporting documents they intended to enter into evidence at the oral hearing, and notices of expert evidence.

The Panel's Findings

79 In *Cost Plus*, the Court of Appeal confirmed a no evidence motion that was granted at the trial level pursuant to the *Supreme Court Civil Rules*. At the trial, the defendant brought the no evidence motion after the plaintiff had closed its case, and the trial judge had ruled that a report, which the plaintiff sought to adduce as expert evidence regarding the quality of the defendant's work, was inadmissible pursuant to the *Supreme Court Civil Rules*. The plaintiff's witness was still permitted to testify, but was not permitted to offer an expert opinion. In those circumstances, the trial judge found that the plaintiff had provided no submissions or evidence regarding alleged misrepresentation by the defendant, and the plaintiff's evidence regarding an alleged breach of contract fell short of establishing a standard against which the defendant's performance could be measured. The trial judge granted the no evidence motion after concluding that the plaintiff's evidence was incapable of establishing the essential elements of the plaintiff's claims of misrepresentation and breach of contract.

80 As is further discussed below, the Board's powers and practices with respect to admitting evidence, including expert evidence, are more flexible than those in the *Supreme Court Civil Rules*. Given the differences in the evidentiary rules and requirements that apply to trials conducted pursuant to *Supreme Court Civil Rules*, versus those that apply in appeals conducted by the Board, the Panel finds that the test in *Cost Plus* is neither applicable nor relevant to Atlantic's no evidence motion.

81 In *Avren*, the Board granted a no evidence motion. However, when considering the Board's decision in *Avren*, it is important to bear in mind that the no evidence motion was granted during an oral hearing, after the appellants had presented their cases but before the respondent and third party had presented their cases. In contrast, the present appeals have proceeded in a hybrid manner. The appeals were originally scheduled to be heard orally, but were converted to a written hearing after the parties had already exchanged their Statements of Points, supporting documents, and notice of expert evidence. In an oral hearing process, documents disclosed with the Statements of Points and notices of expert evidence do not become "evidence" until they are tendered by a witness at the oral hearing (as per the Board's Rule 19), subject to any objections. In written hearings, any documents disclosed with a party's written submissions are assumed to be tendered by that party as evidence (as per the Board's Rule 20), subject to any objections. Thus, in a written hearing procedure, documents are typically considered part of the evidentiary record once they are provided to the Board and the other parties.

82 In the present case, all parties disclosed the documents they intended to rely on (at the oral hearing), before the written hearing process commenced, which is atypical of written hearings. In these circumstances, it is not surprising that some of the Appellants' written submissions include responses to the Director's and Atlantic's previously disclosed documents and arguments. Further, the Director and Atlantic have not yet provided their written arguments or tendered all of their evidence, and it is understandable that some of their evidence and arguments may now be different from what they had originally intended. However, the Panel finds that this process

has not caused prejudice to the Director or Atlantic, as they are still able to make objections to the Appellants' "evidence" (which they have done), and they still have a full opportunity to present their own evidence and respond to the Appellants' cases.

83 In addition, it is important to consider that although the application in *Avren* was framed as a "no evidence" motion, the Board's decision took into account not only the appellants' evidence (or lack thereof) regarding the facts they asserted, but also the appellants' assertions regarding alleged legal flaws in the appealed decision. At para. 54, the Board stated that the appellants were obliged to lead "some evidence that either the order [under appeal] was wrong in law or fact, or that the process leading to the order was flawed in some way" [underlining added]. Thus, the decision was not solely based on there being a lack of evidence to support the facts asserted by the appellants. It was also based on the Board's preliminary assessment of the appellants' arguments with respect to whether the order under appeal was "wrong in law", "or that the process leading to the order was flawed in some way." In that sense, the Board's decision in *Avren* was more akin to a preliminary assessment of the appellants' cases as a whole, to determine whether the respondent and third party should be required to respond.

84 It is also important to consider that the Board's decision in *Avren* was decided before section 31 of the *ATA* applied to the Board, and therefore, the Board was relying on its common law power to control its own procedures when it granted the "no evidence" motion. Arguably, an application under one of the specific subsections under section 31 of the *ATA* now provides a more appropriate means for a party to seek summary dismissal of an appeal.

85 The Panel also finds that *Boardman* is distinguishable from the present appeals. In *Boardman*, the appeal was conducted solely by way of written submissions, and the appellant filed a Notice of Appeal, but made no written submissions and provided no documents to support his appeal. Thus, unlike the present appeals, the appellant in *Boardman* provided nothing more than a Notice of Appeal. Also the respondent in that case provided detailed written submissions and information, and the Board went on to decide the merits of the appeal based on the respondent's materials.

86 In *Cranbrook*, the Board did not decide a no evidence motion; rather, the Board addressed the burden of proof in a decision on the merits of the appeal. At para. 56, the Board held that the appellant had the burden of proving the truth of the facts it asserted, on a balance of probabilities, and was responsible for leading sufficient evidence to meet that test. It was insufficient for the appellant to simply discredit the respondent's evidence or argue that the third party had not proved its case. The Panel agrees with those findings in *Cranbrook*.

87 In summary, the Panel finds that the Board's previous decisions in *Avren*, *Boardman*, and *Cranbrook* do not set out a test that is directly applicable to the present "no evidence" motion. However, some of the findings in those decisions provide guidance in this case. In particular, the Panel finds that the onus is on the Appellants to provide some evidence that is relevant to, and capable of supporting, the facts that they assert. Also, to the extent that the Appellants allege any legal errors by the Director, they must articulate some legal argument that could support a

finding that the Amendment Decision was wrong in law, or that the process leading to the Amendment Decision was flawed in some way. Furthermore, as was the case in *Avren*, Atlantic made this preliminary application before the Respondent (Director) and Third Party (Atlantic) have made their cases, and before the Board has begun to weigh any evidence or assess any arguments for the purposes of deciding the merits of the appeals. Consequently, the Panel must decide the "no evidence" motion based on a *prima facie* assessment of the Appellants' cases, to determine whether the Board should continue with a full hearing of the merits of the appeals.

88 Regarding what constitutes admissible "evidence", section 40 of the *ATA* provides the Board with a broad discretion to accept information, regardless of whether it would be admissible in the courts. Section 40 of the *ATA* states as follows:

> **40** (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.
>
> (2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.
>
> (3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.
>
> (4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.
>
> [underlining added]

89 In addition, the Board's *Practice and Procedure Manual*, states as follows at page 42:

> In an oral hearing, each party has the right to present evidence to support that party's case. "Evidence" is anything that has the potential of establishing or proving a fact. Evidence includes oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Board to decide the case in a particular way.
>
> ...
>
> While most of the information under this heading relates primarily to oral hearings, the principles involved in weighing evidence and applying the correct burden of proof are common to all types of hearings.
>
> [underlining added]

90 Also, as stated at page 43 of the Board's *Practice and Procedure Manual*:

> The rules of evidence that apply to a hearing before the Board are less formal than the rules applied by the courts. Section 40 of the *Administrative Tribunals Act* states that the Board "may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." The Board may admit hearsay and circumstantial evidence if it is considered relevant.

> Relevance is the primary consideration for the Board when deciding whether to admit evidence. Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.
>
> The Board may also exclude evidence. Section 40(2) of the *Administrative Tribunals Act* allows the Board to exclude anything unduly repetitious. In addition, in accordance with general legal principles, the Board may exclude evidence if it is of minimal relevance, is unreliable, may confuse the issues, or may prejudice the other parties. The Board may be obligated to exclude evidence that is privileged or is restricted by a statute such as the *Evidence Act*.
>
> ...
>
> All evidence admitted during the hearing will be assessed by the Board to determine what weight, if any, should be given to the evidence. Generally speaking, evidence that is not sufficiently reliable for the Board's purposes will be given less weight when the Board is making its decision on the merits of the appeal.
>
> [underlining added]

91 Thus, in conducting a *prima facie* assessment of the Appellants' assertions of fact, the Panel has considered whether the Appellants have provided and/or relied on some relevant information that has the potential of establishing or proving at least some of the facts that they assert in their grounds of appeal and written submissions, such that the Board should continue with a full hearing of the merits of the appeals. To the extent that there are concerns about the reliability of any information provided by the Appellants, the Board would take that into account later, after deciding whether the information is admissible as evidence. The Board decides how much weight to give the evidence as part of the process of deciding the merits of the appeals.

92 Taking into account the Appellants' written submissions and the documents they have provided or referred to, the Panel finds that this is not a case where the Appellants have provided no evidence that, on its face, is capable of supporting at least some of the facts asserted in their grounds of appeal and written submissions. Although the Appellants provided no sworn statements (i.e., affidavits) in support of their written submissions, it is not unusual for self-represented parties, which includes half of the Appellants in this case, to provide their evidence in the form of unsworn statements which may be intermingled with their written submissions. Although the Represented Appellants also provided no affidavit evidence, they have indicated that they have financial limitations regarding the appeal process. The Board's March 1, 2018 letter stated on page 4 that "The Board's mandate very clearly provides that it must make the hearing process accessible to all parties. Surely that is denied when the appellants to a proceeding cannot participate because of the cost of the hearing." Although those comments were made in the context of the Board's decision to convert the appeals from an oral hearing to a written hearing, the Panel finds that the same principles apply to the costs associated with obtaining sworn affidavits.

93 In any event, although the Board encourages parties to provide affidavit evidence when hearings are conducted in writing, such evidence is not mandatory. The appeal process, whether conducted orally or in writing, is intended

to be less formal and more accessible than the court process, and the Board takes a more flexible approach to admitting evidence than the courts do. Consistent with section 40 of the *ATA*, the Board will generally admit an unsworn statement into the evidentiary record, subject to any concerns about relevance, privilege, or procedural fairness. The fact that a statement is unsworn, as opposed to sworn, may be reflected in the weight it is accorded when the Board assesses the merits of the appeals.

94 Atlantic and the Director object to the Appellants referring to documents that were disclosed with Atlantic's and the Director's Statements of Points and notices of expert evidence. The Panel recognizes that Atlantic and the Director have not yet filed their written submissions and their "evidence" for the purposes of the written hearing. Although the documents that Atlantic and the Director previously disclosed have not yet been formally tendered by them as "evidence", the Panel finds that most of the documents that the Appellants' submissions refer to were obtained by the Appellants through the internet or another public source. The Panel finds that Atlantic and the Director have no monopoly on the use of public documents as "evidence" in the appeal process. Documents that are accessible to the public are available for any party to use as evidence in support of their case.

95 In addition, the Panel rejects Atlantic's claim that the Appellants cannot make submissions on the documents described in Atlantic's March 16, 2018 letter. In that letter, Atlantic advised that it intended to "rely on and tender" as evidence numerous documents that were disclosed with Atlantic's Statement of Points and notice of expert evidence. Atlantic requested that the Board advise whether Atlantic needed to file additional copies of those documents with its written submissions. The Board's March 19, 2018 letter in response confirmed that Atlantic's documents would be provided to the hearing panel, without the need for further copies to be filed with Atlantic's written submissions. Thus, Atlantic has confirmed that it intends to rely on those documents as its "evidence" for the purposes of the written hearing.

96 The Panel finds that all of the Appellants have provided unsworn statements, and all of their written submissions refer to documents, portions of documents, or internet links to documents that one or more Appellant provided or referred to in their written submissions or their Statement of Points. The documents include the "Williams Lake Airshed Management Plan: 2006-2016", the Lanfranco Report, the consultation report and technical report that Atlantic filed with its amendment application, the Ministry's technical assessment of Atlantic's amendment application, and other documents available on the websites of the Ministry or the Williams Lake Air Quality Roundtable. On their face, those documents appear to be relevant to at least some of the Appellants' grounds for appeal and assertions regarding the Amendment Decision, and admissible under section 40 of the *ATA*.

97 Atlantic and the Director have raised concerns about the Appellants failure to strictly comply with the Board's procedures, and whether this constitutes a breach of procedural fairness. According to the Board's rules for written hearings, the Appellants should have filed the documents that they rely on as evidence with their written submissions. Specifically, the Board's Rule 20, para. 2, states "All evidence (including affidavits and documents) must be included with the written submissions." In this case, some of the information that the Appellants rely on was

filed with their Statements of Points but was not filed a second time with their written submissions. However, the Panel finds that it would be unfair to strictly enforce that Rule against the Appellants but not against Atlantic, given that the Board has stated in its March 19, 2018 letter that Atlantic need not re-file the documents it previously provided with its Statements of Points and notice of expert evidence.

98 Moreover, the Panel finds that the intention behind Rule 20, para. 2, is to ensure that, when an appeal is conducted solely in writing (as opposed to initially being conducted as an oral hearing, but later converting to a written hearing), each party understands that it is responsible for providing its evidence to the Board and the other parties in an orderly fashion. This ensures that all parties have an opportunity to review the other parties' evidence when they prepare their written submissions. It also ensures that the Board receives all of the information that the parties rely on, recognizing that the Board does not have access to the information that was considered by the person who made the appealed decision.

99 In the present appeals, the documents referred to in the Appellants' written submissions were disclosed (in whole or in part, or an internet link was provided) either with their written submissions or Statements of Points. In either case, the Director and Atlantic have had ample opportunity to review, and consider their responses to, the Appellants' documents and submissions. In the circumstances, there is no prejudice to the Director or Atlantic if the Board admits documents that were previously disclosed in the Appellants' Statements of Points, but were not re-filed with their written submissions.

100 Regarding the concerns of Atlantic and the Director regarding any purported expert opinion evidence provided by the Appellants, the Panel acknowledges that the Board's Rule 25 sets out deadlines and other requirements for giving notice of expert evidence. However, Rule 25 does not appear to apply to any of the information that the Appellant rely on or refer to in their written submissions. None of the Appellants have asserted that their submissions, or the documents they refer to, contain expert opinion evidence. Although the Represented Appellants provided a one-page report by Dr. Peter Jackman (and his *curriculum vitae*) with their Statement of Points, they do not refer to it in their written submissions, and they no longer appear to rely on it. Although some of the documents that the Appellants refer to and discuss in their submissions are technical in nature, none of the Appellants claim to be offering expert opinion evidence. The fact that the Appellants are not qualified as expert witnesses does not preclude them from commenting or making submissions on technical documents. As stated at page 45 of the Board's *Practice and Procedure Manual*:

> ... To be "qualified" to give expert opinion evidence on a particular subject matter(s), the Board must be satisfied that the witness has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.
>
> If a person is not qualified to give expert evidence on a particular subject matter, the Board may still receive the witness's evidence. The Board will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given to that witness's testimony.

[underlining added]

101 Thus, any concerns regarding an Appellant's qualifications with regard to their comments on technical information would be taken into account by the Board when deciding how much weight should be accorded to the comments. Also, in terms of procedural fairness, the Panel finds that the Director and Atlantic have had ample time to review and prepare responses to the Appellants' 'non-expert' comments on the technical documents.

102 Atlantic and the Director also raise objections regarding the admissibility of the Appellants' documents based on concerns about hearsay and/or unreliability. As stated above, the Board takes a more flexible approach to admitting evidence than the courts do, and is not bound by the rules and legal principles on the admissibility of hearsay evidence that apply in court proceedings.

103 In summary, the Panel finds, on a *prima facie* basis, that the Appellants have provided and/or relied on some relevant information that is admissible and has the potential of establishing or proving at least some of the facts that they assert in their grounds of appeal and written submissions. The fact that some of that evidence had been disclosed or proffered by the Director or Atlantic does not preclude the Appellants from relying on it. Consequently, the "no evidence" motion should be denied. However, the Panel cautions that these findings are only made for the purpose of deciding whether to grant the no evidence motion. In making this preliminary decision, the Panel has not weighed any of the Appellants' evidence, and the Panel's findings have no bearing on the merits of the appeals.

104 For all of these reasons, the Panel denies Atlantic's request to dismiss the appeals based on a "no evidence" motion.

2. Whether the appeals should be summarily dismissed pursuant to section 31(1)(f) of the *ATA* on the basis that there is no reasonable prospect that the appeals will succeed

The parties' submissions

105 Atlantic submits that section 27(1) of the *Human Rights Code*, *R.S.B.C. 1996, c. 210* (the "*Code*"), contains language that is almost identical to that in section 31(1)(f) of the *ATA*. Section 27(1) of the *Code* states:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> ...
>
> (c) there is no reasonable prospect that the complaint will succeed;

106 Atlantic submits that judicial decisions interpreting the test for summary dismissal under section 27(1)(c) of the *Code* are equally applicable to section 31(1)(f) of the *ATA*. In particular, Atlantic submits that the BC Court of Appeal provided guidance on how summary dismissal powers under the *Code* should be exercised by the BC

Human Rights Tribunal in *BC (Workers Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49 [*Hill*] at para. 27; and, *Lee v. British Columbia (Attorney General)*, 2004 BCCA 257 [*Lee*], at para. 26.

107 *Hill* states as follows at para. 27:

> It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31.
>
> [underlining added in Atlantic's submissions]

108 Similarly, *Lee* states as follows at para. 26:

> ... Thus the HRC [Human Rights Commission] had to assess this case in a preliminary way and make a judgment whether the matter warranted the time and expense of a full hearing. The threshold is not particularly high: whether the evidence takes the case "out of the realm of conjecture" ...

109 Atlantic argues that the following principles from *Hill* and *Lee* are applicable to the present application:

* section 31(1)(f) of the *ATA* creates a "gate-keeping" function that allows the Board to conduct a preliminary assessment of the appeal;
* the assessment is discretionary; and
* the Board is not required to find facts; rather, it should canvas the evidence that the parties intend to present, and come to a determination as to whether there is "no reasonable prospect" that the appeals will succeed.

110 Regarding Atlantic's intended evidence, Atlantic submits that the Board should consider the information in its Statement of Points, supporting documents, and expert reports. In particular, Atlantic refers to the five reports disclosed in its notice of expert evidence. Atlantic maintains that the Board's March 19, 2018 letter states that the expert reports would be accepted as evidence.

111 Atlantic also submits that the Appellants do not seek to cross-examine the witnesses that would have been tendered by the Director and Atlantic, and the Appellants have provided no admissible expert evidence of their own.

Atlantic submits that there is no challenge to any of its expert reports, and the Board is not entitled to reject the conclusions in the expert reports. In support of that proposition, Atlantic refers to *Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493 [*Page*], at paras. 62 - 66:

> While the Hearing Panel is presumed to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction, it is not presumed to have medical expertise.
>
> Where a WCAT panel is faced with a medical diagnosis as to a mental condition that is described in the *DSM-IV* at the time of the diagnosis, it is not equipped to reject that diagnosis, without an appropriate opinion to the contrary.
>
> Here, the Hearing Panel had a diagnosis of PTSD by Dr. Jhetam, a qualified psychiatrist, that it recognized was not "contradicted by other psychiatric or psychological opinion evidence". Although it was open to the Hearing Panel to require that a physician or psychologist appointed by WCAT review Dr. Jhetam's diagnosis, it instead rejected Dr. Jhetam's uncontradicted opinion by presuming that Dr. Meloche, who had not seen the petitioner since 1995, would have disagreed with the opinion of Dr. Jhetam in 2000, and thereafter. Moreover, the Hearing Panel rejected Dr. Jhetam's opinion in the face of his evidence, also uncontradicted, that Dr. Meloche's 1995 diagnosis of Adjustment Disorder with Anxiety "frequently precedes PTSD".
>
> This is not a case of the respondent's panel preferring one diagnosis to another. As there was no psychiatric or psychological opinion that contradicted the only opinion before them as to the petitioner's condition, this is a case of the Hearing Panel making its own diagnosis, when it clearly has no expertise upon which to do so.
>
> I find that such reasoning and the resulting findings are based upon the arbitrary exercise of the WCAT's discretion in terms of the use of the evidence before it, particularly its reliance predominantly if not entirely on an irrelevant factor, the 1995 opinion evidence of Dr. Meloche. In the result I find that the WCAT's decision on this issue is patently unreasonable.
>
> [underlining added in Atlantic's submissions]

112 Atlantic argues that, similar to *Page*, the Board has previously applied the principle that it must accept uncontradicted expert evidence on matters that are outside of its expertise: *Barry Burgoon et al v. Regional Water Manager*, Decision Nos. 2005-WAT-024(c) to 2005-WAT-026(c), June 28, 2010, at paras. 172 - 179 and 188 - 190.

113 In addition, Atlantic submits that the Appellants' written submissions inappropriately select single sentences from Atlantic's documents or the Ministry's technical report on the permit amendment application. Atlantic argues that, without contrary expert evidence, it is unfair and unacceptable to ignore the full recommendations in those documents.

114 Regarding each of the specific issues raised by the Appellants, Atlantic refers to its Schedule A setting out why, in Atlantic's view, there is "no reasonable prospect" that each issue will succeed. For example, regarding issue

#2 -- whether the Amendment Decision will lead to more contaminants and fine particulate matter in the airshed -- Atlantic submits, in part, that "The mere fact that there will be an increase in contaminant emissions is not the relevant test... The Appellants bear the burden to establish that the amendment Decision could cause unreasonable harm to the environment or human health." Atlantic further submits that to meet this burden, the Appellants must have led some evidence from which the Board could conclude what the expected levels of each contaminant will be, that those expected levels would be harmful, and that the harm is unreasonable. Atlantic submits that the Board is not presumed to have expertise in such matters, and the Board must rely on expert evidence to find such facts. Atlantic maintains that its uncontradicted expert evidence is that the increased emission levels are below air quality standards, and pose a "low" or "negligible" risk to human health and the environment. Therefore, there is no reasonable prospect that this issue will succeed.

115 In conclusion, Atlantic maintains that it is now known to the Board that Atlantic's expert reports will be accepted as uncontradicted expert evidence, and therefore, the Appellants' issues that assert contrary findings have no reasonable prospect of success and should be dismissed.

116 The Director did not address whether the appeals should be dismissed pursuant to section 31(1)(f) of the *ATA*.

117 The Represented Appellants submit that the Board's power under section 31(1)(f) of the *ATA* is discretionary, and the Board has rarely, if ever, utilized it. Although the Human Rights Tribunal utilizes a similar power, the Represented Appellants submit that *Hill* emphasizes that there is a low threshold to resist summary dismissal, stating at para. 27 that a complainant defending an application for summary dismissal "must only show [that] the evidence takes the case out of the realm of conjecture." The Represented Appellants maintain that the present appeals are far beyond the realm of conjecture, given that the Appellants' written submissions refer to a considerable body of evidence, and the Board has already found that the evidence warrants a written hearing.

118 Mr. Hamilton submits that there is sufficient evidence, beyond the realm of conjecture, available from the records of the permit amendment process that warrants consideration by the Board.

119 Mr. Pickford submits that the issues raised by the appeals have merit and deserve to be adjudicated by the Board. For example, he submits that a reasonable person would find, on a balance of probabilities, that flaws were evident in the 2001 trial burn of rail ties and stack test documented in the Lanfranco Report. Mr. Pickford submits that the evidence includes a document in which a Ministry meteorologist states that the 2001 test did not include background measurements for SO_2, HCl, and PAH in the Williams Lake airshed. Mr. Pickford argues that this raises concerns about the accuracy of the information obtained from that test, which was used in the emission modelling that Atlantic provided in support of its permit amendment application.

120 Mr. Dressler supports Mr. Hamilton's submission that there is sufficient evidence beyond the realm of conjecture, available in the records from the permit amendment process, that warrants consideration by the Board.

121 In reply, Atlantic submits that it is obvious that the appeals have no reasonable prospect of success. In deciding this application, the Board need not find facts or weigh evidence; rather, the Board should canvas the evidence that is expected to be tendered, and consider the fact that the Appellants have provided no expert evidence and agreed not to challenge the expert reports that are intended to be tendered by Atlantic and the Director.

The Panel's Findings

122 The Board recently considered the test for ordering summary dismissal of an appeal, or part of an appeal, under section 31(1)(f) of the *ATA*. In *Emily Toews et al v. Director, Environmental Management Act*, Decision Nos. 2014-EMA-003(d), 004(d), 005(d), June 25, 2018 [*Toews*], at paras. 120 - 123, the Board considered some decisions of the BC Court of Appeal and BC Supreme Court that, similar to *Hill* and *Lee*, involved reviews of the BC Human Rights Tribunal's summary dismissal of complaints pursuant to section 27(1)(c) of the *Code*. At para. 123 of *Toews*, the Board stated as follows regarding the test for summary dismissal under section 31(1)(f) of the *ATA*:

> The Panel finds that, given the similar wording in section 31(1)(f) of the *Administrative Tribunals Act* and section 27(1)(c) of the *Human Rights Code*, and in the absence of any arguments to the contrary from the Appellants, the test in *Berezoutskaia* and *Chiang* is equally applicable to applications for summary dismissal under section 31(1)(f) of the *Administrative Tribunals Act*. Thus, the question is whether the evidence takes the impugned ground for appeal "out of the realm of conjecture", such that the evidence justifies allowing that ground to be heard at a full hearing of the merits. The onus is on the applicant for dismissal to show that there is "no reasonable prospect that findings of fact that would support the [ground for appeal] could be made on a balance of probabilities after a full hearing of the evidence".
>
> [underlining added]

123 The Panel finds that this reasoning is consistent with the findings in *Hill* and *Lee*, and is equally applicable to the present case.

124 The Panel also agrees with the Appellants that, based on the judicial decisions cited by Atlantic, the threshold for denying an application for summary dismissal under section 31(1)(f) of the *ATA* is low: the appellant's evidence must simply take the appeal "out of the realm of conjecture".

125 In addition, the Panel rejects Atlantic's submission that the Board is not presumed to have expertise in the matters that are relevant to deciding key issues in these appeals, such as whether the Amendment Decision adequately protects human health and the environment. The courts have consistently recognized that the Board is an expert tribunal when it comes to adjudicating issues of fact that arise in appeals. As stated in *Lindelauf v. British Columbia*, *2017 BCSC 626*, at para.:

> The EAB [Board] is a specialized tribunal. The Legislature's decision to establish such a tribunal reflects "the complex and technical nature of the questions that might be raised" and that the tribunal "plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection": *R. v. Consolidated Maybrun Mines Ltd.*, *[1998] 1 S.C.R. 706* at para. 57.
>
> [underlining added]

126 Similarly, as stated in *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.*, *2008 BCSC 1251*, at para. 59:

> The jurisprudence establishes that while the EAB has expertise in respect of the technical and factual matters arising in appeals ...
>
> [underlining added]

127 Similarly, as stated in para. 74 of *Shawnigan Residents' Association v. British Columbia (Director, Environmental Management Act)*, *2017 BCSC 107*:

> ... the Board's decision on this issue was one of mixed fact and law. In particular, the Board's decision that the site of the Facility was not a contaminated site was based on the Board's review of the evidence before it and on the Board's expertise in interpreting matters that arise under the *EMA*.
>
> [underlining added]

128 In addition, the courts have recognized that the Board has expertise in interpreting and applying the statutes under which it hears appeals, and is entitled to deference by the courts in that regard (e.g., see: *Burnaby (City) v. Environmental Appeal Board*, *2017 BCSC 2267*, at paras. 64 and 73).

129 Furthermore, given the nature of the appeal process and the Board's decision-making powers, the Panel rejects Atlantic's submission that the Board must accept the conclusions in Atlantic's expert reports without question simply because the Appellants have provided no contradictory expert evidence of their own. The fact that Atlantic's expert reports will be accepted (once tendered) as evidence does not necessarily mean that the Board will, when weighing that evidence, fully accept or agree with every opinion contained in that evidence.

130 The Board has the authority to conduct appeals as a new hearing of the matter (section 102(2) of the *Act*), and the Board has broad decision-making powers in deciding appeals including the power to make any decision that the Director could have made and that the Board considers appropriate in the circumstances (section 103 of the *Act*). The Board has the discretion to decide how much weight to accord a particular piece of evidence, including expert evidence, and to evaluate the evidence's reliability, relevance, and accuracy, among other things. With regard to expert opinion evidence, the Board is not obliged to unquestioningly accept expert evidence from one party simply because no opposing expert evidence was presented by another party, or because opposing parties have decided

not to cross-examine the expert witness. The qualifications and experience of the expert report's author will always be a factor in determining the weight to be given to their evidence. The Board must be satisfied that the report's author has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.

131 The Panel has reviewed the arguments in Atlantic's Schedule A with respect to why each issue raised by the Appellants has no reasonable prospect of success. As noted by Atlantic, Mr. Hamilton's written submission state that he is withdrawing issues 14.1, 22, 23, 26. Accordingly, those issues are dismissed as having been withdrawn.

132 Turning to the remaining issues, the onus is on Atlantic, as the applicant for summary dismissal under section 31(1)(f) of the *ATA*, to establish that the Appellants' evidence and arguments are insufficient to take the appeals "out of the realm of conjecture". Atlantic's position that the remaining issues have no reasonable prospect of success relies on two main arguments: (1) that the Appellants have provided insufficient evidence (or none that is admissible) to succeed; and/or (2) that the Board "must accept" the conclusions in Atlantic's expert reports because they have not been challenged by the Appellants.

133 The Panel has already found that the Appellants have provided or relied on some relevant information that is admissible and, on a *prima facie* basis, has the potential of establishing or proving at least some of the facts that they assert in their submissions regarding the issues raised by the appeals. The Panel has also found that the Board is not obliged to unquestioningly accept expert evidence. For example, the qualifications and experience of the authors of Atlantic's expert reports must be considered before the Board determines how much weight it should give to their evidence. Although the Appellants have not presented opposing expert evidence, the Board is not obliged to unquestioningly adopt the opinions in Atlantic's expert reports. As a result, it is not a foregone conclusion that Atlantic's evidence necessarily leads to the conclusion that the appeals have no reasonable prospect of success.

134 The Panel finds that Atlantic has not met the onus of establishing that the Appellants' evidence and arguments are insufficient to take the appeals "out of the realm of conjecture". The Panel finds that the Appellants' evidence is, on a *prima facie* basis, sufficient to take the appeals out of the realm of conjecture. The Appellants do not simply express concerns, without any evidentiary support, about the potential effects of the Amendment Decision on human health and the environment. The Panel finds that the Board should proceed to assess the merits of the appeals by weighing the evidence and arguments that are to be presented by all parties, and applying the relevant legislation and legal authorities.

DECISION

135 In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated herein.

136 For the reasons set out above, the Panel denies Atlantic's preliminary application to dismiss the appeals, with the exception of issues 14.1, 22, 23, 26 which have been withdrawn.

"Alan Andison"
Alan Andison, Chair
Environmental Appeal Board

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1 While the Air Permit allowed up to 5% treated rail ties in the feedstock, Atlantic had not burned rail ties at the facility since 2010. (Atlantic's document titled "Frequently Asked Questions", page 2, attached to the affidavit of Rodger Hamilton).

End of Document

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

v.

Carrier Sekani Tribal Council *Respondent*

and

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

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

c.

Conseil tribal Carrier Sekani *Intimé*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, British Columbia Utilities Commission, Première nation crie Mikisew, Première nation de Moosomin, Nunavut Tunngavik Inc., Conseil tribal de la nation Nlaka'pamux, Alliance des nations de l'Okanagan, Bande indienne d'Upper Nicola, Division des Grands lacs de la nation Secwepemc, Assemblée des Premières Nations, Première nation Standing Buffalo Dakota, Sommet des Premières nations, Première nation Duncan's, Première nation de Horse Lake, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. et TransCanada Keystone Pipeline GP Ltd. *Intervenants*

INDEXED AS: RIO TINTO ALCAN INC. *v.* CARRIER SEKANI TRIBAL COUNCIL

2010 SCC 43

File No.: 33132.

2010: May 21; 2010: October 28.

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

RÉPERTORIÉ : RIO TINTO ALCAN INC. *c.* CONSEIL TRIBAL CARRIER SEKANI

2010 CSC 43

N° du greffe : 33132.

2010 : 21 mai; 2010 : 28 octobre.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Honour of the Crown — Aboriginal peoples — Aboriginal rights — Right to consultation — British Columbia authorized project altering timing and flow of water in area claimed by First Nations

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

Droit constitutionnel — Honneur de la Couronne — Peuples autochtones — Droits ancestraux — Droit à la consultation — La Colombie-Britannique a autorisé la construction d'un ouvrage modifiant le débit d'un cours

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

Administrative law — Boards and tribunals — Jurisdiction — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Commission empowered to decide questions of law and to determine whether agreement is in public interest — Whether Commission had jurisdiction to discharge Crown's constitutional obligation to consult — Whether Commission had jurisdiction to consider adequacy of consultation — If so, whether it was required to consider adequacy of consultation in determining whether agreement is in public interest — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

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

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements ("EPAs") which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the

d'eau dans un territoire revendiqué par des Autochtones sans consulter au préalable les Premières nations touchées — La société d'État provinciale d'hydroélectricité a ensuite demandé à la British Columbia Utilities Commission d'approuver un contrat d'achat intervenu avec un producteur d'électricité privé — L'obligation de consulter naît lorsque la Couronne a connaissance de l'existence éventuelle d'une revendication autochtone ou d'un droit ancestral et qu'elle envisage une mesure susceptible d'avoir un effet défavorable sur cette revendication ou ce droit — La Commission a-t-elle agi raisonnablement en refusant de se pencher sur le caractère adéquat de la consultation alors qu'elle était appelée à déterminer si le contrat servait l'intérêt public? — L'obligation de consulter a-t-elle pris naissance? — Que faut-il entendre par « effet défavorable »? — Loi constitutionnelle de 1982, art. 35 — Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 71.

Droit administratif — Organismes et tribunaux administratifs — Compétence — La Colombie-Britannique a autorisé la construction d'un ouvrage modifiant le débit d'un cours d'eau dans un territoire revendiqué par des Autochtones sans consulter au préalable les Premières nations touchées — La société d'État provinciale d'hydroélectricité a ensuite demandé à la British Columbia Utilities Commission d'approuver un contrat d'achat intervenu avec un producteur d'électricité privé — La Commission avait le pouvoir de trancher des questions de droit et de décider si un contrat était dans l'intérêt public — Avait-elle compétence pour s'acquitter de l'obligation de la Couronne de consulter? — Avait-elle le pouvoir de se pencher sur le caractère adéquat de la consultation? — Dans l'affirmative, lui incombait-il de se pencher sur le caractère adéquat de la consultation pour décider si le contrat servait l'intérêt public? — Loi constitutionnelle de 1982, art. 35 — Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 71.

Dans les années 1950, le gouvernement de la Colombie-Britannique a autorisé la construction d'un barrage et d'un réservoir qui ont modifié les débits d'eau dans la rivière Nechako. Les Premières nations prétendent que la vallée de la Nechako fait partie de leurs terres ancestrales et elles revendiquent le droit de pêcher dans la rivière Nechako, mais comme ce n'était pas l'usage à l'époque, elles n'ont pas été consultées relativement au barrage projeté.

Depuis 1961, Alcan vend les surplus d'électricité du barrage à BC Hydro au moyen de contrats d'achat d'électricité (« CAÉ ») dans lesquels elle s'engage à vendre l'électricité excédentaire, et BC Hydro à l'acheter. Le gouvernement de la Colombie-Britannique a demandé

Commission's approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met. Alcan and BC Hydro appealed.

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

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

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

à la Commission d'approuver le CAÉ de 2007. Les Premières nations ont fait valoir que ce dernier devait faire l'objet d'une consultation suivant l'art. 35 de la *Loi constitutionnelle de 1982*.

La Commission a reconnu avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones, mais elle a conclu que la question de la consultation ne pouvait se poser étant donné que le CAÉ de 2007 n'allait pas avoir d'effet préjudiciable sur quelque intérêt autochtone. La Cour d'appel de la Colombie-Britannique a annulé ses ordonnances et lui a renvoyé l'affaire pour qu'elle entende preuve et arguments sur la question de savoir s'il existait ou non une obligation de consulter les Premières nations et, dans l'affirmative, si elle avait été respectée. Alcan et BC Hydro ont interjeté appel.

Arrêt : Le pourvoi est accueilli, et la décision de la British Columbia Utilities Commission approuvant le CAÉ de 2007 est confirmée.

La Commission n'a pas agi de manière déraisonnable en approuvant le CAÉ de 2007. Un gouvernement a l'obligation de consulter les peuples autochtones avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur les terres et les ressources revendiquées par eux. L'obligation de consulter s'origine de l'honneur de la Couronne et c'est un corollaire de celle d'arriver à un règlement équitable des revendications autochtones au terme du processus de négociation de traités. Lorsque ce processus est en cours, la Couronne a l'obligation tacite de consulter les demandeurs autochtones sur ce qui est susceptible d'avoir un effet préjudiciable sur leurs droits issus de traités et leurs droits ancestraux, et de trouver des mesures d'accommodement dans un esprit de conciliation. L'obligation revêt un caractère à la fois juridique et constitutionnel. Elle est de nature prospective et prend appui sur des droits dont l'existence reste à prouver. La nature de l'obligation et le recours pour manquement à celle-ci varient en fonction de la situation.

L'obligation de consulter prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et qu'elle envisage une mesure susceptible d'avoir un effet préjudiciable sur celui-ci. Cette condition comporte trois éléments. Premièrement, la Couronne doit avoir connaissance, concrètement ou par imputation, de l'existence possible d'une revendication autochtone ou d'un droit ancestral. L'existence possible d'une revendication est essentielle, mais il n'est pas nécessaire de prouver que la revendication connaîtra une issue favorable. Deuxièmement, il doit y avoir une mesure ou une décision de la Couronne. Conformément à l'approche généreuse et téléologique que commande l'obligation de

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

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

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

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

consulter, cette mesure ou cette décision ne s'entend pas uniquement de l'exercice d'un pouvoir conféré par la loi ni seulement d'une décision ou d'un acte qui a un effet immédiat sur des terres et des ressources. L'obligation de consulter naît aussi d'une « décision stratégique prise en haut lieu » qui est susceptible d'avoir un effet sur des revendications autochtones et des droits ancestraux. Troisièmement, il doit être possible que la mesure de la Couronne ait un effet sur une revendication autochtone ou un droit ancestral. Le demandeur doit établir un lien de causalité entre la mesure ou la décision envisagée par le gouvernement et un effet préjudiciable éventuel sur une revendication autochtone ou un droit ancestral. Un acte fautif antérieur, une simple répercussion hypothétique et un effet préjudiciable sur la position de négociation ultérieure d'une Première nation ne suffisent pas. Aussi, l'obligation de consulter ne vise que les effets préjudiciables de la mesure ou de la décision actuelle du gouvernement, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. Lorsque la ressource est transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle, il n'y a pas lieu de consulter, mais de négocier une indemnisation.

Un tribunal administratif doit s'en tenir à l'exercice des pouvoirs que lui confère sa loi habilitante, et son rôle en ce qui a trait à la consultation tient à ses obligations et à ses attributions légales. Le législateur peut décider de déléguer à un tribunal administratif l'obligation de la Couronne de consulter, et il peut lui conférer le pouvoir de décider si une consultation adéquate a eu lieu.

Le pouvoir de consulter, qui est distinct du pouvoir de déterminer s'il existe une obligation de consulter, ne peut être inféré du simple pouvoir d'examiner des questions de droit. La consultation comme telle n'est pas une question de droit. Il s'agit d'un processus constitutionnel distinct, souvent complexe, et dans certaines circonstances, d'un droit mettant en jeu faits, droit, politique et compromis. Le tribunal administratif désireux d'entreprendre une consultation doit y être expressément ou tacitement autorisé, et sa loi habilitante doit lui conférer la pouvoir de réparation nécessaire.

L'obligation de consulter est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne. Elle doit être respectée. Si le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent alors s'adresser à une cour de justice pour obtenir la réparation voulue. L'expérience enseigne que la voie judiciaire est longue, coûteuse et souvent vaine et qu'elle ne sert l'intérêt de personne.

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

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

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

Cases Cited

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

En l'espèce, la Commission avait le pouvoir de déterminer si une consultation adéquate avait eu lieu. La *Utilities Commission Act* l'investissait du pouvoir de trancher des questions de droit aux fins de déterminer si un CAÉ servait l'intérêt public, ce qui emportait celui de trancher une question constitutionnelle dont elle était régulièrement saisie. Au moment considéré, elle exigeait également de la Commission qu'elle tienne compte de « tout autre élément jugé pertinent eu égard à l'intérêt public », dont le caractère adéquat de la consultation. L'*Administrative Tribunals Act* ne modifie pas cette conclusion même si elle prévoit qu'un tribunal administratif n'a pas compétence à l'égard d'une « question constitutionnelle », car la demande de révision échappe à la définition restrictive de ce terme.

Le législateur n'a pas délégué à la Commission l'obligation de la Couronne de consulter. Le pouvoir de la Commission d'examiner les questions de droit et tout élément pertinent pour ce qui concerne l'intérêt public ne l'autorise pas à entreprendre la consultation, car celle-ci est un processus constitutionnel distinct, et non une question de droit.

La Commission a reconnu à juste titre avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones et elle a raisonnablement conclu que la question de la consultation ne pouvait se poser étant donné que le CAÉ de 2007 n'allait pas avoir d'effet préjudiciable sur quelque intérêt autochtone. Dans la présente affaire, la Couronne avait connaissance de l'existence possible d'une revendication autochtone ou d'un droit ancestral, et le projet de BC Hydro de conclure avec Alcan un contrat d'achat d'électricité constituait clairement une mesure projetée par la Couronne. Cependant, le CAÉ de 2007 n'allait pas avoir d'impact physique sur la rivière Nechako ou sur le poisson, ni entraîner de changements organisationnels, politiques ou de gestion susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations. L'omission de consulter relativement au projet initial constituait une atteinte sous-jacente et ne suffisait pas pour faire naître l'obligation de consulter. Vu leur obligation d'agir conformément à l'honneur de la Couronne, les représentants de BC Hydro devront néanmoins tenir compte des groupes autochtones touchés et les consulter au besoin lorsqu'une décision ultérieure sera susceptible d'avoir un effet préjudiciable sur eux.

Jurisprudence

Arrêt suivi : *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; **arrêts mentionnés :** *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation*

74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1; *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203; *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

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Utilities Commission Act, R.S.B.C. 1996, c. 473, ss. 2(4), 71, 79, 101(1), 105.

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de projet), 2004 CSC 74, [2004] 3 R.C.S. 550; *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; *Huu-Ay-Aht First Nation c. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx c. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation c. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Première nation Dene Tha' c. Canada (Ministre de l'Environnement)*, 2006 CF 1354 (CanLII), conf. par 2008 CAF 20 (CanLII); *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. c. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203; *R. c. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190.

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of the British Columbia Utilities Commission approving 2007 EPA confirmed.

Daniel A. Webster, *Q.C.*, *David W. Bursey* and *Ryan D. W. Dalziel*, for the appellant Rio Tinto Alcan Inc.

Chris W. Sanderson, *Q.C.*, *Keith B. Bergner* and *Laura Bevan*, for the appellant the British Columbia Hydro and Power Authority.

Gregory J. McDade, *Q.C.*, and *Maegen M. Giltrow*, for the respondent.

Mitchell R. Taylor, *Q.C.*, for the intervener the Attorney General of Canada.

Malliha Wilson and *Tamara D. Barclay*, for the intervener the Attorney General of Ontario.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

Stephanie C. Latimer, for the intervener the Attorney General of Alberta.

Written submissions only by *Gordon A. Fulton*, *Q.C.*, for the intervener the British Columbia Utilities Commission.

Written submissions only by *Robert C. Freedman* and *Rosanne M. Kyle*, for the intervener the Mikisew Cree First Nation.

Written submissions only by *Jeffrey R. W. Rath* and *Nathalie Whyte*, for the intervener the Moosomin First Nation.

Richard Spaulding, for the intervener Nunavut Tunngavik Inc.

Written submissions only by *Timothy Howard* and *Bruce Stadfeld*, for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band.

Robert J. M. Janes, for the intervener the Lakes Division of the Secwepemc Nation.

British Columbia Utilities Commission approuvant le CAÉ de 2007 confirmée.

Daniel A. Webster, *c.r.*, *David W. Bursey* et *Ryan D. W. Dalziel*, pour l'appelante Rio Tinto Alcan Inc.

Chris W. Sanderson, *c.r.*, *Keith B. Bergner* et *Laura Bevan*, pour l'appelante British Columbia Hydro and Power Authority.

Gregory J. McDade, *c.r.*, et *Maegen M. Giltrow*, pour l'intimé.

Mitchell R. Taylor, *c.r.*, pour l'intervenant le procureur général du Canada.

Malliha Wilson et *Tamara D. Barclay*, pour l'intervenant le procureur général de l'Ontario.

Paul E. Yearwood, pour l'intervenant le procureur général de la Colombie-Britannique.

Stephanie C. Latimer, pour l'intervenant le procureur général de l'Alberta.

Argumentation écrite seulement par *Gordon A. Fulton*, *c.r.*, pour l'intervenante British Columbia Utilities Commission.

Argumentation écrite seulement par *Robert C. Freedman* et *Rosanne M. Kyle*, pour l'intervenante la Première nation crie Mikisew.

Argumentation écrite seulement par *Jeffrey R. W. Rath* et *Nathalie Whyte*, pour l'intervenante la Première nation de Moosomin.

Richard Spaulding, pour l'intervenante Nunavut Tunngavik Inc.

Argumentation écrite seulement par *Timothy Howard* et *Bruce Stadfeld*, pour les intervenants le Conseil tribal de la nation Nlaka'pamux, l'Alliance des nations de l'Okanagan et la Bande indienne d'Upper Nicola.

Robert J. M. Janes, pour l'intervenante la Division des Grands lacs de la nation Secwepemc.

Peter W. Hutchins and *David Kalmakoff*, for the intervener the Assembly of First Nations.

Written submissions only by *Mervin C. Phillips*, for the intervener the Standing Buffalo Dakota First Nation.

Arthur C. Pape and *Richard B. Salter*, for the intervener the First Nations Summit.

Jay Nelson, for the interveners the Duncan's First Nation and the Horse Lake First Nation.

Roy W. Millen, for the intervener the Independent Power Producers Association of British Columbia.

Written submissions only by *Harry C. G. Underwood*, for the intervener Enbridge Pipelines Inc.

Written submissions only by *C. Kemm Yates*, *Q.C.*, for the intervener the TransCanada Keystone Pipeline GP Ltd.

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — In the 1950s, the government of British Columbia authorized the building of the Kenney Dam in Northwest British Columbia for the production of hydro power for the smelting of aluminum. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations have since time immemorial used for fishing and sustenance. This was done without consulting with the CSTC First Nations. Now, the government of British Columbia seeks approval of a contract for the sale of excess power from the dam to British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. The question is whether the British Columbia Utilities Commission (the "Commission") is required to consider the issue of consultation with the CSTC First Nations in determining whether the sale is in the public interest.

Peter W. Hutchins et *David Kalmakoff*, pour l'intervenante l'Assemblée des Premières Nations.

Argumentation écrite seulement par *Mervin C. Phillips*, pour l'intervenante la Première nation Standing Buffalo Dakota.

Arthur C. Pape et *Richard B. Salter*, pour l'intervenant le Sommet des Premières nations.

Jay Nelson, pour les intervenantes la Première nation Duncan's et la Première nation de Horse Lake.

Roy W. Millen, pour l'intervenante Independent Power Producers Association of British Columbia.

Argumentation écrite seulement par *Harry C. G. Underwood*, pour l'intervenante Enbridge Pipelines Inc.

Argumentation écrite seulement par *C. Kemm Yates*, *c.r.*, pour l'intervenante TransCanada Keystone Pipeline GP Ltd.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Dans les années 1950, le gouvernement de la Colombie-Britannique a autorisé la construction du barrage Kenney dans le nord-ouest de la province en vue de la production d'électricité destinée à l'alimentation d'une aluminerie. Le barrage et le réservoir ont modifié les débits d'eau dans la rivière Nechako, dont les Premières nations du Conseil tribal Carrier Sekani (« CTCS ») tirent leur subsistance (notamment grâce à la pêche) depuis des temps immémoriaux. Ces Premières nations n'ont pas été consultées avant la construction du complexe. Le gouvernement de la Colombie-Britannique demande aujourd'hui l'approbation d'un contrat de vente des surplus d'électricité produits par le barrage à une société d'État, British Columbia Hydro and Power Authority (« BC Hydro »). La Cour doit déterminer si la British Columbia Utilities Commission (la « Commission ») est tenue de se pencher sur la question de la consultation des Premières nations du CTCS pour déterminer si la vente sert l'intérêt public.

[2] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, this Court affirmed that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. In the intervening years, government-Aboriginal consultation has become an important part of the resource development process in British Columbia especially; much of the land and resources there are subject to land claims negotiations. This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation. I would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights.

I. Background

A. *The Facts*

[3] In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

[4] Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in

[2] Dans l'arrêt *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, la Cour affirme qu'un gouvernement a l'obligation de consulter les peuples autochtones avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur les terres et les ressources revendiquées par eux. Depuis lors, la consultation des Autochtones par le gouvernement constitue un volet important du processus d'exploitation des ressources, spécialement en Colombie-Britannique où beaucoup de terres et de ressources font l'objet de revendications territoriales. Le pourvoi soulève les questions suivantes : d'où naît l'obligation de consulter et quel rôle joue un tribunal administratif dans la consultation et le contrôle de celle-ci? Je suis d'avis d'accueillir le pourvoi, tout en confirmant l'obligation de BC Hydro de consulter les Premières nations du CTCS sur les activités d'exploitation ultérieures susceptibles d'avoir un effet préjudiciable sur leurs revendications et leurs droits.

I. Contexte

A. *Les faits*

[3] Dans les années 1950, Alcan (aujourd'hui Rio Tinto Alcan) a construit un barrage sur la rivière Nechako dans le nord-ouest de la Colombie-Britannique afin de produire de l'électricité destinée à la fabrication d'aluminium. Il s'agissait de travaux colossaux. L'eau de la rivière Nechako a été détournée dans le réservoir du même nom, où une centrale a été construite pour y produire de l'électricité. Après être passée dans les turbines de la centrale, l'eau se déversait ensuite dans la rivière Kemano, puis dans l'océan Pacifique à l'ouest. Le barrage a eu une incidence sur le débit de la rivière Nechako à l'est, ce qui a eu des répercussions sur les stocks de poissons dans les terres aujourd'hui revendiquées par les Premières nations du CTCS. Alcan a effectué ces dérivations d'eau conformément au permis d'exploitation hydraulique permanent nº 102324, qui lui accorde un droit perpétuel d'utilisation de l'eau.

[4] En 1987, Alcan, la province de la Colombie-Britannique et le Canada ont convenu de lâchers

1987 on the release of waters in order to protect fish stocks. Canada was involved because fisheries, whether seacoast-based or inland, fall within federal jurisdiction under s. 91(12) of the *Constitution Act, 1867*. The 1987 agreement directs the release of additional flows in July and August to protect migrating salmon. In addition, a protocol has been entered into between the Haisla Nation and Alcan which regulates water flows to protect eulachon spawning grounds.

[5] The electricity generated by the project has been used over the years primarily for aluminum smelting. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, for use in the local area and later for transmission to neighbouring communities. The Energy Purchase Agreement ("EPA") entered into in 2007, which is the subject of this appeal is the latest in a series of power sales from Alcan to BC Hydro. It commits Alcan to supplying and BC Hydro to purchasing excess electricity from the Kemano site until 2034. The 2007 EPA establishes a Joint Operating Committee to advise the parties on the administration of the EPA and the operation of the reservoir.

[6] The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the diversion of the river effected by the 1950s dam project. They assert, however, that the 2007 EPA for the power generated by the project should be subject to consultation. This, they say, is their constitutional right under s. 35 of the *Constitution Act, 1982*, as defined in *Haida Nation*.

B. *The Commission Proceedings*

[7] The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission*

d'eau pour protéger les stocks de poissons. Le Canada était partie à l'accord, car les pêches, des côtes de la mer ou de l'intérieur, relèvent de la compétence fédérale suivant le par. 91(12) de la *Loi constitutionnelle de 1867*. L'accord de 1987 prévoit des lâchers supplémentaires en juillet et en août afin de protéger le saumon anadrome. De plus, un protocole est intervenu entre la nation Haisla et Alcan pour régulariser les débits d'eau et protéger les frayères d'eulachons.

[5] Au fil des ans, l'électricité générée par la centrale a principalement servi à alimenter une aluminerie. Toutefois, depuis 1961, Alcan vend ses surplus d'électricité à une société d'État, BC Hydro. Ces surplus ont d'abord été consommés localement, puis acheminés vers des collectivités avoisinantes. Le contrat d'achat d'électricité (le « CAÉ ») conclu en 2007, qui fait l'objet du pourvoi, est le plus récent intervenu entre Alcan et BC Hydro. Alcan s'y engage à vendre l'électricité excédentaire produite par la centrale de Kemano, et BC Hydro à l'acheter, jusqu'en 2034. Le CAÉ de 2007 crée un comité conjoint d'exploitation appelé à conseiller les parties sur l'administration du contrat et l'exploitation du réservoir.

[6] Les Premières nations du CTCS prétendent que la vallée de la Nechako fait partie de leurs terres ancestrales et elles revendiquent le droit de pêcher dans la rivière Nechako. Comme ce n'était pas l'usage à l'époque, elles n'ont pas été consultées au sujet du détournement de la rivière occasionné par la construction du barrage dans les années 1950. Elles font toutefois valoir que le CAÉ de 2007 conclu relativement à l'énergie produite par ce barrage devrait faire l'objet d'une consultation. Selon elles, il s'agit d'un droit constitutionnel découlant de l'art. 35 de la *Loi constitutionnelle de 1982*, au sens où l'entend la Cour dans l'arrêt *Nation Haïda*.

B. *Les procédures de la Commission*

[7] Le CAÉ de 2007 a été soumis à l'examen de la Commission, laquelle devait, en application de l'art. 71 de la *Utilities Commission Act*, R.S.B.C. 1996, ch. 473, déterminer si la vente d'électricité

Act, R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

[8] The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "ha[d] failed to act on their legal obligation" to them, but refrained from asking the Commission "to assess the adequacy [of consultation] and accommodation afforded . . . on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, October 10, 2007 (the "Scoping Order"), unreported. The Commission's Scoping Order therefore addressed the consultation issue as follows:

> Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

[9] On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision

était dans l'intérêt public. La Commission avait le pouvoir de déclarer inapplicable le contrat de vente d'électricité qui, selon elle, n'était pas dans l'intérêt public compte tenu de la quantité d'énergie fournie, de la disponibilité de l'approvisionnement, du prix et de la disponibilité de toute autre forme d'énergie, du prix de l'énergie fournie à une entreprise de services publics et de [TRADUCTION] « tout autre élément jugé pertinent eu égard à l'intérêt public ».

[8] La Commission a entrepris ses travaux par la tenue de deux conférences de nature procédurale pour déterminer notamment le « cadre » de l'audience. Le « cadrage » est le processus par lequel la Commission détermine [TRADUCTION] « les données qu'elle estime nécessaires pour décider si le contrat est ou non dans l'intérêt public » en application de l'al. 71(1)b) de la *Utilities Commission Act*. C'est à cette étape qu'a été soulevée la question de la participation des Premières nations à l'audience. Le CTCS n'était pas partie à la procédure, contrairement à la Nation Haisla, qui soutenait que la province et BC Hydro [TRADUCTION] « avaient manqué à leur obligation légale envers elle », mais qui ne demandait pas à la Commission « de se prononcer sur le caractère adéquat [de la consultation] et des mesures d'accommodement prises [. . .] relativement au CAÉ de 2007 » : *Re : British Columbia Hydro & Power Authority Filing of Electricity Power Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, 10 octobre 2007 (l'« ordonnance sur le cadre de l'audience »), inédite. Dans son ordonnance, la Commission se prononce donc comme suit sur la question de la consultation :

> [TRADUCTION] Les éléments de preuve se rapportant à la consultation des Premières nations peuvent être pertinents, et ce, pour les mêmes raisons que la Commission examine souvent la preuve de la consultation d'autres intéressés. De manière générale, une preuve de consultation insuffisante, notamment des Premières nations, n'est pas déterminante eu égard aux questions dont est saisie la Commission.

[9] Le 29 octobre 2007, le CTCS a tardivement demandé d'être constitué partie intervenante sur la question de la consultation au motif que la décision

might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

[10] The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

[11] On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

[12] As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement]

de la Commission risquait d'avoir un effet préjudiciable sur les droits ancestraux et le titre aborigène qu'il revendiquait alors. Le 19 novembre 2007, au début de l'audience, le CTCS a demandé la révision de l'ordonnance qui en définissait le cadre et, dans son argumentation écrite du 20 novembre 2007, il a demandé qu'à l'audience, la Commission examine en outre les questions de savoir si l'obligation de consultation avait été respectée et si la vente d'électricité projetée dans le CAÉ de 2007 pouvait en soi être préjudiciable aux droits ancestraux et au titre aborigène, ainsi que la question connexe des répercussions environnementales du CAÉ de 2007 sur les droits des Premières nations du CTCS.

[10] La Commission a établi un processus comportant deux étapes pour statuer sur la demande de révision. Elle devait d'abord déterminer si un fondement probatoire raisonnable justifiait la révision de l'ordonnance, puis entendre les arguments des parties sur la question de savoir s'il y avait lieu d'accueillir la demande de recadrage. À la première étape, le CTCS a produit des éléments de preuve, présenté des témoins et contre-interrogé ceux de BC Hydro et d'Alcan. La Commission s'en est tenue à la question de savoir si, en raison de la modification du débit de la rivière Nechako ou du niveau du réservoir Nechako qui en résulterait, le CAÉ de 2007 aurait un effet préjudiciable sur les droits éventuels des Premières nations du CTCS.

[11] Le 29 novembre 2007, la Commission a rendu à la première étape une décision préliminaire intitulée [TRADUCTION] « Impact sur le débit d'eau ». Elle y conclut que [TRADUCTION] « suivant le CAÉ de 2007, l'exploitation du réservoir Nechako continue d'incomber à Alcan » et que le contrat ne changera rien aux niveaux de la rivière Nechako, affirmant que [TRADUCTION] « le CAÉ de 2007 accorde la priorité à la production d'électricité, et non à l'eau ». Avec ou sans le CAÉ de 2007, [TRADUCTION] « Alcan exploite le réservoir Nechako dans le but d'optimiser la production d'électricité ».

[12] Au chapitre de la pêche, la Commission a estimé que [TRADUCTION] « les lâchers d'eau effectués à partir du réservoir Nechako [conformément

is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

[13] The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application — specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

[14] On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the 2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional

à l'accord de 1987] visent en priorité le passage des poissons, puis la production d'électricité ». Bien que le calendrier des lâchers d'eau destinés à la production d'électricité puisse changer en raison du CAÉ de 2007, à son avis, cela [TRADUCTION] « n'aura aucun impact sur les apports dans le réseau hydrographique de la Nechako », car ces lâchers d'eau ne sont pas effectués dans la rivière Nechako à l'est — objet de la préoccupation des Premières nations du CTCS —, mais dans la rivière Kemano à l'ouest. La Commission a aussi conclu que le CAÉ de 2007 ne modifiera ni la gestion des débits et des niveaux d'eau, ni la structure de gestion du réservoir.

[13] À la deuxième étape, la Commission a invité les parties à présenter des observations écrites sur la demande de révision — plus précisément, sur la question de savoir si le refus de recadrer l'audience pour que les questions liées à la consultation y soient aussi abordées constituerait une erreur de compétence à la lumière de ces faits. Les parties ont répondu à l'invitation.

[14] Le 17 décembre 2007, la Commission a rejeté la demande du CTCS au motif que le CAÉ de 2007 ne créerait pas de nouveaux effets défavorables sur les intérêts des Premières nations en cause : *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (la « décision sur la demande de révision »). Pour statuer, elle a tenu pour avérés l'atteinte historique aux droits ancestraux et au titre aborigène et le manquement du gouvernement à son obligation de consulter. S'appuyant sur l'arrêt *Nation Haïda*, elle a conclu qu'il fallait [TRADUCTION] « davantage qu'une atteinte sous-jacente ». Le CTCS devait démontrer que le CAÉ de 2007 aurait un « effet préjudiciable » sur les droits ancestraux des Premières nations qui en faisaient partie. Après avoir appliqué ce critère à ses conclusions de fait, elle a statué que l'[TRADUCTION] « examen visé à l'article 71 n'a pas pour effet d'approuver ou de transférer une licence ou une autorisation ou d'en modifier le titulaire, de sorte qu'en l'absence de nouveaux impacts physiques, faire droit [sans consultation] à une demande présentée sous le régime de l'article 71 ne constituerait pas une erreur de compétence ». La Commission a donc estimé que sa décision

error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

[15] The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

> In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

[16] In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. *The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (Donald, Huddart and Bauman JJ.A.)*

[17] The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

concernant le CAÉ de 2007 n'aurait pas d'effet préjudiciable sur les intérêts des Premières nations du CTCS. L'obligation de consulter n'avait donc pas pris naissance, et la Commission n'a pas commis d'erreur de compétence en refusant d'inclure dans le cadre de l'audience la consultation des Premières nations, en sus de la consultation générale de tous les intéressés.

[15] La Commission a ensuite conclu que le CAÉ de 2007 était dans l'intérêt public et devait être approuvé :

> [TRADUCTION] Dans les circonstances du présent examen, on peut raisonnablement tenir pour inutile la preuve relative à la consultation sur l'atteinte historique et continue pour les mêmes raisons qu'il n'y a pas d'erreur de compétence, soit la portée limitée de l'examen visé à l'article 71 et l'absence de nouveaux impacts physiques.

[16] Essentiellement, la Commission a opiné que le CAÉ de 2007 n'aurait pas d'impact physique sur les niveaux d'eau existants de la rivière Nechako, de sorte qu'il ne modifierait pas la gestion des stocks de poissons. Elle a aussi estimé que sa décision ne nécessiterait ni cession ni modification des licences ou des activités d'exploitation. Elle est donc arrivée à la conclusion que sa décision n'aurait aucun effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS, de sorte qu'il n'était pas nécessaire de recadrer l'audience pour permettre que soit débattue plus avant la question de l'obligation de consulter.

C. *Le jugement de la Cour d'appel, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (les juges Donald, Huddart et Bauman)*

[17] Le CTCS a contesté devant la Cour d'appel de la Colombie-Britannique la décision sur la demande de révision et l'approbation du CAÉ de 2007. Au nom de la Cour d'appel, le juge Donald a annulé les ordonnances et renvoyé l'affaire à la Commission pour qu'elle entende [TRADUCTION] « preuve et arguments sur la question de savoir s'il existe ou non une obligation de consulter [les Premières nations du CTCS] et, au besoin, d'arriver à un accord avec elles et, dans l'affirmative, sur la question de savoir si l'obligation a été respectée relativement au dépôt du CAÉ de 2007 » (par. 69).

[18] The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

[19] The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

> . . . the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the [CSTC] would win the point as a precondition for a hearing into the very same point.
>
> I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. [paras. 61-62]

[20] The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

[21] The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional

[18] La Cour d'appel conclut que la Commission avait compétence pour se pencher sur la question de la consultation. La Commission pouvait trancher des questions de droit et, par conséquent, toute question constitutionnelle liée à l'obligation de consulter.

[19] La Cour d'appel opine ensuite que la Commission a prématurément rejeté la demande de révision. Le juge Donald dit ce qui suit au nom de la juridiction d'appel :

> [TRADUCTION] . . . la Commission a tranché une question tenue erronément pour préliminaire alors qu'il s'agissait d'une question de fond. La faille logique a consisté à présumer l'inutilité de la consultation. Autrement dit, la Commission a exigé comme condition préalable à l'examen des prétentions que [le CTCS] en démontre d'abord la justesse.
>
> Je ne dis pas que la Commission serait tenue de conclure à l'existence d'une obligation de consulter en l'espèce. L'erreur de la Commission est de ne pas avoir considéré la question de la consultation dans le cadre d'une audience en bonne et due forme alors que les circonstances exigeaient un examen. [par. 61-62]

[20] La Cour d'appel conclut que l'honneur de la Couronne obligeait la Commission à trancher la question de la consultation et que [TRADUCTION] « le tribunal administratif doté du pouvoir d'approuver le projet doit accepter l'obligation de se prononcer sur le caractère adéquat de la consultation » (par. 53). Contrairement à la Commission, la Cour d'appel ne se demande pas si le CAÉ de 2007 était susceptible d'avoir un effet préjudiciable sur quelque revendication ou droit des Premières nations du CTCS. Elle ne reproche pas à la Commission sa conclusion sur l'effet préjudiciable. Elle semble plutôt estimer que, malgré cette conclusion, la Commission était tenue de déterminer si la consultation pouvait être « utile ». En statuant que la Commission aurait dû examiner la question de la consultation, la Cour d'appel paraît interpréter plus largement que la Commission les conditions auxquelles il y a obligation de consulter.

[21] La Cour d'appel laisse entendre que l'omission de considérer la question de la consultation risquait d'entraîner l'approbation d'un contrat

duty. Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry" (para. 42).

[22] Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

[23] The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to rescope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. *Legislation Regarding the Public Interest Determination*

[24] The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest":

au mépris de l'obligation constitutionnelle de la Couronne. Le juge Donald pose la question suivante : [TRADUCTION] « Comment un contrat conclu par un mandataire de la Couronne dans le non-respect d'une obligation constitutionnelle peut-il être dans l'intérêt public? L'existence d'une telle obligation et l'allégation de non-respect doivent faire partie intégrante de l'examen relatif à l'intérêt public » (par. 42).

[22] Alcan et BC Hydro interjettent appel devant notre Cour. Elles soutiennent que la Cour d'appel a interprété trop largement l'obligation de la Couronne de consulter et le pouvoir du tribunal administratif de trancher les questions touchant à la consultation. Vu le mandat incombant à la Commission suivant sa loi constitutive et la preuve dont elle disposait, Alcan et BC Hydro prétendent que la Commission a conclu à juste titre qu'elle n'était pas tenue d'examiner la question de la consultation soulevée par le CTCS, car peu importe l'importance du droit de participation reconnu, il était impossible de conclure à l'existence d'une obligation de consulter relativement au CAÉ de 2007.

[23] Le CTCS avance que la Cour d'appel a eu raison de conclure que la Commission avait refusé à tort de redéfinir le cadre de l'audience de manière à permettre la présentation d'observations sur la question de la consultation. Il ne fait plus valoir les arguments procéduraux invoqués devant les tribunaux inférieurs.

II. Le cadre législatif

A. *Dispositions législatives régissant la décision relative à l'intérêt public*

[24] L'article 71 de la *Utilities Commission Act* prévoyait que la Commission devait examiner le CAÉ de 2007 pour déterminer si son approbation était dans l'intérêt public. Avant le mois de mai 2008, la décision devait tenir compte de la quantité d'énergie fournie, de la disponibilité de l'approvisionnement, du prix et de la disponibilité de toute autre forme d'énergie, du prix de l'énergie fournie à une entreprise de services publics et de [TRADUCTION] « tout autre élément jugé pertinent

Utilities Commission Act, s. 71(2)(a) to (e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a) and (b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. *Legislation on the Commission's Remedial Powers*

[25] Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2) and (3).

C. *Legislation on the Commission's Jurisdiction and Appeals*

[26] Section 79 of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

[27] Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or

eu égard à l'intérêt public » : al. 71(2)a) à e) de la *Utilities Commission Act*. À compter de mai 2008, se sont ajoutées les considérations suivantes : les [TRADUCTION] « objectifs énergétiques du gouvernement » et son plan à long terme en matière de ressources : al. 71(2.1)a) et b). Or, la disposition portant sur l'intérêt public a vu sa portée ramenée à la prise en compte des intérêts des clients éventuels d'une entreprise de services publics de la Colombie-Britannique : al. 71(2.1)d).

B. *Dispositions législatives régissant le pouvoir de réparation de la Commission*

[25] Au vu des considérations susmentionnées, la Commission peut, si elle juge qu'il est dans l'intérêt public de le faire, rendre une ordonnance approuvant le contrat projeté en application du par. 71(2.4) de la *Utilities Commission Act*. Si elle arrive à la conclusion contraire concernant l'intérêt public, elle peut, par voie d'ordonnance, déclarer le contrat inapplicable, en totalité ou en partie, ou [TRADUCTION] « rendre toute autre ordonnance qu'elle juge indiquée dans les circonstances » : par. 71(2) et (3).

C. *Dispositions législatives régissant la compétence de la Commission et le droit d'appel*

[26] L'article 79 de la *Utilities Commission Act* dispose que les conclusions de fait tirées par la Commission dans les limites de sa compétence sont [TRADUCTION] « opposables et définitives ». L'article 105 confère en outre à la Commission le [TRADUCTION] « pouvoir exclusif de statuer dans toute affaire et sur toute question relevant de sa compétence suivant la présente loi ou un autre texte législatif ». Ses décisions et ordonnances peuvent cependant être contestées devant la Cour d'appel, sur autorisation : par. 101(1).

[27] Ensemble, les art. 79 et 105 de la *Utilities Commission Act* constituent une [TRADUCTION] « disposition d'inattaquabilité » au sens de l'article premier de l'*Administrative Tribunals Act* de la Colombie-Britannique, S.B.C. 2004, ch. 45. Suivant l'art. 58 de l'*Administrative Tribunals Act*, cette disposition d'inattaquabilité assujettit à la norme de

an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all [other] matters".

[28] The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(2) says:

> **8.** . . .
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. *Section 35 of the Constitution Act, 1982*

[29] Section 35 of the *Constitution Act, 1982* reads:

contrôle de la décision « manifestement déraisonnable » [TRADUCTION] « la conclusion de fait ou de droit ou l'exercice du pouvoir discrétionnaire relatifs à une question sur laquelle le tribunal a compétence exclusive du fait de l'existence d'une disposition d'inattaquabilité ». La norme de contrôle de la décision correcte vaut pour [TRADUCTION] « toute [autre] question ».

[28] On peut aussi soutenir que le par. 44(1) de l'*Administrative Tribunals Act* a une incidence sur la compétence de la Commission en ce qu'il s'applique à celle-ci suivant le par. 2(4) de la *Utilities Commission Act*. Le paragraphe 44(1) de l'*Administrative Tribunals Act* dispose qu'[TRADUCTION] « [u]n tribunal administratif n'a pas compétence pour trancher une question constitutionnelle ». L'article premier de l'*Administrative Tribunals Act* délimite cette matière par renvoi à l'art. 8 de la *Constitutional Question Act*, R.S.B.C. 1996, ch. 68. Voici le texte du par. 8(2) de cette loi :

[TRADUCTION]

> **8.** . . .
>
> (2) Lorsque dans une instance, y compris un dossier ou une affaire,
>
> a) la validité ou l'applicabilité constitutionnelle d'une loi est contestée ou
>
> b) une réparation constitutionnelle est demandée,
>
> la loi ne doit pas être tenue pour invalide ou inapplicable, et la réparation ne doit pas être accordée sans qu'un avis de la contestation ou de la demande n'ait été signifié au procureur général du Canada et au procureur général de la Colombie-Britannique.

La [TRADUCTION] « réparation constitutionnelle » est définie comme étant « la réparation visée au par. 24(1) de la *Loi constitutionnelle de 1982*, hormis celle consistant à écarter un élément de preuve ou découlant d'une telle mesure » : *Constitutional Question Act*, par. 8(1).

D. *L'article 35 de la Loi constitutionnelle de 1982*

[29] Voici le libellé de l'art. 35 de la *Loi constitutionnelle de 1982* :

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

III. The Issues

[30] The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;
2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. *When Does the Duty to Consult Arise?*

[31] The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when

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

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuits et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

III. Les questions en litige

[30] Les principales questions à trancher sont les suivantes : (1) la Commission avait-elle compétence pour se prononcer sur la consultation et (2), dans l'affirmative, le refus de la Commission de redéfinir le cadre de l'audience pour que la question de la consultation soit abordée devrait-il être annulé? Il faut dès lors déterminer les conditions auxquelles il y a obligation de consulter et examiner le rôle du tribunal administratif à l'égard de cette obligation. J'examinerai donc successivement ce qui suit :

1. les conditions auxquelles il y a obligation de consulter;
2. le rôle du tribunal administratif à l'égard de la consultation;
3. le pouvoir de la Commission de se prononcer sur la consultation;
4. la décision de la Commission sur la demande de révision;
5. la conclusion de la Commission portant que l'approbation du CAÉ de 2007 servait l'intérêt public.

IV. Analyse

A. *À quelles conditions y a-t-il obligation de consulter?*

[31] Dans l'arrêt *Nation Haïda*, notre Cour établit que l'obligation de consulter prend naissance

the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

[32] The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:

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

[33] The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a

« lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci » (par. 35). Ce critère comporte trois volets : (1) la connaissance par la Couronne, réelle ou imputée, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, (2) la mesure envisagée de la Couronne et (3) la possibilité que cette mesure ait un effet préjudiciable sur une revendication autochtone ou un droit ancestral. J'examinerai chacun de ces volets plus en détail. D'abord, quelques remarques générales sont de mise concernant la source et la nature de l'obligation de consulter.

[32] L'obligation de consulter s'origine de l'honneur de la Couronne. Elle est un corollaire de celle d'arriver à un règlement équitable des revendications autochtones au terme du processus de négociation de traités. Lorsque les négociations sont en cours, la Couronne a l'obligation tacite de consulter les demandeurs autochtones sur ce qui est susceptible d'avoir un effet préjudiciable sur leurs droits issus de traités et leurs droits ancestraux, et de trouver des mesures d'accommodement dans un esprit de conciliation : *Nation Haïda*, par. 20. Comme le dit la Cour au par. 25 de cet arrêt :

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

[33] L'obligation de consulter dont il est fait état dans l'arrêt *Nation Haïda* découle de la nécessité de protéger les intérêts autochtones lorsque des terres ou des ressources font l'objet de revendications ou que la mesure projetée peut empiéter sur un droit ancestral. Sans le respect de cette

final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

[34] Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

[35] *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.

[36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment*

obligation, un groupe autochtone désireux de protéger ses intérêts jusqu'au règlement d'une revendication devrait s'adresser au tribunal pour obtenir une injonction interlocutoire ordonnant la cessation de l'activité préjudiciable. L'expérience enseigne qu'il s'agit d'une démarche longue, coûteuse et souvent vaine. De plus, sauf quelques exceptions, les groupes autochtones réussissent rarement à obtenir une injonction pour mettre fin à la mise en valeur des terres ou aux activités qui y sont exercées et ainsi protéger des droits ancestraux ou issus de traités qui sont contestés.

[34] Fondée sur l'honneur de la Couronne, l'obligation revêt un caractère à la fois juridique et constitutionnel : *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6. Elle vise la protection des droits ancestraux et issus de traités, ainsi que la réalisation de l'objectif de conciliation des intérêts des Autochtones et de ceux de la Couronne. Elle reconnaît que les deux parties doivent collaborer pour concilier leurs intérêts au lieu de s'opposer dans un litige. Elle tient aussi compte du fait que les peuples autochtones participent souvent à l'exploitation des ressources. Empêcher la mise en valeur par voie d'injonction risque de ne servir l'intérêt de personne. L'honneur de la Couronne est donc davantage compatible avec une obligation de consulter axée sur la conciliation des intérêts respectifs des parties.

[35] L'arrêt *Nation Haïda* jette les bases du dialogue préalable au règlement définitif des revendications en obligeant la Couronne à tenir compte des droits ancestraux contestés ou établis *avant* de prendre une décision susceptible d'avoir un effet préjudiciable sur ces droits : J. Woodward, *Native Law*, vol. 1 (feuilles mobiles), p. 5-35. Il s'agit d'une obligation de nature *prospective* prenant appui sur des droits dont l'existence reste à prouver.

[36] La nature de l'obligation varie en fonction de la situation. La consultation exigée est plus approfondie lorsque la revendication autochtone paraît de prime abord fondée et que l'effet sur le droit ancestral ou issu de traité sous-jacent est grave : *Nation Haïda*, par. 43-45, et *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur*

Director), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

[37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

[38] The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at para. 32:

> . . . the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

[39] Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) Knowledge by the Crown of a Potential Claim or Right

[40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a

d'évaluation de projet), 2004 CSC 74, [2004] 3 R.C.S. 550, par. 32.

[37] Le recours pour manquement à l'obligation de consulter varie également en fonction de la situation. L'omission de la Couronne de consulter les intéressés peut donner lieu à un certain nombre de mesures allant de l'injonction visant l'activité préjudiciable, à l'indemnisation, voire à l'ordonnance enjoignant au gouvernement de consulter avant d'aller de l'avant avec son projet : *Nation Haïda*, par. 13-14.

[38] L'obligation de consulter s'inscrit dans ce que Brian Slattery qualifie d'ordre constitutionnel [TRADUCTION] « génératif » où « l'article 35 a une fonction dynamique et non purement statique » (« Aboriginal Rights and the Honour of the Crown » (2005), 29 *S.C.L.R.* (2d) 433, p. 440). Ce dynamisme a été formulé comme suit dans l'arrêt *Nation Haïda* (par. 32) :

> . . . l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Comme le confirme la jurisprudence postérieure à cet arrêt, la consultation [TRADUCTION] « s'attache au maintien de relations constantes » et à l'établissement d'un processus permanent de conciliation en ce qu'elle privilégie les mesures « qui favorisent la continuité des négociations » : D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009), p. 21.

[39] Sur cette toile de fond, j'examine maintenant les trois éléments qui font naître l'obligation de consulter.

(1) Connaissance par la Couronne de l'existence possible d'une revendication ou d'un droit

[40] Pour qu'elle ait l'obligation de consulter, la Couronne doit avoir connaissance, concrètement

claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

[41] The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

(2) Crown Conduct or Decision

[42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that

ou par imputation, d'une revendication visant la ressource ou la terre qui s'y rattache : *Nation Haïda*, par. 35. La norme de preuve applicable, eu égard à la nécessité de préserver l'honneur de la Couronne, n'est pas stricte. Il y a connaissance réelle lorsqu'une revendication a été formulée dans une instance judiciaire ou lors de négociations, ou lorsqu'un droit issu de traité peut être touché : *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388, par. 34. Il y a connaissance par imputation lorsque l'on sait ou que l'on soupçonne raisonnablement que les terres ont été traditionnellement occupées par une collectivité autochtone ou que l'on peut raisonnablement prévoir qu'il y aura une incidence sur des droits. L'existence possible d'une revendication est essentielle, mais il n'est pas nécessaire de prouver que la revendication connaîtra une issue favorable. La revendication doit seulement être crédible. La revendication à l'assise fragile, dont le fondement ne paraît pas plausible à première vue, peut ne faire naître qu'une obligation d'informer. Comme l'affirme notre Cour dans l'arrêt *Nation Haïda* (par. 37) :

La connaissance d'une revendication crédible mais non encore établie suffit à faire naître l'obligation de consulter et d'accommoder. Toutefois, le contenu de l'obligation varie selon les circonstances, comme nous le verrons de façon plus approfondie plus loin. Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes. Il est possible en droit de différencier les revendications reposant sur une preuve ténue des revendications reposant sur une preuve à première vue solide et de celles déjà établies.

[41] Il faut que la revendication ou le droit existe réellement et risque d'être compromis par la mesure gouvernementale, car l'objectif de la consultation est de protéger un droit, établi ou non, d'un préjudice irréparable, pendant les négociations en vue d'un règlement : Newman, p. 30, citant *Nation Haïda*, par. 27 et 33.

(2) Mesure ou décision de la Couronne

[42] Deuxièmement, pour que naisse l'obligation de consulter, la mesure ou la décision de la

engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

[44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

Couronne doit mettre en jeu un droit ancestral éventuel. La mesure doit être susceptible d'avoir un effet préjudiciable sur la revendication ou le droit en question.

[43] Dès lors, la question qui se pose est celle de savoir quelle mesure oblige le gouvernement à consulter. Il a été établi que cette mesure ne s'entend pas uniquement de l'exercice d'un pouvoir conféré par la loi : *Huu-Ay-Aht First Nation c. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, par. 94 et 104; *Wii'litswx c. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, par. 11-15. Cette conclusion s'inscrit dans l'approche généreuse et téléologique que commande l'obligation de consulter.

[44] En outre, une mesure gouvernementale ne s'entend pas uniquement d'une décision ou d'un acte qui a un effet immédiat sur des terres et des ressources. Un simple risque d'effet préjudiciable suffit. Ainsi, l'obligation de consulter naît aussi d'une [TRADUCTION] « décision stratégique prise en haut lieu » qui est susceptible d'avoir un effet sur des revendications autochtones et des droits ancestraux (Woodward, p. 5-41 (italiques omis)). Mentionnons quelques exemples : la cession de concessions de ferme forestière qui auraient permis l'abattage d'arbres dans de vieilles forêts (*Nation Haïda*), l'approbation d'un plan pluriannuel de gestion forestière visant un vaste secteur géographique (*Khaloose First Nation c. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110), la création d'un processus d'examen relativement à un gazoduc important (*Première nation Dene Tha' c. Canada (Ministre de l'Environnement)*, 2006 CF 1354 (CanLII), conf. par 2008 CAF 20 (CanLII)), et l'examen approfondi des besoins d'infrastructure et de capacité de transport d'électricité d'une province (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). La question de savoir si une mesure gouvernementale s'entend aussi d'une mesure législative devra être tranchée dans une affaire ultérieure : voir *R. c. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, par. 37-40.

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example,

(3) Effet préjudiciable de la mesure projetée par la Couronne sur une revendication autochtone ou un droit ancestral

[45] Le troisième élément requis pour qu'il y ait obligation de consulter est la possibilité que la mesure de la Couronne ait un effet sur une revendication autochtone ou un droit ancestral. Le demandeur doit établir un lien de causalité entre la mesure ou la décision envisagée par le gouvernement et un effet préjudiciable éventuel sur une revendication autochtone ou un droit ancestral. Un acte fautif commis dans le passé, telle l'omission de consulter, ne suffit pas.

[46] Une approche généreuse et téléologique est aussi de mise à l'égard de ce troisième élément puisque, comme le dit Newman, l'objectif poursuivi est [TRADUCTION] « de reconnaître que les actes touchant un titre aborigène ou un droit ancestral non encore établi, ou des droits issus de traités, peuvent avoir des répercussions irréversibles qui sont incompatibles avec l'honneur de la Couronne » (p. 30, citant l'arrêt *Nation Haïda*, par. 27 et 33). Cependant, de simples répercussions hypothétiques ne suffisent pas. Comme il appert de l'arrêt *R. c. Douglas*, [2007] BCCA 265, 278 D.L.R. (4th) 653, au par. 44, il doit y avoir un [TRADUCTION] « effet préjudiciable important sur la possibilité qu'une Première nation puisse exercer son droit ancestral ». Le préjudice doit toucher l'exercice futur du droit lui-même, et non seulement la position de négociation ultérieure de la Première nation.

[47] L'effet préjudiciable comprend toute répercussion risquant de compromettre une revendication autochtone ou un droit ancestral. Il est souvent de nature physique. Cependant, comme on l'a vu relativement à ce qui constitue une mesure de la Couronne, la décision prise en haut lieu ou la modification structurelle apportée à la gestion de la ressource risque aussi d'avoir un effet préjudiciable sur une revendication autochtone ou un droit ancestral, et ce, même si elle n'a pas d'[TRADUCTION] « effet immédiat sur les terres et les ressources » : Woodward, p. 5-41. La raison en est qu'une telle modification structurelle de la

a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

[49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated

gestion de la ressource peut ouvrir la voie à d'autres décisions ayant un effet préjudiciable *direct* sur les terres et les ressources. Par exemple, le contrat par lequel la Couronne cède à une partie privée la maîtrise d'une ressource risque de supprimer ou de réduire le pouvoir de la Couronne de faire en sorte que la ressource soit exploitée dans le respect des intérêts autochtones, conformément à l'honneur de la Couronne. Les Autochtones seraient alors dépouillés en tout ou en partie de leur droit constitutionnel de voir leurs intérêts pris en considération dans les décisions de mise en valeur, ce qui constitue un effet préjudiciable : voir l'arrêt *Nation Haïda*, par. 72-73.

[48] Une atteinte sous-jacente ou continue, même si elle ouvre droit à d'autres recours, ne constitue pas un effet préjudiciable lorsqu'il s'agit de déterminer si une décision gouvernementale particulière emporte l'obligation de consulter. La raison d'être de cette obligation est d'empêcher que les revendications autochtones et les droits ancestraux ne soient compromis pendant les négociations auxquelles ils donnent lieu : *Nation Haïda*, par. 33. L'obligation naît lorsque la Couronne a *connaissance*, concrètement ou par imputation, de l'existence potentielle ou réelle du droit ou titre ancestral revendiqué et qu'elle « envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci » : *Nation Haïda*, par. 35 (je souligne). Ce critère est repris par notre Cour relativement à des droits issus de traités dans l'arrêt *Première nation crie Mikisew*, par. 33-34.

[49] Il faut déterminer si une revendication ou un droit est susceptible d'être compromis par la mesure ou la décision *actuelle* du gouvernement. L'atteinte antérieure et continue, y compris l'omission de consulter, ne fait naître l'obligation de consulter que si la décision actuelle risque d'avoir un nouvel effet défavorable sur une revendication actuelle ou un droit existant. Il peut néanmoins y avoir recours pour une atteinte antérieure et continue, y compris l'omission de consulter. Comme le signale la Cour dans l'arrêt *Nation Haïda*, le non-respect de l'obligation de consulter peut donner droit à diverses réparations, dont l'indemnisation. Pour que naisse une nouvelle obligation de

Crown action must put current claims and rights in jeopardy.

[50] Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

[51] As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

[52] The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries

consulter — ce dont il est question en l'espèce —, une mesure envisagée par la Couronne doit mettre en péril une revendication actuelle ou un droit existant.

[50] L'effet préjudiciable ne s'entend pas non plus d'une répercussion négative sur la position de négociation d'un groupe autochtone. L'obligation de consulter, que justifie la nécessité de protéger les droits ancestraux et de préserver l'utilisation ultérieure des ressources revendiquées par les peuples autochtones, compte tenu des intérêts opposés de la Couronne, peut assurément retarder au final la mise en valeur entreprise. Elle peut donc servir non seulement à régler provisoirement une question relative aux ressources, mais aussi, accessoirement, à atteindre un objectif d'indemnisation à long terme. Vue sous cet angle, l'obligation de consulter peut être considérée comme un maillon essentiel du dispositif global permettant à la Couronne de s'acquitter de ses obligations constitutionnelles envers les Premières nations du Canada. Toutefois, dissociée de sa raison d'être qu'est la nécessité de préserver les intérêts autochtones, l'obligation de consulter viserait seulement à favoriser une partie par rapport à une autre dans le processus de négociation.

(4) Interprétation nouvelle de l'obligation de consulter

[51] Rappelons que l'obligation de consulter prend naissance lorsque (1) la Couronne a connaissance, concrètement ou par imputation, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, (2) qu'elle envisage une mesure ou une décision et (3) que cette mesure ou cette décision est susceptible d'avoir un effet préjudiciable sur la revendication autochtone ou le droit ancestral. Il faut donc établir un lien de causalité entre la mesure projetée par la Couronne et l'effet préjudiciable possible sur une revendication autochtone ou un droit ancestral.

[52] L'intimé fonde ses prétentions sur une interprétation plus large de l'obligation de consulter. Il prétend que même si le CAÉ de 2007 n'aura aucun impact sur les niveaux d'eau de la rivière

or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

[53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

[54] The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree — an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

Nechako, ses stocks de poissons ou la gestion de la ressource visée par le litige, il peut y avoir obligation de consulter, car le CAÉ de 2007 fait partie d'un projet hydroélectrique qui continue d'avoir des répercussions sur ses droits. Dès lors, si la Couronne projette quelque mesure — aussi modeste soit-elle — se rapportant à un projet qui touche une revendication autochtone ou un droit ancestral, une nouvelle obligation de consulter voit le jour. La mesure ou la décision gouvernementale en cause, qu'elle ait peu de conséquences, voire aucune, devient le fondement de l'obligation constitutionnelle de consulter relativement à la totalité de la ressource.

[53] Je ne peux adhérer à cette interprétation de l'obligation de consulter. L'arrêt *Nation Haïda* écarte une interprétation aussi large. La Cour y fait reposer l'obligation de consulter sur la nécessité de préserver les droits ancestraux allégués jusqu'au règlement des revendications. L'objet de la consultation se limite donc aux seuls effets préjudiciables de la mesure précise projetée par la Couronne, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. La consultation s'intéresse à l'effet de la décision *actuellement* considérée sur les droits revendiqués.

[54] La thèse d'une obligation de consulter plus étendue s'appuie sur un principe en matière de preuve — celui du fruit de l'arbre empoisonné — selon lequel la Couronne ne saurait aujourd'hui tirer avantage de ses fautes d'hier. L'intimé prétend donc que l'omission de consulter les Premières nations du CTCS au sujet du projet initial de barrage et de dérivation d'eau empêche toute poursuite de l'exploitation de cette ressource tant qu'il n'y a pas eu consultation sur l'ensemble de la ressource et de sa gestion. Or, comme le fait observer la Cour dans l'arrêt *Nation Haïda*, l'absence de consultation ouvre droit à diverses réparations, y compris l'indemnisation. L'ordonnance de consulter n'est indiquée que lorsque la mesure projetée par la Couronne, qu'elle soit immédiate ou prospective, est susceptible d'avoir un effet préjudiciable sur des droits établis ou revendiqués. Sinon, d'autres réparations peuvent être plus indiquées.

B. *The Role of Tribunals in Consultation*

[55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

[56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

[57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

[58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

[59] The decisions below and the arguments before us at times appear to merge the different

B. *Le rôle du tribunal administratif dans la consultation*

[55] L'obligation du tribunal administratif de se pencher sur la consultation et sur la portée de celle-ci dépend de la mission que lui confie sa loi constitutive. Un tribunal administratif doit s'en tenir à l'exercice des pouvoirs que lui confère sa loi habilitante : *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765. Il s'ensuit que le rôle d'un tribunal administratif en ce qui a trait à la consultation tient à ses obligations et à ses attributions légales.

[56] Le législateur peut décider de lui déléguer l'obligation de la Couronne de consulter. Comme le signale la Cour dans l'arrêt *Nation Haïda*, il est loisible aux gouvernements de mettre en place des régimes de réglementation fixant les exigences procédurales de la consultation aux différentes étapes du processus décisionnel relatif à une ressource.

[57] Sinon, il peut lui confier le seul pouvoir de décider si une consultation adéquate a eu lieu, l'exercice de ce pouvoir faisant dès lors partie de son processus décisionnel. En pareil cas, le tribunal administratif ne participe pas à la consultation. Il s'assure plutôt que la Couronne s'est acquittée de son obligation de consulter une Première nation en particulier sur un éventuel effet préjudiciable de la décision en cause sur ses droits ancestraux.

[58] Le tribunal administratif appelé à examiner une question ayant trait à une ressource et ayant une incidence sur des intérêts autochtones peut n'avoir ni l'une ni l'autre de ces obligations, n'avoir que l'une d'elles ou avoir les deux, selon les attributions que lui confère le législateur. Tant son pouvoir légal d'examiner une question de droit que celui d'accorder réparation sont pertinents pour circonscrire sa compétence : *Conway*. Ils sont donc aussi pertinents pour déterminer si un tribunal administratif particulier est tenu d'effectuer une consultation ou de se pencher sur la consultation, ou s'il n'a aucune obligation en la matière.

[59] Les décisions des tribunaux inférieurs et les prétentions formulées devant notre Cour paraissent

duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

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

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

parfois amalgamer les différentes obligations en ce qui concerne la consultation et le contrôle de leur exécution. On prétend plus particulièrement que tout tribunal administratif compétent pour examiner une question de droit a l'obligation constitutionnelle de s'assurer qu'il y a eu consultation adéquate et, s'il n'y en a pas eu, de consulter lui-même les intéressés, que sa loi constitutive le prévoie ou non. Le raisonnement veut que ce pouvoir découle automatiquement du pouvoir du tribunal administratif d'examiner des questions de droit et, par conséquent, des questions constitutionnelles. L'absence de consultation équivaudrait à un vice constitutionnel qui annulerait la compétence du tribunal administratif et qui, en l'espèce, la rendrait contraire à l'intérêt public. Pour s'acquitter de son obligation, le tribunal administratif devrait remédier au vice en effectuant lui-même la consultation.

[60] À mon avis, on ne peut faire droit à cette thèse. Un tribunal administratif n'a que les pouvoirs qui lui sont expressément ou implicitement conférés par la loi. Pour qu'il puisse consulter une Première nation au sujet d'une ressource avant le règlement définitif de revendications, il doit y être expressément ou implicitement autorisé. Le pouvoir de consulter, qui est distinct du pouvoir de déterminer s'il existe une obligation de consulter, ne peut être inféré du simple pouvoir d'examiner une question de droit. La consultation comme telle n'est pas une question de droit. Il s'agit d'un processus constitutionnel distinct, souvent complexe, et dans certaines circonstances, d'un droit mettant en jeu faits, droit, politique et compromis. Par conséquent, le tribunal administratif désireux d'effectuer lui-même la consultation doit avoir le pouvoir de réparation nécessaire pour faire ce à quoi on l'exhorte relativement à la consultation. Le pouvoir de réparation d'un tribunal administratif tient à sa loi habilitante et à l'intention du législateur : *Conway*, par. 82.

[61] Le tribunal administratif doté du pouvoir de se prononcer sur le caractère adéquat de la consultation, mais non du pouvoir d'effectuer celle-ci, doit accorder la réparation qu'il juge indiquée dans les circonstances, conformément aux pouvoirs de réparation qui lui sont expressément ou implicitement

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

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

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

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

> The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. . . . Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of

conférés par sa loi habilitante. L'objectif est de protéger les droits et les intérêts des Autochtones et de favoriser la conciliation d'intérêts que préconise notre Cour dans l'arrêt *Nation Haïda*.

[62] Qu'un tribunal administratif doive s'en tenir à l'exercice de ses pouvoirs légaux et ne faire porter son analyse et ses décisions que sur les questions particulières dont il est saisi comporte certes le risque qu'un gouvernement se soustraie de fait à l'obligation de consulter en limitant le mandat d'un tribunal administratif. On peut craindre en effet qu'en privant un tribunal administratif du pouvoir d'examiner les questions relatives à la consultation ou en répartissant le pouvoir de statuer en la matière entre plusieurs tribunaux administratifs de manière qu'aucun d'eux ne puisse se pencher sur l'obligation de consulter que font naître certaines mesures gouvernementales, le gouvernement se soustraie de fait à cette obligation.

[63] Comme le conclut à juste titre la Cour d'appel, l'obligation de consulter les peuples autochtones, qui naît lorsque le gouvernement prend une décision susceptible d'avoir un effet préjudiciable sur leurs intérêts, est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne et qui doit être respectée. Si le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent alors s'adresser à une cour de justice pour obtenir la réparation voulue : *Nation Haïda*, par. 51.

[64] Avant de passer au volet suivant de l'analyse, il me paraît indiqué de préciser quelle norme de contrôle s'applique à la décision du tribunal administratif. Prenons comme point de départ le par. 61 de l'arrêt *Nation Haïda* :

> L'existence et l'étendue de l'obligation de consulter ou d'accommoder sont des questions de droit en ce sens qu'elles définissent une obligation légale. Cependant, la réponse à ces questions repose habituellement sur l'appréciation des faits. Il se peut donc qu'il convienne de faire preuve de déférence à l'égard des conclusions de fait du premier décideur. [. . .] En l'absence d'erreur sur des questions de droit, il est possible que le tribunal

deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness . . . .

[65] It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. *The Commission's Jurisdiction to Consider Consultation*

[66] Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

[67] The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

[68] As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to

administratif soit mieux placé que le tribunal de révision pour étudier la question, auquel cas une certaine déférence peut s'imposer. Dans ce cas, la norme de contrôle applicable est vraisemblablement la norme de la décision raisonnable. Dans la mesure où la question est une question de droit pur et peut être isolée des questions de fait, la norme applicable est celle de la décision correcte. Toutefois, lorsque les deux types de questions sont inextricablement liées entre elles, la norme de contrôle applicable est vraisemblablement celle de la décision raisonnable . . .

[65] Il est donc clair qu'une certaine déférence s'impose à l'égard d'une décision sur une question mixte de fait et de droit, d'où l'application de la norme de la raisonnabilité. Ce qui n'écarte évidemment pas la nécessité de tenir compte de l'intention expresse du législateur pour déterminer la norme de contrôle qu'il convient d'appliquer dans un cas donné : *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339. Il faut donc, en l'espèce, considérer les dispositions de l'*Administrative Tribunals Act* et de la *Utilities Commission Act* pour arrêter la bonne norme de contrôle, ce dont il est question plus en détail ci-après.

C. *Le pouvoir de la Commission de se pencher sur la consultation*

[66] Après examen du droit régissant l'existence de l'obligation de consulter et le rôle du tribunal administratif relativement à celle-ci, je reviens sur les questions en litige dans le pourvoi.

[67] D'abord, l'examen de l'obligation de consulter relevait-elle du mandat de la Commission? S'agissant d'une question de compétence, la norme de contrôle est, en common law, celle de la décision correcte. Les lois applicables considérées précédemment n'écartent pas cette norme. Je conviens donc avec la Cour d'appel que la Commission n'a pas eu tort de conclure qu'elle avait le pouvoir de se pencher sur la question de la consultation.

[68] Rappelons que la consultation des peuples autochtones par la Couronne découle de l'art. 35 de la *Loi constitutionnelle de 1982*, de sorte qu'elle revêt une dimension constitutionnelle. Il faut déterminer si la Commission avait le pouvoir d'en faire

consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

[69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

[70] Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).

[71] This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over

un objet de son examen. Je le répète, un tribunal administratif doit s'en tenir à l'exercice des pouvoirs conférés par le législateur : arrêt *Conway*. Nous devons donc nous demander si la *Utilities Commission Act* reconnaissait à la Commission le pouvoir d'examiner la question de la consultation du fait de l'assise constitutionnelle de celle-ci.

[69] Il est reconnu que la *Utilities Commission Act* investit la Commission du pouvoir de trancher des questions de droit aux fins de déterminer si le CAÉ de 2007 sert l'intérêt public. Le pouvoir d'un tribunal administratif de statuer en droit emporte celui de trancher une question constitutionnelle dont il est régulièrement saisi, sauf lorsqu'il est clairement établi que le législateur a voulu le priver d'un tel pouvoir (*Conway*, par. 81; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585, par. 39). « [U]n tribunal spécialisé jouissant à la fois de l'expertise et du pouvoir requis pour trancher une question de droit est le mieux placé pour trancher une question constitutionnelle se rapportant à son mandat légal » : *Conway*, par. 6.

[70] Outre les questions de droit qu'elle a le pouvoir général d'examiner, les éléments dont la Commission doit tenir compte suivant l'art. 71 de la *Utilities Commission Act*, bien qu'ils soient surtout axés sur l'économie, sont suffisamment généraux pour englober la consultation des Autochtones par la Couronne. L'alinéa 71(2)e) exigeait aussi de la Commission qu'elle tienne compte de [TRADUCTION] « tout autre élément jugé pertinent eu égard à l'intérêt public ». L'aspect constitutionnel de l'obligation de consulter fait naître un intérêt public spécial qui écarte la prédominance de l'angle économique dans la consultation prévue par la *Utilities Commission Act*. Comme le demande le juge Donald de la Cour d'appel, [TRADUCTION] « Comment un contrat conclu par un mandataire de la Couronne dans le non-respect d'une obligation constitutionnelle peut-il être dans l'intérêt public? » (par. 42).

[71] L'*Administrative Tribunals Act* de la Colombie-Britannique ne modifie pas cette conclusion même si elle prévoit qu'un tribunal administratif

constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions." However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

[72] The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

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

[74] While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place,

n'a pas compétence en matière constitutionnelle. Le paragraphe 2(4) de la *Utilities Commission Act* assujettit la Commission à certaines dispositions de l'*Administrative Tribunals Act*, dont le par. 44(1), qui dispose qu'[TRADUCTION] « [u]n tribunal administratif n'a pas compétence pour trancher une question constitutionnelle. » Or, le terme [TRADUCTION] « question constitutionnelle » est défini de manière stricte à l'article premier comme s'entendant de « toute question exigeant qu'un avis soit donnée en application de l'article 8 de la *Constitutional Question Act* ». L'avis n'est requis que lorsque la validité ou l'applicabilité constitutionnelle d'une loi est contestée ou qu'une réparation constitutionnelle est demandée.

[72] L'objet de la demande présentée à la Commission par le CTCS pour que le cadre de l'audience soit redéfini de manière à englober la question de la consultation ne correspond pas à cette définition. Il n'y avait ni contestation de la validité ou de l'applicabilité constitutionnelle d'une loi, ni demande de réparation fondée sur l'art. 24 de la *Charte* ou l'art. 52 de la *Loi constitutionnelle de 1982*. De manière générale, la consultation visée à l'art. 35 de la *Loi constitutionnelle de 1982* correspond à une question constitutionnelle : *Paul*, par. 38. Toutefois, l'intention du législateur de soustraire à la compétence de la Commission la question de savoir si la Couronne s'est acquittée de son obligation de consulter les titulaires des droits ancestraux en cause ne ressort ni de l'*Administrative Tribunals Act* ni de la *Constitutional Question Act*. Dès lors, suivant le critère dégagé dans les arrêts *Paul* et *Conway*, la Commission a compétence constitutionnelle pour se pencher sur le caractère adéquat de la consultation effectuée par la Couronne relativement aux questions dont elle est régulièrement saisie.

[73] C'est pourquoi j'estime que la Commission avait le pouvoir de déterminer si les peuples autochtones touchés avaient été convenablement consultés.

[74] Même si la *Utilities Commission Act* confère à la Commission le pouvoir de déterminer si une consultation adéquate a eu lieu, elle ne va pas jusqu'à

its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

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

D. *The Commission's Reconsideration Decision*

[76] The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

[77] As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue

l'autoriser à entreprendre elle-même la consultation et à s'acquitter de l'obligation constitutionnelle de la Couronne. Je rappelle que le législateur peut déléguer à un tribunal administratif l'obligation de la Couronne de consulter. Toutefois, en l'espèce, il ne l'a pas fait vis-à-vis de la Commission. La consultation ne constitue pas comme telle une question de droit, mais une démarche constitutionnelle distincte exigeant le pouvoir de transiger et d'accomplir tout ce qui est nécessaire pour concilier les intérêts divergents de la Couronne et des Autochtones. Le pouvoir de la Commission d'examiner les questions de droit et tout élément pertinent pour ce qui concerne l'intérêt public ne l'autorise pas à entreprendre elle-même la consultation des groupes autochtones.

[75] Comme le conclut à juste titre la Cour d'appel, l'obligation de consulter les peuples autochtones, qui naît lorsque le gouvernement prend une décision susceptible d'avoir un effet préjudiciable sur leurs intérêts, est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne et qui doit être respectée. Lorsque le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent s'adresser à une cour de justice pour obtenir la réparation voulue : *Nation Haïda*, par. 51.

D. *La décision de la Commission sur la demande de révision*

[76] La Commission a reconnu à juste titre avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones. Elle a décidé de ne pas se pencher sur la question non pas parce qu'elle n'en avait pas le pouvoir, mais parce qu'elle estimait que la question ne pouvait se poser étant donné sa conclusion que le CAÉ de 2007 n'aurait pas d'effet préjudiciable sur quelque intérêt autochtone.

[77] Comme nous l'avons vu, la Commission a tenu une audience sur la question de savoir s'il fallait recadrer l'audience principale de manière à permettre l'examen de la question de la consultation. La preuve alors produite portait sur l'effet

of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorization", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

[78] The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act*. Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[79] A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may

préjudiciable éventuel de l'approbation du CAÉ de 2007 sur les intérêts des Premières nations du CTCS. La Commission a examiné l'effet du CAÉ de 2007 tant sur les niveaux d'eau (impact physique) que sur la gestion de la ressource et sa maîtrise. Elle a conclu que le CAÉ de 2007 n'aurait aucun impact physique négatif sur la rivière Nechako et ses ressources halieutiques. Elle a aussi estimé que le CAÉ de 2007 n'entraînerait [TRADUCTION] « ni transfert ni modification des licences ou des autorisations », écartant du coup tout effet préjudiciable causé par une modification touchant à la gestion ou à la maîtrise. Selon elle, une atteinte sous-jacente (soit l'omission de consulter relativement au projet initial) ne suffisait pas pour faire naître une obligation de consulter. Elle a donc rejeté la demande de révision et refusé de recadrer l'audience de manière que celle-ci porte aussi sur la consultation.

[78] La décision selon laquelle le recadrage n'était pas nécessaire parce que le CAÉ de 2007 ne pouvait avoir d'incidence sur des intérêts autochtones porte sur une question mixte de fait et de droit. Suivant l'arrêt *Nation Haïda*, la norme de contrôle applicable à ce genre de décision est habituellement celle de la raisonnabilité (au sens où toute conclusion fondée sur un principe de droit erroné n'est pas raisonnable). Cependant, il faut tenir compte des dispositions des lois applicables examinées précédemment. La *Utilities Commission Act* prévoit que les conclusions de fait de la Commission sont [TRADUCTION] « opposables et définitives », ce qui appelle la norme de la décision manifestement déraisonnable suivant l'*Administrative Tribunals Act*. La décision portant sur une question de droit doit être correcte. Or, la question dont nous sommes saisis est une question mixte de fait et de droit. Elle appelle une norme se situant entre celles établies par la loi, à savoir la norme de la raisonnabilité, issue de la common law et consacrée par les arrêts *Nation Haïda* et *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190.

[79] Rappelons que l'obligation de consulter prend naissance lorsque les éléments suivants sont réunis : a) connaissance par la Couronne, réelle ou imputée, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, b) mesure

adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

[80] The first element of the duty to consult — Crown knowledge of a potential Aboriginal claim or right — need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

[81] Nor need the second element — proposed Crown conduct or decision — detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

[82] The third element — adverse impact on an Aboriginal claim or right caused by the Crown conduct — presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

[83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized

projetée par la Couronne et c) risque que celle-ci ait un effet préjudiciable sur la revendication ou le droit. Si, au regard du critère établi dans l'arrêt *Nation Haïda*, on peut soutenir qu'une obligation de consulter pouvait exister, la Commission a eu tort de rejeter la demande de recadrage de l'audience.

[80] Il n'y a pas lieu de s'arrêter au premier élément — la connaissance par la Couronne de l'existence possible d'une revendication autochtone ou d'un droit ancestral. Les revendications des Premières nations du CTCS étaient bien connues de la Couronne et avaient en fait été formulées dans le cadre du processus formel mis sur pied par la province pour le règlement des revendications autochtones.

[81] Il n'y a pas lieu non plus de s'attarder au deuxième élément — la mesure ou la décision projetée par la Couronne. Le projet de BC Hydro de conclure avec Alcan un contrat d'achat d'électricité constitue clairement une mesure projetée par la Couronne. BC Hydro est une société d'État qui agit au nom de la Couronne. Nul ne prétend sérieusement que le CAÉ de 2007 n'équivaut pas à une mesure projetée par la province de la Colombie-Britannique.

[82] Le troisième élément — l'effet préjudiciable de la mesure de la Couronne sur une revendication autochtone ou un droit ancestral — présente une plus grande difficulté. S'appuyant sur l'arrêt *Nation Haïda*, la Commission a estimé que pour satisfaire à l'exigence de l'effet préjudiciable, il fallait [TRADUCTION] « davantage qu'une atteinte sous-jacente ». En d'autres termes, il fallait démontrer que le CAÉ de 2007 était susceptible d'avoir un « effet préjudiciable » sur un intérêt autochtone actuel. La Cour d'appel rejette le point de vue de la Commission sur ce point, ou c'est du moins ce qu'il faut retenir de sa décision.

[83] À mon sens, la Commission a eu raison de conclure qu'une atteinte sous-jacente ne constitue pas comme telle un effet préjudiciable faisant naître une obligation de consulter. Nous l'avons vu, il appert de l'arrêt *Nation Haïda* que le fondement constitutionnel de la consultation réside dans le risque qu'un projet autorisé par l'État ait

developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

[84] It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

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

[86] The Commission considered two types of potential impacts. The first type of impact was the

un effet préjudiciable sur des intérêts autochtones. La consultation porte principalement sur la façon dont la ressource doit être exploitée pour qu'un préjudice irréparable ne soit pas infligé aux intérêts autochtones existants. Les deux parties doivent se rencontrer de bonne foi, dans un climat de mesure compatible avec l'honneur de la Couronne, pour discuter de mise en valeur dans une optique de conciliation des intérêts divergents. Or, un tel échange est impossible lorsque la ressource est transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle. Il ne s'agit plus dès lors de consulter sur l'exploitation ultérieure de la ressource, mais plutôt de négocier une indemnisation pour sa transformation intervenue sans consultation adéquate préalable. La Commission a appliqué le bon critère juridique.

[84] Le CTCS fait valoir que la Couronne a porté atteinte à ses droits lorsque, dans les années 1950, elle a autorisé la construction du barrage Kenney et de la centrale électrique, qui a eu des répercussions sur la rivière Nechako, et que cette atteinte est continue et que rien ne permet de croire qu'elle cessera dans un avenir prévisible. Cependant, la question que devait trancher la Commission était celle de savoir si une nouvelle obligation de consulter pouvait prendre naissance *à l'égard de la décision de la Couronne dont était saisie la Commission*. Il lui fallait déterminer si le CAÉ de 2007 pouvait avoir un effet *préjudiciable* sur les droits revendiqués par les Premières nations du CTCS dans le cadre du processus de règlement en cours. Étant donné les limites de son mandat, la Commission n'était pas saisie de la question de l'atteinte continue et se poursuivant toujours, en sorte que notre Cour ne l'est pas non plus.

[85] Quel est donc l'impact possible du CAÉ de 2007 sur les revendications des Premières nations du CTCS? La Commission a conclu qu'il ne pouvait y en avoir. La question est donc celle de savoir si la conclusion était raisonnable au vu de la preuve offerte à l'appui de la demande de recadrage.

[86] La Commission a considéré deux types d'effet possible. Le premier était l'impact physique du

physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

[87] The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

CAÉ de 2007 sur la rivière Nechako et, par conséquent, sur le poisson. La Commission a examiné minutieusement les éléments de preuve sur les effets que le CAÉ de 2007 pouvait avoir sur les niveaux d'eau de la rivière et elle a conclu qu'il n'y en aurait pas. En fait, les niveaux d'eau de la rivière relevaient entièrement du permis d'exploitation hydraulique et de l'accord de 1987 intervenu entre la province, le Canada et Alcan. La Commission a rejeté l'argument voulant que l'omission d'approuver le CAÉ de 2007 puisse entraîner une augmentation des niveaux d'eau de la rivière Nechako, et favoriser ainsi la pêche, eu égard à la preuve non contredite selon laquelle si Alcan ne pouvait vendre ses surplus d'électricité à BC Hydro, elle trouverait un autre preneur. Elle a conclu qu'avec ou sans le CAÉ de 2007, [TRADUCTION] « Alcan exploite le réservoir Nechako dans le but d'optimiser la production d'énergie ». Enfin, la Commission a conclu que la modification du calendrier des lâchers d'eau destinés à la production d'électricité n'avait aucun impact sur les niveaux d'eau de la rivière Nechako puisque l'eau était déversée dans la rivière Kemano à l'ouest, et non dans la Nechako à l'est.

[87] La Commission s'est aussi penchée sur la question de savoir si le CAÉ de 2007 pouvait entraîner des changements organisationnels, politiques ou de gestion susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS. Je le répète, il peut y avoir obligation de consulter à l'égard non seulement d'impacts physiques particuliers, mais aussi de décisions de gestion ou politiques qui sont prises en haut lieu et qui peuvent avoir une incidence sur l'exploitation future de la ressource au détriment des demandeurs autochtones. La Commission fait remarquer que l'[TRADUCTION] « examen visé à l'art. 71 n'a pas pour effet d'approuver ou de transférer une licence ou une autorisation ou d'en modifier le titulaire ». L'approbation du CAÉ de 2007 n'allait pas entraîner de changements de gestion, ce qui écartait tout effet préjudiciable concomitant. Ces éléments, joints à l'absence d'impact physique, ont amené la Commission à conclure que le CAÉ de 2007 ne risquait pas d'avoir un effet préjudiciable sur des intérêts autochtones.

[88] It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to both Parties, acting reasonably" (s. 4.17).

[89] The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

[90] Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their

[88] Il est toutefois nécessaire de pousser quelque peu l'analyse. Le CAÉ de 2007 prévoit la création d'un comité conjoint d'exploitation formé de représentants d'Alcan et de BC Hydro (clause 4.13). Le comité a pour fonction de conseiller les parties sur l'administration du CAÉ de 2007 et d'accomplir d'autres tâches qui sont précisées ou que lui assignent les parties (clause 4.14). Le CAÉ de 2007 prévoit aussi que, conjointement, les parties élaborent, appliquent et actualisent un modèle d'exploitation du réservoir inspiré de celui d'Alcan et [TRADUCTION] « utilisant des données jugées acceptables par les deux parties, qui sont tenues de se montrer raisonnables » (clause 4.17).

[89] La question est celle de savoir si ces clauses équivalent à autoriser des modifications d'ordre organisationnel qui sont susceptibles d'avoir un effet préjudiciable sur des intérêts autochtones. La Commission ne le croit manifestement pas. Or, il nous faut examiner cette conclusion et nous demander si elle est raisonnable eu égard à l'approche généreuse qui s'impose relativement à l'obligation de consulter, laquelle a pour assise l'honneur de la Couronne.

[90] À supposer que la création du comité conjoint et du modèle d'exploitation du réservoir existant puissent être considérés comme des modifications d'ordre organisationnel apportées par le CAÉ de 2007, la question est celle de savoir si ces dernières sont susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS. Lorsqu'il est établi que l'effet préjudiciable faisant naître l'obligation de consulter résulte d'une modification de l'organisation, notamment celle du pouvoir, c'est généralement parce que la décision opérationnelle en cause risque dès lors d'empêcher la Couronne d'agir honorablement à l'égard des intérêts autochtones. Ainsi, dans l'affaire *Nation Haïda*, la Couronne projetait la conclusion avec Weyerhaeuser d'un contrat à long terme de vente de bois d'œuvre. En concluant le contrat, la Couronne réduisait sa maîtrise de l'exploitation forestière, notamment dans certaines vieilles forêts, et, partant, sa faculté d'exercer son pouvoir décisionnel en la matière de façon conforme à l'honneur de la Couronne. La ressource aurait été

constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

[91] By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

[92] This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the resevoir management team, must in the future consult with the CSTC First Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights

exploitée sans que la Couronne ne se soit acquittée au préalable de l'obligation de consulter que commande l'honneur de la Couronne. Le peuple Haïda aurait été dépouillé de son droit constitutionnel. Difficile de concevoir un effet préjudiciable plus manifeste sur un intérêt autochtone.

[91] En l'espèce, par contre, la Couronne demeure un membre du comité conjoint d'exploitation et un participant en ce qui concerne le modèle d'exploitation du réservoir. Comme ils ont l'obligation d'agir conformément à l'honneur de la Couronne, les représentants de BC Hydro devront tenir compte des groupes autochtones touchés et les consulter au besoin lorsqu'une décision ultérieure sera susceptible d'avoir un effet préjudiciable sur eux. Le droit des Premières nations du CTCS d'être consultées sur toute décision susceptible de compromettre leurs revendications ou leurs droits est préservé. J'ajoute que l'honneur de la Couronne oblige BC Hydro à les informer de toute décision prise en application du CAÉ de 2007 qui est susceptible d'avoir un effet préjudiciable sur leurs revendications ou leurs droits.

[92] Ce droit permanent qu'ont les Premières nations du CTCS d'être consultées pour toute modification ultérieure susceptible d'avoir un effet préjudiciable sur leurs droits ancestraux ne remet pas en cause le bien-fondé de la décision rendue par la Commission relativement à la seule question dont elle était saisie : l'approbation du CAÉ de 2007 pouvait-elle avoir un effet préjudiciable sur leurs revendications ou leurs droits? La Commission a eu raison de répondre par la négative. La preuve non contredite établissait qu'Alcan continuerait de produire la même quantité d'électricité, *que le CAÉ de 2007 soit approuvé ou non*, et qu'elle trouverait un autre acheteur si BC Hydro déclinait l'offre, comme l'y autorisaient le permis d'exploitation hydraulique permanent nº 102324 et l'accord de 1987 sur les niveaux d'eau. De plus, bien que la Commission n'en fasse pas mention, BC Hydro, en tant que membre du comité conjoint d'exploitation et de l'équipe de gestion du réservoir, doit dorénavant consulter les Premières nations du CTCS sur toute décision susceptible d'avoir un effet préjudiciable sur leurs revendications ou leurs droits. À la

currently under negotiation of the CSTC First Nations.

[93] I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. *The Commission's Decision That Approval of the 2007 EPA Was in the Public Interest*

[94] The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

[95] I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed; British Columbia Utilities Commission's approval of 2007 Energy Purchase Agreement confirmed.

lumière de cette preuve, il n'est pas déraisonnable que la Commission conclue que le CAÉ de 2007 n'aura pas d'effet préjudiciable sur les revendications et les droits de ces Premières nations qui faisaient alors l'objet de négociations.

[93] J'arrive à la conclusion que la Commission a bien interprété le droit en ce qui concerne l'obligation de consulter et, par conséquent, la question qu'elle était appelée à trancher pour statuer sur la demande de révision. Elle a bien cerné la question principale dont elle était saisie, à savoir si le CAÉ de 2007 pouvait avoir un effet préjudiciable sur les revendications et les droits des Premières nations du CTCS. Elle a ensuite examiné la preuve pertinente. Elle a considéré les répercussions organisationnelles du CAÉ de 2007 et les changements physiques qui pouvaient en résulter. Elle a conclu que ces modifications ne risquaient pas de compromettre les revendications ou les droits en cause. Il n'a pas été établi qu'elle a agi de manière déraisonnable en tirant ces conclusions.

E. *La décision de la Commission portant que l'approbation du CAÉ de 2007 était dans l'intérêt public*

[94] Le seul motif de contestation de la décision d'approuver le CAÉ de 2007 était l'omission de la Commission d'examiner la question du caractère adéquat de la consultation portant sur les intérêts en cause des Premières nations du CTCS. La conclusion que la Commission n'a pas eu tort de rejeter la demande d'examen de cette question écarte ce motif de contestation. Ainsi, la thèse selon laquelle la Commission a agi de manière déraisonnable en approuvant le CAÉ de 2007 ne saurait être retenue.

V. Dispositif

[95] Je suis d'avis d'accueillir le pourvoi et de confirmer la décision de la Commission approuvant le CAÉ de 2007. Chacune des parties paie ses propres frais de justice.

Pourvoi accueilli; décision de la British Columbia Utilities Commission approuvant le contrat d'achat d'électricité de 2007 confirmée.

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

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

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

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

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

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

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

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

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

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

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

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

Solicitors for the intervener the Assembly of First Nations: Hutchins Légal inc., Montréal.

Procureurs de l'appelante Rio Tinto Alcan Inc. : Bull, Housser & Tupper, Vancouver.

Procureurs de l'appelante British Columbia Hydro and Power Authority : Lawson Lundell, Vancouver.

Procureurs de l'intimé : Ratcliff & Company, North Vancouver.

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

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

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

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

Procureurs de l'intervenante British Columbia Utilities Commission : Boughton Law Corporation, Vancouver.

Procureurs des intervenantes la Première nation crie Mikisew et la Division des Grands lacs de la nation Secwepemc : Janes Freedman Kyle Law Corporation, Victoria.

Procureurs de l'intervenante la Première nation de Moosomin : Rath & Company, Priddis, Alberta.

Procureur de l'intervenante Nunavut Tunngavik Inc. : Richard Spaulding, Ottawa.

Procureurs des intervenants le Conseil tribal de la nation Nlaka'pamux, l'Alliance des nations de l'Okanagan et la Bande indienne d'Upper Nicola : Mandell Pinder, Vancouver.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Hutchins Légal inc., Montréal.

Solicitors for the intervener the Standing Buffalo Dakota First Nation: Phillips & Co., Regina.

Solicitors for the intervener the First Nations Summit: Pape Salter Teillet, Vancouver.

Solicitors for the interveners the Duncan's First Nation and the Horse Lake First Nation: Woodward & Company, Victoria.

Solicitors for the intervener the Independent Power Producers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener Enbridge Pipelines Inc.: McCarthy Tétrault, Toronto.

Solicitors for the intervener the TransCanada Keystone Pipeline GP Ltd.: Blake, Cassels & Graydon, Calgary.

Procureurs de l'intervenante la Première nation Standing Buffalo Dakota : Phillips & Co., Regina.

Procureurs de l'intervenant le Sommet des Premières nations : Pape Salter Teillet, Vancouver.

Procureurs des intervenantes la Première nation Duncan's et la Première nation de Horse Lake : Woodward & Company, Victoria.

Procureurs de l'intervenante Independent Power Producers Association of British Columbia : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante Enbridge Pipelines Inc. : McCarthy Tétrault, Toronto.

Procureurs de l'intervenante TransCanada Keystone Pipeline GP Ltd. : Blake, Cassels & Graydon, Calgary.

Federal Court  Cour fédérale

Date: 20171205

Docket: T-1977-13

Citation: 2017 FC 1099

Ottawa, Ontario, December 5, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TASEKO MINES LIMITED

Applicant

and

THE MINISTER OF THE ENVIRONMENT and THE ATTORNEY GENERAL OF CANADA and THE TSILHQOT'IN NATIONAL GOVERNMENT AND JOEY ALPHONSE, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation

Respondents

and

THE MINING ASSOCIATION OF CANADA, THE MINING ASSOCIATION OF BRITISH COLUMBIA, THE MINING SUPPLIERS ASSOCIATION OF BRITISH COLUMBIA, THE ASSOCIATION FOR MINERAL EXPLORATION, BRITISH COLUMBIA, and MININGWATCH CANADA

Interveners

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review of a Review Panel Report [respectively Panel and Report] concerning the proposed New Prosperity Gold-Copper Mine that was made pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*]. In the this case, the judicial review centers on findings in the Report with respect to water seepage and impact on water quality in Fish Lake (Teztan Biny) and the surrounding area.

[2] The related file T-744-14 is an application for judicial review of subsequent decisions by the Minister of the Environment [Minister] and the Governor in Council [GIC]. The judicial review of those decisions is found in *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100.

[3] The key dispute is the Panel's conclusion that toxic water seepage will be greater than Taseko Mines Limited [Taseko] estimated. This conclusion ultimately led to decisions not approving the proposed mine.

[4] Taseko seeks the following relief in respect of the Panel and its Report:

> [92] Taseko seeks a declaration that the following findings of the Panel are invalid and are quashed or set aside:
>
> (i) the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the TSF;

(ii) the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from TSF; and

(iii) the Panel's conclusion that the concentration of water quality variables in Fish Lake and Wasp Lake would likely be a significant adverse environmental effect

(the "Impugned Findings").

[93] Taseko also seeks a declaration that the Panel failed to observe principles of procedural fairness in its conduct of the public hearing process related to the environmental assessment of the Project.

[94] Should the declarations sought by Taseko be granted in whole or in part, it follows that the matter must be remitted to the Panel to reconsider the Impugned Findings and remedy the breaches in the Panel's process (as applicable), and to then make new determinations in accordance with the directions provided by this Court.

[Footnotes omitted.]

[5] To set the background, the relevant legislation is outlined below.

Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52

43 (1) A review panel must, in accordance with its terms of reference,	**43 (1)** La commission, conformément à son mandat :
(a) conduct an environmental assessment of the designated project;	**a)** procède à l'évaluation environnementale du projet désigné;
(b) ensure that the information that it uses when conducting the environmental assessment is made available to the public;	**b)** veille à ce que le public ait accès aux renseignements qu'elle utilise dans le cadre de cette évaluation;
(c) hold hearings in a manner that offers any interested	**c)** tient des audiences de façon à donner aux parties

party an opportunity to participate in the environmental assessment;

intéressées la possibilité de participer à l'évaluation;

(d) prepare a report with respect to the environmental assessment that sets out

d) établit un rapport assorti de sa justification et de ses conclusions et recommandations relativement à l'évaluation, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public, notamment des parties intéressées;

(i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, and

(ii) a summary of any comments received from the public, including interested parties;

(e) submit the report with respect to the environmental assessment to the Minister; and

e) présente son rapport d'évaluation environnementale au ministre;

(f) on the Minister's request, clarify any of the conclusions and recommendations set out in its report with respect to the environmental assessment.

f) sur demande de celui-ci, précise l'une ou l'autre des conclusions et recommandations dont son rapport est assorti.

…

[…]

126 (1) Despite subsection 38(6) and subject to subsections (2) to (6), any assessment by a review panel, in respect of a project, commenced under the process established under the former Act before the day on which this Act comes into force is continued under the process established under this Act as if the environmental assessment had been referred by the

126 (1) Malgré le paragraphe 38(6) et sous réserve des paragraphes (2) à (6), tout examen par une commission d'un projet commencé sous le régime de l'ancienne loi avant la date d'entrée en vigueur de la présente loi se poursuit sous le régime de la présente loi comme si le ministre avait renvoyé, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une

Minister to a review panel under section 38. The project is considered to be a designated project for the purposes of this Act and Part 3 of the *Jobs, Growth and Long-term Prosperity Act*, and

commission; le projet est réputé être un projet désigné pour l'application de la présente loi et de la partie 3 de la *Loi sur l'emploi, la croissance et la prospérité durable* et :

(a) if, before that day, a review panel was established under section 33 of the former Act, in respect of the project, that review panel is considered to have been established — and its members are considered to have been appointed — under subsection 42(1) of this Act;

a) si, avant cette date d'entrée en vigueur, une commission avait été constituée aux termes de l'article 33 de l'ancienne loi relativement au projet, elle est réputée avoir été constituée — et ses membres sont réputés avoir été nommés — aux termes du paragraphe 42(1) de la présente loi;

(b) if, before that day, an agreement or arrangement was entered into under subsection 40(2) of the former Act, in respect of the project, that agreement or arrangement is considered to have been entered into under section 40 of this Act; and

b) si, avant cette date, un accord avait été conclu aux termes du paragraphe 40(2) de l'ancienne loi relativement au projet, il est réputé avoir été conclu en vertu de l'article 40 de la présente loi;

(c) if, before that day, a review panel was established by an agreement or arrangement entered into under subsection 40(2) of the former Act or by document referred to in subsection 40(2.1) of the former Act, in respect of the project, it is considered to have been established by — and its members are considered to have been appointed under — an agreement or arrangement entered into under section 40 of this Act

c) si, avant cette date, une commission avait été constituée en vertu d'un accord conclu aux termes du paragraphe 40(2) de l'ancienne loi ou du document visé au paragraphe 40(2.1) de l'ancienne loi relativement au projet, elle est réputée avoir été constituée — et ses membres sont réputés avoir été nommés — en vertu d'un accord conclu aux termes de l'article 40 de la présente loi ou du document visé au

or by document referred to in subsection 41(2) of this Act.	paragraphe 41(2) de la présente loi.

II. BACKGROUND FACTS

[6] The New Prosperity Gold-Copper Mine [the Project] is a proposed open pit gold and copper mine in British Columbia, 125 km southwest of Williams Lake (in the traditional territories of the Tsilhqot'in peoples). The $1.5 billion Project is said to provide a number of jobs as well as (allegedly) a $340 million contribution to British Columbia's gross domestic product.

[7] The Project is the successor to another proposed mine, Prosperity, that was rejected by the GIC in 2010 following a federal environmental assessment. The original design of the mine would have necessitated draining the lake Teztan Biny.

[8] In this second Project, Teztan Biny would not be drained because the proposal relocates the tailings storage facility [TSF] and introduces a lake recirculation water management scheme.

[9] On November 7, 2011, the Minister stated that the Project would undergo a federal environmental assessment under the *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA*] (later continued according to the transition provisions of the *CEAA 2012*).

[10] On August 3, 2012, the Panel was issued Amended Terms of Reference that were consistent with the new *CEAA 2012* provisions. The Amended Terms of Reference dictated that the Panel must consider a number of factors in assessing the environmental effects of the proposed project:

a. the environmental effects of the Project including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;

b. the significance of the environmental effects referred to in the above paragraph;

c. comments from the public and Aboriginal groups that are received during the review;

d. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;

e. the need for the Project and alternatives to the Project;

f. the purpose of the Project;

g. alternative means of carrying out the Project that are technically and economically feasible, and the environmental effects of any such alternative means;

h. the need for, and the requirements of, any follow-up program in respect of the Project; and

i. the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future.

[11] The Panel published Guidelines for the Environmental Impact Statement [EIS] on March 16, 2012.

[12] Taseko submitted an EIS on September 27, 2012, purporting to deal with the deficiencies in the initial Prosperity project proposal.

[13] The Panel then engaged in discussions with respect to the technical merits and adequacy of the EIS with "federal departments, the BC Ministry of Energy and Mines ("BC MEM"), aboriginal groups, including the Tsilhqot'in National Government ("TNG"), and Taseko."

[14] Taseko's EIS described features of the proposed TSF and predicted seepage using two computer models: a 3-dimensional model representing the TSF as a horizontal plane, and 2-dimensional model representing the TSF as a vertical plane.

[15] Natural Resources Canada [NRCan] identified significant concerns with the EIS including "deficiencies with both of Taseko's models, the data upon which they were based, Taseko's proposal to rely on adding estimates from both models, and Taseko's proposed mitigation measures."

[16] As a result of these concerns, NRCan recommended the Panel request that Taseko provide a more comprehensive model of 3D numerical groundwater flow, which would address the deficiencies in the models provided in the EIS.

[17] In addition, other participants raised various other concerns with respect to "proposed mitigation measures, lack of hydrogeological data and uncertainty related to the range of till hydraulic conductivities, and significant underestimation in Taseko's seepage estimates."

[18] On February 20, 2013, the Panel released its Public Hearing Procedures, which outlined requirements for the conduct of public hearings and topic-specific hearing sessions.

[19] In a letter dated May 24, 2013, Taseko sought to postpone dealing with the deficiencies. It indicated that differences in technical issues could be dealt with after the Project received approval: "any difference in interpretation of technical data that exists between NRCan and Taseko can be resolved by a specifically focused pump test program, one which Taseko will undertake to refine the pit dewatering system prior to development."

[20] Taseko therefore declined to develop the 3D numerical groundwater flow model requested by the Panel.

[21] On June 14, 2013, NRCan indicated that it was "in the process of developing a numerical groundwater flow model to assess seepage from the base of the tailings storage facility, similar to that requested by the Panel in SIR 12/14(A-a)" and offered to make the findings of this study available to the Panel.

[22] The Panel accepted this offer in a letter dated June 21, 2013. At this time, the Panel also indicated that this information would be made publicly available (online) by way of the project registry.

[23] By June 20, 2013, the Panel found that the environmental assessment could proceed to public hearings. These hearings began on July 22, 2013, and were completed on August 23, 2013, when the final oral arguments took place. The topic-specific, technical hearings took place between July 25, 2013, and August 1, 2013.

[24] On July 4, 2013, NRCan provided the Panel with its 3D numerical model. On July 19, 2013, NRCan provided the Panel with written submissions. In its July 2013 submissions, NRCan stated that "[s]eepage from the TSF was estimated at 8650 m^3/d (100 L/s) which is more than an order of magnitude greater than the proponent's 3D model prediction [of 9 L/s]."

[25] Taseko disputes the accuracy of this seepage estimate characterization.

[26] On August 21, 2013, NRCan submitted a Technical Memorandum that provided "further clarification related to the modeling approaches taken by Taseko and NRCan."

[27] The Panel issued its Report on October 31, 2013. It is the NRCan Technical Memorandum on seepage and the Panel's reliance on these submissions in concluding that the seepage of toxic water from the TSF would be greater than estimated by Taseko that lie at the heart of this judicial review.

[28] In addition to the Applicant Taseko and the Respondent Attorney General of Canada [AG], the Court had the benefit of submissions as Respondents by the Tsilhqot'in National Government [TNG] and Joey Alphonse on his own behalf and on behalf of all members of the Tsilhqot'in Nation. The Mining Association and MiningWatch Canada also appeared, but as intervenors.

[29] The Panel Report is lengthy; however, the impugned findings with respect to seepage are contained within a rather small section of the Report. The majority of the impugned "findings"

and statements are located in a section of the Report titled "5.3.1.2 **Views of Participants**." In this section, the Panel summarized the conclusions and recommendations of NRCan, as well as the conclusions of the independent expert Dr. Leslie Smith.

[30] To put the matter in context, Table 5 of the Report shows a "Comparison of Seepage Estimates taken from the August 21, 2013, Natural Resources Canada Technical Memorandum to the Panel." As this Table is the subject of a great deal of debate, it is reproduced here in full:

	Taseko estimates (based on two different models)	**Natural Resources Canada base case, based on its 3-D model**
Post Closure seepage through bottom of the tailings storage facility	9 L/s (760 m^3/d) From 3-D model	100 L/s (8650 m^3/d)
Main Embankment seepage (towards Fish Lake)	28 L/s (2420 m^3/d) From 2-D model	58 L/s (5087 m^3/d)
South and West Embankment seepage	27 L/s (2333 m^3/d) From 2-D model	29 L/s (2552 m^3/d)
Deep basin seepage (greater than 200 mbgs)	0 L/s (Natural Resources Canada claims Taseko's 2D model precludes this flux component)	20 L/s (1699 m^3/d)

[31] Continuing on its summary of NRCan's conclusions and recommendations, the Panel stated:

> As indicated in the above table, pore water seepage from the tailings storage facility basin was estimated by Natural Resources Canada to be 100 L/s (8 650 m^3/d) which was more than an order of magnitude greater than what it considered to be Taseko's comparative prediction of 9 L/s. The Natural Resources Canada model showed that a further 20 L/s (1 699 m^3/d) of seepage was predicted to flow to the deep groundwater zone beneath the basalt flows that underlie the tailings storage facility. Natural Resources

> Canada claimed that this latter flux was not modeled in the Taseko's 2D approach because an impermeable boundary was assumed at the base of the basalt flows.

[32] This section of the Report went on to summarize the submissions of Dr. Smith, who stated that the framework used by Taseko was developed according to accepted practice; however, "the Natural Resources Canada model has greater flexibility if the tailings storage facility was explicitly included within the model grid."

[33] Dr. Smith explained the differences in seepage estimates between Taseko and NRCan likely arose from differences in the hydraulic conductivity used (that is, tailings, till, shallow bedrock), as well as differences in till layers.

[34] Dr. Smith ultimately estimated the TSF seepage to be between 20 L/s and 100 L/s, and in his opinion "the value would be likely towards the upper end of this range."

[35] In the section titled "5.3.1.3 **Panel's Conclusions and Recommendations**," the Panel identified three potential seepage pathways from the TSF, and concluded that seepage of tailings pore water from the TSF was the largest potential source of contaminant loadings that would impact water quality in the area.

[36] The Panel also identified the "fractured basalt intercalated with the glacial till in the valley bottom" as a potential major seepage pathway.

[37] Further, the Panel found that there was a dearth of data: there was a "lack of detailed geotechnical site investigations required to more reliably characterize the foundation of the tailings storage facility, particularly till thickness, variability in the overburden units, the likely existence of preferred pathways through the fractured upper bedrock units, and the nature and extent of the seeps and springs at the toe of the ridge west of the tailings storage facility."

[38] The Panel then summarized Taseko's estimates of solute migration in the absence of mitigation, as well as its predictions of unrecovered seepage after mitigation. It found that despite the substantial heterogeneity of the overburden and shallow bedrock, Taseko had represented all overburden deposits "as one unit and assigned a bulk hydraulic conductivity value." Further, Taseko did not account for spatial variation of particle size of the tailings.

[39] Of particular relevance, the Panel accepted the upper bound estimate put forward by NRCan and found that Taseko had underestimated the rate of seepage from the TSF. The Panel concluded as follows:

> The Panel has determined that Taseko has underestimated the volume of tailings pore water seepage leaving the tailings storage facility and the rate at which the water plume would reach the various lakes and streams downslope of the tailings storage facility, even with the mitigations proposed.
>
> The Panel accepts Natural Resource Canada's upper bound estimate as the expected seepage rate from the tailings storage facility (see Table 5 above).
>
> The Panel concludes that there is strong evidence that the seepage from the tailings storage facility would be significantly higher than estimated by Taseko, resulting in potentially higher loading of contaminants in the receiving environment.

[40] The Panel went on to make a number of recommendations with respect to further monitoring, testing, and collecting data, in the event that the Project proceeded.

III. ISSUES

[41] Each of the parties phrased their issues slightly differently but in the end the issues the Court considers that must be addressed are:

1. Did the Panel fail to observe principles of procedural fairness by accepting and relying upon the Technical Memorandum without giving Taseko a fair opportunity to respond?
2. Was the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the TSF unreasonable?
3. Was the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from the TSF unreasonable?
4. Was the Panel's conclusion that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect unreasonable?

IV. STANDARD OF REVIEW

[42] Procedural fairness is subject to a correctness standard of review: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 [*Khosa*].

[43] The Panel findings with respect to seepage and water quality are subject to a reasonableness standard of review. In a decision concerning the old *CEAA*, *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 1124 at para 37, 468 FTR 299, aff'd 2016 FCA 114, the Federal Court of Appeal [FCA] stated: "issues raised by the Applicants which challenge the exercise of discretion or assessment of evidence attract a reasonableness standard of review."

[44] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, the SCC indicated that a reasonable decision is one that is intelligible, transparent, and justifiable, and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Reasonableness is a deferential standard, and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Khosa* at para 59).

V. ANALYSIS

A. *Issue 1: Did the Panel fail to observe principles of procedural fairness by accepting and relying upon the Technical Memorandum?*

[45] Taseko argues the following points:

- acceptance of NRCan's Technical Memorandum was late which deprived Taseko's experts of the opportunity to question the author or provide technical submissions;
- the Technical Memorandum contained errors, particularly as to seepage, and these errors were incorporated into the Report;

- the Technical Memorandum went beyond summarizing NRCan's perspective and introduced new evidence in a manner not contemplated by the Public Hearings Procedures;
- Taseko was owed a degree of procedural fairness in accordance with the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-27, 174 DLR (4th) 193 [*Baker*];
- Taseko asserts that, given the nature of the decision, the Panel essentially performed a judicial function where procedural fairness interests are heightened, especially as the Report was part of the Minister and GIC's decision making process under section 52 of *CEAA 2012*; and
- the acceptance of the Technical Memorandum breached the duty of fairness owed as new evidence was introduced favourable to one party and to which the other party had no opportunity to respond further. (*CEP Union of Canada v Power Engineers et al*, 2001 BCCA 743, 209 DLR (4th) 208 [*CEP Union*] (sometimes reported as *CEP, Local 76 v British Columbia (Power Engineers & Boiler & Pressure Vessel Safety Appeal Board)*), relied upon where the British Columbia Court of Appeal [BCCA] held that merely restating evidence previously given may breach this principle.)

[46] For the reasons below, Taseko was owed, and was in fact afforded, a high degree of procedural fairness during the review process.

(1) High Degree of Procedural Fairness owed to Taseko

[47] Despite the Respondents' submissions that a party is not promised procedural perfection in any decision making process, it appears that in this case the parties agree that Taseko was owed a high degree of procedural fairness. The major disagreement between the parties is whether the requisite degree of procedural fairness was in fact met.

[48] A review of the *Baker* factors indicates that Taseko was indeed owed a high degree of procedural fairness during the Panel process:

a) **Nature of the decision:** the Panel process was geared towards making findings of fact, and was designed so that all of the parties could put forward evidence and test the evidence adduced in a quasi-judicial manner (including, for example, cross-examination of experts). While the Public Hearing Procedures note that the Panel will not be "bound by the strict rules of procedure and evidence applicable to judicial proceedings" that does not, *per se*, lessen the degree of procedural fairness.

b) **Nature of the statutory scheme:** there is no formal appeal mechanism to challenge the Report (however, judicial review is available).

c) **Importance of the decision:** although this is not the final decision in the process (the Minister and the GIC made further decisions), it is undeniably crucial in terms of providing the facts and information that the Minister and the GIC require to make their determinations. (Indeed, in this case, the decisions of the Minister and the GIC were consistent with the conclusions of the Report.)

d) **Legitimate expectations:** the Public Hearing Procedures clearly laid out, in a fairly detailed manner, how the Panel process would proceed. The Public Hearing Procedures specifically state that the process should be "fair and orderly." However, the Panel had the power to and did in fact deviate from these Procedures at times.

e) **Procedural choices made by the decision maker:** as noted above, the Panel had the power to deviate from its own procedures (and it did so). Sometimes this was to Taseko's benefit (i.e. allowing Taseko "a few extra days" to respond to late submissions), and sometimes it was not. Deference should be given to a decision maker's choice of process (*Baker* at para 27).

[49] *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 [*Mavi*], cited by the Minister/AG, is not particularly dispositive. *Mavi* indicated that a balance must be struck between the cost of a "fair" process and the public interest in the government acting (and being perceived to be acting) fairly. In this case, with strong public interests on either side (economic and environmental interests, for example), the pendulum would seem to weigh heavily in favour of ensuring fairness. Furthermore, this process was likely quite expensive, and the Respondents have not provided any evidence that additional procedural fairness measures would have been prohibitively expensive.

(2) ***Audi Alteram Partem***

[50] In *Canadian Cable Television Assn v American College Sports Collective of Canada, Inc*, [1991] 3 FC 626 at 639, 81 DLR (4th) 376 (CA), MacGuigan J.A. for the Federal Court of Appeal defined the principle of *audi alteram partem* thus:

> The common law embraces two principles in its concept of natural justice, both usually expressed in Latin phraseology: *audi alteram partem* (hear the other side), which means that **parties must be made aware of the case being made against them and given an opportunity to answer it**.
>
> [Emphasis added.]

[51] Although the Minister/AG cite *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 57, [2007] 1 SCR 350 [*Charkaoui*] for the proposition that the "right to know the case to be met is not absolute," I do not find that decision to be particularly persuasive in this context.

[52] *Charkaoui* was decided in the context of national security concerns; indeed, shortly after the Supreme Court of Canada [SCC] made the statement cited by the Minister/AG, McLachlin CJC stated that "the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual" (at para 58). This case does not present any similar circumstances that would warrant infringement of the *audi alteram partem* principle.

[53] Taseko's position is that the submission of the Technical Memorandum breaches this principle, and its argument is based on two contentions: (1) that the Technical Memorandum was

new evidence favouring NRCan's position; and (2) that Taseko did not have an adequate opportunity to respond to this evidence.

[54] Both of Taseko's premises are flawed. The Technical Memorandum did not contain new information; rather, this document summarized the information that had already been presented to the Panel, and to Taseko, in NRCan's written and oral submissions. Therefore, Taseko already knew the case that it had to meet before the submission of the Technical Memorandum, and the case it had to meet did not change following the submission of the Technical Memorandum.

[55] Taseko's argument that this was "new information" is premised on the contention that Dr. Desbarats had, during cross-examination, abandoned the "order of magnitude position." However, the "order of magnitude" comparison was only used when referencing the difference between the two 3D models, and the "factor of two" acknowledgement before the Panel was made with reference to Taseko's 2D model.

[56] Furthermore, this statement by Dr. Desbarats was preceded by comments regarding the deficiencies of the 2D model and the statement that it was "difficult to compare the two." As stated by the Minister/AG, "NRCan's expert merely acknowledged the math that "if" one was to include the 2D results in the comparison – which he never accepted should be done – then Taseko still would have underestimated seepage by a factor of two (2)."

[57] Therefore, the Technical Memorandum did not contain new information, and it did not constitute a departure from NRCan's previously stated position.

[58] Further, *CEP Union* (relied upon by Taseko) is distinguishable from this case. In *CEP Union*, the BCCA found that the acceptance of written submissions that merely reiterated evidence already given in oral submissions may breach the *audi alteram partem* principle. However, in that case, only one of the parties was given the opportunity to provide written submissions, and the opposing party was not provided with a copy of these submissions (despite their request). The outcome in *CEP Union* turned on the fact that only one party was given the opportunity to provide written submissions. The BCCA stated:

> [14] This takes me to the nub of this case. Is there here a breach of the *audi alteram partem* rule? It appears to me that the learned Chambers judge considered that there was not such a breach on the basis that the written submissions merely restated information that either the Director or Pacifica Paper had expressed aloud in the hearing. With respect, I do not agree. The opportunity to present information and argument in written form is valuable to a party. The opportunity after oral hearing, to reorganize and restate a submission cannot be considered of no import, else to poach upon a line from Browning, "What is writing for?"

[59] This case is therefore distinguishable because Taseko had the opportunity to provide final written submissions. Taseko was also provided with a copy of NRCan's submissions and given an opportunity to respond.

[60] The impugned language of "clarification" does not indicate that the Technical Memorandum contained new information. As put forward by Taseko at the hearing, it believed that it and NRCan had reached some sort of agreement on seepage (that is, that the estimates were within a factor of two); NRCan's Technical Memorandum simply clarified its position that there was no such agreement. As noted by the Minister/AG, this "clarification" language indicated that NRCan wished to convey that its position was unchanged following cross-

examination and Taseko's arguments. Taseko had already responded to the information in the Technical Memorandum and had cross-examined the relevant expert during the course of the review process. As noted below, Taseko recognized during its final submissions that there was no convergence between its own views and those of NRCan.

[61] Finally, even if the Technical Memorandum was found to contain new information, Taseko's second premise is flawed because it had the opportunity to respond to this information. Taseko had sought and received permission to provide responses to any late-in-the-day technical submissions. It chose to provide such responses to several documents, but not to the Technical Memorandum.

[62] Moreover, Taseko's final Closing Submission explicitly states that Taseko was aware that there was no convergence of views between Taseko and NRCan on seepage. Taseko stated:

> In any Tailings Storage Facility ("**TSF**") some seepage is normal – in fact it is an integral part of the design of a TSF. While we had thought there was a convergence of views on seepage predications between Natural Resources Canada ("**NRCan**") and Environment Canada on these issues during the hearing we have recently – somewhat surprisingly – seen those agencies say they remain of different views.
>
> [Bold emphasis in original; Underline emphasis added]

[63] In my view, this indicates that Taseko was aware of the Technical Memorandum's content; it also undercuts Taseko's position at the hearing that it believed there was an agreement between Taseko and NRCan that the difference in seepage estimates was within a factor of two.

[64] In summary, I can find no breach of the *audi alteram partem* rule.

(3) Legitimate Expectations

[65] The general rule of "legitimate expectations" provides that the content of the duty of procedural fairness will be impacted if an individual is found to have a legitimate expectation in the procedure to be followed or the outcome of a decision. However, this is a procedural right, not a substantive one (*Baker* at para 26). Of relevance to this case is the quote, "[i]f the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness" (*Baker* at para 26).

[66] Taseko suggests that its legitimate expectations may have been breached in two ways: (1) the Panel did not follow the Public Hearing Procedures, and (2) Taseko had an expectation that it would be able to respond to new evidence (in the Technical Memorandum) which was not satisfied.

[67] In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 29, [2001] 2 SCR 281, the SCC stated that "[t]he doctrine of legitimate expectations, on the other hand, looks to the *conduct* of the public authority in the exercise of that power… including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified." In this case, although the Public Hearing Procedures were clear, they were not unambiguous nor were they unqualified. In my view, Taseko did not have any legitimate expectations that the Public Hearing Procedures would be followed in every instance rigidly because the Panel had broad discretion to deviate from its own Public Hearing Procedures. In addition, the Panel explicitly told all of the parties that it would be accepting

closing submissions up until a certain date, and that following this date, Taseko would have a few days to respond to any technical submissions. The Panel thus outlined the procedures that it intended to follow, and did precisely that - it followed them.

[68] Taseko has not shown that these Public Hearing Procedures were not met in this case. Taseko identified two provisions in particular that it claims were breached, as noted above:

> 2.7 If a participant files an expert report as part of its submission, then that participant must arrange to have the expert available to answer questions as part of the hearing when the submission is presented…
>
> 2.18 Closing remarks must not be used to present new information but should summarize the Interested Party's perspective on the hearing record and recommendations to the Panel.

[69] The Technical Memorandum does not breach either of these provisions. First, Dr. Desbarats was available for cross-examination on NRCan's Report. Second, the Technical Memorandum did not present new information. Taseko did not request further cross-examination of Dr. Desbarats, and given the fact that he had previously been cross-examined on the same information, it is not clear what this would have accomplished. The Procedures do not provide for further cross-examination following closing submissions.

[70] As to the second point, Taseko did have a legitimate expectation that it would have the opportunity to respond to any final technical submissions. The Panel clearly, unambiguously, and repeatedly affirmed that Taseko would have the opportunity to do so. However, these expectations were satisfied in this case as discussed above in relation to *audi alteram partem*.

[71] Taseko had the opportunity to respond to the Technical Memorandum in its closing submissions and in additional written submissions. As noted above, Taseko had sought and received permission to have "a few days" to respond to submissions concerning technical or specialized knowledge, and it referenced NRCan's position (that there was no convergence of the parties' views on seepage) in its final written submissions to the Panel.

[72] Taseko's decision not to substantively respond to the Technical Memorandum is not a breach of any alleged legitimate expectations.

[73] Finally, as noted by the Minister/AG, the Court may choose not to intervene if there is a lack of prejudice (*Omer v Canada (Citizenship and Immigration)*, 2015 FC 494 at para 9). In this case, it is not clear that Taseko faced any prejudice as a result of the purported procedural irregularities it identified.

(4) Failure to Object

[74] If Taseko was concerned that any of the closing submissions or memoranda breached procedural fairness, it had the obligation to raise these concerns with the Panel. As in *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 FCR 377, and *Hennessy v Canada*, 2016 FCA 180, 484 NR 77, it is not open to Taseko to hold this complaint in reserve as fuel for a judicial review.

[75] In this instance, Taseko did object to the late submissions in general. Before the Panel, Taseko's representative stated:

> So my suggestion would be, **number 1, that we put a stop to these late submissions**, particularly those by persons having expertise or specialized knowledge that should be cut off, and **we need to have a few days at least to be able to assess those and respond**.
>
> And I don't mind having the opportunity to do that after final argument, if that is acceptable to the Panel. But we do definitely need an opportunity to put an end to it.
>
> As well, **we're not going to have an opportunity to ask Mr. McCrory any questions**, which is also part of unfairness in the process. We won't have an opportunity to challenge his material.
>
> [Emphasis added]

The Panel responded thus:

> And just before we go to the next speaker, I indicated to Mr. Gustafson this morning that I would attempt to respond to his request this afternoon, and we are **comfortable affording you several days of time from the receipt of any new technical documents to respond to us** and - - yeah.
>
> With that as our plan, that will possibly, probably entail an extension past the closing remarks for any response by you to new technical documents received.
>
> [Emphasis added]

[76] Taseko received what it asked for. It asked for "a few days" to deal with technical submissions if the Panel accepted such submissions, and this concern was dealt with promptly and appropriately by the Panel.

[77] The obligation to raise concerns is relevant to Taseko's claim that the Technical Memorandum contained new evidence. Taseko did not, at that time, claim that the reception of the Technical Memorandum was unfair because it constituted new evidence. In addition, Taseko

did not at any point inquire as to the authorship of the Technical Memorandum or indicate that failing to identify the individual author was a breach of procedural fairness.

(5) Industry Interveners

[78] In my view, it would be inappropriate to impose any sort of rules of general application on review panels (as proposed by the Industry Interveners) given the need for procedural flexibility and deference to chosen procedures (and the broad discretion with respect to procedure conferred by the *CEAA 2012*). What constitutes a reasonable opportunity to be heard may vary according to the particular circumstances of each review panel.

[79] In conclusion, the Panel did not fail to observe principles of procedural fairness by accepting and relying upon the Technical Memorandum.

B. *Issue 2: Was the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the TSF unreasonable?*

[80] The Panel found that Taseko underestimated the volume of tailings pore water seepage that would leave the TSF. Taseko submits that this finding is unreasonable due to the Panel's misapprehension of Taseko's TSF seepage estimation. In comparing a component of Taseko's TSF seepage estimate with the entire NRCan seepage estimate, Taseko claims "the Panel made an apples-to-oranges comparison that was manifestly unreasonable."

[81] Taseko admits that the Panel correctly stated Taseko's seepage estimates at Table 3 of the Report for a total of 70 L/s of seepage leaving the TSF. However, when summarizing NRCan's

comparison at Table 5 of the Report, Taseko argues that the Panel ignored its own accurate summary of Taseko's estimates. In Table 5, Taseko's estimate of deep basin seepage changes from 15 L/s to 0 L/s.

[82] Taseko also takes issue with comparisons made by NRCan which, along with other errors, led to the Panel's conclusion that Taseko had significantly underestimated seepage from the TSF.

[83] In my view, the Panel's determination (for which deference is owed) that Taseko had underestimated the volume of tailings pore water seepage leaving the TSF, was reasonable.

[84] The Panel was tasked with weighing scientific evidence and making findings of fact thereon, and the Panel had the relevant expertise to do so (the three member panel consisted of Dr. Bill Ross, a professor in the area of environmental design, Dr. George Kupfer, a community consultant, and Dr. Ron Smyth, a geologist). As discussed in *Inverhuron & District Ratepayers' Association v Canada (Minister of the Environment)* (2000), 191 FTR 20 (FCTD), aff'd 2001 FCA 203 [*Inverhuron*], these circumstances are relevant to the reasonableness assessment:

> [71] It is worth noting again that the function of the Court in judicial review is not to act as an "academy of science" or a "legislative upper chamber". In dealing with any of the statutory criteria, the range of factual possibilities is practically unlimited. No matter how many scenarios are considered, it is possible to conceive of one which has not been. The nature of science is such that reasonable people can disagree about relevance and significance. In disposing of these issues, the Court's function is not to assure comprehensiveness but to assess, in a formal rather than substantive sense, whether there has been some consideration of those factors which the **Act** requires the comprehensive study to

> address. If there has been some consideration, it is irrelevant that there could have been further and better consideration.
>
> [Bold emphasis in original; Underline emphasis added]

[85] Taseko argues that Table 5 and the subsequent discussion are a mischaracterization of Taseko's seepage estimates. However, this section of the Report is simply a summary of NRCan's position, and it does not represent any of the Panel's conclusions.

[86] It is important to keep in mind, when reviewing Table 5 and the summary of NRCan's conclusions in the Report, that NRCan had serious concerns with the modelling done by Taseko. Table 5 does not simply repeat the estimates put forward by Taseko (and summarized earlier in the Report). The "errors" cited by Taseko actually represent scientific disagreements with respect to what NRCan believed could reasonably be concluded from the Taseko models, in comparison with the conclusions from its own model.

[87] Therefore, it is inaccurate to say that NRCan made "erroneous comparisons." Explanations were provided for the differences between Taseko's own estimates (in Table 3) and the numbers in NRCan's conclusions (in Table 5), such as that NRCan believed that Taseko's 2D model precluded any conclusions on deep basin seepage (greater than 200 mbgs) (bottom row of Table 5) and that only Taseko's 3D model accounted for seepage through the bottom of the TSF (top row of Table 5).

[88] The "corrected" Table 5 presented in Taseko's Memorandum is therefore misleading and problematic, as it does not accurately represent NRCan's views. NRCan was not bound to accept

Taseko's models or estimates; as noted in *Inverhuron*, "[t]he nature of science is such that reasonable people can disagree about relevance and significance" (para 71).

[89] At no point in the Report does the Panel indicate that it thought Taseko's total seepage estimate was 9 L/s or that it otherwise misunderstood Taseko's seepage estimates. It summarized both Taseko's position and NRCan's position, and it did so accurately.

[90] At the hearing, Taseko invited the Court to conclude that the Panel compared NRCan's estimate of 100 L/s seepage against an erroneous Taseko estimate of 9 L/s total seepage. However, the Panel did not indicate that it relied on the comparisons in Table 5 in reaching its conclusion.

[91] It was open to the Panel to accept the modelling and the estimates put forward by NRCan regardless of how they compared to Taseko's modelling and estimates. Furthermore, NRCan had raised concerns with respect to the accuracy of simply combining Taseko's 2D and 3D model estimates, given the difference in methodologies; for this reason alone, it was open to the Panel to treat Taseko's "combined" estimate of 70 L/s with some suspicion.

[92] The Panel ultimately accepted NRCan's upper bound estimate: "[t]he Panel accepts Natural Resources Canada's upper bound estimate as the expected seepage rate from the tailings storage facility (see Table 5 above)." There is no suggestion that the Panel thought that Table 5 represented Taseko's own estimates.

[93] Moreover, even if the Court accepted that the appropriate comparison was between Taseko's estimate of 70 L/s and NRCan's estimate of 100 L/s, it was open to the Panel to conclude that Taseko had nonetheless significantly underestimated the volume of seepage. No evidence has been put forward by Taseko to show that a difference of a factor of two is insignificant or inconsequential, and it would be inappropriate for the Court to conclude that this is the case.

[94] As discussed during the hearing, this is a difference of 30 L/s more seepage every second of every day for decades – it was open to the Panel to conclude that this was an underestimation of the volume of seepage on Taseko's part. Further, as noted by the TNG, the Panel was not required to base its findings on any particular "scientific threshold," and Taseko failed to identify any such "scientific thresholds" that the Panel's conclusions failed to meet.

[95] In conclusion, by arguing that Table 5 is mistaken, Taseko is essentially attempting to reargue the technical and scientific positions it took before the Panel. The Panel rejected Taseko's conclusions. In my view, it would be inappropriate for this Court to reweigh the evidence and reach a different conclusion.

[96] Furthermore, Taseko's attempts to inject ambiguity into the Panel's findings would require a misreading of the Report in a manner that defies common sense.

C. ***Issue 3: Was the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from the TSF unreasonable?***

[97] Taseko submits that the Panel's acceptance of NRCan's upper bound estimate as the expected seepage rate is unreasonable because:

a) it relies directly upon the erroneous conclusion that Taseko severely underestimated TSF seepage; and

b) it accepts NRCan's model even though it is materially different than the actual design of the TSF proposed by Taseko.

[98] In summary, I have concluded that the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from the TSF was reasonable. As discussed above (see Issue 2), the Panel's conclusion that Taseko underestimated seepage was reasonable; therefore, its reliance on this conclusion in accepting NRCan's upper bound estimate is reasonable.

[99] The SCC's comments in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], with respect to reasonableness are relevant in this case:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the

> qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. **A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion** (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, **if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met**.
>
> [Emphasis added]

[100] In this case, the Panel's in-depth review of the submissions made by all of the interested parties provides more than enough support for its ultimate conclusions. Even if the Court found that the Panel did not make its rationale for rejecting Taseko's mitigation measures sufficiently clear, in my view the record supports the Panel's conclusions.

[101] Various participants submitted concerns regarding the mitigation measures put forward by Taseko, and Taseko responded by stating that additional studies would be done following the approval of the Project. Given the conceptual and unproven nature of the mitigation measures and this lacklustre response from Taseko, it was open to the Panel to not recommend that these

mitigation measures were reasonable. There was nothing unreasonable in finding that satisfactory mitigation measures should precede project approval rather than follow it.

[102] Furthermore, when Taseko's efficiency ratios were applied to NRCan's pre-recovery seepage estimate, the result was far greater than Taseko's post-recovery seepage estimate (11.8 L/s instead of 2.40 L/s).

[103] With respect to the differences between the proposed TSF and the NRCan model, the evidence indicates that the Panel understood these differences. Further, it is not clear how the purported "wrong design" in NRCan's model prejudiced Taseko.

[104] Taseko submitted that NRCan assumed that no seepage would go through the embankments, and that this was problematic because the fact that there was to be seepage out of the sides was a mitigation function (the embankments filter the water). However, the Panel had found that Taseko had assigned homogenous values to the overburden deposits and the particle size of tailings; therefore, the Panel did not accept that this "mitigation function" would function exactly as described by Taseko.

[105] The other differences identified by Taseko, such as till thickness (which Taseko did not even promise to deliver) and calibration, were also understood by the Panel. There is no indication that the Panel improperly assessed NRCan's model instead of the actual proposed model – simply preferring one model over the other is not sufficient to establish that the Panel assessed the "wrong design."

[106] Further, as noted by the Minister/AG, NRCan's assumption actually benefitted Taseko: if NRCan had modelled seepage through the embankments, this undoubtedly would have increased its total seepage estimate.

[107] Taseko claims that the Panel's failure to address seepage mitigation breaches section 43(1)(d)(i) of the *CEAA 2012* and section 2.2(d) of the Amended Terms of Reference. However, section 19(1)(d) of the *CEAA 2012* indicates that the environmental assessment must take into account "mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project" (emphasis added).

[108] Therefore, if the Panel did not agree that Taseko's proposed mitigation measures were feasible or that they would mitigate the significant adverse effects, it did not need to take these into account. Further, the Amended Terms of Reference indicate that the Panel is only required to identify mitigation measures that it recommends.

[109] It should not be assumed that the Panel breached the statutory requirements. In *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186, 388 DLR (4th) 685, rev'g 2014 FC 463, leave to appeal to SCC refused, 36711 (28 April 2016), the FCA considered an appeal from a decision of Russell J., wherein Russell J. had concluded that a joint review panel report created under the *CEAA* did not comply with the legislation. The FCA stated:

> [123] In the circumstances, the Panel made no specific finding that it had complied with the consideration requirements in paragraphs 16(1)(*a*) and (*b*) of the Act. However, **it is our view that in conducting the EA and preparing the EA Report, the**

> **Panel must be taken to have implicitly satisfied itself that it was in compliance with those statutory requirements**. In applying the reasonableness standard to this question, we must consider the Panel's decision as a whole, in the context of the underlying record, to determine whether the Panel's implicit conclusion that it had complied with the consideration requirements is reasonable (see *Agraira* at paragraph 53).
>
> [Emphasis added]

[110] Similarly, in this case, when the Report is considered as a whole it is clear that the Panel considered the seepage mitigation measures put forward by Taseko. The Report reviewed Dr. Smith's comments on mitigation measures, which were critical of Taseko's failure to provide detailed information: "the suite of seepage interception measures Taseko had proposed had been evaluated at a conceptual level only."

[111] Further, the Report reviewed the critique by the British Columbia Ministry of Energy, Mines, and Petroleum Resources (i.e., "there remained uncertainties around the ability to limit and collect the expected volume of seepage from the [TSF], and the ability to effectively treat water to maintain water quality in Fish Lake and its tributaries"). Therefore, unlike in the case of *Bow Valley Naturalists Society v Alberta (Minister of Environmental Protection)* (1995), [1996] 2 WWR 749, 177 AR 161 (ABQB), cited by Taseko, the Panel did not reach its conclusions by flying in the face of "uncontradicted evidence."

[112] In addition, the Panel's acceptance of NRCan's upper bound estimate was supported by the evidence of independent expert Dr. Smith, who stated that the total TSF seepage was likely towards the upper end of a range of 20 to 100 L/s. Finally, it must be noted that, contrary to what is implied in Taseko's submissions, interested parties such as NRCan were not required to

"refute" Taseko's analysis – the Panel was not required to assume that Taseko was correct unless shown otherwise.

D. *Issue 4: Was the Panel's conclusion that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect unreasonable?*

[113] Taseko submits that the findings with respect to seepage, discussed above, "permeated" the Report. In a section on the water quality of Fish Lake (Teztan Biny), the Report stated:

> The Panel also notes that the seepage from the tailings storage facility expected by Natural Resources Canada is considerably greater than estimated by Taseko. On balance, the Panel concludes, as did most presenters on this subject, that there would be higher concentrations of water quality contaminants of concern in Fish Lake than modelled by Taseko.
>
> [Emphasis added]

[114] Taseko argues the impugned seepage finding was directly responsible for the Panel's conclusion that the Project would lead to significant adverse environmental effects on the water quality of Fish Lake (Teztan Biny) and Wasp Lake. The water quality finding relies on the unreasonable seepage finding; therefore, it cannot stand and is inconsistent with the requirements under the Amended Terms of Reference.

[115] The Panel's conclusion that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect was reasonable. As discussed above, the impugned seepage findings were also reasonable; therefore, the Panel's reliance on these findings in reaching a conclusion on water quality was reasonable.

[116] Furthermore, the water quality findings were supported by additional evidence, including Taseko's own admission that the water quality would not be in line with guidelines for the protection of aquatic life. The likely effectiveness of Taseko's water treatment mitigation measures were questioned by presenters for the TNG ("details on the effectiveness of the treatment were not provided or modelled"), the British Columbia Ministry of Environment ("unproven technology over the long term [and] potentially costly"), and the British Columbia Ministry of Energy, Mines, and Petroleum Resources ("[w]ater treatment for the Project did not provide confirmation that the proposed water quality objectives for Fish Lake (Teztan Biny) were likely to be either technically or financially achievable").

[117] Therefore, it was open to the Panel to reject the "unproven and unprecedented" proposals put forward by Taseko.

[118] The Panel stated:

> Based on the evidence, the Panel finds it is unable to accept Taseko's conclusion that the water treatment options proposed would effectively mitigate the adverse effects of the Project on Fish Lake (Teztan Biny) water quality. The Panel concludes that the proposed recirculation scheme, the adaptive management plan and the water treatment options are unlikely to work effectively in the long-term. On this basis, the Panel concludes the "proof of concept" test proposed by Taseko for the environmental assessment has failed.

[119] The Panel therefore did not rely solely on the impugned seepage findings in reaching its conclusions on water quality.

[120] With respect to the precautionary principle, there does not appear to be any dispute between the parties that the Panel was required to assess the proposal in a precautionary manner. The purpose section of the *CEAA 2012* states:

4 (1) The purposes of this Act are	**4 (1)** La présente loi a pour objet :
(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;	**a)** de protéger les composantes de l'environnement qui relèvent de la compétence législative du Parlement contre tous effets environnementaux négatifs importants d'un projet désigné;
(b) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;	**b)** de veiller à ce que les projets désignés dont la réalisation exige l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi soient étudiés avec soin et prudence afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;
(c) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments;	**c)** de promouvoir la collaboration des gouvernements fédéral et provinciaux et la coordination de leurs activités en matière d'évaluation environnementale;
(d) to promote communication and cooperation with aboriginal peoples with respect to environmental assessments;	**d)** de promouvoir la communication et la collaboration avec les peuples autochtones en matière d'évaluation environnementale;

(e) to ensure that opportunities are provided for meaningful public participation during an environmental assessment;	**e)** de veiller à ce que le public ait la possibilité de participer de façon significative à l'évaluation environnementale;
(f) to ensure that an environmental assessment is completed in a timely manner;	**f)** de veiller à ce que l'évaluation environnementale soit menée à terme en temps opportun;
(g) to ensure that projects, as defined in section 66, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;	**g)** de veiller à ce que soient étudiés avec soin et prudence, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants, les projets au sens de l'article 66 qui sont réalisés sur un territoire domanial, qu'une autorité fédérale réalise à l'étranger ou pour lesquels elle accorde une aide financière en vue de leur réalisation à l'étranger;
(h) to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy; and	**h)** d'inciter les autorités fédérales à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;
(i) to encourage the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments.	**i)** d'encourager l'étude des effets cumulatifs d'activités concrètes dans une région et la prise en compte des résultats de cette étude dans le cadre des évaluations environnementales.
(2) The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a	**(2)** Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence, les autorités fédérales et les autorités responsables doivent exercer

manner that protects the environment and human health and applies the precautionary principle.	leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de précaution.
(Court's underlining)	(La Cour souligne)

[121] However, there is clearly a conflict between the parties as to what this entails. Taseko's proposal relied on adaptive management; that is, Taseko proposed that environmental risks and mitigation measures could be dealt with during further stages of development. Other parties considered this an inadequate approach, and sought more information on the risks and feasibility of mitigation.

[122] The Panel recognized the possibility of adaptive management, but found that it could not defer important decisions to the next stage of the process. In the Report, the Panel referenced the requirement that it act in a precautionary manner and stated, with respect to water quality in particular:

> Taseko declined to provide some materials requested by the Panel and by other participants (e.g., description of water quality model for Fish Lake). To deal with the resulting uncertainties, the Panel considered various risk management strategies, including adaptive management in some circumstances. **However, when the Panel concluded the potential adverse environmental effects were potentially "significant", it did not agree that deferring decisions on the approach to manage the risk to subsequent regulatory processes is appropriate**. It is necessary at the environmental assessment stage for the Panel to determine if a significant adverse effect is likely and to consider if and how the risk can be managed to acceptable levels.

> If, after reviewing the record of information for the review, the Panel decided that there were serious uncertainties about a potential adverse environmental effect and the ability to manage that effect and the risk of serious or irreversible environmental harm was high, then the Panel adopted a precautionary approach.
>
> [Emphasis added]

[123] It was reasonable for the Panel not to accept Taseko's "vague assurances" that it would engage in adaptive management in order to deal with adverse environmental effects. The Panel sought information on environmental effects and mitigation measures, and Taseko refused to provide this information. It was entirely reasonable, and in line with the Panel's (reasonable) interpretation of the precautionary principle, for the Panel to conclude that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect.

[124] Indeed, acceptance of vague adaptive management schemes in circumstances such as these would, in my view, tend to call into question the value of the entire review panel process – if all such decisions could be left to a later stage, then the review panel process would simply be for the sake of appearances.

VI. CONCLUSION

[125] For these reasons, the Court concludes that:

a) The Panel did not breach any procedural fairness / *audi alteram partem* / legitimate expectation principles; and

b) The Panel's factual findings were open for it to make and were reasonable.

[126] Therefore, this judicial review will be dismissed with costs to the Respondents.

JUDGMENT in T-1977-13

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondents.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1977-13
STYLE OF CAUSE:	TASEKO MINES LIMITED v THE MINISTER OF THE ENVIRONMENT and THE ATTORNEY GENERAL OF CANADA and THE TSILHQOT'IN NATIONAL GOVERNMENT AND JOEY ALPHONSE, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation AND THE MINING ASSOCIATION OF CANADA, THE MINING ASSOCIATION OF BRITISH COLUMBIA, THE MINING SUPPLIERS ASSOCIATION OF BRITISH COLUMBIA, THE ASSOCIATION FOR MINERAL EXPLORATION, BRITISH COLUMBIA, and MININGWATCH CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 30 AND 31, 2017; FEBRUARY 1-3, 2017
JUDGMENT AND REASONS:	PHELAN J.
DATED:	DECEMBER 5, 2017

APPEARANCES:

K. Michael Stephens Kenneth Leung Shannon Ramsay	FOR THE APPLICANT
Lorne Lachance Naomi Wright Oliver Pulleyblank Michele Charles	FOR THE RESPONDENTS, THE MINISTER OF THE ENVIRONMENT AND THE ATTORNEY GENERAL OF CANADA
Jay Nelson Sonya Morgan	FOR THE RESPONDENTS, THE TSILHQOT'IN NATIONAL GOVERNMENT AND JOEY ALPHONSE, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation

Craig P. Dennis, Q.C. Daniel Yaverbaum	FOR THE INTERVENERS, THE MINING ASSOCIATION OF CANADA, THE MINING ASSOCIATION OF BRITISH COLUMBIA, THE MINING SUPPLIERS ASSOCIATION OF BRITISH COLUMBIA AND THE ASSOCIATION FOR MINERAL EXPLORATION, BRITISH COLUMBIA
Sean Nixon	FOR THE INTERVENER, MININGWATCH CANADA

SOLICITORS OF RECORD:

Hunter Litigation Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS, THE MINISTER OF THE ENVIRONMENT AND THE ATTORNEY GENERAL OF CANADA
Woodward & Company Barristers and Solicitors Victoria, British Columbia	FOR THE RESPONDENTS, THE TSILHQOT'IN NATIONAL GOVERNMENT AND JOEY ALPHONSE, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation
Dentons Canada LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE INTERVENERS, THE MINING ASSOCIATION OF CANADA, THE MINING ASSOCIATION OF BRITISH COLUMBIA, THE MINING SUPPLIERS ASSOCIATION OF BRITISH COLUMBIA AND THE ASSOCIATION FOR MINERAL EXPLORATION, BRITISH COLUMBIA
Ecojustice Vancouver, British Columbia	FOR THE INTERVENER, MININGWATCH CANADA

Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada *Respondents*

and

Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of

Roger William, en son propre nom, au nom de tous les autres membres du gouvernement de la Première Nation Xeni Gwet'in et au nom de tous les autres membres de la Nation Tsilhqot'in *Appelant*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique, chef régional de la région de Cariboo Forest et procureur général du Canada *Intimés*

et

Procureur général du Québec, procureur général du Manitoba, procureur général de la Saskatchewan, procureur général de l'Alberta, Association du traité des Te'mexw, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assemblée des Premières Nations, chefs héréditaires Gitanyow de Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon et Wii'litswx, en leur nom et au nom de tous les Gitanyow, Groupe du traité Hul'qumi'num, Conseil de la Nation haïda, Bureau des chefs Wet'suwet'en, Association du barreau autochtone au Canada, Sommet des Premières Nations, Première Nation Tsawout, Première Nation Tsartlip, Première Nation Snuneymuxw, Première Nation Kwakiutl, Coalition de l'Union des chefs

British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians *Interveners*

Indexed as: Tsilhqot'in Nation *v.* British Columbia

2014 SCC 44

File No.: 34986.

2013: November 7; 2014: June 26.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional

indiens de la Colombie-Britannique, l'Alliance des Nations de l'Okanagan, le Conseil tribal de la Nation Shuswap et leurs communautés membres, bandes indiennes d'Okanagan, d'Adams Lake, de Neskonlith et de Splatsin, Amnistie internationale, Secours Quaker canadien, Nation Gitxaala, Chilko Resorts and Community Association et Conseil des Canadiens *Intervenants*

Répertorié : Nation Tsilhqot'in *c.* Colombie-Britannique

2014 CSC 44

N° du greffe : 34986.

2013 : 7 novembre; 2014 : 26 juin.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

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

Droit des Autochtones — Titre ancestral — Revendications territoriales —Éléments du critère permettant d'établir l'existence du titre ancestral sur un territoire — Droits et restrictions rattachés au titre ancestral — Obligations de la Couronne avant et après la reconnaissance du titre ancestral — Province accordant un permis commercial de coupe de bois dans un secteur qu'une Première Nation semi-nomade considère être son territoire ancestral — Première Nation revendiquant le titre ancestral sur des terres — Le critère permettant d'établir l'existence du titre ancestral exige-t-il la preuve d'une occupation régulière et exclusive ou la preuve d'une occupation intensive d'un site spécifique? — Le juge de première instance a-t-il conclu par erreur à l'existence du titre ancestral? — La Couronne a-t-elle manqué à ses obligations procédurales de consulter et d'accommoder les Autochtones avant de délivrer les permis de coupe de bois? — Les atteintes portées par la Couronne aux intérêts des Autochtones sont-elles justifiées par le cadre d'analyse relatif à l'art. 35 de la Loi constitutionnelle de 1982? — Forest Act, R.S.B.C. 1995, ch. 157 — Loi constitutionnelle de 1982, art. 35.

Droit des Autochtones — Titre ancestral — Revendications territoriales — Lois provinciales d'application

constraints on provincial regulation of Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982 — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title land — Whether application of Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

générale — Contraintes constitutionnelles sur la réglementation, par la province, du territoire visé par le titre ancestral — Partage des compétences — Doctrine de l'exclusivité des compétences — Atteinte et cadre d'analyse de la justification relatif à l'art. 35 de la Loi constitutionnelle de 1982 — Province accordant un permis commercial de coupe de bois dans un secteur qu'une Première Nation semi-nomade considère être son territoire ancestral — Première Nation revendiquant le titre ancestral sur le territoire — Les lois provinciales d'application générale s'appliquent-elles au territoire visé par le titre ancestral? — La Forest Act s'applique-t-elle à première vue au territoire visé par le titre ancestral? — La Constitution a-t-elle pour effet d'écarter l'application de la Forest Act? — La doctrine de l'exclusivité des compétences devrait-elle s'appliquer à des terres grevées du titre ancestral? — Forest Act, R.S.B.C. 1995, ch. 157 — Loi constitutionnelle de 1982, art. 35.

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

Depuis des siècles, la Nation Tsilhqot'in, un regroupement de six bandes semi-nomades ayant une culture et une histoire communes, vit dans une vallée éloignée entourée de rivières et de montagnes dans le centre de la Colombie-Britannique. Ce n'est qu'un groupe autochtone parmi des centaines en Colombie-Britannique dont les revendications territoriales ne sont pas réglées. En 1983, la province a accordé un permis commercial de coupe de bois sur des terres que les Tsilhqot'in considèrent faire partie de leur territoire ancestral. La bande s'y est opposée et a sollicité un jugement déclaratoire interdisant l'exploitation forestière commerciale sur le territoire. La négociation avec la province a mené à une impasse et la revendication territoriale initiale a été modifiée de manière à inclure une revendication du titre ancestral sur le territoire en cause au nom de tous les Tsilhqot'in. Les gouvernements fédéral et provincial ont contesté la revendication du titre.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

La Cour suprême de la Colombie-Britannique a conclu que l'occupation était établie dans le but de fonder l'existence du titre par la démonstration d'une utilisation régulière et exclusive de certains sites ou du territoire revendiqué ainsi que d'un petit secteur à l'extérieur de ce territoire. Appliquant un critère plus restreint fondé sur l'occupation d'un site spécifique exigeant la preuve qu'au moment de l'affirmation de la souveraineté européenne, les ancêtres du groupe autochtone utilisaient intensément une parcelle de terrain spécifique dont les limites sont raisonnablement définies, la Cour d'appel de la Colombie-Britannique a conclu que l'existence du titre revendiqué par les Tsilhqot'in n'avait pas été établie.

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact.

Arrêt : Le pourvoi est accueilli et la Cour reconnaît l'existence du titre ancestral sur le territoire que vise la revendication. La Cour déclare également que la Colombie-Britannique a manqué à son obligation de consultation envers la Nation Tsilhqot'in.

Le juge de première instance a eu raison de conclure que les Tsilhqot'in avaient établi l'existence du titre ancestral sur le territoire revendiqué en cause. Il incombe au groupe revendicateur, en l'espèce les Tsilhqot'in, d'établir l'existence du titre ancestral. Il faut déterminer la façon dont les droits et intérêts qui existaient avant l'affirmation de la souveraineté peuvent trouver leur juste expression en common law moderne. Le titre ancestral découle de l'occupation, c'est-à-dire d'une utilisation régulière et exclusive des terres. Pour fonder l'existence du titre ancestral, l'« occupation » doit être suffisante, continue (si l'occupation actuelle est invoquée) et exclusive. Pour déterminer ce qui constitue une occupation suffisante, l'exigence qui se trouve au cœur du présent pourvoi, il faut examiner la culture et les pratiques des Autochtones et les comparer, tout en tenant compte de leurs particularités culturelles, à ce qui était requis en common law pour établir l'existence d'un titre fondé sur l'occupation. L'occupation suffisante pour fonder l'existence d'un titre ancestral ne se limite pas aux lieux spécifiques d'établissement, mais s'étend aux parcelles de terre régulièrement utilisées pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation des ressources et sur lesquelles le groupe exerçait un contrôle effectif au moment de l'affirmation de la souveraineté européenne.

En concluant que l'existence du titre ancestral avait été établie en l'espèce, le juge de première instance a identifié le bon critère juridique et l'a correctement appliqué à la preuve. Le territoire était peu peuplé, mais il a relevé des éléments de preuve indiquant que les parties du territoire sur lesquelles il a conclu à l'existence du titre étaient régulièrement utilisées par les Tsilhqot'in, ce qui appuyait sa conclusion quant à la possession suffisante. La proximité géographique entre les sites à l'égard desquels une preuve d'occupation récente a été produite et ceux à l'égard desquels il existait une preuve directe d'occupation passée appuyait également l'inférence d'une occupation continue. Au vu de la preuve indiquant que les Tsilhqot'in, avant l'affirmation de la souveraineté, ont repoussé d'autres peuples de leurs terres et ont exigé que les étrangers qui désiraient passer sur leurs terres leur demandent la permission, il a conclu que les Tsilhqot'in considéraient qu'ils possédaient leurs terres en exclusivité. Les critiques de la province à l'endroit des conclusions de fait du juge de première

The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35

instance reposent principalement sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement. En outre, il appartenait au juge de première instance de faire la part des éléments de preuve contradictoires et de tirer des conclusions de fait. La présence d'éléments de preuve contradictoires ne démontre pas l'existence d'une erreur manifeste et dominante. La province n'a pas démontré que les conclusions du juge de première instance ne sont pas étayées par la preuve ou qu'elles sont autrement erronées. Elle n'a pas non plus démontré que ses conclusions étaient arbitraires ou manquaient de précision. En l'absence d'une erreur manifeste, ses conclusions ne devraient pas être modifiées.

De par sa nature, le titre ancestral confère au groupe qui le détient le droit exclusif de déterminer l'utilisation qu'il est fait des terres et de bénéficier des avantages que procure cette utilisation, pourvu que les utilisations respectent la nature collective de ce droit et préservent la jouissance des terres pour les générations futures. Avant que l'existence du titre soit établie, la Couronne est tenue de consulter de bonne foi les groupes autochtones qui revendiquent le titre sur des terres au sujet de ses projets d'utilisation des terres et, s'il y a lieu, de trouver des accommodements aux intérêts de ces groupes. Le niveau de consultation et d'accommodement requis varie en fonction de la solidité de la revendication du groupe autochtone et de la gravité de l'effet préjudiciable éventuel du projet sur l'intérêt revendiqué.

Lorsque l'existence du titre ancestral a été établie, la Couronne doit non seulement se conformer à ses obligations procédurales, mais elle doit aussi justifier toute incursion sur les terres visées par le titre ancestral en s'assurant que la mesure gouvernementale proposée est fondamentalement conforme aux exigences de l'art. 35 de la *Loi constitutionnelle de 1982*. Elle doit à cette fin démontrer l'existence d'un objectif public réel et impérieux, et la compatibilité de la mesure gouvernementale avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone. Le gouvernement doit donc agir d'une manière qui respecte le fait que le titre ancestral est un droit collectif inhérent aux générations actuelles et futures et que l'obligation fiduciaire de la Couronne insuffle une obligation de proportionnalité dans le processus de justification : l'atteinte doit être nécessaire pour atteindre l'objectif gouvernemental (lien rationnel); le gouvernement ne doit pas aller au-delà de ce qui est nécessaire pour atteindre cet objectif (atteinte minimale); et les effets préjudiciables sur l'intérêt autochtone ne doivent pas l'emporter sur les avantages qui devraient découler de cet objectif (proportionnalité de l'incidence).

framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 of the *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and

Les allégations d'atteinte aux droits ou de manquement à l'obligation de consulter adéquatement le groupe peuvent être évitées par l'obtention du consentement du groupe autochtone en question. Ce cadre d'analyse relatif à l'art. 35 permet une conciliation rationnelle des droits ancestraux et des intérêts de tous les Canadiens.

En l'espèce, le manquement allégué découle de la délivrance, par la province, de permis de coupe de bois sur les terres à compter de 1983, avant que l'existence du titre soit reconnue. Le principe de l'honneur de la Couronne obligeait la province à consulter les Tsilhqot'in à propos des utilisations des terres et à trouver des accommodements à leurs intérêts. La province n'a fait ni l'un ni l'autre et a donc manqué à son obligation envers les Tsilhqot'in.

La question de l'application de la *Forest Act* aux terres visées par un titre ancestral revêt une grande importance, et bien qu'il ne soit pas nécessaire de la trancher pour les besoins du présent pourvoi, il convient de l'examiner. Comme point de départ, sous réserve des contraintes constitutionnelles qu'imposent l'art. 35 de la *Loi constitutionnelle de 1982* et le partage des compétences prévu dans la *Loi constitutionnelle de 1867*, les lois provinciales d'application générale s'appliquent aux terres détenues en vertu d'un titre ancestral. Suivant les règles d'interprétation législative, la *Forest Act* s'appliquait, à première vue, aux terres en question à l'époque où les permis ont été délivrés. Le législateur de la Colombie-Britannique entendait clairement que les terres revendiquées demeurent des « terres publiques » pour les besoins de la *Forest Act*, du moins jusqu'à ce que le titre ancestral soit reconnu; c'est sur quoi la province s'est fondée pour accorder le permis. Cependant, maintenant que l'existence du titre a été établie, la définition de « bois des terres publiques » ne s'applique plus au bois qui se trouve sur ces terres et la *Forest Act* ne s'applique plus à ces terres. Le législateur peut toujours modifier la *Forest Act* afin qu'elle s'applique au territoire sur lequel le titre ancestral a été établi, à la condition de respecter les contraintes constitutionnelles applicables.

Cela soulève la question de savoir si le cadre d'analyse relatif à l'art. 35, ou les limites à la compétence que la *Loi constitutionnelle de 1867* accorde à la province, écartent les lois provinciales régissant l'exploitation forestière, telle la *Forest Act*, qui sont à première vue censées s'appliquer aux terres visées par un titre ancestral. Aux termes de l'art. 35, une loi portera atteinte à un droit si la restriction est déraisonnable, si elle est indûment rigoureuse ou si elle refuse aux titulaires du droit le recours à leur moyen préféré de l'exercer. Une loi de nature réglementaire de portée générale, par

no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that

exemple une loi visant la gestion des forêts en prévenant les infestations de ravageurs ou les feux de forêt, satisfera souvent à ce critère et il n'en résultera aucune atteinte. Toutefois, la délivrance de permis de coupe de bois sur des terres grevées du titre ancestral constitue un transfert direct à des tiers de droits de propriété des Autochtones et entraîne manifestement une diminution significative du droit de propriété du groupe autochtone assimilable à une atteinte qui doit être justifiée dans les cas où les Autochtones n'y ont pas consenti.

Enfin, lorsqu'il s'agit de déterminer la validité d'une atteinte causée par l'application des lois provinciales à des terres visées par un titre ancestral, le cadre d'analyse relatif à l'art. 35 écarte la doctrine de l'exclusivité des compétences. L'application de la doctrine de l'exclusivité des compétences et la notion que les droits ancestraux font partie du contenu essentiel du pouvoir fédéral sur les « Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867* ne sont alors d'aucune utilité. La doctrine de l'exclusivité des compétences vise à faire en sorte que les deux niveaux de gouvernement soient en mesure de fonctionner sans que l'un empiète sur le contenu essentiel des domaines de compétence exclusive de l'autre. Cet objectif n'est pas en cause dans les affaires telles que celle qui nous occupe. Les droits ancestraux constituent une limite à l'exercice des compétences tant fédérales que provinciales. Le problème dans des cas comme celui-ci ne résulte pas d'une confrontation entre le pouvoir des provinces et celui du gouvernement fédéral mais plutôt d'une tension entre le droit des titulaires du titre ancestral d'utiliser leurs terres comme ils l'entendent et la volonté de la province de réglementer ces terres au même titre que toutes les autres terres dans la province. La doctrine de l'exclusivité des compétences — fondée sur l'idée que les contextes réglementaires peuvent être divisés en compartiments étanches — va souvent à l'encontre de la réalité moderne. Notre société devient plus complexe, et pour être efficace, la réglementation exige de plus en plus la coopération des régimes fédéral et provincial interreliés. La doctrine de l'exclusivité des compétences peut contrecarrer une telle coopération.

En conséquence, la réglementation provinciale d'application générale, notamment la *Forest Act*, s'appliquera à l'exercice des droits ancestraux tels que le titre ancestral sur des terres, sous réserve de l'application du cadre d'analyse relatif à l'art. 35 qui permet de justifier une atteinte. Ce critère soigneusement conçu vise à concilier la loi d'application générale et les droits ancestraux avec la délicatesse qu'exige l'art. 35 de la *Loi constitutionnelle de 1982*, et il est plus équitable et pratique du point de vue de la politique générale que l'inapplicabilité générale

preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

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qu'impose la doctrine de l'exclusivité des compétences. Il en résulte un équilibre qui préserve le droit ancestral tout en permettant une réglementation efficace des forêts par la province. En l'espèce toutefois, le projet d'aménagement du territoire prévu par la province et les autorisations d'exploitation forestière qu'elle a accordées en vertu de la *Forest Act* étaient incompatibles avec les obligations qu'elle avait envers le peuple Tsilhqot'in.

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David M. Rosenberg, *Q.C.*, *Jay Nelson*, *David M. Robbins* and *Dominique Nouvet*, for the appellant.

Patrick G. Foy, *Q.C.*, and *Kenneth J. Tyler*, for the respondents Her Majesty The Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region.

Mark R. Kindrachuk, *Q.C.*, *Brian McLaughlin* and *Jan Brongers*, for the respondent the Attorney General of Canada.

Alain Gingras and *Hubert Noreau-Simpson*, for the intervener the Attorney General of Quebec.

Heather Leonoff, *Q.C.*, for the intervener the Attorney General of Manitoba.

P. Mitch McAdam, *Q.C.*, and *Sonia Eggerman*, for the intervener the Attorney General for Saskatchewan.

Sandra Folkins, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and *Karey Brooks*, for the intervener the Te'mexw Treaty Association.

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David M. Rosenberg, *c.r.*, *Jay Nelson*, *David M. Robbins* et *Dominique Nouvet*, pour l'appelant.

Patrick G. Foy, *c.r.*, et *Kenneth J. Tyler*, pour les intimés Sa Majesté la Reine du chef de la province de la Colombie-Britannique et le chef régional de la région de Cariboo Forest.

Mark R. Kindrachuk, *c.r.*, *Brian McLaughlin* et *Jan Brongers*, pour l'intimé le procureur général du Canada.

Alain Gingras et *Hubert Noreau-Simpson*, pour l'intervenant le procureur général du Québec.

Heather Leonoff, *c.r.*, pour l'intervenant le procureur général du Manitoba.

P. Mitch McAdam, *c.r.*, et *Sonia Eggerman*, pour l'intervenant le procureur général de la Saskatchewan.

Sandra Folkins, pour l'intervenant le procureur général de l'Alberta.

Robert J. M. Janes et *Karey Brooks*, pour l'intervenante l'Association du traité des Te'mexw.

Charles F. Willms and *Kevin O'Callaghan*, for the interveners the Business Council of British Columbia, the Council of Forest Industries, the Coast Forest Products Association, the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia.

Joseph J. Arvay, *Q.C.*, *Catherine J. Boies Parker* and *Patrick Macklem*, for the intervener the Assembly of First Nations.

Diane Soroka, for the interveners the Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, and the Office of the Wet'suwet'en Chiefs.

Robert B. Morales and *Renée Racette*, for the intervener the Hul'qumi'num Treaty Group.

Written submissions only by *Louise Mandell*, *Q.C.*, *Stuart Rush*, *Q.C.*, *Michael Jackson*, *Q.C.*, *Terri-Lynn Williams-Davidson*, *David Paterson* and *Angela D'Elia*, for the intervener the Council of the Haida Nation.

David C. Nahwegahbow and *Guy Régimbald*, for the intervener the Indigenous Bar Association in Canada.

Maria Morellato, *Q.C.*, *Cheryl Sharvit* and *Stacey Edzerza Fox*, for the intervener the First Nations Summit.

Written submissions only by *John W. Gailus* and *Christopher G. Devlin*, for the interveners the Tsawout First Nation, the Tsartlip First Nation, the Snuneymuxw First Nation and the Kwakiutl First Nation.

Louise Mandell, *Q.C.*, *Michael Jackson*, *Q.C.*, *Ardith Walkem* and *Nicole Schabus*, for the intervener the Coalition of the Union of British Columbia Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands.

Charles F. Willms et *Kevin O'Callaghan*, pour les intervenants Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia et Association for Mineral Exploration British Columbia.

Joseph J. Arvay, *c.r.*, *Catherine J. Boies Parker* et *Patrick Macklem*, pour l'intervenante l'Assemblée des Premières Nations.

Diane Soroka, pour les intervenants les chefs héréditaires Gitanyow de Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon et Wii'litswx, en leur nom et au nom de tous les Gitanyow, et le Bureau des chefs Wet'suwet'en.

Robert B. Morales et *Renée Racette*, pour l'intervenant le Groupe du traité Hul'qumi'num.

Argumentation écrite seulement par *Louise Mandell*, *c.r.*, *Stuart Rush*, *c.r.*, *Michael Jackson*, *c.r.*, *Terri-Lynn Williams-Davidson*, *David Paterson* et *Angela D'Elia*, pour l'intervenant le Conseil de la Nation haïda.

David C. Nahwegahbow et *Guy Régimbald*, pour l'intervenante l'Association du barreau autochtone au Canada.

Maria Morellato, *c.r.*, *Cheryl Sharvit* et *Stacey Edzerza Fox*, pour l'intervenant le Sommet des Premières Nations.

Argumentation écrite seulement par *John W. Gailus* et *Christopher G. Devlin*, pour les intervenantes la Première Nation Tsawout, la Première Nation Tsartlip, la Première Nation Snuneymuxw et la Première Nation Kwakiutl.

Louise Mandell, *c.r.*, *Michael Jackson*, *c.r.*, *Ardith Walkem* et *Nicole Schabus*, pour l'intervenante la Coalition de l'Union des chefs indiens de la Colombie-Britannique, l'Alliance des Nations de l'Okanagan, le Conseil tribal de la Nation Shuswap et leurs communautés membres, les bandes indiennes d'Okanagan, d'Adams Lake, de Neskonlith et de Splatsin.

Justin Safayeni and *Paul Joffe*, for the interveners Amnesty International and the Canadian Friends Service Committee.

Tim A. Dickson, for the intervener the Gitxaala Nation.

Gregory J. McDade, *Q.C.*, and *F. Matthew Kirchner*, for the interveners the Chilko Resorts and Community Association and the Council of Canadians.

Justin Safayeni et *Paul Joffe*, pour les intervenants Amnistie internationale et Secours Quaker canadien.

Tim A. Dickson, pour l'intervenante la Nation Gitxaala.

Gregory J. McDade, *c.r.*, et *F. Matthew Kirchner*, pour les intervenants Chilko Resorts and Community Association et le Conseil des Canadiens.

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Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

[1] Quel critère permet d'établir l'existence d'un titre ancestral sur un territoire? Si l'existence d'un titre est établie, quels droits confère-t-il? La *Forest Act*, R.S.B.C. 1996, ch. 157, de la Colombie-Britannique s'applique-t-elle aux terres visées par un titre ancestral? Quelles contraintes

title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

[2] These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.
- In this case, Aboriginal title is established over the area designated by the trial judge.
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.
- In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

constitutionnelles sont imposées à la réglementation, par la province, des terres visées par un titre ancestral? Enfin, comment concilier l'intérêt public général et les droits conférés par un titre ancestral? Voilà quelques questions importantes soulevées dans le présent pourvoi.

[2] Voici les conclusions tirées dans les présents motifs :

- Le titre ancestral découle de l'occupation, c'est-à-dire d'une utilisation régulière et exclusive des terres.
- En l'espèce, l'existence d'un titre ancestral est établie à l'égard du territoire désigné par le juge de première instance.
- Le titre ancestral confère le droit d'utiliser et de contrôler le territoire et de tirer les avantages qui en découlent.
- Lorsque le titre est revendiqué, mais que son existence n'a pas encore été établie, l'art. 35 de la *Loi constitutionnelle de 1982* oblige la Couronne à consulter le groupe qui revendique ce titre et, s'il y a lieu, à trouver des accommodements à ses intérêts.
- Une fois établie l'existence du titre ancestral, l'art. 35 de la *Loi constitutionnelle de 1982* permet d'y porter atteinte seulement si le groupe autochtone y consent ou si l'atteinte est justifiée par un objectif public réel et impérieux et si elle est compatible avec l'obligation fiduciaire de la Couronne envers le groupe autochtone; lorsqu'il s'agit de déterminer la validité d'une atteinte causée par l'application des lois provinciales aux terres visées par un titre ancestral, ce cadre d'analyse écarte la doctrine de l'exclusivité des compétences.
- En l'espèce, le projet d'aménagement du territoire de la province et les autorisations d'exploitation forestière accordées par elle étaient incompatibles avec les obligations qu'elle avait envers le peuple Tsilhqot'in.

II. The Historic Backdrop

[3] For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

[4] Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

[5] The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xeni Gwet'in. Talks between the Ministry of Forests and the Xeni Gwet'in ensued, but reached an impasse over the Xeni Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

[6] The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about

II. Le contexte historique

[3] Depuis des siècles, le peuple de la nation Tsilhqot'in — un regroupement de six bandes ayant une culture et une histoire communes — vit dans une vallée éloignée entourée de rivières et de montagnes dans le centre de la Colombie-Britannique. Les membres de cette nation ont vécu dans des villages, géré des terres pour y récolter des végétaux à racine et des herbes; ils ont chassé et piégé. Ils ont repoussé les envahisseurs et imposé des conditions aux marchands européens qui entraient sur leur territoire. De leur point de vue, le territoire leur a toujours appartenu.

[4] La Couronne a conclu presque partout au Canada des traités en vertu desquels les peuples autochtones ont renoncé à leurs revendications territoriales en échange de réserves et d'autres promesses, mais, à quelques exceptions près, ce n'est pas ce qui s'est produit en Colombie-Britannique. La nation Tsilhqot'in n'est qu'un groupe autochtone parmi des centaines en Colombie-Britannique dont les revendications territoriales ne sont pas réglées.

[5] La question du titre des Tsilhqot'in est demeurée latente jusqu'en 1983, quand la province a accordé à Carrier Lumber Ltd. un permis d'exploitation forestière l'autorisant à abattre des arbres dans une partie du territoire en question. Le gouvernement de la Première Nation Xeni Gwet'in (une des six bandes qui constituent la nation Tsilhqot'in) s'y est opposé et a sollicité un jugement déclaratoire interdisant l'exploitation forestière commerciale sur le territoire. Le litige a mené au barrage d'un pont que l'entreprise forestière voulait moderniser. Le barrage a été levé quand le premier ministre a promis qu'il n'y aurait aucune autre exploitation forestière sans le consentement des Xeni Gwet'in. Le ministère des Forêts et les Xeni Gwet'in ont négocié, mais ils n'ont pu s'entendre sur le droit de premier refus revendiqué par les Xeni Gwet'in à l'égard de l'exploitation forestière. En 1998, la revendication initiale a été modifiée de manière à inclure une revendication du titre ancestral au nom de tous les Tsilhqot'in.

[6] La revendication se limite à environ cinq pour cent de ce que les Tsilhqot'in — approximativement

3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

[7] In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the

3 000 personnes — considèrent comme étant leur territoire traditionnel. Ce territoire est peu peuplé. Environ 200 membres des Tsilhqot'in y vivent, ainsi que quelques non-Autochtones qui appuient la revendication du titre des Tsilhqot'in. Aucun autre groupe autochtone n'a revendiqué un titre sur ce territoire. Les gouvernements fédéral et provincial s'opposent tous deux à la revendication du titre.

[7] Le procès a débuté en 2002 devant le juge Vickers de la Cour suprême de la Colombie-Britannique et a duré 339 jours sur une période de cinq ans. Le juge de première instance s'est rendu sur le territoire revendiqué et a entendu de nombreux témoignages des aînés, des historiens et d'autres experts. Il a conclu que les Tsilhqot'in avaient droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une partie du territoire revendiqué ainsi que sur un petit secteur à l'extérieur de ce territoire. Cependant, pour des raisons d'ordre procédural que la province n'invoque plus, il a refusé dans son jugement de déclarer l'existence d'un titre ancestral (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] En 2012, la Cour d'appel de la Colombie-Britannique a conclu que l'existence du titre revendiqué par les Tsilhqot'in n'avait pas été établie, mais n'a pas écarté la possibilité que les Tsilhqot'in puissent éventuellement établir l'existence d'un titre sur certains sites à l'intérieur du territoire revendiqué. En ce qui concerne le reste du territoire revendiqué, les Tsilhqot'in n'ont obtenu que les droits ancestraux de chasse, de piégeage et de récolte (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] Les Tsilhqot'in demandent maintenant à notre Cour de reconnaître l'existence du titre ancestral sur le territoire désigné par le juge de première instance, sous réserve d'une exception. Sur une petite partie du territoire désigné par le juge se trouvent des terrains privés ou des terres submergées à l'égard desquels la reconnaissance du titre ancestral n'est pas demandée devant notre Cour. Pour ce qui est des terres désignées par le juge qui ne sont pas des terrains privés ou des terres submergées, les Tsilhqot'in demandent à notre Cour de rétablir les conclusions du juge de première instance, de

land unjustifiably infringed their rights under that title.

confirmer qu'ils possèdent le titre ancestral sur le secteur qu'il a désigné et de confirmer que la délivrance de permis d'exploitation forestière sur les terres a indûment porté atteinte aux droits que leur confère ce titre.

III. The Jurisprudential Backdrop

III. Le contexte jurisprudentiel

[10] In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties — mainly in British Columbia — resuming a policy that had been abandoned in the 1920s: P. W. Hogg, "The Constitutional Basis of Aboriginal Rights", in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 3.

[10] En 1973, la Cour suprême du Canada a marqué le début de l'ère moderne du droit inhérent aux terres ancestrales en statuant que les droits fonciers des Autochtones avaient subsisté à l'établissement des Européens et qu'ils étaient toujours valides s'ils n'avaient pas été éteints par traité ou autrement : *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313. Bien que les juges majoritaires dans *Calder* étaient divisés quant à savoir si le titre avait été éteint, leur confirmation des droits fonciers ancestraux a incité le gouvernement du Canada à entamer des négociations avec les Premières Nations non assujetties à des traités en vue de conclure des traités — principalement en Colombie-Britannique — reprenant ainsi une politique qui avait été abandonnée dans les années 1920 : P. W. Hogg, « The Constitutional Basis of Aboriginal Rights », dans M. Morellato, dir., *Aboriginal Law Since Delgamuukw* (2009), 3.

[11] Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* "recognized and affirmed" existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

[11] Presque 10 ans après l'arrêt *Calder*, les droits existants des Autochtones ont été « reconnus et confirmés » avec l'adoption de l'art. 35 de la *Loi constitutionnelle de 1982*, bien qu'il ait fallu un certain temps pour bien préciser le sens de cette disposition.

[12] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the "pre-existing legal right" of

[12] Dans l'arrêt *Guerin c. La Reine*, [1984] 2 R.C.S. 335, notre Cour a confirmé qu'il était possible que les Autochtones détiennent un titre sur les terres ancestrales. Le litige se rapportait à la conduite du gouvernement à l'égard de terres situées sur une réserve. La Cour a conclu que le gouvernement avait manqué à une obligation fiduciaire envers la bande indienne Musqueam. Dans une opinion concourante, le juge Dickson (plus tard Juge en chef) a examiné la théorie sous-jacente au titre ancestral. Selon lui, la Couronne a acquis un titre absolu ou sous-jacent sur toutes les terres situées

Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as "an independent legal interest" (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

[13] In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "compelling and substantial" purpose and account for the "priority" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (pp. 1113-19).

[14] The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

[15] The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal

en Colombie-Britannique au moment de l'affirmation de la souveraineté. Cependant, ce titre était grevé du « droit, en *common law*, qui existait déjà » que détiennent les peuples autochtones du fait de leur utilisation et de leur occupation des terres avant l'arrivée des Européens (p. 379-382). Le juge Dickson a affirmé que le droit des Autochtones sur leurs terres avait « une existence juridique indépendante » (p. 385), lequel donne naissance à une obligation fiduciaire *sui generis* de la Couronne.

[13] En 1990, notre Cour a conclu que l'art. 35 de la *Loi constitutionnelle de 1982* accordait une protection constitutionnelle à tous les droits ancestraux qui n'avaient pas été éteints avant le 17 avril 1982 et imposait à la Couronne une obligation fiduciaire relativement à ces droits : *R. c. Sparrow*, [1990] 1 R.C.S. 1075. La Cour a déclaré que, sous le régime de l'art. 35, un texte de loi ne peut porter atteinte aux droits protégés par cet article que si l'atteinte résiste à une analyse de la justification en deux étapes : le texte de loi doit poursuivre un objectif « impérieux et réel » et doit reconnaître la « priorité » du droit ancestral en cause qui découle de l'obligation fiduciaire imposée à la Couronne (p. 1113-1119).

[14] Les principes établis dans les arrêts *Calder*, *Guerin* et *Sparrow* ont été réunis et appliqués dans le contexte d'une revendication du titre ancestral dans l'arrêt *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010. Notre Cour a confirmé le caractère *sui generis* des droits et des obligations auxquels la relation entre la Couronne et les peuples autochtones donne naissance, et elle a déclaré que ce qui rend le titre ancestral unique est le fait qu'il découle d'une possession *antérieure* à l'affirmation de la souveraineté britannique, contrairement aux autres domaines, comme le fief simple, qui ont pris naissance *par la suite*. Il faut accorder une importance égale à la common law et au point de vue des Autochtones au moment d'évaluer une revendication du titre ancestral.

[15] Dans l'arrêt *Delgamuukw*, la Cour a résumé le contenu du titre ancestral au moyen de deux énoncés, l'un positif et l'autre négatif. De façon

title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (*ibid.*) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[16] The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a "necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part" (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the "different" (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

[17] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown's duty to consult and accommodate the asserted Aboriginal interest "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" (para. 39). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida.* The Court in

positive, « le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive » (par. 117). De façon négative, ces « utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres » (*ibid.*) — c'est-à-dire que le titre appartient au groupe et qu'il ne peut pas être aliéné d'une manière qui prive les générations futures du contrôle et du bénéfice des terres.

[16] Dans *Delgamuukw*, la Cour a confirmé que les atteintes au titre ancestral peuvent être justifiées au regard de l'art. 35 de la *Loi constitutionnelle de 1982* suivant le critère énoncé dans l'arrêt *Sparrow* et a décrit les droits ancestraux comme un « élément nécessaire de la conciliation de l'existence des sociétés autochtones avec la communauté politique plus large à laquelle ces dernières appartiennent » (par. 161), citant *R. c. Gladstone*, [1996] 2 R.C.S. 723, par. 73. Alors que dans l'arrêt *Sparrow* il était question de la *priorité* des droits ancestraux violés par des dispositions réglementaires sur les intérêts non autochtones, l'arrêt *Delgamuukw* a exposé « autrement » (au par. 168) l'approche selon laquelle les peuples autochtones participent — participation qui varie en fonction de la gravité de l'atteinte — à la prise des décisions concernant leurs terres.

[17] Dans l'arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, la Cour a appliqué l'idée exprimée dans l'arrêt *Delgamuukw*, soit que le groupe autochtone visé participe à la prise des décisions concernant ses terres, à un cas où il est proposé que des activités d'exploitation soient menées sur des terres sur lesquelles le titre ancestral est revendiqué mais n'est pas encore établi. La Cour a reconnu un continuum de consultation. L'obligation de la Couronne de consulter les Autochtones et de trouver des accommodements aux droits qu'ils revendiquent « dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le

Haida stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

[19] The Province, to its credit, no longer contends that the claim should be barred because of

titre » (par. 39). Ainsi, la notion de mise en balance proportionnée qui ressort implicitement de l'arrêt *Delgamuukw* est reprise dans *Nation haïda*. Dans ce dernier arrêt, la Cour a indiqué que la Couronne n'avait pas seulement une obligation morale, mais une obligation légale de négocier de bonne foi dans le but de régler les revendications territoriales (par. 25). Le principe directeur ne repose pas sur les intérêts opposés mais sur la conciliation.

[18] Les arrêts que nous venons d'examiner établissent un certain nombre de postulats qui touchent à des questions soulevées en l'espèce, notamment :

- Le titre absolu ou sous-jacent de la Couronne est assujetti aux droits qu'ont les Autochtones sur les terres où ils sont établis.
- Le titre ancestral confère au groupe autochtone le droit d'utiliser et de contrôler le territoire, et de bénéficier des avantages qu'il procure.
- Les gouvernements peuvent porter atteinte aux droits ancestraux que confère le titre ancestral, mais seulement dans la mesure où ils peuvent démontrer que les atteintes poursuivent un objectif impérieux et réel et qu'elles sont compatibles avec l'obligation fiduciaire qu'a la Couronne envers le groupe.
- L'exploitation des ressources sur des terres revendiquées dont le titre n'a pas été établi exige du gouvernement qu'il consulte la nation autochtone revendicatrice.
- Les gouvernements ont l'obligation légale de négocier de bonne foi dans le but de régler les revendications de terres ancestrales.

C'est dans ce contexte que j'aborde les questions soulevées dans le présent pourvoi.

IV. Les actes de procédure dans les instances relatives aux revendications territoriales des Autochtones

[19] À sa décharge, la province ne soutient plus que la revendication doive être rejetée en raison

defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

[20] I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

[21] First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

[22] Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an "all or nothing" proposition (at para. 117):

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

[23] Third, cases such as this require an approach that results in decisions based on the best

de vices qui entachent les actes de procédure. Cependant, il peut être utile de déterminer l'approche à adopter à l'égard des actes de procédure dans les revendications territoriales compte tenu de leur importance pour de futures revendications territoriales.

[20] Je suis d'accord avec la Cour d'appel pour dire qu'il convient d'adopter une approche fonctionnelle à l'égard des actes de procédure dans les affaires intéressant les Autochtones. Les actes de procédure visent à fournir aux parties et au tribunal un aperçu des allégations importantes et de la réparation sollicitée. Quand les actes de procédure permettent l'atteinte de cet objectif, en l'absence d'un préjudice évident, il ne faut pas tenir compte des vices mineurs. Un certain nombre de considérations étayent cette approche.

[21] Premièrement, dans un cas comme celui qui nous occupe, les principes juridiques sont parfois ambigus de prime abord, de sorte qu'il est difficile de formuler la demande avec exactitude.

[22] Deuxièmement, en de telles circonstances, la preuve quant à la façon dont le territoire était utilisé peut être incertaine au départ, mais à mesure que la demande progresse, des aînés se manifestent et les services d'experts sont retenus. Pendant le procès, les pratiques historiques du groupe autochtone en question sont exposées, vérifiées et précisées. La Cour d'appel a reconnu à juste titre que la question de savoir si le bien-fondé de la revendication d'un titre ancestral est établi sur un territoire n'est pas une affaire de [TRADUCTION] « tout ou rien » (par. 117) :

> [TRADUCTION] L'occupation des territoires traditionnels par les Premières Nations avant l'affirmation de la souveraineté de la Couronne n'était pas une occupation fondée sur le régime Torrens, ni sur des limites précises. Sauf dans les cas où il existait des limites naturelles infranchissables (ou quasi infranchissables), les limites d'un territoire traditionnel étaient habituellement mal définies et variables. [. . .] [Par conséquent] il serait trop exigeant de demander une preuve du titre ancestral qui reflète précisément la revendication. [par. 118]

[23] Troisièmement, les cas comme celui-ci requièrent une approche qui permet de rendre des

evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. *The Test for Aboriginal Title*

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, *per* Lamer C.J., at para. 143:

> In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

décisions fondées sur la meilleure preuve disponible, et non sur ce qu'un avocat a pu envisager quand il a rédigé la demande initiale. L'enjeu n'est rien de moins que la possibilité pour le groupe autochtone et ses descendants d'obtenir justice et la conciliation des intérêts du groupe et de la société en général. Le formalisme à l'égard des actes de procédure ne servirait aucun de ces objectifs. L'intérêt public général commande que les questions relatives aux revendications territoriales et aux droits soient tranchées dans le respect du fond du litige. Ce n'est qu'ainsi que peut se réaliser la conciliation dont notre Cour a fait état dans *Delgamuukw*.

V. L'existence du titre ancestral est-elle établie?

A. *Le critère applicable en matière de titre ancestral*

[24] Comment les tribunaux devraient-ils déterminer si un groupe autochtone semi-nomade détient un titre sur des terres? Notre Cour n'a jamais répondu directement à cette question. Les tribunaux d'instance inférieure ne se sont pas entendus sur l'approche qu'il convient d'adopter. Nous devons donc maintenant préciser le critère.

[25] Je le répète, le critère relatif au titre ancestral énoncé dans l'arrêt *Delgamuukw* est fondé sur l'« occupation » antérieure à l'affirmation de la souveraineté européenne. Pour fonder le titre ancestral, l'occupation doit posséder trois caractéristiques : elle doit être *suffisante*, elle doit être *continue* (si l'occupation actuelle est invoquée) et elle doit être *exclusive*.

[26] Le critère a été énoncé par le juge en chef Lamer dans l'arrêt *Delgamuukw*, par. 143 :

> Pour établir le bien-fondé de la revendication d'un titre aborigène, le groupe autochtone qui revendique ce titre doit satisfaire aux exigences suivantes : (i) il doit avoir occupé le territoire avant l'affirmation de la souveraineté; (ii) si l'occupation actuelle est invoquée comme preuve de l'occupation avant l'affirmation de la souveraineté, il doit exister une continuité entre l'occupation actuelle et l'occupation antérieure à l'affirmation de la souveraineté; (iii) au moment de l'affirmation de la souveraineté, cette occupation doit avoir été exclusive.

[27] The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

[30] Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

[31] Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1, the court stated as follows, at para 89:

[27] En l'espèce, le juge de première instance a conclu que l'« occupation » était établie dans le but de fonder le titre par la démonstration d'une utilisation régulière et exclusive de certains sites ou du territoire. De ce fait, il a estimé que les Tsilhqot'in avaient établi l'existence d'un titre non seulement sur des villages et des sites utilisés pour la récolte de végétaux à racine et de fruits, mais sur des territoires plus vastes que leurs ancêtres utilisaient régulièrement et exclusivement pour la chasse, la pêche et d'autres activités.

[28] La Cour d'appel a rejeté cette conclusion et a appliqué un critère plus restreint à l'égard du titre ancestral — celui de l'occupation d'un site spécifique. Elle a conclu que, pour faire la preuve d'une occupation suffisante établissant l'existence d'un titre, un groupe autochtone doit démontrer qu'au moment de l'affirmation de la souveraineté européenne, ses ancêtres utilisaient *intensément* une parcelle de terrain spécifique dont les limites sont raisonnablement définies.

[29] Pour des groupes autochtones semi-nomades comme les Tsilhqot'in, la démarche de la Cour d'appel lui permet de reconnaître un titre sur de petites parcelles entourées de territoires plus vastes où le groupe possède seulement le droit ancestral d'exercer certaines activités comme la chasse et le piégeage. Par contre, suivant la démarche retenue par le juge de première instance, le groupe détiendrait un titre sur l'ensemble du territoire régulièrement et exclusivement utilisé par ses ancêtres au moment de l'affirmation de la souveraineté européenne.

[30] Dans ce contexte, je reviens sur les exigences de la preuve du titre ancestral : une occupation suffisante avant l'affirmation de la souveraineté, une occupation continue (si l'occupation actuelle est invoquée) et une occupation historique exclusive.

[31] Les trois éléments du critère énoncé dans l'arrêt *Delgamuukw* devraient-ils être examinés séparément ou comme les aspects interreliés d'un concept unique? La Haute Cour d'Australie s'est dite d'avis qu'il y a peu d'intérêt à examiner séparément les aspects de l'occupation. Dans l'affaire *Western Australia c. Ward* (2002), 213 C.L.R. 1, cette cour a indiqué ce qui suit au par. 89 :

The expression "possession, occupation, use and enjoyment . . . to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

[33] The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

[34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[TRADUCTION] L'expression « possession, occupation, utilisation et jouissance [. . .] à l'exclusion de toute autre personne » est une expression composite qui vise à décrire une mesure particulière de contrôle de l'accès aux terres. Décomposer l'expression en ses éléments constitutifs risque d'induire en erreur. Plus particulièrement, parler de « possession » des terres, une possession distincte de la possession à l'exclusion de toute autre personne, attire l'attention sur le contenu de la notion de possession en common law et sur toute notion de contrôle de l'accès que l'on pourrait considérer comme y étant liée, plutôt que sur ce qu'il nous incombe de faire, à savoir déterminer comment les droits et intérêts que les Aborigènes possédaient en vertu des lois ou coutumes traditionnelles peuvent trouver leur juste expression en common law.

[32] À mon avis, les concepts de suffisance, de continuité et d'exclusivité offrent un angle intéressant pour apprécier la question du titre ancestral. Cela étant dit, le tribunal doit veiller à ne pas perdre de vue la perspective autochtone, ou à ne pas la dénaturer, en assimilant les pratiques ancestrales aux concepts rigides de la common law, ce qui irait à l'encontre de l'objectif qui consiste à traduire fidèlement les droits que possédaient les Autochtones avant l'affirmation de la souveraineté en droits juridiques contemporains équivalents. La suffisance, la continuité et l'exclusivité ne sont pas des fins en soi, mais plutôt des façons de savoir si l'existence du titre ancestral est établie.

1. La suffisance de l'occupation

[33] La première exigence — et celle qui se trouve au cœur du présent pourvoi — est celle selon laquelle l'occupation doit être *suffisante* pour fonder un titre ancestral. Il ressort clairement de l'arrêt *Delgamuukw* que le titre ne peut se fonder sur la présence passagère sur un territoire ou sur son utilisation passagère. Alors, en quoi consiste une occupation *suffisante* pour fonder un titre?

[34] Il faut aborder la question de l'occupation suffisante en tenant compte à la fois de la common law et du point de vue des Autochtones (*Delgamuukw*, par. 147); voir aussi *R. c. Van der Peet*, [1996] 2 R.C.S. 507.

[35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

[36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

[37] Sufficiency of occupation is a context-specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There

[35] Le point de vue des Autochtones est axé sur les règles de droit, les pratiques, les coutumes et les traditions du groupe (*Delgamuukw*, par. 148). Dans l'examen de ce point de vue, [TRADUCTION] « il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées » : B. Slattery, « Understanding Aboriginal Rights » (1987), 66 *R. du B. can.* 727, p. 758, cité avec approbation dans *Delgamuukw*, par. 149.

[36] La common law comporte la notion de possession et de contrôle des terres. En common law, la notion de possession ne se limite pas aux sites physiquement occupés, comme une maison, mais s'étend aux terres environnantes qui sont utilisées et sur lesquelles un contrôle effectif est exercé.

[37] La suffisance de l'occupation est une question qui tient au contexte. « L'occupation [. . .] peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en passant par la délimitation et la culture de champs » (*Delgamuukw*, par. 149). L'intensité et la fréquence de l'utilisation peuvent varier en fonction des caractéristiques du groupe autochtone qui revendique le titre et en fonction de la nature du territoire sur lequel le titre est revendiqué. En l'espèce, par exemple, le territoire, bien que vaste, était ingrat et ne pouvait assurer la subsistance que de 100 à 1 000 personnes. Le fait que le groupe autochtone ne comptait qu'environ 400 personnes doit être pris en compte dans le contexte de la capacité d'utilisation du territoire pour déterminer si l'utilisation régulière de secteurs bien définis est établie.

[38] Pour établir une occupation suffisante des terres dans le but de fonder l'existence d'un titre, le groupe autochtone en question doit démontrer qu'il a toujours agi de façon à informer les tiers qu'il détenait la terre pour ses propres besoins. Cette norme n'exige pas une preuve de l'utilisation notoire ou visible qui s'apparente à la preuve d'une revendication de possession adversative, mais

must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or seminomadic.

[39] In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135-38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

> What, then, did one have to do to acquire a title by occupancy? . . . [I]t appears . . . that . . . a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the

l'occupation ne peut pas non plus être purement subjective ou interne. Il faut une preuve d'une forte présence des Autochtones sur les terres revendiquées, qui se manifeste par des actes d'occupation qui pourraient raisonnablement être interprétés comme une preuve que les terres en question ont appartenu au groupe revendicateur ou que ce groupe y exerçait son contrôle ou une gestion exclusive. Je le répète, les actes nécessaires pour indiquer la présence permanente d'un groupe sur des terres et son intention de conserver et d'utiliser les terres pour ses besoins dépendent de son mode de vie et de la nature des terres. Pour établir l'occupation, il suffira peut-être de montrer que des champs ont été cultivés, que des habitations ont été érigées, que des travaux ont été effectués et qu'il y a eu une présence constante sur certaines parties du territoire, mais ce n'est pas essentiel. La notion d'occupation doit aussi refléter le mode de vie des peuples autochtones, y compris ceux qui étaient nomades ou seminomades.

[39] Dans l'arrêt *R. c. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, par. 135-138, le juge Cromwell (maintenant juge de notre Cour), pour des motifs que j'approuve, établit un parallèle entre la suffisance de l'occupation nécessaire pour établir l'existence d'un titre ancestral et les exigences de l'occupation ordinaire en common law. En common law, un occupant ordinaire est une personne qui revendique la possession d'une terre sur laquelle personne n'a un intérêt actuel ou pour laquelle l'existence du titre est incertaine. Le juge Cromwell cite (au par. 136) le passage suivant tiré de l'ouvrage de K. McNeil, *Common Law Aboriginal Title* (1989), p. 198-200 :

> [TRADUCTION] Alors, que fallait-il faire pour acquérir un titre fondé sur l'occupation? [. . .] [I]l semble [. . .] [qu']une entrée occasionnelle, par exemple le fait pour une personne de sillonner un territoire pour y chasser ou y faire du commerce, ou de le parcourir d'un bout à l'autre, ne faisait pas d'elle un occupant, puisque ces actes n'« étaient que passagers et qu'ils visaient une fin particulière, qu'ils ne laissaient aucune marque d'une appropriation ou d'une intention de posséder à son usage distinct ». Il doit donc y avoir eu une entrée réelle et un ou des actes permettant de conclure à l'existence de l'intention d'occuper le territoire. Fait important, les actes et

vacant estate, for the law cast it upon him by virtue of his occupation alone. . . .

Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used. [Emphasis added.]

[40] Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner. . . . Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, . . . it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation

l'intention devaient se rapporter seulement à l'occupation — il était pour ainsi dire inutile pour un occupant éventuel de revendiquer, ou même de souhaiter acquérir, le domaine vacant, puisque le titre lui est conféré par la loi du seul fait de son occupation. . .

D'autres indices de ce qui constitue une occupation peuvent être dégagés de certaines affaires portant sur des terres sur lesquelles le titre est incertain. En général, toute activité sur une terre ou en lien avec une terre qui laisse voir une intention de la détenir ou de l'utiliser pour ses propres fins constitue une preuve d'occupation. Outre les actes évidents, comme délimiter la terre, la cultiver, s'y livrer à des activités minières, de construction ou d'entretien, et empêcher les intrus d'y entrer, bien d'autres actes peuvent être invoqués, comme couper des arbres ou de l'herbe, pêcher dans des cours d'eau, ou même parcourir la région. L'importance accordée à ces actes dépend en partie de la nature des terres et des fins auxquelles elles peuvent raisonnablement être utilisées. [Je souligne.]

[40] Dans *Marshall*, le juge Cromwell a ensuite déclaré que cette norme est différente de la doctrine de la possession de droit. Le but n'est pas d'*attribuer* la possession en l'absence d'actes d'occupation, mais de définir la qualité des actes d'occupation qui démontrent la possession en droit (par. 137). Il a conclu comme suit :

[TRADUCTION] J'adopterais, de façon générale, l'analyse faite par le professeur McNeil selon laquelle la norme d'occupation appropriée, en common law, se trouve à mi-chemin entre la norme minimale d'occupation qui permettrait à une personne de poursuivre un intrus et la norme la plus stricte à laquelle il faut satisfaire pour établir un titre obtenu par possession adversative opposable au véritable propriétaire. [. . .] Lorsque, comme en l'espèce, il est question d'un vaste territoire qui n'a pas été cultivé, des actes tels que l'établissement constant, bien que changeant, et l'utilisation générale pour la pêche, la chasse et la cueillette devraient se voir accorder plus de poids que s'il était question d'un territoire délimité et cultivé. L'aspect sans doute le plus éloquent, [. . .] il est impossible de limiter la preuve à l'endroit bien précis où la coupe a eu lieu : Pollock et Wright, p. 32. La question est plutôt de savoir si les actes d'occupation dans certains lieux démontrent que le revendicateur occupait tout le secteur. [par. 138]

[41] En résumé, la preuve de l'occupation doit procéder d'une approche visant à déterminer le

based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

caractère suffisant de l'occupation qui soit adaptée aux particularités culturelles et qui repose sur les points de vue du groupe autochtone en question — ses règles de droit, ses pratiques, sa taille, son savoir-faire technologique et la nature de la terre — ainsi que sur la notion de possession qui établit l'existence d'un titre en common law. Il est impossible d'énumérer chaque indice d'occupation qui pourrait s'appliquer dans un cas déterminé. Le critère de la common law en matière de possession — lequel exige une intention d'occuper ou de conserver la terre pour les besoins de l'occupant — doit être pris en compte tout comme le point de vue du groupe autochtone qui, selon sa taille et son mode de vie, pourrait concevoir la possession de la terre d'une façon quelque peu différente de la possession en common law.

[42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

[42] La jurisprudence et la doctrine ne donnent pas à penser que le titre ancestral se limite à certains villages ou à des fermes, comme l'a conclu la Cour d'appel. Au contraire, suivant une approche qui tient compte des particularités culturelles, l'utilisation régulière des terres pour la chasse, la pêche, le piégeage et la cueillette constitue une utilisation « suffisante » pour fonder un titre ancestral dans la mesure où cette utilisation, eu égard aux faits de l'espèce, révèle une intention de la part du groupe autochtone de détenir ou de posséder les terres d'une manière comparable à celle exigée pour établir l'existence d'un titre en common law.

[43] The Province argues that this Court in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there "appears to have rejected the territorial approach of the Court of Appeal" ("Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*.

[43] La province plaide que dans *R. c. Marshall; R. c. Bernard*, 2005 CSC 43, [2005] 2 R.C.S. 220, notre Cour a rejeté une approche territoriale à l'égard du titre; elle s'appuie sur une remarque du professeur K. McNeil selon laquelle la Cour [TRADUCTION] « semble avoir rejeté l'approche territoriale de la Cour d'appel » (« Aboriginal Title and the Supreme Court : What's Happening? » (2006), 69 *Sask. L. Rev.* 281, cité dans le mémoire de la Colombie-Britannique, par. 100). En fait, dans *Marshall; Bernard*, notre Cour n'a pas rejeté l'approche fondée sur le territoire, mais a seulement estimé (au par. 72) qu'il fallait « la preuve d'une utilisation suffisamment régulière et exclusive » du territoire en question, une exigence établie dans l'arrêt *Delgamuukw*.

[44] The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

2. Continuity of Occupation

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

[47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The

[44] Dans *Marshall; Bernard*, notre Cour a confirmé que les groupes nomades et semi-nomades peuvent établir l'existence d'un titre s'ils établissent une possession physique suffisante d'un territoire, ce qui constitue une question de fait. « Le passage dans un territoire ou son utilisation dans le cadre d'un mode de vie nomade ne fondera pas nécessairement un titre sur celui-ci », mais la Cour a confirmé que, selon l'arrêt *Delgamuukw*, « l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources » peut être suffisante (par. 66). Bien que la question consistait à savoir si le critère de la common law relatif à la possession avait été respecté, la Cour n'a pas nié la nécessité de tenir compte du point de vue du groupe autochtone en question; la possession suffisante est une « question de fait qui dépend de l'ensemble des circonstances, en particulier de la nature du territoire et de la façon dont il a été utilisé collectivement » (*ibid.*).

2. La continuité de l'occupation

[45] Le fait que l'occupation actuelle soit invoquée comme preuve de l'occupation antérieure à l'affirmation de la souveraineté donne lieu à une deuxième condition — la continuité entre l'occupation actuelle et l'occupation antérieure à l'affirmation de la souveraineté.

[46] Le concept de la continuité n'exige pas que les groupes autochtones fassent la preuve d'une continuité parfaite entre leurs pratiques, coutumes et traditions actuelles et celles qui existaient avant le contact avec les Européens (*Van der Peet*, par. 65). Il en va de même pour le titre ancestral. La continuité signifie simplement que, pour qu'une preuve de l'occupation actuelle permette de conclure à l'occupation antérieure à l'affirmation de la souveraineté, l'occupation actuelle doit tirer son origine de l'époque antérieure à l'affirmation de la souveraineté. Il appartient au juge des faits d'examiner cette question.

3. L'exclusivité de l'occupation

[47] La troisième exigence est l'occupation *exclusive* des terres au moment de l'affirmation de la

Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[49] As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

> A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to

souveraineté. Le groupe autochtone doit avoir eu « l'intention et [. . .] la capacité de garder le contrôle exclusif » des terres (*Delgamuukw*, par. 156, citant McNeil, *Common Law Aboriginal Title*, p. 204 (je souligne)). L'utilisation régulière, mais non exclusive, peut donner naissance à des droits ancestraux usufructuaires; en ce qui concerne le titre ancestral, l'utilisation doit avoir été exclusive.

[48] L'exclusivité doit s'entendre au sens de l'intention et de la capacité de contrôler le territoire. Le fait que d'autres groupes ou des particuliers se soient trouvés sur le territoire ne nie pas nécessairement l'exclusivité de l'occupation. La question de savoir si le groupe revendicateur avait l'intention et la capacité de contrôler le territoire au moment de l'affirmation de la souveraineté est une question de fait qui relève du juge de première instance et qui dépend de divers facteurs tels que les caractéristiques du groupe, la nature des autres groupes de la région et les caractéristiques du territoire en question. L'exclusivité peut être établie au moyen d'une preuve démontrant que les autres groupes ont été exclus du territoire, ou d'une preuve démontrant que certains groupes n'avaient accès au territoire qu'avec la permission du groupe revendicateur. Le fait qu'une permission était demandée, et qu'elle était accordée ou refusée, ou que des traités ont été conclus avec d'autres groupes, peut démontrer l'intention et la capacité de contrôler le territoire. Même le fait que l'occupation n'ait jamais été contestée peut permettre de conclure que le groupe avait l'intention et la capacité de contrôler le territoire.

[49] Tout comme c'était le cas de la suffisance de l'occupation, il faut aborder l'exigence de l'exclusivité en tenant compte de la common law et du point de vue des Autochtones, ainsi que du contexte et des caractéristiques de la société autochtone. Dans l'arrêt *Delgamuukw*, la Cour a expliqué ce qui suit au par. 157 :

> La prise en considération du point de vue des [A]utochtones peut également amener à conclure qu'une intrusion par d'autres groupes autochtones ne fait pas obstacle à l'occupation exclusive du territoire visé par le groupe autochtone qui en revendique le titre, et que la présence autorisée de ces autres groupes peut renforcer cette

[A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. *Was Aboriginal Title Established in This Case?*

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with

occupation exclusive. À titre d'exemple, le groupe autochtone qui revendique le titre aborigène peut avoir, en matière d'intrusion, des règles de droit qui sont des preuves de l'occupation exclusive, de sorte que la présence d'intrus n'est pas considérée comme une preuve à l'encontre de l'exclusivité. De plus, l'existence de règles de droit autochtones en vertu desquelles d'autres groupes autochtones peuvent être autorisés à utiliser les terres ou même à y résider temporairement étayerait la conclusion d'occupation exclusive. De fait, si cette permission a fait l'objet de traités entre les nations autochtones concernées, ces traités feraient également partie du point de vue des [A]utochtones.

4. Résumé

[50] Il incombe au groupe revendicateur d'établir l'existence du titre ancestral. Il faut déterminer la façon dont les droits et intérêts qui existaient avant l'affirmation de la souveraineté peuvent trouver leur juste expression en common law moderne. Dans l'examen de la question de savoir si l'existence d'un titre ancestral est établie, les conditions générales sont les suivantes : (1) une « occupation suffisante » du territoire revendiqué afin d'établir l'existence d'un titre au moment de l'affirmation de la souveraineté européenne; (2) la continuité de l'occupation lorsque l'occupation actuelle est invoquée; et (3) l'exclusivité de l'occupation historique. Pour déterminer ce qui constitue une occupation suffisante, il faut examiner la culture et les pratiques des Autochtones et les comparer, tout en tenant compte de leurs particularités culturelles, à ce qui était requis en common law pour établir l'existence d'un titre fondé sur l'occupation. L'occupation suffisante pour fonder l'existence d'un titre ancestral ne se limite pas aux lieux spécifiques d'établissement, mais s'étend aux parcelles de terre régulièrement utilisées pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation des ressources et sur lesquelles le groupe exerçait un contrôle effectif au moment de l'affirmation de la souveraineté européenne.

B. *L'existence du titre ancestral a-t-elle été établie en l'espèce?*

[51] Le juge de première instance a appliqué un critère fondé sur l'utilisation régulière et exclusive

the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

[52] Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

[53] I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

[54] I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

[55] The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

[56] Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

du territoire. Son critère est conforme au bon critère juridique. Reste à savoir s'il l'a correctement appliqué à la preuve dont il disposait.

[52] La question de savoir si la preuve présentée dans une affaire donnée permet de conclure à l'existence d'un titre ancestral est une question de fait que doit trancher le juge de première instance : *Marshall; Bernard*. Il s'agit donc de savoir si la province a démontré que le juge de première avait commis une erreur manifeste et dominante dans ses conclusions de fait.

[53] J'aborde la question sous les angles susmentionnés de la suffisance, de la continuité et de l'exclusivité.

[54] Je ne répéterai pas les commentaires que j'ai formulés précédemment sur ce qui est requis pour établir la suffisance de l'occupation. L'utilisation régulière du territoire suffit pour établir la suffisance; le concept ne se limite pas aux villages qui ont été occupés de façon continue. Il faut aborder la question en tenant compte du point de vue du groupe autochtone et de la common law, sans oublier les coutumes du peuple et la nature du territoire.

[55] La preuve en l'espèce appuie la conclusion du juge de première instance quant à l'occupation suffisante. Le territoire était peu peuplé, mais le juge de première instance a relevé des éléments de preuve indiquant que les parties du territoire sur lesquelles il a conclu à l'existence du titre étaient régulièrement utilisées par les Tsilhqot'in. La Cour d'appel n'a pas vraiment contesté ces conclusions.

[56] La Cour d'appel a plutôt fondé son rejet de l'existence du titre ancestral sur la proposition de droit selon laquelle l'utilisation régulière du territoire ne pouvait pas fonder le titre ancestral — seules la présence régulière sur des parcelles spécifiques ou leur occupation intensive étaient suffisantes. Cette interprétation, comme je l'ai déjà mentionné, ne trouve pas d'appui dans la jurisprudence; l'arrêt *Delgamuukw* confirme plutôt à l'égard du titre ancestral une approche fondée sur l'utilisation du territoire.

[57] This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5 to 7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this finding.

[58] Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

[59] The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

- The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141-42).

- The trial judge relied on a map the validity of which the Province disputes (para. 143).

[57] Cela m'amène à la continuité. La revendication du titre présentée en l'espèce est fondée dans une certaine mesure sur l'occupation actuelle, ce qui soulève la question de la continuité. La preuve produite et acceptée ensuite dans les parties 5 à 7 des motifs du juge de première instance se rapporte aux événements qui remontent jusqu'en 1999. Le juge de première instance a pris en considération cette preuve directe d'une occupation plus récente conjointement avec la preuve archéologique, la preuve historique et les témoignages d'aînés, qui indiquaient tous une présence continue des Tsilhqot'in dans la région visée par la revendication. La proximité géographique entre les sites à l'égard desquels une preuve d'occupation récente a été produite et ceux à l'égard desquels il existait une preuve directe d'occupation passée renforçait l'inférence d'une occupation continue. Au paragraphe 945, il est indiqué, sous la rubrique [TRADUCTION] « Continuité », que « le peuple Tsilhqot'in a occupé le secteur revendiqué de façon continue avant et après l'affirmation de la souveraineté ». Je ne vois aucune raison de modifier cette conclusion.

[58] Enfin, j'en viens à l'exclusivité. Le juge de première instance a conclu que les Tsilhqot'in, avant l'affirmation de la souveraineté, ont repoussé d'autres peuples de leurs terres et ont exigé que les étrangers qui désiraient passer sur leurs terres leur demandent la permission. Il en a conclu que les Tsilhqot'in considéraient qu'ils possédaient leurs terres en exclusivité. Il n'y a aucune raison de modifier cette conclusion.

[59] La province plaide en outre que les conclusions du juge de première instance quant à la manière dont certaines parties du territoire étaient utilisées ne peuvent être retenues. La province affirme ce qui suit :

- Les limites du territoire établies par le juge de première instance sont arbitraires et contredites par certains éléments de preuve (mémoire, par. 141-142).

- Le juge de première instance s'est fondé sur une carte dont la province conteste la validité (par. 143).

- The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).

- The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).

- A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).

[60] Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

[61] The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge

- Le peuple Tsilhqot'in qui, selon le juge de première instance, comptait 400 personnes au moment de l'affirmation de la souveraineté, ne pouvait pas occuper les 1 900 km^2 de terres sur lesquelles l'existence d'un titre a été établie (par. 144).

- Le juge de première instance n'a pas identifié des secteurs de manière suffisamment précise; il s'est plutôt appuyé sur de vagues descriptions (par. 145).

- Un examen attentif de la façon incohérente et arbitraire dont le juge de première instance a défini les secteurs grevés d'un titre ancestral démontre le manque de fiabilité de son approche (par. 147).

[60] La plupart des critiques de la province à l'égard des conclusions de fait du juge de première instance reposent sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement. La préoccupation que suscite la petite taille de la population des Tsilhqot'in en 1846 n'a de sens que si l'on adopte le critère étroit de l'occupation intensive et que l'on ne tient pas compte de la nature du territoire en question, un territoire montagneux qui n'aurait pas pu assurer la subsistance d'une population beaucoup plus importante. De même, l'allégation selon laquelle le juge de première instance aurait omis d'identifier certains secteurs avec précision n'a de sens que si l'on adopte le critère étroit de l'occupation intensive. Les autres critiques ne servent qu'à souligner le caractère contradictoire de la preuve. Il appartenait au juge de première instance de faire la part des éléments de preuve contradictoires et de tirer des conclusions de fait. La présence d'éléments de preuve contradictoires ne démontre pas l'existence d'une erreur manifeste et dominante.

[61] La province n'a pas démontré que les conclusions du juge de première instance ne sont pas étayées par la preuve ou qu'elles sont autrement erronées. Elle n'a pas non plus démontré que ses conclusions étaient arbitraires ou manquaient de précision. Le juge de première instance avait la

body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

[62] This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

[63] The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

[64] The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the

tâche colossale de tirer des conclusions à partir d'une quantité énorme d'éléments de preuve produits au cours d'un procès de 339 jours étalé sur une période de cinq ans. Une grande partie de la preuve était historique et donc, de par sa nature, parfois imprécise. Le juge de première instance a passé de longues périodes de temps dans le territoire revendiqué en compagnie de témoins et a entendu des témoignages sur la façon dont différents secteurs étaient utilisés. En l'absence d'une erreur manifeste, ses conclusions ne devraient pas être modifiées.

[62] Cela étant dit, j'ai accepté la proposition de la province d'examiner les cartes et les éléments de preuve et d'apprécier les conclusions du juge de première instance au sujet des secteurs auxquels devrait s'appliquer un jugement déclarant l'existence d'un titre ancestral. Par souci de clarté, je joins en annexe une carte qui montre les divers territoires et la façon dont le juge de première instance les a considérés (Annexe; voir l'annexe « A » du mémoire de l'appelant). Les limites territoriales définies par le juge de première instance et ses conclusions quant au titre ancestral semblent logiques et entièrement étayées par la preuve.

[63] Le juge de première instance a divisé le territoire revendiqué en six régions et a ensuite examiné de nombreux sites à l'intérieur de chaque région. Il a examiné des éléments de preuve archéologique et historique ainsi que les récits oraux des aînés autochtones faisant état de ces sites. À certains de ces sites, bien que la preuve donnait à penser que les Tsilhqot'in y avaient été présents, il a conclu que la preuve ne permettait pas d'établir une occupation régulière et exclusive. À d'autres sites, il a estimé que la preuve établissait une telle occupation. Après avoir examiné un grand nombre de sites, le juge de première instance a pu inférer les limites à l'intérieur desquelles les Tsilhqot'in occupaient régulièrement et exclusivement le territoire. En procédant de cette façon, le juge de première instance n'a commis aucune erreur.

[64] La province critique également le juge de première instance parce qu'il a donné son avis sur des terres qui se trouvent à l'extérieur du territoire

mandate of a trial judge who, should pronounce only on pleaded matters.

[65] In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

[66] I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (para. 117), including non-traditional purposes, provided these

revendiqué. Selon la province, cela outrepassait le mandat d'un juge de première instance, qui doit se prononcer seulement sur les questions soulevées.

[65] À mon avis, cette critique est inappropriée. Il est évident qu'aucun jugement déclarant l'existence d'un titre n'aurait pu être rendu à l'égard de terres se trouvant à l'extérieur du territoire revendiqué. Les commentaires du juge de première instance à propos de secteurs non revendiqués n'étaient pas de la nature d'une décision, mais visaient simplement à fournir des pistes pour de futures négociations relatives aux revendications territoriales. Après avoir examiné la preuve et en avoir tiré des conclusions, il était logique, sur les plans économique et pratique, que le juge de première instance donne son opinion aux parties. De plus, ainsi que je l'ai fait remarquer lorsque je me suis penchée sur l'approche qu'il convient d'adopter à l'égard des actes de procédure dans les cas où un titre ancestral est en cause, ces affaires soulèvent des considérations particulières. Souvent, la portée d'une revendication ne peut être établie avec précision au début des procédures. La situation s'éclaircit au fur et à mesure que les éléments de preuve se dégagent sur une période qui peut être longue. Si, à la fin du processus, les limites de la revendication initiale et les limites établies suivant la preuve sont différentes, il ne faudrait pas reprocher au juge de première instance de le souligner.

[66] J'estime que le juge de première instance a eu raison de conclure que l'occupation des Tsilhqot'in était suffisante et exclusive au moment de l'affirmation de la souveraineté. Il y avait amplement d'éléments de preuve démontrant une occupation antérieure à l'affirmation de la souveraineté, et cette preuve était renforcée par des éléments de preuve démontrant une occupation continue plus récente.

VI. Quels droits confère le titre ancestral?

[67] Je le rappelle, l'arrêt *Delgamuukw* établit que le titre ancestral « comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins » (par. 117), y compris des fins non traditionnelles, dans la mesure

uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. *The Legal Characterization of Aboriginal Title*

[69] The starting point in characterizing the legal nature of Aboriginal title is Dickson J.'s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[70] The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land . . . for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does

où ces utilisations peuvent se concilier avec la nature collective et continue de l'attachement qu'a le groupe pour le territoire visé. Sous réserve de cette limite intrinsèque, le groupe qui détient le titre a le droit de choisir les utilisations qui sont faites de ces terres et de bénéficier des avantages économiques qu'elles procurent (par. 166).

[68] Je vais d'abord examiner la qualification juridique du titre ancestral. J'exposerai ensuite mes observations sur ce que le titre ancestral confère à ses titulaires et sur les limites auxquelles il est assujetti.

A. *La qualification juridique du titre ancestral*

[69] Le point de départ de la qualification de la nature juridique du titre ancestral est le jugement concordant du juge Dickson dans l'arrêt *Guerin*, dont il est question précédemment. Au moment de l'affirmation de la souveraineté européenne, la Couronne a acquis un titre absolu ou sous-jacent sur toutes les terres de la province. Ce titre était toutefois grevé des droits préexistants des peuples autochtones qui occupaient et utilisaient les terres avant l'arrivée des Européens. La doctrine de la *terra nullius* (selon laquelle nul ne possédait la terre avant l'affirmation de la souveraineté européenne) ne s'est jamais appliquée au Canada, comme l'a confirmé la *Proclamation royale* de 1763. Le droit des Autochtones sur les terres qui grève le titre sous-jacent de la Couronne a une existence juridique indépendante qui donne naissance à une obligation fiduciaire de la part de la Couronne.

[70] Le contenu du titre sous-jacent de la Couronne est ce qui reste après la soustraction du titre ancestral : art. 109 de la *Loi constitutionnelle de 1867*; *Delgamuukw*. Comme nous l'avons déjà vu, l'arrêt *Delgamuukw* établit que le titre ancestral accorde « le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins », lesquelles ne se limitent pas aux utilisations traditionnelles ou « distinctives » (par. 117). Autrement dit, le titre ancestral est un intérêt bénéficiaire sur les terres : *Guerin*, p. 382. En termes simples, les titulaires du titre ont droit aux avantages associés aux terres — de les utiliser,

not retain a beneficial interest in Aboriginal title land.

[71] What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act*, *1982*.

[72] The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

B. *The Incidents of Aboriginal Title*

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.

d'en jouir et de profiter de leur développement économique. Par conséquent, la Couronne ne conserve pas un intérêt bénéficiaire sur les terres visées par un titre ancestral.

[71] Alors, que reste-t-il du titre absolu ou sous-jacent de la Couronne sur les terres détenues en vertu d'un titre ancestral? Il ressort de la doctrine et de la jurisprudence deux éléments connexes — une obligation fiduciaire de la Couronne envers les Autochtones à l'égard des terres ancestrales et le droit de porter atteinte au titre ancestral si le gouvernement peut démontrer que l'atteinte est justifiée dans l'intérêt général du public en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*. Dans l'arrêt *Delgamuukw*, la Cour a dit qu'il s'agissait d'un processus de conciliation des intérêts autochtones et de l'intérêt général du public en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*.

[72] Les caractéristiques du titre ancestral découlent de la relation particulière entre la Couronne et le groupe autochtone en question. C'est cette relation qui rend le titre ancestral *sui generis*, ou unique. Le titre ancestral est ce qu'il est — le résultat unique de la relation historique entre la Couronne et le groupe autochtone en question. Des analogies avec d'autres formes de propriété — par exemple, la propriété en fief simple — peuvent être utiles pour mieux comprendre certains aspects du titre ancestral. Cependant, elles ne peuvent pas dicter précisément en quoi il consiste ou ne consiste pas. Comme le juge La Forest l'a indiqué dans *Delgamuukw*, par. 190, le titre ancestral « n'équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens ».

B. *Les attributs du titre ancestral*

[73] Le titre ancestral confère des droits de propriété semblables à ceux associés à la propriété en fief simple, y compris le droit de déterminer l'utilisation des terres, le droit de jouissance et d'occupation des terres, le droit de posséder les terres, le droit aux avantages économiques que procurent les terres et le droit d'utiliser et de gérer les terres de manière proactive.

[74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

[74] Cependant, le titre ancestral comporte une restriction importante — il s'agit d'un titre collectif détenu non seulement pour la génération actuelle, mais pour toutes les générations futures. Cela signifie qu'il ne peut pas être cédé, sauf à la Couronne, ni être grevé d'une façon qui empêcherait les générations futures du groupe d'utiliser les terres et d'en jouir. Les terres ne peuvent pas non plus être aménagées ou utilisées d'une façon qui priverait de façon substantielle les générations futures de leur utilisation. Il peut être possible d'apporter certaines modifications — même permanentes — aux terres. La question de savoir si une utilisation particulière est irréconciliable avec la possibilité pour les générations futures de bénéficier des terres constituera une question qu'il faudra trancher lorsqu'elle se posera.

[75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

[75] Les droits et restrictions afférents au titre ancestral découlent de l'intérêt que ce titre confère, intérêt qui découle à son tour de l'occupation autochtone à l'époque de la souveraineté européenne et qui grève le titre sous-jacent revendiqué par la Couronne au moment de l'affirmation de la souveraineté. Le titre ancestral postérieur à l'affirmation de la souveraineté reflète le fait que les Autochtones occupaient le territoire avant l'affirmation de la souveraineté, avec tous les attributs que constituent les droits d'utilisation et de jouissance qui existaient avant l'affirmation de la souveraineté et qui composaient le titre collectif détenu par les ancêtres du groupe revendicateur — notamment le droit de contrôler l'utilisation des terres. Cependant, les utilisations ne se limitent pas aux utilisations et aux coutumes antérieures à l'affirmation de la souveraineté; tout comme les autres propriétaires fonciers, les titulaires du titre ancestral des temps modernes peuvent utiliser leurs terres de façon moderne, s'ils le veulent.

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

[76] Le droit de contrôler la terre que confère le titre ancestral signifie que les gouvernements et les autres personnes qui veulent utiliser les terres doivent obtenir le consentement des titulaires du titre ancestral. Si le groupe autochtone ne consent pas à l'utilisation, le seul recours du gouvernement consiste à établir que l'utilisation proposée est justifiée en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*.

C. *Justification of Infringement*

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast,

C. *La justification de l'atteinte*

[77] Pour justifier qu'il puisse passer outre aux volontés du groupe qui détient le titre ancestral au motif que l'atteinte sert l'intérêt général du public, le gouvernement doit établir : (1) qu'il s'est acquitté de son obligation procédurale de consultation et d'accommodement; (2) que ses actes poursuivaient un objectif impérieux et réel; et (3) que la mesure gouvernementale est compatible avec l'obligation fiduciaire qu'a la Couronne envers le groupe : *Sparrow*.

[78] L'obligation de consultation est une obligation procédurale que fait naître l'honneur de la Couronne avant que l'existence du titre soit confirmée. Lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle ou réelle du titre ancestral et qu'elle envisage une mesure susceptible d'avoir un effet préjudiciable sur ce titre, elle est tenue de consulter le groupe qui revendique le titre ancestral et, s'il y a lieu, de trouver des accommodements au droit ancestral. L'obligation de consultation doit être respectée avant la prise de mesures pouvant avoir un effet préjudiciable sur le droit.

[79] L'obligation de consultation et d'accommodement se situe à l'intérieur d'un continuum, comme il en a été question dans l'arrêt *Nation haïda*. En général, le niveau de consultation et d'accommodement nécessaire est proportionnel à la solidité de la revendication et à la gravité de l'incidence négative que la mesure gouvernementale proposée aurait sur le droit revendiqué. « Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes » (par. 37). Le niveau de consultation et d'accommodement nécessaire est le plus élevé lorsque l'existence du titre a été établie. Lorsque la consultation ou l'accommodement est jugé insuffisant, la décision du gouvernement peut être suspendue ou annulée.

[80] Lorsque l'existence du titre ancestral n'est pas établie, l'honneur de la Couronne lui impose une obligation procédurale de consultation et, s'il y a lieu, d'accommodement de l'intérêt autochtone

where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

> . . . the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can

non encore établi. Par contre, lorsque l'existence du titre a été établie, la Couronne doit non seulement se conformer à ses obligations procédurales, mais doit aussi s'assurer que la mesure gouvernementale proposée est fondamentalement conforme aux exigences de l'art. 35 de la *Loi constitutionnelle de 1982*. Pour cela, le gouvernement doit poursuivre un objectif impérieux et réel et il doit démontrer que la mesure proposée est compatible avec l'obligation fiduciaire de la Couronne envers le groupe autochtone.

[81] Je conviens avec la Cour d'appel que l'objectif impérieux et réel du gouvernement doit être examiné du point de vue des Autochtones ainsi que du point de vue de l'intérêt général du public. Comme il est indiqué au par. 72 de l'arrêt *Gladstone* :

> . . . sont considérés comme des objectifs impérieux et réels les objectifs visant soit la reconnaissance de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones soit — et, à l'étape de la justification, ce genre d'objectifs pourrait bien être le plus pertinent — la conciliation de cette occupation avec l'affirmation par Sa Majesté de sa souveraineté sur ce territoire. [Je souligne.]

[82] Comme l'explique la Cour dans l'arrêt *Delgamuukw*, le processus de conciliation des intérêts autochtones avec l'intérêt général de la société dans son ensemble constitue la raison d'être du principe de la justification. Les Autochtones et les non-Autochtones sont « tous ici pour y rester » et doivent forcément favoriser un processus de conciliation (par. 186). Pour constituer un objectif impérieux et réel, l'objectif général du public invoqué par le gouvernement doit poursuivre l'objectif de conciliation, compte tenu des intérêts autochtones et de l'objectif général du public.

[83] Quels objectifs peuvent justifier une atteinte au titre ancestral? Dans *Delgamuukw*, le juge en chef Lamer a fait les remarques suivantes au nom de la Cour :

> Depuis *Gladstone*, l'éventail d'objectifs législatifs qui peuvent justifier une atteinte au titre aborigène est assez large. La plupart de ces objectifs peuvent être rattachés

be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.]

à la conciliation de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones avec l'affirmation de la souveraineté de la Couronne, ce qui nécessite la reconnaissance du fait que les « sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie » (au par. 73). À mon avis, l'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet et qui, en principe, peuvent justifier une atteinte à un titre aborigène. Toutefois, la question de savoir si une mesure ou un acte donné du gouvernement peut être expliqué par référence à l'un de ces objectifs est, en dernière analyse, une question de fait qui devra être examinée au cas par cas. [Je souligne; soulignement dans l'original omis; par. 165.]

[84] If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.

[84] Si le gouvernement démontre qu'il poursuit un objectif impérieux et réel, il doit ensuite prouver que l'atteinte proposée au droit ancestral est compatible avec l'obligation fiduciaire de la Couronne envers les peuples autochtones.

[85] The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.

[85] Dans le contexte de la justification, l'obligation fiduciaire de la Couronne mérite une analyse plus approfondie. Le titre sous-jacent de la Couronne sur les terres est détenu au profit du groupe autochtone et encadré par l'obligation fiduciaire de la Couronne envers le groupe. Cela influence le processus de justification de deux façons.

[86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

[86] Premièrement, l'obligation fiduciaire de la Couronne signifie que le gouvernement doit agir d'une manière qui respecte le fait que le titre ancestral est un droit collectif inhérent aux générations actuelles et futures. L'intérêt bénéficiaire sur les terres que détient le groupe autochtone est dévolu à l'ensemble des membres du groupe titulaire du titre. Les atteintes au titre ancestral ne peuvent donc pas être justifiées si elles priveront de façon substantielle les générations futures des avantages que procurent les terres.

[87] Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty

[87] Deuxièmement, l'obligation fiduciaire de la Couronne insuffle une obligation de proportionnalité dans le processus de justification. Il ressort

to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "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" (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. *Remedies and Transition*

[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails

implicitement de l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone que l'atteinte doit être nécessaire pour atteindre l'objectif gouvernemental (lien rationnel), que le gouvernement ne va pas au-delà de ce qui est nécessaire pour atteindre cet objectif (atteinte minimale) et que les effets préjudiciables sur l'intérêt autochtone ne l'emportent pas sur les avantages qui devraient découler de cet objectif (proportionnalité de l'incidence). L'exigence de proportionnalité est inhérente au processus de conciliation énoncé dans l'arrêt *Delgamuukw* et elle a été reprise dans l'arrêt *Nation haïda*, où la Cour insiste sur le fait que l'obligation de la Couronne de consulter et d'accommoder à l'étape des revendications « dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre » (par. 39).

[88] En résumé, le titre ancestral confère au groupe qui le détient le droit exclusif de déterminer l'utilisation qu'il est fait des terres et le droit de bénéficier des avantages que procure cette utilisation, sous réserve d'une seule exception, soit que les utilisations respectent sa nature collective et préservent la jouissance des terres pour les générations futures. Lorsque le gouvernement porte atteinte au titre ancestral sans le consentement du groupe titulaire du titre, il doit le faire en respectant l'obligation procédurale de la Couronne de consulter le groupe. L'atteinte doit également être justifiée par la poursuite d'un objectif public impérieux et réel et elle doit être compatible avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone.

D. *Mesures de réparation et période transitoire*

[89] Avant que l'existence du titre soit établie par un jugement déclaratoire ou une entente, la Couronne est tenue de consulter de bonne foi les groupes autochtones qui revendiquent le titre sur des terres au sujet de ses projets d'utilisation des terres et, s'il y a lieu, de trouver des accommodements aux intérêts de ces groupes. Le niveau de consultation et d'accommodement requis varie en fonction de la solidité de la revendication du groupe autochtone et de la gravité de l'effet

to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

préjudiciable éventuel sur l'intérêt revendiqué. Le manquement par la Couronne à son obligation de consultation peut donner lieu à diverses mesures de réparation, notamment une injonction, des dommages-intérêts ou une ordonnance enjoignant la tenue de consultations ou la prise de mesures d'accommodement : *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650, par. 37.

[90] Une fois l'existence du titre ancestral sur des terres établie par un jugement déclaratoire ou une entente, le gouvernement doit demander le consentement du groupe autochtone titulaire du titre pour ses projets d'aménagement du territoire. En l'absence de consentement, les projets d'aménagement sur les terres assujetties au titre ne peuvent aller de l'avant si le gouvernement ne s'est pas acquitté de son obligation de consultation et ne peut justifier une atteinte à ce titre aux termes de l'art. 35 de la *Loi constitutionnelle de 1982*. Les mesures de réparation habituelles en cas d'atteinte à des intérêts sur des terres sont disponibles, en les adaptant au besoin en fonction de la nature particulière du titre ancestral et de l'obligation fiduciaire de la Couronne envers les titulaires du titre ancestral.

[91] Il s'ensuit d'un point de vue pratique que des obligations différentes puissent être applicables au fil du temps dans un cas donné. À l'étape de la revendication, avant que soit établie l'existence du titre ancestral, le gouvernement a une obligation de consulter de bonne foi le groupe en cause et, s'il y a lieu, d'accommoder ses intérêts. Alors que la validité de la revendication devient plus apparente, le niveau requis de consultation et d'accommodement augmente proportionnellement. Lorsqu'une revendication est particulièrement solide — par exemple, peu avant qu'un tribunal confirme l'existence du titre — il faut bien prendre soin de préserver l'intérêt autochtone en attendant le règlement définitif de la revendication. Enfin, une fois l'existence du titre établie, le gouvernement ne peut réaliser, sur les terres grevées d'un titre ancestral, un projet d'aménagement auquel le groupe titulaire du titre n'a pas consenti à moins qu'il se soit acquitté de son obligation de consultation et que le projet d'aménagement soit justifié au sens de l'art. 35 de la *Loi constitutionnelle de 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

[93] Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

[92] Une fois l'existence du titre établie, il peut être nécessaire pour le gouvernement de réévaluer sa conduite passée compte tenu de cette nouvelle réalité afin de s'acquitter fidèlement par la suite de son obligation fiduciaire envers le groupe titulaire du titre. Par exemple, si, avant que le titre ancestral soit établi, le gouvernement a entrepris un projet sans le consentement du groupe autochtone, il peut être tenu de l'annuler une fois l'existence du titre établie si la poursuite du projet porte indûment atteinte aux droits des Autochtones. De même, si une loi a été valablement adoptée avant que l'existence du titre soit établie, elle pourra être déclarée inapplicable pour l'avenir dans la mesure où elle porte injustement atteinte au titre ancestral.

E. *Quelles étaient les obligations de la Couronne au moment de la prise de la mesure gouvernementale?*

[93] Avant le jugement déclarant l'existence du titre ancestral, la province était tenue de consulter les Tsilhqot'in et de trouver des accommodements aux intérêts qu'ils revendiquaient. Au moment de la prise de la mesure gouvernementale contestée, la revendication du titre sur les terres par les Tsilhqot'in était à première vue solide et l'obligation de consultation de la Couronne se situait au haut du continuum décrit dans *Nation haïda* et exigeait un niveau élevé de consultation et d'accommodement afin de préserver les intérêts des Tsilhqot'in.

[94] Maintenant qu'un jugement a reconnu l'existence du titre, le peuple Tsilhqot'in détient un titre ancestral sur la partie du territoire désignée par le juge de première instance, sous réserve de l'exception indiquée au par. 9 des présents motifs. Cela donne au peuple Tsilhqot'in, sous réserve des limites inhérentes au titre collectif détenu au bénéfice des générations futures, le droit de déterminer les utilisations des terres et de bénéficier des avantages économiques qu'elles procurent. Comme nous l'avons déjà vu, il ne s'agit pas simplement d'un droit de premier refus sur la gestion des terres de la Couronne ou sur les plans de leur utilisation. Il s'agit plutôt du droit d'utiliser et de gérer les terres de façon proactive.

VII. Breach of the Duty to Consult

[95] The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

[96] The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

[97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

VII. Le manquement à l'obligation de consultation

[95] En l'espèce, le manquement allégué découle de la délivrance, par la province, de permis permettant à des tiers de mener des activités forestières et de construire des infrastructures connexes sur les terres à compter de 1983, avant que l'existence du titre soit reconnue. Au cours de cette période, les Tsilhqot'in détenaient sur les terres un intérêt qui n'était pas encore légalement reconnu. Le principe de l'honneur de la Couronne obligeait la province à les consulter à propos des utilisations des terres et à trouver des accommodements à leurs intérêts. La province n'a fait ni l'un ni l'autre et a manqué à son obligation envers les Tsilhqot'in.

[96] La Couronne a manqué à son obligation de consultation quand ses représentants ont planifié l'enlèvement du bois. L'inclusion des terres visées par un titre ancestral dans une région d'approvisionnement en bois, l'autorisation de blocs de coupe sur les terres visées par un titre ancestral dans le cadre d'un plan d'aménagement forestier et la délivrance de permis de coupe ont eu lieu sans aucune consultation significative avec les Tsilhqot'in.

[97] J'ajoute ceci. Les gouvernements et particuliers qui proposent d'utiliser ou d'exploiter la terre, que ce soit avant ou après une déclaration de titre ancestral, peuvent éviter d'être accusés de porter atteinte aux droits ou de manquer à l'obligation de consulter adéquatement le groupe en obtenant le consentement du groupe autochtone en question.

VIII. Les lois provinciales et le titre ancestral

[98] Je le rappelle, j'ai conclu que la province a manqué à son obligation de consulter les Tsilhqot'in et de trouver des accommodements à leur intérêt sur les terres. Cela suffit à trancher le pourvoi.

[99] Cependant, les parties ont présenté des observations détaillées sur l'application de la *Forest Act* aux terres visées par un titre ancestral. Les tribunaux d'instance inférieure ont traité de cette question, laquelle prend une grande importance pour le peuple des Tsilhqot'in et pour les autres groupes autochtones de la Colombie-Britannique et d'ailleurs. Il convient donc que nous l'examinions.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. *Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?*

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[100] Les questions qui se posent sont les suivantes : (1) Les lois provinciales d'application générale s'appliquent-elles aux terres visées par un titre ancestral et, dans l'affirmative, comment s'appliquent-elles? (2) À première vue, la *Forest Act* de la Colombie-Britannique s'applique-t-elle aux terres visées par un titre ancestral? Et (3) si, à première vue, la *Forest Act* s'applique, son application est-elle écartée par l'application de la Constitution du Canada? Je vais examiner successivement chacune de ces questions.

A. *Les lois provinciales d'application générale s'appliquent-elles aux terres visées par un titre ancestral?*

[101] De façon générale, les lois provinciales d'application générale s'appliquent aux terres visées par un titre ancestral. Cependant, comme nous le verrons, cet énoncé est assorti de limites constitutionnelles importantes.

[102] En règle générale, les gouvernements provinciaux ont le pouvoir de réglementer l'utilisation des terres situées à l'intérieur de la province. Cette règle s'applique à toutes les terres, qu'elles soient détenues par le gouvernement, par des propriétaires privés ou par les titulaires d'un titre ancestral. Le fondement de ce pouvoir réside dans le par. 92(13) de la *Loi constitutionnelle de 1867*, lequel accorde à la province le pouvoir de légiférer en matière de propriété et de droits civils dans la province.

[103] Le pouvoir provincial de réglementer les terres détenues en vertu d'un titre ancestral est constitutionnellement limité de deux façons. Premièrement, il est limité par l'art. 35 de la *Loi constitutionnelle de 1982*. Aux termes de cet article, toute atteinte aux droits découlant du titre ancestral doit poursuivre un objectif gouvernemental impérieux et réel et doit être compatible avec la relation fiduciaire entre la Couronne et les titulaires du titre. Deuxièmement, le pouvoir d'une province de réglementer les terres visées par un titre ancestral peut aussi, dans certains cas, être limité par le pouvoir fédéral sur les « Indiens et les terres réservées pour les Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867*.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

> Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. *Does the Forest Act on its Face Apply to Aboriginal Title Land?*

[107] Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question

[104] Dans l'arrêt *Sparrow*, notre Cour a laissé entendre que les facteurs suivants seront pertinents au moment de déterminer si une loi d'application générale entraîne une diminution appréciable d'un droit ancestral, ce qui donne lieu à une atteinte : (1) si la restriction imposée par la loi est déraisonnable; (2) si la loi est indûment rigoureuse; et (3) si la loi refuse aux titulaires du droit le recours à leur moyen préféré d'exercer ce droit (p. 1112). Les trois facteurs doivent être pris en compte; par exemple, même s'il est jugé que les lois d'application générale ne sont pas déraisonnables ou indûment rigoureuses, cela ne signifie pas qu'il ne peut pas y avoir d'atteinte au titre ancestral. Comme la Cour l'a affirmé dans l'arrêt *Gladstone* :

> Le simple fait qu'on réponde par la négative à l'une de ces questions [formulées dans l'arrêt *Sparrow*] n'empêche pas le tribunal de conclure à l'existence d'une atteinte à première vue. Cette réponse négative n'est qu'un des facteurs que le tribunal doit prendre en considération pour déterminer s'il y a eu atteinte à première vue. [par. 43]

[105] On peut prévoir que les lois et règlements d'application générale visant à protéger l'environnement ou à assurer, à long terme, la santé des forêts de la Colombie-Britannique seront habituellement raisonnables, qu'ils ne seront pas, directement ou indirectement, indûment rigoureux et qu'ils ne refuseront pas au groupe autochtone leur moyen préféré d'exercer leur droit. Et il faut espérer que les groupes autochtones et le gouvernement provincial collaboreront pour assurer la pérennité de l'environnement naturel qui leur est si important. Cela dit, lorsque survient un conflit, l'analyse qui précède sert à le régler.

[106] Sous réserve de ces contraintes constitutionnelles, les lois provinciales d'application générale s'appliquent aux terres détenues en vertu d'un titre ancestral.

B. *À première vue, la Forest Act s'applique-t-elle aux terres visées par un titre ancestral?*

[107] À ce stade-ci, la question de savoir si une loi d'application générale telle la *Forest Act* était *censée* s'appliquer aux terres visées par un titre

at this point — is always a matter of statutory interpretation.

[108] The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

[109] Under the *Forest Act*, the Crown can only issue timber licences with respect to "Crown timber". "Crown timber" is defined as timber that is on "Crown land", and "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the Crown" (s. 1). The Crown is not empowered to issue timber licences on "private land", which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is "Crown land"; (2) Aboriginal title land is "private land"; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

[110] If Aboriginal title land is "vested in the Crown", then it falls within the definition of "Crown land" and the timber on it is "Crown timber".

[111] What does it mean for a person or entity to be "vested" with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not

ancestral est toujours une question d'interprétation législative.

[108] Selon la règle fondamentale en matière d'interprétation législative, [TRADUCTION] « il faut interpréter les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, son objet et l'intention du législateur » : R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 1.

[109] Aux termes de la *Forest Act*, le gouvernement ne peut délivrer des permis de coupe que pour le [TRADUCTION] « bois des terres publiques », défini comme étant le bois qui se trouve sur les « terres publiques », lesquelles sont définies comme étant les « terres dévolues à la Couronne, qu'elles soient ou non recouvertes d'eau, ou un droit sur ces terres » (art. 1). Le gouvernement n'a pas le pouvoir de délivrer des permis de coupe de bois sur les « terres privées », elles-mêmes définies comme étant toutes les terres qui ne sont pas des terres publiques. La *Forest Act* ne fait pas mention des terres visées par un titre ancestral et nous laisse devant trois possibilités : (1) les terres visées par un titre ancestral sont des « terres publiques »; (2) les terres visées par un titre ancestral sont des « terres privées »; ou (3) la *Forest Act* ne s'applique nullement aux terres visées par un titre ancestral. Pour les besoins du présent pourvoi, il n'y a pas de différence en pratique entre les deux dernières possibilités.

[110] Si les terres visées par un titre ancestral sont « dévolues à la Couronne », la définition des « terres publiques » s'y applique et le bois qui s'y trouve est du « bois des terres publiques ».

[111] Que signifie pour une personne ou une entité le fait qu'un bien lui soit « dévolu »? En droit des biens, un intérêt est dévolu lorsqu'aucune condition ou restriction n'en restreint la jouissance. Un bien peut être dévolu en possession ou en intérêt. Un bien est dévolu en possession lorsque la personne a le droit actuel de jouir du bien. Le domaine viager en est un exemple. Un bien est dévolu en intérêt lorsque le droit d'en prendre possession ultérieurement est figé. Un intérêt

in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary* (9th ed. 2009), *sub verbo* "vested".

[112] Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

[113] The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

[114] It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands

résiduel est dévolu en intérêt mais non en possession : B. Ziff, *Principles of Property Law* (5e éd. 2010), p. 245; *Black's Law Dictionary* (9e éd. 2009), à l'article « *vested* » (dévolu).

[112] Le titre ancestral confère un droit sur les terres-mêmes, et la Couronne est tenue de justifier toute atteinte au titre. J'ai déjà expliqué que le contenu du titre sous-jacent de la Couronne se limite à l'obligation fiduciaire envers les Autochtones et au droit de porter atteinte au titre ancestral dans la mesure où l'atteinte est justifiée. On pourrait difficilement affirmer que la Couronne a le droit actuel de jouir des terres comme elle pourrait le faire dans le cas d'un bien dévolu en possession. De même, bien que le titre ancestral puisse être aliéné en faveur de la Couronne, cela ne confère pas un droit figé de jouir ultérieurement du titre comme elle pourrait le faire dans le cas d'un bien dévolu en intérêt. Il semblerait plutôt que par l'effet du titre ancestral, les terres en question sont dévolues au groupe autochtone.

[113] La deuxième considération en matière d'interprétation législative est plus équivoque. Le législateur peut-il avoir voulu que les vastes territoires de la province susceptibles d'être visés par un titre ancestral soient soustraits à la réglementation de l'exploitation forestière? Et que dire de la longue période pendant laquelle les revendications territoriales font l'objet de négociation et le titre ancestral demeure incertain? Pendant cette période, les groupes autochtones n'ont pas le droit de gérer les forêts; ils ont seulement droit qu'on les consulte et, s'il y a lieu, qu'on les accommode relativement à l'utilisation des terres : *Nation haïda*. À cette étape, le gouvernement peut continuer à gérer la ressource en question, mais l'honneur de la Couronne l'oblige à respecter la revendication non encore prouvée.

[114] Il semble ressortir clairement du dossier historique et du dossier en l'espèce que dans ce contexte évolutif, le législateur de la Colombie-Britannique s'est fondé sur le fait que les terres revendiquées demeurent des [TRADUCTION] « terres publiques » au sens de la *Forest Act*, du moins jusqu'à ce que le titre ancestral soit reconnu par un tribunal ou une entente. Autrement, personne

of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words "vested in the Crown" to cover at least lands to which Aboriginal title had not yet been confirmed.

[115] I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order.* To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands.

[116] Applied to this case, this means that as a matter of statutory construction, the lands in question were "Crown land" under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. *Is the Forest Act Ousted by the Constitution?*

[117] The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial

ne se serait occupé des forêts qui couvrent des centaines de milliers d'hectares et qui représentent une ressource d'une valeur inestimable. Compte tenu de ce contexte historique très particulier, il semble clair que le législateur doit avoir voulu que les mots « dévolues à la Couronne » s'appliquent au moins aux terres sur lesquelles l'existence du titre ancestral n'était pas encore confirmée.

[115] Je conclus que le législateur voulait que la *Forest Act* s'applique aux terres visées par une revendication de titre ancestral, *jusqu'à ce que l'existence du titre soit confirmée par une entente ou une ordonnance judiciaire.* Conclure autrement reviendrait à accepter que le législateur voulait que les forêts se trouvant sur ces terres ne soient pas du tout réglementées et minerait la prémisse sur laquelle était fondée l'obligation de consulter confirmée dans l'arrêt *Nation haïda*. Cependant, une fois que l'existence du titre ancestral est confirmée, les terres sont « dévolues » au groupe autochtone et ne sont plus des terres publiques.

[116] L'application de cette conclusion en l'espèce signifie que, selon les règles d'interprétation législative, les terres en question étaient des [TRADUCTION] « terres publiques » aux termes de la *Forest Act* au moment où les permis d'exploitation forestière ont été délivrés. Cependant, maintenant que l'existence du titre a été établie, l'intérêt bénéficiaire sur les terres est dévolu au groupe autochtone et non à la Couronne. La définition de « bois des terres publiques » ne s'applique plus au bois qui se trouve sur ces terres et la *Forest Act* ne s'y applique plus. J'aimerais préciser un point évident — le législateur peut toujours modifier la *Forest Act* afin qu'elle s'applique sur les terres visées par un titre ancestral, à la condition de respecter les contraintes constitutionnelles applicables.

C. *La Forest Act est-elle écartée par la Constitution?*

[117] La question suivante consiste à savoir si la Constitution permet au législateur provincial de légiférer sur les forêts qui se trouvent sur des terres visées par un titre ancestral. Actuellement, la *Forest Act* s'applique aux terres visées par une revendication du titre ancestral, mais pas aux terres

legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

sur lesquelles l'existence de ce titre a été confirmée. Cependant, le législateur provincial pourrait modifier la *Forest Act* de manière à ce qu'elle s'applique explicitement aux terres sur lesquelles l'existence du titre ancestral a été confirmée. Cela soulève la question de savoir si la Constitution écarte les lois provinciales régissant l'exploitation forestière qui, à première vue, sont censées s'appliquer aux terres visées par un titre ancestral.

1. Section 35 of the *Constitution Act, 1982*

[118] Section 35 of the *Constitution Act, 1982* represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

[119] Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. "[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights" (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive

1. L'article 35 de la *Loi constitutionnelle de 1982*

[118] L'article 35 de la *Loi constitutionnelle de 1982* représente « l'aboutissement d'une bataille longue et difficile à la fois dans l'arène politique et devant les tribunaux pour la reconnaissance de droits ancestraux » (*Sparrow*, p. 1105). Il protège les droits ancestraux contre l'exercice, par les provinces et le fédéral, de leur compétence législative et prévoit un cadre qui facilite les négociations et la conciliation des intérêts autochtones avec ceux du public en général.

[119] Selon le par. 35(1), les droits ancestraux existants sont « reconnus et confirmés ». Dans *Sparrow*, notre Cour a conclu que ces mots devaient être interprétés de façon libérale en fonction de l'objet qu'ils visent. La reconnaissance et la confirmation des droits ancestraux consacrent dans la Constitution les obligations fiduciaires de la Couronne envers les peuples autochtones. Bien que les droits reconnus et confirmés ne soient pas absolus, l'art. 35 oblige la Couronne à concilier son pouvoir avec son obligation. « [L]a meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux » (*Sparrow*, p. 1109). Le juge en chef Dickson et le juge La Forest ont précisé cet objectif comme suit à la p. 1110 :

> La reconnaissance constitutionnelle exprimée dans la disposition en cause permet donc, dans une certaine mesure, de contrôler la conduite du gouvernement et de limiter fortement le pouvoir du législateur. Bien qu'elle ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans une société qui, au XX^{e} siècle, devient de plus en plus complexe et interdépendante et où il est nécessaire

promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s. 35(1).

de protéger et de gérer les ressources épuisables, cette reconnaissance représente un engagement important de la part de la Couronne. Le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

[120] Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

[120] Lorsqu'une mesure législative porte atteinte à un droit ancestral protégé par l'art. 35 de la *Loi constitutionnelle de 1982*, il faut se poser deux questions. Premièrement, la mesure porte-t-elle atteinte au droit ancestral (une atteinte à première vue, dans l'arrêt *Sparrow*)? Deuxièmement, dans l'affirmative, l'atteinte peut-elle être justifiée?

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

[121] Le tribunal doit d'abord examiner les caractéristiques ou les attributs du droit en question. Dans le cas du titre ancestral, trois attributs sont pertinents : (1) le droit d'utiliser et d'occuper les terres de façon exclusive; (2) le droit de choisir les utilisations qui peuvent être faites des terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures des peuples autochtones; (3) le droit de bénéficier des avantages économiques que procurent les terres (*Delgamuukw*, par. 166).

[122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

[122] Ensuite, pour déterminer si la mesure législative porte atteinte au droit, le tribunal doit se demander si la mesure entraîne une diminution appréciable du droit : *Gladstone*. Comme je l'ai déjà expliqué, dans *Sparrow*, la Cour a laissé entendre que les trois facteurs suivants peuvent permettre de déterminer s'il y a eu atteinte : (1) si la restriction imposée par la loi est déraisonnable; (2) si la loi est indûment rigoureuse; et (3) si la loi refuse aux titulaires du droit le recours à leur moyen préféré de l'exercer (p. 112).

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

[123] Une loi de nature réglementaire de portée générale, par exemple une loi visant la gestion des forêts en prévenant les infestations de ravageurs ou les feux de forêt, satisfera souvent au critère énoncé dans *Sparrow* car elle sera raisonnable, ne sera pas indûment rigoureuse et ne refusera pas aux titulaires du droit le recours à leur moyen préféré de l'exercer. Dans un tel cas, il n'y a aucune atteinte.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[124] Une loi de nature réglementaire de portée générale susceptible de modifier le mode d'exercice du droit ancestral diffère d'une loi qui a pour effet de céder à des tiers des droits de propriété des Autochtones. La délivrance de permis de coupe de bois sur des terres grevées du titre ancestral par exemple — un transfert direct à des tiers de droits de propriété des Autochtones — constituera manifestement une diminution significative du droit de propriété du groupe autochtone assimilable à une atteinte qui doit être justifiée dans les cas où les Autochtones n'y ont pas consenti.

[125] J'ai déjà expliqué que, pour justifier une atteinte, la Couronne doit démontrer : (1) qu'elle s'est acquittée de son obligation procédurale de consulter les titulaires d'un droit et de trouver des accommodements au droit, dans la mesure appropriée, à l'étape où l'atteinte était envisagée; (2) que l'atteinte poursuit un objectif législatif impérieux et réel dans l'intérêt du public; (3) que l'intérêt du public est proportionnel à tout effet négatif sur l'intérêt autochtone. Ce cadre permet une conciliation rationnelle des droits ancestraux et des intérêts de tous les Canadiens.

[126] Bien qu'il ne soit pas nécessaire de trancher cette question pour les besoins du présent pourvoi, les tribunaux d'instance inférieure ont abordé la question de savoir si la Colombie-Britannique poursuivait un objectif impérieux et réel en délivrant dans ce cas des permis de coupe, et je vais formuler les observations suivantes au bénéfice de toutes les parties éventuelles. Je conviens avec les tribunaux d'instance inférieure qu'il n'existait aucun objectif impérieux et réel en l'espèce. Le juge de première instance a conclu que les deux objectifs invoqués par la province — les avantages économiques liés à l'exploitation forestière sur les terres visées par une revendication du titre et la nécessité d'empêcher la propagation d'une infestation du dendroctone du pin ponderosa — n'étaient pas étayés par la preuve. Après avoir examiné les témoignages d'experts dont il disposait, il a conclu que les sites de coupe proposés n'étaient pas rentables et qu'ils ne visaient pas à empêcher la propagation du dendroctone du pin ponderosa.

[127] Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

[128] The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

[129] "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both

[127] Devant la Cour d'appel, la province ne prétendait plus que les activités forestières visaient à combattre l'infestation du dendroctone du pin ponderosa, mais elle a continué de soutenir que les conclusions du juge de première instance sur la rentabilité étaient déraisonnables parce que, si les travaux d'exploitation forestière n'avaient pas été rentables, ils n'auraient pas été effectués. La Cour d'appel a rejeté cet argument pour deux raisons : (1) les titulaires d'une tenure forestière doivent parfois maintenir l'exploitation forestière pour conserver leurs droits, même si ce n'est pas rentable; (2) l'accent porte sur la valeur économique de l'exploitation forestière par rapport aux effets préjudiciables qu'elle aurait sur les droits ancestraux des Tsilhqot'in, et non sur la rentabilité de l'exploitation forestière uniquement du point de vue du titulaire de la tenure forestière. En bref, la Cour d'appel n'a relevé aucune erreur dans le raisonnement du juge de première instance sur ce point. Je suis d'accord. Accorder à des tiers le droit de récolter du bois sur les terres des Tsilhqot'in constitue une atteinte grave qui ne sera pas justifiée à la légère. Si le gouvernement souhaite à l'avenir accorder de tels droits de récolte, il devra établir qu'il poursuit par la récolte un objectif impérieux et réel, ce qui n'a pas été fait en l'espèce.

2. Le partage des compétences

[128] Comme je l'ai déjà indiqué, le point de départ est que, de façon générale, la réglementation de l'exploitation forestière dans la province relève du pouvoir que le par. 92(13) de la *Loi constitutionnelle de 1867* accorde à la province en matière de propriété et de droits civils. Sur le plan constitutionnel, la réglementation de l'exploitation forestière est, « de par son caractère véritable », une compétence provinciale. Ainsi, la *Forest Act* respecte le partage des compétences à moins qu'elle soit écartée par une compétence fédérale, même si elle peut, de manière incidente, toucher les matières relevant de la compétence fédérale.

[129] « Les Indiens et les terres réservées pour les Indiens » relèvent de la compétence fédérale en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Par conséquent, les ressources forestières

the provincial power over forestry in the province and the federal power over "Indians". Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

qui se trouvent sur des terres visées par un titre ancestral relèvent à la fois de la compétence provinciale en matière de ressources forestières dans la province et de la compétence fédérale sur les « Indiens ». Ainsi, sur le plan constitutionnel, les ressources forestières qui se trouvent sur les terres visées par un titre ancestral comportent un double aspect puisque les deux paliers de gouvernement exercent sur elles une compétence concurrente. Habituellement, une telle compétence concurrente ne crée pas de conflit — les gouvernements fédéral et provinciaux collaborent de manière productive dans plusieurs domaines qui comportent un double aspect, par exemple l'insolvabilité et la garde des enfants. Cependant, lorsque se présente un conflit de compétence, deux doctrines permettent de le résoudre.

[130] First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament's power over "Indians", the latter would trump the former. No such inconsistency is alleged in this case.

[130] Premièrement, la doctrine de la prépondérance s'applique en cas de conflit ou d'incompatibilité entre une loi provinciale et une loi fédérale, en ce sens qu'il est impossible de se conformer aux deux textes de loi ou que la réalisation de l'objet d'une loi fédérale est entravée. Dans un tel cas, la loi fédérale l'emporte. Par conséquent, si l'application d'une loi provinciale valide, comme la *Forest Act*, entre en conflit avec une loi fédérale valide adoptée en vertu du pouvoir du Parlement sur les « Indiens », la seconde aurait priorité sur la première. On n'a allégué l'existence d'aucune incompatibilité de la sorte en l'espèce.

[131] Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions. First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power? (*Quebec (Attorney General) v.*

[131] Deuxièmement, la doctrine de l'exclusivité des compétences s'applique lorsque des lois adoptées par un palier de gouvernement entravent le contenu essentiel protégé d'une compétence de l'autre palier de gouvernement. Cette doctrine repose sur la prémisse que, puisque les compétences fédérales et provinciales prévues aux art. 91 et 92 de la *Loi constitutionnelle de 1867* sont exclusives, chaque palier de gouvernement exerce sa compétence sur un contenu minimum essentiel et irréductible auquel l'autre palier de gouvernement ne peut toucher. Pour déterminer si une loi provinciale comme la *Forest Act* est écartée par l'application de la doctrine de l'exclusivité des compétences, le tribunal doit se poser deux questions. Premièrement, la loi provinciale touche-t-elle un aspect du contenu essentiel protégé de la compétence fédérale? Et

Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536).

[132] The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over "Indians". He placed considerable reliance on *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over "Indians". It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

[133] The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

[134] The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[135] The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to "Indians" under s. 91(24) is somewhat mixed. While no case has held that Aboriginal

deuxièmement, l'application de la loi provinciale pourrait-elle entraver de façon importante la compétence fédérale? (*Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536).

[132] Le juge de première instance a conclu que l'exclusivité des compétences rendait les dispositions de la *Forest Act* inapplicables aux terres détenues en vertu d'un titre ancestral parce que les dispositions autorisant la gestion, l'acquisition, l'enlèvement et la vente du bois sur ces terres touchent au contenu essentiel de la compétence fédérale sur les « Indiens ». Il a accordé une grande importance à l'arrêt *R. c. Morris*, 2006 CSC 59, [2006] 2 R.C.S. 915, dans lequel la Cour a conclu que seul le Parlement a le pouvoir de déroger aux droits reconnus dans un traité parce que les droits issus de traités se rattachent au contenu essentiel de la compétence fédérale sur les « Indiens ». Le juge de première instance a donc estimé que, comme les droits ancestraux s'apparentent aux droits issus de traités, la province n'a pas le pouvoir de légiférer relativement aux forêts qui se trouvent sur les terres visées par un titre ancestral.

[133] Le raisonnement adopté par le juge de première instance est essentiellement le suivant. Les droits ancestraux font partie du contenu essentiel de la compétence fédérale prévue au par. 91(24) de la *Loi constitutionnelle de 1867*. La doctrine de l'exclusivité des compétences s'applique aux matières qui font partie du contenu essentiel du par. 91(24). Par conséquent, la Constitution empêche les gouvernements provinciaux de légiférer d'une manière qui limite les droits ancestraux. Ce raisonnement suscite un certain nombre de difficultés.

[134] La proposition suivant laquelle les droits ancestraux font partie du contenu essentiel de la compétence fédérale en matière de réglementation prévue au par. 91(24) de la *Loi constitutionnelle de 1867* constitue l'aspect crucial de ce raisonnement.

[135] La jurisprudence est quelque peu ambiguë quant à savoir si les droits visés à l'art. 35 font partie du contenu essentiel du pouvoir fédéral de faire des lois relatives aux « Indiens » prévu au

rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta.* However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* — this latter proposition being inconsistent with the reasoning accepted by the trial judge.

par. 91(24). Aucune décision n'a conclu que les droits ancestraux, par exemple le titre ancestral sur des terres, font partie du contenu essentiel de la compétence fédérale prévue au par. 91(24), mais on l'indique dans des remarques incidentes. Toutefois, notre Cour a également indiqué dans des remarques incidentes que la Constitution permet aux gouvernements provinciaux de porter atteinte aux droits ancestraux lorsque ces atteintes sont justifiées au sens de l'art. 35 de la *Loi constitutionnelle de 1982* — et cette proposition va à l'encontre du raisonnement que le juge de première instance a accepté.

[136] In *R. v. Marshall*, [1999] 3 S.C.R. 533, this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

[136] Dans l'arrêt *R. c. Marshall*, [1999] 3 R.C.S. 533, notre Cour a supposé que l'exclusivité des compétences ne s'appliquait pas en cas de conflit entre une loi provinciale et des droits issus d'un traité. Le cadre d'analyse relatif à l'art. 35 énoncé dans *Sparrow* a plutôt été retenu comme le moyen permettant de résoudre le conflit :

> . . . the federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives . . . . [para. 24]

> . . . les gouvernements fédéral et provinciaux [ont le pouvoir] de réglementer, dans les limites de leurs champs respectifs de compétences législatives, l'exercice du droit issu du traité, sous réserve du fait que la Constitution exige que les restrictions imposées à l'exercice de ce droit soient justifiées pour des raisons de conservation ou pour d'autres objectifs d'intérêt public réels et impérieux . . . [par. 24]

[137] More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

[137] Plus récemment cependant, dans l'arrêt *Morris*, notre Cour a fait une distinction avec l'arrêt *Marshall* puisque le droit issu du traité en question dans *Marshall* était un droit de nature commerciale. Dans *Morris*, la Cour a conclu que l'exclusivité des compétences interdisait à la province de porter atteinte au droit issu du traité — un droit de nature non commerciale dans cette affaire — indépendamment du fait que l'atteinte puisse ou non être justifiée en vertu de l'art. 35 de la *Loi constitutionnelle de 1982*.

[138] Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that

[138] Cela mis à part, la jurisprudence ne traite pas directement du lien entre l'exclusivité des compétences et l'art. 35 de la *Loi constitutionnelle de 1982*. L'ambiguïté de la jurisprudence a engendré l'imprévisibilité. Il est clair que lorsqu'une loi *fédérale* valide porte atteinte à un droit ancestral ou issu d'un traité, le cadre d'analyse relatif à l'art. 35 énoncé dans *Sparrow* régit l'applicabilité de la loi. Il est

it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered. Does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework? Is provincial interference with Aboriginal rights treated differently than treaty rights? And, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

toutefois moins évident que ce soit le cas lorsqu'une loi *provinciale* valide porte atteinte à un droit ancestral ou issu d'un traité. La jurisprudence laisse sans réponse les questions suivantes : L'exclusivité des compétences empêche-t-elle absolument les gouvernements provinciaux de limiter les droits ancestraux même si le cadre d'analyse énoncé dans *Sparrow* permettrait de justifier l'atteinte en question? Une atteinte à un droit ancestral de la part de la province est-elle traitée différemment d'une atteinte à un droit issu d'un traité? Et les droits ancestraux de nature commerciale sont-ils traités différemment des droits ancestraux de nature non commerciale? Comme aucune décision n'a examiné explicitement ces questions, je propose de le faire maintenant.

[139] As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

[139] J'ai déjà indiqué que l'art. 35 de la *Loi constitutionnelle de 1982* impose des limites quant à la façon dont les gouvernements, tant fédéral que provinciaux, peuvent traiter les terres visées par un titre ancestral. Ces gouvernements ne peuvent faire des lois qui entraînent une diminution appréciable d'un droit ancestral ou issu d'un traité à moins que l'atteinte soit justifiée dans l'intérêt public général et qu'elle soit compatible avec l'obligation fiduciaire qu'a la Couronne envers le groupe autochtone. L'objectif consiste à protéger les droits ancestraux et issus d'un traité tout en permettant la conciliation des intérêts autochtones avec ceux de la société en général.

[140] What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

[140] Alors, à quoi peuvent encore servir l'application de la doctrine de l'exclusivité des compétences et la notion que les droits ancestraux font partie du contenu essentiel du pouvoir fédéral sur les « Indiens » prévu au par. 91(24) de la *Loi constitutionnelle de 1867*? Il faut répondre comme suit : elles ne servent à rien.

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

[141] La doctrine de l'exclusivité des compétences vise à faire en sorte que les deux niveaux de gouvernement soient en mesure de fonctionner sans que l'un empiète sur le contenu essentiel des domaines de compétence exclusive de l'autre. Cet objectif n'est pas en cause dans les affaires telles que celle qui nous occupe. Les droits ancestraux constituent une limite à l'exercice des compétences tant fédérales que provinciales.

[142] The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

[143] An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

[142] Tout comme le fait la *Charte canadienne des droits et libertés*, la protection des droits ancestraux garantie à l'art. 35 de la *Loi constitutionnelle de 1982* vient limiter l'exercice des pouvoirs législatifs fédéraux et provinciaux. La *Charte* constitue la partie I de la *Loi constitutionnelle de 1982*, et la protection des droits ancestraux constitue la partie II. Les parties I et II sont apparentées et limitent toutes deux l'exercice des pouvoirs gouvernementaux, qu'ils soient fédéraux ou provinciaux. Les droits garantis à la partie II, tout comme les droits garantis par la *Charte* à la partie I, sont *opposables* au gouvernement — ils ont pour effet d'*interdire* certains types de réglementation que les gouvernements pourraient autrement imposer. Ces limites n'ont rien à voir avec la question de savoir si une activité fait partie du contenu essentiel des pouvoirs du gouvernement fédéral.

[143] Une analogie avec la jurisprudence relative à la *Charte* peut illustrer ce point. Le Parlement a une compétence exclusive en matière de droit criminel. Cependant, l'exercice de son pouvoir en droit criminel est circonscrit par l'art. 11 de la *Charte* qui garantit le droit à l'équité du processus criminel. Tout comme les droits ancestraux sont un aspect fondamental du droit autochtone, le droit à l'équité du processus criminel est un aspect fondamental du droit criminel. Mais nous ne disons pas que le droit à l'équité du processus criminel prévu à l'art. 11 fait partie du contenu essentiel de la compétence du Parlement en matière de droit criminel. Il s'agit plutôt d'une *limite* à la compétence du Parlement en matière de droit criminel. Si l'on considérait que les droits garantis à l'art. 11 font partie du contenu essentiel de la compétence du Parlement en matière de droit criminel de sorte que l'exclusivité des compétences s'applique, on aboutirait à un résultat absurde : les violations, par les provinces, des droits garantis à l'art. 11 seraient jugées suivant une norme différente de celle applicable aux violations par le gouvernement fédéral, et seules ces dernières seraient susceptibles d'être sauvegardées en vertu de l'article premier de la *Charte*. L'application de l'exclusivité des compétences aux droits ancestraux aboutirait au même résultat absurde.

[144] The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

[145] Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

[146] First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: How far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

[147] Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as

[144] La doctrine de l'exclusivité des compétences vise à régler les conflits entre les compétences provinciales et les compétences fédérales; elle y parvient en créant des domaines de compétence exclusive pour chaque palier de gouvernement. Cependant, le problème dans des cas comme celui-ci ne résulte pas d'une confrontation entre le pouvoir des provinces et ceux du gouvernement fédéral mais plutôt d'une tension entre le droit des titulaires du titre ancestral d'utiliser leurs terres comme ils l'entendent et la volonté de la province de réglementer ces terres au même titre que toutes les autres terres dans la province.

[145] En outre, l'application de la doctrine de l'exclusivité des compétences dans ce domaine créerait de sérieuses difficultés d'ordre pratique.

[146] Premièrement, l'application de l'exclusivité des compétences aurait pour effet d'établir deux critères différents pour l'appréciation de la constitutionnalité d'une loi provinciale touchant aux droits ancestraux. Suivant l'arrêt *Sparrow*, la réglementation provinciale est inconstitutionnelle si elle entraîne une diminution appréciable d'un droit ancestral qui ne saurait être justifiée au regard de l'art. 35 de la *Loi constitutionnelle de 1982*. Suivant la doctrine de l'exclusivité des compétences, la réglementation provinciale serait inconstitutionnelle si elle portait atteinte à un droit ancestral, peu importe que l'atteinte soit raisonnable ou justifiable. Il y aurait donc deux critères contradictoires censés répondre à la même question : Jusqu'où les gouvernements provinciaux peuvent-ils aller dans la réglementation de l'exercice des droits ancestraux protégés par l'art. 35?

[147] Deuxièmement, en l'espèce, appliquer la doctrine de l'exclusivité des compétences dans le but d'exclure la réglementation provinciale des forêts se trouvant sur les terres visées par un titre ancestral entraînerait des résultats inégaux et indésirables et pourrait créer des vides législatifs. Il en résulterait une réglementation morcelée en matière de ressources forestières — certaines régions de la province seraient assujetties aux lois provinciales et d'autres régions seraient réglementées par les lois

pests and fires, a situation desired by neither level of government.

[148] Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[149] This Court has recently stressed the limits of interjurisdictional immunity. "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of "limited application" and should be applied "with restraint"

fédérales ou ne seraient pas réglementées du tout. Cela pourrait rendre difficile, voire impossible, la résolution efficace de problèmes comme les ravageurs ou le feu : une situation souhaitée par ni l'un ni l'autre des paliers de gouvernement.

[148] La doctrine de l'exclusivité des compétences — fondée sur l'idée que les contextes réglementaires peuvent être divisés en compartiments étanches — va souvent à l'encontre de la réalité moderne. Notre société devient plus complexe, et pour être efficace, la réglementation exige de plus en plus la coopération des régimes fédéral et provincial interreliés. Les deux paliers de gouvernement possèdent des outils, compétences et expertises différents, et les doctrines plus souples du double aspect et de la prépondérance fédérale sont sensibles à cette réalité : suivant ces doctrines, on encourage la coopération intergouvernementale jusqu'au moment où survient un conflit qu'il faut régler. Par contre, la doctrine de l'exclusivité des compétences peut contrecarrer une telle coopération. Dans le cas des forêts qui se trouvent sur les terres visées par un titre ancestral, les tribunaux devraient examiner la loi provinciale sur les ressources forestières afin de s'assurer qu'elle ne porte pas atteinte au contenu essentiel de la compétence fédérale sur les « Indiens » et devraient également examiner la loi fédérale afin de s'assurer qu'elle ne porte pas atteinte au contenu essentiel du pouvoir provincial de gérer les forêts. Suggérer, comme en l'espèce, que les deux paliers de gouvernement conviennent que les lois en question devraient rester en vigueur ne règle pas la question.

[149] Notre Cour a récemment souligné les limites de l'exclusivité des compétences. Les doctrines constitutionnelles « doivent faciliter et non miner ce que notre Cour a appelé un "fédéralisme coopératif" » et, par conséquent, « les tribunaux privilégient, dans la mesure du possible, l'application régulière des lois édictées par les deux ordres de gouvernement » (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 24 et 37 (italiques dans l'original omis)). Pour cette raison, la doctrine de l'exclusivité des compétences

(paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

[150] *Morris*, on which the trial judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *Canadian Owners and Pilots Association*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves

est d'une « application restreinte » et elle devrait être appliquée « avec retenue » (par. 67 et 77). Ces principes ont été confirmés dans des arrêts plus récents : *Marine Services International Ltd. c. Ryan (Succession)*, 2013 CSC 44, [2013] 3 R.C.S. 53; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134.

[150] L'arrêt *Morris*, sur lequel le juge de première instance s'est appuyé, a été rendu avant que la Cour formule une approche moderne de l'application de la doctrine de l'exclusivité des compétences dans les arrêts *Banque canadienne de l'Ouest* et *Canadian Owners and Pilots Association* et, par conséquent, il confère peu de valeur jurisprudentielle sur ce sujet (voir *Marine Services*, par. 64). Dans la mesure où l'arrêt *Morris* appuie la proposition voulant qu'il soit catégoriquement interdit aux gouvernements provinciaux de réglementer l'exercice des droits ancestraux, il ne devrait plus être suivi. J'estime que, conformément aux commentaires formulés dans les arrêts *Sparrow* et *Delgamuukw*, la réglementation provinciale d'application générale s'appliquera à l'exercice des droits ancestraux, notamment au titre ancestral sur des terres, sous réserve de l'application du cadre d'analyse relatif à l'art. 35 qui permet de justifier une atteinte. Ce critère soigneusement conçu vise à concilier la loi d'application générale et les droits ancestraux avec la délicatesse qu'exige l'art. 35 de la *Loi constitutionnelle de 1982*, et il est plus équitable et pratique du point de vue de la politique générale que l'inapplicabilité générale qu'impose la doctrine de l'exclusivité des compétences.

[151] Pour ces raisons, je conclus que la doctrine de l'exclusivité des compétences ne devrait pas être appliquée dans les cas où les terres sont détenues en vertu du titre ancestral. C'est plutôt la démarche axée sur le critère fondé sur l'art. 35, énoncée dans *Sparrow*, qui devrait être retenue. Les lois provinciales d'application générale, y compris la *Forest Act*, devraient s'appliquer à moins qu'elles soient déraisonnables ou indûment rigoureuses ou qu'elles refusent aux titulaires du titre le recours à leur moyen préféré d'exercer leurs droits et

the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act*, *1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

que ces restrictions ne puissent pas être justifiées conformément au cadre d'analyse de la justification décrit précédemment. Il en résulte un équilibre qui préserve le droit ancestral tout en assurant une réglementation efficace des forêts par la province, comme l'exige l'art. 35 de la *Loi constitutionnelle de 1982*.

[152] Le cadre d'analyse relatif à l'art. 35 s'applique à l'exercice des compétences tant provinciales que fédérales : *Sparrow*; *Delgamuukw*. Par conséquent, il offre un moyen exhaustif et rationnel de circonscrire les lois provinciales touchant les terres visées par un titre ancestral dans les limites fixées par la Constitution. La question qui se pose dans des cas comme celui-ci ne porte pas, à la base, sur le conflit entre les paliers fédéral et provincial de gouvernement — les doctrines de la prépondérance fédérale et de l'exclusivité des compétences permettent de traiter cette question selon que l'indique la jurisprudence — il s'agit plutôt de savoir dans quelle mesure le gouvernement provincial peut réglementer des terres visées par un titre ancestral ou faisant l'objet d'une revendication du titre ancestral. L'article 35 de la *Loi constitutionnelle de 1982* constitue le cadre approprié à l'intérieur duquel doit être considérée une telle question puisqu'il oblige directement le gouvernement à respecter ces droits ou à démontrer que l'atteinte se rapporte à la poursuite d'un objectif impérieux et réel et qu'elle est compatible avec son obligation fiduciaire envers les groupes autochtones.

IX. Conclusion

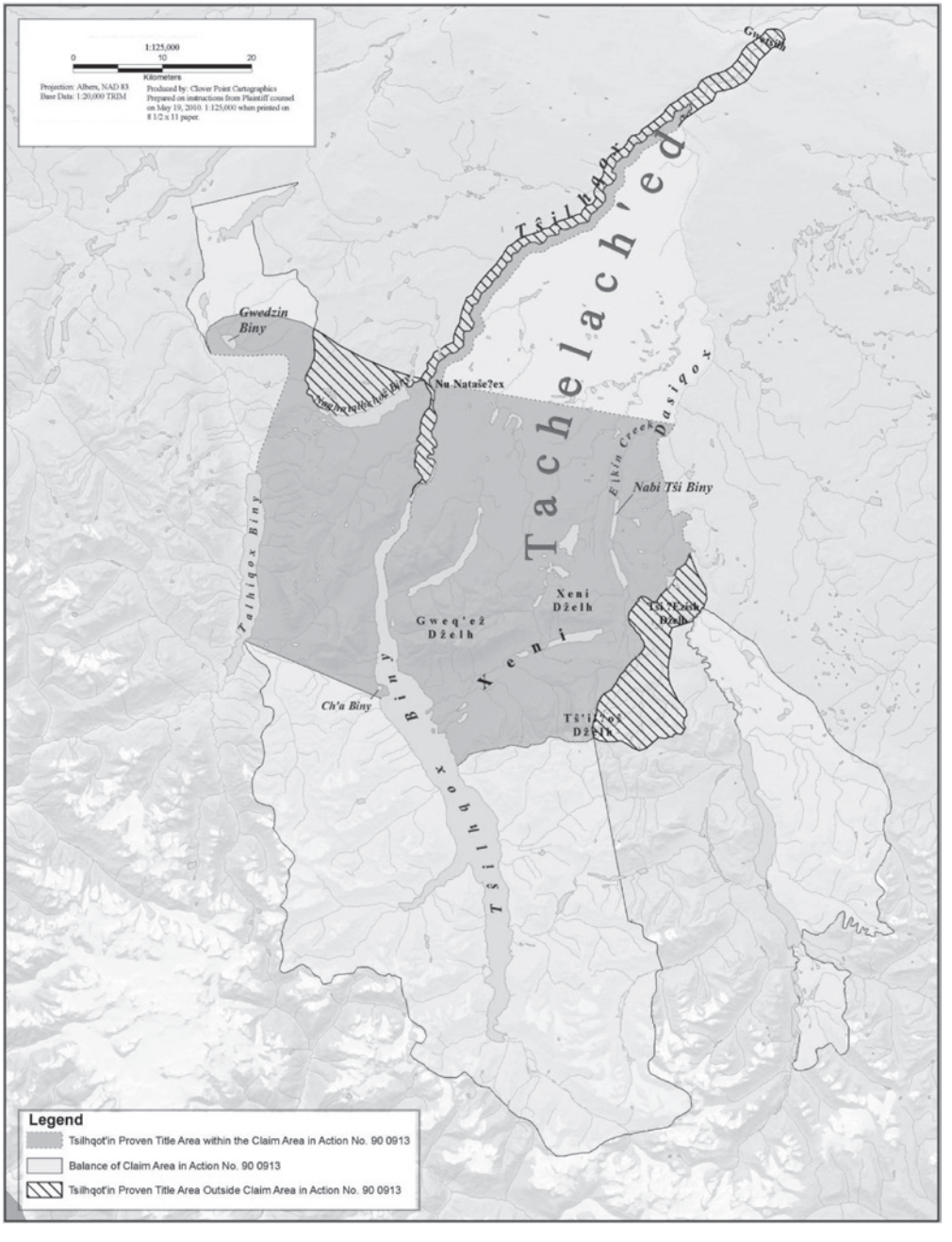
[153] Je suis d'avis d'accueillir le pourvoi et de rendre un jugement déclarant l'existence d'un titre ancestral sur la région en question, comme l'ont demandé les Tsilhqot'in. Je déclare également que la Colombie-Britannique a manqué à l'obligation de consultation qu'elle avait envers les Tsilhqot'in en raison du plan d'aménagement du territoire qu'elle a établi et des autorisations d'exploitation forestière qu'elle a accordées.

APPENDIX

PROVEN TITLE AREA – VISUAL AID

ANNEXE

TERRITOIRE SUR LEQUEL L'EXISTENCE DU TITRE EST ÉTABLIE – SUPPORT VISUEL



Appeal allowed.

Solicitors for the appellant: Rosenberg & Rosenberg, Vancouver; Woodward & Company, Victoria.

Solicitors for the respondents Her Majesty The Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region: Borden Ladner Gervais, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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

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

Solicitors for the intervener the Te'mexw Treaty Association: Janes Freedman Kyle Law Corporation, Vancouver.

Solicitors for the interveners the Business Council of British Columbia, the Council of Forest Industries, the Coast Forest Products Association, the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Arvay Finlay, Vancouver.

Solicitors for the interveners the Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and

Pourvoi accueilli.

Procureurs de l'appelant : Rosenberg & Rosenberg, Vancouver; Woodward & Company, Victoria.

Procureurs des intimés Sa Majesté la Reine du chef de la province de la Colombie-Britannique et le chef régional de la région de Cariboo Forest : Borden Ladner Gervais, Vancouver.

Procureur de l'intimé le procureur général du Canada : Procureur général du Canada, Saskatoon.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

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

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

Procureurs de l'intervenante l'Association du traité des Te'mexw : Janes Freedman Kyle Law Corporation, Vancouver.

Procureurs des intervenants Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia et Association for Mineral Exploration British Columbia : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Arvay Finlay, Vancouver.

Procureurs des intervenants les chefs héréditaires Gitanyow de Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon et Wii'litswx, en leur nom et au nom

on behalf of all Gitanyow, and the Office of the Wet'suwet'en Chiefs: Peter Grant & Associates, Vancouver.

Solicitor for the intervener the Hul'qumi'num Treaty Group: Robert B. Morales, Ladysmith, British Columbia.

Solicitors for the intervener the Council of the Haida Nation: White Raven Law Corporation, Surrey, British Columbia.

Solicitors for the intervener the Indigenous Bar Association in Canada: Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario; Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the First Nations Summit: Mandell Pinder, Vancouver; Morgan & Associates, West Vancouver.

Solicitors for the interveners the Tsawout First Nation, the Tsartlip First Nation, the Snuneymuxw First Nation and the Kwakiutl First Nation: Devlin Gailus, Victoria.

Solicitors for the intervener the Coalition of the Union of British Columbia Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands: Mandell Pinder, Vancouver; University of British Columbia, Vancouver; Thompson Rivers University, Kamloops.

Solicitors for the interveners Amnesty International and the Canadian Friends Service Committee: Stockwoods, Toronto; Paul Joffe, Saint-Lambert, Quebec.

Solicitors for the intervener the Gitxaala Nation: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners the Chilko Resorts and Community Association and the Council of Canadians: Ratcliff & Company, North Vancouver.

de tous les Gitanyow, et le Bureau des chefs Wet'suwet'en : Peter Grant & Associates, Vancouver.

Procureur de l'intervenant le Groupe du traité Hul'qumi'num : Robert B. Morales, Ladysmith, Colombie-Britannique.

Procureurs de l'intervenant le Conseil de la Nation haïda : White Raven Law Corporation, Surrey, Colombie-Britannique.

Procureurs de l'intervenante l'Association du barreau autochtone au Canada : Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario; Gowling Lafleur Henderson, Ottawa.

Procureurs de l'intervenant le Sommet des Premières Nations : Mandell Pinder, Vancouver; Morgan & Associates, West Vancouver.

Procureurs des intervenantes la Première Nation Tsawout, la Première Nation Tsartlip, la Première Nation Snuneymuxw et la Première Nation Kwakiutl : Devlin Gailus, Victoria.

Procureurs de l'intervenante la Coalition de l'Union des chefs indiens de la Colombie-Britannique, l'Alliance des Nations de l'Okanagan, le Conseil tribal de la Nation Shuswap et leurs communautés membres, les bandes indiennes d'Okanagan, d'Adams Lake, de Neskonlith et de Splatsin : Mandell Pinder, Vancouver; University of British Columbia, Vancouver; Thompson Rivers University, Kamloops.

Procureurs des intervenants Amnistie internationale et Secours Quaker canadien : Stockwoods, Toronto; Paul Joffe, Saint-Lambert, Québec.

Procureurs de l'intervenante la Nation Gitxaala : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intervenants Chilko Resorts and Community Association et le Conseil des Canadiens : Ratcliff & Company, North Vancouver.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20180830

**Dockets: A-78-17 (lead file); A-217-16; A-218-16;
A-223-16; A-224-16; A-225-16; A-232-16;
A-68-17; A-74-17; A-75-17;
A-76-17; A-77-17; A-84-17; A-86-17**

Citation: 2018 FCA 153

CORAM: **DAWSON J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

**ATTORNEY GENERAL OF CANADA,
NATIONAL ENERGY BOARD and
TRANS MOUNTAIN PIPELINE ULC**

Respondents

and

ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

Heard at Vancouver, British Columbia, on October 2-5, 10, 12-13, 2017.

Judgment delivered at Ottawa, Ontario, on August 30, 2018.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

Federal Court of Appeal | Cour d'appel fédérale

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CORAM: **DAWSON J.A.**
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BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

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REASONS FOR JUDGMENT

DAWSON J.A.

Para.

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Para.

I. Introduction

[1] On May 19, 2016, the National Energy Board issued its report concerning the proposed expansion of the Trans Mountain pipeline system. The Board's report recommended that the Governor in Council approve the expansion. The Board's recommendation was based on the Board's findings that the expansion is in Canada's public interest, and that if certain environmental protection procedures and mitigation measures are implemented, and if the conditions the Board recommended are implemented, the expansion is not likely to cause significant adverse environmental effects.

[2] On November 29, 2016, the Governor in Council accepted the Board's recommendation and issued Order in Council P.C. 2016-1069. The Order in Council recited the Governor in Council's acceptance of the Board's recommendation, and directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project, subject to the conditions recommended by the Board.

[3] A number of applications for judicial review of the Board's report and the Order in Council were filed in this Court. These applications were consolidated. These are the Court's reasons for judgment in respect of the consolidated proceeding. Pursuant to the order consolidating the applications, a copy of these reasons shall be placed in each file.

A. Summary of Conclusions

[4] While a number of applicants challenge the report of the National Energy Board, as explained below, the Order in Council is legally the only decision under review. Its validity is challenged on two principal grounds: first, the Board's process and findings were so flawed that the Governor in Council could not reasonably rely on the Board's report; second, Canada failed to fulfil the duty to consult owed to Indigenous peoples.

[5] Applying largely uncontested legal principles established by the Supreme Court of Canada to the factual record, a factual record that is also largely not contested, I conclude that most of the flaws asserted against the Board's process and findings are without merit. However, the Board made one critical error. The Board unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic. The unjustified exclusion of marine shipping from the scope of the Project led to successive, unacceptable deficiencies in the Board's report and recommendations. As a result, the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest.

[6] Applying the largely uncontested legal principles that underpin the duty to consult Indigenous peoples and First Nations set out by the Supreme Court, I also conclude that Canada acted in good faith and selected an appropriate consultation framework. However, at the last stage of the consultation process prior to the decision of the Governor in Council, a stage called Phase III, Canada's efforts fell well short of the mark set by the Supreme Court of Canada. Canada failed in Phase III to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The duty to consult was not adequately discharged.

[7] Accordingly, for the following reasons, I would quash the Order in Council and remit the matter back to the Governor in Council for appropriate action, if it sees fit, to address these flaws and, later, proper redetermination.

[8] These reasons begin by describing: (i) the expansion project; (ii) the applicants who challenge the Board's report and the Order in Council; (iii) the pending applications for judicial review; (iv) the legislative regime; (v) the report of the Board; and, (vi) the decision of the Governor in Council. The reasons then set out the factual background relevant to the challenges before the Court before turning to the issues raised in these applications and the consideration of those issues.

II. The Project

[9] No company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and given

leave to the company to open the pipeline (subsection 30(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7).

[10] Trans Mountain Pipeline ULC is the general partner of Trans Mountain Pipeline L.P. (together referred to as Trans Mountain). Trans Mountain owns and holds operating certificates issued by the National Energy Board for the existing Trans Mountain pipeline system. This system includes a pipeline approximately 1,147 kilometres long that moves crude oil, and refined and semi-refined petroleum products from Edmonton, Alberta to marketing terminals and refineries in the central region and lower mainland area of British Columbia, as well as to the Puget Sound area in Washington State.

[11] On December 16, 2013, Trans Mountain submitted an application to the National Energy Board for a certificate of public convenience and necessity (and certain amended certificates) for the Trans Mountain Expansion Project (Project).

[12] The application described the Project to consist of a number of components, including: (i) twinning the existing pipeline system with approximately 987 kilometres of new pipeline segments, including new proposed pipeline corridors and rights-of-way, for the purpose of transporting diluted bitumen from Edmonton, Alberta to Burnaby, British Columbia; (ii) new and modified facilities, including pump stations and tanks (in particular, an expanded petroleum tank farm in Burnaby which would be expanded from 13 to 26 storage tanks); (iii) a new and expanded dock facility, including three new berths, at the Westridge Marine Terminal in

Burnaby; and, (iv) two new pipelines running from the Burnaby storage facility to the Westridge Marine Terminal.

[13] The Project would increase the number of tankers loaded at the Westridge Marine Terminal from approximately five Panamax and Aframax class tankers per month to approximately 34 Aframax class tankers per month. Aframax tankers are larger and carry more product than Panamax tankers. The Project would increase the overall capacity of Trans Mountain's existing pipeline system from 300,000 barrels per day to 890,000 barrels per day.

[14] Trans Mountain's application stated that the primary purpose of the Project is to provide additional capacity to transport crude oil from Alberta to markets in the Pacific Rim, including Asia. If built, the system would continue to transport crude oil—primarily diluted bitumen.

III. The Applicants

[15] A number of First Nations and two large cities are significantly concerned about the Project and its impact upon them, and challenge its approval. Two non-governmental agencies also challenge the Project. These applicants are described below.

A. Tsleil-Waututh Nation

[16] The applicant Tsleil-Waututh Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and its members are Aboriginal peoples within the

meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[17] In the traditional dialect of Halkomelem, the name Tsleil-Waututh means "People of the Inlet". Tsleil-Waututh's asserted traditional territory extends approximately from the vicinity of Mount Garibaldi to the north to the 49th parallel and beyond to the south. The traditional territory extends west to Gibsons and east to Coquitlam Lake. The traditional territory includes areas across British Columbia's Lower Mainland, including sections of the Lower Fraser River, Howe Sound, Burrard Inlet and Indian Arm.

[18] Tsleil-Waututh's traditional territory encompasses the proposed Westridge Marine Terminal and fuel storage facility expansion, and approximately 18 kilometres of pipeline right-of-way. Approximately 45 kilometres of marine shipping route will pass within Tsleil-Waututh's asserted traditional territory.

[19] Much of Tsleil-Waututh's population of 500 people live in its primary community of Tsleil-Waututh, which is located on the north shore of Burrard Inlet, approximately 3 kilometres across the Inlet from the Westridge Marine Terminal.

[20] Tsleil-Waututh asserts Aboriginal title to the land, water, air, marine foreshore and resources in Eastern Burrard Inlet. It also asserts freestanding stewardship, harvesting and cultural rights in this area. The Crown states that it assessed its duty to consult with Tsleil-Waututh on the deeper end of the consultation spectrum.

B. City of Vancouver

[21] The City of Vancouver is the third most densely populated city in North America, after New York City and San Francisco. It has 69.8 kilometres of waterfront along Burrard Inlet, English Bay, False Creek and the Fraser River, with 18 kilometres of beaches and a 22-kilometre long seawall.

[22] Approximately 25,000 residents of Vancouver live within 300 metres of the Burrard Inlet and English Bay shorelines.

C. City of Burnaby

[23] The City of Burnaby is the third largest city in British Columbia, with a population of over 223,000 people.

[24] A number of elements of the Project infrastructure will be located in Burnaby: (i) the new Westridge Marine Terminal; (ii) the Burnaby Terminal, including thirteen new storage tanks and one replacement storage tank; (iii) two new delivery lines following a new route connecting the Burnaby Terminal to the Westridge Marine Terminal through a new tunnel to be drilled under the Burnaby Mountain Conservation Area; and, (iv) a portion of the main pipeline along a new route to the Burnaby Terminal.

D. The Squamish Nation

[25] The applicant Squamish Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act* and its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. There are currently just over 4,000 registered members of the Squamish Nation.

[26] The Squamish assert that since a time before contact with Europeans, Squamish have used and occupied lands and waters on the southwest coast of what is now British Columbia, extending from the Lower Mainland north to Whistler. This territory includes Burrard Inlet, English Bay, Howe Sound and the Squamish Valley. The boundaries of asserted Squamish territory thus encompass all of Burrard Inlet, English Bay and Howe Sound, as well as the rivers and creeks that flow into these bodies of water.

[27] Squamish has three reserves located in and at the entrance to Burrard Inlet:

i. Seymour Creek Reserve No. 2 (ch'ích'elxwi7kw) on the North shore close to the Westridge Marine Terminal;
ii. Mission Reserve No. 1 (eslhá7an); and,
iii. Capilano Reserve No. 5 (xwmelchstn).

Also located in the area are Kitsilano Reserve No. 6 (senákw) near the entrance to False Creek, and three other waterfront reserves in Howe Sound.

[28] Project infrastructure, including portions of the main pipeline, the Westridge Marine Terminal, the Burnaby Terminal, two new delivery lines connecting the terminals, and sections of the tanker routes for the Project will be located in Squamish's asserted traditional territory and close to its reserves across the Burrard Inlet. The shipping route for the Project will also travel past three Squamish reserves through to the Salish Sea.

[29] Squamish asserts Aboriginal rights, including title and self-government, within its traditional territory. Squamish also asserts Aboriginal rights to fish in the Fraser River and its tributaries. The Crown assessed its duty to consult Squamish at the deeper end of the consultation spectrum.

E. Coldwater Indian Band

[30] The applicant Coldwater is a band within the meaning of section 2 of the *Indian Act*. Its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. Coldwater, together with 14 other bands, comprise the Nlaka'pamux Nation.

[31] The Nlaka'pamux Nation's asserted traditional territory encompasses part of south-central British Columbia extending from the northern United States to north of Kamloops. This territory includes the Lower Thompson River area, the Fraser Canyon, the Nicola and Coldwater Valleys and the Coquihalla area.

[32] Coldwater's registered population is approximately 850 members. Approximately 330 members live on Coldwater's reserve lands. Coldwater holds three reserves: (i) Coldwater Indian Reserve No. 1 (Coldwater Reserve) approximately 10 kilometres southwest of Merritt, British Columbia; (ii) Paul's Basin Indian Reserve No. 2 located to the southwest of the Coldwater Reserve, upstream on the Coldwater River; and, (iii) Gwen Lake Indian Reserve No. 3 located on Gwen Lake.

[33] Approximately 226 kilometres of the proposed pipeline right-of-way and four pipeline facilities (the Kamloops Terminal, the Stump Station, the Kingsvale Station and the Hope Station) will be located within the Nlaka'pamux Nation's asserted traditional territory. The Kingsvale Station is located in the Coldwater Valley. The approved pipeline right-of-way skirts the eastern edges of the Coldwater Reserve. The existing Trans Mountain pipeline system transects both the Coldwater Reserve and the Coldwater Valley.

[34] Coldwater asserts Aboriginal rights and title in, and the ongoing use of, the Coldwater and Nicola Valleys and the Nlaka'pamux territory more generally. The Crown assessed its duty to consult Coldwater at the deeper end of the consultation spectrum.

F. The Stó:lō Collective

[35] One translation of the term "Stó:lō" is "People of the River", referencing the Fraser River. The Stó:lō are a Halkomelem-speaking Coast Salish people. Traditionally, they have been tribally organized.

[36] The "Stó:lō Collective" was formed for the sole purpose of coordinating and representing the interests of its membership before the National Energy Board and in Crown consultations about the Project. The Stó:lō Collective represents the following applicants:

(a) Aitchelitz, Skowkale, Tzeachten, Squiala First Nation, Yakweakwioose, Shxwa:y Village and Soowahlie, each of which are villages and also bands within the meaning of section 2 of the *Indian Act* (the Ts'elxweyeqw Villages). The Ts'elxweyeqw Villages collectively comprise the Ts'elxweyeqw Tribe. Members of the Ts'elxweyeqw Villages are Stó:lō people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*; and,

(b) Skwah and Kwaw-Kwaw-Apilt, each of whom are villages and also bands within the meaning of section 2 of the *Indian Act* (the Pil'Alt Villages). The Pil'Alt Villages are members of the Pil'Alt Tribe. Members of the Pil'Alt Villages are Stó:lō people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. The Pil'Alt Villages are represented by the Ts'elxweyeqw Tribe in matters relating to the Project. (On March 6, 2018, Kwaw-Kwaw-Apilt filed a notice of discontinuance.)

[37] The Stó:lō's asserted traditional territory, known as S'olh Temexw, includes the lower Fraser River watershed.

[38] The Stó:lō live in many villages, all of which are located in the lower Fraser River watershed.

[39] The existing Trans Mountain pipeline crosses, and the Project's proposed new pipeline route would cross, approximately 170 kilometres of the Stó:lō Collective applicants' asserted

traditional territory, beginning from an eastern point of entry near the Coquihalla Highway and continuing to the Burrard Inlet.

[40] The Stó:lō possess established Aboriginal fishing rights on the Fraser River (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289). The Crown assessed its duty to consult Stó:lō at the deeper end of the consultation spectrum.

G. Upper Nicola Band

[41] The applicant Upper Nicola is a member community of the Syilx (Okanagan) Nation and a band within the meaning of section 2 of the *Indian Act*. Upper Nicola and Syilx are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

[42] The Syilx Nation's asserted traditional territory extends from the north past Revelstoke around Kinbasket to the south to the vicinity of Wilbur, Washington. It extends from the east near Kootenay Lake to the west to the Nicola Valley. Upper Nicola currently has eight Indian Reserves within Upper Nicola's/Syilx's asserted territory. The primary residential communities are Spaxomin, located on Upper Nicola Indian Reserve No. 3 on the western shore of Douglas Lake, and Quilchena, located on Upper Nicola Indian Reserve No. 1 on the eastern shore of Nicola Lake.

[43] Approximately 130 kilometres of the Project's proposed new pipeline will cross through Upper Nicola's area of responsibility within Syilx territory. The Stump Station and the Kingsvale Station are also located within Syilx/Upper Nicola's asserted territory.

[44] Upper Nicola asserts responsibility to protect and preserve the claimed Aboriginal title and harvesting and other rights held collectively by the Syilx, particularly within its area of responsibility in the asserted Syilx territory. The Crown assessed its duty to consult Upper Nicola at the deeper end of the consultation spectrum.

H. Stk'emlupsemc te Secwepemc of the Secwepemc Nation

[45] The Secwepemc are an Aboriginal people living in the area around the confluence of the Fraser and Thompson Rivers. The Secwepemc Nation is comprised of seven large territorial groupings referred to as "Divisions". The Stk'emlupsemc te Secwepemc Division (SSN) is comprised of the Skeetchestn Indian Band and the Kamloops (or Tk'emlups) Indian Band. Both are bands within the meaning of section 2 of the *Indian Act*. SSN's members are also Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

[46] The Skeetchestn Indian Band is located along the northern bank of the Thompson River, approximately 50 kilometres west of Kamloops and has four reserves. Its total registered population is 533. The Tk'emlups Indian Band is located in the Kamloops area and has six reserves. Its total registered population is 1,322. Secwepemc Territory is asserted to be a

substantial landmass which encompasses many areas, including the area in the vicinity of Kamloops Lake.

[47] The existing and proposed pipeline right-of-way crosses through SSN's asserted traditional territory for approximately 350 kilometres. Approximately 80 kilometres of the proposed pipeline right-of-way and two pipeline facilities, the Black Pines Station and the Kamloops Terminal, will be located within SSN's asserted traditional territory.

[48] The SSN claim Aboriginal title over its traditional territory. The Crown assessed its duty to consult SSN at the deeper end of the consultation spectrum.

I. Raincoast Conservation Foundation and Living Oceans Society

[49] These applicants are not-for-profit organizations. Their involvement in the National Energy Board review process focused primarily on the effects of Project-related marine shipping.

IV. The applications challenging the report of the National Energy Board and the Order in Council

[50] As will be discussed in more detail below, two matters are challenged in this consolidated proceeding: first, the report of the National Energy Board which recommended that the Governor in Council approve the Project and direct the Board to issue the necessary certificate of public convenience and necessity; and, second, the decision of the Governor in Council to accept the recommendation of the Board and issue the Order in Council directing the Board to issue the certificate.

[51] The following applicants applied for judicial review of the report of the National Energy Board:

- Tsleil-Waututh Nation (Court File A-232-16)
- City of Vancouver (Court File A-225-16)
- City of Burnaby (Court File A-224-16)
- The Squamish Nation and Xálek/Sekyú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-217-16)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-223-16)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-218-16).

[52] The following applicants applied, with leave, for judicial review of the decision of the Governor in Council:

- Tsleil-Waututh Nation (Court File A-78-17)
- City of Burnaby (Court File A-75-17)
- The Squamish Nation and Xálek/Sekyú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-77-17)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-76-17)
- The Stó:lō Collective applicants (Court File A-86-17)
- Upper Nicola Band (Court File A-74-17)
- Chief Ron Ignace and Chief Fred Seymour, on their own behalf and on behalf of all other members of Stk'emlupsemc te Secwepemc of the Secwepemc Nation (Court File A-68-17)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-84-17).

V. The legislative regime

[53] For ease of reference the legislative provisions referred to in this section of the reasons are set out in the Appendix to these reasons.

A. The requirements of the *National Energy Board Act*

[54] As explained above, no company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and, after the pipeline is built, has given leave to the company to open the pipeline.

[55] Trans Mountain's completed application for a certificate of public convenience and necessity for the Project triggered the National Energy Board's obligation to assess the Project pursuant to section 52 of the *National Energy Board Act*. Subsection 52(1) of that Act requires the Board to prepare and submit to the Minister of Natural Resources, for transmission to the Governor in Council, a report which sets out the Board's recommendation as to whether the certificate should be granted, together with all of the terms and conditions that the Board considers the certificate should be subject to if issued. The Board is to provide its reasons for its recommendation. When considering whether to recommend issuance of a certificate the Board is required to take into account "whether the pipeline is and will be required by the present and future public convenience and necessity".

[56] The Board's recommendation is, pursuant to subsection 52(2) of the *National Energy Board Act*, to be based on "all considerations that appear to it to be directly related to the

pipeline and to be relevant" and the Board may have regard to five specifically enumerated factors which include "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."

[57] If an application relates to a "designated" project, as defined in section 2 of the *Canadian Environmental Assessment Act, 2012*, the Board's report must also set out the Board's environmental assessment of the project. This assessment is to be prepared under the *Canadian Environmental Assessment Act, 2012* (subsection 52(3) of the *National Energy Board Act*). A designated project is defined in section 2 of the *Canadian Environmental Assessment Act, 2012*:

designated project means one or more physical activities that	projet désigné Une ou plusieurs activités concrètes :
(*a*) are carried out in Canada or on federal lands;	*a*) exercées au Canada ou sur un territoire domanial;
(*b*) are designated by regulations made under paragraph 84(*a*) or designated in an order made by the Minister under subsection 14(2); and	*b*) désignées soit par règlement pris en vertu de l'alinéa 84*a*), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);
(*c*) are linked to the same federal authority as specified in those regulations or that order.	*c*) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.
It includes any physical activity that is incidental to those physical activities.	Sont comprises les activités concrètes qui leur sont accessoires.

[58] The remaining subsections in section 52 deal with the timeframe in which the Board must complete its report. Generally, a report must be submitted to the Minister within the time limit specified by the Chair of the Board. The specified time limit must not be longer than 15 months after the completed application has been submitted to the Board.

B. The requirements of the *Canadian Environmental Assessment Act, 2012*

[59] Pursuant to subsection 4(3) of the *Regulations Designating Physical Activities*, SOR/2012-147, and section 46 of the Schedule thereto, because the Project includes a new onshore pipeline longer than 40 kilometres, the Project is a designated project as defined in part (*b*) of the definition of "designated project" set out in paragraph 57 above. In consequence, the Board was required to conduct an environmental assessment under the *Canadian Environmental Assessment Act, 2012*. For this purpose, subsection 15(*b*) of the *Canadian Environmental Assessment Act, 2012* designated the National Energy Board to be the sole responsible authority for the environmental assessment.

[60] As the responsible authority, the Board was required to take into account the environmental effects enumerated in subsection 5(1) of the *Canadian Environmental Assessment Act, 2012*. These effects include changes caused to the land, water or air and to the life forms that inhabit these elements of the environment. The effects to be considered are to include the effects upon Aboriginal peoples' health and socio-economic conditions, their physical and cultural heritage, their current use of lands and resources for traditional purposes, and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[61] Subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* required the Board to take into account a number of enumerated factors when conducting the environmental assessment, including:

- the environmental effects of the designated project (including the environmental effects of malfunctions or accidents that may occur in connection with the

designated project) and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

- mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- alternative means of carrying out the designated project that are technically and economically feasible, and the environmental effects of any such alternative means; and
- any other matter relevant to the environmental assessment that the responsible authority, here the Board, requires to be taken into account.

[62] The Board was also required under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* to make recommendations to the Governor in Council with respect to the decision to be made by the Governor in Council under paragraph 31(1)(*a*) of that Act—a decision about the existence of significant adverse environmental effects and whether those effects can be justified in the circumstances.

C. Consideration by the Governor in Council

[63] Once in receipt of the report prepared in accordance with the requirements of the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may make its decision concerning the proponent's application for a certificate.

[64] Three decisions are available to the Governor in Council. It may, by order:

i. "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report" (paragraph 54(1)(*a*) of the *National Energy Board Act*); or

ii. "direct the Board to dismiss the application for a certificate" (paragraph 54(1)(*b*) of the *National Energy Board Act*); or

iii. "refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration" and specify a time limit for the reconsideration (subsections 53(1) and (2) of the *National Energy Board Act*).

[65] Subsection 54(2) of the *National Energy Board Act* requires that the Governor in Council's order "must set out the reasons for making the order."

[66] Subsection 54(3) of the *National Energy Board Act* requires the Governor in Council to issue its order within three months after the Board's report is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, extend this time limit.

[67] Additionally, once the National Energy Board as the responsible authority for the designated project has submitted its report with respect to the environmental assessment, pursuant to subsection 31(1) of the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*, "decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment … that the designated project":

(i) is not likely to cause significant adverse environmental effects,	(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,
(ii) is likely to cause significant adverse environmental effects that can	(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans

be justified in the circumstances, or	les circonstances,
(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;	(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

VI. The report of the National Energy Board

[68] On May 19, 2016, the Board issued its report which recommended approval of the Project. The recommendation was based on a number of findings, including:

- With the implementation of Trans Mountain's environmental protection procedures and mitigation measures, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects.
- However, effects from the operation of Project-related marine vessels would contribute to the total cumulative effects on the Southern resident killer whales, and would further impede the recovery of that species. Southern resident killer whales are an endangered species that reside in the Salish Sea. Project-related marine shipping follows a route through the Salish Sea to the open ocean that travels through the whales' critical habitat as identified in the Recovery Strategy for the Northern and Southern resident killer whales. The Board's finding was that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, and that it is likely to result in significant adverse effects on Aboriginal cultural uses associated with these marine mammals."
- The likelihood of a spill from the Project or from a Project-related tanker would be very low in light of the mitigation and safety measures to be implemented. However, the consequences of large spills could be high.
- The Board's recommendation and decisions with respect to the Project were consistent with subsection 35(1) of the *Constitution Act, 1982*.

- The Project would be in the Canadian public interest and would be required by the present and future public convenience and necessity.
- If approved, the Board would attach 157 conditions to the certificate of public convenience and necessity. The conditions dealt with a broad range of matters, including the safety and integrity of the pipeline, emergency preparedness and response and ongoing consultation with affected entities, including Indigenous communities.

VII. The decision of the Governor in Council

[69] On November 29, 2016, the Governor in Council issued the Order in Council, accepting the Board's recommendation that the Project be approved and directing the Board to issue a certificate of public convenience and necessity to Trans Mountain.

[70] The Order in Council contained a number of recitals, two of which are relevant to these applications. First, the Governor in Council stated its satisfaction "that the consultation process undertaken is consistent with the honour of the Crown and the [Aboriginal] concerns and interests have been appropriately accommodated". Second, the Governor in Council accepted the Board's recommendation that the Project is required by present and future public convenience and necessity and that it will not likely cause significant adverse environmental effects.

[71] The Order in Council was followed by a 20-page explanatory note which was stated not to form part of the Order in Council. The Explanatory Note described the Project and its objectives and the review process before the National Energy Board, and summarized the issues raised before the Board. The Explanatory Note also dealt with matters that post-dated the Board's report and set out the government's "response to what was heard".

VIII. Factual background

A. Canada's consultation process

[72] The first step in the consultation process was determining the Indigenous groups whose rights and interests might be adversely impacted by the Project. In order to do this, a number of federal departments and the National Energy Board coordinated research and analysis on the proximity of Indigenous groups' traditional territories to elements of the Project, including the proposed pipeline right-of-way, the marine terminal expansion, and the designated shipping lanes. Approximately 130 Indigenous groups were identified, including all of the Indigenous applicants.

[73] On August 12, 2013, the National Energy Board wrote to the identified Indigenous groups to advise that Trans Mountain had filed a Project description on May 23, 2013, and to provide preliminary information about the upcoming review process. This letter also attached a letter from the Major Projects Management Office of Natural Resources Canada. The Major Projects Management Office's letter advised that Canada would rely on the National Energy Board's public hearing process:

> to the extent possible, to fulfil any Crown duty to consult Aboriginal groups for the proposed Project. Through the [National Energy Board] process, the [Board] will consider issues and concerns raised by Aboriginal groups. The Crown will utilise the [National Energy Board] process to identify, consider and address the potential adverse impacts of the proposed Project on established or potential Aboriginal and treaty rights.

[74] In subsequent letters sent to Indigenous groups between August 2013 and February 19, 2016, the Major Projects Management Office directed Indigenous groups that could be impacted

by the Project to participate in and communicate their concerns through the National Energy Board public hearings. Additionally, Indigenous groups were advised that Canada viewed the consultation process to be as follows:

i. Canada would rely, to the extent possible, on the Board's process to fulfil its duty to consult Indigenous peoples about the Project;

ii. There would be four phases of Crown consultation:

   a. "Phase I": early engagement, from the submission of the Project description to the start of the National Energy Board hearing;

   b. "Phase II": the National Energy Board hearing, commencing with the start of the Board hearing and continuing until the close of the hearing record;

   c. "Phase III": consideration by the Governor in Council, commencing with the close of the hearing record and continuing until the Governor in Council rendered its decision in relation to the Project; and

   d. "Phase IV": regulatory authorization should the Project be approved, commencing with the decision of the Governor in Council and continuing until the issuance of department regulatory approvals, if required.

iii. Natural Resources Canada's Major Projects Management Office would serve as the Crown Consultation Coordinator for the Project.

iv. Following Phase III consultations, an adequacy of consultation assessment would be prepared by the Crown. The assessment would be based upon the depth of consultation owed to each Indigenous group. The depth of consultation owed would in turn be based upon the Project's potential impact on each group and the strength of the group's claim to potential or established Aboriginal or treaty rights.

[75] On May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups, including the applicants, to provide additional information on the scope and timing of Phase III Crown consultation. Indigenous groups were advised that:

i. Canada intended to submit summaries of the concerns and issues Indigenous groups had brought forward to date and to seek feedback on the completeness and accuracy of the summaries. The summaries would be issued in the form of Information Requests, a Board hearing process explained below. Canada would also seek Indigenous groups' views on adverse impacts not yet addressed by Trans Mountain's mitigation measures. The Crown would use the information provided by Indigenous groups to "refine our current understanding of the potential impacts of the project on asserted or established Aboriginal or treaty rights."

ii. Phase III consultation would focus on two questions:

   a. Are there outstanding concerns with respect to Project-related impacts to potential or established Aboriginal or treaty rights?

   b. Are there incremental accommodation measures that should be considered by the Crown to address any outstanding concerns?

iii. Information made available to the Crown throughout each phase of the consultation process would be consolidated into a "Crown Consultation Report". "This report will summarize both the procedural aspects of consultations undertaken and substantive issues raised by Aboriginal groups, as well as how these issues may be addressed in the process". The section of the Crown Consultation Report dealing with each Indigenous group would be provided to the group for review and comment before the report was placed before the Governor in Council.

iv. If Indigenous groups identified outstanding concerns there were a number of options which might "be considered and potentially acted upon." The options were described to be:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

(underlining added)

B. Prehearing matters and the Project application

[76] To facilitate participation in the National Energy Board hearing process, the Board operates a participant funding program. On July 22, 2013, the Board announced that it was making funding available under this program to assist landowners, Indigenous groups and other interested parties to participate in the Board's consideration of the Project. To apply for funding, a party required standing as an intervener in the Board's process.

[77] On July 29, 2013, the Board released its "list of issues" which identified the topics the Board would consider in its review of the Project. The following issues of relevance to these applications were included:

- the need for the proposed Project.
- the potential environmental and socio-economic effects of the proposed Project, including any cumulative environmental effects that were likely to result from the Project, including those the Board's Filing Manual required to be considered.
- the potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that might occur.
- the terms and conditions to be included in any recommendation to approve the Project that the Board might issue.
- the potential impacts of the Project on Indigenous interests.
- contingency plans for spills, accidents or malfunctions, during construction and operation of the Project.

[78] On September 10, 2013, the Board issued "Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities." This was

a guidance document intended to assist the proponent. The document described requirements that supplemented those set out in the Board's Filing Manual.

[79] In particular, this guidance document required Trans Mountain's assessment of accidents and malfunctions to deal with a number of things, including measures to reduce the potential for accidents and malfunctions, credible worst case spill scenarios together with smaller spill scenarios and information on the fate and behaviour of any spilled hydrocarbons. For all mitigation measures Trans Mountain proposed, it was required to describe the roles, responsibilities and capabilities of each relevant organization in implementing mitigation measures, and the level of care and control Trans Mountain would have in overseeing or implementing the measures.

[80] On December 16, 2013, Trans Mountain formally filed its application, seeking approval to construct and operate the Project.

C. The scoping decision and the hearing order

[81] On April 2, 2014, the Board issued a number of decisions setting the parameters of the Project's environmental assessment and establishing the hearing process for the Project. Three of these decisions are of particular relevance to these applications.

[82] First, the Board issued a hearing order which set out timelines and a process for the hearing. The hearing order did not allow any right of oral cross-examination. Instead, the hearing order provided a process whereby interveners and the Board could submit written interrogatories,

referred to as Information Requests, to Trans Mountain. The hearing order also set out a process for interveners and the Board to compel adequate responses to their Information Requests, an opportunity for Indigenous groups to provide oral traditional evidence, and allowed both written arguments in chief and summary oral arguments.

[83] Next, in the decision referred to as the "scoping" decision, the Board defined the "designated project" to be assessed, and described the factors to be assessed under the *Canadian Environmental Assessment Act, 2012* (and the scope of each factor). In defining the "designated project", the Board did not include marine shipping activities as part of the "designated project". Rather, the Board stated that it would consider the effects of increased marine shipping under the *National Energy Board Act*. To the extent there was potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board would consider those effects under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

[84] Finally, the Board ruled on participation rights in the hearing. The Board granted participation status to 400 interveners and 1,250 commentators. All of the applicants before the Court applied for, and were granted, intervener status. Additionally, a number of government departments were granted intervener status; both Health Canada and the Pacific Pilotage Authority were granted commentator status.

D. Challenges to the hearing order and the scoping decision

[85] Of relevance to issues raised in these applications are two challenges brought against the hearing order and the scoping decision.

[86] The first challenge requested that all evidence filed in the hearing be subject to oral cross-examination. The Board dismissed this request in Ruling No. 14. In Ruling No. 51, the Board dismissed motions seeking reconsideration of Ruling No. 14.

[87] The second challenge was brought by Tsleil-Waututh to aspects of both the hearing order and the scoping decision. Tsleil-Waututh asserted, among other things, that the Board erred in law by failing to include marine shipping activities in the Project description. This Court granted Tsleil-Waututh leave to appeal this and other issues. On September 6, 2016, this Court dismissed the appeal (2016 FCA 219). The dismissal of the appeal was expressly stated, at paragraph 21 of the Court's reasons, to be without prejudice to Tsleil-Waututh's right to raise the issue of the proper scope of the Project "in subsequent proceedings".

E. The TERMPOL review process

[88] In view of the Project's impact on marine shipping, it is useful to describe this process.

[89] Trans Mountain requested that the marine transportation components of the Project be assessed under the voluntary Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL). The review process was chaired by Transport Canada and the

review committee was composed of representatives of other federal agencies and Port Metro Vancouver.

[90] The purpose of the review process was to objectively appraise operational vessel safety, route safety and cargo transfer operations associated with the Project, with a focus on improving, where possible, elements of the Project.

[91] The review committee did not identify regulatory concerns for the tankers, tanker operations, the proposed route, navigability, other waterway users or the marine terminal operations associated with tankers supporting the Project. It found that Trans Mountain's commitments to the existing marine safety regime would provide for a higher level of safety for tanker operations appropriate to the increase in traffic.

[92] The review committee also proposed certain measures to provide for a high level of safety for tanker operations. Examples of such proposed measures were the extended use of tethered and untethered tug escorts and the extension of the pilot disembarkation zone. Trans Mountain agreed to adopt each of the recommended measures.

[93] The TERMPOL report formed part of Transport Canada's written evidence before the National Energy Board.

F. The applicants' participation in the hearing before the Board

[94] The applicants, as interveners before the Board, were entitled to:

- issue Information Requests to Trans Mountain and others;
- file motions, including motions to compel adequate responses to Information Requests;
- file written evidence;
- comment on draft conditions; and,
- present written and oral summary argument.

[95] All of the applicants issued Information Requests, filed or supported motions and filed written evidence. Interveners who filed evidence were required to respond in writing to written questions about their evidence from the Board, Trans Mountain or other interveners.

[96] All of the applicants filed written submissions commenting on draft conditions except for the City of Vancouver and SSN.

[97] All of the applicants filed written arguments and all of the applicants except SSN delivered oral summary arguments.

[98] Indigenous interveners could adduce traditional Indigenous evidence, either orally or in writing. Oral evidence could be questioned orally by other interveners, Trans Mountain or the Board. Tsleil-Waututh, Squamish, Coldwater, SSN, and Upper Nicola provided oral, Indigenous traditional evidence. The Stó:lō Collective formally objected to the Board's procedure for introducing Indigenous oral traditional evidence and did not provide such evidence.

G. Participant funding

[99] As previously mentioned, the Board operated a participant funding program. Additional funding was available through the Major Projects Management Office and Trans Mountain.

[100] It is fair to say that the participant funding provided to the applicants by the Board and the Major Projects Management Office was generally viewed to be inadequate by them (see for example the affidavit of Chief Ian Campbell of the Squamish Nation). Concerns were also expressed about delays in funding. Funds provided by the Board could only be applied to work conducted after the funding was approved and a funding agreement was executed.

[101] The following funds were paid or offered.

1. Tsleil-Waututh Nation

[102] Tsleil-Waututh requested $766,047 in participant funding. It was awarded $40,000, plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered to pay $14,000 for consultation following the close of the hearing record and $12,000 following the release of the Board's report. These offers were not accepted.

2. The Squamish Nation

[103] Squamish applied for $293,350 in participant funding. It was awarded $44,720, plus travel costs for one person to attend the hearing. The Major Projects Management Office offered

$12,000 for consultations following the close of the Board's hearing record, and $14,000 to support participation in consultations following the release of the Board's report. These funds were paid.

3. Coldwater Indian Band

[104] Coldwater was awarded $48,490 in participant funding from the Board. Additionally, the Major Projects Management Office offered an additional $52,000 in participant funding.

4. The Stó:lō Collective

[105] The Stó:lō Collective was awarded $42,307 per First Nation band in participant funding from the Board. Additionally, the Major Projects Management Office offered $4,615.38 per First Nation band for consultation following the close of the Board's hearing record, and $5,384.61 per First Nation band following the release of the Board's report.

5. Upper Nicola Band

[106] Upper Nicola was awarded $40,000 plus travel costs for two members to attend the hearing and an additional $10,000 in special funding through the Board's participant funding program. Additionally, the Major Projects Management Office offered Upper Nicola Band and the Okanagan Nation Alliance $11,977 and $24,000 respectively in participant funding for consultations following the close of the Board's hearing record. The Okanagan Nation Alliance was offered an additional $26,000 following the release of the Board's report.

6. SSN

[107] SSN applied for participant funding in excess of $300,000 in order to participate in the Board's hearing. It was awarded $36,920 plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered $18,000 in participation funding for consultations following the close of the Board's hearing record and $21,000 for consultations following the release of the Board's report.

7. Raincoast Conservation Foundation and Living Oceans Society

[108] Raincoast was awarded $111,100 plus travel costs for two people to attend the hearing from the Board's participant funding program. Living Oceans was awarded $89,100 plus travel costs for two persons to attend the hearing through the participant funding program.

H. Crown consultation efforts—a brief summary

1. Phase I (from 2013 to April 2014)

[109] In this initial engagement phase some correspondence was exchanged between the Crown and some of the Indigenous applicants. Canada does not suggest that any of this correspondence contained any discussion about any substantive matter.

2. Phase II (from April 2014 to February 2016)

[110] During the Board's hearing process and continuing until the close of its hearing record, Canada continued to exchange correspondence with some of the Indigenous applicants.

Additionally, some informational meetings were held; however, these meetings did not allow for any substantive discussion about any group's title, rights or interests, or the impact of the Project on the group's title, rights or interests.

[111] To illustrate, Crown representatives met with Squamish officials on September 11, 2015, and November 27, 2015. At these meetings Squamish raised a number of concerns, including its concerns that Squamish had not been involved in the design of the consultation process, that the consultation process was inadequate to assess impacts on Squamish rights and title and that inadequate funding was provided for participation in the Board's hearing. Squamish also expressed confusion about the respective roles of the Board and Trans Mountain in consultations with Squamish.

[112] Similarly, informational meetings were held with the Stó:lō Collective on July 18, 2014 and December 3, 2015. Again, no substantive discussion took place about Stó:lō's title, rights and interests or the impact of the Project thereon. The Stó:lō also expressed their concerns about the consultation process, including their concerns that the Board failed to compel Trans Mountain to respond adequately to Information Requests and the lack of specificity of the Board's draft terms and conditions.

[113] Informational hearings of this nature were also held with Upper Nicola and SSN in 2014.

[114] It is fair to say that in Phase II Canada continued to rely upon the National Energy Board process to fulfil the Crown's duty to consult. Canada's efforts in Phase II were largely directed to

using the Information Request process to solicit concerns and potential mitigation measures from First Nations. Canada prepared tables to record potential Project impacts and concerns and to record and monitor whether those potential impacts and concerns were addressed in Trans Mountain's commitments, the Board's draft terms and conditions or other mitigation measures.

3. Phase III (February to November 2016)

[115] Crown representatives met with all of the Indigenous applicants in Phase III. Generally, the Indigenous applicants expressed dissatisfaction with the National Energy Board process and the Crown's reliance on that process. Individual concerns raised by individual Indigenous applicants will be discussed in the context of consideration of the adequacy of Canada's consultation efforts.

[116] Towards the latter part of Phase III, on August 16, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly sent a letter to Indigenous groups confirming that they were responsible for conducting consultation efforts for the Project, and that they were coordinating by participating in joint consultation meetings, sharing information and by preparing the draft "Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project" (Crown Consultation Report).

[117] Canada summarized its consultation efforts in the Crown Consultation Report, which included appendices specific to individual Indigenous groups. Indigenous groups were generally provided with a first draft of the Crown Consultation Report, together with the appendix relevant

to that group, in August of 2016. Comments and corrections were to be provided in September 2016. A second draft of the Crown Consultation Report, together with relevant appendices, was provided to Indigenous groups in November of 2016, with comments due by mid-November.

I. Post National Energy Board report events

1. The Interim Measures for Pipeline Reviews

[118] On January 27, 2016, Canada introduced this initiative as part of a strategy to review Canada's environmental assessment processes. The Interim Measures set out five guiding principles to guide the approval of major pipeline projects:

i. No proponent would be required to return to the beginning of the approval process. That is, no proponent would be required to begin the approval process afresh.
ii. Decisions about pipeline approval would be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.
iii. The views of the public and affected communities would be sought and considered.
iv. Indigenous peoples would be meaningfully consulted, and, where appropriate, accommodated.
v. The direct and upstream greenhouse gas emissions linked to a project under review would be assessed.

[119] Canada advised that it planned to apply the Interim Measures to the Project and that in order to do so it would: undertake deeper consultations with Indigenous peoples and provide funding to support participation in these deeper consultations; assess the upstream gas emissions associated with the Project and make this information public; and, appoint a ministerial

representative to engage local communities and Indigenous groups in order to obtain their views and report those views back to the responsible Minister.

[120] The Minister of Natural Resources sought and obtained a four-month extension of time to permit implementation of the Interim Measures. The deadline for the Governor in Council to make its decision on Project approval was, therefore, on or before December 19, 2016.

2. The Ministerial Panel

[121] On May 17, 2016, the Minister announced he was striking a three-member independent Ministerial Panel that would engage local communities and Indigenous groups as contemplated in Canada's implementation of the Interim Measures for the Project.

[122] The Ministerial Panel held a series of public meetings in Alberta and British Columbia, received emails and received responses to an online questionnaire. The Ministerial Panel submitted its report to the Minister on November 1, 2016, in which it identified six "high-level questions" that "remain unanswered" that it commended to Canada for serious consideration.

[123] The report of the Ministerial Panel expressly stated that the panel's work was "not intended as part of the federal government's concurrent commitment to direct consultation with First Nations" and that "full-scale consultation" was never the intent of the panel "especially in the case of First Nations, where the responsibility for consultation fell elsewhere". It follows that no further consideration of the Ministerial Panel is required in the context of consideration of the adequacy of Canada's consultation efforts.

3. Greenhouse gas assessment

[124] For completeness, I note that in November 2016, Environment Canada did publish an assessment estimating the upstream greenhouse gas emissions from the Project.

IX. The issues to be determined

[125] Broadly speaking, the applicants' submissions require the Court to address the following questions.

[126] First, is there merit in any of the preliminary issues raised by the parties?

[127] Second, under the applicable legislative scheme, can the report of the National Energy Board be judicially reviewed?

[128] Finally, should the decision of the Governor in Council be set aside? This in turn requires the Court to consider:

i. What is the standard of review to be applied to the decision of the Governor in Council?

ii. Did the Governor in Council err in determining whether the Board's process of assembling, analyzing, assessing and studying the evidence before it was so deficient that the report submitted by it to the Governor in Council did not qualify as a "report" within the meaning of the *National Energy Board Act*? This will require the Court to consider:

   a. was the process adopted by the Board procedurally fair?

   b. did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

c. did the Board err in its treatment of the *Species at Risk Act*, S.C. 2002, c. 29?

d. did the Board impermissibly fail to decide certain issues before it recommended approval of the Project?

e. did the Board impermissibly fail to consider alternatives to the Westridge Marine Terminal?

iii. Did the Governor in Council fail to comply with the statutory requirement to give reasons?

iv. Did the Governor in Council err by concluding that the Indigenous applicants were adequately consulted and, if necessary, accommodated?

X. Consideration of the issues

A. The preliminary issues

[129] Before turning to the substantive issues raised in this application it is necessary to deal with three preliminary issues raised by the parties. They may be broadly characterized as follows.

[130] First, as described above, a number of the applicants commenced applications challenging the report of the National Energy Board. Trans Mountain moves to strike on a preliminary basis the six applications for judicial review commenced in respect of the report of the National Energy Board on the ground that the report is not amenable to judicial review.

[131] Second, the applicants ask that the two affidavits sworn on behalf of Trans Mountain by Robert Love, or portions thereof, be struck or given no weight on a number of grounds, including that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits.

[132] Finally, the applicants object to the "Consultation Chronologies" found in Canada's compendium.

1. Trans Mountain's motion to strike

[133] In *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, at paragraph 125, this Court concluded that applications for judicial review do not lie against reports made pursuant to section 52 of the *National Energy Board Act* recommending whether a certificate of public convenience and necessity should issue for all or any portion of a pipeline. Accordingly, Trans Mountain seeks orders striking the six notices of application (listed above at paragraph 51) that challenge the Board's report.

[134] A comparison of the parties enumerated in paragraph 51 with those parties who challenge the decision of the Governor in Council (enumerated in paragraph 52) shows that all but one of the applicants who challenge the report of the National Energy Board also challenge the decision of the Governor in Council. For reasons not apparent on the record, the City of Vancouver elected to challenge only the report of the Board.

[135] The City of Vancouver, supported by the City of Burnaby, Tsleil-Waututh, Raincoast and Living Oceans, responds to Trans Mountain by arguing that *Gitxaala* was wrongly decided on this point and that in any event, the applications should not be struck on a preliminary basis.

[136] Those applicants who challenge both decisions are able to argue, and do argue, that in *Gitxaala* this Court determined that the decision of the Governor in Council cannot be

considered in isolation from the Board's report; it is for the Governor in Council to determine whether the process followed by the Board in assembling, analyzing, assessing, and studying the evidence before it was so deficient that its report does not qualify as a "report" within the meaning of the *National Energy Board Act*.

[137] Put another way, a statutory pre-condition for a valid Order in Council is a report from the Board prepared in accordance with all legislative requirements. The Governor in Council is therefore required to be satisfied that the report was prepared in accordance with the governing legislation. This makes practical sense as well because the Board's report formed the factual basis for the decision of the Governor in Council.

[138] It is in the context of these arguments that I turn to consider whether the applications should be struck on a preliminary basis.

[139] The jurisprudence of this Court is uniformly to the effect that motions to strike applications for judicial review are to be resorted to sparingly: see, for example, *Odynsky v. League for Human Rights of B'Nai Brith Canada*, 2009 FCA 82, 387 N.R. 376, at paragraph 5, citing *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C.R. 588, (1994), 176 N.R. 48.

[140] The rationale for this approach is that judicial review proceedings are designed to proceed with celerity; motions to strike carry the potential to unduly and unnecessarily delay the

expeditious determination of an application. Therefore justice is better served by allowing the Court to deal at one time with all of the issues raised by an application.

[141] This rationale is particularly applicable in the present case where striking the applications would still leave intact the ability of all but one of the applicants to argue the asserted flaws in the Board's report in the context of the Court's review of the decision of the Governor in Council. Little utility would be achieved in deciding the motions when the arguments in support of them will be considered now, in the Court's determination of the merits of the applications.

[142] For this reason, in the exercise of my discretion I would dismiss Trans Mountain's motion to strike the applications brought challenging the report of the National Energy Board. I deal with the merits of the argument that the report is not amenable to judicial review below at paragraph 170 and following.

2. The applicants' motion asking that the two affidavits of Robert Love, or portions thereof, be struck or given no weight

[143] The applicants argue that the Love affidavits, or portions thereof, should be struck or given no weight on three grounds. First, the applicants argue that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits so that his evidence should be disregarded as inadmissible hearsay. Second, the applicants argue that the affidavits contain irrelevant and impermissible evidence about Trans Mountain's engagement and consultations with the Indigenous applicants. Finally, the applicants argue that the second affidavit impermissibly augments the evidence that was before the Board and the Governor in Council.

(a) The hearsay objection

[144] In both impugned affidavits Mr. Love swore that "I have personal knowledge of the matters in this Affidavit, except where stated to be based on information and belief, in which case I believe the same to be true." Notwithstanding this statement, on cross-examination, Mr. Love admitted that his first affidavit was based almost entirely on facts of which he had no personal knowledge and that his affidavit failed to disclose that he relied on information and belief to assert those facts. He largely relied on Trans Mountain's lawyers to prepare the paragraphs of his affidavit of which he had no direct knowledge. The basis of his belief that his affidavit was truthful and accurate was his "trust in other people". He frequently admitted that there were other Trans Mountain employees who had direct knowledge of the matters set out in his affidavit (cross-examination of Robert Love, June 19, 2017, by counsel for the City of Burnaby, page 14, line 17 to page 50, line 8).

[145] Similarly, under cross-examination Mr. Love admitted that he had no personal knowledge of the contents of his second affidavit which dealt with Trans Mountain's consultation with Squamish (cross-examination Robert Love, June 22, 2017, by counsel for Squamish, page 2, line 7 to page 11, line 4). When cross-examined by counsel for Coldwater, Mr. Love admitted that he was "largely" not involved with Trans Mountain's engagement with Coldwater. Rather, "[i]t was the aboriginal engagement team who did the communications." (cross-examination of Robert Love, June 22, 2017, by counsel for Coldwater, page 2, line 9 to page 2, line 21).

[146] Mr. Love is the Manager, Land and Rights-of-Way for Kinder Morgan Canada Inc., a company related to Trans Mountain. During his cross-examination by counsel for Squamish he described his role to be responsible for securing "all of the private land interest for the Trans Mountain Expansion Project and to obtain all utility crossings". He was also responsible "for undertaking the land rights necessary to go through about 10 reserves that we have agreements with." Later, on his cross-examination, he explained that prior to swearing his affidavit he "sat down with Regan Schlecker and went through most of the First Nation's engagement and high-level [government] engagements that were happening here" because he had no direct involvement in those engagements. Regan Schlecker was Trans Mountain's Aboriginal affairs manager.

[147] On the basis of Mr. Love's many admissions the applicants argue that Mr. Love's evidence should be struck or given no weight.

[148] Trans Mountain argues in response that the City of Burnaby failed to object to the Love affidavits on a timely basis. It also argues that on judicial review the parties can provide background explanations and summaries regarding the administrative proceeding below and that no applicant points to any important statements in the affidavits that were shown to be based on hearsay.

[149] I begin by rejecting Trans Mountain's argument that the arguments raised by Burnaby were raised too late and so should not be considered. While Burnaby may well not have raised its hearsay objection on a timely basis (see the order of the case management Judge issued on July

25, 2017), both the City of Vancouver and Squamish did object to the Love affidavits on a timely basis. Squamish adopts Burnaby's objections (Squamish's memorandum of fact and law, paragraph 133) and the City of Vancouver relies upon the cross-examination of Mr. Love conducted by counsel for Burnaby (Vancouver's memorandum of fact and law, paragraph 109). On this basis, in my view, Burnaby's arguments are properly before the Court.

[150] With respect to Trans Mountain's argument on the merits, I begin by noting that to the extent background statements and summaries are admissible on an application for judicial review, this admissibility is for the sole and limited purpose of orienting the reviewing Court. In any event and more importantly, affidavits must always fully and candidly disclose if an affiant is relying on information and belief and what portions of the affidavit are based on information and belief. In that event, the affiant must disclose both the sources of the information relied upon and the bases for the affiant's belief in the truth of the information sworn to. This was not done in the present case.

[151] Notwithstanding this failure, I do not see the need to strike portions of the Love affidavits. The affidavits are relevant for the purpose of orienting the Court. However, it is unsafe to rely on the contents of the Love affidavits for the purpose of establishing the truth of their contents unless Mr. Love had personal knowledge of a particular fact or matter. Because Mr. Love did not demonstrate any material, personal knowledge of Trans Mountain's engagement with the Indigenous applicants, and because there is no explanation as to why an individual directly involved in that engagement could not have provided evidence, evidence of

Trans Mountain's engagement must come from other sources—such as the consultation logs Trans Mountain placed in evidence before the Board.

[152] As I have determined that it is unsafe except in limited circumstances to rely upon the contents of the Love affidavits to establish the truth of their contents, it is unnecessary for me to consider the applicants' objection to the second affidavit on the ground that it impermissibly supplemented the consultation logs in evidence before the Board.

(b) Relevance of evidence of Trans Mountain's engagement with the Indigenous applicants

[153] In answer to an Information Request issued by Squamish inquiring whether Canada delegated any procedural aspects of consultation to Trans Mountain, Canada responded:

> The Crown has not delegated the procedural aspects of its duty to consult to Trans Mountain. The Crown does rely on the [National Energy Board] review process to the extent possible to fulfill this duty, a process that requires the proponent to work with and potentially accommodate Aboriginal groups impacted by the project. The [National Energy Board] filing manual provides information to the proponent on the requirement to engage potentially affected Aboriginal groups. This does not constitute delegation of the duty to consult.
>
> (underlining added)

[154] Based on this response, the Indigenous applicants argue that evidence of Trans Mountain's engagement with them is irrelevant. It is necessary to consider this submission because it is an issue that transcends the Love affidavits—there is other evidence of Trans Mountain's engagement.

[155] I accept Trans Mountain's submission that proper evidence of its engagement with the Indigenous applicants is relevant. I reach this conclusion for the following reasons.

[156] First, the Indigenous applicants were informed by the Major Projects Management Office's letter of August 12, 2013, that Canada would rely on the Board's public hearing process "to the extent possible" to fulfil the Crown's duty to consult. As Canada noted in its response to the Information Request, the Board's hearing process required Trans Mountain to work with, and potentially accommodate, Indigenous groups impacted by the Project. Thus the Major Projects Management Office's August 12 letter encouraged Indigenous groups with Project-related concerns to discuss those concerns directly with Trans Mountain. Unresolved concerns were to be directed to the National Energy Board. It follows from this that the Indigenous applicants were informed before the commencement of the Board's hearing process that the Board and, in turn, Canada would rely in part on Trans Mountain's engagement with them.

[157] Thereafter, the Board required Trans Mountain "to make all reasonable efforts to consult with potentially affected Aboriginal groups and to provide information about those consultations to the Board." The Board expressly required this information to include "evidence on the nature of the interests potentially affected, the concerns that were raised and the manner and degree to which those concerns have been addressed. Trans Mountain was expected to report to the Board on all Aboriginal concerns that were expressed to it, even if it was unable or unwilling to address those concerns". (Report of the National Energy Board, page 46).

[158] Trans Mountain's consultation was guided by the Board's Filing Manual requirements and directions given by the Board during the Project Description phase.

[159] This demonstrates that Trans Mountain's consultation was central to the decision of the Board. Therefore, evidence of Trans Mountain's efforts is relevant.

[160] My second reason for finding proper evidence of Trans Mountain's engagement to be relevant is that, consistent with Canada's response to Squamish's Information Request, a review of the Crown Consultation Report shows that in Section 3 Canada summarized "the procedural elements and chronology of Aboriginal consultations and engagement activities undertaken by the proponent, the [Board] and the Crown." Elements of Trans Mountain's engagement were summarized in the Crown Consultation Report, and therefore put before the Governor in Council so it could assess the adequacy of consultation. Elements that were summarized include Trans Mountain's Aboriginal Engagement Program and the Mutual Benefit Agreements Trans Mountain entered into with Indigenous groups. Trans Mountain's Aboriginal Engagement Program was noted to have provided approximately $12 million in capacity funding to potentially affected groups. As well, Trans Mountain provided funding to conduct traditional land and resource use and traditional marine resource use studies. As for the Mutual Benefit Agreements, as of November 2016, Canada was aware that 33 potentially affected Indigenous groups had signed such agreements with Trans Mountain. These included a letter of support for the Project.

[161] Canada's reliance on Trans Mountain's engagement also makes evidence about that engagement relevant.

[162] Finally on this point, some Indigenous applicants assert that Trans Mountain's engagement efforts were inadequate. Evidence of Trans Mountain's engagement, including its provision of capacity funding, is relevant to this allegation and to the issue of the adequacy of available funding.

3. Canada's compendium—The Consultation Chronologies

[163] In its compendium, Canada included schedules in the form of charts (referred to as "Consultation Chronologies") which describe events said to have taken place. The Indigenous applicants assert that the schedules are interpretive, inaccurate, and incomplete and that they should not be received by the Court for two reasons.

[164] First, the Indigenous applicants argue that the Consultation Chronologies summarize the facts as perceived by the Crown. As such, the material should have appeared in Canada's affidavit and in its memorandum of fact and law. It is argued that Canada should not be permitted to circumvent page length restrictions on the length of its memorandum by creating additional resources in its compendium.

[165] Second, the Indigenous applicants argue that the Consultation Chronologies are not evidence. Instead, the summaries are newly created documents that were not before the Board or

the Governor in Council. Their admission is also argued to be prejudicial to the Indigenous applicants.

[166] Canada responds that, as the case management Judge noted in his direction of September 7, 2017, "parties often include material in their compendia as an aid to argument. As long as the aid to argument is brief and helpful and is not anything resembling a memorandum of fact and law and as long as the aid to argument presents or is based entirely upon facts and data from the evidentiary record without adding to it, hearing panels of this Court usually permit it. Of course, there is a limit to this."

[167] I agree with the Indigenous applicants that the Consultation Chronologies must be approached with caution. For example, the Consultation Chronology in respect of the Coldwater Indian Band recites that on May 3, 2016, Canada emailed Coldwater a letter dated November 3, 2015 sent in response to Coldwater's letter of August 20, 2015. The Consultation Chronology also recites that the letter contained an offer to meet with Coldwater to discuss the consultation process and Project-related issues. However, Coldwater points to the sworn evidence of its Chief Councillor to the effect that the November 3, 2015 letter did not actually address the concerns detailed in Coldwater's letter of August 20, 2015, and that the meeting was never arranged because the November 3, 2015 letter was not provided to Coldwater until May 3, 2016.

[168] Thus, I well understand the concern of the Indigenous applicants. This said, this Court's understanding of the evidence is not based upon a summary in chart form which briefly summarizes the consultation process. The Court will base its decision upon the evidentiary

record properly before it, which includes the record before the Board and the Governor in Council, the affidavits sworn in this proceeding, the cross-examinations thereon, the statement of agreed facts, and the contents of the agreed book of documents. The sole permissible use of the Consultation Chronologies is as a form of table of contents or finding aid that directs a reader to a particular document in the record. On the basis of this explanation of the limited permissible use of the Consultation Chronologies there is no need to strike them, a point conceded by counsel for Coldwater and Squamish in oral argument.

[169] For completeness, I note that Upper Nicola moved on a preliminary basis to strike portions of the second Love affidavit on the ground that the affidavit impermissibly recited confidential information. That motion is the subject of brief, confidential reasons issued contemporaneously with these reasons. After the parties to the motion have the opportunity to make submissions, a public version of the confidential reasons will issue.

B. Is the report of the National Energy Board amenable to judicial review?

[170] While I would dismiss Trans Mountain's motion to strike the application on a preliminary basis, because some applicants do challenge the report of the National Energy Board it is necessary to decide whether judicial review lies, notwithstanding this Court's conclusion to the contrary in *Gitxaala*.

[171] The applicants who argue that, contrary to *Gitxaala*, the Board's report is amenable to judicial review acknowledge the jurisprudence of this Court to the effect that the test applied for overruling a decision of another panel of this Court is whether the previous decision is

"manifestly wrong" in the narrow sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed: see, for example, *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, at paragraph 10. The applicants argue that *Gitxaala* was manifestly wrong in deciding that the Board's report was not justiciable. The specific errors asserted are:

a. *Gitxaala* was manifestly wrong in holding that only "decisions about legal or practical interests are judicially reviewable". The Court did not address case law that has interpreted subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 more broadly.
b. The Court failed to deal with the prior decision of this Court in *Forestethics Advocacy v. Canada (Attorney General)*, 2014 FCA 71, 390 D.L.R. (4th) 376.
c. The Court failed to deal with prior jurisprudence of the Federal Court and this Court which did review environmental assessment reports prepared by a joint review panel.
d. The Court referred to provisions of the *Canadian Environmental Assessment Act, 2012* that were inapplicable.
e. The *Gitxaala* decision impermissibly thwarts the right to seek judicial review of the decision of the National Energy Board.

[172] I will deal with each argument in turn after first reviewing this Court's analysis in *Gitxaala*.

1. The decision of this Court in *Gitxaala*

[173] The Court's consideration of the justiciability of the report of the Joint Review Panel began with its detailed analysis of the legislative scheme (reasons, paragraphs 99 to 118). The Court then turned to consider the proper characterization of the legislative scheme, which the

Court described to be "a complete code for decision-making regarding certificate applications."

The Court then reasoned:

> [120] The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council.
>
> [121] Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.
>
> [122] In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
>
> [123] This is a different role—a much attenuated role—from the role played by environmental assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.
>
> [124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:
>
> - In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive," but this is "[s]ubject to sections 30 and 31." Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.
>
> - In the case of the report under section 52 of the *National Energy Board Act*, subsection 52(11) of the *National Energy Board Act* provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.
>
> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative

> scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.
>
> [126] Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent decision to make after the Governor in Council has decided the matter. It simply does what the Governor in Council has directed in its Order in Council.
>
> (underlining added)

[174] Having reviewed *Gitxaala*, I now turn to the asserted errors.

> 2. Was *Gitxaala* wrongly decided on this point?
>
> (a) Did the Court err by stating that only "decisions about legal or practical interests" are judicially reviewable?

[175] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by "anyone directly affected by the matter in respect of which relief is sought" (underlining added). In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, this Court considered the scope of subsection 18.1(1) as follows:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply

> to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> …
>
> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> [29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.
>
> (underlining added)

[176] To similar effect, in *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, 387 N.R. 365, the Court wrote, at paragraph 10, that when "administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review".

[177] On the basis of these authorities the City of Vancouver, supported by the City of Burnaby and Raincoast and Living Oceans, argues that this Court erred by writing in paragraph 125 in *Gitxaala* that only "decisions about legal or practical interests" are reviewable. The Court is said to have overlooked the established jurisprudence to the effect that "matter" as used in subsection 18.1(1) denotes a broader category than merely decisions.

[178] In my view, when the Court's analysis in *Gitxaala* is read in its entirety no such statement was made and no such error was made.

[179] In *Gitxaala*, the Court found that the only action to carry legal consequences was the decision of the Governor in Council. The environmental assessment conducted by the Joint Review Panel under the *Canadian Environmental Assessment Act, 2012* did not affect legal rights or carry legal consequences. Instead, the assessment played "no role other than assisting in the development of recommendations submitted to the Governor in Council" (reasons, paragraph 122). The same could be said of the balance of the report prepared pursuant to the requirements of the *National Energy Board Act*.

[180] Put another way, on the basis of the legislative scheme enacted by Parliament, the report of the Joint Review Panel constituted a set of recommendations to the Governor in Council that lacked any independent legal or practical effect. It followed that judicial review did not lie from it.

[181] Both the determination about the effect of the report of the Joint Review Panel and the conclusion that it was not justiciable were wholly consistent with *Air Canada* and *Democracy Watch*. It was therefore unnecessary for the Court to expressly deal with these decisions, or with subsection 18.1(1).

[182] To complete this analysis, I note that the City of Vancouver also argues that it was prejudiced because the report of the National Energy Board did not comply with section 19 of the *Canadian Environmental Assessment Act, 2012* and because the Board's process was unfair. However, any detrimental effects upon the City of Vancouver could have been remedied through a challenge to the decision of the Governor in Council; the City has not asserted that it suffered

any prejudice in the interval between the issuance of the Board's report and the issuance of the Order in Council by the Governor in Council.

(b) *Forestethics Advocacy v. Canada (Attorney General)*

[183] In this decision, a single Judge of this Court decided whether this Court or the Federal Court had jurisdiction to entertain applications for judicial review brought in respect of the Report of the Joint Review Panel for the Enbridge Northern Gateway Project. Justice Sharlow found jurisdiction to lie in this Court. The City of Vancouver argues that implicit in this decision is the conclusion the reports prepared by joint review panels under the *Canadian Environmental Assessment Act, 2012* are judicially reviewable.

[184] I respectfully disagree. At issue in *Forestethics* was the proper interpretation of section 28 of the *Federal Courts Act*. The Court made no finding about whether the report is amenable to judicial review—its only finding was that the propriety of the report (which would include whether it was amenable to judicial review) was a matter for this Court, not the Federal Court.

(c) The jurisprudence which reviewed environmental assessment reports

[185] The City of Vancouver also points to jurisprudence in which environmental assessment reports prepared by joint review panels were judicially reviewed, and argues that this Court erred by failing to deal with this jurisprudence. The authorities relied upon by Vancouver are: *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, 15 Admin. L.R. (3d) 25, (F.C.); *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000]

2 F.C.R. 263, (1999), 169 F.T.R. 298 (C.A.); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 80 Admin. L.R. (4th) 74; *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520, 422 F.T.R. 299; and, *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463, 455 F.T.R. 1, rev'd on appeal, 2015 FCA 186, 475 N.R. 247.

[186] All of these authorities predate *Gitxaala*. They do not deal with the "complete code" of legislation that was before the Court in *Gitxaala*. But, more importantly, in none of these decisions was the availability of judicial review put in issue—this availability was assumed. In *Gitxaala* the Court reviewed the legislative scheme and explained why the report of the Joint Review Panel was not justiciable. The Court did not err by failing to refer to case law that had not considered this issue.

(d) The reference to inapplicable provisions of the *Canadian Environmental Assessment Act, 2012*

[187] The City of Vancouver also argues that *Gitxaala* is distinguishable because it dealt with section 38 of the *Canadian Environmental Assessment Act, 2012*, a provision that has no application to the process at issue here. The City also notes that *Gitxaala*, at paragraph 124, referred to sections 30 and 31 of the *Canadian Environmental Assessment Act, 2012*. These sections are said not to apply to the Joint Review Panel at issue in *Gitxaala*.

[188] I accept that pursuant to subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* the environmental assessment of the Northern Gateway project (at issue in *Gitxaala*)

was continued under the process established under the *Canadian Environmental Assessment Act, 2012*. Subsection 126(1) specified that such continuation was to be as if the assessment had been referred to a review panel under section 38 of the *Canadian Environmental Assessment Act, 2012*, and that the Joint Review Panel which continued the environmental assessment was considered to have been established under section 40 of the *Canadian Environmental Assessment Act, 2012*.

[189] It followed that sections 29 through 31 of the *Canadian Environmental Assessment Act, 2012* did not apply to the Northern Gateway project, and ought not to have been referenced by the Court in *Gitxaala* in its analysis of the legislative scheme.

[190] This said, the question that arises is whether these references were material to the Court's analysis. To assess the materiality, if any, of this error I begin by reviewing the content of the provisions said to be erroneously referred to in *Gitxaala*.

[191] Section 29 of the *Canadian Environmental Assessment Act, 2012*, discussed above at paragraph 62, requires a responsible authority to ensure that its environmental assessment report sets out its recommendation to the Governor in Council concerning the decision the Governor in Council must make under paragraph 31(1)(*a*) of the *Canadian Environmental Assessment Act, 2012*. Section 30 allows the Governor in Council to refer any recommendation made by a responsible authority back to the responsible authority for reconsideration. Section 31 sets out the options available to the Governor in Council after it receives a report from a responsible authority. Paragraph 31(1)(*a*), discussed at paragraph 67 above, sets out the three choices

available to the Governor in Council with respect to its assessment of the likelihood that a project will cause significant adverse environmental effects and, if so, whether such effects can be justified.

[192] These provisions, without doubt, do apply to the Project at issue in these proceedings. Therefore, the Project is to be assessed under the legislative scheme analyzed in *Gitxaala*. It follows that *Gitxaala* cannot be meaningfully distinguished.

[193] As to the effect, if any, of the erroneous references in *Gitxaala*, the statutory framework applicable to the Northern Gateway project originated in three sources: the *National Energy Board Act*; the *Canadian Environmental Assessment Act, 2012*; and, transitional provisions found in section 104 of the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c.19 (Jobs Act).

[194] Provisions relevant to the present analysis are:

- subsection 104(3) of the Jobs Act which required the Joint Review Panel to set out in its report an environmental assessment prepared under the *Canadian Environmental Assessment Act, 2012*;
- subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* which continued the environmental assessment under the process established under that Act; and,
- paragraph 104(4)(*a*) of the Jobs Act which made the Governor in Council the decision-maker under section 52 of the *Canadian Environmental Assessment Act, 2012* (thus, it was for the Governor in Council to determine if the Project was likely to cause significant adverse environmental effects and, if so, whether such effects could be justified).

[195] These provisions are to the same effect as sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012*. I dismiss the relevance of section 30 to this analysis because it had no application to the environmental assessment under review in *Gitxaala*. Further, and more importantly, section 30 played no significant role in the Court's analysis.

[196] It follows that the analysis in *Gitxaala* was based upon a proper understanding of the legislative scheme, notwithstanding the Court's reference to sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012* instead of the applicable provisions.

[197] Put another way, the error was in no way material to the Court's analysis of the respective roles of the Joint Review Panel, which prepared the report to the Governor in Council, and the Governor in Council, which received the panel's recommendations and made the decisions required under the legislative scheme.

[198] Indeed, the technical nature of the erroneous references was acknowledged by Raincoast in its application for leave to appeal the *Gitxaala* decision to the Supreme Court of Canada. At paragraph 49 of its memorandum of argument it described the Court's error to be "technical in nature" (Trans Mountain's Compendium, volume 2, tab 35). To the same effect, Vancouver does not argue that the Court's error was material to its analysis. Vancouver simply notes the error in footnote 118 of its memorandum of fact and law.

[199] Accordingly, I see no error in the *Gitxaala* decision that merits departing from its analysis.

(e) *Gitxaala* thwarts review of the decision of the National Energy Board

[200] Finally, Vancouver argues that subsection 54(1) of the *National Energy Board Act* and 31(1) of the *Canadian Environmental Assessment Act, 2012* both make the Board's report a prerequisite to the decision of the Governor in Council. As the Governor in Council is not an adjudicative body, meaningful review must come in the form of judicial review of the report of the Board. The decision in *Gitxaala* thwarts such review.

[201] I respectfully disagree. As this Court noted in *Gitxaala* at paragraph 125, the Governor in Council is required to consider any deficiency in the report submitted to it. The decision of the Governor in Council is then subject to review by this Court under section 55 of the *National Energy Board Act*. The Court must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. If the decision of the Governor in Council is based upon a materially flawed report the decision may be set aside on that basis. Put another way, under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon. The report is not immune from review by this Court and the Supreme Court.

(f) Conclusion on whether the report of the National Energy Board is amenable to judicial review

[202] For these reasons, I have concluded that the report of the National Energy Board is not justiciable. It follows that I would dismiss the six applications for judicial review which challenge that report. In the circumstance where the arguments about justiciability played a small part in the hearing I would not award costs in respect of these six applications.

[203] As the City of Vancouver did not seek and obtain leave to challenge the Order in Council, it follows that the City is precluded from challenging the Order in Council.

C. Should the decision of the Governor in Council be set aside on administrative law grounds?

1. The standard of review to be applied to the decision of the Governor in Council

[204] In *Gitxaala*, when considering the standard of review to be applied to the decision of the Governor in Council, the Court wrote that it was not legally permissible to adopt a "one-size-fits-all" approach to any particular administrative decision-maker. Rather, the standard of review must be assessed in light of the relevant legislative provisions, the structure of the legislation and the overall purpose of the legislation (*Gitxaala*, paragraph 137).

[205] I agree. Particularly in the present case it is necessary to draw a distinction between the standard of review applied to what I will refer to as the administrative law components of the Governor in Council's decision and that applied to the constitutional component which required

the Governor in Council to consider the adequacy of the process of consultation and, if necessary, accommodation. This is an approach accepted and urged by the parties.

(a) The administrative law components of the decision

[206] In *Gitxaala*, the Court conducted a lengthy standard of review analysis (*Gitxaala*, paragraphs 128-155) and concluded that, because the Governor in Council's decision was a discretionary decision founded on the widest considerations of policy and public interest, the standard of review was reasonableness (*Gitxaala*, paragraph 145).

[207] Canada, Trans Mountain and the Attorney General of Alberta submit that *Gitxaala* was correctly decided on this point.

[208] Tsleil-Waututh, Raincoast and Living Oceans submit that the governing authority is not *Gitxaala*, but rather is the earlier decision of this Court in *Council of the Innu of Ekuanitshit v. Canada (Attorney General*), 2014 FCA 189, 376 D.L.R. (4th) 348. In this case the Court found the reasonableness standard of review applied to a decision of the Governor in Council approving the federal government's response to a report of a joint review panel prepared under the now repealed *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*Canadian Environmental Assessment Act, 1992*). The Court rejected the submission that the correctness standard applied to the question of whether the Governor in Council and the responsible authorities had respected the requirements of the *Canadian Environmental Assessment Act, 1992* before making their decisions under subsections 37(1) and 37(1.1) of that Act. Under these provisions the Governor in Council and the responsible authorities were required to review the

report of the joint review panel and determine whether the project at issue was justified despite its adverse environmental effects.

[209] This said, while deference was owed to decisions made pursuant to subsections 37(1) and 37(1.1), the Court wrote that "a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme." (*Innu of Ekuanitshit*, paragraph 44).

[210] To the submission that *Innu of Ekuanitshit* is the governing authority, Tsleil-Waututh adds two additional points: first and, in any event, the "margin of appreciation" approach followed in *Gitxaala* is no longer good law; and, second, issues of procedural fairness are to be reviewed on the standard of correctness. Tsleil-Waututh's additional submissions are adopted by the City of Burnaby.

[211] I see no inconsistency between the *Innu of Ekuanitshit* and *Gitxaala* for the following reasons.

[212] First, the Court in *Gitxaala* acknowledged that it was bound by *Innu of Ekuanitshit*. However, because of the very different legislative scheme at issue in *Gitxaala*, the earlier decision did not satisfactorily determine the standard of review to be applied to the decision of the Governor in Council at issue in *Gitxaala* (*Gitxaala*, paragraph 136). This Court did not doubt the correctness of *Innu of Ekuanitshit* or purport to overturn it.

[213] Second, in each case the Court determined the standard of review to be applied to the decision of the Governor in Council was reasonableness. It was within the reasonableness standard that the Court found in *Innu of Ekuanitshit* that the Governor in Council's decision must still be made within the bounds of the statutory scheme.

[214] Third, and finally, the conclusion in *Innu of Ekuanitshit* that a reviewing court must ensure that the Governor in Council's decision was exercised "within the bounds established by the statutory scheme" (*Innu of Ekuanitshit*, paragraph 44) is consistent with the requirement in *Gitxaala* that the Governor in Council must determine and be satisfied that the Board's process and assessment complied with the legislative requirements, so that the Board's report qualified as a proper prerequisite to the decision of the Governor in Council. Then, it is for this Court to be satisfied that the decision of the Governor in Council was lawful, reasonable and constitutionally valid. To be lawful and reasonable the Governor in Council must comply with the purview and rationale of the legislative scheme.

[215] Reasonableness review requires a court to assess whether the decision under review falls within a range of possible, acceptable outcomes which are defensible on the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

[216] Reasonableness review is a contextual inquiry. Reasonableness "takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 59; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at paragraph 57); in every case the fundamental question "is the scope of decision-making power

conferred on the decision-maker by the governing legislation." (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paragraph 18).

[217] Thus, when a court reviews a decision made in the exercise of a statutory power, reasonableness review requires the decision to have been made in accordance with the terms of the statute: see, for example, *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344, at paragraphs 29-30. Put another way, an administrative decision-maker is constrained in the outcomes it may reach by the statutory wording (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paragraph 21).

[218] The Supreme Court recently considered this in the context of a review of a decision of the Specific Claims Tribunal. The Tribunal is required by its governing legislation to adjudicate specific claims "in accordance with law and in a just and timely manner." The majority of the Court observed that the Tribunal's mandate expressly tethered "the scope of its decision-making power to the applicable legal principles." and went on to note that the "range of reasonable outcomes available to the Tribunal is therefore constrained by these principles" (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 D.L.R. (4th) 239, at paragraphs 33-34).

[219] With respect to Tsleil-Waututh's two additional points, I believe the first point was addressed above. Reasonableness "takes its colour from the context." To illustrate, reasonableness review of a policy decision affecting many entities is of a different nature than

reasonableness review of, say, a decision on the credibility of evidence before an adjudication tribunal.

[220] The second point raises the question of the standard of review to be applied to questions of procedural fairness.

[221] As this Court noted in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366, at paragraph 67, the standard of review for questions of procedural fairness is currently unsettled.

[222] As Trans Mountain submits, in cases such as *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at paragraphs 70-72, this Court has applied the standard of correctness with some deference to the decision-maker's choice of procedure (see also *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraphs 79 and 89).

[223] This said, in my view it is not necessary to resolve any inconsistency in the jurisprudence because, as will be explained below, even on a correctness review I find there is no basis to set aside the Order in Council on the basis of procedural fairness concerns.

(b) The constitutional component

[224] As explained above, a distinction exists between the standard of review applied to the administrative law components of the Governor in Council's decision and the standard applied to

the component which required the Governor in Council to consider the adequacy of the process of consultation with Indigenous peoples, and if necessary, accommodation.

[225] Citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraphs 61-63, the parties agree that the existence and extent of the duty to consult are legal questions reviewable on the standard of correctness. The adequacy of the consultation is a question of mixed fact and law which is reviewable on the standard of reasonableness. I agree.

[226] Reasonableness review does not require perfect satisfaction (*Gitxaala*, paragraphs 182-183 and the cases cited therein). The question to be answered is whether the government action "viewed as a whole, accommodates the collective aboriginal right in question". Thus, "[s]o long as every reasonable effort is made to inform and to consult, such efforts would suffice." (*Haida Nation*, paragraph 62, citing *R. v. Gladstone*, [1996] 2 S.C.R. 723 and *R. v. Nikal*, [1996] 1 S.C.R. 1013). The focus of the analysis should not be on the outcome, but rather on the process of consultation and accommodation (*Haida Nation*, paragraph 63).

[227] Having set out the governing standards of review, I next consider the various flaws that are said to vitiate the decision of the Governor in Council.

2. Did the Governor in Council err in determining that the Board's report qualified as a report so as to be a proper condition precedent to the Governor in Council's decision?

[228] The Board's errors said to vitiate the decision of the Governor in Council were briefly summarized above at paragraph 128. For ease of reference I reorganize and repeat that the applicants variously assert that the Board erred by:

a. breaching the requirements of procedural fairness;
b. failing to decide certain issues before it recommended approval of the Project;
c. failing to consider alternatives to the Westridge Marine Terminal;
d. failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*; and,
e. erring in its treatment of the *Species at Risk Act*.

The effect of each of these errors is said to render the Board's report materially deficient such that it was not a "report" that the Governor in Council could rely upon. A decision made by the Governor in Council without a "report" before it must be unreasonable; the statute makes it clear that the Governor in Council can only reach a decision when informed by a "report" of the Board.

[229] I now turn to consider each alleged deficiency.

(a) Was the Board's process procedurally fair?

(i) Applicable legal principles

[230] The Board, as a public authority that makes administrative decisions that affect the rights, privileges or interests of individuals, owes a duty of procedural fairness to the parties before it. However, the existence of a duty of fairness does not determine what fairness requires in a particular circumstance.

[231] It is said that the concept of procedural fairness is eminently variable, and that its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

> … to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

(*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at paragraph 22).

[232] In *Baker*, the Supreme Court articulated a non-exhaustive list of factors to be considered when determining what procedural fairness requires in a given set of circumstances: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme, including the existence of an appeal procedure; the importance of the decision to the

lives of those affected; the legitimate expectations of the person challenging the decision; and, the choice of procedures made by the decision-maker.

[233] Applying these factors, the City of Burnaby argues that the content of the procedural duty owed to it was significant.

[234] Other applicants and the respondents did not make submissions on the content of the procedural duty of fairness.

[235] Having regard to the adjudicative nature of the decision at issue, the court-like procedures prescribed by the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, the absence of an unrestricted statutory right of appeal (subsection 22(1) of the *National Energy Board Act* permits an appeal on a question of law or jurisdiction only with leave of this Court) and the importance of the Board's decision to the parties, I accept Burnaby's submission that the content of the duty of fairness owed by the Board to the parties was significant. The parties were entitled to a meaningful opportunity to present their cases fully and fairly. Included in the right to present a case fully is the right to effectively challenge evidence that contradicts that case. I will consider below more precisely the content of this duty.

[236] Having briefly summarized the legal principles that apply to issues of procedural fairness, I next enumerate the assertions of procedural unfairness.

(ii) The asserted breaches of procedural fairness

[237] The City of Burnaby asserts that the Board breached a duty of fairness owed to it by:

a. failing to hold an oral hearing;
b. failing to provide Burnaby with an opportunity to test Trans Mountain's evidence by cross-examination;
c. failing to require Trans Mountain to respond to Burnaby's written Information Requests and denying Burnaby's motions to compel further and better responses to the Information Requests;
d. delegating the assessment of critically important information until after the Board's report and the Governor in Council's decision;
e. failing to provide sufficient reasons concerning:
    i. alternative means of carrying out the Project;
    ii. the risks, including seismic risk, related to fire and spills;
    iii. the suitability of the Burnaby Mountain Tunnel;
    iv. the protection of municipal water sources; and,
    v. whether, and on what basis, the Project is in the public interest.

[238] Tsleil-Waututh submits that the Board breached the duty of fairness by restricting its ability to test Trans Mountain's evidence and by permitting Trans Mountain to file improper reply evidence.

[239] The Stó:lō submit that it was procedurally unfair to subject their witnesses who gave oral traditional Indigenous evidence to cross-examination when Trans Mountain's witnesses were not cross-examined.

[240] Squamish briefly raised the issue of inadequate response to their Information Request to Natural Resources Canada, and the Board's terse rejection of their requests for further and better responses from Natural Resources Canada, the Department of Fisheries and Oceans and Trans Mountain.

[241] Each assertion will be considered.

(iii) The failure to hold a full oral hearing and to allow cross-examination of Trans Mountain's witnesses

[242] It is convenient to deal with these two asserted errors together.

[243] The applicants argue that the Board's decision precluding oral cross-examination was "a stark departure from the previous practice for a project of this scale." (Burnaby's memorandum of fact and law, paragraph 160) that deprived the Board of an important and established method for determining the truth. The applicants argue that this was particularly unfair because Trans Mountain failed to participate in good faith in the Information Request process with the result that the process did not provide an effective, alternative method to test Trans Mountain's evidence.

[244] The respondents Canada and Trans Mountain answer that:

- The Board has discretion to determine whether a hearing proceeds as a written or oral hearing, and the Board is entitled to deference with respect to its choice of procedure.

- The process was tailored to take into account the number of participants, the volume of evidence and the technical nature of the information to be received by the Board.
- Many aspects of the hearing were conducted orally: the oral Indigenous traditional evidence, Trans Mountain's oral summary argument, the interveners' oral summary arguments and any reply arguments.
- Cross-examination is never an absolute right. A decision-maker may refuse or limit cross-examination so long as there is an effective means to challenge and test evidence.

[245] I acknowledge the importance of cross-examination at common law. However, because the content of the duty of fairness varies according to context and circumstances, the duty of fairness does not always require the right of cross-examination. For example, in a multi-party public hearing related to the public interest, fairness was held not to require oral cross-examination (*Unicity Taxi Ltd. v. Manitoba Taxicab Board* (1992), 80 Man. R. (2d) 241, [1992] 6 W.W.R. 35 (Q.B.); aff'd (1992) 83 Man. R. (2d) 305, [1992] M.J. No. 608 (C.A.)). The Court dismissed the allegation of unfairness because "in the conduct of multi-faceted and multi-party public hearings [cross-examination] tends to become an unwieldy and even dangerous weapon that may lead to disturbance, disruption and delay."

[246] Similarly, in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, the Supreme Court found that the Chippewas of the Thames were given an adequate opportunity to participate in the decision-making process of the Board (reasons, paragraph 51). This finding was supported by the Court's enumeration of the following facts: the Board held an oral hearing; provided early notice of the hearing process to affected Indigenous groups and sought their formal participation; granted intervener status to the

Chippewas of the Thames; provided participant funding to allow the Chippewas of the Thames to tender evidence and pose formal Information Requests to the project proponent, to which they received written responses; and permitted the Chippewas of the Thames to make oral closing submissions. No right of oral cross-examination was granted (reasons, paragraph 52), yet the process provided an adequate right to participate.

[247] These decisions are of course not determinative of the requirements of fairness in the present context.

[248] The relevant context is discussed by the Board in its Ruling No. 14, which dealt with a motion requesting that the hearing order be amended to include a phase for oral cross-examination of witnesses. After quoting an administrative law text to the effect that procedural fairness is not a fixed concept, but rather is one that varies with the context and the interest at stake, the Board wrote:

> Here, the context is that the Board will be making a recommendation to the Governor in Council. The recommendation will take into account whether the pipeline is and will be required by the present and future public convenience and necessity. The Board's recommendation will be polycentric in nature as it involves a wide variety of considerations and interests. Persons directly affected by the Application include Aboriginal communities, land owners, governments, commercial interests, and other stakeholders. The motion and several of the comments in support of it appear to place significant reliance on the potential credibility of witnesses. The Board notes that this is not a criminal or civil trial. The Board's hearing also does not involve an issue of individual liberty. It is a process for gathering and testing evidence for the Board's preparation, as an expert tribunal, of its recommendation to the Governor in Council about whether to issue a certificate under section 52 of the NEB Act. The Board will also be conducting an environmental assessment and making a recommendation under CEAA 2012.
>
> Hearing processes are designed individually and independently by the Board based on the specific circumstances of the application. Each process is designed to provide for a fair hearing, but the processes are not necessarily the same. For

this Application, the Hearing Order provides two opportunities to ask written information requests. There is also an opportunity to file written evidence, and to provide both written and oral final argument. For Aboriginal groups that also wish to present Aboriginal traditional evidence orally, there is an opportunity to do this.

Regarding the nature of the statutory scheme, section 8 of the NEB Act authorizes the Board to make rules about the conduct of hearings before the Board. The Rules provide that public hearings may be oral or written, as determined by the Board. The Board has previously held fully written hearings for section 52 oil and gas pipeline applications. Hearings can also be oral, with significant written components, as is the case here. In addition to the hearing procedures set out in the Rules, the Board makes rules about hearing procedures in its Hearing Order and associated rulings and bulletins.

….

Additional legislative requirements for the Board's public hearings are found in subsection 11(4) of the NEB Act, which requires that applications before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, and within the time limit provided. This subsection of the NEB Act was added in 2012. For this Application, the legislated time limit, which is 15 months after the completeness determination is made, is 2 July 2015.

As the legislative time limits are recent, there is no legitimate expectation as to the hearing procedures that will be used to test the evidence. In this case, the Board has provided notice about the procedures that will apply.

In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.

(underlining added, footnotes omitted)

[249] Further aspects of the relevant context are discussed in the Board's final report at page 4:

For the Board's review of the Project application, the hearing had significant written processes as well as oral components. With the exception of oral traditional evidence described below, evidence was presented in writing, and

> testing of that evidence was carried out through written questions, known as Information Requests (IRs). Intervenors submitted over 15,000 questions to Trans Mountain over two major rounds of IRs. Hundreds of other questions were asked in six additional rounds of IRs on specific evidence. If an intervenor believed that Trans Mountain provided inadequate responses to its questions, it could ask the Board to compel Trans Mountain to provide a more complete response. Trans Mountain could do the same in respect of IRs it posed to intervenors on their evidence. There was also written questioning on various additional evidence, including supplemental, replacement, late and Trans Mountain's reply evidence.
>
> The Board decided, in its discretion in determining its hearing procedure, to allow testing of evidence by IRs and determined that there would not be cross examination in this hearing. The Board decided that, in the circumstances of this hearing where there were 400 intervenors and legislated time limits, and taking into consideration the technical nature of the information to be examined, it was appropriate to test the evidence through written processes. In the final analysis, the written evidence submitted was subjected to extensive written questioning by up to 400 participants and the Board. The Board is satisfied that the evidence was appropriately tested in its written process and that its hearing was fair for all parties and met natural justice requirements. …
>
> (underlining added, footnote omitted)

[250] Having set out the context relevant to determining the content of the duty of fairness, and the Board's discussion of the context, the next step is to apply the contextual factors enumerated in *Baker* to determine whether the absence of oral cross-examination was inconsistent with the participatory rights required by the duty of fairness. The heart of this inquiry is directed to whether the parties had a meaningful opportunity to present their case fully and fairly.

[251] Applying the first *Baker* factor, the nature of the Board's decision is different from a judicial decision. The Board is required to apply its expertise to the record before it in order to make recommendations about whether the Project is and will be required by public convenience and necessity, and whether the Project is likely to cause significant adverse environmental effects that can or cannot be justified in the circumstances. Each recommendation requires the Board to

consider a broad spectrum of considerations and interests, many of which depend on the Board's discretion. For example, subsection 52(2) of the *National Energy Board Act* requires the Board's recommendation to be based on "all considerations that appear to it to be directly related to the pipeline and to be relevant". The Board's environmental assessment is to take into account "any other matter relevant to the environmental assessment that the [Board] requires to be taken into account" (paragraph 19(1)(*j*) of the *Canadian Environmental Assessment Act, 2012*). The nature of the decision points in favour of more relaxed requirements under the duty of fairness.

[252] The statutory scheme also points to more relaxed requirements. The Board may determine that a pipeline application be dealt with wholly in writing (Rule 22(1), *National Energy Board Rules of Practice and Procedure, 1995*). The Board is required to deal with matters expeditiously, and within the legislated time limit. When the hearing order providing for Information Requests, not oral cross-examination, was issued on April 2, 2014, the Board was required to deliver its report by July 2, 2015. In legislating this time limit Parliament must be presumed to have contemplated that pipeline approval projects could garner significant public interest such that, as in this case, 400 parties successfully applied for leave to intervene. One aspect of the statutory scheme does point to a higher duty of fairness: the legislation does not provide for a right of appeal (save with leave on a question of law or jurisdiction). However, as discussed at length above, the Board's decision is subject to scrutiny in proceedings such as this.

[253] The importance of the decision is a factor that points toward a heightened fairness requirement.

[254] For the reasons given by the Board, I do not see any basis for a legitimate expectation that oral cross-examination would be permitted. To the Board's reasons I would add that such an expectation would be contrary to the Board's right to determine that an application be reviewed wholly in writing. While the Board did permit oral cross-examination in its review of the Northern Gateway Pipeline, in that case the Board's report discloses that intervener status was granted to 206 entities—roughly half the number of entities given intervener status in this case.

[255] Finally, the Board's choice of procedure, while not determinative, must be given some respect, particularly where the legislation gives the Board broad leeway to choose its own procedure, and the Board has experience in deciding appropriate hearing procedures.

[256] I note that when the Board rendered its decision on the request that it reconsider Ruling No. 14 so as to allow oral cross-examination, the applicants had received Trans Mountain's responses to their first round of Information Requests; many had brought motions seeking fuller and better answers. The Board ruled on the objections on September 26, 2014. Therefore, the Board was well familiar with the applicants' stated concerns, as is seen in Ruling No. 51 when it declined to reconsider its earlier ruling refusing to amend the hearing order to allow oral cross-examination.

[257] Overall, while the importance of the decision and the lack of a statutory appeal point to stricter requirements under the duty of fairness, the other factors point to more relaxed requirements. Balancing these factors, I conclude that the duty of fairness was significant. Nevertheless, the duty of fairness was not breached by the Board's decisions not to allow oral

cross-examination and not to allow a full oral hearing. The Board's procedure did allow the applicants a meaningful opportunity to present their cases fully and fairly.

[258] Finally on this issue, the Board allowed oral traditional Indigenous evidence because "Aboriginal people have an oral tradition that cannot always be shared adequately in writing." (Ruling No. 14, page 5). With respect to Stó:lō's concerns about permitting oral questioning of oral traditional evidence, the Board permitted "Aboriginal groups [to] choose to answer any questions in writing or orally, whichever is practical or appropriate by their determination." (Ruling No. 14, page 5). This is a complete answer to the concerns of the Stó:lō.

[259] I now turn to the next asserted breach of procedural fairness.

(iv) Trans Mountain's responses to the Information Requests

[260] The City of Burnaby and Squamish argue that Trans Mountain provided generic, incomplete answers to the Information Requests and the Board failed in its duty to compel further and better responses.

[261] During the oral hearing before this Court Burnaby reviewed in detail: Burnaby's first Information Request questioning Trans Mountain about its consideration of alternatives to expanding the pipeline, tank facilities and marine terminal in a major metropolitan area; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; Burnaby's second Information Request; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; the Board's first Information Request to Trans Mountain questioning

alternative means of carrying out the Project; Trans Mountain's response; the Board's second Information Request; and, Trans Mountain's response to the Board's second Information Request. Burnaby argues that Trans Mountain provided significantly more information to the Board than it did to Burnaby, but the information Trans Mountain provided was still insufficient.

[262] Squamish made brief reference in oral argument to the Board's failure to order fuller answers about the Crown's assessment of the strength of its claims to Aboriginal rights and title.

[263] As can be seen from Burnaby's oral submission, it brought motions before the Board to compel better answers in respect of both of Trans Mountain's responses to Burnaby's Information Requests.

[264] I begin consideration of this issue by acknowledging that most, but not all, of Burnaby's requests for fuller answers were denied by the Board. However, procedural fairness does not guarantee a completely successful outcome. The Board did order some further and better answers in respect of each motion. Burnaby must prove more than just that the Board did not uphold all of its objections.

[265] The Board's reasons for declining to compel further answers are found in two of the Board's rulings: Ruling No. 33 (A4 C4 H7) in respect of the first round of Information Requests directed to Trans Mountain by the interveners, and Ruling No. 63 (A4 K8 G4) in respect of the second round of the interveners' Information Requests. Each ruling was set out in the form of a letter which attached an appendix. The appendix listed each question included in the motions to

compel, organized by intervener, and provided "the primary reason" the motion to compel was granted or denied. Each ruling also provided in the body of the decision "overall comments about the motions and the Board's decision".

[266] The Board set out the test it applied when considering motions to compel in the following terms:

> …the Board looks at the relevance of the information sought, its significance, and the reasonableness of the request. The Board balances these factors so as to satisfy the purpose of the [Information Request] process, while preventing an intervenor from engaging in a 'fishing expedition' that could unfairly burden the applicant.

[267] In its decision the Board also provided general information describing circumstances that led it to decline to compel further answers. Of relevance are the following two situations:

- In some instances, Trans Mountain provided a full answer to the question asked, but the intervener disagreed with the answer. In these cases, rather than seeking to compel a further answer, the Board advised the interveners to file their own evidence in response or to provide their views during final argument.
- In some cases, Trans Mountain may not have answered all parts of an intervener's Information Request. However, in those cases where the Board was of the view that the response provided sufficient information and detail for the Board to consider the application, the Board declined to compel a further response.

[268] It is clear that the Board viewed Burnaby's requests for fuller answers about Trans Mountain's consideration and rejection of alternate locations for the marine terminal to fall within the second situation described above.

[269] The Board's second Information Request to Trans Mountain on this point was answered by Trans Mountain on July 21, 2014, and its answer was served upon all of the interveners. Therefore, the Board was aware of this response when on September 26, 2014, it rejected Burnaby's motion in Ruling No. 33.

[270] That the Board found Trans Mountain's answer to its second Information Request to be sufficient is reflected in the Board's report, where at pages 241 to 242 the Board relied on the content of Trans Mountain's response to its second Information Request to articulate Trans Mountain's consideration of the alternatives to the Westridge Marine Terminal. At page 244 of the report, the Board found Trans Mountain's "alternative means assessment" to be appropriate. The Board went on to acknowledge Burnaby's concern that Trans Mountain had not provided an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat or Roberts Bank. However, the Board disagreed, finding that "Trans Mountain has provided an adequate assessment, including consideration of the technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations."

[271] Obviously, Burnaby disagrees with this assessment. However, it has not demonstrated how the Board's conduct concerning Burnaby's Information Requests breached the requirements of procedural fairness. For example, Burnaby has not pointed to evidence that contradicted Trans Mountain's stated reasons for rejecting alternative marine terminal locations. Trans Mountain stated that its assessment was based on feasibility of coincident marine and pipeline access, and technical, economic and environmental considerations of the screened alternative locations. Any

demonstrated conflict in the evidence on these points may have supported a finding that meaningful participation required Trans Mountain to provide more detailed information.

[272] In support of its submission concerning procedural fairness Squamish pointed to a question it directed to Natural Resources Canada. It asked whether that entity had "assessed the strength of Squamish's claim to aboriginal rights in the area of the proposed Project" and if so, to provide "that assessment and any material upon which that assessment is based."

[273] The response Squamish received to its Information Request was:

> The Crown has conducted preliminary depth of consultation assessments for all Aboriginal groups, including Squamish Nation, whose traditional territory intersects with or is proximate to the proposed pipeline right of way, marine terminal expansion and designated marine shipping lanes. (Depth of consultation assessments consider both potential impacts to rights and the strength of claim to rights.) The Crown's depth of consultation assessment is iterative and is expected to evolve as the [Board] review process unfolds and as Aboriginal groups submit their evidence to the [Board] and engage in Phase III consultations with the Crown. The Crown has assessed depth of consultation for the Squamish Nation as "high." This preliminary conclusion was filed into evidence [by the Major Projects Management Office] on May 27, 2015.
>
> The starting point for these assessments is to work with information the Crown has in hand, but Squamish Nation is invited to provide information that they believe could assist the Crown in understanding the nature and scope of their rights.
>
> (underlining added)

[274] Squamish objected to the Board that its request was only partly addressed, and requested that Natural Resources Canada provide the material on which its assessment was based.

[275] In reply to Squamish's motion to compel a further answer, Natural Resources Canada responded:

> In the context of the current hearing process, it is the view of [the Major Projects Management Office] that the further information and records sought by Squamish Nation will not be of assistance to the Panel in fulfilling its mandate.
>
> However, the Crown will communicate with the Squamish Nation in August 2015 to provide further information on Phase III Crown consultation and the Crown's approach to considering adverse impacts of the Project on potential or established Aboriginal and treaty rights. This forthcoming correspondence will summarize the Crown's understanding of the strength of Squamish Nation's claim for rights and title.

[276] The Board denied Squamish's request for a fuller answer on the primary ground that the information Squamish sought "would not contribute to the record in any substantive way and, therefore, would not be material to the Board's assessment."

[277] Given the mandate of the Board, the iterative nature of the consultation process and the fact that direct Crown consultation would take place in Phase III following the release of the Board's report, Squamish has not shown that it was a breach of procedural fairness for the Board not to compel a fuller answer to its question.

(v) The asserted deferral and delegation of the assessment of important information

[278] The City of Burnaby next argues that the Board impermissibly deferred "the provision of critically important information to after the Report stage, and after the [Governor in Council's decision]" (memorandum of fact and law, paragraph 164). Burnaby says that by doing so, the Board acted contrary to the statutory regime and breached the principle of *delegatus non potest*

delegare. At this point in its submissions, Burnaby did not suggest what specific aspect of the statutory regime was contravened, or how the Board or the Governor in Council improperly delegated their statutory responsibility. At this stage, Burnaby deals with this as an issue of procedural fairness. I deal with the statutory scheme argument commencing at paragraph 322.

[279] Burnaby points to a number of issues where it alleges that the Board failed to weigh the evidence and expert opinions put before it. Burnaby says:

- It provided expert evidence that the Project presents serious and unacceptable safety risks to the neighbourhoods that are proximate to the Burnaby Terminal as a result of fire, explosion and boil-over, and that Trans Mountain had failed to assess these risks.
- It established gaps in Trans Mountain's geotechnical investigation of the tunnel option and a lack of analysis of the feasibility of the tunnel option.
- It identified significant information gaps with respect to the Westridge Marine Terminal, including gaps concerning: the final design; spill risk; fire risk; geotechnical risk; and, the ability to respond to these risks.
- It adduced evidence that the available fire response resources were inadequate.
- It demonstrated the risk to Simon Fraser University following an incident at the Burnaby Terminal because of the tunnel's proximity to the only evacuation route from the University.

[280] Burnaby argues that the Board declined to compel further information from Trans Mountain on these points, and instead imposed conditions that required Trans Mountain to do certain specified things in the future. For example, the Board imposed conditions requiring Trans Mountain to file with the Board for approval a report to revise the terminal risk assessments, including the Burnaby Terminal risk assessment, to include consideration of the risks not assessed (Board Conditions 22 and 129). Board Condition 22 had to be met at least six months

before Trans Mountain commenced construction; Condition 129 had to be met at least three months before Trans Mountain applied to open each terminal. Burnaby also notes that many conditions imposed by the Board were not subject to subsequent Board approval.

[281] Burnaby argues that this process prevented meaningful testing of information filed after the Board issued its report recommending that the Project be approved. Further, the Governor in Council did not have access to the material to be filed in response to the Board's conditions when it made its determination of the public interest.

[282] Underpinning these arguments is Burnaby's assertion that the "Board's rulings deprived Burnaby of the ability to review and assess the validity of the alternatives assessment (or to confirm that one was made)." (memorandum of fact and law, paragraph 41).

[283] I can well understand Burnaby's concern—the consequence of a serious spill or explosion and fire in a densely populated metropolitan area might be catastrophic. However, in my respectful view, Burnaby's understandable desire to be able to independently review and assess the validity of the assessment of alternatives to the expansion of the Westridge Marine Terminal, or other matters that affect the City, is inconsistent with the regulatory scheme enacted by Parliament. Parliament has vested in the Board the authority and responsibility to consider and then make recommendations to the Governor in Council on matters of public interest; the essence of the Board's responsibility is to balance the Project-related benefits against the Project-related burdens and residual burdens, and to then make recommendations to the Governor in Council. In this legislative scheme, the Board is not required to facilitate an interested party's

independent review and assessment of a project. It is not for this Court to opine on the appropriateness of the policy expressed and implemented in the *National Energy Board Act*. Rather, the Court's role is to apply the legislation as Parliament has enacted.

[284] The Supreme Court has recognized the Board's "expertise in the supervision and approval of federally regulated pipeline projects" and described the Board to be "particularly well positioned to assess the risks posed by such projects". The Supreme Court went on to note the Board's "broad jurisdiction to impose conditions on proponents to mitigate those risks" and to acknowledge that it is the Board's "ongoing regulatory role in the enforcement of safety measures [which] permits it to oversee long-term compliance with such conditions" (*Chippewas of the Thames First Nation*, paragraph 48). While the Supreme Court was particularly focused on the Board's expertise in the context of its ability to assess risks posed to Indigenous groups, the Board's expertise extends to the full range of risks inherent in the operation of a pipeline, including the risks raised by Burnaby.

[285] Burnaby's submission must be assessed in the light of the Board's approval process. I will set out the Board's approval process at some length because of the importance of this issue to the City of Burnaby and other applicants.

[286] The Board described its approval process in Section 1.3 of its report:

> Trans Mountain's Application was filed while the Project was at an initial phase of the regulatory lifecycle, as is typical of applications under section 52 of the NEB Act. As set out in the Board's Filing Manual, the Board requires a broad range of information when a section 52 application is filed. At the end of the hearing, the level of information available to the Board must be sufficient to allow it to make a recommendation to the GIC that the Project is or is not in the public

interest. There also must be sufficient information to allow the Board to draft conditions that would attach to any new and amended CPCNs, and other associated regulatory instruments (Instruments), should the Project be approved by the GIC.

The Board does not require final information about every technical detail during the application stage of the regulatory process. For example, much of the information filed with respect to the engineering design would be at the conceptual or preliminary level. Site-specific engineering information would not be filed with the Board until after the detailed routing is confirmed, which would be one of the next steps in the regulatory process should the Project be approved. Completion of the detailed design of the project, as well as subsequent construction and operations, would have to comply with:

- the NEB Act, regulations, including the National Energy Board Onshore Pipeline Regulations (OPR), referenced standards and applicable codes;

- the company's conceptual design presented, and commitments made in the Application and hearing proceedings; and

- conditions which the Board considers necessary.

The Board may impose conditions requiring a company to submit detailed information for review (and in some cases, for approval) by the Board before the company is permitted to begin construction. Further information, such as pressure testing results, could be required in future leave to open applications before a company would be permitted to begin pipeline operations. In compliance with the OPR, a company is also required to fully develop an emergency response plan prior to beginning operations. In some cases, the Board has imposed conditions with specific requirements for the development, content and filing of the emergency response plan (see Table 1). This would be filed and fully assessed at a condition compliance stage once detailed routing is known. Because the detailed routing information is necessary to perform this assessment, it would be premature to require a fully detailed emergency response plan to be filed at the time of the project application.

While the project application stage is important, as set out in Chapter 3, there are further detailed plans, studies and specifications that are required before the project can proceed. Some of these are subject to future Board approval, and others are filed with the Board for information, disclosure, and/or future compliance enforcement purposes. The Board's recommendation on the project application is not a final determination of all issues. While some hearing participants requested the final detailed engineering or emergency response plans, the Board does not require further detailed information and final plans at this stage of the regulatory lifecycle.

> To set the context for its reasons for recommendation, the Board finds it helpful to identify the fundamental consideration used in reaching any section 52 determination. The overarching consideration for the Board's public interest determination at the application stage is: can this pipeline be constructed, operated and maintained in a safe manner. The Board found this to be the case. While this initial consideration is fundamental, a finding that a pipeline could be constructed, operated and maintained in a safe manner does not mean a pipeline is necessarily in the public interest as there are other considerations that the Board must weigh, as discussed below. However, the analysis would go no further if the answer to this fundamental question were answered in the negative, as an unsafe pipeline can never be in the public interest.
>
> (underlining added, footnote omitted)

[287] The Board went on to describe how projects are regulated through their lifecycle in Chapter 3, particularly in Sections 3.1 to 3.5:

> 3.0 Regulating through the Project lifecycle
>
> The approval of a project, through issuance of one or more Certificate of Public Convenience and Necessity (CPCN) and/or orders incorporating applicable conditions, forms just one phase in the Board's lifecycle regulation. The Board's public interest determination relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions, such as those discussed in Chapter 1. Throughout the lifecycle of an approved project, as illustrated in Figure 4, the Board holds the pipeline company accountable for meeting its regulatory requirements in order to keep its pipelines and facilities safe and secure, and protect people, property and the environment. To accomplish this, the Board reviews or assesses condition filings, tracks condition compliance, verifies compliance with regulatory requirements, and employs appropriate enforcement measures where necessary to quickly and effectively obtain compliance, prevent harm, and deter future non-compliance.
>
> After a project application is assessed and the Board makes its section 52 recommendation (as described in Chapter 2, section 2.1), the project cannot proceed until and unless the Governor in Council approves the project and directs the Board to issue the necessary CPCN. If approved, the company would then prepare plans showing the proposed detailed route of the pipeline and notify landowners. A detailed route hearing may be required, subject to section 35 of the *National Energy Board Act* (NEB Act). The company would also proceed with the detailed design of the project and could be required to undertake additional studies, prepare plans or meet other requirements pursuant to NEB conditions on any CPCN or related NEB order. The company would be required to comply with

all conditions to move forward with its project, prior to and during construction, and before commencing operations. While NEB specialists would review all condition filings, those requiring approval of the Board would require this approval before the project could proceed.

Once construction is complete, the company would need to apply for the Board's permission (or "leave") to open the project and begin operations. While some conditions may apply for the life of a pipeline, typically the majority must be satisfied prior to beginning operations or within the first few months or years of operation. However, the company must continue to comply with the *National Energy Board Onshore Pipeline Regulations* (OPR) and other regulatory requirements to operate the pipeline safely and protect the environment.

…

If the Project is approved, the Board would employ its established lifecycle compliance verification and enforcement approach to hold Trans Mountain accountable for implementing the proposed conditions and other regulatory requirements during construction, and the subsequent operation and maintenance of the Project.

3.1 Condition compliance

If the Project is approved and Trans Mountain decides to proceed, it would be required to comply with all conditions that are included in the CPCNs and associated regulatory instruments (Instruments). The types of filings that would be required to fulfill the conditions imposed on the Project, if approved, are summarized in Table 4.

If the Project is approved, the Board would oversee condition compliance, make any necessary decisions respecting such conditions, and eventually determine, based on filed results of field testing, whether the Project could safely be granted leave to open.

Documents filed by Trans Mountain on condition compliance and related Board correspondence would be available to the public on the NEB website. All condition filings, whether or not they are for approval, would be reviewed and assessed to determine whether the company has complied with the condition, and whether the filed information is acceptable within the context of regulatory requirements and standards, best practices, professional judgement and the goals the condition sought to achieve. If a condition is "for approval," the company must receive formal approval, by way of a Board letter, for the condition to be fulfilled.

If a filing fails to fulfill the condition requirements or is determined to be inadequate, the Board would request further information or revisions from the company by a specified deadline, or may direct the company to undertake additional steps to meet the goals that the condition was set out to achieve.

> 3.2 Construction phase
>
> During construction, the Board would require Trans Mountain to have qualified inspectors onsite to oversee construction activities. The Board would also conduct field inspections and other compliance verification activities (as described in section 3.5) to confirm that construction activities meet the conditions of the Project approval and other regulatory requirements, to observe whether the company is implementing its own commitments and to monitor the effectiveness of the measures taken to meet the condition goals, and ensure worker and public safety and protection of the environment.
>
> 3.3 Leave to open
>
> If the Project is approved and constructed, the Board will require Trans Mountain to also apply, under section 47 of the NEB Act, for leave to open the pipelines and most related facilities. This is a further step that occurs after conditions applicable to date have been met and the company wishes to begin operating its pipeline and facilities. The Board reviews the company's submissions for leave to open, including the results of field pressure testing, and may seek additional information from the company. Before granting leave to open, the Board must be satisfied that the pipeline or facility has been constructed in compliance with requirements and that it can be operated safely. The Board can impose further terms and conditions on a leave to open order, if needed.
>
> (underlining added, figures and tables omitted)

[288] In Section 3.5 the Board set out its compliance and enforcement programs noting that:

> While all companies are subject to regulatory oversight, some companies receive more than others. In other words, high consequence facilities, challenging projects and those companies who are not meeting the Board's regulatory expectations and goals can expect to see the Board more often than those companies and projects with routine operations.

[289] No applicant challenged the accuracy of the Board's formulation of its approval process and subsequent compliance verification and enforcement approach. The City of Burnaby has not shown how the Board's multi-step approval process is either procedurally unfair or an improper delegation of authority. Implicit in the Board's imposition of a condition, such as a condition requiring a revised risk assessment, or a condition requiring information regarding tunnel

location, construction methods, and the like, is the Board's expectation that the condition may realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. Also implicit in the Board's imposition of a condition is its understanding of its ability to assess condition filings (whether or not the condition requires formal approval), and its ability to oversee compliance with its conditions.

[290] Transparency with respect to Trans Mountain's compliance with conditions is provided by the Board publishing on its website all documents filed by Trans Mountain relating to condition compliance and all related, responsive Board correspondence.

[291] As for the role of the Governor in Council in such a tiered approval process, the recitals to the Order in Council show that the Board's conditions were placed before the Governor in Council. Therefore, the Governor in Council must be seen to have been aware of the extent of the matters left for future review by the Board, and to have accepted the Board's assessment and recommendation about the public interest on that basis.

(vi) Failing to provide adequate reasons

[292] The City of Burnaby next argues that the Board erred by failing to provide sufficient reasons on the following issues:

a. alternative means of carrying out the Project;
b. risks relating to fire and spills (including seismic risk);
c. the suitability of the Burnaby Mountain Tunnel;
d. the protection of municipal water sources; and,

e. whether, and on what basis, the Project is in the public interest.

[293] I begin my analysis by noting that the adequacy of reasons is not a "stand-alone basis for quashing a decision". Rather, reasons are relevant to the overall assessment of reasonableness. Further, reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 14).

[294] This is consistent with the Court's reasoning in *Dunsmuir* where the Supreme Court explained the notion of reasonableness review and spoke of the role reasons play in reasonableness review:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process

> of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" *(Canada (Attorney General) v. Mossop*, 2008 SCC 9, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).
>
> (underlining added)

[295] Reasons need not include all of the relevant arguments, statutory provisions or jurisprudence. A decision-maker need not make an explicit finding on each constituent element leading to the final conclusion. Reasons are adequate if they allow the reviewing court to understand why the decision-maker made its decision and permit the reviewing court to determine whether the conclusion is within the range of acceptable outcomes.

[296] I now turn to consider Burnaby's submissions in the context of the Board's reasons.

Alternative means of carrying out the Project

[297] Burnaby's concern about alternative means of carrying out the Project centers on the Board's treatment of alternative locations for the marine terminal. In Section 11.1.2 the Board dealt with the requirement imposed by paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* that an environmental assessment of a designated project must take into account "alternative means of carrying out the designated project that are technically and economically feasible". The views of the Board are expressed in this section on pages 244 through 245.

[298] Of particular relevance to Burnaby's concern are the first two paragraphs of the Board's reasons:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.

[299] In my view, these reasons allowed the Governor in Council and allow this Court to know why the Board found Trans Mountain's assessment of alternative means to be adequate or appropriate—the Board accepted the facts conveyed by Trans Mountain and found that these facts provided an appropriately detailed consideration of the alternative means. In my further view, the reasons, when read with the record, also allow the Court to consider whether the Board's treatment of alternatives to the Westridge Marine Terminal were so materially flawed that the Board's report was not a "report" that the Governor in Council could rely upon. This is a substantive issue I deal with below commencing at paragraph 322.

Assessment of risks

[300] Burnaby's concerns about the assessment of risks centre on the Burnaby Terminal risk assessment, the Westridge Marine Terminal risk assessment, the Emergency Fire Response plan and the evacuation of Simon Fraser University.

Burnaby Terminal

[301] The Board's consideration of terminal expansions generally is found in Section 6.4 of its report. The Burnaby Terminal is discussed at pages 92 through 95 of the Board's report. After setting out the evidence, including Burnaby's evidence, at page 95 the Board expressed its reasons on the Burnaby Terminal as follows:

> The Burnaby Terminal is uphill of the neighborhood of Forest Grove. An issue of potential concern is the possibility, however remote, of a multiple-tank failure in a common impounding area exceeding the available secondary containment capacity under certain conditions. The Board would impose a condition requiring Trans Mountain to demonstrate that the secondary containment system would be capable of draining large spills away from Tank 96, 97 or 98 to the partial RI. Trans Mountain must also demonstrate that the secondary containment system has the capacity to contain a spill from a multiple-tank rupture scenario (Condition 24).
>
> The City of Burnaby and the City of Burnaby Fire Department raised concerns about fire and safety risks at the Burnaby Terminal following, in particular, those associated with boil-overs. Trans Mountain claimed that boil-over events are unlikely, yet did not quantify the risks through rigorous analysis. The Board is of the view that a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal. The Board would impose conditions requiring Trans Mountain to revise the terminal risk assessments, including the Burnaby Terminal, to demonstrate how the mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria considering all tanks in each respective terminal (Conditions 22 and 129).

[302] With respect to the geotechnical design, the Board wrote at page 97:

> The Board acknowledges the concerns of participants regarding the preliminary nature of the geotechnical design evidence provided. However, the Board is of the view that the design information and the level of detail provided by Trans Mountain with respect to the geotechnical design for the Edmonton Terminal West Tank Area and the Burnaby Terminal are sufficient for the Board at the application stage. The Board notes that more extensive geotechnical work will be completed for the detailed engineering and design phase of the Project.
>
> …

> With regard to the selection of Seismic Use Group (SUG) for the design of the tanks, the Board notes that Trans Mountain has not made a final determination. Nevertheless, should the Project be approved, the Board will verify that Trans Mountain's tanks have secondary controls to prevent public exposure, in accordance with SUG I design criteria, by way of Conditions 22, 24 and 129.

[303] In my view, these reasons adequately allow the Court to understand why the Board rejected Burnaby's evidence and why it imposed the conditions it did.

Westridge Marine Terminal

[304] The Board dealt with the Westridge Marine Terminal expansion in Section 6.5 of its report.

[305] The Board expressed its views at pages 100 through 102. With respect to the design approach the Board wrote:

> Trans Mountain has committed to design, construct, and operate the Westridge Marine Terminal (WMT) in accordance with applicable regulations, standards, codes and industry best practices. The Board accepts Trans Mountain's design approach, including Trans Mountain's effort to eliminate two vapour recovery tanks in the expanded WMT by modifying the vapour recovery technology. The Board considers this to be a good approach for eliminating potential spills and fire hazards. The Board would impose Condition 21 requiring Trans Mountain to provide its decision as well as its rationale to either retain or eliminate the proposed relief tank.

[306] With respect to the geotechnical design, the Board wrote:

> The Board acknowledges the City of Burnaby's concern regarding the level of detail of the geotechnical information provided in the hearing for the Westridge Marine Terminal (WMT) offshore facilities. However, the Board is of the view that Trans Mountain has demonstrated its awareness of the requirements for the geotechnical design of the offshore facilities and accepts Trans Mountain's geotechnical design approach.

> To confirm that soil conditions have been adequately assessed for input to the final design of the WMT offshore facilities, the Board would impose conditions requiring Trans Mountain to file a final preliminary geotechnical report for the design of the offshore facilities, and the final design basis for the offshore pile foundation layout once Trans Mountain has selected the pile design (Conditions 34 and 83).
>
> To verify the geotechnical design approach for the WMT onshore facilities the Board would impose Condition 33 requiring Trans Mountain to file a preliminary geotechnical report for the onshore facilities prior to the commencement of construction.
>
> The Board would examine the geotechnical reports upon receipt and advise Trans Mountain of any further requirements for the fulfilment of the above conditions prior to the commencement of construction.

[307] I have previously dealt with Burnaby's concern with the Board's failure to compel further and better information from Trans Mountain at the hearing stage, and to instead impose conditions requiring Trans Mountain to do certain things in future. Burnaby's concerns relating to the assessment of risks centre on this approach taken by the Board. Burnaby has not demonstrated how the Board's reasons with respect to the Westridge Marine Terminal risk assessment are inadequate.

Emergency fire response

[308] The Board responded to Burnaby's concerns about adequate resources to respond to a fire as follows at page 156:

> The Board shares concerns raised by the City of Burnaby Fire Department and others about the need for adequate resources to respond in the case of a fire. The Board finds the 6-12 hour response time proposed by Trans Mountain for industrial firefighting contractors to arrive on site as inadequate, should they be needed immediately for a response to a fire at the Burnaby Terminal. The Board would impose conditions requiring Trans Mountain to complete a needs assessment with respect to the development of appropriate firefighting capacity for a safe, timely, and effective response to a fire at the Westridge Marine Terminal (WMT) and at the Edmonton, Sumas, and Burnaby Terminals. The

> conditions would require Trans Mountain to assess and evaluate resources and equipment to address fires, and a summary of consultation with appropriate municipal authorities and first responders that will help inform a Firefighting Capacity Framework (Conditions 118 and 138).

[309] Again, Burnaby's concern is not so much with respect to the adequacy of the Board's reasons, but rather with the Board's approach to dealing with Burnaby's concerns through the imposition of conditions—in this case conditions that do not require formal Board approval. On this last point, the Board's explanation of its process for the review of conditions supports the conclusion that an inadequate response to a condition, even a condition not requiring formal Board approval, would be detected by the Board's specialists. Further, the Board oversees compliance with the conditions it imposes.

[310] In any event, I see no inadequacy in the Board's reasons.

Suitability of the Burnaby Mountain Tunnel

[311] The Board deals with the Burnaby Mountain Tunnel in Sections 6.2.2 and 6.2.3. The Board's views, in part, are expressed as follows at pages 81 and 82:

> Regarding the City of Burnaby's concern with Trans Mountain's geotechnical investigation, the Board is of the view that the level of detail of the geotechnical investigation for the tunnel option is sufficient for the purpose of assessing the feasibility of constructing the tunnel. The Board notes that a second phase of drilling is planned for the development of construction plans at the tunnel portals, and that additional surface boreholes or probe holes could be drilled from the tunnel face during construction. The Board is of the view that both the tunnel and street options are technically feasible, and accepts Trans Mountain's proposal that the streets option be considered as an alternative to the tunnel option.
>
> The Board is not aware of the use of the concrete or grout-filled tunnel installation method for other hydrocarbon pipelines in Canada. The Board is concerned that damage to the pipe or coating may occur during installation of the pipelines or grouting, and that there will be limited accessibility for future maintenance and

> repairs. The Board is also concerned that there may be voids or that cracks could form in the grout. The Board would require Trans Mountain to address these and other matters, including excavation, pipe handing, backfilling, pressure testing, cathodic protection, and leak detection, through the fulfillment of Conditions 26, 27 and 28 on tunnel design, construction, and operation.
>
> The Board would impose Condition 29 regarding the quality and quantity of waste rock from the tunnel and Trans Mountain's plans for its disposal.
>
> The Board would also impose Condition 143 requiring Trans Mountain to conduct baseline inspections, including in-line inspection surveys, of the new delivery pipelines in accordance with the timelines and descriptions set out in the condition. The Board is of the view that these inspections would aid in mitigating any manufacturing and construction related defects, and in establishing re-inspection intervals.

[312] Burnaby has not demonstrated how these reasons are inadequate.

Protection of municipal water sources

[313] While Burnaby enumerated this as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on this point and did not point to any particular section of the Board's reasons said to be deficient. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

Public interest

[314] Again, while Burnaby enumerated this issue as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on the point.

[315] The Board's finding with respect to public interest is contained in Chapter 2 of the Board's report where, among other things, the Board described the respective benefits and burdens of the Project and then balanced the benefits and burdens in order to conclude that the

Project “is in the present and future public convenience and necessity, and in the Canadian public interest”. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

(vii) Trans Mountain’s reply evidence

[316] At paragraph 71 of its memorandum of fact and law, Tsleil-Waututh makes the bare assertion that the Board “permitted [Trans Mountain] to file improper reply evidence”. While Tsleil-Waututh referenced in a footnote its motion record filed in response to Trans Mountain’s reply evidence, it did not make any submissions on how the Board erred or how the reply evidence was improper. Nor did Tsleil-Waututh reference the Board’s reasons issued in response to its motion.

[317] Tsleil-Waututh argued before the Board that, rather than testing Tsleil-Waututh’s evidence through Information Requests, Trans Mountain filed extensive new or supplementary evidence in reply. Tsleil-Waututh alleged that the reply evidence was substantially improper in nature. Tsleil-Waututh sought an order striking portions of Trans Mountain’s reply evidence. In the alternative Tsleil-Waututh sought, among other relief, an order allowing it to issue Information Requests to Trans Mountain about its reply evidence and allowing it to file sur-reply evidence.

[318] The Board, in Ruling No. 96, found that Trans Mountain’s reply evidence was not improper. In response to the objections raised before it, the Board found that:

- Trans Mountain's reply evidence was not evidence that Trans Mountain ought to have brought forward as evidence-in-chief in order to meet its onus.
- Trans Mountain's reply evidence was filed in response to new evidence adduced by the interveners.
- Given the large volume of evidence filed by the interveners, the length of Trans Mountain's reply evidence was not a sufficient basis on which to find it to be improper.
- To the extent that portions of the reply evidence repeated evidence already presented, this caused no prejudice to the interveners who had already had an opportunity to test the evidence and respond to it.

[319] The Board allowed Tsleil-Waututh to test the reply evidence through one round of Information Requests. The Board noted that the final argument stage was the appropriate stage for interveners and Trans Mountain to make submissions to the Board about the weight to be given to the evidence.

[320] Tsleil-Waututh has not demonstrated any procedural unfairness arising from the Board's dismissal of its motion to strike portions of Trans Mountain's reply evidence.

(viii) Conclusion on procedural fairness

[321] For all the above reasons the applicants have not demonstrated that the Board breached any duty of procedural fairness.

(b) Did the Board fail to decide certain issues before recommending approval of the Project?

[322] Both Burnaby and Coldwater make submissions on this issue. Additionally, Coldwater, Squamish and Upper Nicola make submissions about the Board's failure to decide certain issues in the context of the Crown's duty to consult. The latter submissions will be considered in the analysis of the adequacy of the Crown's consultation process.

[323] Burnaby's and Coldwater's submissions may be summarized as follows.

[324] Burnaby raises two principal arguments: first, the Board failed to consider and assess the risks and impacts of the Project to Burnaby, instead deferring the collection of information relevant to the risks and impacts and consideration of that information until after the decision of the Governor in Council when Trans Mountain was required to comply with the Board's conditions; and, second, the Board failed to consider alternative means of carrying out the Project and their environmental effects. Instead, contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to require Trans Mountain to include with its application an assessment of the Project's alternatives and failed to require Trans Mountain to provide adequate answers in response to Burnaby's multiple Information Requests about alternatives to the Project.

[325] With respect to the first error, Burnaby asserts that it is a "basic principle of law that a tribunal or a court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment." (Burnaby's memorandum of fact and law, paragraph 142). In breach of this

principle, the Board did not require Trans Mountain to provide further evidence, nor did the Board weigh or decide conflicting evidence. Instead, the Board deferred assessment of critical issues by imposing a series of conditions on Trans Mountain.

[326] With respect to the second error, Burnaby states that Trans Mountain failed to provide evidence about alternative routes and locations for portions of the Project, including the Burnaby Terminal and the Westridge Marine Terminal. Thus, Burnaby says the Board "had no demonstrated basis on the record to decide" about preferred options or to decide that Trans Mountain used "criteria that justify and demonstrate how the proposed option was selected and why it is the preferred option." (Burnaby's memorandum of fact and law, paragraph 133).

[327] Coldwater asserts that contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to look at the West Alternative as an alternative means of carrying out the Project. Briefly stated, the West Alternative is an alternative route for a segment of the new pipeline. The approved route for this segment of the new pipeline passes through the recharge zone of the aquifer that supplies the sole source of drinking water for 90% of the residents of the Coldwater Reserve and crosses two creeks which are the only known, consistent sources of water that feed the aquifer. The West Alternative is said by Coldwater to pose the least apparent danger to the aquifer.

[328] Trans Mountain responds that the Board considered the risks and impacts of the Project to Burnaby and determined that there was sufficient evidence to conclude that the Project can be constructed, operated and maintained in a safe manner. Further, it was reasonable for the Board

to implement conditions requiring Trans Mountain to submit additional information for Board review or approval throughout the life of the Project. This Court's role is not to reweigh evidence considered by the Board.

[329] Trans Mountain notes that the proponent's application and the subsequent Board hearing represent the process by which the Board collects enough information to ensure that a project can be developed safely and that its impacts are mitigated. At the end of the hearing, the Board requires sufficient information to assess the Project's impacts, and whether the Project can be constructed, operated and maintained safely, and to draft terms and conditions to attach to a certificate of public convenience and necessity, should the Governor in Council approve the Project. It follows that the Board did not improperly defer its consideration of Project impacts to the conditions.

[330] To the extent that some applicants suggest that the Board acted contrary to the "precautionary principle" Trans Mountain responds that the precautionary principle must be applied with the corollary principle of "adaptive management". Adaptive management responds to the difficulty, or impossibility, of predicting all of the environmental consequences of a project on the basis of existing knowledge. Adaptive management permits a project with uncertain, yet potentially adverse, environmental impacts to proceed based on mitigation measures and adaptive management techniques designed to identify and deal with unforeseen effects (*Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 F.C. 672, at paragraph 24).

[331] With respect to the assessment of alternative means, Trans Mountain notes that it presented evidence that it had conducted a feasibility analysis of alternative locations to the Westridge Marine Terminal and the Burnaby Terminal. Based on technical, economic and environmental considerations Trans Mountain had eliminated these options because of the significantly increased costs and larger environmental impacts associated with these alternatives.

[332] Trans Mountain also argues that it presented evidence to confirm that its routing criteria followed the existing pipeline alignment and other linear facilities wherever possible. Additionally, it presented various routing alternatives to the Board. Trans Mountain's preferred corridor through Burnaby Mountain was developed in response to requests that it consider a trenchless option through Burnaby Mountain (as opposed to routing the new pipeline through residential streets). Further, while it had initially considered the West Alternative route around the Coldwater Reserve, Trans Mountain rejected this alternative because it necessitated two crossings of the Coldwater River and involved geo-technical challenges and greater environmental disturbances.

[333] Based on the evidence before it the Board found that:

- Trans Mountain provided an adequate assessment of technically and economically feasible alternatives, including alternative locations;
- the Burnaby Mountain corridor minimized Project impacts and risks;
- Trans Mountain's route selection process and criteria, and the level of detail it provided for its alternative means assessment, were appropriate; and
- the Board imposed Condition 39 to deal with Coldwater's concerns regarding the aquifer. This condition required Trans Mountain to file with the Board, at least six months prior to commencing construction between two specified points, a

> hydrogeological report relating to Coldwater's aquifer. This report must describe, delineate and characterize a number of things. For example, based on the report's quantification of the risks posed to the groundwater supplies for the Coldwater Reserve, the report must "describe proposed measures to address identified risks, including but not limited to considerations related to routing, project design, operational measures, or monitoring".

[334] Trans Mountain submits that while the applicants disagree with the Board's finding about the range of alternatives, the Board has discretion to determine the range of alternatives it must consider and it is not this Court's role to reweigh the Board's assessment of the facts.

(i) Did the Board fail to assess the risks and impacts posed by the Project to Burnaby?

[335] At paragraphs 278 to 291 I dealt with Burnaby's argument that the Board breached the duty of procedural fairness by deferring and delegating the assessment of important information. This argument covers much of the same ground, except it is not couched in terms of procedural fairness.

[336] The gist of Burnaby's concern is reflected in its argument that "[i]t is a basic principle of law that a tribunal or court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment."

[337] This submission is best considered in concrete terms. The risks the Board is said not to have assessed are the risks posed by the Burnaby Terminal, the tunnel route through Burnaby Mountain, the Westridge Marine Terminal, the lack of available emergency fire response

resources to respond to a fire at the Westridge Marine and Burnaby terminals and, finally, the risk in relation to the evacuation of Simon Fraser University following an incident at the Burnaby Terminal. Illustrative of Burnaby's concerns is its specific and detailed argument with respect to the assessment of the risk associated with the Burnaby Terminal.

[338] With respect to the assessment of the risks associated with the Burnaby Terminal, Burnaby points to the report of its expert, Dr. Ivan Vince, which identified deficiencies or information gaps in Trans Mountain's risk assessment for the Burnaby Terminal. A second report prepared by Burnaby's Deputy Fire Chief identified gaps in Trans Mountain's analysis of fire risks and fire response capability.

[339] Burnaby acknowledges that the Board recognized these gaps and deficiencies. Thus, it found that while Trans Mountain claimed that boil-over events are unlikely, Trans Mountain "did not quantify the risks through a rigorous analysis" and that "a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal". Burnaby argues, however, that despite recognizing this deficiency, the Board then failed to require Trans Mountain to provide further information and assessment prior to the issuance of the Board's report. Instead, the Board imposed conditions requiring Trans Mountain to file for the Board's approval a report revising the terminal risk assessments, including the Burnaby Terminal risk assessment, and including consideration of the risks not assessed (Conditions 22 and 129).

[340] Condition 22 specifically required the revised risk assessment to quantify and/or include the following:

a. the effect of any revised spill burn rates;
b. the potential consequences of a boil-over;
c. the potential consequences of flash fires and vapour cloud explosions;
d. the cumulative risk based on the total number of tanks in the terminal, considering all potential events (pool fire, boil-over, flash fire, vapour cloud explosion);
e. the domino (knock-on) effect caused by a release of the contents of one tank on other tanks within the terminals and impoundment area(s), or other tanks in adjacent impoundment areas; and,
f. risk mitigation measures, including ignition source control methods.

[341] The Board required that for those risks that could not be eliminated "Trans Mountain must demonstrate in each risk assessment that mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria for risk acceptability."

[342] Burnaby concludes its argument on this point by stating that this demonstrates that when the Board completed its report and made its recommendation to the Governor in Council the Board did not have information on the risks enumerated in Condition 22, or information on whether these risks could be mitigated. It follows, Burnaby submits, that the Board failed in its duty to weigh and decide conflicting evidence.

[343] Burnaby advances similar arguments in respect of the other risks described above.

[344] In my view, Burnaby's argument illustrates that the Board did look critically at the competing expert evidence about risk assessment. After weighing the competing expert reports, the Board determined that Burnaby's evidence did reveal gaps and deficiencies in Trans

Mountain's risk assessments. Burnaby's real complaint is not that the Board did not consider and weigh conflicting evidence. Rather, its complaint is that the Board did not then require Trans Mountain to in effect re-do its risk assessment.

[345] However this, in my respectful view, overlooks the Board's project approval process, a process described in detail at paragraphs 285 to 287 above.

[346] This process does not require a proponent to file in its application information about every technical engineering detail. What is required is that by the end of the Board's hearing the Board have sufficient information before it to allow it to form its recommendation to the Governor in Council about whether the project is in the public interest and, if approved, what conditions should attach to the project. Included in the consideration of the public interest is whether the project can be constructed, operated and maintained safely.

[347] This process reflects the technical complexity of projects put before the Board for approval. What was before the Board for consideration was Trans Mountain's study and application for approval of a 150 metre-wide pipeline corridor for the proposed pipeline route. At the hearing stage much of the information filed with the Board about the engineering design was at a conceptual or preliminary level.

[348] Once a project is approved, one of the next steps in the regulatory process is a further hearing for the purpose of confirming the detailed routing of a project. Only after the detailed route is approved by the Board can site-specific engineering information be prepared and filed

with the Board. Similarly, detailed routing information is necessary before things such as a fully detailed emergency response plan acceptable to the Board may be prepared and filed (report, page 7).

[349] The Board describes the approval of a project to be "just one phase" in the Board's lifecycle regulation. Thereafter the Board's public interest determination "relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions" (report, page 19).

[350] As stated above, implicit in the Board's imposition of a condition is the Board's expert view that the condition can realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. After the Board imposes conditions, mechanisms exist for the Board to assess information filed in response to its conditions and to oversee compliance with its conditions.

[351] Burnaby obviously disagrees with the Board's assessment of risk. However, Burnaby has not shown that the Board's approval process is in any way contrary to the legislative scheme. Nor has it demonstrated that the approval process impermissibly defers determinations post-judgment. Courts cannot determine issues after a final judgment is rendered because of the principle of *functus officio*. While this principle has some application to administrative decision-makers it has less application to the Board whose mandate is ongoing to regulate through a project's entire lifecycle.

(ii) Did the Board fail to consider alternative means of carrying out the Project?

[352] As explained above, Burnaby's concern is that Trans Mountain did not provide sufficient information to allow the Board to conclude that Trans Mountain's assessment of alternatives was adequate. Burnaby says that the Board simply accepted Trans Mountain's unsupported assertion that the alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing Trans Mountain's assertion. Burnaby argues that evidence is required to support that assertion "so that the evidence may be tested by intervenors and weighed by the Board in determining whether the preferred location is the best environmental alternative and in the public interest." (Burnaby's memorandum of fact and law, paragraph 136).

[353] I begin consideration of Burnaby's submission with the observation that Burnaby's challenge is a challenge to the Board's assessment of the sufficiency of the evidence before it. The Board, as an expert Tribunal, is entitled to significant deference when making such a fact-based assessment.

[354] Moreover, in my respectful view, Burnaby's submission fails to take into account that paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* does not require the Board to have regard to any and all alternative means of carrying out a designated project. The Board is required to consider only those alternative means that are "technically and economically feasible".

[355] While Burnaby relies upon guidance from the Canadian Environmental Assessment Agency as to the steps to be followed in the assessment of alternative means, and also relies upon the guidance set out in the Board's Filing Manual about the filing requirements for the consideration of alternatives, these criteria apply only to the treatment of true alternatives, that is alternatives that are technically and economically feasible.

[356] I now turn to Burnaby's specific concern that the Board simply accepted Trans Mountain's assertion that Project alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing this assertion. Burnaby argues that the Board was obliged to require that Trans Mountain provide evidence about alternative routes and locations for the Burnaby Terminal and the Westridge Marine Terminal so that the evidence could be tested by it and other interveners.

[357] The impugned quotation comes from Trans Mountain's response to Burnaby's first Information Request (Exhibit H to the affidavit of Derek Corrigan). As previously referred to above at paragraph 269, in addition to Burnaby's Information Requests, the Board also served two Information Requests on Trans Mountain questioning it about alternative marine terminals.

[358] The preamble to the Board's second Information Request referenced Trans Mountain's first response to the Board in which it stated that it had considered potential alternative marine terminal locations based on the feasibility of coincident marine and pipeline access, and screened them based on technical, economic, and environmental considerations. The preamble also referenced Trans Mountain's response that it had ultimately concluded that constructing and

operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint and significantly greater environmental effects as compared to the existing facilities. Based on this conclusion Trans Mountain did not continue with a further assessment of alternative termini for the Project.

[359] One of the specific inquiries directed to Trans Mountain by the Board in its second Information Request was:

> Please elaborate on Trans Mountain's rationale for the Westridge Marine Terminal as the preferred alternative, including details to justify Trans Mountain's statement in [Trans Mountain's response to the Board's first Information Request] that constructing and operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint, and additional environmental effects, as compared to expanding existing facilities.

[360] In its response to the Board, Trans Mountain began by explaining the consideration it had given the option of a northern terminal. Trans Mountain's assessment ultimately "favoured expansion of the existing system south over a new northern lateral [pipeline] and terminal." This assessment was based on the following considerations. The northern option involved:

- A 250 kilometre longer pipeline with a concomitant 10% to 20% higher project capital cost.
- Greater technical challenges, including routing through high alpine areas of the Coast Mountains, or extensive tunneling to avoid these areas. These technical challenges, while not determined to be insurmountable, resulted in greater uncertainty for both cost and construction schedule.
- Fewer opportunities to benefit from existing operations, infrastructure and relationships. These benefits involved both using the existing Trans Mountain right-of-way, facilities, programs and personnel, and the synergies flowing from other existing infrastructure such as road access, power, and marine infrastructure.

> The inability to benefit from existing operations would increase the footprint and the potential impact of the northern option.

[361] Based on these considerations, Trans Mountain concluded that expansion along the existing Trans Mountain pipeline route was the more favourable option because of the higher costs and the greater uncertainty of both cost and schedule that accompanied the northern option.

[362] Trans Mountain then turned to explain its consideration of the alternative southern terminals. Five southern alternative locations were considered: (i) Howe Sound, which was eliminated because there was no feasible pipeline access west of Hope, it would require a new lateral pipeline from the Kamloops area, it involved extreme terrain and there was limited land available in close proximity for storage facilities; (ii) Vancouver Harbour, which was eliminated because there were no locations with coincident feasible pipeline access and no land for storage facilities; (iii) Sturgeon Bank, which was eliminated because there was no feasible land available in close proximity for storage facilities; (iv) Washington State, which was eliminated because it involved a longer pipeline and complex regulatory issues (including additional permits required by both Washington State and federal authorities); and, (v) Boundary Bay, which was eliminated because of insufficient water depth.

[363] This left for consideration Roberts Bank. Trans Mountain conducted a screening level assessment based on “desktop studies” of technical, economic and environmental considerations for marine access, storage facilities and pipeline routing for a terminal at that location.

[364] After setting out the assumed technical configuration for the Roberts Bank dock, storage and pipeline, Trans Mountain reviewed the engineering and geotechnical considerations. While no unsurmountable engineering or geotechnical issues were identified, Trans Mountain's assessment showed that relative to the Westridge Marine Terminal, the Roberts Bank alternative "required a significantly larger dock structure, a large new footprint for the storage terminal, a longer right of way, and a greater diversion from the existing corridor. The extent and cost of ground improvement necessary for the dock and storage terminal also presented a significant source of uncertainty."

[365] Trans Mountain then reviewed the relevant environmental considerations. Trans Mountain's assessment showed that while both Westridge and Roberts Bank:

> … have unique and important environmental values, based on the setting the environmental conditions at Roberts Bank appeared to be more substantial and uncertain than at Westridge Terminal, particularly given the larger footprint required for the dock and storage terminal. Without effective mitigation accidents or malfunctions at Roberts Bank could result in greater and more immediate consequences for the natural [environment].

[366] Trans Mountain then detailed the salient First Nations' considerations. For the purpose of the screening assessment, Trans Mountain assumed First Nation concerns and interests to be similar to those for the Westridge Terminal and likely to include concerns for impacts on traditional rights, environmental protection, and potential interest in economic opportunities.

[367] Trans Mountain then reviewed the land use considerations, concluding that relative to the Westridge Terminal "the Roberts Bank alternative would result in a greater change in land use both for the storage terminal and the dock structure. As surrounding development is less than that

for Westridge accidents or malfunctions at this location would be expected to affect fewer people."

[368] Trans Mountain's assessment next looked to the estimated cost differences. While operating costs were not quantified for comparison purposes, "given the additional dock and storage terminal required these costs would be higher for the Roberts Bank alternative."

[369] The assessment then looked at marine access considerations. While Roberts Bank offered a shorter and relatively less complex marine transit:

> [T]here is an existing well established marine safety system for vessels calling at Westridge. Although Roberts Bank would allow service to larger vessels which would result in potentially lower transport costs for shippers and lower probability of oil spill accidents larger cargos result in potentially larger spill volumes. While the overall effect on marine spill risk was not determined it is expected that larger cargos would require a greater investment in spill response.

[370] Trans Mountain then set out the conclusions it drew from its assessment. While the Westridge and Roberts Bank terminal alternatives each had positive and negative attributes, especially when viewed from any one perspective, overall Trans Mountain's rationale for the Westridge Marine Terminal as a preferred alternative was based on the expectation that Roberts Bank would result in:

- Significantly greater cost—Trans Mountain estimated a $1.2 billion higher capital cost and assumed higher operating costs for the Roberts Bank alternative.
- A larger footprint and additional environmental effects—Roberts Bank would result in an additional storage terminal with an estimated 100 acres of land required, a larger dock structure with a 7 kilometre trestle, and a 14 kilometre longer pipeline that diverges further from the existing pipeline corridor.

[371] I have set out Trans Mountain's response to the Board at some length because of the importance of this issue to Burnaby. In my view, two points arise from Trans Mountain's response to the Board.

[372] First, its response was not as conclusory as Burnaby's submission might suggest. Second, Trans Mountain's explanation for eliminating a northern alternative and the six, southern alternatives on the ground they were not technically or economically feasible was based on factual and technical considerations well within the expertise of the Board. To illustrate, the Board would have an understanding of the technical challenges posed when routing through high alpine areas. It would also be familiar with considerations such as the expense and environmental impact that accompany the construction of a longer pipeline, away from an existing pipeline corridor, or a new storage facility. The Board would have an appreciation of the need for coincident pipeline access and land for storage facilities and of the efficiencies that flow from things such as the use of existing infrastructure and relationships.

[373] In relevant part, the Board's conclusion on alternative means was:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.
>
> (underlining added)

[374] Burnaby has not demonstrated that the Board's finding that Trans Mountain provided an appropriate level of detail in its alternative means assessment was flawed. This was a fact-based assessment well within the Board's area of expertise.

(iii) Did the Board fail to look at the West Alternative as an alternative route for the new pipeline?

[375] In its project application, Trans Mountain initially proposed four alternative routes for the new pipeline through the Coldwater River Valley. These were referred to as the Modified Reserve Route, the East Alternative, the Modified East Alternative and the West Alternative. While initially its preferred route was identified to be the East Alternative, Trans Mountain later changed its preferred route to be the Modified East Alternative. Coldwater alleges that at some point early in the process Trans Mountain unilaterally withdrew the West Alternative from consideration without notice to Coldwater. Coldwater also alleges that the East and Modified East Alternatives pose the greatest risk of contaminating the aquifer that supplies drinking water to the Coldwater Reserve, and that the West Alternative is the only route to pose no apparent threat to the aquifer.

[376] Before the Board, Coldwater argued that Trans Mountain did not adequately assess alternative locations for the new pipeline through the Coldwater River Valley. Coldwater requested that the Board require a re-examination of routing options for the Coldwater River Valley before any recommendation on the Project was made.

[377] The Board, in its report, acknowledged Coldwater's concerns at pages 241, 285 and 289.

[378] The Board noted, at page 245, that "the detailed route for the Project has not been finalized, and that this hearing assessed the general route for the Project, the potential environmental and socio-economic effects of the Project, as well as all evidence and commitments made by Trans Mountain regarding the design, construction and safe operation of the pipeline and associated facilities."

[379] At page 290 the Board found that Trans Mountain had not sufficiently shown that there was no potential interaction between the aquifer underlying the Coldwater Reserve and the proposed Project route. Therefore, the Board imposed Condition 39 requiring Trans Mountain to file a hydrogeological study to more precisely determine the potential for interactions and impacts on the aquifer and to assess the need for any additional measures to protect the aquifer, including monitoring measures (Condition 39 was described in greater detail above at paragraph 333).

[380] Coldwater argues that the Board breached its statutory obligation to consider alternative means of carrying out the designated project. Further, this breach cannot be cured at the detailed route hearing because at a detailed route hearing the Board can only consider limited routing options within the approved pipeline corridor. The West Alternative is well outside the approved corridor. Coldwater submits that the Board's only option at the detailed route hearing is to decline to approve the detailed routing and to reject Trans Mountain's Plan, Profile and Book of Reference (PPBoR); Coldwater says this is an option the Board would be unwilling to pursue given the Project's post-approval momentum.

[381] I agree that at a detailed route hearing the Board may only approve, or refuse to approve, a proponent's PPBoR. However, this does not mean that at a detailed route hearing the Board is precluded from considering routes outside of the approved pipeline corridor.

[382] Subsection 36(1) of the *National Energy Board Act* requires the Board "to determine the best possible detailed route of the pipeline and the most appropriate methods and timing of constructing the pipeline." This provision does not limit the Board to considering the best possible detailed route within the approved pipeline corridor. This was recognized by the Board in *Emera Brunswick Pipeline Company Ltd. (Re)*, 2008 LNCNEB 10, at page 30.

[383] Additionally, section 21 of the *National Energy Board Act* permits the Board to review, vary or rescind any decision or order, and in *Emera* the Board recognized, at page 31, that where a proposed route is denied on the basis of evidence of a better route outside of the approved pipeline corridor an application may be made under section 21 to vary the corridor in that location.

[384] It follows that the Board would be able to vary the route of the new pipeline should the hydrogeological study to be filed pursuant to Condition 39 require an alternative route, such as the West Alternative route, in order to avoid risk to the Coldwater aquifer.

[385] As the pipeline route through the Coldwater River Valley remains a live issue, depending on the findings of the hydrogeological report, it follows that Coldwater has not demonstrated that the Board breached its statutory obligation to consider alternative means.

[386] The next error said to vitiate the Board's report is its alleged failure to consider alternatives to the Westridge Marine Terminal.

> (c) Did the Board fail to consider alternatives to the Westridge Marine Terminal?

[387] In my view, this issue was fully canvassed in the course of considering Burnaby's argument that the Board impermissibly failed to decide certain issues for recommended approval of the Project.

> (d) Did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

[388] Tsleil-Waututh argues that the Board breached the requirements of the *Canadian Environmental Assessment Act, 2012* by excluding Project-related marine shipping from the definition of the "designated project" which was to be assessed under that Act. In turn, the Governor in Council is said to have unreasonably exercised its discretion when it relied upon the Board's materially flawed report—in effect the Governor in Council did not have a "report" before it and, thus, could not proceed to its decision. Tsleil-Waututh adds that the Board failed to comply with the requirements of subsection 31(1) of the *Canadian Environmental Assessment Act, 2012* by:

i. failing to determine whether the environmental effects of Project-related marine shipping are likely, adverse and significant;
ii. concluding that the Project is not likely to cause significant adverse environmental effects; and,

iii. failing to determine whether the significant adverse environmental effects likely to be caused by Project-related marine shipping can be justified under the circumstances.

[389] The significant adverse effect of particular concern to Tsleil-Waututh are the Project's significant adverse effects upon the endangered Southern resident killer whales and their use by Indigenous peoples.

[390] Tsleil-Waututh's submissions are adopted by Raincoast and Living Oceans. To these submissions they add that the Board's decision to exclude Project-related shipping from the definition of the "designated project" was not a discretionary scoping decision as Trans Mountain argues. Rather, the Board erroneously interpreted the statutory definition of "designated project".

[391] The definition of "designated project" is found in section 2 of the *Canadian Environmental Assessment Act, 2012*: see paragraph 57 above. The parties agree that the issue of whether Project-related marine shipping ought to have been included as part of the defined designated project turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project. This is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.

[392] In response to the submissions of Tsleil-Waututh, Raincoast and Living Oceans, Canada and Trans Mountain make two submissions. First, they submit that the Board reasonably concluded that the increase in marine shipping was not part of the designated project. Second,

and in any event, they argue that the Board conducted an extensive review of marine shipping. Therefore, the question for the Court becomes whether the Board's assessment was substantively adequate, such that the Governor in Council still had a "report" before it such that the Board's assessment could be relied upon. Canada and Trans Mountain answer that question in the affirmative.

[393] Before commencing my analysis, it is important to situate the Board's scoping decision and the exclusion of Project-related shipping from the definition of the Project. The definition of the designated project truly frames the scope of the Board's analysis. Activities included as part of the designated project are assessed under the *Canadian Environmental Assessment Act, 2012* with its prescribed list of factors to be considered. Further, as the Board acknowledged in Chapter 10 of its report, the *Species at Risk Act* imposes additional obligations on the Board when a designated project is likely to affect a listed wildlife species. These obligations are discussed below, commencing at paragraph 442.

[394] This assessment is to be contrasted with the assessment of activities not included in the definition of the designated project. These excluded activities are assessed under the *National Energy Board Act* if the Board is of the opinion that any public interest may be affected by the issuance of a certificate of public convenience and necessity, or by the dismissal of the proponent's application. On this assessment the Board is to have regard to all considerations that "appear to it to be directly related to the pipeline and to be relevant". Parenthetically, to the extent that there is potential for the effects of excluded activities to interact with the

environmental effects of a project, these effects are generally assessed under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

[395] I begin my analysis with Trans Mountain's application to the Board for a certificate of public convenience and necessity for the Project. In Volume 1 of the application, at pages 1-4, Trans Mountain describes the primary purpose of the Project to be "to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim including BC, Washington State, California and Asia." In Volume 2 of the application, at pages 2-27, Trans Mountain describes the marine shipping activities associated with the Project. Trans Mountain notes that of the 890,000 barrels per day capacity of the expanded system, up to 630,000 barrels per day, or 71%, could be delivered to the Westridge Marine Terminal for shipment by tanker. To place this in perspective, currently in a typical month five tankers are loaded with diluted bitumen at the Westridge Marine Terminal, some of which are the smaller, Panamax tankers. The expanded system would be capable of serving up to 34 of the larger, Aframax tankers per month (with actual demand influenced by market conditions).

[396] This evidence demonstrates that marine shipping is, at the least, an element that accompanies the Project. Canada argues that an element that accompanies a physical activity while not being a major part of the activity is not "incidental" to the physical activity. Canada says that this was what the Board implicitly found.

[397] The difficulty with this submission is that it is difficult to infer that this was indeed the Board's finding, albeit an implicit finding. I say this because in its scoping decision the Board

gave no reasons for its conclusion. In the second paragraph of the decision, under the introductory heading, the Board simply set out its conclusion:

> For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects under the cumulative effects portion of the CEAA 2012 environmental assessment.
>
> (underlining added)

[398] Having defined the designated project not to include the increase in marine shipping, the Board dealt with the Project-related increase in marine shipping activities in Chapter 14 of its report. Consistent with the scoping decision, at the beginning of Chapter 14 the Board stated, at page 323:

> As described in Section 14.2, marine vessel traffic is regulated by government agencies, such as Transport Canada, Port Metro Vancouver, Pacific Pilotage Authority and the Canadian Coast Guard, under a broad and detailed regulatory framework. The Board does not have regulatory oversight of marine vessel traffic, whether or not the vessel traffic relates to the Project. There is an existing regime that oversees marine vessel traffic. The Board's regulatory oversight of the Project, as well as the scope of its assessment of the Project under the *Canadian Environmental Assessment Act* (CEAA 2012), reaches from Edmonton to Burnaby, up to and including the Westridge Marine Terminal (WMT). However, the Board determined that potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur, are relevant to the Board's consideration of the public interest under the NEB Act. Having made this determination, the Board developed a set of Filing Requirements specific to the issue of the potential effects of Project-related marine shipping activities to complement the Filing Manual.

(underlining added, footnotes omitted)

[399] Two points emerge from this passage. The first point is the closest the Board came to explaining its scoping decision was that the Board did not have regulatory oversight over marine vessel traffic. There is no indication that the Board grappled with this important issue.

[400] The issue is important because the Project is intended to bring product to tidewater; 71% of this product could be delivered to the Westridge Marine Terminal for shipment by tanker. Further, as explained below, if Project-related shipping forms part of the designated project additional requirements apply under the *Species at Risk Act*. Finally, Project-related tankers carry the risk of significant, if not catastrophic, adverse environmental and socio-economic effects should a spill occur.

[401] Neither Canada nor Trans Mountain point to any authority to the effect that a responsible authority conducting an environmental assessment under the *Canadian Environmental Assessment Act, 2012* must itself have regulatory oversight over a particular subject matter in order for the responsible authority to be able to define a designated project to include physical activities that are properly incidental to the Project. The effect of the respondents' submission is to impermissibly write the following italicized words into the definition of "designated project": "It includes any physical activity that is incidental to those physical activities *and that is regulated by the responsible authority*."

[402] In addition to being impermissibly restrictive, the Board's view that it was required to have regulatory authority over shipping in order to include shipping as part of the Project is

inconsistent with the purposes of the *Canadian Environmental Assessment Act, 2012* enumerated in subsection 4(1). These purposes include protecting the components of the environment that are within the legislative authority of Parliament and ensuring that designated projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects.

[403] The second point that arises is that the phrase "incidental to" is not defined in the *Canadian Environmental Assessment Act, 2012*. It is not clear that the Board expressly directed its mind to whether Project-related marine shipping was in fact an activity "incidental" to the Project. Had it done so, the Canadian Environmental Assessment Agency's "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" provides a set of criteria relevant to the question of whether certain activities should be considered "incidental" to a project. These criteria are:

i. the nature of the proposed activities and whether they are subordinate or complementary to the designated project;
ii. whether the activity is within the care and control of the proponent;
iii. if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to "direct or influence" the carrying out of the activity;
iv. whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,
v. the federal and/or provincial regulatory requirements for the activity.

[404] The Board does not advert to, or grapple with, these criteria in its report. Had the Board grappled with these criteria it would have particularly considered whether marine shipping is

subordinate or complementary to the Project and whether Trans Mountain is able to "direct or influence" aspects of tanker operations.

[405] In this regard, Trans Mountain stated in its application, on pages 8A-33 to 8A-34, that while it did not own or operate the vessels calling at the Westridge Marine Terminal, "it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea." Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal.

[406] The Board recognized Trans Mountain's ability to give directions to tanker operators in Conditions 133, 134 and 144 where, among other things, the Board required Trans Mountain to:

- confirm that it had implemented its commitments to enhanced tug escort by prescribing minimum tug capabilities required to escort outbound, laden tankers and by including these minimum capabilities as part of its Tanker Acceptance Standard;
- file an updated Tanker Acceptance Standard and a summary of any revisions made to the Standard; and,
- file annually a report documenting the continued implementation of Trans Mountain's marine shipping-related commitments noted in Condition 133, any instances of non-compliance with Trans Mountain's requirements and the steps taken to correct instances of non-compliance.

[407] To similar effect, as discussed below in more detail, Trans Mountain committed in the TERMPOL review process to require, through its tanker acceptance process, that tankers steer a certain course upon exiting the Juan de Fuca Strait.

[408] Trans Mountain's ability to "direct or influence" tanker operations was a relevant factor for the Board to consider.

[409] The Board's reasons do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme. As explained in more detail below, it follows that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision.

[410] It follows that it is necessary to consider the respondents' alternate submission that the assessment the Board conducted was, nevertheless, substantially adequate such that the Governor in Council could rely upon it for the purpose of assessing the public interest and the environmental effects of the Project. To do this I will first consider the deficiencies said to arise from the assessment of Project-related shipping under the *National Energy Board Act*, as opposed to its assessment under the *Canadian Environmental Assessment Act, 2012*. I will then turn to the Board's findings, as set out in its report, in order to determine whether the Board's report was materially deficient or substantially adequate.

(i) The deficiencies said to arise from the Board's assessment of Project-related marine shipping under the *National Energy Board Act*

[411] Had the Project been defined to include Project-related marine shipping, subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* would have required the Board to

consider, and make findings, concerning the factors enumerated in section 19. In the present case, these include:

- the environmental effects of marine shipping, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project, and any cumulative effects likely to result from the designated project in combination with other physical activities that have or will be carried out;
- the significance of these effects;
- mitigation measures that are technically and economically feasible that would mitigate any significant adverse effects of marine shipping; and,
- alternative means of carrying out the designated project that are technically and economically feasible. This would include alternate shipping routes.

[412] I now turn to address the Board's consideration of Project-related shipping.

(ii) The Board's consideration of Project-related marine shipping and its findings

[413] I begin by going back to the Board's statement, quoted above at paragraph 398, that "potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur" were relevant to the Board's consideration of the public interest under the *National Energy Board Act*. In this context, in order to ensure that the Board had sufficient information about those effects, the Board developed the specific filing requirements referred to by the Board in the passage quoted above.

[414] These filing requirements required Trans Mountain to provide a detailed description of the increase in marine shipping activities including: the frequency of passages, passage routing,

speed, and passage transit time; and, the alternatives considered, such as passage routing, frequency of passages and tanker type utilized.

[415] Trans Mountain's assessment of accidents and malfunctions related to the increase in marine shipping was required to include descriptions of matters such as:

- measures to reduce the potential for accidents and malfunctions to occur, including an overview of relevant regulatory regimes;
- credible worst case spill scenarios and smaller spill scenarios;
- the fate and behaviour of any hydrocarbons that may be spilled;
- the potential environmental and socio-economic effects of credible worst case spill scenarios and smaller spill scenarios, taking into account the season-specific behaviour, trajectory, and fate of the hydrocarbon(s) spilled, as well as the range of weather and marine conditions that could prevail during the spill event; and,
- Trans Mountain's preparedness and response planning, including an overview of the relevant regulatory regimes.

[416] Trans Mountain was required to provide information on navigation and safety including:

- an overview of the relevant regulatory regimes and the role of the different organizations involved;
- any additional mitigation measures in compliance with, or exceeding regulatory requirements, proposed by Trans Mountain to further facilitate marine shipping safety; and,
- an explanation of how the regulatory regimes and any additional measures promote the safety of the increase in marine shipping activities.

[417] The filing requirements also required specific information relating to all mitigation measures related to the increase in marine shipping activities.

[418] I now turn to specifically consider Chapter 14 of the Board's report and its consideration of the Project-related increase in marine shipping activities. Because the applicants' primary concern centers on the Project's impact on the Southern resident killer whales and their use, I will focus on the Board's consideration of this endangered species, including spill prevention and the effects of spills. The Board did also consider and make findings about the impact of increased Project-related shipping on air emissions, greenhouse gases, marine and fish habitat, marine birds, socio-economic effects, heritage resources and human health effects.

[419] The Board began by describing the extent of existing, future, and Project-related shipping activities. It then moved to a review of the regulatory framework and some federal improvement initiatives. The Board's report describes how marine shipping is regulated under the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 and administered by Transport Canada, the Canadian Coast Guard and other government departments.

[420] The Board then moved, in Section 14.3, to the assessment of the effects of increased marine shipping, focusing on changes to the environmental and socio-economic setting caused by the routine operation of Project-related marine vessels. It noted that while it assessed the potential environmental and socio-economic factors of increased marine shipping as part of its public interest determination under the *National Energy Board Act*, the Board "followed an approach similar to the environmental assessment conducted under [the *Canadian Environmental Assessment Act, 2012*] … to the extent it was appropriate, to inform the Board's public interest determination."

[421] The Board went on to explain that in order to consider whether the effects of marine shipping were likely to cause significant environmental effects, it considered the existing regulatory scheme in the absence of any specific mitigation measures. This reflected the Board's view that since marine shipping was beyond its regulatory authority, it did not have the ability to impose specific mitigation conditions to address environmental effects of Project-related marine shipping. The Board also explained that it considered any cumulative effects that were likely to arise from Project-related shipping, in combination with environmental effects arising from other current or reasonably foreseeable marine vessel traffic in the area.

[422] Finally, before turning to its assessment of the Project's effects, the Board stated that its assessment had considered:

- adverse impacts of Project-related marine shipping on *Species at Risk Act* (SARA)-listed wildlife species and their critical habitat;
- all reasonable alternatives to Project-related marine shipping that would reduce impact on SARA-listed species' critical habitat; and,
- measures to avoid or lessen any adverse impacts, consistent with applicable recovery strategies or action plans.

[423] The Board then went on to make the following findings and statements with respect to marine mammals generally:

- Underwater noise from Project-related marine vessels would result in sensory disturbances to marine mammals. The disturbance is expected to be long-term as it is likely to occur for the duration of operations of Project-related vessel traffic.
- When assessing the impact of Project-related shipping on specific species, the Board's approach was to consider the temporal and spatial impact, and its reversibility.

- Project-related marine vessels have the potential to strike a marine mammal, which could result in lethal or non-lethal effects. Further, the increase in Project-related marine traffic would contribute to the cumulative risk of marine mammal vessel strikes. The Board acknowledged Trans Mountain's commitment to provide explicit guidance for reporting both marine mammal vessel strikes and mammals in distress to appropriate authorities.
- The Board accepted the evidence of the Department of Fisheries and Oceans and Trans Mountain to the effect that there were no direct mitigation measures that Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers. It recognized that altering vessel operations, for example by shifting shipping lanes away from marine mammal aggregation areas or reducing marine vessel speed, could be an effective mitigation measure. However, these specific measures were outside of the Board's regulatory authority, and out of Trans Mountain's control. The Board encouraged other regulatory authorities, such as Transport Canada or Fisheries and Oceans Canada to explore initiatives that would aim to reduce the potential effects of marine vessels on marine mammals.
- The Board recognized initiatives currently underway, or proposed, and noted Trans Mountain's commitment to participate in some of these initiatives. The Board imposed Condition 132 requiring Trans Mountain to develop a Marine Mammal Protection Program, and to undertake or support initiatives that focus on understanding and mitigating Project-related effects. Such Protection Program is to be filed prior to the commencement of Project operations.
- The Board explained that Condition 132 was meant to ensure that Trans Mountain fulfilled its commitments to participate in the development of industry-wide shipping practices in conjunction with the appropriate authorities. At the same time, the Board recognized that the Marine Mammal Protection Program offered no assurance that effective mitigation would be developed and implemented to address Project-related effects on marine mammals.
- The Board acknowledged the recommendation of the Department of Fisheries and Oceans that Trans Mountain explore the use of marine mammal on-board

> observers on Project-related marine vessels. The Board expressed its agreement and set out its expectation that it would see an initiative of this type incorporated as part of Trans Mountain's Marine Mammal Protection Program.

[424] The Board also acknowledged Trans Mountain's commitment to require Project-related marine vessels to meet any future guidelines or standards for reducing underwater noise from commercial vessels as they come into force.

[425] The Board went on to make the following findings with specific reference to the Southern resident killer whale:

- The Southern resident killer whale population has crossed a threshold where any additional adverse environmental effects would be considered significant. The current level of vessel traffic in the regional study area and the predicted future increase of vessel traffic in that area, even excluding Project-related marine vessels, "have and would increase the pressure on the Southern resident killer whale population."
- The Board expressed its expectation that Project-related marine vessels would represent a maximum of 13.9% of all vessel traffic in the regional study area, excluding the Burrard Inlet, and would decrease over time as the volume of marine vessel movements in the area is anticipated to grow. Therefore, while the effects from Project-related marine vessels would be a small fraction of the total cumulative effects, the Board acknowledged that this increase in marine vessels associated with the Project "would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern resident killer whale. The effects associated with Project-related marine vessels will impact numerous individuals of the Southern resident killer whale population in a habitat identified as critical to the recovery". The Board classified these effects as "high magnitude". Consequently, the Board found that "the operation of Project-related

marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

- The Board recognized that the "Recovery Strategy for the Northern and Southern Resident Killer Whale" prepared by the Department of Fisheries and Oceans identified vessel noise as "a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations."
- The Board noted that the death of a Southern resident killer whale from a Project-related marine vessel collision, despite the low likelihood of such an event, would have population level consequences. The Board acknowledged that Project-related marine vessels would encounter a killer whale relatively often, however, "given the limited number of recorded killer whale marine vessel strikes and the potential avoidance behaviors of killer whales" the Board accepted the evidence of Trans Mountain and the Department of Fisheries and Oceans that the probability of a Project-related marine mammal vessel strike on a Southern resident killer whale was low.
- The Board expressed the view that the recovery of the Southern resident killer whale requires complex, multi-party initiatives, and that the Department of Fisheries and Oceans and other organizations are currently undertaking numerous initiatives to support the recovery of the species, including finalizing an action plan. The Board acknowledged Trans Mountain's commitment to support the objectives and recovery measures identified in the action plan. The draft action plan included a detailed prioritized list of initiatives. The Board expressed its expectation that Trans Mountain would support these initiatives within the Marine Mammal Protection Program. The Board encouraged initiatives, including initiatives of the federal government, to prioritize and implement specific measures to promote recovery of the species.
- Finally, the Board concluded that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

[426] The Board then considered the impact of marine shipping on the traditional use of marine resources by Indigenous communities, finding that:

- There would be disruptions to Indigenous marine vessels and harvesters, and this may disrupt activities or access to specific sites. However, in the Board's view these disruptions would be temporary, occurring only during the period of time when Project-related tanker vessels are in transit. Thus, it was of the view that Indigenous marine vessel users would maintain the ability to continue to harvest marine resources and to access subsistence and cultural sites in the presence of these periodic and short-term disruptions.
- Therefore, the Board found that, with the exception of the effects on the Southern resident killer whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites would be low.
- Given the low frequency, duration and magnitude of effects associated with potential disruptions, and Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Indigenous communities, the Board found that adverse effects on traditional marine resource uses, activities and sites were not likely and that, overall, Project-related marine traffic's contribution to overall effects related to changes in traditional marine use patterns was not likely to be significant.
- Project-related marine traffic's contribution to cumulative effects was found to be of low to medium magnitude, and reversible in the long term. The Board therefore found significant adverse cumulative effects associated with Project-related marine vessel traffic on traditional marine resource use was not likely to be significant, with the exception of effects associated with the traditional use of the Southern resident killer whale, which were considered significant.
- Recognizing the cultural importance of the killer whale to certain Indigenous groups, the Board found that "the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale."

[427] Finally, in Sections 14.4 to 14.6 the Board considered spill prevention. It made the following findings:

- The Board accepted the evidence filed by Trans Mountain regarding marine shipping navigation and safety, including the reports filed as part of the TERMPOL Review Process.
- Although a large spill from a tanker associated with the Project would result in significant adverse environmental and socio-economic effects, such an event is not likely.
- Even with response efforts, any large spill would result in significant adverse environmental and socio-economic effects.
- Trans Mountain, in conjunction with the Western Canada Marine Response Corporation, proposed appropriate measures to respond to potential oil spills from Project-related tankers. These proposed measures exceed regulatory requirements and would result in a response capacity that is double, and a delivery time that is half, that required by the existing planning standards. The Board gave substantial weight to the fact that the TERMPOL Review Committee and the Canadian Coast Guard did not identify any particular concerns with marine spill response planning associated with the Project.
- The environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, the location of the spill, the response time, the effectiveness of containment and cleanup, the valued components that were impacted, and the weather and time of year of the spill.
- A small spill, quickly contained, could have adverse effects of low magnitude, whereas a credible worst-case spill could have adverse effects of larger geographic extent and longer duration, and such effects would probably be significant. Moreover, spills could impact key marine habitats such as salt marshes, eelgrass beds and kelp forests, which could, in turn, affect the numerous species that rely upon them. Spills could also affect terrestrial species along the coastline, including SARA-listed terrestrial plant species.

- Although impacts from a credible worst-case spill would probably be adverse and significant, natural recovery of the impacted areas and species would likely return most biological conditions to a state generally similar to pre-spill conditions. Such recovery might be as quick as a year or two for some valued components, or might take as long as a decade or more for others. Valuable environmental values and uses could be lost or diminished in the interim. For some valued components, including certain SARA-species, recovery to pre-spill conditions might not occur.
- Mortality of individuals of SARA-listed species could result in population level impacts and could jeopardize recovery. For example, the impact on a Southern resident killer whale of exposure to an oil spill potentially would be catastrophic.
- There is a very low probability of a credible worst-case event.
- The effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Indigenous people would likely be adverse and significant. However, the probability of such a worst-case event is very low.

[428] With respect to the Board's reference to the report of the TERMPOL Review Committee, one of the topics dealt with in that report was Project routing. It was noted, in Section 3.2, that the "shipping route to and from Trans Mountain's terminal to the open sea is well-established and used by deep sea tankers as well as other vessel types such as cargo vessels, cruise ships and ferries." Later in the report it was noted that "Aframax class tankers currently use the proposed route, demonstrating that tanker manoeuvrability issues are not a concern."

[429] Notwithstanding, the Review Committee did make one finding with respect to the shipping route. Finding 9 was to the effect that "Trans Mountain's commitment to require via its tanker acceptance process that Project tankers steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait will enhance safety and protection of the marine environment by providing the shortest route out of the Canadian" economic exclusion zone.

[430] Returning to the Board's report, the end result of the Board's assessment of the Project was that, notwithstanding the impacts of the Project upon the Southern resident killer whales and Indigenous cultural uses associated with them, with the implementation of Trans Mountain's environmental protection procedures and mitigation, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects. This was the Board's recommendation under section 29 of the *Canadian Environmental Assessment Act, 2012*.

(iii) Was the Board's assessment of Project-related marine shipping substantially adequate?

[431] I begin with the Board's description of its approach to the assessment of marine shipping. It "followed an approach similar to the environmental assessment conducted under" the *Canadian Environmental Assessment Act, 2012* "to the extent it was appropriate". Consistent with this approach, the Board's filing requirements in respect of marine shipping required Trans Mountain to provide information about mitigation measures and alternatives—factors which subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* require be considered in an environmental assessment.

[432] Bearing in mind that the primary focus of the applicants' concern about the Board's assessment of Project-related marine shipping is the Board's assessment of the adverse effects of the Project on Southern resident killer whales, the previous review of the Board's findings demonstrates that the Board considered the Project's effects on the Southern resident killer whales, including the environmental effects of malfunctions or accidents that might occur, the significance of those effects and the cumulative effects of the Project on efforts to promote

recovery of the species. The Board found the operation of the Project-related tankers was likely to result in significant, adverse effects to the Southern resident killer whale population.

[433] Given the Board's finding that the Project was likely to result in significant adverse effects on the Southern resident killer whale, and its finding that Project-related marine vessel traffic would further contribute to the total cumulative effects (which were determined to be significant), the Board found that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Indigenous use associated with the Southern resident killer whale.

[434] The Board then considered mitigation measures through the limited lens of its regulatory authority. It found there were no direct mitigation measures Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers.

[435] The Board stated that it considered all reasonable alternatives to Project-related marine shipping that would reduce the impact on SARA-listed species' critical habitat. This would include the critical habitat of the Southern resident killer whale. As part of this consideration, the Board directed Information Request No. 2 to Trans Mountain. In material part, Trans Mountain responded that the only known potential mitigation measures relevant to the Salish Sea to reduce the risk of marine mammal vessel strikes would be to alter the shipping lanes in order to avoid sensitive habitat (that is areas where whales aggregate), and to set speed restrictions. Trans Mountain advised that shipping lanes and speed restrictions are set at the discretion of Transport Canada.

[436] Thereafter, the Board issued an Information Request to Transport Canada that, among other things, requested Transport Canada to summarize any initiatives it was currently supporting or undertaking that evaluated potential alternative shipping lanes or vessel speed reductions along the southern coast of British Columbia with the intent of reducing impacts on marine mammals from marine shipping. Transport Canada responded that it was "not currently contemplating alternative shipping lanes or vessel speed restrictions for the purpose of reducing impacts on marine mammals from marine shipping in British Columbia". However, Transport Canada noted it was participating in the Enhancing Cetacean Habitat and Observation Program led by Port Metro Vancouver.

[437] Transport Canada's statement that it had no current intent to make alterations to shipping lanes or to impose vessel speed restrictions would seem to have pre-empted further consideration of routing alternatives by the Board.

[438] This review of the Board's report has shown that the Board in its assessment of Project-related marine shipping considered:

- the effects of Project-related marine shipping on Southern resident killer whales;
- the significance of the effects;
- the cumulative effect of Project-related marine shipping on the recovery of the Southern resident killer whale population;
- the resulting significant, adverse effects on the traditional Indigenous use associated with the Southern resident killer whale;
- mitigation measures within its regulatory authority; and,
- reasonable alternatives to Project-related marine shipping.

[439] Given the Board's approach to the assessment and its findings, the Board's report was adequate for the purpose of informing the Governor in Council about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups. The Board's report adequately informed the Governor in Council of the significance of these effects, the Board's view there were no direct mitigation measures Trans Mountain could apply to reduce potential adverse effects from Project-related tankers, and that there were potential mitigation measures beyond the Board's regulatory authority and so not the subject of proper consideration by the Board or conditions. Perhaps most importantly, the report put the Governor in Council on notice that the Board defined the Project not to include Project-related marine shipping. This decision excluded the effects of Project-related shipping from the definition of the Project as a designated project and allowed the Board to conclude that, as it defined the Project, the Project was not likely to cause significant adverse effects.

[440] The Order in Council and its accompanying Explanatory Note demonstrate that the Governor in Council was fully aware of the manner in which the Board had assessed Project-related marine shipping under the *National Energy Board Act*. The Governor in Council was also fully aware of the effects of Project-related marine shipping identified by the Board and that the operation of Project-related vessels is likely to result in significant adverse effects upon both the Southern resident killer whale and Indigenous cultural uses of this endangered species.

[441] Having found that the Governor in Council understood the Board's approach and resulting conclusions, it remains to consider the reasonableness of the Governor in Council's

reliance on the Board's report to approve the Project. This is considered below, after considering the applicants' submissions with respect to the *Species at Risk Act*.

(e) Did the Board err in its treatment of the *Species at Risk Act*?

[442] The purposes of the *Species at Risk Act* are: to prevent wildlife species from being extirpated or becoming extinct; to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and, to manage species of special concern to prevent them from becoming endangered or threatened (section 6).

[443] Important protections are found in section 77 of the Act, which is intended to protect the critical habitat of listed wildlife species, and section 79, which is intended to protect listed wildlife species and their critical habitat from new projects. Listed wildlife species are those species listed in Schedule 1 of the Act, a list of wildlife species at risk. Sections 77 and 79 are set out in the Appendix to these reasons.

[444] Raincoast and Living Oceans argue that as a result of unreasonably defining the designated project not to include Project-related marine shipping, the Board failed to meet the requirement of subsection 79(2) of the *Species at Risk Act*. As a result of this error they say it was unreasonable for the Governor in Council to rely upon the Board's report without first ensuring that the Board had complied with subsection 79(2) of the Act with respect to Southern resident killer whales. They also argue that it was unreasonable for the Governor in Council not to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

[445] I will deal first with the applicability of section 79 of the Act.

(i) Did the Board err by concluding that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping?

[446] Section 79 obligates every person required "to ensure that an assessment of the environmental effects of a project is conducted" to:

i. promptly notify the competent minister or ministers if the project "is likely to affect a listed wildlife species or its critical habitat." (subsection 79(1));
ii. identify the adverse effects of the project on the listed wildlife species and its critical habitat (subsection 79(2)); and,
iii. if the project is carried out, ensure that measures are taken "to avoid or lessen those effects and to monitor them." The measures taken must be taken in a way that is consistent with any applicable recovery strategy and action plans (subsection 79(2)).

[447] Subsection 79(3) defines a "project" to mean, among other things, a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*.

[448] The Board acknowledged its obligations under section 79 of the *Species at Risk Act* in the course of its environmental assessment (Chapter 10, page 161). However, because it had not defined the designated project to include Project-related marine shipping, the Board rejected Living Oceans' submission that the Board's obligations under section 79 of the *Species at Risk Act* applied to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale (Chapter 14, page 332). Notwithstanding this conclusion that section 79 did not apply, for reasons that are not explained in its report, the Board did comply with the

obligation under subsection 79(1) to notify the responsible ministers that the Project might affect Southern resident killer whales and their habitat. The Board did this by letter dated April 23, 2014 (a letter sent approximately three weeks after the Board made its scoping decision).

[449] I have found that the Board unjustifiably excluded Project-related marine shipping from the Project's description. It follows that the failure to apply section 79 of the *Species at Risk Act* to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale was also unjustified.

[450] Both Canada and Trans Mountain argue that, nonetheless, the Board substantially complied with its obligations under section 79 of the *Species at Risk Act*. Therefore, as with the issue of Project-related marine shipping, the next question is whether the Board substantially complied with its obligations under section 79.

(ii) Did the Board substantially comply with its obligations under section 79 of the *Species at Risk Act*?

[451] The respondents argue that, in addition to complying with the notification requirement found in subsection 79(1), the Board considered:

- the adverse impacts of marine shipping on listed wildlife species and their critical habitat;
- all reasonable alternatives to marine shipping that would reduce impact on listed species' critical habitat; and
- measures, consistent with the applicable recovery strategies or action plans, to avoid or lessen any adverse impacts of the Project.

[452] Canada and Trans Mountain submit that as a result the Board met its requirements "where possible." (Trans Mountain's memorandum of fact and law, paragraph 120). On this last point, Trans Mountain submits that the Board lacked authority to impose conditions or otherwise ensure that measures were taken to avoid or lessen the effects of marine shipping on species at risk. Thus, while the Board could identify potential mitigation measures, and encourage the appropriate regulatory authorities to take further action, it could not ensure compliance with subsection 79(2) of the *Species at Risk Act*.

[453] Canada and Trans Mountain have accurately summarized the Board's findings that are relevant to its consideration of Project-related shipping in the context of the *Species at Risk Act*. However, I do not accept their submission that the Board's consideration of the Project's impact on the Southern resident killer whale substantially complied with its obligation under section 79 of the *Species at Risk Act*. I reach this conclusion for the following reason.

[454] By defining the Project not to include Project-related marine shipping, the Board failed to consider its obligations under the *Species at Risk Act* when it considered the Project's impact on the Southern resident killer whale. Had it done so, in light of its recommendation that the Project be approved, subsection 79(2) of the *Species at Risk Act* required the Board to ensure, if the Project was carried out, that "measures are taken to avoid or lessen" the Project's effects on the Southern resident killer whale and to monitor those measures.

[455] While I recognize the Board could not regulate shipping, it was nonetheless obliged to consider the consequences at law of its inability to "ensure" that measures were taken to

ameliorate the Project's impact on the Southern resident killer whale. However, the Board gave no consideration in its report to the fact that it recommended approval of the Project without any measures being imposed to avoid or lessen the Project's significant adverse effects upon the Southern resident killer whale.

[456] Because marine shipping was beyond the Board's regulatory authority, it assessed the effects of marine shipping in the absence of mitigation measures and did not recommend any specific mitigation measures. Instead it encouraged other regulatory authorities "to explore any such initiatives" (report, page 349). While the Board lacked authority to regulate marine shipping, the final decision-maker was not so limited. In my view, in order to substantially comply with section 79 of the *Species at Risk Act* the Governor in Council required the Board's exposition of all technically and economically feasible measures that are available to avoid or lessen the Project's effects on the Southern resident killer whale. Armed with this information the Governor in Council would be in a position to see that, if approved, the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place. Without this information the Governor in Council lacked the necessary information to make the decision required of it.

[457] The reasonableness of the Governor in Council's reliance on the Board's report is considered below.

[458] For completeness I now turn to the second argument advanced by Raincoast and Living Oceans: it was unreasonable for the Governor in Council to fail to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

(iii) Was the Governor in Council obliged to comply with subsection 77(1) of the *Species at Risk Act*?

[459] Subsection 77(1) applies when any person or body, other than a competent minister, issues or approves "a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species". The person or body may authorize such an activity only if they have consulted with the competent minister, considered the impact on the species' critical habitat and formed the opinion that: (a) all reasonable alternatives to the activity that would reduce the impact on the critical habitat have been considered and the best solution has been adopted; and (b) all feasible mitigation measures will be taken to minimize the impact on the critical habitat.

[460] The Board accepted that:

> … vessel noise is considered a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations.
>
> (report, page 350)

[461] It also accepted that the impact of a Southern resident killer whale being exposed to an oil spill "is potentially catastrophic" (report, page 398).

[462] Based on these findings, Raincoast and Living Oceans submit that Project-related shipping "may destroy" critical habitat so that subsection 77(1) was engaged.

[463] I respectfully disagree. The Order in Council directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project. The Governor in Council did not issue or approve a licence, permit or other authorization that authorized marine shipping.

[464] Further, subsection 77(1.1) of the *Species at Risk Act* provides that subsection 77(1) does not apply to the Board when, as in the present case, it issues a certificate pursuant to an order made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*. I accept Canada's submission that Parliament would not have intended to exempt the Board from the application of subsection 77(1) while at the same time contemplating that the Governor in Council was not exempted and was obliged to comply with subsection 77(1). This is particularly so given the Board's superior expertise in assessing impacts on habitat and mitigation measures. If subsection 77(1) applied, the Board's ability to meet its obligations was superior to that of the Governor in Council.

(f) Conclusion: the Governor in Council erred by relying upon the Board's report as a proper condition precedent to the Governor in Council's decision

[465] Trans Mountain's application was complex, raising challenging issues on matters as diverse as Indigenous rights and concerns, pipeline integrity, the fate and behaviours of spilled hydrocarbons in aquatic environments, emergency prevention, preparedness and response, the

need for the Project and its economic feasibility and the effects of Project-related shipping activities.

[466] The approval process was long and demanding for all participants; after the hearing the Board was left to review tens of thousands of pages of evidence.

[467] Many aspects of the Board's report are not challenged in this proceeding.

[468] This said, I have found that the Board erred by unjustifiably excluding Project-related marine shipping from the Project's definition. While the Board's assessment of Project-related shipping was adequate for the purpose of informing the Governor in Council about the effects of such shipping on the Southern resident killer whale, the Board's report was also sufficient to put the Governor in Council on notice that the Board had unjustifiably excluded Project-related shipping from the Project's definition.

[469] It was this exclusion that permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping. This exclusion then permitted the Board to conclude that, notwithstanding its conclusion that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project (as defined by the Board) was not likely to cause significant adverse environmental effects. The Board could only reach this conclusion by defining the Project not to include Project-related shipping.

[470] The unjustified exclusion of Project-related marine shipping from the definition of the Project thus resulted in successive deficiencies such that the Board's report was not the kind of "report" that would arm the Governor in Council with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification. In the language of *Gitxaala* this resulted in a report so deficient that it could not qualify as a "report" within the meaning of the legislation and it was unreasonable for the Governor in Council to rely upon it. The Board's finding that the Project was not likely to cause significant adverse environmental effects was central to its report. The unjustified failure to assess the effects of marine shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the effects of the Project was so critical that the Governor in Council could not functionally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

[471] I have considered the reference in the Explanatory Note to the Order in Council to the government's commitment to the proposed Action Plan for the Southern resident killer whale and the then recently announced Oceans Protection Plan. These inchoate initiatives, while laudable and to be encouraged, are by themselves insufficient to overcome the material deficiencies in the Board's report because the "report" did not permit the Governor in Council to make an informed decision about the public interest and whether the Project is likely to cause significant adverse environmental effects as the legislation requires.

[472] There remains to consider the issue of the remedy which ought to flow from the unreasonable reliance upon the Board's report. In my view, this is best dealt with following consideration of the adequacy of the Crown's consultation process.

[473] My conclusion that the Board's report was so flawed that it was unreasonable for the Governor in Council to rely upon it arguably makes it unnecessary to deal with the argument advanced on behalf of the Attorney General of British Columbia. It is nonetheless important that it be briefly considered.

3. The challenge of the Attorney General of British Columbia

[474] As explained above at paragraphs 64 and 65, after the Board submits a report to the Governor in Council setting out the Board's recommendation under section 52 of the *National Energy Board Act* about whether a certificate of public convenience and necessity should issue, the Governor in Council may, among other options, by order direct the Board to issue a certificate of public convenience and necessity. Irrespective of the option selected, the Governor in Council's order "must set out the reasons for making the order" (subsection 54(2) of the *National Energy Board Act*). The Attorney General of British Columbia intervened in this proceeding to argue that, in breach of this statutory obligation, the Governor in Council failed to give reasons explaining why the Project is not likely to cause significant adverse environmental effects and why the Project is in the public interest.

[475] The Attorney General also argued in its written memorandum, but not orally, that the Governor in Council failed to consider the "disproportionate impact of Project-related marine

shipping spill risks on the Province of British Columbia". This failure is said to render the Governor in Council's decision unreasonable.

[476] In consequence, the Attorney General of British Columbia supports the request of the applicants that the Governor in Council's Order in Council be set aside.

(a) Did the Governor in Council fail to comply with the obligation to give reasons?

[477] The lynchpin of the Attorney General's argument is his submission that the Governor in Council's reasons must be found "within the four corners of the Order in Council" and nowhere else. Thus, the Attorney General submits that it is impermissible to have regard to the accompanying Explanatory Note or to documents referred to in the Explanatory Note, including the Board's report and the Crown Consultation Report. Read in this fashion, the Order in Council does not explain why the Governor in Council found the Project is not likely to cause any significant adverse environmental effects or was in the public interest.

[478] I respectfully reject the premise of this submission. Subsection 54(2) does not dictate the form the Governor in Council's reasons should take, requiring only that the "order must set out the reasons". Given the legislative nature and the standard format of an Order in Council (generally a series of recitals followed by an order) Orders in Council are not well-suited to the provision of lengthy reasons. In the present case, the two-page Order in Council was accompanied by the 20-page Explanatory Note. They were published together in the Canada Gazette. Given this joint publication, it would, in my view, be unduly formalistic to set aside the

Order in Council on the ground that the reasons found in the attached Explanatory Note were placed in an attachment to the order, and not within the "four square corners" of the order.

[479] Similarly, it would be unduly formalistic not to look to the content of the Board's report that informed the Governor in Council when rendering its decision. The Order in Council specifically referenced the Board's report and the terms and conditions set out in an appendix to the report, and expressly accepted the Board's public interest recommendation. This conclusion that the Order in Council may be read with the Board's report is consistent with this Court's decision in *Gitxaala*, where the Court accepted Canada's submission that the Order in Council should be read together with the findings and recommendations in the report of the joint review panel. This Court read the Order in Council together with the report and other documents in the record and found that the Governor in Council had met its statutory obligation to give reasons.

[480] I therefore find that the Governor in Council also in this case complied with its statutory obligation to give reasons.

(b) Did the Governor in Council fail to consider the impact of Project-related shipping spill risks on the Province of British Columbia?

[481] I disagree that the Governor in Council failed to consider the impact of shipping spill risks. The Explanatory Note shows the Governor in Council considered that:

- The Board found the risk of a major crude oil spill occurring was low (Explanatory Note, page 10).
- The Board imposed conditions relating to accidents and malfunctions (Explanatory Note, page 13).

[482] Under the heading “Government response to what was heard” the Explanatory Note set out the following about the risk of spills:

> Communities are deeply concerned about the risk and impacts that oil spills pose to their land, air, water and communities. In addition to the terms and conditions related to spills identified by the NEB, land-based oil spills are subject to both federal and provincial jurisdiction. Federally regulated pipelines are subject to NEB regulation and oversight, which requires operators to develop comprehensive emergency management programs and collaborate with local responders in the development of these programs. B.C. also recently implemented regulations under the provincial *Environmental Management Act* to strengthen provincial oversight and require industry and government to collaborate in response to spills in B.C.
>
> The Government recently updated its world-leading pipeline safety regime through the *Pipeline Safety Act*, which came into force in June 2016. The Act implements $1 billion in “absolute liability” for companies operating major crude oil pipelines to clarify that operators will be responsible for all costs associated with spills irrespective of fault up to $1 billion; operators remain liable on an unlimited basis beyond this amount when they are negligent or at fault. The Act also requires proponents to carry cash on hand to ensure they are in a position to immediately respond to emergencies.
>
> With respect to ship source spills, the Government recently announced $1.5 billion in new investment in a national Oceans Protection Plan to enhance its world-leading marine safety regime. The Oceans Protection Plan has four main priority areas:
>
> - creating a world-leading marine safety system that improves responsible shipping and protects Canada’s waters, including new preventative and response measures;
> - restoring and protecting the marine ecosystems and habitats, using new tools and research;
> - strengthening partnerships and launching co-management practices with Indigenous communities, including building local emergency response capacity; and
> - investing in oil spill cleanup research and methods to ensure that decisions taken in emergencies are evidence-based.
>
> The Plan responds to concerns related to potential marine spills by strengthening the Coast Guard’s ability to take command in marine emergencies, toughening

> requirements for industry response to incidents, and by enhancing Indigenous partnerships.

[483] While the Attorney General of British Columbia disagrees with the Governor in Council's assessment of the risk of a major spill from Project-related shipping, there is no merit to the submission that the Governor in Council failed to consider the risk of spills posed by Project-related shipping.

[484] I now turn to consider the adequacy of the consultation process.

D. Should the decision of the Governor in Council be set aside on the ground that Canada failed to consult adequately with the Indigenous applicants?

1. The applicable legal principles

[485] Before commencing the analysis, it is helpful to discuss briefly the principles that have emerged from the jurisprudence which has considered the scope and content of the duty to consult. As explained in the opening paragraphs of these reasons, the applicable principles are not in dispute; what is in dispute is whether, on the facts of this case (which are largely agreed), Canada fulfilled its constitutional duty to consult.

[486] The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

[487] The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation,* paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.

[488] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).

[489] When the claim to title is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).

[490] Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal.

[491] The Supreme Court has found the Board to possess both the procedural powers necessary to implement consultation and the remedial powers to accommodate, where necessary, affected Indigenous claims and Indigenous and treaty rights. The Board's process can, therefore, be relied on by the Crown to fulfil, in whole or in part, the Crown's duty to consult (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, paragraph 34).

[492] As referenced above at paragraph 284, the Supreme Court has described the Board as having considerable institutional expertise both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Indigenous or treaty rights substantially overlap with the project's potential environmental impact, the Board "is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available" (*Clyde River*, paragraph 33).

[493] When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's ultimate responsibility to ensure consultation is adequate. Rather, it is a means by which the Crown can be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated (*Haida Nation*, paragraph 53).

[494] The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Indigenous groups a veto over what can be done with land pending final proof of their claim. What is required is a process of balancing interests—a process of give and take. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation (*Haida Nation*, paragraphs 42, 48 and 62).

[495] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation*, paragraph 47).

[496] Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through a meaningful process of consultation" (*Haida Nation*, paragraph 42). The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation*, paragraph 45).

[497] At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation*, paragraph 42).

[498] In the present case, much turns on what constitutes a meaningful process of consultation.

[499] Meaningful consultation is not intended simply to allow Indigenous peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, paragraph 54).

[500] The duty is not fulfilled by simply providing a process for exchanging and discussing information. There must be a substantive dimension to the duty. Consultation is talking together for mutual understanding (*Clyde River*, paragraph 49).

[501] As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

[502] Where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making

becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of impacts on Indigenous rights (*Gitxaala*, paragraph 315).

[503] Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation, and, if appropriate in the circumstances, communicate its findings to the First Nation and attempt to substantially address the concerns of the First Nation (*Mikisew Cree First Nation*, paragraph 55).

[504] Consultation must focus on rights. In *Clyde River*, the Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*" (emphasis in original) (*Clyde River*, paragraph 45). Mitigation measures must provide a reasonable assurance that constitutionally protected rights were considered as rights in themselves—not just as an afterthought to the assessment of environmental concerns (*Clyde River*, paragraph 51).

[505] When consulting on a project's potential impacts the Crown must consider existing limitations on Indigenous rights. Therefore, the cumulative effects and historical context may inform the scope of the duty to consult (*Chippewas of the Thames*, paragraph 42).

[506] Two final points. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Indigenous right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it (*Gitxaala*, paragraph 236).

[507] Second, it is important to understand that the public interest and the duty to consult do not operate in conflict. As a constitutional imperative, the duty to consult gives rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest. In the case of the Board, a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*Clyde River*, paragraph 40).

2. The standard to which Canada is to be held in fulfilling the duty

[508] As briefly explained above at paragraph 226, Canada is not to be held to a standard of perfection in fulfilling its duty to consult. The Supreme Court of Canada has expressed this concept as follows:

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

[509] As in *Gitxaala*, in this case "the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ." (*Gitxaala*, paragraph 182).

[510] Against this legal framework, I turn to the design and execution of Canada's four-phase consultation process. This process began in May 2013 with the filing of the Project description and ended in November 2016 with the decision of the Governor in Council to approve the Project and direct the issuance of a certificate of public convenience and necessity.

3. Application of the legal principles to the evidence

[511] The Indigenous applicants express a myriad of concerns and asserted deficiencies with respect to the consultation process. Broadly speaking, they challenge both the design of the process and the execution of the process.

[512] I will deal first with the asserted deficiencies in the design of the process selected and followed by Canada, and then consider the asserted deficiencies in the execution of the process.

(a) Was the consultation process deficient because of the design of the process selected and followed by Canada?

[513] Generally speaking, the most salient concerns expressed with respect to the design of the consultation process are the assertions that:

i. The consultation framework was unilaterally imposed.

ii. The National Energy Board process is inadequate for fulfilling consultation obligations.

iii. Insufficient funding was provided.

iv. The process allowed the Project to be approved when essential information was lacking.

[514] Each assertion will be considered in turn.

(i) The consultation framework was unilaterally imposed

[515] There was no substantive consultation with the Indigenous applicants about the four-phase consultation process.

[516] However, as Canada argues, the Crown possesses a discretion about how it structures a consultation process and how it meets its consultation obligations (*Gitxaala*, paragraph 203, citing *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443, 566 A.R. 259, at paragraph 39). What is required is a process that allows Canada to make reasonable efforts to inform and consult (*Haida Nation*, at paragraph 62).

[517] Canada's four-phase consultation process is described above at paragraphs 72 through 75. While I deal below with the asserted frailties of the Board's hearing process in this particular case, the Supreme Court has recently re-affirmed that the Crown may rely on a regulatory agency to fulfil the Crown's duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Chippewas of the Thames*,

paragraph 32). In the present case, no applicant asserts that the National Energy Board lacked any necessary statutory power so as to be able to fulfil in part the Crown's duty to consult. It follows that Canada could rely upon a consultation process which relied in part on the Board's hearing process, so long as Canada remained mindful of its constitutional obligation to ensure before approving the Project that consultation was adequate.

[518] Canada implemented a five-phase consultation framework for the review of the Northern Gateway Project. In *Gitxaala*, this Court found that the framework was reasonable (*Gitxaala*, paragraph 8). When the two consultation frameworks are compared there is little to distinguish them. An additional first phase was required in the Northern Gateway framework simply because the project was reviewed by a joint review panel, not the Board.

[519] Given Canada's discretion as to how the consultation process is structured and the similarity of this consultation process to that previously found by this Court to be reasonable, I am satisfied that Canada did not act in breach of the duty to consult by selecting the four-phase consultation process it adopted.

(ii) The Board's process is said to be inadequate for fulfilling consultation obligations

[520] A number of deficiencies are asserted with respect to the Board's process and its adequacy for fulfilling, to the extent possible, consultation obligations. The asserted deficiencies include:

- The Board's decision not to allow cross-examination of Trans Mountain's evidence.

- The Board's treatment of oral traditional evidence.
- The Board's timeframe which is said not to have provided sufficient time for affected Indigenous groups to inform themselves of the complexity of the Project and to participate with knowledge of the issues and impacts on them.
- The Board's failure to consult with affected Indigenous groups about any of the decisions the Board made prior to or during the hearing, including the list of issues for the hearing, the panel members who would hear the application, the design of the regulatory review and the environmental assessment, the decision-making process and the report and its recommendations.
- The failure of the Board's process to provide the required dialogue and consultation directly with Canada in circumstances where it is said that consultation in Phase III would be too little, too late.

[521] It is convenient to deal with the first four deficiencies together as the Board's choice of procedures, its decision-making process and its ultimate decision flow from its powers as a regulator under the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*.

[522] As explained above, the Supreme Court has found that meaningful Crown consultation can be carried out wholly or in part through a regulatory process (*Chippewas of the Thames*, paragraph 32). Prior to this decision, concern had been expressed about the tension said to result if a tribunal such as the Board were required both to carry out consultation on behalf of the Crown and then adjudicate on the adequacy of the consultation. The Supreme Court responded that such concern is addressed by observing that while it is the Crown that owes the constitutional duty to consult, agencies such as the Board are required to make legal decisions that comply with the Constitution. The Supreme Court went on to explain, at paragraph 34, that:

> When the [Board] is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution.
>
> (underlining added)

[523] Applying these principles to the submissions before this Court, and bearing in mind that at this point I am only addressing submissions with respect to the adequacy of the design of the consultation process, the Board was required to provide a process that was impartial and fair and in accordance with its statutory framework and the Constitution.

[524] As explained above, section 8 of the *National Energy Board Act* authorizes the Board to make rules about the conduct of hearings before it, and the Board's rules allow the Board to determine whether public hearings held before it are oral or written. Section 52 of the *National Energy Board Act* requires the Board to render its report to the Minister within strict timelines. It follows that the Board could decide not to allow oral cross-examination, could determine how oral traditional evidence would be received and could schedule the hearing to comply with section 52 of the *National Energy Board Act* so long as, at the end of the hearing, it was satisfied that it had exercised its responsibilities in a manner that was fair and impartial and consistent with its governing legislation and section 35 of the *Constitution Act, 1982*.

[525] Similarly, the Board was authorized as a neutral arbitrator to make the decisions required of it under the legislation, including decisions about which issues would be decided during the hearing, the composition of the hearing panel and the content of its ultimate report. So long as these decisions were made in a manner that was fair and impartial, and in accordance with the

legislative scheme and subsection 35(1) of the *Constitution Act, 1982* they too were validly made. The Indigenous applicants have not shown that any additional dialogue or process was required between the Board and the Indigenous applicants in order for the Board's decision to be constitutionally sound.

[526] Put another way, when the Board's process is relied on in whole or in part to fulfil the obligation to consult, the regulatory hearing process does not change and the Board's role as neutral arbitrator does not change. What changes is that the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied.

[527] I now consider the last deficiency said to make the Board's process inadequate for fulfilling even in part the duty to consult: the failure of the Board's process to provide the required consultation directly with Canada.

[528] The Indigenous applicants do not point to any jurisprudence to support their submission that Canada was required to dialogue directly with them during the Board's hearing process (that is, during Phase II) and I believe this submission may be dealt with briefly.

[529] As stated above, meaningful Crown consultation can be carried out wholly through a regulatory process so long as where the regulatory process relied upon by the Crown does not achieve adequate consultation or accommodation, the Crown takes further steps to meet its duty

to consult by, for example, filling any gaps in consultation on a case-by-case basis (*Clyde River*, paragraph 22).

[530] In the present case, Phase III was designed in effect to fill the gaps left by the Phase II regulatory process—Phase III was to focus on outstanding concerns about the Project-related impacts upon potential or established Indigenous or treaty rights and on any incremental accommodation measures that Canada should address. Leaving aside the question of whether Phase III adequately addressed gaps in the consultation process, a point dealt with below, the Indigenous applicants have not shown that the consultation process required Canada's direct involvement in the regulatory process.

[531] For all of these reasons, I am satisfied that the Board's process was adequate for fulfilling its consultation obligations.

[532] The next concern with respect to the design of the consultation process is that it is said that insufficient participant funding was provided.

(iii) The funding provided is said to have been inadequate

[533] Two Indigenous applicants raise the issue of inadequate funding: Squamish and SSN.

[534] Squamish sought participant funding of $293,350 to participate in the Board process but was granted only $44,270, plus travel costs for one person to attend the hearing. Canada later provided $26,000 to Squamish to participate in consultation following the close of the Board

hearing record. The Squamish appendix to the Crown Consultation Report notes that the British Columbia Environmental Assessment Office also offered Squamish $5,000 in capacity funding to participate in consultations.

[535] Chief Campbell of the Squamish Nation provided evidence that the funding provided to Squamish was not adequate for Squamish to obtain experts to review and respond to the 8 volume, 15,000 page, highly technical Project application. Nor, in his view, was the funding adequate for Squamish to undertake a comprehensive assessment of the impacts of the Project on Squamish rights and title. He notes that Squamish's limited budget is fully subscribed to meet the needs of its members and that the sole purpose of Squamish's involvement in the hearing and consultation process was "defensive: to protect our rights and title."

[536] SSN requested in excess of $300,000 for legal fees, expert fees, travel costs, meeting attendance costs and information collecting costs. It received $36,920 in participant funding, plus travel for two representatives to attend the hearing. Canada later offered $39,000 to SSN to participate in consultation following the close of the Board hearing record. The British Columbia Environmental Assessment Office also offered some capacity funding.

[537] SSN states that Canada knew that SSN requested funding in largest part to complete a traditional land and resource use study. It states that Canada knew that such studies had been completed for other Indigenous groups in relation to the Project, but that neither Canada nor the proponent had undertaken such a study for SSN.

[538] I accept that the level of participant funding provided constrained participation in the process before the National Energy Board by the Squamish and the SSN. However, as Canada submits, it is difficult to see the level of participant funding as being problematic in a systematic fashion when only two applicants address this issue.

[539] In *Gitxaala*, this Court rejected the submission that inadequate funding had been provided for participation before the joint review panel and in the consultation process. The Court noted, at paragraph 210, that the evidence filed in support of the submissions did:

> … not explain how the amounts sought were calculated, or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable.

[540] Much the same can be said of the evidence filed on this application. While SSN did append its request for participant funding as Exhibit D to the affidavit of its affiant Jeanette Jules, at the time this application was submitted SSN had not determined which expert or experts would be hired, it could not advise as to how many hours the expert(s) would likely bill or what the expert(s)' hourly rate(s) would be. The information provided was simply that it was expected that $80,000 was required to prepare a traditional land use study and that an additional $30,000 was required as the approximate cost of a wildlife study. No information was provided by either applicant about financial resources available to it.

[541] The evidence has not demonstrated that the level of participant funding was so inadequate as to render the entire consultation process unreasonable.

(iv) The process allowed the Project to be approved when essential information was lacking

[542] The final deficiency asserted with respect to the structure of the consultation process relates to the nature of the Board's process for approving projects. A number of Indigenous applicants argue that Canada's reliance upon the Board's hearing process was unreasonable in circumstances where potential impacts to title and rights remained unknown because studies of those potential impacts, and of the measures proposed in the Board's report to mitigate potential impacts, were left to a later date after the Governor in Council approved the Project. It is argued that without identification of all of the impacts of the Project Canada cannot rely on the Board's assessment of impacts to fulfil the duty to consult.

[543] Commencing at paragraph 286 above, I describe in some detail the Board's approval process in the context of the submission of the City of Burnaby that the Board's approval process was procedurally unfair because of what Burnaby characterized to be the deferral and delegation of the assessment of important information.

[544] Beginning at paragraph 322 above, I deal with the submissions of the City of Burnaby and Coldwater that the Governor in Council erred in determining that the Board's report qualified as a report because the Board did not decide certain issues before recommending approval of the Project. Consideration of the concerns advanced by Coldwater with respect to the Board's failure to deal with the West Alternative begins at paragraph 375 above. At paragraphs 384 and 385, I conclude that the pipeline route through the Coldwater River Valley remains a live issue.

[545] This places in context concerns raised by Coldwater and other applicants about the reasonableness of Canada's reliance on a process that left important issues unresolved at the time the Governor in Council approved the Project.

[546] In my view, this concern is addressed by the Supreme Court's analysis in the companion cases of *Clyde River* and *Chippewas of the Thames* where the Supreme Court explained that the Board's approval process may itself trigger the duty to consult where that process may result in adverse impacts upon Indigenous and treaty rights (*Clyde River*, paragraphs 25 to 29; *Chippewas of the Thames*, paragraphs 29 to 31).

[547] Examined in the context of Coldwater's concerns about the West Alternative and the protection of Coldwater's aquifer, this means that the Board's decision about the detailed pipeline routing in the vicinity of the Coldwater Reserve will trigger the duty to consult because Canada will have knowledge, real or constructive, of the potential impact of that decision upon Coldwater's aquifer located beneath the Coldwater Reserve. Once the duty is triggered, the Board may only make its decision if it informs itself of the impacts to the aquifer and takes the rights and interests of Coldwater into consideration before making its final decisions about pipeline routing and compliance with Condition 39 (*Chippewas of the Thames*, paragraph 48). Canada will remain responsible to ensure that the Board's decision upholds the honour of the Crown (*Clyde River*, paragraph 22). This is, I believe, a full answer to the concern that the consultation framework was deficient because certain decisions remain to be made after the Governor in Council approved the Project.

(v) Conclusion on the adequacy of the process selected and followed by Canada

[548] In *Clyde River* and *Chippewas of the Thames* the Supreme Court provided helpful guidance about the indicia of a reasonable consultation process. Applying those indicia:

- The Indigenous applicants were given early notice of the Project, the Board's hearing process, the framework of the consultation process and Canada's intention to rely on the National Energy Board process, to the extent possible, to discharge Canada's duty to consult.
- Participant funding was provided to the Indigenous applicants both by the Board and Canada (and the provincial Crown as well).
- The Board's process permitted Indigenous applicants to provide written evidence and oral traditional evidence, to question both Trans Mountain and the federal government interveners through Information Requests and to make written and oral closing submissions.
- The regulatory framework permitted the Board to impose conditions upon Trans Mountain that were capable of mitigating risks posed by the Project to the rights and title of the Indigenous applicants.
- After the Board's hearing record closed and prior to the decision by the Governor in Council, Canada provided a further consultation phase, Phase III, designed to enable Canada to deal with concerns not addressed by the hearing, the Board's proposed conditions and Trans Mountain's commitments.
- Canada understood, and advised the Indigenous applicants, that if Indigenous groups identified outstanding concerns in Phase III there were a number of options available to Canada. These included asking the National Energy Board to reconsider its recommendations and conditions, undertaking further consultations prior to issuing additional permits or authorizations and the use of existing or new policy and program measures to address outstanding concerns.

[549] I am satisfied that the consultation framework selected by Canada was reasonable. It was sufficient, if properly implemented, to enable Canada to make reasonable efforts to inform itself and consult. Put another way, this process, if reasonably implemented, could have resulted in mutual understanding on the core issues and a demonstrably serious consideration of accommodation.

(b) Was the consultation process deficient because of Canada's execution of the process?

[550] Canada argues that the consultation process allowed for deep consultation both in form and in substance. In particular it notes that:

- The Indigenous applicants were given early notice of the proposed Project, the Board hearing process and the consultation process, as well as Canada's intention to rely on the Board's process, to the extent possible, to discharge Canada's duty to consult.
- The Board required that Trans Mountain extensively consult before filing its application so as to attempt to address potential impacts by way of project modifications and design.
- Participant funding was provided to the Indigenous applicants by both Canada and the Board.
- The Indigenous applicants were afforded the opportunity before the Board to provide oral traditional and written evidence, to ask questions of Trans Mountain and the Federal interveners, and to make both written and oral submissions. The Board's report formulated conditions to mitigate, avoid or otherwise address impacts on Indigenous groups, and explained how Indigenous concerns were considered and addressed.
- Canada ordered an extension of the legislative timeframe for the Governor in Council's decision and met and corresponded with the Indigenous applicants to

discuss concerns that may not have been adequately addressed by the Board and to work together to identify potential accommodation measures.

- Canada developed the Crown Consultation Report to inform government decision-makers and sought feedback from the Indigenous applicants on two draft versions of the Crown Consultation Report.
- Canada reviewed upstream greenhouse gas emission estimates for the Project, struck a Ministerial Panel to seek public input and held a workshop in Kamloops.
- Canada developed additional accommodation measures including an Indigenous Advisory and Monitoring Committee, the Oceans Protection Plan and the Action Plan for the Recovery of the Southern Resident Killer Whale.
- Canada gave written reasons for conditionally approving the Project that showed how Indigenous concerns were considered and addressed.

[551] While in *Gitxaala* this Court found that the consultation process followed for the Northern Gateway project fell well short of the mark, Canada submits that the flaws identified by the Court in *Gitxaala* were remedied and not repeated. Specific measures were taken to remedy the flaws found in the earlier consultation. Thus:

i. Canada extended the consultation process by four months to allow deeper consultation with potentially affected Indigenous groups, greater public engagement and an assessment of the greenhouse gas emissions associated with the Project.

ii. The Order in Council expressly stated that the Governor in Council was "satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated". Reasons for this conclusion were given in the Explanatory Note.

iii. Canada shared its preliminary strength of claim assessments in August 2016 to allow Indigenous groups to comment on the assessments. Canada's ultimate assessments were set out in the Crown Consultation Report.

iv. Canada's officials met and dialogued with Indigenous groups. As well, several Ministers met with Indigenous groups. While the Governor in Council accepted the report of the National Energy Board, in addition to the Board's conditions the Crown Consultation Report contained a commitment to design, fund and implement an Indigenous Advisory and Monitoring Committee for the Project and the Explanatory Note referenced two new initiatives: the Economic Pathways Partnership and the Oceans Protection Plan.

v. In order to ensure that the Governor in Council received accurate information, two drafts of the Crown Consultation Report were distributed for comment and Indigenous groups were invited to provide their own submissions to the Governor in Council.

vi. The consultation was based on the unique facts and circumstances applicable to each Indigenous group. The Crown Consultation Report contained a detailed appendix for each potentially affected Indigenous group that dealt with: background information; a preliminary strength of claim assessment; a summary of the group's involvement in the Board and Crown Consultation process; a summary of the group's interests and concerns; accommodation proposals; the group's response to the Board's report; the potential impacts of the Project on the group's Indigenous interests; and the Crown's conclusions.

[552] I acknowledge significant improvements in the consultation process. To illustrate, in *Gitxaala* this Court noted, among other matters, that:

- requests for extensions of time were ignored (reasons, paragraphs 247 and 250);
- inaccurate information was put before the Governor in Council (reasons, paragraphs 255-262);
- requests for information went unanswered (reasons, paragraphs 272, 275-278);
- Canada did not disclose its assessment of the strength of the Indigenous parties' claim to rights or title or its assessment of the Project's impacts (reasons, paragraphs 288-309); and,

- Canada acknowledged that the consultation on some issues fell well short of the mark (reasons, paragraph 254).

[553] Without doubt, the consultation process for this project was generally well-organized, less rushed (except in the final stage of Phase III) and there is no reasonable complaint that information within Canada's possession was withheld or that requests for information went unanswered.

[554] Ministers of the Crown were available and engaged in respectful conversations and correspondence with representatives of a number of the Indigenous applicants.

[555] Additional participant funding was offered to each of the applicants to support participation in discussions with the Crown consultation team following the release of the Board's report and recommendations. The British Columbia Environmental Assessment Office also offered consultation funding.

[556] The Crown Consultation Report provided detailed information about Canada's approach to consultation, Indigenous applicants' concerns and Canada's conclusions. An individualized appendix was prepared for each Indigenous group (as described above at paragraph 551(vi)).

[557] However, for the reasons developed below, Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation.

[558] To summarize my reasons for this conclusion, Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

[559] On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints. As this Court wrote in *Gitxaala*, at paragraph 265, speaking of the limited mandate of Canada's representatives:

> When the role of Canada's representatives is seen in this light, it is of no surprise that a number of concerns raised by Aboriginal groups—in our view, concerns very central to their legitimate interests—were left unconsidered and undiscussed. This fell well short of the conduct necessary to meet the duty to consult.

[560] Further, Phase III was to focus on two questions: outstanding concerns about Project-related impacts and any required incremental accommodation measures. Canada's ability to consult and dialogue on these issues was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to

genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.

[561] Together these three factors led to a consultation process that fell short of the mark and was, as a result, unreasonable. Canada then exacerbated the situation by its late disclosure of its view that the Project did not have a high level of impact on the established and asserted rights of the Indigenous applicants—a disclosure made two weeks before they were required to submit their final response to the consultation process and less than a month before the Governor in Council approved the Project.

[562] I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.

[563] The jurisprudence of the Supreme Court on the duty to consult is clear. The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave

serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project. The instances below show how Canada fell short of its obligations.

(i) The need for meaningful two-way dialogue

[564] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above at paragraphs 499 to 501, meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.

[565] The need for meaningful dialogue exists and operates in a factual context. Here, Phase III was a critically important part of the consultation framework. This was so for a number of reasons.

[566] First, Phase III was the first opportunity for the Indigenous applicants to dialogue directly with Canada about matters of substance, not process.

[567] Second, the Board's report did not deal with all of the subjects on which consultation was required. For example, the Board did not make any determinations about the nature and scope of asserted or established Indigenous rights, including title rights. Nor did the Board consider the

scope of the Crown's duty to consult or whether the duty was fulfilled. Nor did Trans Mountain in its application, or the Board in its report, assess how the residual effects of the Project, or the Project itself, could adversely impact traditional governance systems and claims to Aboriginal title (Crown Consultation Report, sections 1.4, 4.3.4 and 4.3.5). Canada was obliged to consult on these issues.

[568] Third, neither Trans Mountain nor the Board assessed the Project's impacts on a specific basis for each affected Indigenous group. Rather, Trans Mountain assessed the effects related to Project construction and operations (including potential accidents and malfunctions) that might impact biophysical resources and socio-economic components within the Project area, and the Indigenous uses, practices and activities associated with those resources. This approach was accepted by the Board (Board report, pages 51 to 52).

[569] Finally, Phase III began in earnest with the release of the Board's report and finalized conditions. This report contained findings of great importance to the applicants because the Board's findings led Canada to conclude that the Project had only a minor-to-moderate impact on the Indigenous applicants. As a matter of law, this conclusion directly affected both the depth of consultation required and the need for accommodation measures. The following two examples illustrate the importance of the Board's findings to the Indigenous applicants.

[570] The first example concerns the assessment of the Project's potential impact on freshwater fishing. The Board found that the proposed watercourse crossings designs, mitigation measures, reclamation activities and post-construction monitoring were appropriate and that they would

effectively reduce the extent of effects on fish and fish habitat. Watercourse crossings would be required to comply with federal and provincial laws and regulations and would require permits under the British Columbia *Water Sustainability Act*, S.B.C. 2014, c. 15. The Board agreed with Trans Mountain's self-assessment of the potential for serious harm in that the majority of proposed watercourse crossings would not constitute serious harm to fish for the purposes of the *Fisheries Act*, R.S.C. 1985, c. F-14 (Board report, pages 183 and 185).

[571] The Stó:lō have a constitutionally protected right to fish on the Fraser River, a right affirmed by the Supreme Court of Canada. In the Stó:lō appendix to the Crown Consultation Report, Canada concluded that Project construction and routine maintenance during operation would be expected to result in a minor-to-moderate impact on the Stó:lō's freshwater fishing and marine fishing and harvesting activities (Stó:lō appendix, pages 26 and 27). This assessment flowed directly from the Board's conclusion that Project-related activities could result in low-to-moderate magnitude effects on freshwater and marine fish and fish habitat and the Board's conclusion that its conditions, if the Project was approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Stó:lō appendix, pages 24 and 25).

[572] The second example relates to the ability of Indigenous groups to use the lands, waters and resources for traditional purposes. The Board found that this ability would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities, such as harvesting or accessing sites or areas of traditional land resource use, would be temporarily interrupted. The Board was of the view that these impacts would be short-

term, as they would be limited to brief periods during construction and routine maintenance, and that these effects would be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the Westridge Marine Terminal site. The Board found these effects would be reversible in the short to long term, and low in magnitude (Board report, page 279). The Board also found that:

- Project-related pipeline, facility and Westridge Marine Terminal construction and operation, and marine shipping activities were likely to have low-to-moderate magnitude environmental effects on terrestrial, aquatic and marine species harvested by Indigenous groups as a whole (Board report, pages 204, 221 to 224 and 362);
- Construction of the Westridge Marine Terminal, the pipeline and associated facilities were likely to cause short-term temporary disruptions to Indigenous community members accessing traditional hunting, trapping and plant gathering sites (Board report, page 279); and,
- Project-related marine shipping activities were likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers were in transit (Board report, page 362).

[573] Based on these findings, Canada concluded that the impact of Project construction and operation and Project-related marine shipping activities on Tsleil-Waututh's and Squamish's hunting, trapping and plant gathering activity would be negligible-to-minor. The Project's impact on these activities was assessed to be minor for the Stó:lō and SSN, and minor-to-moderate for Coldwater and Upper Nicola.

[574] The critical importance of the Board's findings to the Indigenous applicants mandated meaningful dialogue about those findings. I now turn to consider Canada's execution of Phase III of the consultation process, commencing with the mandate of the Crown consultation team.

(ii) The implementation of the mandate of the Crown consultation team

[575] While Canada submits that the members of the Crown consultation team were not mere note-takers, the preponderance of the evidence is to the effect that the members of the Crown consultation team acted on the basis that, for the most part, their role was that of note-takers who were to accurately report the concerns of the Indigenous applicants to the decision-makers.

[576] My review of the evidence begins with the explanation of the team's mandate found in the Crown Consultation Report. I then move to the evidence of the interactions between the Crown consultation team and the Indigenous applicants during the consultation process.

[577] First, a word of explanation about the source of the evidence cited below. Unless otherwise noted, the evidence comes from meeting notes prepared by Canada. It was Canada's practice to prepare meeting notes following each consultation meeting, to send the draft notes to the affected Indigenous group for comment, and then to revise the notes based on the comments received before distributing a final version. The parties did not take issue with the accuracy of meeting notes. As shown below, where there was any disagreement on what had been said, the minutes set out each party's view of what had been said.

a. The Crown Consultation Report

[578] Section 3.3.4 of the Crown Consultation Report dealt with Phase III of the consultation process. Under the subheading "Post-NEB Hearing Phase Consultation" the report stated:

> … The mandate of the Crown consultation team was to listen, understand, engage and report to senior officials, Aboriginal group perspectives. The Minister of Natural Resources and other Ministers were provided a summary of these meetings.

b. The experience of Tsleil-Waututh

[579] At a meeting held on April 5, 2016, Erin O'Gorman of Natural Resources Canada "highlighted her mandate to listen and understand [Tsleil-Waututh's] perspective on how consultations should be structured, and move this information for decision. No mandate to defend the current approach."

[580] In the course of the introductions and opening remarks at a meeting held September 15, 2016, "Canada stressed that the Crown's ultimate goal is to understand the position and concerns of the [Tsleil-Waututh] on the proposed Trans Mountain Expansion project."

[581] At a meeting held on October 20, 2016, Canada's representatives advised that "[o]ur intention is to provide a report to cabinet and include all first Nations consulted, we are open to having [Tsleil-Waututh] input review and representation in that report, together with mitigation and accommodation measures." In response, a representative of Tsleil-Waututh "indicated he did not want consultations and a report of concerns to [Governor in Council]: that has occurred and

does not work." The response of the federal representatives to this was that "it was sufficient to convey information to the [Governor in Council] depending on how it's done."

c. The experience of Squamish

[582] On October 6, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly wrote to Squamish in response to a letter from Squamish setting out its views on the outstanding deficiencies in the Board review process and requesting a review of the consultation approach the Crown was taking to inform forthcoming federal and provincial decisions in respect of the Project. Under the heading "Procedural Concerns" Squamish was advised:

> The Crown Consultation Team's objective has always been to work with Squamish and other Aboriginal groups to put forward the best information possible to decision makers within the available regulatory timeframe, via this Consultation and Accommodation Report. Comments and input provided by Squamish will help the Crown Consultation Team to accurately convey Squamish's interests, concerns, and any specific proposals.
>
> The Crown is now focused on validating the key substantive concerns of Squamish, and has requested feedback on an initial draft report so that the Crown can include draft conclusions in a subsequent revision that will include the Crown's assessment of the seriousness of potential impacts from the Project on Aboriginal Interests, specific to each Aboriginal group.
>
> …
>
> At this stage in the process, following a four month extension of the federal legislated time limit, for a decision on the Project (required by December 19, 2016), we continue to want to ensure that Squamish's substantive concerns with respect to the Project, [Board] report (including recommended terms and conditions), and related proposals for mitigation or accommodation are accurately and comprehensively documented in the Consultation and Accommodation Report.
>
> (underlining added)

[583] At the only consultation meeting held with Squamish, Canada's consultation lead referenced the ethics the team abided by during each meeting with Indigenous groups: "honesty, truth, pursuing the rightful path and ensuring that accurate and objective, representative information is put before decision-makers."

[584] He later reiterated that "[i]t is the Crown's duty to ensure that accurate information on these outstanding issues is provided to decision-makers, including how Squamish perceives the project and any outstanding issues."

d. The experience of Coldwater

[585] At a meeting held with Coldwater on March 31, 2016, prior to the start of Phase III, the head of the Crown consultation team explained that:

> … the work of the Crown consultation team, to develop a draft report that helps document the potential impacts of the project on [Coldwater] rights and interests, will be the vehicle through which the Crown documents potentially outstanding issues and accommodation proposals. It may appear as though the Crown is relying solely on the [Board] process, however it is not. It is leading its own consultation activities and will be overlaying a separate analytical framework (i.e. the impacts-on-rights lens).

[586] At a meeting on May 4, 2016, discussing, among other things, the effect of the Project on Coldwater's aquifer the Crown consultation team advised:

> For specifics such as detailed routing, it is the [Board] which decides those. The responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers.
>
> (underlining added)

After Coldwater expressed its strong preference for the West Alternative Canada's representatives responded that:

> [t]his issue is one which is very detailed, and will need to be recorded carefully and accurately in the Crown consultation Report. The Crown consultation report can highlight that project routing is a central issue for Coldwater.
>
> (underlining added)

[587] At a consultation meeting held on October 7, 2016, again in the context of discussions about Coldwater's aquifer, one of Canada's representatives:

> … acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analysed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise. The Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> …
>
> Coldwater asked what the point of consultation was if all that was coming from the Crown was a summary report to the [Governor in Council].
>
> (underlining added)

[588] In the later stages of the meeting during a discussion headed "Overview of Decision Making", Coldwater stated that based on the discussion with the Crown to date it did not seem likely that there would be a re-analysis of the West Alternative or any of the additional analysis Coldwater had asked for. Canada's representatives responded that:

> [The Crown's] position is that the detailed route hearing process and Condition 39 provide avenues to consider alternative routes, however the Crown is not currently considering alternative routes because the [Board] concluded that the applied for pipeline corridor is satisfactory. The Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, it will then be

> up to Cabinet to decide if those concerns warrant reconsideration of the current route.
>
> (underlining added)

e. The experience of Stó:lō

[589] An email sent from the Major Projects Management Office following an April 13, 2016, consultation meeting advised that:

> The Crown consultation team for [the Trans Mountain expansion] and the forthcoming Ministerial Representative (or Panel) will hear views on the project and whether there are any outstanding issues not addressed in the [Board's] final report and conditions or [Environment Canada's] assessment of upstream greenhouse gas emissions. This will provide another avenue for participants to provide their views on the upstream [greenhouse gas] assessment for [Trans Mountain expansion]. Any comments will be received and given consideration by the Government of Canada.
>
> (underlining added)

[590] On May 12, 2016, the Stó:lō wrote to the Minister of Natural Resources, the Honourable James Carr. It wrote about the Crown Consultation Report that:

> … we understood [Canada's representative] Mr. Neil to say that the federal decision-maker will be the Governor-in-Council and that [Natural Resources Canada], further to this Crown consultation, will not make recommendations with respect to this project. Instead, its report to the Governor-in-Council will be a summary of what it heard during its consultations with aboriginal peoples with some commentary. We further understood Mr. Whiteside [another federal representative] to say that the Governor-in-Council cannot, based on Crown consultations, add or make changes to the Terms and Conditions of the project as set out by the [Board]. If we have misunderstood these representations, we would appreciate being informed in writing. If we have not misunderstood these representations, we believe that [Natural Resources Canada] is misinterpreting its constitutional obligations and the authority of federal decision-makers.
>
> (underlining added)

[591] The Stó:lō went on to observe that "[a] high level of consultation means more than simply gathering information on aboriginal interests, cross checking those with the Terms and Conditions of the project and reporting those findings to the federal decision-maker." And that "[a] simple 'what we heard' report is inadequate to this task and the Governor-in-Council must be aware of its obligation to either reject or make changes to the project to protect and preserve the aboriginal rights, title and interests of the Stó:lō Collective."

[592] The Minister responded on July 15, 2016. The Minister agreed that addressing concerns required more than gathering and reporting information from consultation sessions and advised that if the Stó:lō Collective identified concerns that had not been fully addressed by the Board's terms and conditions consultation would "include efforts to preserve the Aboriginal rights in question." The Minister encouraged the Stó:lō Collective "to work with the Crown consultation team so that the Stó:lō Collective's interests are fully understood and articulated in the Crown Consultation and Accommodation Report" (underlining added). The Minister added that "[a]ny accommodation measures or proposals raised during Crown consultations will be included in this report and will inform the Government's decision on [the Project]."

f. The experience of Upper Nicola

[593] At a meeting held on March 31, 2016, after Chief McLeod expressed his desire for Upper Nicola's "intentions to be heard by decision makers, and asked that all of the information shared today be relayed to Minister Carr", Canada's representatives responded that "senior decision makers are very involved in this project and the Crown consultation team would be relaying the outcomes and the meeting records from the meeting today up the line." Canada's Crown

consultation lead noted that "wherever possible he would like to integrate some of the Indigenous words Chief McLeod spoke about into the Crown consultation report as a mechanism to relay the important messages which the Chief is talking about."

[594] At a meeting on May 3, 2016, immediately prior to the release of the Board's report and recommendations, Canada's consultation lead "reiterated the current mandate for the Crown consultation team, which is to listen, learn, understand, and to report up to senior decision makers" (underlining added). Upper Nicola's legal counsel responded that "the old consultation paradigm, where the Crown's officials meets with Aboriginal groups to hear from them their perspectives and then to report this information to decision makers, is no longer valid."

[595] Towards the end of the meeting, in response to a question about a recent media story which claimed that the Prime Minister had instructed his staff to develop a strategy for approving Trans Mountain, a senior advisor to Indigenous and Northern Affairs Canada advised that he had "received no instructions from his department that would change his obligation as a public servant to ensure that he does all he can to remain objective and impartial and to ensure that the views of Aboriginal groups are appropriately and accurately relayed to decision makers." The Crown consultation lead added that the "Crown consultation team has no view on the project. Its job is to support decision makers with accurate information" (underlining added).

g. The experience of SSN

[596] In an email of July 7, 2015, sent prior to the release of the Board's draft conditions, SSN was advised by the Major Projects Management Office that the Federal "Crown's consultation

will focus on an exchange of information and dialogue on two key documents", the Board's draft conditions and the draft Crown Consultation Report. With respect to the Crown Consultation Report, the email advised that the focus would be to determine "whether the Crown has adequately described the Aboriginal group's participation in the process, the substantive issues they have raised and the status of those issues (including Aboriginal groups' views on any outstanding concerns and residual issues arising from Phase III)" (underlining added).

[597] In a later email of June 17, 2016, SSN were informed that:

> The objective of the Crown consultation team moving forward is to consult collaboratively in an effort to reach consensus on outstanding issues and related impacts on constitutionally protected Aboriginal and treaty rights, as well as options for accommodating any impacts on rights that may need to be considered as part of the decision-making process. The status of these discussions will be documented in a Consultation and Accommodation Report that will help inform future decisions on the proposed project and any accompanying rationale for the government's decisions.
>
> (underlining added)

h. Conclusion on the mandate of the Crown consultation team

[598] As this review of the evidence shows, members of the Crown consultation team advised the Indigenous applicants on a number of occasions throughout the consultation process that they were there to listen and to understand the applicants' concerns, to record those concerns accurately in the Crown Consultation Report, and to pass the report to the Governor in Council. The meeting notes show the Crown consultation team acted in accordance with this role when discussing the Project, its impact on the Indigenous applicants and their concerns about the Project. The meeting notes show little or no meaningful responses from the Crown consultation team to the concerns of the Indigenous applicants. Instead, too often Canada's response was to

acknowledge the concerns and to provide assurance the concerns would be communicated to the decision-makers.

[599] As this Court explained in *Gitxaala* at paragraph 279, Canada was required to engage, dialogue and grapple with the concerns expressed to it in good faith by the Indigenous groups impacted by the Project. Meaningful dialogue required someone representing Canada empowered to do more than take notes—someone able to respond meaningfully to the applicants' concerns at some point in time.

[600] The exchanges with the applicants demonstrate that this was missing from the consultation process. The exchanges show little to facilitate consultation and show how the Phase III consultation fell short of the mark.

[601] The consultation process fell short of the required mark at least in part because the consultation team's implementation of its mandate precluded the meaningful, two-way dialogue which was both promised by Canada and required by the principles underpinning the duty to consult.

(iii) Canada's reluctance to depart from the Board's findings and recommended conditions and genuinely engage the concerns of the Indigenous applicants

[602] During Phase III each Indigenous applicant expressed concerns about the suitability of the Board's regulatory review and environmental assessment. These concerns were summarized and reported in the appendix to the Crown Consultation Report maintained for each Indigenous

applicant (Tsleil-Waututh appendix, pages 7-8; Squamish appendix, page 4; Coldwater appendix, pages 4-5; Stó:lō appendix, pages 12-14; Upper Nicola appendix, pages 5-6; SSN appendix, page 4). These concerns related to both the Board's hearing process and its findings and recommended conditions. The concerns expressed by the Indigenous applicants included:

- The exclusion of Project-related shipping from the definition of the "designated project" which was to be assessed under the *Canadian Environmental Assessment Act, 2012*.
- The inability to cross-examine Trans Mountain's witnesses, coupled with what were viewed to be inadequate responses by Trans Mountain to Information Requests.
- The Board's recommended terms and conditions were said to be deficient for a number of reasons, including their lack of specificity and their failure to impose additional conditions (for example, a condition that sacred sites be protected).
- The Board's findings were generic, thus negatively impacting Indigenous groups' ability to assess the potential impact of the Project on their title and rights.
- The Board's legislated timelines were extremely restrictive and afforded insufficient time to review the Project application and to participate meaningfully in the review process.
- The Board hearing process was an inappropriate forum for assessing impacts to Indigenous rights, and the Board's methods and conclusions regarding the significance and duration of the Project's impacts on Indigenous rights were flawed.

[603] However, missing from both the Crown Consultation Report and the individual appendices is any substantive and meaningful response to these concerns. Nor does a review of the correspondence exchanged in Phase III disclose sufficient meaningful response to, or dialogue about, the various concerns raised by the Indigenous applicants. Indeed, a review of the record of the consultation process discloses that Canada displayed a closed-mindedness when

concerns were expressed about the Board's report and was reluctant to depart from the findings and recommendations of the Board. With rare exceptions Canada did not dialogue meaningfully with the Indigenous applicants about their concerns about the Board's review. Instead, Canada's representatives were focused on transmitting concerns of the Indigenous applicants to the decision-makers, and nothing more. Canada was obliged to do more than passively hear and receive the real concerns of the Indigenous applicants.

[604] The evidence on this point comes largely from Tsleil-Waututh and Coldwater.

[605] I begin with the evidence of the Director of Tsleil-Waututh's Treaty, Lands and Resources Department, Ernie George. He affirmed that at a meeting held with representatives of Canada on October 21, 2016, to discuss Tsleil-Waututh's view that the Board's process was flawed such that the Governor in Council could not rely on its report and recommendations:

> 81. Canada expressed that it was extremely reluctant to discuss the fundamental flaws that [Tsleil-Waututh] alleged were present in relation to the [Board] process, and even prior to the meeting suggested that we might simply need to "agree to disagree" on all of those issues. In our view Canada had already determined that it was not willing to take any steps to address the issues that [Tsleil-Waututh] identified and submitted constituted deficiencies in the [Board] process, despite having the power to do so under CEAA and NEBA and itself stating that this was a realistic option at its disposal.
>
> (underlining added)

[606] Mr. George was not cross-examined on his affidavit.

[607] Canada's reluctance was firmly expressed a few days later at a meeting held on October 27, 2016. Mr. George affirmed:

> 101. [Tsleil-Waututh] raised its concern that although the [Board] reached similar conclusions as [Tsleil-Waututh] that oil spills in Burrard Inlet would cause significant adverse environmental effects, it disagreed with Drs. Gunton and Broadbent's conclusions as to the likelihood of spills occurring. [Tsleil-Waututh] then asked Canada whether it agreed with those conclusions. Canada was unable to respond because it did not bring its risk experts to the meeting. [Tsleil-Waututh] rearticulated its view that such risks were far too high.
>
> 102. At this point, despite the critical importance of this issue, Canada advised [Tsleil-Waututh] that it was unwilling to revisit the [Board's] conclusions and would instead wholly rely on the [Board's] report on this issue. We stated that we did not accept Canada's position, that further engagement on this subject was required, and that we would be willing to bring our experts to a subsequent meeting to consider any new material or new technology that Canada might identify.
>
> (underlining added)

[608] This evidence is consistent with the meeting notes prepared by Canada which reflect that Canada's representatives "indicated that government would rely on the [Board's] report". The notes then record that Tsleil-Waututh's representatives inquired "if the [Government of Canada] was going to rely on the [Board's] report, there was an openness to discuss matters related to gaps in the [Board's] report and what had been ignored." In response, "Canada acknowledged [Tsleil-Waututh's] views on the [Board] process, and indicated that it could neither agree or disagree: both [Tsleil-Waututh] and [Canada] had been intervenors and neither could know how the [Board] panel weighed information provided to it."

[609] Coldwater provided similar evidence relating to its efforts to consult with Canada about the Project's impacts on its aquifer at meetings held on May 4, 2016 and October 7, 2016.

[610] On May 4, 2016, representatives of Coldwater expressed their view that the West Alternative was a much better pipeline route that addressed issues the Board had not addressed

adequately. As set out above, Canada's representatives responded that for "specifics such as detailed routing, it is the [Board] which decides those" and added that "[t]he responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers."

[611] Canada again expressed the view that the Board's findings were not to be revisited in the Crown consultation process at the meeting of October 7, 2016. In response to a question about the West Alternative, Canada's representatives advised that in the Phase III consultation process it was not for Canada to consider the West Alternative as an alternate measure to mitigate or accommodate Coldwater's concerns. The meeting notes state:

> The Crown replied that the [Board] concluded that the current route is acceptable; however the Panel imposed a condition requiring the Proponent to further study the interaction between the proposed pipeline and the aquifer. Tim Gardiner acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analyzed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise, the Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> (underlining added)

[612] Canada went on to express its confidence in Board Condition 39 and the detailed route hearing process.

[613] Later, in response to Coldwater's concern that the Board never considered the West Alternative, the meeting notes show that Canada's representatives:

> … acknowledged Coldwater's concerns, and explained that when the West Alternative was no longer in the [Board's] consideration, the Crown was not able

> to question that. [Mr. Whiteside] acknowledged that from Coldwater's perspective this leaves a huge gap. Mr. Whiteside went on to explain that the Proponent's removal of the West Alternative "is not the Crown's responsibility. We are confined to the [Board] report."
>
> (underlining added)

[614] Finally, in the course of an overview of decision-making held at the end of the October 7, 2016 meeting, Canada advised it was not considering alternative routes "because the [Board] concluded that the applied for pipeline corridor is satisfactory." Canada added that "[t]he Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, [and] it will then be up to Cabinet to decide if those concerns warrant reconsideration of the current route."

[615] As this Court had already explained in *Gitxaala,* at paragraph 274, Canada's position that it was confined to the Board's findings is wrong. As in *Gitxaala*, Phase III presented an opportunity, among other things, to discuss and address errors, omissions and the adequacy of the recommendations in the Board's report on issues that vitally concerned the Indigenous applicants. The consequence of Canada's erroneous position was to seriously limit Canada's ability to consult meaningfully on issues such as the Project's impact on each applicant and possible accommodation measures.

[616] Other meeting notes do not record that Canada expressed its reluctance to depart from the Board's findings in the same terms to other Indigenous applicants. However, there is nothing inconsistent with this position in the notes of the consultation with the other applicants.

[617] For example, in a letter sent to Squamish by the Major Projects Management Office on July 14, 2015, it was explained that the intent of Phase III was:

> … not to repeat or duplicate the [Board] review process, but to identify, consider and potentially address any outstanding concerns that have been raised by Aboriginal groups (i.e. concerns that, in the opinion of the Aboriginal group, have not been addressed through the [Board] review process).

[618] Later, Squamish met with the Crown consultation team on September 11, 2015, to discuss the consultation process. At this meeting Squamish raised concerns about, among other things, the adequacy of Canada's consultation process. In a follow-up letter counsel for Squamish provided more detail about the "Squamish Process"—a proposed process to enable consideration of the Project's impact upon Squamish's interests. The process included having community concerns inform the scope of the assessment with the goal of having these concerns substantively addressed by conditions placed on the Project proponent.

[619] Canada responded by letter dated November 26, 2015, in which it reiterated its position that:

> … there are good reasons for the Crown to rely on the [Board's] review of the Project to inform the consultation process. This approach ensures rigour in the assessment of the potential adverse effects of the Project on a broad range of issues including the environment, health and socio-economic conditions, as well as Aboriginal interests.

[620] The letter went on to advise that:

> Information from a formal community level or third-party review process can be integrated into and considered through the [Board] review process if submitted as evidence. For the Trans Mountain Expansion Project, the appropriate time to have done so would have been prior to the evidence filing deadline in May 2015.

[621] Canada went on to express its confidence that the list of issues, scope of assessment and scope of factors examined by the Board would inform a meaningful dialogue between it and Squamish.

[622] In other words, Canada was constrained by the Board's review of the Project. Canada required that evidence of any assessment or review process be first put before the Board, and any dialogue had to be informed by the Board's findings.

[623] A similar example is found in the Crown's consultation with Upper Nicola. At the consultation meeting held on September 22, 2016, Upper Nicola expressed its concern with the Board's economic analysis. The Director General of the Major Projects Management Office responded that "as a rule, the [Governor in Council] is deferential to the [Board's] assessment, but they are at liberty to consider other information sources when making their decision and may reach a different conclusion than the [Board]." The Senior Advisor from Indigenous and Northern Affairs Canada added that "the preponderance of detail in the [Board] report weighs heavy on Ministers' minds."

[624] No dialogue ensued about the legitimacy of Upper Nicola's concern about the Board's economic analysis, although Canada acknowledged "a strong view 'out there' that runs contrary to the [Board's] determination."

[625] Matters were left that if Upper Nicola could provide more information about what it said was an incorrect characterization of the economic rationale and Indigenous interests, this information would be put before the Ministers.

[626] Put another way, Canada was relying on the Board's findings. If Upper Nicola could produce information contradicting the Board that would be put before the Governor in Council; it would not be the subject of dialogue between Upper Nicola and Canada's representatives. Canada did not grapple with Upper Nicola's concerns, did not discuss with Upper Nicola whether the Board should be asked to reconsider its conclusion about the economics of the Project and did not explain why Upper Nicola's concern was found to lack sufficient merit to require Canada to address it meaningfully.

[627] As explained above at paragraph 491, Canada can rely on the Board's process to fulfil, in whole or in part, the Crown's duty to consult. However, reliance on the Board's process does not allow Canada to rely unwaveringly upon the Board's findings and recommended conditions. When real concerns were raised about the hearing process or the Board's findings and recommended conditions, Canada was required to dialogue meaningfully about those concerns.

[628] The Board is not immune from error and many of its recommendations were just that—proffered but not binding options for Canada to consider open-mindedly, assisted by its dialogue with the Indigenous applicants. Phase III of the consultation process afforded Canada the opportunity, and the responsibility, to dialogue about the asserted flaws in the Board's process and recommendations. This it failed to do.

(iv) Canada's erroneous view that the Governor in Council could not impose additional conditions on the proponent

[629] Canada began and ended Phase III of the consultation process operating on the basis that it could not impose additional conditions on the proponent. This was wrong and limited the scope of necessary consultation.

[630] Thus, on May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups to provide additional information on the scope and timing of Phase III consultation. If Indigenous groups identified outstanding concerns after the Board issued its report, the letter described the options available to Canada as follows:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

[631] Canada expressed the position that these were the available options throughout the consultation process (see, for example, the meeting notes of the consultation meeting held on March 31, 2016, with Coldwater).

[632] Missing was the option of the Governor in Council imposing additional conditions on Trans Mountain.

[633] At a meeting held on April 13, 2016, after Canada's representatives expressed the view that the Crown could not add additional conditions, the Stó:lō's then counsel expressed the

contrary view. She asked that Canada's representatives verify with their Ministers whether Canada could attach additional conditions. By letter dated November 28, 2016 (the day before the Project was approved), Canada, joined by the British Columbia Environmental Assessment Office, advised that "the Governor in Council cannot impose its own conditions directly on the proponent as part of its decision" on the certificate of public convenience and necessity.

[634] This was incorrect. In *Gitxaala*, at paragraphs 163 to 168, this Court explained that when considering whether Canada has fulfilled its duty to consult, the Governor in Council necessarily has the power to impose conditions on any certificate of public convenience and necessity it directs the National Energy Board to issue.

[635] In the oral argument of these applications Canada acknowledged this power to exist, albeit characterizing it to be a power unknown to exist prior to this Court's judgment in *Gitxaala*.

[636] Accepting that the power had not been explained by this Court prior to its judgment in *Gitxaala*, that judgment issued on June 23, 2016, five months before Canada wrote to the Stó:lō advising that the Governor in Council lacked such a power and five months before the Governor in Council approved the Project. The record does not contain any explanation as to why Canada did not correct its position after the *Gitxaala* decision.

[637] The consequence of Canada's erroneous position that the Governor in Council lacked the ability to impose additional conditions on Trans Mountain seriously and inexplicably limited Canada's ability to consult meaningfully on accommodation measures.

(v) Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants

[638] As explained above at paragraph 488, the depth of the required consultation increases with the seriousness of the potentially adverse effect upon the claimed title or right. Canada's assessment of the Project's effect on each Indigenous applicant was therefore a critical aspect of the consultation process.

[639] Canada ultimately assessed the Project not to have a high level of impact on the exercise of the Indigenous applicants' "Aboriginal Interests" (a term defined in the Crown Consultation Report to include "asserted or established Aboriginal rights, including title and treaty rights."). The Project was assessed to have a minor impact on the exercise of the Aboriginal Interests of Squamish and SSN, a minor-to-moderate impact on the Aboriginal Interests of Coldwater and Stó:lō and a moderate impact on the Aboriginal Interests of Tsleil-Waututh and Upper Nicola.

[640] This important assessment was not communicated to the Indigenous applicants until the first week of November 2016, when the second draft of the Crown Consultation Report was provided (the first draft contained placeholder paragraphs in lieu of an assessment of the Project's impact). Coldwater, Upper Nicola and SSN received the second draft of the Crown Consultation Report on November 1, 2016, Squamish and Stó:lō on November 3, 2016 and Tsleil-Waututh on November 4, 2016. Each was given two weeks to respond to the draft Crown Consultation Report.

[641] By this point in time Squamish, Coldwater, Stó:lō and SSN had concluded their consultation meetings with Canada and no further meetings were held.

[642] Tsleil-Waututh did have further meetings with Canada, but these meetings were for the specific purposes of discussing greenhouse gases, the economic need for the Project and the Oceans Protection Plan.

[643] Upper Nicola did have a consultation meeting with Canada on November 16, 2016, at which time it asked for an extension of time to respond to the second draft of the Crown Consultation Report. In response, Upper Nicola received a two-day extension until November 18, 2016, to provide its comments to Canada. Canada's representatives explained that "Cabinet typically requires material one month ahead of a decision deadline to enable time to receive and review the report, translate etc. and that we've already reduced this down to enable a second round of comments."

[644] Importantly, Canada's Crown consultation lead acknowledged that other groups had asked for more time and the request had been "communicated to senior management and the Minister loud and clear." Canada's consultation lead went on to recognize that the time provided to review the second draft "may be too short for some to contribute detailed comments". There is no evidence that Canada considered granting the requested extension so that the Indigenous groups could provide detailed, thoughtful comments on the second draft of the Crown Consultation Report, particularly on Canada's assessment of the Project's impact. Nor does the record shed any light on why Canada did not consider granting the requested extension. The

statutory deadline for Cabinet's decision was December 19, 2016, and the Indigenous applicants had been informed of this.

[645] Ultimately, the Governor in Council approved the Project on November 29, 2016.

[646] The consequence of Canada's late communication of its assessment of the Project's impact was mitigated to a degree by the fact that from the outset it had acknowledged, and continues to acknowledge, that it was obliged to consult with the Indigenous applicants at the deeper end of the consultation spectrum. Thus, the assessment of the required depth of consultation was not affected by Canada's late advice that the Project, in its view, did not have a high level of impact on the claimed rights and title of the Indigenous applicants.

[647] This said, without doubt Canada's view of the Project's impact influenced its assessment of both the reasonableness of its consultation efforts and the extent that the Board's recommended conditions mitigated the Project's potential adverse effects and accommodated the Indigenous applicants' claimed rights and title. For this reason, the late delivery of Canada's assessment of the Project's impact until after all but one consultation meeting had been held contributed to the unreasonableness of the consultation process.

[648] I now turn to review instances that illustrate Canada's failure to dialogue meaningfully with the Indigenous applicants.

(vi) Canada's failure to dialogue meaningfully

a. The experience of Tsleil-Waututh

[649] Tsleil-Waututh had conducted its own assessment of the Project's impact on Burrard Inlet and on Tsleil-Waututh's title, rights and interests and traditional knowledge. This assessment, based on the findings of six independent experts and the traditional knowledge of Tsleil-Waututh members, concluded, among other things that:

- The likelihood of oil spills in Burrard Inlet would increase if the Project is implemented, and because spilled oil cannot be cleaned up completely, the consequences in such circumstances would be dire for sensitive sites, habitat and species, and in turn for the Tsleil-Waututh's subsistence economy, cultural activities and contemporary economy.
- Any delay in spilled oil cleanup response would decrease significantly the total volume of oil which could be cleaned up, and in turn increase the negative effects and consequences of a spill.
- The direct effects of marine shipping are likely to add to the effects and consequences of spilled oil, which in turn will further amplify the negative effects of the Project on Tsleil-Waututh's title, rights and interests.
- Tsleil-Waututh could not accept the increased risks, effects and consequences of even another small incident like the 2007 spill at the Westridge Marine Terminal or the 2015 MV Marathassa oil spill, let alone a worst-case spill.

[650] In the view of Tsleil-Waututh, the Board erred by excluding Project-related shipping from the Project's definition. Tsleil-Waututh was also of the view that the Board's conditions did not address their concerns about marine shipping. For example, Tsleil-Waututh noted that very few of the Board's conditions set out desired outcomes. Rather, they prescribed a means to secure an unspecified outcome.

[651] At the consultation meeting of October 27, 2016, Canada's representatives repeatedly acknowledged Tsleil-Waututh's view that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012* and that the Board's failure to do so resulted in the further failure to impose conditions on marine shipping.

[652] However, when the discussion turned to how to address Tsleil-Waututh's concerns, federal representatives noted that "proposals to strengthen marine shipping management, including nation to nation relationships, would take time to develop and strengthen." They went on to express optimism:

> … that progress toward a higher standard of care could occur over the next few years with First Nations, at a nation to nation level, particularly on spill response and emergency preparedness capacities. As baseline capacities increased, risks would be reduced.

[653] This generic and vague response that concerns could be addressed in the future, outside the scope of the Project and its approval, was Canada's only response. Canada did not suggest any concrete measures, such as additional conditions, to accommodate Tsleil-Waututh's concerns about marine shipping.

[654] Nor did Canada propose any accommodation measures at the meeting of October 28, 2016. At this meeting, Tsleil-Waututh sought further discussion about the Project's definition because, in its view, this issue had to be resolved if the Project was to be sent back to the Board for reconsideration. Canada's representatives responded that this was a matter for consideration

by the Governor in Council and "it was understood that the scope of the [Board's] review would be litigated."

[655] Nor did Canada respond meaningfully to Tsleil-Waututh's concerns in the Crown Consultation Report or in the Tsleil-Waututh appendix.

[656] The appendix, after detailing Tsleil-Waututh's concerns responded as follows:

> Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Tsleil-Waututh that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.
>
> (underlining added)

[657] Section 4.2.6 of the Crown Consultation Report referred to the proposed Indigenous Advisory and Monitoring Committee and to recognition of the historical impacts of the existing Trans Mountain pipeline. The nascent nature of the Indigenous Advisory and Monitoring Committee is shown by the listing of possible roles the committee "could" play.

[658] Section 5.2 of the Crown Consultation Report dealt with Canada's assessment of the adequacy of consultation. It contains no response to Tsleil-Waututh's specific concerns that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012*, and that the Board's failure to do this resulted in the further failure to impose conditions on marine shipping. Section 5.2 did

provide Canada's limited response to concerns about the appropriateness of the Board's review process:

> With respect to perceived inadequacies in the [Board] review process, the Crown notes the Government's commitment to modernize the [Board] and to restore public trust in federal environmental assessment processes. The Crown further notes that consultations on these processes have been launched and will include the engagement of Indigenous groups. Overall, however, Government, through its Interim Strategy, indicated that no project proponent would be sent back to the beginning, which mean [*sic*] that project [*sic*] currently undergoing regulatory review would continue to do so within the current framework.

[659] Canada has not pointed to any correspondence in which it meaningfully addressed Tsleil-Waututh's concern that the Board's conditions were not sufficiently robust and that Project-related shipping should not have been excluded from the Project's definition.

[660] Tsleil-Waututh raised valid concerns that touched directly on its asserted title and rights. While Canada strove to understand those concerns accurately, it failed to respond to them in a meaningful way and did not appear to give any consideration to reasonable mitigation or accommodation measures, or to returning the issue of Project-related shipping to the Board for reconsideration.

[661] While Canada moved to implement the Indigenous Advisory and Monitoring Committee and the Oceans Protection Plan, these laudable initiatives were ill-defined due to the fact that each was in its early planning stage. As such, these initiatives could not accommodate or mitigate any concerns at the time the Project was approved, and this record does not allow consideration of whether, as those initiatives evolved, they became something that could meaningfully address real concerns.

b. The experience of Squamish

[662] At the one consultation meeting held in Phase III with Squamish on October 18, 2016, Squamish took the position throughout the meeting that it had insufficient information about the Project's impact on Squamish to make a decision on the Project or to discuss mitigation measures. Reference was made to a lack of information about the fate and behaviour of diluted bitumen if spilled in a marine environment. Squamish also expressed the view that the Governor in Council was equally unable to make a decision on the Project because of research and information gaps about diluted bitumen.

[663] Canada responded:

> The Crown recognized that there are uncertainties and information gaps which factor into the project decision. Most decisions are not made with perfect certainty. For instance, fate and behaviour of diluted bitumen in the marine environment has been identified as an information gap. The Crown is happy to discuss the level of uncertainty but is unsure how the [Governor in Council] will weigh these issues, such as whether they will decide that uncertainties are acceptable for the project to move forward. It should be noted that the [Governor in Council] can send the [Board] recommendation and any terms and conditions back to the [Board] for reconsideration.
>
> (underlining added)

[664] The meeting notes do not reflect that any discussion ensued about the fate and behaviour of diluted bitumen in water. This is not surprising because the Crown consultation team had effectively told Squamish that any discussion would not factor into the Governor in Council's deliberation and ultimate decision.

[665] In a letter dated the day before the Project was approved, Canada and the British Columbia Environmental Assessment Office wrote jointly to Squamish responding to issues raised by Squamish. With respect to diluted bitumen the letter stated:

> Squamish Nation has identified concerns relating to potential spills as well as the fate and behaviour of diluted bitumen. The [Board's] Onshore Pipeline Regulations (OPR) requires a company to develop and implement management and protection programs in order to anticipate, prevent, mitigate and respond to conditions that may adversely affect the safety and security of the general public, the environment, property and, company's personnel and pipelines. A company must follow the legal requirements identified in the *National Energy Board Act* and its associated regulations, other relevant standards, and any conditions contained within the applicable Project certificates or orders.

[666] This generic response is not a meaningful response to Squamish's concern that too little was known about how diluted bitumen would behave if spilled and that this uncertainty made it premature to approve the Project.

[667] The letter went on to review Board conditions, planned government initiatives (such as the Area Response Planning Initiative, Transport Canada's commitment to engage with British Columbia First Nations on issues related to marine safety and the Oceans Protection Program). The letter also referenced research that the Government of Canada was conducting on the behaviour and potential impacts of a diluted bitumen spill in a marine environment. While laudable initiatives, they too did not respond meaningfully to Squamish's concern that more needed to be known before the Project was approved.

[668] There is nothing in Canada's response to show that Squamish's concern about diluted bitumen was given real consideration or weight, and nothing to show any consideration was given to any meaningful and tangible accommodation or mitigation measures.

c. The experience of Coldwater

[669] Coldwater's concerns about the Project's impact on its aquifer were described above at paragraphs 609-610 in the context of Canada's unwillingness to depart from the Board's findings and recommended conditions.

[670] As explained at paragraph 610, when, during the consultation process, Coldwater suggested an alternate route for the pipeline that in its view posed less risk to its drinking water, Canada advised that it is the Board that decides pipeline routing, and the role of the Crown consultation team was to make sure the issue of an alternate route was reflected in the Crown Consultation Report so that it could be considered by the decision-makers.

[671] Later during the May 4, 2016 meeting, in response to a question from Coldwater about a detailed route hearing, Brian Nesbitt, a contractor made available to answer questions about the Board, responded:

> Brian explained that the Governor in Council would approve the approved, detailed route, but that if someone doesn't agree with that route they can intervene, say a detailed route hearing is required, and propose an alternative route. He stated that the burden of proof is essentially flipped and the landowner has the onus to show that the best route is somewhere other than the approved route.
>
> Brian provided an overview of the Detailed Route Approval Process (DRAP). Alternative routes, even outside the approved ROW corridor, can be proposed. In those cases it falls to the intervening party to make the case for why that route is the best one. In Brian's experience, these arguments have been made in past hearings and sometimes they are successful. He provided the example of a pipeline going through a wooded area where inner city kids would go. If an alternative route is identified in the detailed route hearing, the proponent has to apply for a variance. This might require Governor in Council decisions, depending on how the CPCN is worded. Brian emphasized that the burden of establishing a better route lies with the landowner.

(underlining added)

[672] A senior advisor for Indigenous and Northern Affairs Canada then agreed that Coldwater would require a very significant variance, a departure of about 10 kilometres from the approved pipeline right-of-way.

[673] Counsel for Coldwater, Melinda Skeels, then replied:

> Melinda stated that it does not sound reasonable to expect Coldwater to mount the kind of evidence needed to make the case for that alternative. In her view, this issue needs to be addressed before a certificate is issued. It cannot wait until after.
>
> Melinda stated that it did not seem like a detailed route hearing is a realistic option that would assist in addressing Coldwater's routing concerns.
>
> > *Coldwater's recollection is that:* Joseph, Tim and Ross were in general agreement, particularly given the significance of the variance and the fact that the onus would be shifted to Coldwater.
> >
> > *The Crown's position is that:* The Crown officials would neither have agreed with or disagreed with the above statement.

[674] The senior advisor for Indigenous and Northern Affairs Canada responded:

> … reflecting this concern in the Crown Consultation Report is one way to have it before decision makers prior to a decision on the certificate. He said that the routing issue goes to the heart of the CPCN and that the Crown may need to send the Project back to the [Board] to address this.

[675] As explained at paragraph 587 above, Coldwater's request for an analysis of the pipeline route was revisited at the October 7, 2016, consultation meeting. Canada acknowledged that the aquifer had not been fully explored, but expressed confidence in the Board's Condition 39.

[676] In response:

> Coldwater expressed its concern that, given the momentum behind the project following a [Governor in Council] approval, it will take a major adverse finding in the Condition 39 report for the West Alternative to become viable. They argued that their aquifer concerns would not be sufficiently mitigated by moving the pipeline within the 150m approved route corridor as part of a detailed route hearing, because the West Alternative was well outside that recommended corridor. Coldwater asked if an approved route corridor had ever been changed because of a report released following a GIC approval.
>
> The [Board] asserted that detailed route hearings in the past had led to routes being changed for various reasons; however he (Brian Nesbitt) was personally unaware of a route being moved outside an approved corridor. However, it is possible if the situation warrants.
>
> …
>
> The Crown replied that Condition 39 was put in place because the Board felt that evidence did not provide enough certainty about the impact of the Project on Coldwater's aquifer. That knowledge gap will have to be addressed, to the [Board's] satisfaction, prior to construction commencing. The Crown appreciates that the Condition does not provide certainty about the possibility of changing the pipeline corridor; however the presence of the Condition indicates that the [Board] is not satisfied with the information currently available.
>
> (underlining added)

[677] In the Crown Consultation Report Canada acknowledged that a pipeline spill associated with the Project could result in minor to serious impacts to Coldwater's Aboriginal Interests:

> The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. The Crown acknowledges that Coldwater relies primarily on an aquifer crossed by the Project for their drinking water, as well as subsistence foods and natural resources, and are at greater risk for adverse effects from an oil spill. To address the concerns raised by Coldwater during the post-[Board] Crown consultation period, [Environmental Assessment Office] proposes a condition that would require, in addition to [Board] Condition 39, characterization of the aquifer recharge and discharge sources and aquifer confinement, and include an assessment of the vulnerability of the aquifer.

(underlining added, footnote omitted)

[678] Throughout the consultation process, Canada worked to understand Coldwater's concerns, and the British Columbia Environmental Assessment Office imposed a condition requiring a second hydrogeological report for approval by it. However, missing from Canada's consultation was any attempt to explore how Coldwater's concerns could be addressed. Also missing was any demonstrably serious consideration of accommodation—a failure likely flowing from Canada's erroneous position that it was unable to impose additional conditions on the proponent.

[679] Canada acknowledged that the Project would be located within an area of Coldwater's traditional territory where Coldwater was assessed to have a strong *prima facie* claim to Aboriginal title. In circumstances where Coldwater would bear the burden of establishing a better route for the pipeline, and where the advice given to Coldwater by the Board's technical expert was that he was personally unaware of a route being moved out of the approved pipeline corridor, Canada placed its reliance on Condition 39, and so advised Coldwater. However, as Canada acknowledged, this condition carried no certainty about the pipeline route. Nor did the condition provide any certainty as to how the Board would assess the risk to the aquifer.

[680] At the end of the consultation process, and at the time the Project was approved, Canada failed to meaningfully engage with Coldwater, and to discuss and explore options to deal with the real concern about the sole source of drinking water for its Reserve.

d. The experience of Stó:lō

[681] As part of the Stó:lō's effort to engage with the Crown on the Project, Stó:lō prepared a detailed technical submission referred to as the "Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project", also referred to as "ICA". A copy of the ICA was filed with the Board.

[682] The ICA was based on surveys, interviews, meetings and workshops held with over 200 community members from approximately 11 Stó:lō bands. The ICA concluded that the Project posed a significant risk to the unique Indigenous way of life of the Stó:lō, threatening the cultural integrity and survival of core relationships at the heart of the Stó:lō worldview, identity, health and well-being. The ICA also contained 89 recommendations which, if implemented by Trans Mountain or the Crown, were believed by Stó:lō to mitigate the Project's adverse effects on Stó:lō.

[683] To illustrate the nature of the recommendations, section 17.2 of the ICA deals with recommendations to mitigate the Project's impact on fisheries. Section 17.2.1 deals with Management and Planning in the context of fisheries mitigation. The recommended Management and Planning mitigation measures are:

> 17.2.1 Management and Planning
>
> 5. Stó:lō Fishing representatives will participate in the development and review of Fisheries Management Plans and water course crossing EPPs before construction and mitigation plans are finalized.
>
> 6. Stó:lō representatives will provide input on proposed locations for Hydrostatic test water withdrawal and release.

> 7. [The proponent] will consult with Stó:lō representatives to develop the Emergency Response Plans in the study area.
>
> 8. Stó:lō representatives will consult with community members to determine appropriate restoration plans for water crossings including bank armouring, seed mixes or replanting requirements.
>
> 9. Stó:lō fishing representatives must be notified if isolation methods will not work and [the proponent] is considering another crossing method.
>
> 10. Stó:lō representatives must be notified as soon as a spill or leak, of any size, is detected.
>
> 11. During water quality monitoring program, anything that fails to meet or exceed established guidelines will be reported to a Stó:lō Fisheries Representative within 12 hours.

[684] These measures are specific, brief and generally measured and reasonable. If implemented they would provide more detail to the Board's generic conditions on consultation and require timely notification to the Stó:lō of events that may adversely impact their interests.

[685] During the Board's Information Request process, the Stó:lō pressed Trans Mountain to respond to their 89 recommendations but Trans Mountain did not provide a substantive response. Instead, Trans Mountain provided a general commitment to work with Stó:lō to develop a mutually-acceptable plan for implementation.

[686] The Board did not adopt any of the specific 89 recommendations made by the Stó:lō in its terms and conditions.

[687] At a meeting held with the Crown consultation team on April 13, 2016, before the release of the Board's report, the Stó:lō provided an overview of the development of the ICA and

expressed many concerns, including their dissatisfaction with their engagement with Trans Mountain.

[688] The Stó:lō representative stated that, among other things, Trans Mountain was directed by the Board to include Indigenous knowledge in Project planning, but did not. By way of example, the Stó:lō explained that the Fraser River is a tidal (at least up to Harrison River), meandering river, with a wandering gravel bed that is hydrologically connected to many wetlands and waterways crossed by the Project. A map of historical waterways was provided in the ICA, along with a table listing local and traditional knowledge of waterways crossed by the Project. None of this information was considered in Trans Mountain's technical reports. In Stó:lō's view, Trans Mountain's assumptions and maps about the Fraser River were wrong and did not include their traditional knowledge. A year after the ICA was provided to Trans Mountain the Stó:lō met with Trans Mountain's fisheries manager who had never seen the ICA or any of the technical information contained in it.

[689] Additionally, Stó:lō provided details about deficiencies identified in Trans Mountain's evidence filed with the Board about Stó:lō title, rights, interests and Project impacts. For example, Trans Mountain's evidence was to the effect that the Stó:lō had no traditional plant harvesting areas within the Project area. However, the ICA identified and mapped several plant gathering sites within the proposed pipeline corridor. Another example of a deficiency was Trans Mountain's evidence that there were no habitation sites in the Project area; however, the ICA mapped three habitation sites within the proposed pipeline corridor and two habitation sites located within 50 metres of the pipeline corridor.

[690] At a later consultation meeting held September 23, 2016, the Stó:lō reiterated that a key concern was their view that the Board's process had failed to hold the proponent accountable for integrating Stó:lō's traditional use information into the assessment of the Project. The draft Crown Consultation Report overlooked evidence filed by Stó:lō about their traditional land use. Instead, the report repeated oversights in Trans Mountain's evidence presented to the Board. For example, Stó:lō noted the Crown was wrong to state that "[n]o plant gathering sites were identified within the proposed pipeline corridor". The Stó:lō had explained this at the April 13, 2016 meeting.

[691] The Stó:lō Collective was not confident that Trans Mountain would follow through on commitments to include local Indigenous people or traditional knowledge in the development of the Project unless the Board's terms and conditions required Trans Mountain to regularly engage Stó:lō communities in a meaningful way.

[692] Canada's representatives confirmed that the Stó:lō Collective was looking for stronger conditions, more community-specific commitments and more accountability placed on Trans Mountain so that conditions proposed by Stó:lō became regulatory requirements.

[693] The Crown consultation team met with Stó:lō once after the release of the Board's report, on September 23, 2016.

[694] During this meeting the "Collective noted with great concern that the [Board] report came out May 19th, that the [Governor in Council's] decision is due Dec. 19th, and that the

Crown was just meeting now (Sept. 23) to consult on the [Board] report with so many potential gaps left to discuss and seek to resolve with tight timelines to do so".

[695] At this meeting the Crown consultation team presented slides summarizing the Board's conclusions. The Stó:lō noted their disagreement with the following findings of the Board:

> - "Ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be ***temporarily impacted***" by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of [Traditional Land and Resource Use] will be ***temporary interrupted***.";
>
> - "Project's contribution to potential broader cultural impacts related to access and use of natural resources is ***not significant***."; and,
>
> - "Impacts would be ***short term, limited to brief periods*** during construction and routine maintenance, ***largely confined to the Project footprint*** for the pipeline… Effects would be ***reversible in the short to long term, and low in magnitude***."
>
> (emphasis in original)

[696] The Stó:lō pointed to the potential permanent impact of the Project on sites of critical cultural importance to Stó:lō and the Project's impacts related to access and use of natural resources.

[697] With respect to sites of critical cultural importance, the Stó:lō explained that none of the information contained in their ICA influenced the design of the Project or was included in the Project alignment sheets. The failure to include information about cultural sites on the Project alignment sheets meant that various geographic features known to Stó:lō and the proponent were not being factored into Project effects, or avoidance or mitigation efforts. In response to questions, Stó:lō confirmed that even though Trans Mountain was well aware of Stó:lō sites of

importance, as detailed in the ICA, Trans Mountain had not recognized them on the right-of-way corridor maps. Stó:lō believed this afforded the sites no protection if the Project was approved.

[698] With respect to Lightning Rock, a culturally significant spiritual and burial site, the Stó:lō noted that Trans Mountain planned to put a staging area in proximity to the site which, in the view of the Stó:lō, would obliterate the site. The Board had imposed Condition 77 relating to Lightning Rock. This condition required Trans Mountain to file a report outlining the conclusions of a site assessment for Lightning Rock, including reporting on consultation with the Stó:lō Collective. However, Stó:lō Cultural Heritage experts had not been able to meet with Trans Mountain to participate in Lightning Rock management plans since September 2015. This was a source of great frustration.

[699] The Stó:lō suggested that the Board's conditions should specifically list the Indigenous groups Trans Mountain was required to deal with instead of the generic "potentially affected Aboriginal groups" referenced in the Board's current conditions.

[700] The Stó:lō also requested that they be involved in selecting the Aboriginal monitors working within their territory as contemplated by the Board's conditions. For example, Condition 98 required Trans Mountain to file a plan describing participation by "Aboriginal groups" in monitoring construction of the Project. Stó:lō wanted to ensure these monitors were sufficiently knowledgeable about issues of importance to the Stó:lō.

[701] The September 23, 2016, meeting notes do not indicate any response or meaningful dialogue on the part of the Crown consultation team in response to any of Stó:lō's concerns and suggestions.

[702] Interestingly, at the November 16, 2016, consultation meeting with Upper Nicola, the last of the consultation meetings and the only consultation meeting held after Canada provided the second draft of the Crown Consultation Report setting out Canada's assessment of the Project's impacts, the Crown consultation lead explained:

> … "potentially affected Aboriginal groups" has been noted by many Aboriginal groups as too vague in the recommended conditions, and this phrase is repeated throughout the 157 conditions. Makes reference to how the Crown's consultation and accommodation report does address specific Aboriginal groups. Discussed another point on the [Board] condition for "Aboriginal monitors"—where communities would not [*sic*] want locally knowledgeable Aboriginal people to fulfil this role and not someone from farther afield.

[703] Notwithstanding apparently widespread concern about the Board's generic use of the phrase "potentially affected Aboriginal groups" and the need for locally-selected Indigenous monitors, and despite Canada's ability to add new conditions that would impose the desired specificity, Canada failed to meaningfully consider such accommodation.

[704] Canada and the British Columbia Environmental Assessment Office purported to respond to two of Stó:lō's concerns in their letter of November 28, 2016, to the Stó:lō: the concerns about Traditional Ecological Knowledge and sites of cultural importance.

[705] The Crown "acknowledges the Stó:lō Collective's view that the [Board] and the proponent overlooked traditional knowledge within the development of the [Board] conditions

and Project design." The Crown discusses these issues in Sections III and IV of the Stó:lō Collective appendix (pages 13, 29 and 30 respectively).

[706] I deal with the Stó:lō appendix beginning at paragraph 712 below. As explained below, the Stó:lō appendix does not deal meaningfully with the concerns about Traditional Ecological Knowledge and sites of cultural importance.

[707] The Crown made two more points independent of the Stó:lō Collective appendix. First, it expressed its understanding that the Stó:lō could trigger a detailed route hearing. Second, it encouraged the Stó:lō Collective to continue discussions with the proponent.

[708] In connection with the detailed route hearing, the Crown advised that "[w]ithin the scope of such a hearing exists the potential for the right-of-way to move locations." There are three points to make about this response. First, as explained above at paragraphs 380 to 384, at a detailed route hearing the right of way may only move within the approved pipeline corridor, otherwise an application must be made to vary the pipeline corridor; second, the onus at a detailed route hearing is on the person requesting the alteration; and, third, Canada failed to consider its ability to impose additional conditions, likely because it was operating under the erroneous view it could not. The ability to trigger a detailed route hearing provided no certainty about how potential adverse effects to areas of significant importance to the Stó:lō would be dealt with. This was not a meaningful response on Canada's part.

[709] As to the Crown's suggestion that the Stó:lō Collective continue its discussions with the proponent, no explanation is given as to why this was believed to be an appropriate response to the concerns of the Stó:lō in light of the information they had provided as to the proponent's unwillingness to deal directly with them on a timely basis, or in some cases, at all.

[710] The November 28, 2016, letter also referenced the four accommodation measures the Stó:lō requested in their two-page submission to the Governor in Council. The first asked for a condition to "outline and identify specifics regarding Trans Mountain's collaboration with and resourcing of the Stó:lō Collective to update construction alignment sheets and EPPs to reflect information provided in the Integrated Cultural Assessment" (March 2014). The Stó:lō were told "The recommendations included in the Stó:lō Collective's two-page submission of November 17, 2016 will be provided directly to federal and provincial decision makers."

[711] Leaving aside the point that the letter was sent the day before the Project was approved, none of this is responsive, meaningful, two-way dialogue that the Supreme Court requires as part of the fulfillment of the duty to consult.

[712] Nor is any meaningful response provided in the Stó:lō appendix to the Crown Consultation Report. This is illustrated by the following two examples. First, while the appendix recites that the Stó:lō Collective recommended 89 actions that would assist Trans Mountain to avoid or mitigate adverse effects on their Aboriginal Interests there is no discussion or indication that Canada seriously considered implementing any of the 89 recommended actions, and no explanation as to why Canada did not consider implementing any Stó:lō specific

recommendation as an accommodation or mitigation measure. Second, while the appendix acknowledges that the Stó:lō provided examples of Traditional Ecological Knowledge which they felt the proponent and the Board ignored in the Project design, environmental assessment and mitigation planning, no analysis or response to the concern is given.

[713] In the portion of the appendix that deals with Canada's assessment of the Project's impacts on the Stó:lō, the Crown relies on the conclusions of the Board to find that the impacts of the Project would be up to minor-to-moderate. Thus, for instance, the appendix repeats the Board's conclusion that if the Project is approved, the Board conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping and gathering. In an attempt to deal with the specific concerns raised by the Stó:lō about the adequacy of the Board's report and its conditions, the appendix recites that:

> … the proponent would implement several mitigation measures to reduce potential effects to species important for the Stó:lō Collective's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignment Sheets and environmental tables within the immediate vicinity of the [right-of-way] will be clearly marked before the start of clearing.

[714] While the second draft of the Crown Consultation Report was revised to reference the plant gathering sites identified by Stó:lō in the ICA and in the April and October consultation meetings, Canada continued to rely upon the Board's findings without explaining, for example, how the Board's finding that "Trans Mountain adequately considered all the information provided on the record by Aboriginal groups regarding their traditional uses and activities." (report, page 278) was reliable in the face of the information contained in the ICA.

[715] Nor does Canada explain the source of its confidence in the proponent's commitments in light of the concerns expressed by the Stó:lō that Trans Mountain had failed to follow through on its existing commitments and that without further conditions Stó:lō feared the proponent would not follow through with its commitments to the Board.

[716] With respect to the Stó:lō's concerns about a Project staging area at Lightning Rock, the appendix noted that Lightning Rock was protected by Board Condition 77 which required the proponent to file with the Board an archaeological and cultural heritage field investigation undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site. The appendix goes on to note that:

> However, given that this is a sacred site with burial mounds, Stó:lō Collective have noted that any Project routing through this area is inappropriate given the need to preserve the cultural integrity of the site and the surrounding area. For the Stó:lō Collective, the site surrounding Lightning Rock should be a "no go" area for the Project.

[717] However, Stó:lō's position that Lightning Rock should be a "no go" area is left unresolved and uncommented upon by Canada.

[718] Another Stó:lō concern detailed by Canada in the appendix, but unaddressed, is the concern of the Stó:lō Collective that the locations of various other culturally important sites do not appear on Trans Mountain's detailed alignment sheets. Examples of such sites include bathing sites within the 150 metre pipeline right-of-way alignment at Bridal Veil Falls, and an ancient pit house located within the pipeline right-of-way. None of these sites are the subject of any Board condition.

[719] The appendix recites Canada's conclusion on these concerns of the Stó:lō as follows:

> With regards to specific risk concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for the Stó:lō Collective's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during [right-of-way] finalization, narrowing the [right-of-way] in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

[720] This is not meaningful, two-way dialogue in response to Stó:lō's real and valid concerns about matters of vital importance to the Stó:lō.

[721] Canada adopts a similar approach to its assessment of the Project's impact on freshwater fishing and marine fishing and harvesting at pages 24 to 27 of the Stó:lō appendix.

[722] The section begins by acknowledging the Stó:lō's deeply established connection to fishing and marine harvesting "which are core to Stó:lō cultural activities and tradition, subsistence and economic purposes."

[723] After summarizing each concern raised by the Stó:lō, Canada responds by adopting the Board's conclusions that the Project's impact will be low-to-moderate and that Board conditions will either directly or indirectly avoid or reduce potential environmental effects on fishing activities.

[724] In the course of this review Canada acknowledges the Board's finding that "Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality." Appendix 12 to the Board report defines a moderate impact to be one that, among other things, noticeably affects the resource involved.

[725] Canada also acknowledges that during the operational life of the Project fishing and harvesting activities directly affected by the construction and operation of the Westridge Marine Terminal would not occur within the expanded water lease boundaries.

[726] Further, impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur on a daily basis. Project-related marine vessels also would cause temporary disruption to the Stó:lō Collective's marine fishing and harvesting activities. These disruptions are said "likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes." This too would occur on a daily basis if the Westridge Marine Terminal were to serve 34 Aframax tankers per month.

[727] Missing however from Canada's consultation analysis is any mention of the Stó:lō's constitutionally protected right to fish, and how that constitutionally protected right was taken into account by Canada. Also missing is any explanation as to how the consultation process affected the Crown's ultimate assessment of the impact of the Project on the Stó:lō. Meaningful

consultation required something more than simply repeating the Board's findings and conditions without grappling with the specific concerns raised by the Stó:lō about those same findings.

e. The experience of Upper Nicola

[728] Throughout the consultation process, Upper Nicola raised the issue of the Project's impact on Upper Nicola's asserted title and rights. The issue was raised at the consultation meetings of March 31, 2016, and May 3, 2016, but no meaningful dialogue took place. Canada's representatives advised at the March meeting that until the Board released its report Canada did not know how the Project could impact the environment and Upper Nicola's interests and so could not "yet extrapolate to how those changes could impact [Upper Nicola's] Aboriginal rights and title interests."

[729] The issue was raised again, after the release of the Board's report, at the consultation meeting of September 22, 2016. Upper Nicola expressed its disagreement with Canada's assertion in the first draft of the Crown Consultation Report that potential impacts on its title claim for the pipeline right-of-way included temporary impacts related to construction, and longer-term impacts associated with Project operation. In Upper Nicola's view, construction did not have a temporary impact on its claim to title. Upper Nicola also stated that Canada had examined the Project's impact on title without considering impacts on governance and management, and concerns related to title, such as land and water issues. The meeting notes do not record any response to these concerns.

[730] Nor did Canada respond meaningfully to Upper Nicola's position that the Project would render 16,000 hectares of land unusable or inaccessible for traditional activities. Upper Nicola viewed this to constitute a significant impact that required accommodation of their rights to stewardship, use and governance of the land and water. Canada's response was to acknowledge a letter sent to the Prime Minister in which numerous Indigenous groups had proposed a mitigation measure to ensure they would have a more active role in monitoring and stewardship of the Project. Canada stated that it saw merit in the proposal and that a response to the letter would be forthcoming.

[731] On November 18, 2016, Upper Nicola wrote to the Crown consultation lead to highlight its key, ongoing concerns with the Project and the consultation process. With respect to title, Upper Nicola wrote:

> There were areas which the Crown has determined that we have a strong prima facie claim to Aboriginal title and rights. The Crown must therefore acknowledge the significant impacts and infringements of the Project to Upper Nicola/Syilx Title and Rights, including the incidents of Aboriginal title which include: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land and adequately accommodate these impacts, concerns and infringements. This has not yet been done.
>
> (underlining added)

[732] Canada and the British Columbia Environmental Assessment Office wrote to Upper Nicola on November 28, 2016, the day before the Project was approved, to respond to the issues raised by Upper Nicola. The only reference to Upper Nicola's asserted title is this brief reference:

> *Impacts and Mitigation:* In response to comments received, the Crown has reviewed its analysis and discussion in the Consultation and Accommodation Report on the direct and indirect impacts of the Project on Syilx (Okanagan) Nation's rights and other interests. In addition, Upper Nicola identified that the study titled "Upper Nicola Band Traditional Use and Occupancy Study for the Kingsvale Transmission Line in Support of the Trans Mountain Expansion Project" (Kingsvale TUOS) had not been specifically referenced in the Syilx (Okanagan) Nation appendix. Upper Nicola resent the Kingsvale TUOS to the Crown on Friday, November 18 and in response to this information, the Crown reviewed the Kingsvale TUOS, summarized the study's findings in Syilx (Okanagan) Nation's appendix, and considered how this information changes the expected impacts of the Project on Syilx (Okanagan) Nation's Aboriginal rights and title. <u>As a result, conclusions were revised upward for Project impacts on Syilx (Okanagan) Nation's freshwater fishing activities, other traditional and cultural activities, as well as potential impacts on Aboriginal title</u>.
>
> (underlining added)

[733] No response was made to the request to acknowledge the Project's impacts and infringement of Upper Nicola's asserted title and rights.

[734] In the Upper Nicola appendix, Canada acknowledged that the Project would be located within an area of Syilx Nation's asserted traditional territory where Syilx Nation was assessed to have a strong *prima facie* claim to Aboriginal title and rights. Canada then asserted the Project to have "minor-to-moderate impact on Syilx Nation's asserted Aboriginal title to the proposed Project area." Canada did not address Upper Nicola's governance or title rights in any detail. Canada did refer to section 4.3.5 of the Crown Consultation Report but this section simply reiterates the Board's findings and conditions and the requirement that the proponent continue consultation "with potentially affected Aboriginal groups".

[735] Missing is any explanation as to why moderate impacts to title required no accommodation beyond the environmental mitigation measures recommended by the Board—mitigation measures that were generic and not specific to Upper Nicola.

[736] Throughout Phase III, Upper Nicola had proposed numerous potential mitigation measures and had requested accommodation related to stewardship, use and governance of the water. No response was given as to why Canada rejected this request. This was not meaningful, two-way dialogue or reasonable consultation.

f. The experience of SSN

[737] Canada met with SSN twice during Phase III. At the first meeting, on August 3, 2016, SSN expressed the desire to have consultation go beyond the environmental assessment process which they felt was insufficient to tackle the issues that affected their territory. SSN sought to move forward on a nation to nation basis and wished to formalize a nation to nation consultation protocol using the Project as a starting point for further consultation.

[738] In response, Canada and representatives of British Columbia asked that the SSN be prepared to review a draft memorandum of understanding for consultation about the Project (affidavit of Jeanette Jules, paragraph 70).

[739] The meeting notes reflect that at the first meeting on August 3, 2016, SSN also raised as accommodation or mitigation measures that: the Project conditions be more specific with respect to safety and emergency preparedness response, warning notifications to communities and

opportunities for training; and, that there be provision for both a spillage fee and a revenue tax imposed on the proponent for the benefit of SSN. The meeting notes do not reflect any dialogue or response from Canada to these proposals.

[740] On September 9, 2016, the Crown consultation lead sent a two-page draft memorandum of understanding to the SSN (two pages not including the signature page).

[741] At the second and last meeting on October 6, 2016, the SSN advised that they desired the proponent to submit to a review of the Project by the SSN, but that the proponent was unwilling to undergo another review. The SSN also repeated their desire for the federal and provincial Crowns to allow SSN to impose a resource development tax on proponents whose projects are located in the SSN's traditional territory. In response, the Crown raised the difficulty in implementing the tax and having the Project undergo assessment by the SSN before the mandated decision deadline of December 19, 2016.

[742] At this meeting Canada sought comments on the draft memorandum of understanding. Jeanette Jules, a counsellor with the Kamloops Indian Band swore in an affidavit filed in support of SSN's application for judicial review that:

> At [the October 6, 2016] meeting, the majority of the time was spent on discussing the content of the [memorandum of understanding], that is, what would engagement with the Crowns on the Project look like. We did not spend any time discussing the routing of the pipeline Project at Pipsell or SSN's concerns about the taking up of new land in the Lac du Bois Grasslands Protected area, although I did voice concerns about those issues again at that meeting. At the end of the meeting, the Crowns committed to revising the [memorandum of understanding] and to setting up another meeting to discuss it with us.
>
> (underlining added)

[743] The meeting notes state that toward the end of the meeting SSN expressed the desire to have a terrestrial spill response centre stationed in their reserve. SSN contemplated that funding for the centre should be raised through a per-barrel spillage fee charged on product flowing through the pipeline.

[744] Thereafter, no memorandum of understanding was finalized and no further meetings took place between Canada and the SSN. Ms. Jules swears that:

> I fully expected that between our last meeting with Canada and the Province of BC and the [Governor in Council] decision to approve the Project, we would come to an agreement on the terms of a [memorandum of understanding] and have had meaningful engagement with the Crowns about pipeline routing and SSN's other concerns raised in its final argument.

[745] Ms. Jules was not cross-examined on her affidavit.

[746] In the November 28, 2016, letter sent to the SSN by Canada and the British Columbia Environmental Assessment Office they wrote:

> We also would like to take this opportunity to provide you with additional information or responses to concerns that Stk'emlúps te Secwèpemc Nation has raised with the Crown.
>
> At the October 6, 2016 meeting with SSN, in addition to reiterating SSN's plan on undertaking its own assessment of the project, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory, and that SSN wants the federal and provincial Crown's to make the jurisdictional room necessary for the tax to be implemented. These proposals have been added to the SSN specific appendix for consideration by decision makers.

[747] This is not a meaningful response to the proposals made by the SSN. The only response made to the resource development tax during the consultation meetings was the difficulty this

would pose to meeting Canada's decision deadline (notwithstanding that SSN had sought consultation on a broader basis than the Project—the Project was contemplated by SSN to be a starting point).

[748] The SSN appendix to the Crown Consultation Report faithfully records SSN's concerns about the review process, noting, in part, that:

> SSN stated that the [Board] hearing process is an inappropriate forum for assessing impacts to their Aboriginal rights. SSN also expressed concern about the [Board] process' legislated timelines and the way these timelines were unilaterally imposed on them. SSN considers this timeline extremely restrictive and does not believe it affords SSN sufficient time to review the application and participate meaningfully in the review process. SSN has stated that their ability to participate in the process is further hampered by a lack of capacity funding from either the [Board] or the Crown. SSN has expressed a view that related regulatory (i.e. permitting) processes are not well-coordinated, which they believe results in an incomplete sharing of potential effects to SSN Interests. They refer to the perceived disconnected process between the proposed Project and proposed Ajax Mine application review. SSN are not satisfied with the current crown engagement model and the lack of addressing SSN's needs for a nation-to-nation dialogue about their concerns and interests, and have proposed that the Crown develop a [memorandum of understanding] to address these issues and provide a framework for the dialogue moving forward.
>
> …
>
> SSN have requested Nation-to-Nation engagement related to the broader issue of land management and decision making within their territory. SSN requested a consultation protocol agreement be developed, starting with a [memorandum of understanding] for Nation-to-Nation consultation, which would take the form of a trilateral agreement between SSN, BC and Canada. SSN recommended a framework of sustainable Crown funding to participate in the [memorandum of understanding] process, leading to a sustainable funding model to support ongoing land use management within SSN's territory.
>
> At the October 6, 2016 meeting, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory. SSN wants the federal and provincial Crown's [*sic*] to make the jurisdictional room necessary for the tax to be implemented.
>
> (underlining added)

[749] Missing from the appendix is any advice to the Governor in Council that Canada committed to providing a draft memorandum of understanding to SSN and any advice about the status of the memorandum of understanding. Also missing is any indication of what, if any, impact this had on Canada's view of the consultation process.

[750] In the SSN appendix Canada acknowledged that "the Project would be located within an area of Tk'emlúps te Secwe'pemc and Skeetchestn's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title". Canada had also assessed its duty to consult SSN as being at the deeper end of the consultation spectrum.

[751] Notwithstanding, Canada did not provide any meaningful response to SSN's proposed mitigation measures, and conducted no meaningful, two-way dialogue about SSN's concerns documented on pages 3 to 7 of the SSN appendix.

[752] This was not reasonable consultation as required by the jurisprudence of the Supreme Court of Canada.

(vii) Conclusion on Canada's execution of the consultation process

[753] As explained above at paragraphs 513 to 549, the consultation framework selected by Canada was reasonable and sufficient. If Canada properly executed it, Canada would have discharged its duty to consult.

[754] However, based on the totality of the evidence I conclude that Canada failed in Phase III to engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns.

[755] Certainly Canada's consultation team worked in good faith and assiduously to understand and document the concerns of the Indigenous applicants and to report those concerns to the Governor in Council in the Crown Consultation Report. That part of the Phase III consultation was reasonable.

[756] However, as the above review shows, missing was a genuine and sustained effort to pursue meaningful, two-way dialogue. Very few responses were provided by Canada's representatives in the consultation meetings. When a response was provided it was brief, and did not further two-way dialogue. Too often the response was that the consultation team would put the concerns before the decision-makers for consideration.

[757] Where responses were provided in writing, either in letters or in the Crown Consultation Report or its appendices, the responses were generic. There was no indication that serious consideration was given to whether any of the Board's findings were unreasonable or wrong. Nor was there any indication that serious consideration was given to amending or supplementing the Board's recommended conditions.

[758] Canada acknowledged it owed a duty of deep consultation to each Indigenous applicant. More was required of Canada.

[759] The inadequacies of the consultation process flowed from the limited execution of the mandate of the Crown consultation team. Missing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board's process, findings and recommendations and how those flaws could be addressed.

[760] The inadequacies of the consultation process also flowed from Canada's unwillingness to meaningfully discuss and consider possible flaws in the Board's findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.

[761] These three systemic limitations were then exacerbated by Canada's late disclosure of its assessment that the Project did not have a high level of impact on the exercise of the applicants' "Aboriginal Interests" and its related failure to provide more time to respond so that all Indigenous groups could contribute detailed comments on the second draft of the Crown Consultation Report.

[762] Canada is not to be held to a standard of perfection in fulfilling its duty to consult. However, the flaws discussed above thwarted meaningful, two-way dialogue. The result was an unreasonable consultation process that fell well short of the required mark.

[763] The Project is large and presented genuine challenges to Canada's effort to fulfil its duty to consult. The evaluation of Canada's fulfillment of its duty must take this into account.

However, in largest part the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with and respond to. Had Canada's representatives met with each of the Indigenous applicants immediately following the release of the Board's report, and had Canada's representatives executed a mandate to engage and dialogue meaningfully, Canada could well have fulfilled the duty to consult by the mandated December 19, 2016 deadline.

E. Remedy

[764] In these reasons I have concluded that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition.

[765] This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project was not likely to cause significant adverse environmental effects.

[766] This finding—that the Project was not likely to cause significant adverse environmental effects—was central to its report. The unjustified failure to assess the effects of Project-related shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed

conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

[767] I have also concluded that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants.

[768] It follows that Order in Council P.C. 2016-1069 should be quashed, rendering the certificate of public convenience and necessity approving the construction and operation of the Project a nullity. The issue of Project approval should be remitted to the Governor in Council for prompt redetermination.

[769] In that redetermination the Governor in Council must refer the Board's recommendations and its terms and conditions back to the Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council. As well, the Governor in Council may specify a time limit within which the Board shall complete its reconsideration.

[770] Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in the light of the

Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate.

[771] Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval.

[772] As mentioned above, the concerns of the Indigenous applicants, communicated to Canada, are specific and focussed. This means that the dialogue Canada must engage in can also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples.

F. Proposed Disposition

[773] For these reasons I would dismiss the applications for judicial review of the Board's report in Court Dockets A-232-16, A-225-16, A-224-16, A-217-16, A-223-16 and A-218-16.

[774] I would allow the applications for judicial review of the Order in Council P.C. 2016-1069 in Court Dockets A-78-17, A-75-17, A-77-17, A-76-17, A-86-17, A-74-17, A-68-17 and A-84-17, quash the Order in Council and remit the matter to the Governor in Council for prompt redetermination.

[775] The issue of costs is reserved. If the parties are unable to agree on costs they may make submissions in writing, such submissions not to exceed five pages.

[776] Counsel are thanked for the assistance they have provided to the Court.

"Eleanor R. Dawson"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Judith Woods J.A."

APPENDIX

National Energy Board Act, R.S.C. 1985, c. N-7

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out	52 (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit et présente au ministre un rapport, qu'il doit rendre public, où figurent :
(*a*) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and	*a*) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;
(*b*) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.	*b*) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.
(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:	(2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :
(*a*) the availability of oil, gas or any other commodity to the pipeline;	*a*) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;
(*b*) the existence of markets, actual or potential;	*b*) l'existence de marchés, réels ou potentiels;
(*c*) the economic feasibility of the	*c*) la faisabilité économique du

pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

(3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

(5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

(6) The Board shall make public the

pipeline;

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

(3) Si la demande vise un projet désigné au sens de l'article 2 de la *Loi canadienne sur l'évaluation environnementale (2012)*, le rapport contient aussi l'évaluation environnementale de ce projet établi par l'Office sous le régime de cette loi.

(4) Le rapport est présenté dans le délai fixé par le président. Ce délai ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office.

(5) Si l'Office exige du demandeur, relativement au pipeline, la communication de renseignements ou la réalisation d'études et déclare publiquement, avec l'approbation du président, que le présent paragraphe s'applique, la période prise par le demandeur pour remplir l'exigence n'est pas comprise dans le calcul du délai.

(6) L'Office rend publiques, sans

dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

délai, la date où commence la période visée au paragraphe (5) et celle où elle se termine.

(7) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

(7) Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.

(8) To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(8) Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

(*a*) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

a) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué dans l'arrêté;

(*b*) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

b) de donner, en vertu du paragraphe 6(2.1), les instructions qui figurent dans l'arrêté, ou de prendre, en vertu du paragraphe 6(2.2), les mesures qui figurent dans l'arrêté;

(*c*) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

c) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.

(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

(9) Les décrets et arrêtés pris en vertu du paragraphe (7) lient l'Office et les arrêtés pris en vertu du paragraphe (8) lient le président.

(10) A copy of each order made under subsection (8) must be published in the *Canada Gazette* within 15 days after it is made.

(10) Une copie de l'arrêté pris en vertu du paragraphe (8) est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

(11) Subject to sections 53 and 54, the Board's report is final and conclusive.

(11) Sous réserve des articles 53 et 54, le rapport de l'Office est définitif et sans appel.

53 (1) After the Board has submitted its report under section 52, the

53 (1) Une fois que l'Office a présenté son rapport en vertu de l'article 52, le

Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

(2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.

…

54 (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

(*a*) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

(*b*) direct the Board to dismiss the application for a certificate.

(2) The order must set out the reasons for making the order.

(3) The order must be made within three months after the Board's report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

(4) Every order made under subsection

gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

(2) Le décret peut préciser tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

…

54 (1) Une fois que l'Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret :

a) donner à l'Office instruction de délivrer un certificat à l'égard du pipeline ou d'une partie de celui-ci et de l'assortir des conditions figurant dans le rapport;

b) donner à l'Office instruction de rejeter la demande de certificat.

(2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci.

(3) Le décret est pris dans les trois mois suivant la remise, au titre de l'article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l'Office pour effectuer le réexamen et faire rapport n'est pas comprise dans le calcul du délai imposé pour prendre le décret.

(4) Les décrets pris en vertu des

(1) or (3) is final and conclusive and is binding on the Board.	paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.
(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.	(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.
(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.	(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

***Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s.52**

2(1) designated project means one or more physical activities that	2(1) projet désigné Une ou plusieurs activités concrètes :
(*a*) are carried out in Canada or on federal lands;	*a*) exercées au Canada ou sur un territoire domanial;
(*b*) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and	*b*) désignées soit par règlement pris en vertu de l'alinéa 84a), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);
(*c*) are linked to the same federal authority as specified in those regulations or that order.	*c*) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.
It includes any physical activity that is incidental to those physical activities.	Sont comprises les activités concrètes qui leur sont accessoires.
…	…
5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are	5 (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :
(*a*) a change that may be caused to the following components of the environment that are within the	*a*) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la

legislative authority of Parliament:	compétence législative du Parlement :
(i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,	(i) les poissons et leur habitat, au sens du paragraphe 2(1) de la *Loi sur les pêches*,
(ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,	(ii) les espèces aquatiques au sens du paragraphe 2(1) de la *Loi sur les espèces en péril*,
(iii) migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and	(iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*,
(iv) any other component of the environment that is set out in Schedule 2;	(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;
(*b*) a change that may be caused to the environment that would occur	*b*) les changements qui risquent d'être causés à l'environnement, selon le cas :
(i) on federal lands,	(i) sur le territoire domanial,
(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or	(ii) dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,
(iii) outside Canada; and	(iii) à l'étranger;
(*c*) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on	*c*) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :
(i) health and socio-economic conditions,	(i) en matière sanitaire et socio-économique,
(ii) physical and cultural heritage,	(ii) sur le patrimoine naturel et le patrimoine culturel,
(iii) the current use of lands and resources for traditional purposes, or	(iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

(iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

…

…

19 (1) The environmental assessment of a designated project must take into account the following factors:

19 (1) L'évaluation environnementale d'un projet désigné prend en compte les éléments suivants :

(*a*) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à celle d'autres activités concrètes, passées ou futures, est susceptible de causer à l'environnement;

(*b*) the significance of the effects referred to in paragraph (a);

b) l'importance des effets visés à l'alinéa a);

(*c*) comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, any interested party — that are received in accordance with this Act;

c) les observations du public — ou, s'agissant d'un projet dont la réalisation requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, des parties intéressées — reçues conformément à la présente loi;

(*d*) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux négatifs importants du projet;

(*e*) the requirements of the follow-up program in respect of the designated project;

e) les exigences du programme de suivi du projet;

(*f*) the purpose of the designated project;

f) les raisons d'être du projet;

(*g*) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means;

g) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

(*h*) any change to the designated project that may be caused by the environment;

h) les changements susceptibles d'être apportés au projet du fait de l'environnement;

(*i*) the results of any relevant study conducted by a committee established under section 73 or 74; and

i) les résultats de toute étude pertinente effectuée par un comité constitué au titre des articles 73 ou 74;

(*j*) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.

j) tout autre élément utile à l'évaluation environnementale dont l'autorité responsable ou, s'il renvoie l'évaluation environnementale pour examen par une commission, le ministre peut exiger la prise en compte.

…

…

29 (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

29 (1) Si la réalisation d'un projet désigné requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, l'autorité responsable à l'égard du projet veille à ce que figure dans le rapport d'évaluation environnementale relatif au projet :

(*a*) its recommendation with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

a) sa recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)a) relativement au projet, compte tenu de l'application des mesures d'atténuation qu'elle précise dans le rapport;

(*b*) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

b) sa recommandation quant au programme de suivi devant être mis en oeuvre relativement au projet.

…

31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

(*a*) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project

(i) is not likely to cause significant adverse environmental effects,

(ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

(*b*) direct the responsible authority to issue a decision statement to the proponent of the designated project that

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

(ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation

…

31 (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale ou son rapport de réexamen en application des articles 29 ou 30, le gouverneur en conseil peut, par décret pris en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie* :

a) décider, compte tenu de l'application des mesures d'atténuation précisées dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen, que la réalisation du projet, selon le cas :

(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,

(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances,

(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

b) donner à l'autorité responsable instruction de faire une déclaration qu'elle remet au promoteur du projet dans laquelle :

(i) elle donne avis de la décision prise par le gouverneur en conseil en vertu de l'alinéa a) relativement au projet,

(ii) si cette décision est celle visée aux sous-alinéas a)(i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au

measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.	projet, à savoir la mise en oeuvre des mesures d'atténuation et du programme de suivi précisés dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen.

***Species at Risk Act*, S.C. 2002, c. 29**

77 (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that	77 (1) Malgré toute autre loi fédérale, toute personne ou tout organisme, autre qu'un ministre compétent, habilité par une loi fédérale, à l'exception de la présente loi, à délivrer un permis ou une autre autorisation, ou à y donner son agrément, visant la mise à exécution d'une activité susceptible d'entraîner la destruction d'un élément de l'habitat essentiel d'une espèce sauvage inscrite ne peut le faire que s'il a consulté le ministre compétent, s'il a envisagé les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce et s'il estime, à la fois :
(*a*) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and	*a*) que toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce ont été envisagées, et la meilleure solution retenue;
(*b*) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.	*b*) que toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce.
(1.1) Subsection (1) does not apply to the National Energy Board when it issues a certificate under an order made under subsection 54(1) of the	(1.1) Le paragraphe (1) ne s'applique pas à l'Office national de l'énergie lorsqu'il délivre un certificat conformément à un décret pris en vertu du paragraphe 54(1) de la *Loi*

National Energy Board Act.

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).

…

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

(3) The following definitions apply in this section.

person includes an association, an organization, a federal authority as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*, and any body that is set out in Schedule 3 to that Act.

sur l'Office national de l'énergie.

(2) Il est entendu que l'article 58 s'applique même si l'autorisation a été délivrée ou l'agrément a été donné en conformité avec le paragraphe (1).

…

79 (1) Toute personne qui est tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet et toute autorité qui prend une décision au titre des alinéas 67a) ou b) de la *Loi canadienne sur l'évaluation environnementale (2012)* relativement à un projet notifient sans tarder le projet à tout ministre compétent s'il est susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

(2) La personne détermine les effets nocifs du projet sur l'espèce et son habitat essentiel et, si le projet est réalisé, veille à ce que des mesures compatibles avec tout programme de rétablissement et tout plan d'action applicable soient prises en vue de les éviter ou de les amoindrir et les surveiller.

(3) Les définitions qui suivent s'appliquent au présent article.

personne S'entend notamment d'une association de personnes, d'une organisation, d'une autorité fédérale au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* et de tout organisme mentionné à l'annexe 3 de

	cette loi.
project means	projet
(*a*) a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012* or a project as defined in section 66 of that Act;	*a*) Projet désigné au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* ou projet au sens de l'article 66 de cette loi;
(*b*) a project as defined in subsection 2(1) of the *Yukon Environmental and Socio-economic Assessment Act*; or	*b*) projet de développement au sens du paragraphe 2(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*;
(*c*) a development as defined in subsection 111(1) of the *Mackenzie Valley Resource Management Act*.	*c*) projet de développement au sens du paragraphe 111(1) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-78-17 (LEAD FILE); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17
STYLE OF CAUSE:	TSLEIL-WAUTUTH NATION et al. v. ATTORNEY GENERAL OF CANADA et al.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 2-5, 10, 12-13, 2017
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. WOODS J.A.
DATED:	AUGUST 30, 2018

APPEARANCES:

Maxime Faille Scott A. Smith Paul Seaman	FOR THE APPLICANT, TSLEIL-WAUTUTH NATION
Susan Horne K. Michael Stephens Rebecca Robb	FOR THE APPLICANT, CITY OF VANCOUVER
Gregory McDade Michelle Bradley	FOR THE APPLICANT, CITY OF BURNABY
F. Matthew Kirchner Emma K. Hume Michelle Bradley	FOR THE APPLICANTS, THE SQUAMISH NATION (ALSO KNOWN AS THE SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL

	ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SQUAMISH NATION, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN IN HIS CAPACITY AS CHIEF OF THE COLDWATER BAND ON BEHALF OF ALL MEMBERS OF THE COLDWATER BAND
Crystal Reeves Elin Sigurdson	FOR THE APPLICANT UPPER NICOLA BAND
Jana McLean Joelle Walker	FOR THE APPLICANTS, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE TS'ELXWÉYEQW TRIBE
Sarah D. Hansen Megan Young	FOR THE APPLICANTS, CHIEF RON IGNACE AND CHIEF FRED SEYMOUR ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE STK'EMLUPSEMC TE SECWEPEMC OF THE SECWEPEMC NATION
Margot Venton Dyna Tuytel	FOR THE APPLICANTS, RAINCOAST CONSERVATION FOUNDATION AND LIVING OCEANS SOCIETY
Jan Brongers Bruce Hughson Dayna Anderson Liliane Bantourakis Sarah Bird Jon Khan Ashley Caron	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA

Maureen Killoran, Q.C. Olivia Dixon Sean Sutherland	FOR THE RESPONDENT, TRANS MOUNTAIN PIPELINE ULC
Paul Johnston Keith Bergner Toby Kruger	FOR THE RESPONDENT, NATIONAL ENERGY BOARD
Marta Burns Doreen Mueller	FOR THE INTERVENER, ATTORNEY GENERAL OF ALBERTA
Thomas R. Berger, O.C., Q.C. Monique Pongracic-Speier	FOR THE INTERVENER, ATTORNEY GENERAL OF BRITISH COLUMBIA

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP Vancouver, British Columbia	FOR THE APPLICANT, TSLEIL-WAUTUTH NATION
Hunter Litigation Chambers Vancouver, British Columbia	FOR THE APPLICANT, CITY OF VANCOUVER
Ratcliff & Company LLP North Vancouver, British Columbia	FOR THE APPLICANT, CITY OF BURNABY
Ratcliff & Company LLP North Vancouver, British Columbia	FOR THE APPLICANTS, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band
Mandell Pinder LLP Vancouver, British Columbia	FOR THE APPLICANT, UPPER NICOLA BAND
Miller Titerle + Company LLP Vancouver, British Columbia	FOR THE APPLICANTS, AITCHELITZ, SKOWKALE,

	SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE
Miller Thomson LLP Vancouver, British Columbia	FOR THE APPLICANTS,CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION
Ecojustice Calgary, Alberta	FOR THE APPLICANTS, RAINCOAST CONSERVATION FOUNDATION AND LIVING OCEANS SOCIETY
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA
National Energy Board Legal Services Calgary, Alberta Osler, Hoskin & Harcourt LLP Calgary, Alberta	FOR THE RESPONDENT, NATIONAL ENERGY BOARD FOR THE RESPONDENT, TRANS MOUNTAIN PIPELINE ULC
Alberta Justice and Solicitor General Edmonton, Alberta	FOR THE INTERVENER, ATTORNEY GENERAL OF ALBERTA
Ministry of Justice Victoria, British Columbia	FOR THE INTERVENER, ATTORNEY GENERAL OF BRITISH COLUMBIA

COURT FILE NO.: 03-CV-245266CM2
DATE: 20070703

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ISAAC VESCIO, BY HIS LITIGATION GUARDIAN LINA VESCIO AND LINA VESCIO PERSONALLY	)	*Mr. Ismail Barmania, Michael O'Brien QC* and *Ms. Nadine Barmania*, counsel for the Plaintiffs
	)	
Plaintiffs	)	
- and -	)	
DR. HARTLEY A. GARFIELD, DR. JOHN DOE and MOUNT SINAI HOSPITAL	)	*Mr. Tom Curry* and *Ms. Anne Posno*, counsel for the Defendant, Dr. Garfield; and
	)	*Mr. William Carter*, *Mr. Tim Buckley* and *Ms. Anna Marrison*, counsel for the Defendant, Mount Sinai Hospital
Defendants	)	
	)	**HEARD:** April 16,17, 18, 19, 20, 23, 24, 26, 27, May 7, 8, 9, 10, 11, 14, 15 and 22, 2007 and written submissions June 2007

Moore J.

Introduction

[1] By all accounts, Isaac Vescio enjoyed a normal gestation and birth. He became the third child and second son of his proud and excited parents, Lina and Pat, and brother to his equally excited siblings, Vanessa and Gian Paolo.

[2] Isaac was welcomed into the world, following an unremarkable labour and a natural childbirth at Mount Sinai Hospital, by his immediate family and a close family friend, "aunt" Elaine, at 4:40 p.m. on Wednesday, 21 October 1999.

[3] As Isaac was born at a gestational age of 35 weeks and 5 days, he was not yet a full-term baby and out of an abundance of caution, the birthing team included a pediatrician, a respiratory therapist and NICU nurse who were also present for Isaac's birth.

[4] Mother and son remained at Mount Sinai for about 42 hours of rest and recuperation and were discharged home at about 11:00 am on Saturday, 23 October 1999. An integral part of the discharge process was an examination of baby Isaac conducted by Dr. Garfield, his pediatrician.

[5] To a one, the Vescios were sure that Isaac was a healthy baby boy; this is what they were told and they knew nothing to the contrary on that Saturday morning; but, by mid afternoon of the following day, Sunday, 24 October 1999, they had brought Isaac back to the Hospital. On

Sunday, Lina first observed an unexpected yellow tint to the colour of her newborn son's skin and eyes, telltale signs of jaundice.

[6] Until Sunday, immediate family members and one close friend, Elaine Belanger-Porter, were the only people, other than Dr. Garfield and hospital staff at Mount Sinai, who had seen Isaac at all. Not one of them saw any sign or symptom of concern.

[7] It appears that jaundice was slow to present but once it arrived, it struck with a real vengeance. Despite the immediate and intensive investigations and treatment afforded at Mount Sinai on and after Isaac's return to the Emergency Department on that Sunday, the outcome was tragic.

[8] Isaac is now burdened with an array of afflictions and limitations that combine to permanently and completely disable him, both mentally and physically. Isaac is catastrophically impaired.

[9] On Isaac's behalf, and in her own right, Lina brings this action against Dr. Garfield and against Mount Sinai Hospital for damages arising from alleged failures in the care and treatment afforded Isaac in the first hours and days of his life.

[10] The quantum of damages has been agreed to in the amount of $8,000,000. Accordingly, only issues of liability remained for determination at trial.

Background – The Vescios

[11] Lina makes an excellent witness on her own behalf. She is pleasant, presentable, well spoken and responsive. Despite all she has been through in caring for Isaac, she maintains dignity, balance and reasonable objectivity. Regrettably, she can offer no explanation for the etiology of the many afflictions with which her youngest son has been burdened.

[12] Lina was born near Rome, Italy on the sixth of February 1955. She came to Canada as an infant. She was married to Pat Vescio on April 26, 1980. He also was born in Italy.

[13] The Vescios have a son, Gian Paolo, born June 4, 1985 and a daughter, Vanessa, born 27 June 1986. Both children were jaundiced as newborn infants; Gian Paolo required some phototherapy treatment but Vanessa's jaundice was very mild and she did not require treatment.

[14] Both of the older children recovered from their early jaundice uneventfully and now are healthy young adults. Gian Paolo is 21 years of age and is finishing his political science degree at York University. Vanessa, now 20, has studied music at Humber College and is working full time in the music field.

[15] Lina is a high school graduate and she completed one year of college. She was a litigation secretary for many years and worked for 10 years with her husband, operating a

restaurant. She returned to school and achieved a paralegal certificate in 1997. Shortly afterwards, she became pregnant with Isaac.

[16] Pat graduated from Humber College as a draftsman but he spent his working career in the restaurant business. He currently manages a banquet hall in Concorde.

Lina's Health

[17] Before Isaac's birth, Lina had no known health problems. She was 44 years of age at the time of the pregnancy.

[18] Dr. Lyons is an obstetrician and he oversaw the progress of this pregnancy. Lina was very cautious and followed her doctor's advice in all respects. She had an amniocentesis and visited her doctor regularly.

[19] Dr. Lyons ordered blood-work and interpreted the results to be normal. He held hospital privileges at Mount Sinai and wrote his conclusions relating to Lina's blood-work and overall health into the Antenatal Record, a document that is prepared by the obstetrician summarizing the course of the mother's progress through her pregnancy. The Antenatal Record must be sent to the Hospital toward the end of the term of a pregnancy and in fact it was in this case. It then becomes part of the Hospital record and is kept in the ordinary course at the Hospital.

[20] The Antenatal Record was generated according to standard protocol and it declared Lina's blood-work, specifically her glucose tolerance tests, to be normal. Dr. Lyons did not give evidence. Lina was not made aware of any adverse results nor of any implications of any blood tests to the future well being of her expected baby.

[21] Dr. Lyons also referred Lina to Dr. Garfield, a pediatrician. Lina met Dr. Garfield in about September of 1999, during the ninth month of the pregnancy with Isaac. During that visit, they spoke of circumcision for her baby and she felt that Dr. Garfield was prepared to perform the procedure. They discussed immunization and he suggested that Lina arrange to bring in the baby to his office a few days after birth for an examination.

Labour, Childbirth and the Hours Immediately Following

[22] Lina attended at Mount Sinai on the morning of 21 October 1999. Lina's labour began at about 6 a.m.; she, Pat, Vanessa and Elaine Belanger-Porter went to the hospital together. Labour progressed normally. Isaac was born at 4:40 that afternoon. Lina did not have an epidural but did require an episiotomy. Otherwise, her natural childbirth experience was uneventful.

[23] To Lina, her newly born baby boy looked pinkish/reddish in colour and she described him as being "little and cute". Shortly thereafter, Lina was taken to a 4-bed nursery ward in the hospital, known as the Combined Care Unit, a Level One Nursery. Isaac was examined by a pediatrician present at the time of his birth and, soon thereafter, cleaned up and taken to Lina in the combined care ward.

[24] Lina was urged by the nurses to settle in and try to feed her baby. She was determined to breastfeed but she thought that the baby had trouble latching on. Lina continued to try to breastfeed the baby at regular intervals well into the night.

[25] The baby was very calm and quiet and Lina does not recall him crying at all on the first evening and night of his young life. Lina tried strategies given her by the nursing staff to encourage the baby to feed but they did not, to her observation at least, seem to work well.

[26] The baby urinated and produced some stool that night.

[27] Lina was sore and tired but persevered in her attempts to feed her baby that Thursday night and on through much of Friday, 22 October. Isaac took a few sucks at a time but Lina recalls that he did not appear to be feeding well at all.

[28] Lina remembers changing diapers on Friday two times or more. She recalls seeing no stool from the baby that day, however.

[29] Isaac's colour on Friday was still pink. That appearance changed very little throughout the day. Lina recalls the baby looking flushed; he was becoming brownish in appearance and moving toward an olive complexion, one that she and all of her immediate family shared. She was not concerned about the baby's appearance at this point at all.

[30] On Friday evening, the baby became irritable and fidgety. He cried a lot. This both surprised and concerned Lina. The nurses reassured her. She continued her attempts to feed the baby but with little success.

[31] Through the night, the baby's disposition changed again; he returned to being calm and sleepy. Lina does not recall the baby awakening between 6:00 a.m. and the time they were discharged home at 10:30 or 11:00 a.m..

[32] Lina changed two diapers that Saturday morning. She does not recall seeing any sign of stool in the diapers.

[33] That morning she saw that the infant was not as red as he had been on the previous two days. His complexion, to her, looked somewhat yellowish but his cheeks were still flushed. He looked normal and she was not concerned about his appearance.

[34] Lina recalled that he baby remained lethargic and sleepy all morning. He was still not feeding well.

[35] On separate occasions, first a nurse and then Dr. Garfield attended and examined the baby. Lina disrobed the baby for each of them. She described both examinations to have been brief. The nurse gave Lina an envelope containing papers that the hospital made available to new mothers and she reviewed some of their content with Lina. Following his examination, Dr. Garfield cleared the baby for discharge.

[36] Pat then took Lina and the baby home.

The Lay Witnesses

[37] The descriptions heard from immediate members of the Vescio family and friend, Elaine, regarding Isaac's skin colour, his activity levels and the prevailing weather and lighting conditions during which visual observations were made in the first days of Isaac's life as a newborn infant were remarkably similar. This may be nothing more than an innocent coincidence or it may represent a consensus view agreed to over time but it sounded somewhat scripted.

[38] Nevertheless, the evidence of these lay witnesses was unchallenged and uncontroverted and I accept that these people endeavored to provide their best recollections on these matters. I accept that they observed neither colour nor activity markers of concern to them at any time between Isaac's birth and the late morning of Sunday, 24 October 1999.

[39] Certainly, there has been no suggestion made that these lay people could or should have appreciated the presence of a growing health problem for Isaac before they did. Equally, there is no suggestion that they caused or contributed to the medical outcome ultimately experienced. Indeed, a case such as this one falls to be determined largely beyond and despite, not because of, the evidence of lay witnesses.

At home, Saturday and Sunday

[40] The Vescios and their friend, Elaine, saw and cared for Isaac at his new home on Saturday and Sunday. The baby stayed in a crib in his parents' bedroom and slept most of the time. Lina continued her efforts to feed Isaac but still without much apparent success. She became increasingly worried about that.

[41] The room was dimly lit. Those who saw Isaac's appearance saw nothing out of the ordinary. He was changing gradually toward the olive complexion of his parents and siblings. He continued to be sleepy and lethargic. He did not wake up on Sunday morning and Lina did not notice his eyes being open that morning.

[42] Lina recalls changing Isaac's diapers at home; she does not now remember seeing stool.

[43] Lina slept in until almost 10:00 a.m. that Sunday morning. Shortly thereafter she noticed that the baby's skin colour looked yellow and she took him down to her brightly lit kitchen for a better look. There, she saw that the skin looked "a bit more yellow" than it had been. Isaac's red flush was fading and he seemed to be turning noticeably yellow. While in the kitchen, the baby opened his eyes and Lina saw that the whites of his eyes had a yellow colour as well. Lina's observations of changes in Isaac's appearance and the fact that he was not feeding well concerned her and she called the hospital.

[44] First she called the Hospital for Sick Children; she was advised to call the birth hospital and so she did. The advice on the call to Mount Sinai was to bring the baby back to Mount Sinai and that she did.

[45] By the time they arrived back at Mount Sinai, about mid afternoon on Sunday the 24th, Isaac looked considerably yellow and was very lethargic. Lina was ushered into a separate room in the Emergency Department in order that she might feed her baby but he would not feed.

Hospital Records

[46] Although virtually all of the delivery, birth and initial stay records for mother and son are missing, Lina kept her copy of the Newborn Record. This record was given to her at the time of the discharge on Saturday the 23rd of October and it contained notes and markings made by Dr. Garfield and by the discharge nurse.

[47] Also available and produced, on consent, into evidence at trial without qualification or caveat concerning their use as evidence were: Dr. Martiniuk's Emergency Record (Exhibit 1, pages 126 and 128), Dr. Tanswell's Consultation Report (Exhibit 1, page 175), and Dr. Jefferies' NICU Final Summary (Exhibit 1, pages 167-169). These are each records made by medical doctors following their review of patient charts and following the provision of medical treatment to Isaac.

[48] I accept the submission made by the hospital that these documents were authored by persons unaffected by the prospect of litigation at a time when they were under a professional duty to Isaac to accurately record the significant clinical events, including his history, findings on their examinations, their diagnosis, and treatment. Even Dr. Wainer agreed, "those records made contemporaneously with the events would be more reliable than the contemporaneous recollections" at trial.

[49] Lina did not author any portion of these documents but they do contain information about Isaac's feeding and waste output, information that Lina acknowledges came to Isaac's caregivers, by way of history, from her. These records evidence that breast-feeding was progressing adequately and that urine and stool production, proxies for nutritional intake, were more considerable than Lina remembered in her evidence in chief. The records are silent about any concerns Lina may have had about Isaac becoming established in his feeding in those early days.

[50] More specifically, I find that the available documentary evidence supports this defence submission:

> Mrs. Vescio's evidence about the degree of feeding and behaviour concerns she had prior to the discharge from Hospital cannot be accepted as reliable in the context of the following evidence:

(a) The final discharge summary dictated November 9, 1999, which was prepared with the benefit of the complete chart, stated that:

> The baby was initially breast-feeding well and was discharged home at 24 hours of age. Apart from having a slightly pinkish stained diaper, there were no abnormalities noticed during the short hospital stay.

Reference: Final Summary, Exhibit 1, p. 169

(b) The history recorded by the emergency physician on Sunday, October 24 was consistent with recent feeding concerns, established latching and regular elimination;

Reference: Emergency Record, Exhibit 1, p. 126 [p. 128 transcribed]

(c) On Sunday, October 24, Baby Vescio had lost 9.6% of his birth weight which falls within an acceptable range of normal weight loss and is consistent with the baby feeding;

Reference: Examination-in-Chief of Dr. Sgro taken May 7, 2007, p. 136, lines 1 - 15

(d) Babies of 35 – 36 weeks' gestation are not expected to fully establish feeding by the second day of life. Consistent with this, Mrs. Vescio was reassured by the nurses that her concerns were not indicative of a significant feeding problem;

> Q. And they reassured you that what you were experiencing and what Isaac was experiencing was normal, didn't they?
>
> A. Yes.

Reference: Cross-Examination of Mrs. Vescio taken April 17, p. 48, lines 4 - 7

(e) Mrs. Vescio testified that Isaac was regularly producing urine in his diapers requiring that these be changed. This is also reflected in the partially completed baby activity report made by Mrs. Vescio marked as Exhibit 3;

Reference: Cross-Examination of Mrs. Vescio taken April 17, 2007, p. 53, lines 14 – 24

Baby Activity Report, Exhibit 3

(f) Isaac Vescio's feeding and behaviour problems became worse on the Saturday evening, into the Sunday morning;

> Q. And it was worse on the Sunday morning than it was on the Saturday?
>
> A. Yeah.

Reference: Cross-Examination of Mrs. Vescio taken April 17, 2007, p. 11, lines 6 - 8

(g) Mrs. Vescio raised no concerns with Dr. Garfield and was satisfied herself that Isaac was a healthy baby on discharge;

Reference: Cross-Examination of Mrs. Vescio taken April 17, p. 48, lines 4 - 7

(h) Neither the nurses nor Mrs. Vescio were concerned about Isaac Vescio such that they requested that the physician present in Mrs. Vescio's room on the Friday evening assessing the other babies assess Isaac Vescio;

Reference: Examination-in-Chief of Mrs. Vescio taken April 16, pp. 72 - 73

(i) There were no significant concerns and so none were noted in the Newborn Record:

> Q. In your practice back in October 1999, when did you put comments following a notation of breastfeeding?
>
> A. If there were any problems that were arising, for example, problems with breastfeeding, nipple problems, poor latch, I might document it there.

Reference: Examination-in-Chief of Tina Hua taken May 14, 2007, pp. 85 – 86, lines 23 – 2, see also pp. 85 – 87

From the evidence of Mrs. Vescio, it may be concluded therefore that:

(j) Isaac Vescio was not jaundiced at discharge;

(k) She had forgotten about the history of jaundice in the case of her two older children and did not give that history to anyone at the Hospital nor could she have to Dr. Garfield;

(l) Isaac Vescio's feeding patterns and behaviours were within a normal range for a healthy, near-term baby;

(m) Isaac Vescio's colour and condition at discharge were not areas of concern to Mrs. Vescio since she raised no concerns with Dr. Garfield;

(n) Isaac Vescio was feeding normally at home for a near-term baby and produced urine and stool in normal quantities;

(o) Sudden onset of hyperbilirubinemia commenced sometime after discharge and resulted in a rapid deterioration of his condition on Sunday, October 24, from his condition Saturday, October 23.

[51] Lina has done her very best to assist the court with her recollections of Isaac's first hours of life but she admits that the observations she made then may not have entirely withstood the passage of time. The available records, however, were made contemporaneously with the events. The observations were made and recorded by doctors trained and experienced in the creation of such records. In these circumstances, where the records and Lina's recollections part ways, I prefer the accuracy of the evidence contained in the records.

Hyperbilirubinemia

[52] Jaundice is a clinical description of an appearance of being yellow due to the presence in the bloodstream of elevated levels of bilirubin.

[53] Hyperbilirubinemia is a specific term involving a threshold of bilirubin level. The generally accepted range for jaundice would be between 80 and 120 units of bilirubin measurement, umol/l/hr. There is no laboratory value of bilirubin level that is diagnostic of hyperbilirubinemia. The diagnosis can depend upon the age of the infant but as the level of bilirubin in the blood rises so too does the severity of the hyperbilirubinemia rise.

[54] In an infant of 48 hours of age, a level of 280 units of bilirubin would generally lead to the initiation of phototherapy treatment in a term infant.

[55] The level of bilirubin that would initiate a blood exchange transfusion in 1999 would be of the order of 360 units and at that time a unit measurement reading of 425 would, according to accepted pediatric guidelines, absolutely require that a transfusion be performed.

[56] Bilirubin is produced following the destruction of red blood cells within the body. It is eliminated by the liver, which conjugates or converts bilirubin into a water-soluble solvent that is then excreted from the body.

[57] In the first week of life, any remaining unconjugated bilirubin may also be passed in the infant's stool. As it passes down the bowel, however, any remaining unconjugated bilirubin may be absorbed back into the bloodstream (entero-hepatic re-absorption) and jaundice is thereby

maintained. And, if the baby is not feeding well, it will not pass stool and that allows for more re-absorption (which can become close to 100%).

[58] In the first 24 to 36 hours of life, stool is a tarry black substance [muconium]. As feeding improves, stool becomes yellow, also a reflection of jaundice coming out.

[59] Liver function takes longer to mature in a premature baby. Conjugation is less likely to happen and therefore bilirubin levels tend to be higher in premature babies because the immature liver may not efficiently eliminate bilirubin.

[60] Hyperbilirubinemia leading to kernicterus is very rare. Indeed, many pediatricians may not encounter kernicterus in a career but mild jaundice is very common. As many as 50-70% of all full term babies will evidence some degree of jaundice within the first few days of life. Premature babies may be expected to be somewhat more susceptible to developing jaundice.

Kernicterus

[61] Kernicterus was originally used as a term indicating a pathological finding of staining, found on autopsy, in the area of the basal ganglia of the brain. It now refers to a combination of clinical and laboratory findings and, possibly, imaging findings on MRI. To make the diagnosis of kernicterus, ideally there would be a history of significant hyperbilirubinemia, long-term neurological outcomes and associated MRI findings with basal ganglia changes.

[62] Dr Fazal explained that "jaundice" is not a scientific term. Hyperbilirubinemia is a scientific term. Kernicterus describes the end stage of brain injury flowing from very high bilirubin levels.

[63] There is no absolute threshold, but the higher the level of hyperbilirubinemia, the more likely it becomes that kernicterus may develop. Dr. Garfield's submissions assert that there is no recognized level of bilirubin that is known to result in kernicterus, and not all children with very high levels of bilirubin will suffer from kernicterus. Upon the evidence I have heard and accept, I agree.

Clinical Assessment of Jaundice

[64] The Newborn Record confirms that Isaac was examined both by Dr. Garfield, someone Dr. Fazal accepted to be a recognized leader in the field of pediatrics, and by a nurse, before he was discharged home from hospital on Saturday morning. Both physician and nurse would be expected to look at skin colour to establish that there was no evidence of blue or yellow colours apparent upon close visual observation.

[65] Colour is important to demonstrate profusion or proper breathing; a blue colour to the skin or nails of an infant may signal breathing problems and yellow is important to establish the presence of jaundice. There was no observation of either colour evident in Isaac's case prior to his discharge home on Saturday morning.

[66] Indeed, Dr. Fazal ultimately conceded that, at the time of discharge, there was no evidence of any discharge concerns whatsoever present in Isaac's case. Dr. Garfield noted on the Newborn Record that Isaac was a normal male, by which he meant, through the symbols he wrote, to convey the opinion that Isaac was healthy and fit for discharge home.

[67] The assessment of jaundice is a matter of clinical judgment made by the doctors and nurses in a hospital setting. It involves a combination of experience and training.

[68] At levels of 350 or 400 micromoles per liter of blood, phototherapy or transfusion treatments can reverse the situation. Phototherapy can effectively break down high levels of bilirubin such that the offending substance can be conjugated and discharged without significant or lasting damage to the newborn. A transfusion removes and replaces bilirubin laden blood with blood containing no or normal and manageable levels of bilirubin. Often, a transfusion will establish balance within the bloodstream and eliminate jaundice in the infant. At a bilirubin unit level as high as 688, however, there is a consensus in medical opinions offered in this case that even with treatment, the patient will end up with some degree of brain damage. Upon re-admission to hospital on Sunday afternoon, the bilirubin level in Isaac's blood serum was tested and found to be 688.

[69] The medical experts called in this case agree that Isaac developed jaundice and that it progressed to become hyperbilirubinemia and progressed further to produce kernicterus or brain damage. The results of that brain damage are seen in the deficits and limitations that describe Isaac's catastrophic impairment.

What did the Defendants do wrong? The Plaintiff's Position

[70] Quite apart from and in addition to hospital records availability issues, about which more will be said later, the plaintiffs assert that the defendants failed to provide adequate and necessary health care services to Isaac and Lina Vescio, particularly during the first 42 hours of Isaac's life.

[71] More specifically, the plaintiffs assert that: Dr. Garfield and/or Nurse Hua:

- failed to perform a complete or adequate visual assessment of jaundice;
- Failed to utilize available means to perform proper investigations or verification of Isaac's physical status (ie: bilimeter or blood serum testing) when he knew that visual assessment of jaundice was unreliable;
- Failed to give due or proper consideration to Isaac's gestational age (prematurity);
- Failed to give due or proper consideration to Isaac's breast-feeding, feeding difficulties and behaviour;

- Failed to provide Mrs. Vescio with appropriate or adequate instruction to recognize and respond appropriately to jaundice after discharge;

- Discharged Isaac at 42 hours of age when he did not meet the criteria for early discharge established by the CPS and the AAP; and

- Failed to take a proper history.

Dr. Garfield's Position

[72] On behalf of Dr. Garfield it is respectfully submitted that the plaintiffs' claim must be dismissed since:

- There is no expert evidence that the conduct of the defendant Dr. Garfield failed to meet the expected standard of practice of a community paediatrician in Ontario in his assessment or treatment of Isaac Vescio in 1999;

- The standard of care is not fraught with such obvious risk as to allow the court to ignore it and determine its own standard;

- Isaac Vescio did not have feeding or behavioural problems in Hospital and was not jaundiced on his discharge from Hospital;

- There was no reason to keep Isaac Vescio in Hospital based on his known history and condition and Mrs. Vescio did not raise any concerns with Dr. Garfield upon his visit and assessment;

- Dr. Garfield's appointment with Mrs. Vescio before the delivery was not an occasion on which a history should have been taken and Mrs. Vescio did not raise the issue;

- In any case, the additional information of the history of jaundice in Isaac Vescio's siblings was not known and could not have been known as Mrs. Vescio did not advise anyone of it and could not recall it at the time;

- Isaac Vescio suffered an extremely rare event of sudden onset hyperbilirubinemia leading to kernicterus which was not foreseeable and the plaintiffs have not proven earlier treatment would have altered his outcome; and

- There is no case for spoliation.

[73] Dr Garfield also submits that:

- The plaintiffs did not lead any expert opinion evidence from a witness who said that Dr. Garfield failed to meet the required standard of care. The only evidence

before this court on the issue of the standard of practice in Ontario in 1999 is the expert opinion evidence of Dr. Michael Sgro, who testified that the expected standard was met by Dr. Garfield;

- Isaac Vescio was properly assessed and discharged in accordance with the expected standards of practice in 1999, as a normal male with no jaundice or significant feeding or behaviour concerns which required he remain in the Hospital;

- None of the suggested risk factors were known, or could have been known to Dr. Garfield, at the time of the discharge;

- Isaac Vescio was not jaundiced at discharge based on the consistent evidence of all observers and the available contemporaneous records;

- Specific to Dr. Garfield's assessment of Isaac Vescio for discharge, the plaintiffs did not challenge Dr. Garfield on:

  His invariable practice to review the chart and the scope of his physical examination;

  His conclusion that Isaac Vescio was normal, with no jaundice and no significant feeding or behaviour concerns;

  The expected standards of practice in 1999 and whether such standards were fraught with obvious risk; and

  His denial that he destroyed any documents in circumstances that could constitute spoliation of evidence.

- Isaac Vescio suffered from a blood disorder caused by an anti-c antibody and probably a G6PD deficiency. The pathological hemolisis caused by the blood disorder, coupled with the physiologic jaundice, resulted in unforeseeable, sudden onset hyperbilirubinemia. Contrary to the plaintiffs' submissions, a statistical analysis cannot explain the extreme hyperbilirubinemia and kernicterus suffered by Isaac Vescio;

- The plaintiffs have not proven that but for the alleged negligence of the defendants, the outcome for Isaac Vescio would be different. No expert testified that earlier treatment or a decision not to discharge would have prevented kernicterus; and

- There is no evidence to suggest that Dr. Garfield played any role in or had any knowledge of the missing Hospital chart. Dr. Garfield was not informed of Isaac

Vescio's subsequent Hospital admission or his unfortunate condition until Dr. Garfield was served with the statement of claim in or around March 2003.

The Position of Mount Sinai

[74] The position of Mount Sinai Hospital is summed up in the following extracts from its written submissions:

- The axis about which this case revolves is the decision to discharge Isaac on October 23, 1999. All of the available documentary evidence supports this decision. Isaac was not clinically jaundiced at the time of his discharge and there were no risk factors which, employing the then current standards of practice, were known or ought to have been known.

- The available documentary evidence is substantial and is certainly sufficient to permit the court to reach a fair and informed decision in this case. In addition to the available birth admission records, the October 24, 1999 readmission records are particularly useful as they address the very questions being asked by this court: whether there were any abnormalities, including feeding difficulties, weighing against discharge.

- Even if the plaintiffs were able to meet the burden of proving the Hospital was negligent in the care provided to Isaac Vescio, they have not proven that but for such negligence, Isaac would not have sustained kernicterus. In other words, there is no expert evidence that but for the defendants' negligence Isaac would have received earlier treatment and his kernicterus would likely have been prevented.

- Isaac's G6PD deficiency in combination with anti-c antibodies in his blood were responsible for causing a sudden haemolytic event, which unfortunately led to Isaac's kernicterus.

- This rare, tragic and unpredictable confluence of conditions is the inescapable calculus of this case.

Analysis

[75] Principal among the concerns raised by the plaintiff is the decision to discharge Isaac from Mount Sinai Hospital on Saturday, 23 October 1999. This decision followed upon physical examinations of the baby by a nurse and thereafter by Dr. Garfield. As such, the doctor authorized Isaac's discharge and the hospital acquiesced in that decision.

[76] At the time of discharge, Isaac was about 42 hours of age. The Canadian Pediatric Society has published guidelines addressing several enumerated concerns for consideration by pediatricians determined to discharge full term newborn babies from hospital before age 48 hours. These concerns largely mirror those published by the equivalent American society, although the American guidelines are somewhat more conservative.

[77] Dr. Wainer adopts the Canadian guidelines as appropriate for purposes of his practice. He points out that they do not specifically address the matter of discharging a baby, such as Isaac, who was born before achieving a gestational age of 37 weeks. Indeed, he cannot personally recall ever discharging a premature baby before at least 48 hours of age.

[78] Dr. Wainer concedes that the diagnosis of jaundice and the application of guidelines for the management of preterm infants involves the exercise of clinical judgment by physicians. This is the same process as applies to full term infants.

[79] In 1999, physicians were left to apply clinical judgment to the decision making process leading to the discharge of an infant born at fewer than 37 weeks gestation because the Canadian Pediatric Society had not, and still today has not, issued guidelines speaking to the discharge from hospital following upon the birth of a premature infant.

[80] Even if a decision to discharge Isaac, or any prematurely born baby at age 42 hours of age, might be worthy of consideration, Dr. Wainer and Dr. Fazal point to the criteria endorsed by the Canadian Pediatric Society for full term infants and assert that Isaac's situation stands out in contrast to those criteria in many respects.

[81] To begin with, the criteria address the case of "well" babies. The pediatricians called by the plaintiffs believe that Isaac was not a "well" baby because they understand and assume that his feeding was inadequate and because of the fact that his was a premature birth. Isaac was a large baby for his gestational age and many of the individual criteria listed in the Canadian and/or American Pediatric Associations' published guidelines would include him out of a decision to discharge from hospital at an age lower than 48 hours after birth.

[82] These doctors necessarily founded their expert opinions, in part at least, upon the facts given in evidence by Lina. In this respect, they assumed as accurate and sufficiently complete the descriptions Lina gave of the course of her attempts to establish an appropriate latch and feeding

for Isaac. As well, these doctors took Lina's evidence of her baby's urine and stool output into consideration along with her description of Isaac's activity levels, his lethargy and his sleeping habits. They also considered and relied upon Lina's description of Isaac's appearance and skin colour at various times during his first 42 hours.

[83] Neither doctor was present during the time Lina gave her evidence to this court. Both had reviewed Lina's discovery transcript but, of course, its contents did not become evidence at trial. Apparently they did not review transcripts of Lina's trial evidence, although that would not have put them offside the order excluding witnesses, as experts were excepted from the application of that order.

[84] So, these doctors were asked to assume that summaries of Lina's evidence as read by plaintiffs' counsel were accurate and their opinions followed. The difficulty arising from that process is that the relatively brief summaries they were read did not encapsulate all of Lina's evidence. This became clear through the course of cross-examinations.

[85] While it is both expected and necessary that an expert found an opinion upon assumptions that he or she may not have first-hand knowledge of, the accuracy of those assumptions is of paramount importance to any consideration of the opinion rendered in court.

[86] In addition to the evidence assumed from fact witnesses such as Lina, Dr. Wainer founded his opinions, in part, upon assumptions regarding chemical and biological functions within the organs and blood stream of baby Isaac.

[87] Upon readmission to Mount Sinai Hospital, blood tests were performed and demonstrated that Isaac's bilirubin level then stood at 688 micromoles per litre of blood per hour (umol/l/hr). The accuracy of this reading is conceded and relied upon by all of the parties and experts in this case.

[88] Dr. Wainer posits that there will be a low but positive bilirubin level within the blood of every newborn baby. This starting point position is uncontroverted. He suggests that an appropriate assumed at-birth bilirubin level for the average newborn would be about 20 umol/l/hr. If this assumption is accurate, it is evident that Isaac's bilirubin level rose by 668 units over the course of his first 70 hours of life. The question then becomes: did Isaac's bilirubin level rise at a steady, linear rate?

[89] For purposes of his analysis and opinion, Dr. Wainer assumed that the rate of rise indeed was linear. He prepared and introduced into evidence, as Exhibit 11, a chart demonstrating the rise in Isaac's bilirubin level over time. Given that his analysis is not an exact science, Dr. Wainer explained that he also charted a linear rise over the time period up to Isaac's first discharge from hospital, at 42 hours of age, assuming 20% positive and negative variances respectively. Why the figure 20% was arbitrarily selected rather than any other was not established to my satisfaction. It is not lost upon me that this marked variance conveniently allows for a low-end bilirubin level, at hour 42, that is in the low to mid 300s. This level of jaundice might be more easily missed during a visual examination, I suppose.

[90] Interestingly, the three graph lines charted by Dr. Wainer from birth through to age 42 hours start from the at-birth assumed bilirubin level of 20 units and rise in a linear fashion demonstrating a deviation range of plus or minus 20%. As such, Isaac's bilirubin level at the time of discharge from hospital on Saturday morning would range from about 330 up to 500 units. From age 42 hours onward, however, the lines on Dr. Wainer's chart converge toward the point that indicates a bilirubin reading of 688 at the time of testing on readmission to the Emergency Department at Mount Sinai Hospital on Sunday afternoon.

[91] Now, it seems to me to be logically and mathematically sound that if you start from an initial bilirubin level of 20 and project a linear rate of rise through hour 42 and on to the time of post readmission testing, a level of 688 will appear on the graph. What I have difficulty with, however, is how the deviation lines (charting variances of plus or minus 20%) can logically separate before hour 42 and converge thereafter at the 688 level at hour 70.

[92] Projecting the upper and lower linear progression lines from 42 hours to readmission produces (688 +/- 20%) a low of 550 and a high of 826 units at 70 hours; but, testing on readmission established the bilirubin level to be 688.

[93] Surely if the bilirubin level at hour 42 could be off by a margin of 20%, the level could be off, by that or some other percentage, at each other hour charted. Dr. Wainer offered no rationale for the assumption that the three lines should separate as they proceed out from hours zero to 42 and then return from the demonstrated separation apparent at hour 42 to confluence at hour 70.

[94] Dr. Wainer does not deny that a rapid rise in bilirubin levels can be experienced in some patients but he does not see an event to explain rapid rise in this case. Parenthetically, I note that the lower of the three graphed lines on Exhibit 11 rises at a linear rate to hour 42 and thereafter, it rises at a higher rate to hour 70. In any event, this doctor asserts that a linear rise in bilirubin levels is a reasonable assumption, notwithstanding that it is not accepted as such by other experts in this case or that he admitted that it is not the only viable assumption an expert in his field could reasonably consider.

[95] At this point, it must be said that it is not the number of opinions on this or any issue in this case supporting one side of a proposition or another that matters to me but rather the quality and persuasive force of any given opinion.

[96] On the basis of the assumptions Dr. Wainer chose to accept, the bilirubin level for Isaac at discharge on Saturday morning was 415 umol/l/hr (plus or minus 20%). As such, the baby's clinical status at the time of discharge would be that he was, to use Dr. Wainer's choice of words, "deeply jaundiced". He concedes that at such levels, jaundice would be quite evident and not only visible in the head but also throughout the entire body of a newborn baby. He accepts that that degree of jaundice would be almost impossible to miss in a well-lit room on clinical examination by a nurse or an experienced pediatrician.

[97] There is unanimity of medical opinion that a bilirubin level of 400, indeed even a level of about 300, would be very obvious to an experienced clinician. Dr Freedman put the matter this

way: “I don't want to make it dramatic, but it would be like seeing a lemon in a bowl of apples. It would be self-evident”.

[98] Dr. Kaplan said that at a level higher than 500, a baby would be the colour of an orange or a pumpkin "literally". He added that a level of 300 to 500 would produce a "deep yellow colour bordering on the colour of an orange".

[99] Dr. Kaplan had read the transcript of the evidence given by Dr. Wainer. He read that Dr. Wainer suggests a bilirubin level of between 300 and 500 units would have been present at the time of Isaac’s discharge home on Saturday morning and that Dr. Wainer chose to apply a linear analysis approach to the progression of the baby’s bilirubin rise.

[100] If the baby had a bilirubin level in that range, he would have been "deeply jaundiced" and deep jaundice would have been recognized in hospital but Dr. Kaplan sees no evidence of jaundice present at the time of discharge at all. He concludes that Dr. Wainer’s theory is simply not compatible with what happened to this baby.

[101] While I have no difficulty in accepting Dr. Wainer’s credentials and expertise, I have real difficulty accepting his objectivity and the essentials of his opinions, especially where those opinions are contested in the evidence of equally, if not more, qualified experts whose objectivity I fully accept. In this latter category, I include doctors Sgro, Freedman and Kaplan.

[102] I am mindful of and in agreement with the view expressed by Lax J. both in *Symaniw v. Zajac*, [1996] O.J. No. 3123 (Gen. Div.) at para. 41 and more recently in *Latin v. Hospital for Sick Children*, [2007] O.J. No. 13 (Ont. Sup. Ct.) that in considering the conflicting evidence of experts, the court should weigh and assess in light of these factors:

- The relevance of the training, experience and specialty of the witness to the medical issues before the court;
- Any reason for the witness to be less than impartial;
- Whether that testimony appears credible and persuasive compared and contrasted with the other expert testimony at the trial.

A word about Expert Evidence

[103] The ability to give opinion evidence at any trial is a privilege, not a right and it is afforded sparingly. In the case of experts in the field of medicine, it is afforded by order of a trial judge, with the hope and expectation that the expert can, in an impartial fashion, assist the court to a full and fair appreciation of matters necessarily in issue and beyond the experience, knowledge, or ready appreciation of the court.

[104] Having carefully followed the evidence of Dr. Wainer, I am very suspicious that his objectivity has been compromised by his eagerness to persuade this court of the validity of

the opinions he gave, both as to the merit of his own view of the likely progression toward and causes for the injuries Isaac ultimately suffered and as to his criticisms of the views of other experts. That he authored thirteen reports to counsel in this case is troubling to me, in and of itself.

[105] As well, I noted numerous instances arising during his cross-examinations in which Dr. Wainer maintained rigid positions in the face of reasonable suggestions not entirely opposite to positions he had earlier espoused. On the whole, he struck me as a man on a mission and that mission had rather less to do with assisting the court toward a reasonable understanding of technical, medical issues arising in this case than it had to do with winning a debate on his particular views.

[106] In the same general way, I am troubled by the evidence heard from Lisa Williston, R.N., who was accepted as an expert in nursing and who opined on the standard of care for nurses at times relevant to Isaac's birth and neo-natal care at Mount Sinai. Overall, the court was helped very little by her opinions; her efforts at objectivity were certainly not apparent to me.

[107] She too was rigid and unyielding in her views. For example, when asked to agree that counting diapers is one of the best ways to determine if a baby is being adequately fed, she declined to agree, arguing that it was not the best way, in her view. Surely one of the best does not equal the only.

[108] This nurse was also heard to say that the comments box on the top portion of the Newborn Record (Exhibit 2, also copied in Exhibit 1, page 120) was intended to contain all information relevant to the care and feeding of the newborn prior to discharge. Her position is that no information is immaterial and if information is not charted, the event didn't happen. She feels that the comments section requires inclusion of all information, whether important or not, having to do with the course of the infant's breast-feeding while in hospital.

[109] This portion of the Newborn Record form simply is not big enough nor, in my view, designed for the inclusion of every scrap of information a nurse observes and may record elsewhere in hospital records. As is evident from the hospital records that are available and those specimen records also contained in Exhibit 1, there are charts specifically designed for the recording of infant feeding and behaviour issues; it is inconceivable that all information from all chart records should be re-recorded in this small section of the Newborn Record.

[110] These are but two of the many instances of partisan positioning that were evident to me during the course of Ms. Williston's evidence.

[111] The thrust of the evidence of the three experts called for the plaintiffs seems to be that the decisions made by Dr. Garfield and by the discharge nurse, Ms. Hua, in favour of discharging Isaac home on Saturday morning were flawed. To the extent that that is indeed the thrust, even assuming that Isaac was not displaying signs or symptoms of jaundice at the time, it seems to me to be largely unhelpful to focus upon post discharge decision record keeping.

[112] Much time was devoted to focusing many witnesses on the completeness and accuracy of the Newborn Record, yet the discharge decisions had already been made before the decision makers put their notes and signatures upon this form. There is no evidence to suggest that Isaac's treatment or outcome following his Saturday discharge were influenced at all, let alone adversely, by the information contained in or omitted from the Newborn Record.

[113] In my view, it is more germaine to focus upon the information that was known or that should have been known by the decision makers, and the extent, if any, to which this information supported the decisions made.

Sibling History

[114] One of the criteria that the plaintiffs' experts cited as a risk factor for the development of Isaac's hyperbilirubinemia is the history of jaundice in his siblings. The plaintiffs' experts did not, however, examine the particulars of the jaundice experienced by Isaac's siblings and describe the role that it actually played, if it did at all, in the development and progression of the problem Isaac actually experienced.

[115] Exhibit 1, pages 332 through 363, contains delivery and newborn records for each of Isaac's siblings. My review of those records persuades me that Isaac's experience was very different from that of either his brother or sister, and that their jaundice cannot reasonably be thought to be a predictor of Isaac's outcome. Beyond that, I see no basis in the siblings' records to support a conclusion that Isaac should have been kept at Mount Sinai longer than the 42 hours he spent there following his birth.

[116] It is interesting to note from the sibling records and from those relating to Lina's pregnancy with Isaac that Dr. E. Lyons followed all three of these pregnancies. Although Gian Paolo developed jaundice prior to discharge from hospital as a newborn, there is no note from Dr. Lyons alerting the reader to that fact contained in records he made relating to Lina's later born children, Vanessa and Isaac. The Antenatal Records (Exhibit 1, pages 362 and 92) prepared by Dr. Lyons contain no comments about sibling jaundice.

[117] Also silent is the portion of the record (at page 360, item 41,) relating to Vanessa's delivery, used for grading potential risks to a newborn baby's health. In Vanessa's case the item invites a letter to be inserted if Lina had given birth to previous babies with hyperbilirubinemia. The term applies to Gian Paolo's jaundice and therefore one might expect to see a letter inserted there on the document made up at the time of Vanessa's neo-natal care, but none appears.

[118] Gian Paolo was born on the afternoon of 4 June 1985; he presented with a normal pink colour which is noted (page 335) to have remained normal through to the day shift on June 7th. The time of the notation is not shown, but on that shift Gian Paolo became 3 days old and he

was noted to be jaundiced. His jaundice continued for more than 3 shifts (1 full day) before treatment was started, at some point during the evening of June 8th. Phototherapy is the only treatment administered and it continued through all or parts of 5 shifts. Gian Paolo was discharged on June 10th at 2:26 p.m. (page 332).

[119] At the time of his discharge, Gian Paolo was still jaundiced, as is so noted on his chart (page 333). A bilirubin level that day was 228 (page 339). His level was 219 on the 7th, the day he was first seen to have been jaundiced, but phototherapy was not begun until the 8th, co-incidentally, the day his level rose to its high, 262.

[120] Vanessa was born on the 22nd of June 1986. Her colour was pink, as shown on the day shift notes and remained so until some point during the night shift on the 23rd (page 351). Her bilirubin was tested on the 24th and on the 25th to be 181 and 216 respectively (page 355). She was discharged from hospital at 11:00 am on the 25th, within only a few hours of her highest recorded bilirubin level.

[121] Vanessa's final diagnosis at discharge shows no reference to jaundice or any other health concern (page 348).

[122] The inevitable conclusion from all of this is that both of Isaac's siblings showed signs of jaundice within days of their birth and both were sent home with jaundice remaining at levels about double that at which the experts in this case agree clinical signs of jaundice are visible.

[123] In the 1980's, the evidence establishes, it was the norm to keep newborns and mothers in hospital for several days. By the 1990's the norm had changed and discharge times were rolled back to times ranging between 24 and 48 hours following the birth of healthy babies. Today, Gian Paolo would likely have been discharged home before his jaundice was noted. Vanessa's jaundice was tested and lower on day 2 of her life than it was on day 3 when she was actually discharged; one wonders if her jaundice would, even today, delay her discharge.

[124] In any event, I see nothing in the sibling records to suggest, let alone establish, that Isaac's discharge should have been delayed because of the siblings' histories.

[125] Finally, on this point, I agree with Dr. Garfield's submission that Mrs. Vescio had forgotten that her other children had experienced jaundice, one requiring phototherapy. Significantly, Mrs. Vescio recalled the sibling jaundice only after the children's' medical records were produced as part of this litigation. She could not therefore have raised it with anyone in the Hospital, or with Dr. Garfield.

Dr. Garfield

[126] That a doctor possessed of Dr. Garfield's particular and extensive training and experience in medicine in general and in the specialty of pediatrics in particular can speak in court with authority, clarity and precision on matters within his sphere of expertise is, of itself,

neither impressive nor novel. In these respects, Dr. Garfield did impress; but he was, perhaps, more impressive for what he did not say.

[127] Dr. Garfield did not pretend to recall his pre-discharge examination of Isaac Vescio, one of some 25,000 examinations of newborns he has done over his more than three decades in practice. He did not deny, in fact he readily accepted, that if Lina said she saw him measure the circumference of her son's head, then that he did.

[128] He did not deny that the Newborn Record form should have been accurately and completely filled out and that in some respects it was not. That form called for the examining physician, at the time of discharge, to insert measurement data for the head circumference. Dr. Garfield omitted that data entry. Parenthetically, I must add here that no evidence was called to suggest that the inclusion of data on that measurement would have affected Isaac's outcome.

[129] Dr. Garfield admitted that he did not take a full family history from Lina when he met with her in his office before Isaac's birth. He relied upon the history available from Lina's obstetrician (Dr. E. Lyon), including the lack of any specific indication of a maternal history of relevance.

[130] Neither of the plaintiffs' experts, namely Dr. Wainer or Dr. Fazal, was critical of Dr. Garfield's approach to this type of prenatal visit.

[131] Dr. Garfield admitted that whatever notes he may have made at the time of that office visit were disposed of in the ordinary course of his office practice, as he did not actually become Isaac's pediatrician and did not see Isaac in consultation or treatment after his discharge from Mount Sinai's Neonatal Unit on the Saturday morning.

[132] He admitted that he has never seen a case of kernicterus in his practice.

[133] Hindsight is 20/20 and an understanding of Isaac's deterioration in this case might be enhanced if more and better medical and hospital records were available. Dr. Garfield admits that. At the time of his involvement with Lina and Isaac, however, he followed his usual practice.

[134] In giving his evidence, Dr. Garfield purported not to be a perfect pediatrician but rather one who followed a thorough and peer accepted procedure for managing the early days of life of newborns in his care at Mount Sinai. In the result, I am comfortable in accepting Dr. Garfield's evidence and find that he very probably applied his usual practice and procedures to his management and examination for discharge in this case.

[135] Specifically, I find that Dr. Garfield observed, touched and measured Isaac in all of the ways he explained his usual practice to involve. His examination addressed numerous potential concerns of medical significance, the presence of signs of jaundice being but one. He found no signs of jaundice and no signs or symptoms of concern. He reviewed Isaac's hospital chart for any record or note indicating that Isaac was unwell, not feeding or voiding appropriately, or otherwise not progressing as a normal child should. He testified that he would

probably also have spoken to nursing staff and would have taken any concern expressed by staff or by a baby's mother into account. Accordingly, he concluded and recorded on the Newborn Record that Isaac was a healthy male child who could accompany his mother home.

[136] I also accept the defence submission and find that the plaintiffs' expert, Dr. Fazal, testified that pressing on the skin to remove the blood and then looking at the skin colour assesses jaundice. This is consistent with Dr. Garfield's invariable practice, and Dr. Fazal was not critical of Dr. Garfield in this regard.

[137] A concern is raised in plaintiff's submissions that Dr. Garfield discharged Isaac home without knowing the results of DAT testing on cord blood taken from the baby at birth. I decline to find that that fact establishes a lack of care or negligence on his part and accept the submission that negative DAT results are not indications of a problem. If anything, such results would have suggested that there was no anti-body issue. This would, had he known that the Mount Sinai lab actually made a negative DAT test result, have offered further reassurance to Dr. Garfield in relation to the decision to discharge Isaac.

[138] I cannot accept that Isaac was jaundiced, let alone deeply jaundiced, at discharge and that all health care professionals, including Dr. Garfield, missed all signs and symptoms of his jaundice. I find that there was no clinical sign or symptom of jaundice apparent to Dr. Garfield at the time of his pre-discharge examination of Isaac on Saturday morning.

Tina Hua R.N.

[139] Nurse Hua was charged with the care of Lina and Isaac on Saturday morning and she examined Isaac as part of her pre-discharge procedures. As well, she spoke with Lina and provided her with the printed materials that the Hospital makes available to new mothers at the time of their discharge (Exhibit 1, pages 279-331). I found Nurse Hua to be a very bright, articulate and impressive witness. I have no doubt that she well understood the discharge protocols she was required to follow at Mount Sinai and that she followed them in this case.

[140] Although she has no memory of Isaac and but a vague recollection of Lina, Ms. Hua recognized her notes and signatures on hospital records (Exhibit 1, pages 91 & 120). She well remembers her usual practice and is confident that she followed it.

[141] In terms of discharge planning, she explained that her priorities included seeing how the baby was feeding and voiding and checking the colour of the baby. As well, she would address the mother's readiness, physiologically, in terms of comfort with handling the baby and whether the mother had family or other appropriate supports around her at home to help with her recuperation and with the care of her infant.

[142] She would have a conversation with the mother about how comfortable she was with the prospect of going home with her baby and whether she had any questions. Nurse Hua would access information about the progress of mother and baby in hospital through discussions with her colleagues and by looking at the patient charts. She would be looking, in particular, for

frequency of feeding and voiding as indicators that the baby was getting nutrition from the mother.

[143] She would, during the course of her discharge discussions with each new mother speak about jaundice and tell mother that, frequently, babies become jaundiced and that it is important monitor for that outcome and that it is also important to feed the baby regularly. She would encourage the mother to examine her baby in sunlight.

[144] She would also make the mother aware that a public health nurse would be available and that Mount Sinai has a unit available to support her should issues of breastfeeding or infant care arise. She would encourage the mother to call her doctor or the hospital as indicated.

[145] Nurse Hua would examine the baby, take the smock and diaper off and look at the baby's colour, breathing, that limbs are moving appropriately and she would assess the general appearance of the baby.

[146] She would look at colour overall and "possibly", she added, by pressing down on the baby's skin. She would discuss with the mother whether she was able to recognize signs of jaundice or dehydration and know the importance of calling a doctor should health concerns arise.

[147] The meeting and review of documentation with the mother requires about 30 or 40 minutes in total. The practice described refers to all discharges done at Mount Sinai in October of 1999.

[148] If Nurse Hua had any concern about feeding behavior or colour, she would chart it and then tell the baby's physician, if she decided that the discharge ought to be placed on hold.

[149] Where the physician attends on the morning of discharge, she would directly communicate any concerns to the physician then. At the time of her nursing assessment for discharge, Ms. Hua had no concern about mother or child and expressed none to any physicians.

[150] Nurse Hua recorded no evidence of jaundice or of any other concern suggesting that Isaac should not be discharged. I find this to be entirely consistent with the observations, physical examination and clinical findings of Dr. Garfield.

Isaac's journey through Jaundice and Hyperbilirubinemia

[151] Neither the available hospital records nor the evidence of the health care professionals who examined Isaac before his discharge home on Saturday morning suggest that he was jaundiced; quite the contrary, he appeared to be very well and flourishing.

[152] I reject the opinion offered by Dr. Wainer that Isaac's course followed a linear progression and that he was deeply jaundiced at the time of his discharge. I prefer the views of

Drs. Freedman and Kaplan and find that Isaac was not jaundiced at discharge but became so later and by reason of a hemolytic event that was not foreseeable and that produced a very rapid rise in bilirubin in Isaac's bloodstream.

[153] As is apparent from any review of the curriculum vitae of the doctors that attended and gave evidence in this case, the court has benefited from and is most grateful for the opinions of extremely skilled, experienced and knowledgeable clinicians, researchers, authors and teachers in a very complex area of medicine and science. The medical witnesses and particularly those called by the defendants literally included world-renowned experts in their respective fields.

[154] Dr. Freedman explained that where an infant presents without jaundice on day two of life, the conjugating capacity of the child's liver is working maximally and remarkably effectively to excrete bilirubin produced by the normal tendency toward jaundice within the first two to three days of life. Dr. Freedman has seen cases of sudden onset hyperbilirubinemia quite frequently and for the same reasons as appear to apply in this case.

[155] On being asked how an apparently normal baby can return to the hospital at age 70 hours with a bilirubin level of 688, Dr. Freedman said this means that the maximum efficiency of liver function has been overcome because of an increase in bilirubin load being produced. The liver capacity thereby becomes overwhelmed.

[156] Dr. Kaplan's view is somewhat different than that offered by Dr. Freedman but he assures the court that the two views are consistent with each other. Dr. Kaplan opined that there are two types of hemolytic events that can lead to an increase in bilirubin production in a newborn: immune and non-immune events. He feels that Isaac's case arose principally from a non-immune hemolisis.

[157] The most common cause of this type of hemolisis arises in the presence of a G6PD deficiency. The G6PD enzyme plays a major role in the production of red cell anti-oxidants in the body and a deficiency allows for destruction of red cells upon exposure to the presence of an oxidant.

[158] Exposure to oxidants can occur within the body but can also occur by way of exposure to external sources such as may be found in mothballs and by way of exposure to some drugs and chemicals that can become triggers of hemolisis. Often a specific trigger is not identified.

[159] There are more than 100 different variants or types of G6PD deficiency and all result in a lower than normal level of G6PD activity.

[160] Most newborns with a G6PD deficiency will prosper even if they develop some degree of jaundice. In about 15% of G6PD deficient babies, significant jaundice typically responds to phototherapy with good outcomes.

[161] In the severe kind of hemolisis situations, very high levels of bilirubin, involving readings of 500 to 700, can occur. This is unpredictable. Sometimes the trigger is not identifiable; for example, if a mother eats fava beans and the offending agent within the beans is transferred into her breast milk, feeding can produce a severe hemolytic event for a breastfed baby.

[162] G6PD deficient babies can become extremely yellow within 12 to 24 hours. Bilirubin levels can skyrocket. There is no way to know which baby would be at risk. Dr. Freedman feels that Isaac's bilirubin rise is consistent with this process.

[163] Dr. Freedman adds that there also seems to be an impact from a G6PD deficiency that decreases the ability of the liver to conjugate bilirubin. Therefore, the level of bilirubin rises as the conjugating ability of the liver decreases. Doctors cannot measure the conjugating ability of the liver in a newborn, for ethical reasons. It would require a biopsy.

[164] Also, he adds, Gilbert's syndrome causes a minor decrease in the conjugation ability of the liver but that syndrome working together with a G6PD deficiency symbiotically produces a greater decrease in conjugation capability. In his opinion, the likelihood is that Isaac also has Gilbert's syndrome.

[165] It is Dr. Kaplan's opinion that Isaac is G6PD deficient [Exhibit 1 page 179A]. He explained that the negative result seen on G6PD testing done following readmission to hospital in October of 1999 represents a false negative. Dr. Kaplan opines that Isaac's case is consistent with Severe Onset G6PD deficiency. It is also consistent with normal presentation or appearance through the first 42 hours of life of a 35 to 36 week gestation newborn.

[166] Dr. Freedman's theory involves an immune type of hemolisis consistent with the presence of an anti-c antibody.

[167] Dr. Kaplan feels that that antibody likely caused a low-grade hemolisis, which was not enough to produce jaundice at first; but it set the stage to produce a severe hemolisis when the baby became exposed to an oxidant at a point following the time of his Mount Sinai to home discharge. It was at this point that Isaac suffered a sudden and severe hemolytic event.

[168] Dr. Kaplan explained that there is no known way to screen for the presence or severity of a G6PD deficiency. Often with G6PD deficiency of the severe type, there is no identifiable trigger. Nevertheless, a sudden and precipitous rise in bilirubin levels often describes the characteristic unpredictability of this deficiency.

[169] In my view, the hemolytic event that produced the sudden rise in bilirubin in Isaac's case occurred after Dr. Garfield examined Isaac and after he was discharged home. The event may have included features of one or both of the processes described by Drs. Freedman and Kaplan, those being immune or non-immune hemolytic processes. Both processes lead to a rise in bilirubin and working independently or together, they can and did bring about an unpredictable, sudden onset of severe hyperbilirubinemia leading to kernicterus.

Can kernicterus be predicted?

[170] Dr. Sgro says that it is not possible to predict prospectively that kernicterus will develop. He does not agree that risk factor identification is important in so far as the development of kernicterus is concerned. It is important to recognize infants at risk of hyperbilirubinemia in order that treatment can be initiated but kernicterus cannot be predicted.

[171] Dr. Sgro was taken to his study and publication of 2006 [Exhibit 18] where 258 of the 367 reported cases of severe neonatal hyperbilirubinemia met the criteria for his study, for an estimated incidence of 1 in 2480 live births over the two year study period.

[172] Severe hyperbilirubinemia was identified in this study in 73 infants before they were even discharged from hospital. The remaining 185 infants were readmitted with hyperbilirubinemia from home. Despite the fact that infants in the former group remained within a hospital setting, they still achieved bilirubin levels averaging 425, or the transfusion threshold.

[173] Dr. Sgro's study identified that a small but significant number of infants developed severe hyperbilirubinemia within, on average, 2.6 days of life. Notably, in my view, in 165 cases (64.0%), no cause was identified for the hyperbilirubinemia ultimately diagnosed.

[174] The study recommended a screening process involving routine serum bilirubin testing of all jaundiced infants and, ideally, blood serum testing of all infants before discharge; nevertheless, no changes have yet been made in the Canadian Pediatric Society's guidelines.

[175] In his study publication, Dr. Sgro states that hyperbilirubinemia is the most common cause of readmission of a newborn to hospital. The risks of hyperbilirubinemia were known in the 1990s but the association between hyperbilirubinemia and kernicterus has only come to light in recent times. Put another way, Dr. Sgro asserts that you need to make a distinction between hyperbilirubinemia and kernicterus. Infants at risk for developing the former are not thereby at significant risk of developing the latter.

[176] Dr. Sgro confirmed that between 300,000 and 350,000 children are born in Canada each year. Of these, about 250,000 to 280,000 will develop jaundice and, therefore, have hyperbilirubinemia. Of those children that do become jaundiced, 8 to 10% may have sufficiently severe jaundice that they will require phototherapy treatment. Of those, a small portion will have such severe hyperbilirubinemia that they will be at risk for long-term neurological sequelae. Of this number, some may develop kernicterus but the risk of developing kernicterus is very small and of the order of 1 to 50 infants per 100,000 live births. Therefore, there may be as few as 10 infants born in Canada in any given year who develop kernicterus.

[177] Dr. Sgro concludes that there are no red flags for the development hyperbilirubinemia contained within the Antenatal Records prepared by Dr. E. Lyons during and concerning Lina's pregnancy with Isaac [Exhibit 1, pages 92 and 93].

[178] Dr. Sgro was taken to [page 128, Exhibit 1] the transcription of the emergency admission record. He reviewed the history and examination sections. He found the history recorded there to be consistent with the onset of clinically significant hyperbilirubinemia occurring on the morning of readmission. His view of the nature and severity, as well as the timing of onset, of Isaac's decline toward kernicterus is consistent with the views of Drs. Freedman and Kaplan and I accept it.

Bilimeters

[179] Dr. Sgro is familiar with the Minolta device and understands how it uses light to convert to a number or, in newer equipment, to a computer estimated serum bilirubin blood level. The device is not helpful. It has significant limitations. It is not calibrated and not accurate. Newer devices are slightly more accurate.

[180] None of the medical doctors in this case advocate the use of bilimeters, either in addition to or in place of a clinical, visual examination of a newborn to assist in the detection of the presence or severity of jaundice.

[181] There is no proof in this case that the use of bilimeters by either physicians or nurses was a generally accepted practice within the discharge of newborns protocols of public hospitals in Ontario in 1999.

[182] Further, whether serviceable bilimeters were available at Mount Sinai in October of 1999 or not, and the evidence is not at all conclusive on this point, it is clear that bilimeters were not customarily used other than, perhaps, where a nurse had first identified jaundice by way of visual examination.

[183] Given my finding that Isaac was not jaundiced to a level apparent, on visual examination by Dr. Garfield, nurse Hua or any member of the Vescio family or their friend, Elaine, on Saturday, I cannot accept that a bilimeter, if used, would have generated a reliable reading to the contrary.

[184] In any event, I do not find that the failure to use a bilimeter prior to Isaac's discharge from the combined care nursery at Mount Sinai on Saturday morning caused or contributed to his eventual, medical outcome.

Early Discharge

[185] In 1999 and still today, newborn babies are routinely discharged home in the interval from 24 to 48 hours after their birth. This applies to full term and to premature infants alike. Attending health care professionals in the hospital setting separately assess each case. The decision to discharge follows from the exercise of clinical judgment.

[186] The question, therefore, is not whether any baby born in October of 1999 at Mount Sinai should be discharged at 42 hours of life. The question is whether Isaac should have

been, based on the information that was known or that should have been known at the time. The physicians called by the plaintiffs assert that Isaac should not have been discharged on Saturday morning. The inference seems to be that if Isaac had stayed at Mount Sinai longer, the signs and symptoms of the hyperbilirubinemia induced kernicterus that he developed would have been noted, treatment would have been undertaken and a very different outcome would have been realized. Upon the whole of the evidence in this case, however, neither the assertion nor the inference has been made out.

[187] First, the inference. No doctor has been heard to predict and medically support a different, let alone a better, outcome for Isaac if he had stayed at Mount Sinai. Several doctors were taken to questions about cases of kernicterus about which data is kept currently in archives at Stanford University in California. Many of the cases recorded in the Kernicterus Registry located there involve sudden onset hyperbilirubinemia and a significant number of those involved children who were in hospital when onset occurred. These are infants who had the benefit of a very high level of care. It appears that not every case of kernicterus can be predicted and treated successfully.

[188] Dr. Wainer was asked, in chief, what, in all probability, would Isaac's injuries be if he had been appropriately diagnosed and treated. He was not asked to define what the appropriate diagnosis and /or treatment would have been, what health care specialists would have been involved or when and why Isaac could not have been managed effectively despite having been discharged home.

[189] What Dr. Wainer opined in response was: "If Isaac's jaundice/hyperbilirubinemia had been detected before he was – before he showed the classic kernicterus symptoms that he displayed on the afternoon of….re-admission, there's every reason to expect that his outcome would have been normal" (Transcript: 23 April 2007; page 118 lines 12-20).

[190] In my view, Dr. Wainer is building an "if" upon a "maybe" to suggest a chance that a better outcome may have arisen if Isaac had stayed in hospital, where intervention treatments may have occurred sooner. Even so, this hoped for better outcome presupposes Dr. Wainer's theory of linear progression in rate of rise of Isaac's bilirubin level applies or, at least that the rise would not be, as I find that it was, sudden and aggressively rapid.

[191] As to the issue of whether Isaac was a good candidate for discharge on Saturday morning, the plaintiffs rely largely upon the evidence of Drs. Fazal and Wainer.

[192] Dr. Fazal is a general or community pediatrician called to comment upon the care given to Isaac at Mount Sinai Hospital. He was also called to speak to the physiological causes of hyperbilirubinemia and factors contributing to Isaac's overall outcome. As well, he was called to comment upon Isaac's clinical status at the time he was discharged from hospital and the criteria that could and should have been addressed in connection with discharge.

[193] Dr. Wainer is a pediatrician with training and non-Canadian recognition in the area of neonatology. He has an interest and considerable experience in the area of jaundice in newborns.

[194] His expertise was conceded but as a practitioner in Calgary, Alberta, he did not speak as an expert on the standard of care for physicians or nurses involved in discharge decisions for newborns in this jurisdiction.

[195] In Dr. Fazal's view, this case presents a multi-factorial problem including feeding problems, lethargy, premature birth, the possibility of enzymes being passed through breast milk and a history of jaundice in both siblings and that all these factors combine to create a perfect setup for hyperbilirubinemia.

[196] Dr. Fazal was taken through laboratory results of blood testing. He agreed that the result of the positive anti-c test was first available at 11:31 a.m. on 25 October. As such, it was not available to Dr. Garfield at the time of his examination for Isaac's discharge.

[197] Further, the glucose tolerance testing done during Lina's pregnancy was properly read and recorded by Dr. E. Lyons to be normal. Therefore, there was nothing on the Antenatal Record that should have put Dr. Garfield on notice of a concern for mother or child arising from diabetes complications.

[198] Dr. Fazal accepted that if Dr. Garfield examined Isaac and found no colour or other concerns, the decision to discharge Isaac represents an "honest and intelligent exercise of his clinical judgment".

[199] Assuming that neither Lina nor staff members in the Neonatal Unit at Mount Sinai complained of significant feeding difficulties, lethargy or irritability of the child, Dr. Fazal agrees that there would be no indication of risk factors for jaundice sufficient to warrant keeping Isaac in hospital.

[200] Dr. Wainer concedes that the diagnosis of jaundice and the application of guidelines for the management of pre-term infants necessarily involves the exercise of clinical judgment by physicians and the same process applies to full term and near-term infants.

[201] Lina concedes that she did not raise any concerns about Isaac's feeding or his behaviour to Dr. Garfield or to Ms. Hua when she saw them at Mount Sinai on Saturday morning. I am satisfied that both Dr. Garfield and Nurse Hua reviewed the hospital chart for Isaac during the course of completing their usual pre-discharge assessment routine. Had the chart then been missing or had it contained any notes indicating that Isaac was not feeding or behaving normally, his discharge would have been stopped.

[202] While I have no doubt that Lina was anxious that Isaac feed well and was concerned that his feeding and behaviour may not have been normal in his first hours of life, she was reassured by the nurses and taught strategies to help in her efforts at breastfeeding. Lina

confirms that the available records and the history contained therein about feeding and voiding in the time before discharge is accurate and establishes that Isaac's progress was normal and in keeping with expected milestones.

[203] The Hospital submits that despite starting to complete the Baby Activity Record while in hospital as instructed by Nurse Hua, Lina did not make any entries following Isaac's discharge. This is consistent with an absence of concern about Isaac's feeding on Saturday; I agree.

[204] In the circumstances presenting on Saturday morning, the exercise of clinical judgment in favour of discharging Isaac home was appropriate. I would add that there was no evidence led by the plaintiffs that credibly establishes what Isaac's bilirubin level was at hour 48 of his life. That is, there is no credible evidence before me as to what Isaac's bilirubin level actually was at the time the plaintiffs assert that he should not have been discharged from Mount Sinai's Combined Care Unit. That he would have been visibly jaundiced at hour 48 or that if he had been kept in hospital longer, that he would have been diagnosed and treated and, if treated, to what outcome, is sheer speculation.

The Accepted Standard is "Fraught with Risk"

[205] The plaintiff asserts that it is open to the court to replace a standard of care by which the parties comport themselves with another standard where, as is submitted to be the situation here, the existing standard is fraught with risk.

[206] In other words, if the court believes there is a better way of doing things, it is open to it to judge the conduct of the parties, including medical doctors, hospitals and employed nurses by a standard that they themselves do not recognize or adhere to for the provision of health care services.

[207] In certain cases the court may step in and apply a new standard but this is not one of those cases. In *Anderson v. Chasney*, [1949] 4 D.L.R. 71; affirmed [1950] 4 D.L.R. 223 (S.C.C.), the court determined that the ordinary man is competent to consider whether or not it is negligent not to use sponges with ties or to have a count of sponges kept during an operation. Such a case would not involve difficult or uncertain questions of medical or surgical treatment nor matters of a scientific or highly technical character.

[208] The matter was revisited in *ter Neuzen v. Korn* (1995), 127 D.L.R. (4th) 577 in which Sopinka J. stated (at para 51) that:

> "[A]s a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are

> readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice".

[209] Upon the evidence before me, it is clear that the diagnosis and treatment of jaundice is a matter of clinical judgment. Whether or under what circumstances one should step in to apply phototherapy or transfusion therapy would likewise require clinical judgment. Whether to use bilimeter devices or upon what protocols is not a matter so obvious that a lay person should second guess health care specialists upon it. Similarly, the requirements upon discharge from hospital and the nature and extent of physical examinations of newborns by doctors and/or nurses involve health and safety concerns far beyond the knowledge of the medically untrained. These are far more complicated matters than those involved in deciding whether to account for sponges used during an operation.

[210] The determination of any professional negligence in this case must be made according to the standards of care accepted in the medical and hospital communities and addressed by the witnesses in this case.

Missing Records

[211] Most of the records of Mount Sinai relating to the delivery and neo-natal stay for Lina and the records relating to Isaac's two stays in Hospital in October of 1999 are missing.

[212] The hospital has expended considerable time and effort to locate and produce missing records and to determine why they have not been located to date. The witnesses called to address the issue offered no explanation as to why or when the records were lost; there is no expectation remaining now that these records will ever be found.

[213] It has not been suggested that these witnesses acted personally to hide or destroy records but the plaintiffs assert that liability and/or adverse inferences for the Hospital should arise from the failure to produce full records. This result can arise in circumstances where a hospital fails to meet its statutory duty to create, preserve, maintain and produce records as required by governing legislation. The plaintiffs also assert that their position benefits from the application of the doctrine of spoliation to the circumstances of this case.

[214] The plaintiffs also submit that Dr. Garfield should have made and kept clinical notes relating to the visit Lina made to his office during September of 1999, shortly before Isaac's birth. Whatever notes Dr. Garfield made were disposed of in the ordinary course within the year following that visit. The plaintiffs also seek to apply the doctrine of spoliation to the disposal of the clinical notes.

[215] As stated above, I must conclude that the records that the Hospital was obliged to generate in order to comply with the requirements of the relevant regulation, *Hospital Management*, R.R.O. 1990, Reg. 965 under the *Public Hospitals Act*, R.S.O. 1990, c. P.40 were made. It is inconceivable that care and treatment could have been afforded to Lina and Isaac

without such records having been generated in the ordinary course of their respective hospitalizations at Mount Sinai.

[216] It is also clear that Dr. Garfield and Nurse Hua referred to the hospital records in the course of their deliberations leading to the discharges of mother and son on Saturday morning. So too, I find, was reference made to those records by the medical and hospital personnel involved at the time of Isaac's re-admission on Sunday afternoon. Undoubtedly, further reference was made to the records throughout Isaac's hospitalization from Sunday, the 24th of October to his subsequent discharge on about 9 November 1999; certainly a fair reading of the NICU Final Summary (pages 167-169) confirms that Dr. Ann Jefferies reviewed hospital charts and records before authenticating that Summary.

[217] Further, it is inconceivable to me that the many laboratory test requisitions and results documents later generated from hospital computers and the heart monitoring records and documents sourced from offices and departments as described in the evidence from hospital witnesses at this trial could have been created in a vacuum.

[218] On the whole of the evidence before this court, I conclude that hospital records for Lina and for Isaac were created in conformity with applicable legislation and with hospital record making protocols in place at the relevant time. What became of the missing hospital records, when and why they were misplaced, is far from clear.

[219] What is clear is that Dr. Garfield's notes relating to Lina and the missing Hospital records were respectively disposed of and misplaced well before Dr. Garfield and/or the Hospital were put on notice of any claim to be made against them. Isaac's charts were noted missing and dummy charts created in the system (to facilitate billing the Ministry of Health for hospital services to Isaac) in December 2000 and February 2001. By the time Lina requested access to her own hospital stay records, they too were missing and she was advised that searches were underway to locate them.

[220] There can be no doubt but that both Dr. Garfield and Mount Sinai hospital are required to make and maintain records in keeping with the legislation and professional standards governing them. The plaintiffs assert that liability and/or adverse inferences should arise from the failure to comply with such record keeping standards.

[221] Quite apart from the fact that Isaac's outcome did not arise because of a failure to maintain records, his kernicterus having developed by Sunday afternoon, at a time when hospital and medical records were intact, there is no evidence suggesting, let alone establishing that a sufficient understanding of Isaac's situation has been materially impeded by the absence of all or any of the missing records.

Spoliation

[222] The plaintiffs assert that spoliation is defined as: "… the destruction of evidence, it constitutes an obstruction of justice. The destruction, or the significant and meaningful

alteration of a document or instrument. It is a maximum flaw, bearing chiefly on evidence but also upon the value generally of the thing destroyed, that everything the most to his disadvantage is to be presumed against the spoliator". (See Black's Law Dictionary as quoted in *Douglas v. Inglis Ltd.,* [2000] O.J. No. 1001 (Ont. Sup. Ct.) per Flinn J.).

[223] The plaintiffs also quote and rely upon authority arising from an appeal to the Saskatchewan Court of Appeal in which Tallis J.A. concluded that the "integrity of the administration of justice in both civil and criminal matters depends in a large part on the honesty of parties and witnesses. Spoliation of relevant documents is a serious matter. Our system of disclosure and the production of documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law… a party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial". See *Doust v. Schatz,* 2002 SKCA 129 (*CanLII)* at para. 27.

[224] The plaintiffs also assert that non-preservation of documents in contravention of a duty to preserve the documents, whether the result of intentional or negligent acts or omissions, raises the doctrine of spoliation and an adverse inference against the defendants. See *Cheung v. Toyota Canada Inc.* 2003 *CanLii 9439 (Ont. Sup. Ct)* per Low J..

[225] I agree with the defence submission that there is no evidence to support the allegation that the medical records of Lina and Isaac Vescio were "deliberately and/or intentionally" lost or destroyed by an individual in the employ of the Hospital to "cover up" acts or omissions and the identity of individuals in the care and treatment rendered to Isaac. Such an allegation was not put to any of the Hospital witnesses.

[226] Although I can accept the concept of spoliation as defined by the plaintiffs and that the concept was considered in the unique circumstances of the quoted cases, I have some difficulty in considering that this case should be determined on the basis of the reasoning and outcome of those cases.

[227] In *Rochon,* (supra), the alleged spoliator was an expert retained by the insurer of a home damaged by fire that was thought to have originated in a clothes dryer. The expert examined, removed and apparently damaged the dryer control components. Although subrogation litigation against the dryer manufacturer was not commenced until some years after the fire, it appears clear that the homeowner and his insurer were aware of the potential for a claim arising all along. Regardless, Flinn J. declined to apply the principle of spoliation, as he saw evidence available on both sides of the cause of loss debate. He stated, at para. 20, "In this case a few of the pieces of the dryer are missing. There are many photographs taken by both experts of the machine, the fire site and her clothing. There is the evidence of the two experts and indeed, the very controls that are alleged to have been defective are available for whatever inspection might be required. Consequently, there is evidence that the defendant may rebut.

Surely it is a matter of weight to be given to the experts' opinions, as these plaintiffs seek to prove liability."

[228] In *Doust*, (*supra*), the records in question went missing after the claim between the parties about the number and value of certain horses had materialized. The trial judge, at para.21, described the records as "recently destroyed documents which would have definitely determined the question". The appeal court was likewise cognizant of the time of destruction concern. The court added at para. 28 that, "given the nature of the controversy over the number of mares at the relevant time, Mr. Schatz with his length of experience in the PMU business clearly understood the importance of preserving relevant records for use on discovery and at trial. In this case his failure to preserve and produce the records hampered the trial process".

[229] In *Cheung*, (*supra*), a preservation court order had been made requiring the continuing availability of tires for evidentiary purposes in ongoing litigation. Indeed the order had been made in response to previously detected events of spoliation. The issue before Low J. was not whether the court should impose sanctions. Instead, Justice Low stated at para. 1 that, "The real issue is what sanction is appropriate, given the particular facts and the extent of prejudice to the three moving defendants and given that this motion is made prior to trial".

[230] Although the plaintiffs rely on cases in which records and other evidence were lost or destroyed, including one case involving lost hospital records, *Coriale v. Sisters St Joseph of Sault Ste. Marie* (1998), 41 O.R. (3rd) 347 (Gen Div) per Molloy J., the cases are distinguishable in that they involve known disputes at the time of the loss or destruction of the evidence. Many of the cases address pre-trial motions issues that are also distinguishable from the issues before me.

[231] In any event, the records that are in evidence serve to rebut any presumption that might otherwise apply, even if Dr. Garfield and/or the Hospital might be considered to have lost or destroyed records in a manner and at a time that creates an issue and otherwise supports a finding of spoliation. The Newborn Record and Isaac's re-admission and NICU Final Summary records contain confirmation of evidence, now adopted by Lina as accurate, that demonstrates that Isaac was feeding and behaving in a manner consistent with the clearance for discharge he was given following the visual and physical examinations made by Dr. Garfield and nurse Hua.

[232] Further, Drs. Fazal and Wainer opined clearly and without reservation that the documents they had seen, taken together with the facts they assumed would be made out upon the evidence of Lina and other lay witnesses, were ample foundations to support their opinions.

[233] Finally, and as indicated above, I am satisfied that the missing records would not likely contain evidence to support the view that Isaac's discharge should have been delayed. There is no suggestion that such records contained, for example, evidence of poor feeding. Such notations would be inconsistent with the available evidence.

[234] In the circumstances, I find no evidence that medical or hospital records generated in the ordinary course were disposed of in a manner intended to defeat claims asserted or even

anticipated to arise from Lina's pregnancy, labour and delivery or the care that either Lina or Isaac received thereafter.

[235] In the result and regardless of whether an independent tort of spoliation exists upon the current state of our law, this is not a proper case upon which to consider granting relief to the plaintiff based upon the doctrine of spoliation.

[236] Further, I cannot accept the submission that this is an appropriate case in which to draw an inference against the defendants or make a presumption in favour of the plaintiff that facts contained in missing charts and records would be unfavourable to the positions of the defendants.

[237] Again I note that the absence of records has not hampered the plaintiffs' experts in reaching their conclusions. The available records are sufficient in number, nature and content, when read in concert with the evidence of the very people who saw Isaac that day, to establish that Isaac was healthy, not jaundiced and was feeding well at the time of his discharge on Sunday.

Failure to Call Certain Witnesses

[238] The plaintiffs submit that an unfavourable inference can be drawn in circumstances where a party has failed to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not offer an explanation for the failure to do so. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

Sopinka & Lederman, *The Law of Evidence in Canada*, 2nd. ed. (Toronto: Butterworths, 1999) at 297.

[239] Specifically, the plaintiffs point to nurses, doctors and other health care specialists whose names are identified in the available hospital records and who were not called by the defendants at trial and assert that an adverse inference ought to be drawn from the failure to call these people.

[240] The Hospital asserts that witnesses who were not called were not available. One of the nurses, for example, was said to be a patient in a hospital herself during the trial. Another could not be located. One of the identified doctors now lives and is training in the United States. Further, there is no evidence from which I can discern whether any of these identified people would be material witnesses over whom either defendant has exclusive control.

[241] There is no ownership in a witness. The plaintiffs had alternative procedures open for exploration. They could have approached these individuals had they wished to or sought an

order allowing of examination of such people as non-parties before trial and could, in any event, have summonsed them to trial.

[242] I agree with the defence position that identified doctors were more available to Lina for consultation before or during the trial than to the defendants. Doctors cannot discuss care and treatment of patients, absent a court order or an appropriate consent from, or given on behalf of, the patient.

[243] The plaintiffs' experts did not express any concern that their opinions suffered on account of the absence of these potential witnesses. Many of the potential witnesses in fact did provide evidence; to the extent that their observations and opinions are contained in the available records entered as exhibits, their evidence is before me. I do not draw an adverse inference in these circumstances.

The Law – Standard of Care/Causation

Was there a Breach?

[244] There is remarkably little disagreement between and among the parties upon the state of the applicable law. It is generally accepted that the applicable standard of care is one requiring a medical doctor and any health care professional to both know and exercise that level of care and skill that would be expected of a normal prudent practitioner of the same experience and standing.

[245] As a general proposition, to make out a claim in negligence, it must be established that there was a duty of care, that this duty was breached, that there were damages, and that the damages were caused by the breach.

[246] There is no question that medical practitioners owe a duty of care to their patients. The question of whether there was a breach of this duty depends on the applicable standard of care.

[247] It is generally accepted that the applicable standard of care for any health care professional is the level of care and skill that would be expected of a prudent practitioner of the same experience and standing.

[248] The parties accept the following standard from *Wilson v. Swanson* (1956), 5 D.L.R. (2d) 113 (S.C.C.) at p. 120, quoting *Rann v. Twitchell* (1909), 82 vt. 79 at p. 84:

> He is not to be judged by the result, nor is he to be held liable for an error in judgment. His negligence is to be determined by reference to the pertinent facts existing at the time of his examination and treatment, of which he knew, or in the exercise of due care, should have known.

[249] Broadly speaking, the parties should agree that neither doctor nor nurse should be held accountable so long as the care and treatment that they provide is in keeping with a respected body of professional opinion. See *ter Neuzen, supra.*

[250] For the reasons I have detailed above, I must find that the exercise of clinical judgment by Dr. Garfield and by Nurse Hua at the time of Isaac's discharge from Mount Sinai Hospital fell within the standard of care required of each of them by our law.

Causation

[251] I have already found above that the defendants did not breach the duty of care owed to the plaintiffs. This in itself is determinative of the question raised in this case. See *Willliams (Litigation guardian of) v. Bowler,* [2005] O.J. No. 3323.

[252] However, even if there had been a breach of the duty of care, there is no evidence before me that would establish that this breach caused the damage suffered by Isaac.

[253] The plaintiffs bear the onus of establishing the defendants' negligence and that this negligence brought about the injuries complained of. Unlike many medical misadventure cases, this is not a case in which the actions of a doctor or nurse caused an injury that would not otherwise have occurred and nor is it a case in which the actions of the health care specialists obliterated the cause of patient's injury such that causation could not be established by the plaintiff.

[254] The most that can be said here is that there is a *possibility* that had Isaac remained in hospital, a problem would have been identified soon enough for the damage to have been reduced or avoided. This possibility comes nowhere close to satisfying either the "but for" or "material contribution" standards for causation.

[255] In *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289, Sopinka J. asked and answered the question of whether the plaintiff in a malpractice suit must prove causation in accordance with traditional principles or whether recent developments in the law justify a finding of liability on the basis of some less onerous standard.

[256] Causation was there defined to be "an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and any injury to the victim in order to justify compensation of the latter out of the pocket of the former" (p. 12).

[257] Sopinka J. concluded that "the legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced." (p. 15).

[258] The doctor in question in *Snell v. Farrell* performed an operation. The court observed that he "was present during the operation and was in a better position to observe what

occurred. Furthermore he was able to interpret from a medical standpoint what he saw. In addition, by continuing the operation which has been found to constitute negligence, he made it impossible for the respondent or anyone else to detect bleeding which is alleged to have caused the injury. In these circumstances, it was open to the trial judge to draw the inference that the injury was caused by the retrobulbar bleeding. There was no evidence to rebut this inference" (p. 21).

[259] In the instant case, the defendants did not alter the medical landscape for Isaac by permitting his discharge from Mount Sinai on Saturday. His medical condition changed not at all by reason of that decision nor as a result of the examinations leading to it. Both sides to the debate about the wisdom of the discharge decision had and continue to have the same facts available to them against which to measure the discharge decision.

[260] *Hock (Guardian of) v. Hospital for Sick Children*, (1998-01-30) ONCA c21778 is a case referred to and relied upon by the plaintiff in support of the proposition that causation need not be determined with scientific precision and an inference of causation may be drawn without scientific proof. Causation is a practical question of fact which can best be and usually is answered by ordinary common sense. Where, in a particular case, evidence of causation is in the hands of the defence, relatively little affirmative evidence on the plaintiff's part will be required to justify drawing an inference of causation, in the absence of evidence to the contrary. The trier of fact must weigh all the evidence and having done so, determine whether an inference adverse to the defence should be drawn on the issue of causation.

[261] *Hock* is a case of operative intervention preceding an unfortunate outcome. The Court of Appeal accepted the trial judge’s determination of negligence but declined to find that the negligence caused or materially contributed to the infant plaintiff’s injuries. Notwithstanding my determination that neither defendant has been shown to be negligent, it is important to also note that the link between alleged negligence and causation of Isaac’s outcome is also lacking.

[262] A case of closer application to the facts of the instant case may be that of *Aristorenas v. Comcare Health Services* (2006), 274 D.L.R. (4th) 304. Although the Ontario Court of Appeal was not unanimous in its reasoning, the court agreed upon the appropriateness of applying the robust and pragmatic approach set out in *Snell v. Farrell, supra.*

[263] Speaking for the majority of the court, Rouleau J.A. reviewed the development of the law of causation from *Snell v. Farrell* forward in time. Specifically, he contrasted application of the “but for” test to the “material contribution” test with the former obliging a plaintiff in a delayed medical diagnosis case to prove, on a balance of probabilities, that the delay caused or contributed to the unfavourable outcome. As such, the plaintiff fails if he cannot establish that the outcome could have been avoided with prompt diagnosis and treatment.

[264] A mere chance of avoiding an unfavourable outcome, that is a chance lower than the threshold described *in Cottrelle v. Gerrard* (2003), 233 D.L.R. (4th) 45 (Ont. C.A.) as “more likely than not”, is not enough.

[265] As to the application of the material contribution approach, Rouleau J.A. wrote: “Thus, it would seem that the "material contribution" test is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of logical or structural difficulties in establishing "but for" causation, not because of practical difficulties in establishing that the negligent act was a part of the causal chain.” (para. 53).

[266] Rouleau JA added in the following paragraph that: “The "robust and pragmatic" approach is not a distinct test for causation but rather an approach to the analysis of the evidence said to demonstrate the necessary causal connection between the conduct and the injury. Importantly, a robust and pragmatic approach must be applied to evidence; it is not a substitute for evidence to show that the defendant's negligent conduct caused the injury.”

[267] He added, at para. 56, “ It is important to note that Sopinka J. does not reduce the ultimate burden of proof from a balance of probabilities. Rather, the "robust and pragmatic" approach is adopted in evaluating the facts of the case and deciding whether they meet the civil standard. Put another way, the burden of proof is the same, but a series of facts and circumstances established by the evidence led at trial may enable the trial judge to draw an inference even though medical and scientific expertise cannot arrive at a definitive conclusion.”

[268] Negligence was conceded by the doctor in *Aristorenas* but the question remained as to whether that negligence caused the necrotizing fasciitis that the plaintiff went on to develop.

[269] The evidence on causation troubled the court. Even if a link between the disease ultimately developed and a delay in treatment of an infection is assumed, no witness considered or gave evidence as to the effect of the delay in performing the first treatment. The evidence supported various causes for the necrotizing fasciitis.

[270] As indicated above, I am not persuaded that there was any negligence on the part of either Dr. Garfield or the Hospital; nor am I persuaded, even if negligence were present, that it caused kernicterus. As was the situation in *Aristorenas*, there are many theories of causation and the evidence of the plaintiffs’ experts is flawed. An onus does not rest with the defendants to establish the cause of Isaac’s medical outcome. In meeting the claims of the plaintiffs, however, the defendants have led compelling evidence through credible and world renowned experts that establishes that factors other than those suggested by the plaintiffs led to or caused Isaac’s eventual outcome.

[271] Also apt is a closing comment offered by the court in *Aristorenas:* “One cannot help but have sympathy for the plight of the plaintiff. She suffered grievous injuries and proved serious acts of negligence on the part of professionals in providing what should have been basic routine wound care. But, on the current state of the law she did not make out causation”, para. 78.

[272] In the recent case, *Latin v. Hospital for Sick Children*, [2007] O.J. No. 13, Lax J. found at para. 131 that appropriate test for a case of delayed diagnosis and treatment was the “but for” test:

> “This is not a case where it is alleged that multiple harms have caused the injuries. In general terms, this is a case of delayed diagnosis and treatment. Therefore, the "but for" test applies. The precise cause of Ryleigh's injury is not known. The plaintiffs contend that Ryleigh suffered a hypoxic-ischemic brain injury as a result of decreased perfusion of her brain due to shock, fever and infection. This requires the plaintiff to prove on a balance of probabilities that she sustained this injury and but for the negligence of the nurses and Hospital, this would have been avoided. The plaintiffs are not required to prove the unprovable, i.e. what, as a matter of fact, would have happened if the defendants had followed a course of management which the plaintiffs' experts testified should have been followed. Inferences from the evidence, including expert evidence, can establish the causal link, but loss of a chance of a favourable outcome will not satisfy the plaintiff's evidentiary burden unless it surpasses the threshold of more likely than not.

[273] The Supreme Court of Canada re-visited the law on causation and the tests applicable to its determination in *Resurface Corp. v. Hanke*, [2007] S.C.J. No. 7. Chief Justice McLachlin confirmed that the law of causation has not changed; the “but for” test applies in all but special circumstances. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements (para. 25):

> First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.”

[274] Finally, on this issue, The Ontario Court of Appeal has very recently released yet another decision on causation. In *Barker v. Montfort Hospital*, [2007] O.J. No. 1417 (C.A.), the court dealt with an appeal arising from alleged negligence of a general surgeon who managed and eventually operated on a patient who developed a bowel twisting problem. A section of bowel was ultimately removed but, at trial, no expert was asked for or gave an opinion on whether the removed section would have been alive and salvageable at the time the surgery ought to have been performed.

[275] The court concluded therefore that surgery performed sooner would have afforded the patient a chance of avoiding the outcome she actually experienced but that that did not satisfy the requirement of showing that earlier surgery would, more likely than not, have avoided the injury.

[276] Following consideration and specific reference to the decision in *Henke, supra,* Rouleau J.A. stated at pp. 10-11:

> "In the present case, the respondents have not shown that it was impossible to prove that the delay in carrying out the operation caused Ms. Barker's injury on a balance of probabilities…the evidence that was led and that generally addressed the point at which the bowel likely died was unfavorable to the respondents…. in my view, therefore, the material contribution test has no application to the present case. We are left, therefore, with the "but for" test…There is a complete absence of medical or other evidence from which to infer that, but for the delay in operating, a section of the bowel would likely have been saved".

[277] In the circumstances of this case, neither the "but for" nor the "material contribution" standard has been met. There is no credible evidence before me to support the finding that had Isaac remained in hospital, his outcome would have been different.

[278] At its best, the plaintiffs' case is that but for the alleged negligence of the defendants, there may have been a chance that Isaac's hyperbilirubinemia could have been diagnosed and treated to produce a different, perhaps a more favourable, outcome. Given the current state of the law and the evidence before me, I must conclude that the plaintiffs have not met their onus to prove causation.

Conclusions

[279] As I indicated at the outset, I am mindful of the tragic and omnipresent consequences to Isaac and to each member of his family arising from the kernicterus that Isaac suffered at such a tender age. Perhaps proceeding to and through the trial of this action has been cathartic for the family; but at the very least, the Vescios can now take comfort in the knowledge that every evidentiary stone has been upturned.

[280] In closing, I thank counsel for their assistance and patience in helping me ascend the learning curve of issues and evidence in this case, particularly in matters medical. The parties have each and all been particularly well represented by their respective counsel in this long and difficult trial. Counsel have vigorously, professionally and effectively represented the best interests of their clients and they have unfailingly and willingly afforded each other and the court the highest levels of co-operation and civility, in the best traditions of the Bar. Their preparation and presentation has been exceptional and most welcome.

[281] The action is dismissed against both defendants with costs to the defendants, if demanded, in amounts to be agreed upon or fixed. Should the parties be unable to agree on costs issues, I will receive brief written submissions on costs and may request that counsel make oral submissions thereafter.

_____

Moore J.

Released: July 3, 2007

COURT FILE NO.: 03-CV-245266CM2
DATE: 20070703

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ISAAC VESCIO, BY HIS LITIGATION GUARDIAN LINA VESCIO AND LINA VESCIO PERSONALLY

Plaintiffs

- and -

DR. HARTLEY A. GARFIELD, DR. JOHN DOE and MOUNT SINAI HOSPITAL

Defendants

REASONS FOR JUDGMENT

Moore J.

Released: July 3, 2007

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wet'suwet'en Treaty Office Society v. British Columbia (Environmental Assessment Office),* 2021 BCSC 717

Date: 20210420
Docket: S201338
Registry: Vancouver

Between:

Wet'suwet'en Treaty Office Society

Petitioner

And

Executive Director of the British Columbia Environmental Assessment Office and Coastal Gaslink Pipeline Ltd.

Respondents

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for Wet'suwet'en Treaty Office Society:	C. DiPuma D.J. Larkin
Counsel for Coastal Gaslink Pipeline Ltd.:	K. O'Callaghan T. Ahmed M. Grist
Counsel for Executive Director of the British Columbia Environmental Assessment Office:	K. Wolfe A. Caron
Place and Dates of Hearing:	Vancouver, B.C. October 1, 2 and 16, 2020
Place and Date of Judgment:	Vancouver, B.C. April 20, 2021

Introduction and issues

[1] The Wet'suwet'en Treaty Office Society, ("OW") applies for judicial review of the October 15, 2019 decision ("Decision") of the executive director ("Executive Director") of the Environmental Assessment Office ("EAO"), granting a five-year extension to an environmental assessment certificate ("EAC") for the Coastal GasLink Pipeline Project ("Project").

[2] The Project is a 675-km-long natural gas pipeline intended to run from near Groundbirch, B.C. to a liquefied natural gas export terminal at Kitimat, B.C. Coastal Gaslink Pipeline Ltd. ("CGL") is currently in the process of constructing the Project. The OW is a non-profit society established as a central services office for the Wet'suwet'en Nation and is governed by the Wet'suwet'en hereditary chiefs. The Project passes through the asserted traditional territories of the Wet'suwet'en Nation.

[3] The OW seeks an order quashing the Decision and remitting it back to the EAO and Executive Director for further consideration. CGL supports the Decision. The issues to be determined are whether the Decision:

a) was procedurally unfair as reasons were not provided;

b) was unreasonable in its treatment of CGL's compliance record; and

c) was unreasonable in its treatment of Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls ("Inquiry Report").

[4] At the outset, it is important to identify what this judicial review is not about. This review is not about what the OW did or did not do in the consultation process for the extension application, nor about its objection to the Project generally. The OW's actions are not in issue. Nor is this review about the undeniable importance of the Inquiry Report in further understanding the harms and systemic causes of

violence against Indigenous women and girls and other vulnerable populations. All parties accept the importance of the Inquiry Report.

[5] The OW no longer relies upon an argument, originally advanced in its petition, that one of the issues concerning the Inquiry Report raises a "question of law of central importance to the legal system" that must be reviewed by this Court on a standard of correctness.

[6] The Executive Director as represented by the Attorney General of British Columbia appeared in this matter pursuant to ss. 15(1) and 16(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The response to petition filed on behalf of the Executive Director included argument on the merits of the issues to be determined. It did so because at the time the response was filed, the Executive Director was the only respondent. CGL was subsequently added as a respondent. At this hearing, the Executive Director withdrew those portions of his response, and in keeping with the limited role of a decision-maker appearing on judicial review, appropriately confined his submissions: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44; *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494.

Statutory framework and the EAO

[7] At the date of the Decision, the applicable legislation was the former *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EAA*]. The *EAA* has since been repealed and replaced by the *Environmental Assessment Act*, S.B.C. 2018, c. 51, [*Current EAA*] but the new legislation is not relevant to this proceeding.

Purposes of the *EAA* and EAO

[8] The purpose of the *EAA* is to regulate the significant environmental, economic, social, heritage and health effects of proposed reviewable projects by identifying those effects and determining ways to mitigate them. The *EAA* "balances the need for environmental protection against encouraging economic development": *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 at paras. 99-100.

[9] The EAO is the regulatory agency charged with administering the *EAA*. The EAO is responsible for: determining the need for and conducting environmental assessments for reviewable projects; and ensuring compliance with and enforcement of environmental assessment certificates. The organizational structure of the EAO reflects these two functions, with two separate branches responsible for those areas: *Sierra Club of BC Foundation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 596 [*Sierra Club*] at paras. 51 and 57.

Applications for environmental assessment certificates

[10] A project proponent is responsible for bringing a reviewable project to the EAO's attention. If the Executive Director considers that a project may have significant adverse environmental, economic, social, heritage or health effects, the Executive Director may issue an order requiring the project to undergo an environmental assessment before the project may proceed: s. 10(1)(c) of the *EAA*. If an assessment is required, the Executive Director must make an order which will determine the scope and procedure for the assessment: s. 11. The EAO then conducts a review of the application, which may include engagement with scientific professionals, Indigenous groups, the public, local governments, and federal and provincial agencies. Based upon the information received during the review, the EAO produces an assessment report and if applicable, proposes conditions for the environmental assessment certificate. The EAO's assessment report and any recommendations of the Executive Director are provided to the responsible provincial ministers who decide whether to grant an environmental assessment certificate, and if so, with or without conditions.

[11] If an environmental assessment certificate is issued, the proponent must not carry on activity except that which is in compliance with that certificate: s. 8(2). The EAO's Compliance and Enforcement Policy and Procedure guide ("Compliance Policy"), defines certificate conditions as "legally-binding requirements…to which the certificate holder must adhere throughout the life of the project".

Applications for extension certificates

[12] The duration of an environmental assessment certificate, and the ability to apply for a one-time extension of a certificate, are addressed in s. 18 of the *EAA.* The relevant portions of that section state:

> 18 (1) An environmental assessment certificate must specify a deadline, at least 3 years and not more than 5 years after the issue date of the certificate, by which time the holder of the certificate, in the reasonable opinion of the minister, must have substantially started the project.
>
> (2) However, the holder of an environmental assessment certificate may apply in writing to the executive director for an extension of the deadline specified in the environmental assessment certificate, stating why the proponent wishes an extension of the deadline.
>
> (3) On receipt of an application under subsection (2), the minister or the executive director must complete a review of
>
> (a) the application, and
>
> (b) the reasons given under subsection (2),
>
> in accordance with any procedure determined by the minister or the executive director to assess the proposed extension.
>
> (4) The minister or the executive director may
>
> (a) extend the deadline specified in the environmental assessment certificate, on one occasion only, for not more than 5 years, or
>
> (b) refuse to extend the deadline.

[13] In *Glacier Resorts Ltd. v. British Columbia (Minister of Environment)*, 2019 BCCA 289 at paras. 51-52, Mr. Justice Groberman, speaking for the majority, discussed the rationale for the substantially start deadline:

> [51] The legislation itself balances proponents' desires to build infrastructure and developments with the broader interests of the public in protecting the environment. It provides for intensive study of projects before a certificate is issued allowing them to go ahead. It protects proponents by allowing them to proceed with projects that have been "substantially started" within the deadline set by the certificate.
>
> [52] The legislation, however, is also mindful of the fact that environmental science progresses. The perceived impact of a proposed project may change over time, not only due to changes in public attitudes, but also due to increasing knowledge of the harm caused by certain types of development. Further, the character of a development site may change substantially over time. Finally, advances in technology may result in more effective mitigation measures becoming available. It would be unwise to allow long-delayed

> projects to proceed based on reports and conditions that have become outdated.

[14] There is no statutorily prescribed form for extension applications. In April 2016, the EAO published a guidance document entitled, Requesting a Certificate Extension ("Extension Guide"). The Extension Guide states that the minister has the authority, under s. 37 of the *EAA*:

> …to add new conditions to a certificate if the project is not substantially started by the deadline specified in the certificate. This allows conditions to be updated if required.

The Extension Guide further states:

> When considering a request, the Environmental Assessment Office (EAO) considers such things as the rationale for requiring an extension, the certificate holder's compliance record, and new or changed potential significant adverse effects.

[15] The Extension Guide indicates that on receipt of an extension application, the EAO will: circulate the extension request to appropriate agencies, governments and Indigenous groups to provide advice to the EAO on the potential for new or changed adverse effects not anticipated at the time of the original assessment; consider comments received and resolve issues as required; provide the holder of the certificate an opportunity to respond to comments where appropriate; and refer the application to the Executive Director or minister for a decision on whether to grant the requested extension, and if so, whether additional or revised conditions are required.

[16] Guidance documents such as the Extension Guide are not legislation and do not fetter the discretion of a statutory decision maker: *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 at pp. 6-7. In this case, the *EAA* grants the Executive Director or minister the discretion to extend or refuse applications, after reviewing the "application" and "why the proponent wishes an extension of the deadline": s. 18(2). The Extension Guide is part of the factual context that, along with the purpose of the *EAA*, animates those requirements.

[17] The Executive Director may delegate his or her powers and duties under the *EAA* to certain persons: s. 4. In September 2016, the Executive Director delegated his duty under s. 18(3) to complete reviews of extension applications to a number of EAO staff, including those involved in CGL's application.

Compliance and enforcement

[18] Part 5 of the *EAA* concerns enforcement of environmental assessment certificates and sanctions that may be imposed to address non-compliance.

[19] Pursuant to the Compliance Policy, EAO officers may inspect a project, and if there is non-compliance, may issue an advisory or warning. The minister may make an order to cease an activity, or remedy non-compliance: s. 34. The *EAA* provides for other escalating sanctions. The minister may also amend or attach new conditions, suspend, or cancel an environmental assessment certificate where the minister has reasonable and probable grounds to believe that the certificate holder is in default of one or more requirements of a certificate: s. 37. The relevant portions of s. 37 state:

> 37 (1) For any of the reasons listed in subsection (2), the minister by order may
>
> (a) suspend all or some of the rights of the holder of an environmental assessment certificate under the certificate or cancel an environmental assessment certificate, or
>
> (b) amend or attach new conditions to an environmental assessment certificate.
>
> (2) The reasons referred to in subsection (1) are as follows:
>
> (a) the holder of the environmental assessment certificate does not substantially start the project by the deadline specified in the certificate;
>
> (b) the minister has reasonable and probable grounds to believe that the holder of the certificate is in default of
>
> (i) an order of the Supreme Court made under section 35, 45 or 47,
>
> (ii) an order of the minister made under section 34 or 36 (2),or
>
> (iii) one or more requirements of the certificate; …

Background of application and extension application for the Project

Application for the EAC for the Project

[20] In October 2012, CGL submitted its application for an environmental assessment certificate. Subsequently, the Executive Director issued an order requiring an environmental assessment certificate for the Project, and the Executive Director's delegate issued an order setting out the scope and procedures for the assessment. This order established a working group ("Working Group"), which included representatives of federal and provincial agencies, local governments, and Indigenous groups to provide advice to the EAO and CGL on issues within the scope and mandate of their respective organizations. The OW participated in the Working Group. On October 23, 2014, the Minister of Environment and the Minister of Natural Gas Development issued EAC (#E14-03) along with reasons. The EAC authorized CGL to construct the Project subject to 32 conditions.

Extension application for the Project

[21] Pursuant to the terms of the EAC, CGL was required to substantially start the Project by October 23, 2019. In April 2019, CGL applied to the Executive Director for an extension of the substantial start deadline ("Extension Application"). CGL does not admit that it did not substantially start by the deadline. No specific procedure was directed by the Executive Director or minister pursuant to s. 18(3) to assess the Extension Application, however as noted previously, the EAO has published the Extension Guide.

[22] In early June 2019, the EAO contacted members of the original Working Group regarding the Extension Application and proposed a schedule for the assessment process. Thereafter, between June and September 2019, the OW, CGL and the EAO exchanged numerous letters, submissions, and responses regarding issues raised by the OW. The OW objected to an extension.

[23] Each of CGL and the EAO prepared a tracking table to list and track the issues raised by Working Group members and the responses provided by CGL and

the EAO ("CGL Tracking Table" and "EAO Tracking Table", collectively referred to as the "Tracking Tables").

[24] Another document that requires identification arises out of a sub-set of the exchange of submissions beginning with a letter from the OW which asks 67 questions, and which was discussed in a subsequent telephone meeting between representatives from the EAO, the OW, and the Oil and Gas Commission ("OGC"). The EAO provided its written response to these questions, also in the form of a table, and which included responses from the OGC ("Response Document").

[25] On September 13, 2019, the EAO provided the OW with a draft of the EAO's evaluation report to the Executive Director, along with the Tracking Tables, and indicated its intention to refer the report to the Executive Director at the beginning of October 2019. The EAO invited comment from the OW. Subsequently the OW reiterated its position that the Extension Application should not be granted. The EAO finalized its report to the Executive Director ("Evaluation Report").

[26] In the Evaluation Report, the EAO provides a brief history of the issuance of the EAC and notes that documents relating to the assessment are on EPIC. EPIC is a government website, accessible to the public, for projects reviewed by the EAO, and which provides links to associated documents. The EAO cites the relevant statutory provisions and describes the Project and activities to date, and the reasons why CGL wants to extend the EAC. The EAO describes the review process that took place and the responses from agencies and Indigenous groups and references the Tracking Tables and the Response Document. The EAO states that it considered the rationale for requiring the extension, CGL's compliance record, and new or changed potential significant adverse effects that would require revisions to the EAC, Certified Project Description, or Table of Conditions. Most of the Evaluation Report addresses specific concerns raised by the OW and Dark House, a Wet'suwet'en house. This includes sections on CGL's compliance record and the Inquiry Report. The Evaluation Report concludes with a summary and a recommendation that the Extension Application be granted.

The Decision

[27] On October 15, 2019, the Executive Director issued the Decision. No new conditions were added to the EAC. The Executive Director did not provide formal reasons for the Decision. After recitals noting the relevant sections of the *EAA*, the Decision states:

> The Executive Director has fully considered the reasons for the Certificate Holder's application and any comments received from agencies and Indigenous Nations.
>
> NOW THEREFORE
>
> Pursuant to Section 18(4) of the Act, the Executive Director extends the date specified in the Certificate by which the Certificate Holder must have substantially started the Project to October 23, 2024.

The record

[28] The parties agree that the Evaluation Report, the Tracking Tables, and the Response Document were provided to the Executive Director for the purpose of deciding whether to grant the Extension Application, and form part of the record. The OW and the EAO also filed affidavits on this review. The parties agree those affidavits are admissible. CGL filed an affidavit of Mr. Kevin Wyman, and argues that the information contained within it should also form part of the record. The OW objects to most of this affidavit.

[29] In *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 BCCA 387 [*Air Canada*], the Court discussed that while usually only the record before the decision-maker is considered, there are circumstances where a court may need evidence of the decision-maker's own expertise or experience which informed the decision, or evidence of procedures followed to assess procedural fairness: paras. 34-37. The "key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court": para. 39. An affidavit containing "general background information" will be admissible if it is what the decision-maker "actually knew or acted upon" or if it serves to "educate the court on matters that are within the specialized expertise of a tribunal", but it must not "simply seek to shore up weaknesses in the record": para. 40. The evidence must be neutral

"non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case" before the decision-maker, but must "not engage in spin or advocacy": para. 41, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 45.

[30] I agree with the parties that the two affidavits filed by the OW and the one affidavit filed by the EAO (which are largely duplicative of each other) are admissible within the principles in *Air Canada*.

[31] With respect to the affidavit of Mr. Wyman, the OW argues that it is an attempt to introduce evidence that: is inconsistent with the evidence CGL provided to the Executive Director; is not general background information, and goes beyond that which was before the Executive Director to bolster CGL's position in relation to the merits of the Extension Application and this judicial review; and post-dates the Executive Director's Decision and therefore was not considered by him.

[32] CGL argues that the affidavit: contains factual context for the Decision, much of which is already in the record; facilitates the Court's understanding of the EAO's expertise and its supervision of the Project, and how its processes have worked following the Decision; is relevant to the statutory framework; is relevant to determining the remedy should the Court decide the Decision was unreasonable; and does not prejudice the OW as the material is largely publicly-available.

[33] I find that the paragraphs of Mr. Wyman's affidavit to which the OW objects, along with the documents referred to in those paragraphs (except to the extent they are already included in the three other affidavits), are not admissible for the following reasons. Paragraphs 17, 22-26, 84-86 and 88 are evidence concerning: attempts by CGL to engage the OW in the development of the Socio-Economic Effects Management Plan ("SEEMP") both before and after the Decision; the blockades of the Project; and attempts by CGL to engage the OW regarding the Extension Application. As stated at the beginning of these reasons, the OW's conduct is not in issue in these proceedings. Paragraphs 27-33 are evidence regarding steps CGL

has taken regarding the management of socio-economic effects before and after the Decision, although some of the information, such as the existence of certain policies, is already in admissible documents. Paragraphs 35-37, 40-66, 68-69, 71, 74, and 82-83 are evidence regarding CGL's explanation for the non-compliance findings, and evidence of compliance, before and after the Decision, although some of this information is already in admissible documents. This further evidence, if admitted, would be used for advocacy and to bolster the Executive Director's Decision. Finally, events after the Decision are not relevant as they cannot provide justification for the Decision.

[34] I turn first to the procedural fairness issue.

Procedural fairness legal principles

[35] The parties agree that no deference is owed to the Executive Director on the issue of whether there was procedural fairness. I agree that the standard of review is correctness, which is sometimes referred to as "fairness": *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission),* 2021 BCCA 67 at para. 57.

[36] There is a general common law duty of procedural fairness imposed on every public authority making an administrative decision which is not of a legislative nature, and which affects the "rights, privileges or interests of an individual": *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at p. 653; *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at paras. 38-39. Purely ministerial decisions on broad grounds of public policy, or legislative functions, will not typically result in a duty of procedural fairness: *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at pp. 628-629; *Canadian Union of Public Employees v. Canada (Attorney General)*, 2018 FC 518 at paras. 126-130.

[37] When a person is entitled to procedural fairness, the extent and content of that duty is flexible and depends on the legislation and rights affected in all of the circumstances of the case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], at paras. 21-22. A non-exhaustive list of

factors that inform the content of the duty of fairness is: the nature of the decision and the process followed in making it; the legislation; the importance of the decision to the person affected; the legitimate expectations of the person challenging the decision; and the choices of procedures made by the decision-making agency: *Baker* at paras. 23-28.

[38] In certain circumstances, the duty of procedural fairness will require the provision of a written explanation for the decision: *Baker* at para. 43. Factors that militate in favour of requiring written reasons are: the person has participatory rights in the decision-making process; an adverse decision would have a significant impact on that person; or there is a right of appeal: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], at para. 77. Where reasons are not given, the record as a whole may be examined to determine the reasons: *Vavilov* at paras. 94 and 137. In *Baker*, the Court accepted the notes of a reviewing officer as being the reasons and stated at para. 44:

> …Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary…when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. …

Issue 1: procedural fairness and the provision of reasons

[39] It is not in dispute that the Executive Director owed the OW a duty of procedural fairness. The issues are: whether the content of that duty extended to the provision of an explanation or reasons for the Decision; and if there was such a duty, whether that duty was fulfilled.

[40] On this last issue, both parties refer to *Sierra Club*, so I will briefly outline the facts of that case. *Sierra Club* also concerned the *EAA* and a judicial review of the Executive Director's orders exempting an owner of two dams from the requirement to obtain environmental assessment certificates. At paras. 66-69, the Court

addressed the argument that the Executive Director did not provide reasons for the orders. The orders issued referenced Summary Evaluation Reports prepared by the EAO for the two dams, and confirmed the conclusion that the dams will not result in adverse environmental, economic, social, heritage or health effects. The Court found that the Summary Evaluation Reports explained why the Executive Director reached his decision.

Position of OW

[41] In its petition, the OW argues that the Evaluation Report represents the reasons, and in the alternative, if the Evaluation Report is not the reasons, the Decision lacks reasons and is in breach of the Executive Director's duty of procedural fairness. The OW argues it was owed reasons because: its rights, privileges and interests were affected; the Decision was final and specific with respect to whether to extend the EAC and apply any conditions; since 2012, the EAO has engaged extensively with the OW in relation to the Project, including compliance and the Extension Application; and the Decision was important to the OW given the special relationship the Wet'suwet'en Nation has to the lands on which the Project is being constructed, and the harms identified by the Inquiry Report.

[42] Despite its position in its petition that the Evaluation Report represents the reasons, the OW argues that it is not clear that the Evaluation Report is the reasons. The OW argues that the only rationale given in the Decision is the one recital, quoted above, that the Executive Director "has fully considered the reasons for the Certificate Holder's application and any comments received from agencies and Indigenous Nations". While the OW acknowledges that the Tracking Tables and the Response Document provide those comments, and there is a link between the Decision and those documents, the Executive Director did not make any findings or draw any conclusions regarding those comments. The OW distinguishes this case from the circumstances in *Sierra Club*, and argues that because the Decision does not reference the Evaluation Report, there is no nexus, "nor any means of confirming that the executive director's reasons for granting the extension are the same" as

those set out in the Evaluation Report. Further, unlike *Sierra Club*, the Decision did not "confirm the conclusion(s)" set out in the Evaluation Report. Finally, unlike *Sierra Club*, there is no indication that the Executive Director was "alive to the issues".

Position of CGL

[43] CGL argues that the Executive Director's duty of procedural fairness owed to the OW was minimal and did not require written reasons because: the Decision was a "ministerial-type" of decision which should be given deference; the "administrative renewal" of the already-approved Project is discretionary; and the statutory requirements and scope of an extension application are narrower than an original application for a certificate. Further, while the Executive Director did not provide formal reasons, the OW received procedural fairness as it was extensively engaged by the EAO in the Extension Application process, and the record which was given to the Executive Director includes the Evaluation Report, which by itself and with the remainder of the record, provides a thorough explanation as to why the Executive Director reached his Decision. CGL relies upon *Sierra Club* and argues that the EAO's Summary Evaluation Reports in that case are analogous to the Evaluation Report in this case. CGL argues it is illogical to suggest that the Executive Director did not consider the very report created for the sole purpose of supporting his decision-making.

Analysis

[44] The OW is a group whose important interests are affected by the Extension Application. The Project passes through the asserted traditional territories of the OW. The Inquiry Report addresses potential harms to Indigenous women and girls that are correlated with work camps. The EAO engaged extensively with the OW in recognition of its interests in the Project. While the scope of issues for consideration on an extension application may be more limited, this does not limit the interests of OW in those issues. The Decision was not ministerial, but nor was it the result of an adversarial, adjudicative process between two competing parties. The Decision was made pursuant to legislated requirements where the sole applicant was CGL and

where the EAO sought comments from interested persons. There is no statutory requirement in the *EAA* requiring reasons for a decision on an extension application, nor does the OW assert that the EAO made a representation that reasons would be provided.

[45] For the above reasons, I conclude that the Executive Director's duty of procedural fairness owed to the OW for the Extension Application includes a duty to provide an explanation for the Decision with respect to the concerns raised by the OW, but this duty does not extend to the provision of written reasons.

[46] I am unable to accede to the OW's argument that there is no nexus between the Evaluation Report and the Decision. The Evaluation Report states:

> To inform the Executive Director's decision on whether to extend the EAC, the EAO considered the Certificate Holder's rationale for requiring an extension, their compliance record, and new or changed potential significant adverse effects that would require revisions to the EAC, CPD [Certified Project Description], or TOC [Table of Conditions] to address these new potential adverse effects.
>
> [Emphasis added.]

[47] The Executive Director delegated his authority to review the Extension Application to certain EAO staff. It would make little sense that the report made with that delegated authority, and created to inform the Executive Director's Decision, would not be used by him in making his decision.

[48] In its cover letter delivering the reasons, the EAO stated that the Evaluation Report (referred to below as the Extension Report) was reviewed by the Executive Director, and after doing so, he decided to extend the deadline in the EAC:

> On October 15, 2019, after reviewing the extension request and the EAO's Extension Report, Kevin Jardine, the Executive Director of the Environmental Assessment Office, has decided to extend the deadline specified in the EAC to October 23, 2024….
>
> [Emphasis added.]

[49] There is another nexus. The Decision states in its recital that:

> The Executive Director has fully considered the reasons for the Certificate Holder's application and any comments received from agencies and Indigenous Nations.
>
> [Emphasis added.]

[50] The comments from Indigenous nations and agencies (including those of the EAO) were summarized in the Evaluation Report, and further details were provided in the Tracking Tables and Response Document, which were referenced in the Evaluation Report. There is no indication anywhere in the record that the Executive Director disagrees with the Evaluation Report, and he followed the EAO recommendation.

[51] In my view, the only reasonable conclusion to draw from the above facts is that the Executive Director adopted the Evaluation Report, and as supplemented by the Tracking Tables and the Response Document, as the explanation or reasons for his Decision. I find that to the extent there was a duty to provide an explanation for the Decision, this duty was fulfilled by those documents, which address each of the OW concerns raised on this petition. I find there was no breach of the duty of procedural fairness owed to the OW.

[52] I turn next to the review of the Decision on the basis of reasonableness.

Reasonableness review legal principles

[53] The parties agree that on the issues raised, the applicable standard of review for the Decision is reasonableness. In the leading case of *Vavilov*, the majority discussed the guiding principles for conducting such a review.

[54] The review is concerned with the hallmarks of "justification, transparency and intelligibility" within the decision-making process, and whether the decision is defensible in the context, including the facts and law. The court must consider whether the decision, including the rationale and the outcome, was unreasonable: paras. 83-87.

[55] The burden is on the party challenging the decision to show that it is unreasonable. There must be "sufficiently serious shortcomings" before a decision is considered unreasonable: para. 100. Where reasons are given, they are the starting point of the analysis: para. 84. Reasons are not assessed against a standard of perfection: paras. 91 and 128. In cases where no reasons are given, the court "must look to the record as a whole to understand the decision: para. 137.

[56] There are two types of fundamental flaws. The first is where the decision shows a failure of an internally coherent reasoning process. This is not a "line-by-line treasure hunt for error", but the court must be able to find a "rational chain of analysis". The reasons should be read with "due sensitivity to the administrative regime" in which they were given: paras. 100-103.

[57] The second type of flaw is where the Decision is in some respect untenable in the context of the relevant facts and law: paras. 105-107. Factors to consider may include: the governing statutory scheme (the decision must "ultimately comply" with the statutory scheme); other relevant statutory or common law (for example, precedent); principles of statutory interpretation; the evidence before the decision maker (the reviewing court must refrain from "reweighing and reassessing" the evidence, but the decision must be reasonable in light of the evidence); the submissions of the parties before the decision maker (the decision maker need not "respond to every argument", but must "meaningfully grapple with key issues or central arguments"); past practices and past decisions; and the impact of the decision on the affected individual (the greater the consequences, the more the reasons must reflect that the decision maker has considered the consequences and they are justified): paras. 108, 125-128, and 133-135.

[58] Even if the outcome of a decision could be reasonable under different circumstances, if the reviewing court finds an unreasonable chain of analysis or a fundamental flaw, it is not open to the court to disregard those errors and substitute its own justification for the outcome: para. 96.

[59] It is important to distinguish between a reasonableness review and a correctness review. The court "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem". Instead, the court considers "only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable": para. 83.

[60] Before addressing whether the Decision was unreasonable in its treatment of CGL's compliance record and the Inquiry Report, I note that the OW makes an argument that is closely related to its argument on procedural fairness, but recast in a reasonableness framework. In summary, the OW argues that there is no nexus between the Decision and the Evaluation Report, and it is therefore impossible to determine whether the Decision was based on a rational chain of reasoning. As a result, the Decision is unreasonable. As I have already found that the Executive Director's Decision adopted the Evaluation Report, I do not agree with this argument.

[61] I will turn now to whether the Decision was unreasonable in its treatment of CGL's compliance record.

Issue 2: reasonableness of the Decision concerning CGL's compliance record

[62] The OW argues that the Executive Director's Decision to grant the extension is unreasonable as it fails to meaningfully account for CGL's demonstrated history of non-compliance with the conditions of its EAC.

[63] There are four documents that address the compliance issues. I will first review the relevant portions of those documents, and then the arguments of the OW and CGL.

Inspection reports

[64] The OW and CGL referred in detail to the inspection reports. As the OW argues that some of the findings in the Evaluation Report are not supported by the facts, I will summarize those portions of the inspection reports where there was found to be non-compliance.

[65] The findings of non-compliance concern:

a) January 2019: pre-construction investigative works, which came within the definition of "construction" in the EAC, carried out prior to the submission of plans, and which had been remedied by the time of the inspection report;

b) February 2019: a self-identified delay of seven days in a yearly self-report; a self-identified mapping error that resulted in plant habitat assessments not being completed at 15 sites, which was being corrected, and which resulted in an order to refrain from construction in those areas in advance of those assessments being completed; and a failure to notify trap-line holders at least six months prior to carrying out activities, which resulted in an order to cease activities within that area until proper notification had been provided;

c) March 2019: Indigenous persons had been denied access to their trap-lines on one day, and the EAO noted that heightened tensions may have impeded effective communication between CGL staff and the Indigenous persons;

d) April 2019: a failure to securely install geotextile fabric and sideboards to the top of a bridge deck; an improperly installed sediment fence which did not fully contain potentially contaminated soil; and at a camp which had been in operation for two days, failure to install proper bear-proof garbage receptacles, with garbage not properly secured;

e) June and July 2019: food waste was not stored in bear-proof containers, which resulted in the EAO issuing an order requiring CGL to securely dispose of or manage wildlife attractants; a camp was not enclosed by an electric fence to deter bears, and this took three months to rectify; and

f) October 2019: at a helicopter refueling area, a fuel spill kit was not in the immediate area; a contaminated soil disposal bin was covered but did not have a sealed lid; a containment tray beneath a used oil-tank was filled with rain water, when there had been a heavy rain fall just prior to the inspection; various waste bins contained some waste that should not be there, for example, a bin labeled for cardboard contained a plastic garbage bag. All of these were rectified.

[66] Except where the three orders are noted, all of the instances of non-compliance resulted in an advisory or warning from EAO compliance officers.

Tracking Tables

[67] Both Tracking Tables note comments from the OW and Dark House that CGL has not been compliant with EAC conditions. I will summarize those notations in the Tracking Tables that form the basis of the OW's arguments.

[68] The CGL responded that: it was committed to compliance and is focused on continuous improvement of its monitoring and inspection programs; it was implementing the Construction Monitoring and Community Liaison Program, in accordance with one of the EAC conditions and continues to invite the OW to participate in the program, and was available to discuss any concerns; and that it "considers this focus on compliance of the Project to be a separate matter from the request to extend the EAC Certificate".

[69] The EAO responded that: its compliance and enforcement branch had completed multiple inspections in 2018 and 2019 and orders were issued for any areas where CGL was found to be out of compliance; the inspection reports are publicly available on EPIC; the EAO routinely works with Indigenous groups in the conduct of compliance and enforcement activities within their territories and is open to further engagement; and it will continue to undertake inspections and be responsive to complaints.

Response Document

[70] The OW and CGL identified 12 of the 67 questions that focused on compliance. In summary, the responses of the EAO are similar to those set out in its Tracking Table. In addition, the EAO confirmed that: it would consider CGL's compliance record in assessing the Extension Application; it conducts regular inspections, and in the event of noncompliance, issues enforcement to bring the Project into compliance; inspections to date "have identified a range of noncompliance, as recorded in the inspection records"; if non-compliance is ongoing, it "engages in progressive enforcement"; and compliance with regulatory requirements "is the expectation" and it holds CGL accountable for compliance. The EAO agreed no compliance and enforcement program can ensure 100% compliance, and that one of the objectives of the Indigenous Relations Program is to facilitate the flow of information and their involvement to increase the effectiveness of compliance and enforcement.

Evaluation Report

[71] The Evaluation Report states the following regarding compliance:

> 5.1.4 Compliance with the EAC
>
> Concern regarding the Certificate Holder's compliance with conditions of the EAC were raised by Indigenous Nations, in particular by Office of the Wet'suwet'en. In 2018 and 2019, Office of the Wet'suwet'en brought to the attention of the EAO multiple allegations of non-compliance with the EAC including those related to investigative works, wildlife incidents, access management, firearms policy cultural sites and archeological values.
>
> The EAO's C&E has treated these allegations as complaints and conducted compliance inspections in accordance with the Compliance and Enforcement Policy and Procedure, and made associated compliance determinations. The EAO notes that the EAC non-compliances identified on CGL, have been rectified, or are in the process of being rectified by the Certificate Holder. Given the currently available compliance records (not considering the ongoing compliance determinations where a decision has not been made), the EAO has found that the Certificate Holder was prompt in responding to remediation orders issued by the EAO. In addition, on several occasions the Certificate Holder has self-identified potential non-compliant activities and reported on their actions to rectify the non-compliance.
>
> In subsequent dialogue with Office of the Wet'suwet'en the EAO reaffirmed a desire to continue to work with Office of the Wet'suwet'en regarding CGL

> compliance. The EAO identified opportunities for Office of the Wet'suwet'en to be further involved in compliance activities (such as monitoring compliance, participation in field inspections, receiving information on completion of remediation orders) through the C&E's Indigenous Relations Liaison Program. Condition 30 of the EAC also requires the Certificate Holder to provide opportunities for representatives from Indigenous Nationals to participate in construction monitoring within their traditional territory. The certificate Holder states that they have developed a Construction Monitoring and Community Liaison Program and are engaging with Indigenous groups to identify participants.
>
> In consideration of the compliance concerns raised during the review of the Extension Application, the EAO is satisfied that despite instances of non-compliance, the Certificate Holder has demonstrated a commitment to remediation and returning to compliance.

Position of OW

[72] The OW argues that an extension application "is the one opportunity in the life of a project" for the EAO to consider a certificate holder's compliance history as a whole, and to determine whether in light of that history, the Project should proceed at all or if conditions should be added to ensure better compliance.

[73] The OW argues that although the inspection reports form part of the record for this judicial review, it is unclear whether they were actually reviewed by the EAO. This is because, before filing this petition, the OW wrote to the EAO to request the record relied upon for the Evaluation Report. In response, the EAO advised that the Evaluation Report provides links to the various records, which are all public documents on EPIC. The links in the Evaluation Report did not go to the inspection reports. The OW argues that if the EAO did not review its own inspection reports, its conclusions cannot be reasonable. The OW acknowledges that the Evaluation Report refers to "the available compliance records" which is inconsistent with the EAO not having the inspection records. OW argues this discrepancy does not reflect a transparent or coherent chain of analysis.

[74] The OW argues that the conclusion to be drawn from the collective content of the Tracking Tables and the Response Document is that: the OW raised the instances of non-compliance and asked for confirmation these would be considered;

the EAO acknowledged OW had raised compliance issues, had conducted "point-in-time" inspections, and had identified a range of noncompliance, and that this would be considered; and CGL asserted an ongoing commitment to compliance and took the view that non-compliance is "a separate matter from the request to extend" the EAC. The OW argues that the Executive Director did not clarify his position on CGL's view, and therefore failed to grapple with a critical issue.

[75] The OW's main argument is that the inspection reports show that CGL has an established pattern of non-compliance, and that the Executive Director failed to grapple with what the OW characterizes as significant and frequent non-compliance and a lack of self-reporting. The OW argues that the Evaluation Report fails to analyze the compliance record and provides no rationale for the approval of the extension in light of that history. The OW submits there is no reference to the nature, timing, or frequency of the non-compliance, nor a weighing of this evidence, which could provide a chain of reasoning that justifies the outcome. The OW acknowledges that not every compliance finding had to be addressed, but argues that on the whole, there had to be an explanation. Instead, the OW argues that the EAO's focus was on its desire to continue to work with the OW on compliance issues and opportunities for the OW to "be further involved in compliance activities". While this may be desirable, it is not logically connected to the EAO's consideration of CGL's compliance record.

[76] Further, referring to specific inspection reports, the OW argues that where the Evaluation Report does attempt to address CGL's compliance record, the EAO's conclusions that CGL had been "prompt in responding to remediation orders" and "demonstrated a commitment to remediation and returning to compliance" are not justifiable on the facts.

Position of CGL

[77] CGL disagrees that the Extension Application was the "one opportunity in the life of the Project" for the EAO to impose additional conditions as a result of non-compliance. Pursuant to s. 37 of the *EAA*, the EAO can impose new conditions at

any time that one of the circumstances listed in subsection (2) are in existence, which includes non-compliance with a certificate. Further, under s. 34, the minister can impose orders to cease or remedy if a reviewable project is not being carried out in accordance with an environmental assessment certificate.

[78] CGL argues that the non-compliances that the OW have emphasized were appropriately addressed under Part 5 of the *EAA*. The EAO has continued to monitor compliance and retains jurisdiction to impose sanctions, or add certificate conditions, throughout the Project's construction if there is non-compliance. The thrust of the OW's argument appears to be that the Executive Director should have exercised his discretion to refuse to grant the Extension Application or add conditions as a form of sanction. This submission ignores Part 5 of the *EAA*. A decision to grant more time to complete an already-approved project under Part 3 of the *EAA* is "separate and distinct" from Part 5. However, these two distinct parts of the *EAA* "are not mutually exclusive and may run at the same time": *Sierra Club* at para. 51.

[79] CGL argues that it is clear that the EAO was aware of the inspection records. In preparing the Evaluation Report, the EAO considered "the EAC non-compliances identified", which are published on EPIC.

[80] CGL argues that EAO's treatment of CGL's compliance record was reasonable given the applicable factual and legal context. The Evaluation Report, Tracking Tables and the Response Document show that the EAO meaningfully considered the nature of the non-compliances, and CGL's commitment to compliance. These are reasonable factors to consider and provided a rational justification for the Decision. The conclusion that CGL had rectified or was committed to compliance was reasonable based on the facts. The Project has been under close scrutiny by the EAO, and the subject of numerous inspections since 2018. Instances of non-compliance have ranged from minor to more serious issues. CGL has implemented corrective measures in response, and the instances of non-compliance that the OW refers to must be considered in the context of the overall scale of the Project and granularity of the inspections. Of all the inspections, at the

time of the Decision, CGL had received three orders to remedy, and the EAO had never resorted to more significant enforcement measures. The vast majority of enforcement measures were at the low end of sanctions, being advisories or warnings, and were proportionate to the infractions being minor. The Evaluation Report indicates the EAO was satisfied by CGL's compliance efforts.

Analysis

[81] I do not accept the OW's argument that the EAO may not have had the inspection reports. I see no reason to conclude that publicly available documents on the EAO's own website were not available and reviewed, especially when the Evaluation Report, EAO Tracking Table and Response Document refer to the inspection reports and/or findings in those reports.

[82] I also do not agree with the OW's argument that because CGL stated in its Tracking Table that non-compliance is "a separate matter" from the Extension Application, the Executive Director failed to grapple with what the OW characterizes as a critical issue. It is clear from the Evaluation Report that the EAO considered compliance history to be a relevant factor, and did consider it, despite what may have been meant by CGL's comment.

[83] I do not agree with the OW that the Evaluation Report fails to analyze the compliance record and provides no rationale for the approval of the Extension Application. Both the frequency and nature of the non-compliances are addressed in the statement that there were "multiple allegations of non-compliance with the EAC including those related to investigative works, wildlife incidents, access management, firearms policy, cultural sites and archeological values". Further, the Evaluation Report concludes that: the non-compliance which had occurred had been addressed by the enforcement process; and CGL was committed to compliance, and had either rectified or was in the process of rectifying any non-compliance. In light of the legislative context which provides for inspections and escalating sanctions, and given the scope of the Project, these are relevant factors and explain the EAO's conclusions regarding the OW's compliance concerns. I do not agree with the OW

that instead of analyzing the non-compliances, the EAO focused on how the OW could become more involved with compliance. In my view, the EAO was simply extending the opportunity to the OW to become more involved in a compliance program if the OW wished.

[84] I have reviewed the inspection reports in the record for the limited purpose of considering OW's argument that there is no evidence to support the conclusions in the Evaluation Report. It is not the function of the court, on a judicial review for reasonableness, to reweigh the evidence. I do not agree with the OW that the conclusions in the Evaluation Report are not supported by the inspection reports. There is ample evidence in the inspection reports to support the EAO's conclusion that non-compliances "have been rectified, or are in the process of being rectified", and that CGL "was prompt in responding to remediation orders".

[85] In summary, with respect to CGL's compliance record, the OW has not established that the outcome of the Decision is unreasonable or that there were fundamental flaws in the reasoning process. I find that the explanations as set out in the Evaluation Report and as supplemented by the Tracking Tables and Response Document, are justified, transparent and intelligible.

[86] I turn next to whether the Decision was unreasonable in its treatment of the Inquiry Report.

Issue 3: reasonableness of the Decision concerning the Inquiry Report

[87] The OW's final argument is that the Executive Director's Decision to grant the extension is unreasonable because it does not meaningfully account for the potential harms and recommendations identified in the Inquiry Report.

[88] There are several documents that are relevant to the Inquiry Report. I will first review those documents and then the arguments of the OW and CGL.

EAC assessment and Ministers' reasons

[89] The 2014 EAO assessment report recommending the EAC shows that the EAO assessed the Project's social effects, which included effects on community utilities and services and community quality of life, as well as economic effects and health effects. In the Ministers' reasons for granting the EAC, the Ministers noted that the "main construction camps for the Project will be located near several northern communities" and that "several concerns were raised…that the Project could result in increased demands on community utilities and services, heath care, waste management facilities, housing and accommodation, and social services". The Ministers stated they were:

> … satisfied that the condition for the development of a Socio-Economic Effects Management Plan (SEEMP), which will include monitoring activities to inform management of potential cumulative socio-economic effects relating to pipeline construction and other projects will suffice to manage those concerns. …

Condition 24 and the Framework

[90] Condition 24 of the EAC requires CGL to develop and implement a SEEMP in accordance with a framework ("Framework") which is attached to the Table of Conditions. Condition 24 states that:

> The SEEMP must include specific actions to address the following:
>
> - implementation of mitigation set out in [certain sections of the original EAC application, being section 12 (economic impacts) and section 15 (infrastructure and services)];
> - effective consultation planning and implementation with affected Aboriginal Groups, local governments and service delivery agencies regarding effects related to community level infrastructure and services including water, waste (solid and liquid), health and social services;
> - approach to designing and communicating programs related to employment and contracting opportunities, skills training and education;
> - monitoring and reporting on the effectiveness of the mitigation set out in the Application and in the SEEMP; and
> - if necessary, description of an adaptive management approach, including the implementation of alternative mitigation, <u>to address unpredicted effects directly related to the Project</u>.
>
> …

> Any amendments to the SEEMP as a result of the adaptive management approach must be developed in consultation with CSCD [Ministry of Community, Sport and Cultural Development] and approved by EAO prior to implementation, unless otherwise authorized by EAO.
>
> [Emphasis added.]

[91] The Framework describes what the SEEMP should contain and how it should be developed, approved, monitored, and if necessary, amended. It is evident from this document that the SEEMP: is intended to address socio-economic effects, with a focus on infrastructure and services; is "intended to be adaptable to the emergence of new information"; must include an adaptive management process which includes mitigation measures to address "effects not previously identified"; may be amended; and that stakeholder engagement is an important aspect of the plan. The certificate holder will initiate the amendment process with the approval of the EAO and in consultation with affected parties (p. 5).

SEEMP

[92] In March 2016, the EAO approved CGL's SEEMP. Its purpose is described as follows (p. 2):

> The purpose of the SEEMP is to engage identified parties in Coastal GasLink's approach to implementing mitigation during construction to avoid or reduce potential adverse socio-economic effects on regional and community infrastructure and services as presented in the Application for an Environmental Assessment Certificate (Application), and monitor and report on the effectiveness of the mitigation. Coastal GasLink will use an adaptive management approach, where required, if monitoring indicates that the mitigation is not achieving the predicted outcome, and include any new or revised mitigation in its reporting. The SEEMP also describes Coastal Gaslink's plans to engage with identified groups during implementation of the SEEMP, including the issues management and adaptive management approaches during construction.

[93] The identified groups consulted include provincial ministries and agencies (including advanced education, skills training, police, and victim services), local governments, and Indigenous groups (pp. 11-13).

[94] The SEEMP identifies potential adverse socio-economic effects, which in addition to other effects focused on community infrastructure and services, include: limited local participation in contract opportunities; a local skilled labour shortage and lack of time to train local workers; increased demand on police, health and social services; increased demand for education services; and reduction in available housing (pp. 9-10 and Appendix D).

[95] Specific examples of mitigations for the above identified effects are listed in an appendix, and include: a procurement strategy for Indigenous and local contractors; a CGL skills training program; communication with police in advance of construction; communication with local housing providers regarding housing options; communication with training service providers to develop local skilled workers; housing the temporary workforce in construction camps with appropriate recreational facilities; and appropriate worker and contractor policies, such as for exhibiting respectful conduct in the community (Appendix D).

[96] In the SEEMP, CGL states that all its employees and contractors are subject to "TransCanada" policies and programs. (CGL is a wholly-owned subsidiary of TransCanada PipeLines Limited.) These policies and programs are stated to align with the mitigations in the above appendix and include an: Aboriginal Relations Policy; Alcohol and Drug Policy; Duty to Accommodate Policy; Employee/Visitor/Contractor Health, Safety and Environment Orientation Program; Employment Equity and Non-Discrimination Policy; Harassment-Free Workplace Policy; Incident Management System Program; Community Partnership Plan; Education and Training Plan; and Local and Aboriginal Participation Plan (pp. 7-8).

[97] With respect to baseline information for monitoring mitigation effectiveness for adaptive management, the SEEMP states that CGL "carried out studies to establish baseline information from which reasonable predictions of the potential adverse effects" were made for the original EAC application, and which were supplied in the EAC application's Social Technical Report and Economic Technical Report. Sources of monitoring data include qualitative and quantitative data collected by CGL (p. 26):

> Internal data collection, such as Diversity and Local Spending Data, provides statistics on items such as local and Aboriginal spending, workforce diversity and community investment spending. Data collected from Internal Incident Reports and Statistics include incident severity, type of incident, location, time of day and cumulative statistics on incident frequency rates. The internal Incident Reports also include qualitative data, such as incident details, causes and recommendations for corrective action.

[98] Other sources of monitoring data identified are stated to include Engagement Records, Education and Training Spending Data, Education and Training Partnership Reports, Health and Safety Audits, Inspection Monitoring Data, Camp Residency Data and Camp Policies Review, along with input from various educational, employment, and Indigenous groups (Appendix D).

[99] The SEEMP states CGL will use adaptive management where monitoring results indicate that outcomes are not as predicted and new or modified mitigations may be needed (p. 27). If a previously unidentified issue arises, the issues management process will be used. With respect to the issues management process, the SEEMP states (p. 16):

> Issues identified will be addressed in alignment with Coastal GasLink's approved Aboriginal Consultation Plan or Public Consultation Plan located on the EAO's website. If an unpredicted adverse effect is shown to be directly related to construction, the adaptive management process… may be implemented.

Inquiry Report

[100] On June 3, 2019 the Inquiry Report was released. The Inquiry was tasked with investigating violence against Indigenous women, girls, and 2SLGBTQQIA people, and identifying practices that have been effective in reducing violence and increasing safety (p. 58, vol. 1a). Chief Commissioner Marion Buller described the violence as a "national tragedy" (p. 5, vol. 1a). Commissioner Michèle Audette stated the Inquiry Report sheds light on a crisis that, though "identified long ago, we have been slow to examine in depth" (p. 7, vol. 1a).

[101] The Inquiry Report contains "deeper dives" into particular topics, one of those being resource extraction projects. In summary, the Inquiry Report found evidence of

a "correlation between resource extraction projects and violence against Indigenous women, girls, and 2SLGBTQQIA people (p. 593, vol. 1a). The increased rate of violence is "largely the result of the migration into camps of mostly non-Indigenous young men with high salaries and little to no stake in the host Indigenous community". Industries that create "boom towns" and "man camps" have "increased rates of drug- and alcohol-related offences, sexual offences, domestic violence, and gang violence, as well as sex industry activities" in the host communities, which disproportionately impact Indigenous women, girls, and 2SLGBTQQIA people. These groups also "do not have equitable access to the economic benefits" of these industries. Indigenous women face barriers to participating in the extraction industry due to work environments where there are "elevated rates of workplace racism, sexual harassment, and violence", and that are often far from law enforcement and largely unpoliced. The nature of the work, in particular shift-work in isolated locations, "deters women from participating" as it is not compatible with family and meaningful community life. When women are employed, it is often in low-paying jobs. The creation of a boom town "often results in high rates of inflation and an increased cost of living in the host communities", which disproportionately impacts Indigenous women.

[102] The Inquiry Report made a number of "Calls for Justice" related to the resource extraction and development industries. In summary, these include: for industry to consider the safety and security of these groups and their equitable benefit from such projects; for governments and bodies mandated to approve and/or monitor development projects to complete "gender-based socio-economic impact assessments", which must include mitigations of the risks and impacts identified; for impact-benefit agreements related to projects to include provisions that address the safety and security of these groups and to ensure that these groups equitably benefit from the projects; and for industry, governments and service providers to anticipate and address increased demand on social infrastructure and services and to have mitigation measures in place (p. 196 vol. 1b).

[103] As noted in the Inquiry Report, governments are not required to implement the recommendations of the Inquiry Report, nor does the Inquiry Report resolve individual cases or declare people legally at fault (p. 60, vol. 1a).

Tracking Tables

[104] The Tracking Tables contain comments from both the OW and Dark House regarding the Inquiry Report. The OW: noted the recommendations around temporary housing for resource extraction projects and the missing and murdered women along the "Highway of Tears" (Highway 16); stated the SEEMP was being disregarded "as the complaints are getting violent in nature"; and requested inclusion of the Inquiry Report recommendations. Dark House was concerned about a work camp near a healing lodge where there would be vulnerable people, and noted the Inquiry Report's conclusions regarding work camps.

[105] CGL's responses to the OW and Dark House were similar. CGL responded that potential socio-economic effects associated with the Project were assessed in the original application for the EAC and in a 2017 amendment to the EAC. (I note that amendment is not the subject of this petition.) Mitigations were developed to address the potential effects, and form part of the SEEMP. CGL acknowledged the concerns regarding work camps, and set out the steps it had taken for security and safety, such as a "zero-tolerance" approach to harassment, and rules and guidelines for CGL and its contractors regarding harassment-free workforce accommodations and work environments. With respect to the work camp identified, this included policies setting: zero-tolerance for the possession of firearms, possession and use of illegal drugs, recreational cannabis, and alcohol on the premises; and workers being tested for drugs and alcohol prior to hiring. CGL had put in place: security guards to enforce workforce safety and accommodation rules 24 hours a day, seven days a week; fencing around the camp to prevent human/wildlife interactions; and security personnel stationed at the entrance to control access in and out of the work camp and prevent all unauthorized persons from accessing the site. Under the heading "issue resolution status", CGL stated that the "comments raised relate to potential

effects from the workforce accommodation which were already assessed as part of the EAC Application and are therefore outside the scope of the EAC Extension", however, it was available to work with the OW and Dark House to review any concerns. CGL noted that Dark House and the OW had not been responsive to their invitations to do so.

[106] The EAO stated in the EAO Tracking Table that it had responded to the OW concerns in previous correspondence and continued to be open "to facilitate the required dialogue for ensuring that any important information related to the safety of communities and individuals is shared in a timely manner and to identify potential updates to the [SEEMP]". In response to the Dark House concerns, the EAO stated that it had directed CGL to respond to the concerns related to the proximity of the healing lodge to the work camp, including mitigation measures proposed to minimize risks. CGL had responded with the key mitigation measures and would engage further with Dark House to discuss concerns.

Response Document

[107] The OW and CGL identified two of the 67 questions that focused on the Inquiry Report. In response to what the EAO was going to do about the Inquiry Report recommendations, the EAO responded that it "held a series of workshops in the province regarding the impact of construction camps to Indigenous groups" and the report from these workshops will be provided to the OW. Further, that "Condition #24 allows for the incorporation of new information via updating SEEMP" and this was previously addressed in their correspondence to the OW.

Evaluation Report

[108] The Evaluation Report states the following regarding the Inquiry Report:

> 5.2.2 Construction Camps
>
> Office of the Wet'suwet'en and Dark House expressed concern regarding potential impacts to their members, including women and girls, from industrial construction camps in their territory and referred to the federal report *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. The EAO is aware that

> B.C. has committed to developing a 'path forward' to ending violence against Indigenous women and girls. This path is being developed in collaboration with survivors, family members and communities and not only addresses the inquiry's Call for Justice, but also historic, B.C.-specific recommendations previously provided to government. This work is closely aligned with government's commitments to reconciliation and the implementation of the UNDRIP. It is also complementary to government's commitment to ensure gender equity is reflected in the provincial government's budget, policies, and programs.
>
> This summer, representatives from across government ministries reviewed the Calls for Justice and past recommendations to determine current progress in addressing systemic causes of violence and recommended solutions, as well as preliminary priorities and opportunities for additional action. Several Indigenous-led, community-based engagements will take place across the province to determine community priorities and opportunities for collaboration. This work will result in the identification of recommendations for government to build a path forward to end violence and inform the creation of an interim response to the final report.
>
> The Certificate Holder also provided a summary of their key mitigation measures in relation to a construction camp in Office of the Wet'suwet'en and Dark House territory (Camp 9A). The EAO response referred to the condition #24 SEEMP requirements to implement, monitor and report on the effectiveness of mitigation set out in the Application and in the SEEMP. There is also a requirement for adaptive management and implementation of alternative mitigation if unpredicted effects directly related to CGL were identified. To meet the requirements of condition 24, the EAO requested that the Certificate Holder consider in the SEEMP how effects related to industrial development, including construction camps, on Indigenous communities including women, children and other vulnerable populations, will be identified and addressed and how Indigenous Nations will be engaged in the identification and monitoring of potential social impacts. The EAO receives semi-annual SEEMP reports in alignment with summer and winter construction seasons during the construction phase. The EAO reviews these reports and posts them on EPIC. Additionally, the Certificate Holder pointed to their Issues Management Process described in section 3.4.2 of SEEMP. This process requires the Certificate Holder to engage SEEMP contacts identified in section 3.1 of the SEEMP including all Indigenous groups and report to the EAO on the results of engagement.
>
> In consideration of the issues raised and commitments made by the Certificate Holder and the requirements of the EAC, the EAO is satisfied that a potential approval of the extension request would not have consequences that could not be appropriately addressed by the existing provisions of the EAC.
>
> [Emphasis added.]

[109] The relevant conclusion in the Evaluation Report states:

> That material changes in circumstances relevant to the Extension Application have not occurred since the original EA that could affect the EA conclusions or require revisions to the EAC, CPD [Certified Project Description] and TOC [Table of Conditions].

Position of OW

[110] The OW reiterates its argument that the Extension Application is the "one opportunity in the life of the Project" to assess new or changed potential significant adverse effects and add conditions to the EAC. The harms identified in the Inquiry Report were unknown or undetected at the time of the original EAC assessment. The Extension Guide identifies new potential adverse effects as a factor that the EAO will consider, and which is at the heart of the EAO's legislative mandate.

[111] The OW argues that there is a conflict between the OW's position that the Extension Application should address the Inquiry Report, and CGL's view (as expressed in the CGL Tracking Table) that these concerns were already assessed and therefore "are outside the scope of the EAC Extension." The OW argues that the Executive Director did not grapple with this conflict and there is no way to know whether he considered the Inquiry Report to be within the scope of the Extension Application or not, and the Decision is therefore unreasonable.

[112] In the OW's correspondence with the EAO during the application process, it asserted that the EAO has a legal obligation to conduct a gender-based socio-economic impact assessment arising from the Inquiry Report. At this hearing, the OW acknowledged that the Inquiry Report does not create new legal obligations or change the legislative framework, nor was the EAO bound to implement the recommendations of the Inquiry Report. However, the OW argues that this did not absolve the EAO from considering the Inquiry Report given that decision makers must make decisions in light of the relevant legal and factual context. The OW characterizes the Inquiry Report as a "sea change" in society's understanding of violence against Indigenous women and girls and 2SLGBTQQIA people.

[113] The OW argues that the Inquiry Report made findings of fact and recommendations that "bear directly" on the reasonableness of the Decision. The OW argues that public inquiries: find facts; may shift public opinion; may form the impetus for administrative assessment and action; and are routinely considered in assessing the reasonableness of an administrative decision. A decision may be unreasonable where a decision maker does not adequately consider the context provided by such findings. As commissions of inquiry do not make findings in relation to a particular person or entity, this is why the EAO should have undertaken an assessment specific to the Project.

[114] The OW's main argument focuses on the conclusion in the Evaluation Report that approval of the Extension Application would not have consequences that "could not be appropriately addressed by the existing provisions of the EAC". The OW argues this is an unreasonable conclusion as the SEEMP generally, and the adaptive management process in particular, do not and cannot address the harms identified in the Inquiry Report. There are three prongs to this argument.

[115] The first prong is that there is no evidence that the Inquiry Report harms were identified or assessed by a study at the time of the original EAC application. Further, the SEEMP was not intended to, nor does it address, the types of harms identified in the Inquiry Report. The SEEMP is focused on community infrastructure and services as a result of population increases from projects and camps, and the monitoring and mitigation of potential harms related to these issues. The OW refers to passages in the documents discussed above, in support of this argument. The OW refers to CGL's zero-tolerance policies and physical security measures, which focus on work camps, and argues that the harms articulated in the Inquiry Report are not so limited, leading to mitigation measures which are not responsive to all of the harms. The OW argues that the EAO "fundamentally misapprehended" the nature of the harms articulated in the Inquiry Report.

[116] The second prong of the OW's main argument is that neither the issues management process, nor the adaptive management process within the SEEMP,

nor an amendment to the SEEMP, are appropriate to address the harms and cannot be used as a substitute for the assessment that was required. These processes only require CGL to record and review issues brought to their attention and follow up with the initiator, but have no binding requirement to mitigate. Further, those issues need only be within the scope of the SEEMP, which the OW argues is limited to infrastructure and services.

[117] The OW argues that adaptive management is a mechanism to manage remaining uncertainty after an assessment has been done, thus allowing a project to proceed. It has no application where there is a vacuum of knowledge regarding a potential harm and measures that could mitigate it. Adaptive management requires predicting potential adverse impacts, monitoring the actual impacts, assessing actual outcomes, and then checking whether those results support the predicted outcomes and adjusting the project if outcomes are worse than predicted. There is no baseline information from which to make predictions of potential adverse effects. The OW argues adaptive management cannot be a "general commitment to do something when and if it becomes necessary": *Re Coalspur Mines (Operations) Ltd.*, 2014 ABAER 4 at para. 78. In describing adaptive management, the OW also refers to: *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 [*Pembina*] at para. 32, *Re Stannus and British Columbia (Director, Environmental Management Act)*, [2018] B.C.E.A. No. 11 at para. 178; *Bay of Fundy Inshore Fisherman's Assn v. Nova Scotia (Minister of Environment)*, 2016 NSSC 286 at para. 58, and 2017 NSSC 96 at para. 47; and *Toews v. British Columbia (Director, Environmental Management Act)*, [2015] B.C.E.A. No. 25 at para. 137.

[118] Finally, the third prong of the OW's main argument is that the EAO's reliance on B.C.'s "path forward" and the work of various government ministries to review the Calls for Justice is irrelevant. Reliance on such external and aspirational endeavours to the exclusion of conducting its own impact assessment is outside the EAO's legislative mandate and authority. The EAO must assess the harms with respect to this Project. While the EAO's comments on the path forward may have been

intended to assuage the OW concerns, such comments do not excuse the EAO from properly considering each of the factors it was required to assess.

Position of CGL

[119] CGL refers to the wide discretion of the Executive Director under s. 18(3) of the *EAA*. Unlike the *Current EAA* (which does require gender-based impact assessments), neither the *EAA* in force at the time, nor the Inquiry Report, impose a legal obligation on the EAO to conduct a gender-based impact assessment as alleged by the OW during the Extension Application. Regardless, the Evaluation Report shows that the EAO did consider the Inquiry Report, and considered it seriously and reasonably. CGL argues that given the assessment of socio-economic effects which had already been assessed at the time of the original application for the EAC, and the existing structure and flexibility of the SEEMP, the EAO's conclusion that the Inquiry Report could be addressed through the SEEMP and that further conditions were not required, was rational and reasonable.

[120] CGL addresses the three prongs of the OW's main argument. First, CGL argues that the purpose of the SEEMP, as understood by the EAO, is much broader than community infrastructure and services. Like the OW, CGL refers to passages in the documents above, in support of its position that the SEEMP is not so limited. CGL argues that the SEEMP is intended to address a wide range of potential adverse socio-economic effects, and it is flexible enough to address the potential harms identified in the Inquiry Report. CGL points to the EAO's response to the concerns from Dark House, and the EAO directing CGL to respond, and argues this is an example of how the EAC and SEEMP work to adapt to new risks identified. The EAO and CGL were already taking steps within the existing structure of the SEEMP to address those concerns.

[121] Second, CGL argues that the EAO's conclusion that the adaptive management process within the SEEMP can be used to identify, assess, and manage potential harms identified in the Inquiry Report, is consistent with the principles of adaptive management. The record, including the recommendation of

the Executive Director for the original EAC application, shows that the socio-economic effects relating to the Project and construction camps had been assessed, although the harms identified in the Inquiry Report were not singled out. CGL refers to specific policies, data sources, monitoring, and mitigations described in the SEEMP in support of that conclusion. Mitigation measures are already in place for broader harms. CGL acknowledges that those do not address everything in the deeper dive in the Inquiry Report, and there will need to be further analysis through the adaptive management process and in consideration of the Inquiry Report, but the structure and many mitigation measures are already present. The SEEMP recognizes that potential adverse socio-economic effects "might change over time" and the SEEMP was expressly created "to adapt mitigation to those situations in collaboration with…communities", which would include the OW.

[122] Adaptive management responds to the difficulty or impossibility of predicting all of the consequences of a project. Courts have recognized that some level of uncertainty should not paralyze entire projects: *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage),* 2003 FCA 197 [*Canadian Parks*] at para. 24; and *Pembina* at paras. 32 and 56. Adaptive management permits projects with uncertain, yet potentially adverse effects to proceed based on flexible management strategies capable of adjusting to new information regarding adverse impacts.

[123] Further, a key component of the SEEMP is engagement with local governments, communities, and Indigenous groups to identify new issues and monitor mitigation implementation. The SEEMP requires that if a previously unidentified issue arises, affected parties will be engaged in the issues management process. Adaptive management is generally focused on what is measured already but the issues management process allows new issues to be considered.

[124] Third, with respect to the EAO referring to the government's path forward, CGL argues that this in itself does not give rise to a legal error: *Greenpeace Canada v. (Attorney General)*, 2016 FCA 114 [*Greenpeace*] at para. 76. By referring to the

government steps, the EAO was indicating that the Inquiry Report was being taken seriously and was assuaging the OW concerns, but the EAO was not relying upon this. Instead, the next paragraphs of the Evaluation Report show that the EAO was addressing the Inquiry Report through the SEEMP and had directed CGL to consider the Inquiry Report in order to meet the requirements of condition 24.

Analysis

[125] I do not accept the OW's argument that because CGL stated in its Tracking Table that "potential effects from the workforce accommodation … were already assessed as part of the EAC Application and are therefore outside the scope of the EAC Extension", that the Executive Director failed to grapple with a critical issue. It is clear from the Evaluation Report that the EAO considered the Inquiry Report to be a potential new or changed effect, and did consider it.

[126] As for the factual and legal context, commissions of inquiries find facts: *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 at para. 62. Findings of commissions of inquiry have been considered in assessing the reasonableness of administrative decisions: *Thomas v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 838 at paras. 59-69; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 86. However, commissions of inquiry do not impose binding legal obligations on government, regulators or industry: *Alexis Nakota Sioux Nation v. Canada (Aboriginal Affairs and Northern Development*), 2006 FC 721 at para. 8; *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at p. 460; and *R v. Doyle*, 2007 BCCA 587 at paras. 11-13. Further, there is no specific legal obligation under the *EAA*, to carry out a gender-based impact assessment.

[127] There is no dispute that the Inquiry Report and its Calls for Justice are matters of significant importance to our governments and the people of Canada. The Inquiry Report has contributed to the understanding of the systemic causes of this serious problem. The Inquiry made recommendations to help end the violence. The

findings in the Inquiry Report are relevant, but there are no findings with respect to the Project.

[128] The Evaluation Report does not state that the Inquiry Report is not a new adverse effect and that it would not be considered any further. Nor does the Evaluation Report state that no further mitigations are required. In my view, the Evaluation Report concludes that: the Inquiry Report was a new or changed potential adverse effect; the socio-economic effects associated with construction camps and the Project had been addressed in the original application for the EAC and by the SEEMP; and that the SEEMP was the appropriate tool to address the Inquiry Report, and through which further mitigations would be put in place, if required. I conclude this because the Evaluation Report: references specific existing mitigations that address many of the systemic causes of violence identified in the Inquiry Report (e.g. drug and alcohol, and harassment policies) and the adaptive management process in the SEEMP used to address unpredicted social effects; and states that to meet condition 24, the EAO had requested CGL to consider in the SEEMP how effects related to industrial development and construction camps, on Indigenous communities including women, children and other vulnerable populations, will be identified and addressed, and how Indigenous Nations will be engaged in the identification and monitoring of potential social impacts.

[129] The OW's first argument suggests that the Extension Application was the one and only time the Inquiry Report could be addressed, and that the approval of the Extension Application without further conditions, has effectively closed the door on further consideration of it. In light of the above, I do not agree with this argument. The EAO had already required CGL to address the Inquiry Report through the SEEMP and this was taking place whether or not the extension was granted.

[130] The OW also argues that the EAO "fundamentally misapprehended" the harms. In support of this argument, the OW referenced the EAO's response to the Dark House concerns regarding proximity of its healing lodge to a work camp. In my

view, the EAO was addressing that specific concern, and this does not show that the EAO had a limited understanding of the harms.

[131] The main issue is whether it was unreasonable, in the factual and legal context, for the EAO and by extension the Executive Director, to conclude that the potential adverse effects as discussed in the Inquiry Report, and as they may relate to the Project, could be appropriately addressed by the existing provisions of the EAC, and in particular the SEEMP including its new issues and adaptive management processes.

[132] I disagree with the OW that the SEEMP is focused only on community infrastructure and services and therefore cannot address broader socio-economic harms. The SEEMP is intended to address socio-economic effects, and while it is stated to be focused on community infrastructure and services, and there is much in the SEEMP that does address those two subjects, a detailed reading of the SEEMP shows that it also addresses other socio-economic effects. The EAC and SEEMP identified many of the same systemic causes of adverse effects as those identified in the Inquiry Report. For example, there are mitigations which address personal behaviour, safety, and security. The SEEMP: specifically itemizes existing policies on harassment, drug and alcohol use, firearms, discrimination, and employee behaviour; discusses the need to have adequate recreational facilities within camps; identifies that community services such as policing may need to be increased; and sets out specific mitigations related to all of these. Condition 29 requires cultural awareness training at the request of an Indigenous group. The SEEMP addresses economic concerns that: local contractors and Indigenous groups be able to access the economic benefit of the Project through employment and contracting opportunities; there may be a need for skills training in the local workforce to access those opportunities, and to enable CGL to hire locally (thus benefiting local people and also limiting newcomers); and housing availability and affordability may be affected. These systemic economic issues were also identified in the Inquiry Report

as being systemic economic issues that are correlated with violence against Indigenous women and girls, and 2SLGBTQQIA people.

[133] However, the concerns and mitigations identified in the SEEMP are not stated to be specific to Indigenous women and girls, as opposed to broader populations. For example, policies and mitigations that address behaviour, safety, and security are meant to benefit all persons. The SEEMP addresses the concern that the economic benefits of the Project be available to local and Indigenous persons, and condition 29 requires cultural awareness training, but the SEEMP does not specifically mention women within that population. Similarly, while the SEEMP identifies that there may be a need for local skills training, it does not specifically mention Indigenous women within that group. Adequate police services and housing availability and affordability are concerns for everyone, but lack of adequate police services and housing can disproportionately affect certain groups.

[134] By finding that many of the systemic causes of the adverse effects in the SEEMP are the same or similar as those identified in the Inquiry Report, I am not suggesting the adverse effects on Indigenous women and children and other vulnerable populations are the same as for broader populations. I accept they are disproportionately affected, and may be affected in unique ways, and there may be intersectionality with other factors which affect the degree or type of potential harm for these groups. The issue is whether these potential adverse effects are so different that the EAO's conclusion that these could be addressed within the issues and adaptive management processes of the SEEMP is unreasonable.

[135] The OW characterizes the availability of an adaptive management process as being in a narrow set of circumstances where extensive study has already been undertaken, and CGL conversely characterizes it as being available in a wider set of circumstances. The case authorities cited by the OW where there are comments regarding extensive study are distinguishable from the situation here. They involve highly technical or scientific data, for example, for nuclear energy plants, ocean energy turbines, end-pit lakes in coal mining, and air emissions from aluminum

smelting. In my view, the extent of study required must be that which is sufficient in the circumstances, and I adopt the comments in *Pembina*, at para. 32:

> …Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.
>
> [Emphasis added.]

[136] I disagree with the OW that adaptive management is not appropriate because there is no baseline data. The SEEMP states that CGL carried out two studies for the original application (Social Technical Report and Economic Technical Report), and identified several other existing qualitative and quantitative data sources for monitoring. The record does not indicate what details are in those reports. It may be that those reports already contain the data that is useful, or it may be that further information is required through the issues management or adaptive management process. However, the onus is on the OW to establish that the existing data does not provide sufficient information, such that it is unreasonable to conclude that these processes can address the Inquiry Report. The OW has not done so. It is not sufficient to simply say there is no data, or what is in existence, is not adequate. There has to be some evidence of that.

[137] The OW also suggests that adaptive management is not appropriate because it is complaints-driven and CGL is not required to implement mitigations. In my view, that is too narrow a view of the SEEMP process, and ignores that: the EAO has required CGL to address the Inquiry Report; the EAO monitors compliance; and an important aspect of the SEEMP to which CGL must adhere, is stakeholder engagement.

[138] In summary, the OW's main argument leads to the conclusion that nothing short of a gender-based impact assessment conducted by the EAO, as recommended by the Inquiry Report, would be reasonable; and that a more specific or robust assessment was required. However, to establish that a decision was

unreasonable, the applicant "must do more than merely allege that a better analysis could have been undertaken": *Greenpeace* at para. 63.

[139] I do not agree with the OW's argument that the EAO erred by relying upon the government initiatives instead of doing the assessment the OW argues should have been done. In my view, the EAO did not rely upon the government initiatives in substitution of, or to defer, assessing the Inquiry Report. The reference by the EAO to the government review of the Inquiry Report was a recognition by the EAO that: the Inquiry Report was important; further time was required by the government to address it; the EAO was also assessing it; and the EAO would be addressing it further. This was the EAO assuaging the OW concerns, and indicates that the EAO does not consider this to be a closed topic, but a work in progress. The Evaluation Report states that the EAO requested CGL to consider how the harms identified in the Inquiry Report "will be identified and addressed and how Indigenous Nations will be engaged in the identification and monitoring of potential social impacts", and notes that CGL is required to make semi-annual SEEMP reports. These comments do not indicate a failure or refusal of the EAO to consider the Inquiry Report, but the opposite.

[140] In summary, with respect to the Inquiry Report, the OW has not established that the outcome of the Decision is unreasonable or that there were fundamental flaws in the reasoning process. I find that the explanations as set out in the Evaluation Report and as supplemented by the Tracking Tables and Response Document, are justified, transparent and intelligible.

[141] Finally, I want to emphasize that this decision should not be taken as in any way diminishing the importance of the Inquiry Report. As stated at the beginning of these reasons, the Inquiry Report is of undeniable value in our society's work toward finding solutions to end the unacceptable violence against Indigenous women and girls, and 2SLGBTQQIA people. The importance of the Inquiry Report was not disputed on this petition.

Order

[142] The OW's petition is dismissed. Neither CGL nor the EAO seek costs of the petition.

"Norell J."

2014 CarswellOnt 2321
Ontario Environmental Review Tribunal

Wrightman v. Director, Ministry of the Environment

2014 CarswellOnt 2321, [2014] O.E.R.T.D. No. 11, 86 C.E.L.R. (3d) 18

In the Matter of appeals by Esther Wrightman, Harvey Wrightman, and Middlesex-Lambton Wind Action Group Inc. filed August 16, 2013 for a hearing before the Environmental Review Tribunal pursuant to section 142.1 of the Environmental Protection Act, R.S.O. 1990, c. E.19, as amended, with respect to Renewable Energy Approval No. 8980-95RSLP issued by the Director, Ministry of the Environment, on August 1, 2013 to Kerwood Wind Inc. under section 47.5 of the Environmental Protection Act, regarding the construction, installation, operation, use and retiring of a 37 wind turbine generator with a total name plate capacity of 60 megawatts at a site located at multiple addresses south of Townsend Line, west of Centre Road, north of Napperton Drive and east of Sexton Road, in the Township of Adelaide Metcalfe, County of Middlesex, Ontario

In the Matter of a hearing held on October 15-18, 21-23, 25, 30-31 and November 8, 2013 at the Middlesex County Administrative Offices, 399 Ridout Street North, London, Ontario, and at the West Middlesex Memorial Centre, 334 Metcalfe Street, Strathroy, Ontario

Dirk VanderBent Chair, Maureen Carter-Whitney Member

Heard: October 15-18, 21-23, 25, 30-31; November 8, 2013
Judgment: February 14, 2014
Docket: 13-102 to 13-104

Counsel: Harvey Wrightman, Appellant, for himself and Appellant, Middlesex-Lambton Wind Action Group Inc.
Esther Wrightman, Appellant, for herself
Andrew Weretelnyk, Katie Clements, for Director, Ministry of the Environment
Dennis Mahony, John Terry, Arlen Sternberg, Justin Necpal, for Approval Holder, Kerwood Wind Inc.
Kathryn Minten, for herself

Subject: Environmental; Natural Resources
Related Abridgment Classifications
Environmental law
III Statutory protection of environment
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Environmental law
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Headnote

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Appeals — To administrative tribunal — Grounds for appeal — Miscellaneous

Ministry of Environment issued renewable energy approval to KW Inc. for construction, installation, operation, use and retiring of wind facility — Appellants appealed — Appeal dismissed — Appellants did not meet onus under s. 145.2.1 of Environmental Protection Act to prove that engaging in project in accordance with renewable energy approval would cause serious and irreversible harm to plant life, animal life or natural environment — Appellants did not meet onus to prove that engaging in project in accordance with renewable energy approval would cause serious harm to human health — Appellants failed to established that health test had been met based on public safety risks cited by appellants, namely: shadow flicker, ice throw, blade throw, tower collapse and damage resulting from tower fire — Appellants did not establish that sound levels were higher than those predicted by noise modelling conducted on behalf of approval holder.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Species protection

Ministry of Environment issued renewable energy approval to KW Inc. for construction, installation, operation, use and retiring of wind facility — Appellants appealed — Appeal dismissed — Appellants did not meet onus under s. 145.2.1 of Environmental Protection Act to prove that engaging in project in accordance with renewable energy approval would cause serious and irreversible harm to plant life, animal life or natural environment — Evidence established that risk to bald eagle population, considered either in local or regional context, was low — There was insufficient evidence to make determination regarding appropriate population scale to consider in assessing harm with respect to wildlife species — Evidence in respect of stray voltage was technical and scientific evidence for which opinion or interpretative evidence was required.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Noise

Ministry of Environment issued renewable energy approval to KW Inc. for construction, installation, operation, use and retiring of wind facility — Appellants appealed — Appeal dismissed — Evidence adduced by appellants fell short of establishing that sound levels were higher than those predicted by noise modelling conducted on behalf of approval holder and even if it did, test was that health test must be met at sound levels of 40 dBA or less — In light of difference of professional opinion as to whether effects of amplitude modulation were adequately considered and addressed by noise guidelines and absent any more detailed evidence regarding these effects, particularly as they applied to project wind turbines, this evidence was at best exploratory in nature.

Table of Authorities

Cases considered:

Alliance to Protect Prince Edward County v. Director, Ministry of the Environment (2013), 2013 CarswellOnt 9187, 76 C.E.L.R. (3d) 171 (Ont. Environmental Review Trib.) — followed

Bovaird v. Director, Ministry of the Environment (2013), 2013 CarswellOnt 18046 (Ont. Environmental Review Trib.) — followed

Erickson v. Ontario (Director, Ministry of Environment) (2011), 2011 CarswellOnt 6794, 61 C.E.L.R. (3d) 1 (Ont. Environmental Review Trib.) — followed

Lewis v. Director, Ministry of the Environment (2013), 2013 CarswellOnt 15895 (Ont. Environmental Review Trib.) — followed

Monture v. Ontario (Director, Ministry of the Environment) (2012), 2012 CarswellOnt 12208 (Ont. Environmental Review Trib.) — followed

Preserve Mapleton Inc. v. Ontario (Director, Ministry of the Environment) (2012), 2012 CarswellOnt 4721, 67 C.E.L.R. (3d) 246 (Ont. Environmental Review Trib.) — referred to

Wrightman v. Director, Ministry of Environment (2013), 2013 CarswellOnt 18504 (Ont. Environmental Review Trib.) — referred to

Wrightman v. Director, Ministry of Environment (2014), 2014 CarswellOnt 413 (Ont. Environmental Review Trib.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — considered

s. 24(1) — considered
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 52 — considered
Endangered Species Act, 2007, S.O. 2007, c. 6
Generally — referred to
Environmental Protection Act, R.S.O. 1990, c. E.19
Generally — referred to

s. 1(1) "natural environment" — considered

s. 47.5 [en. 2009, c. 12, Sched. G, s. 4(1)] — considered

s. 142.1 [en. 2009, c. 12, Sched. G, s. 9] — considered

s. 142.1(3) [en. 2009, c. 12, Sched. G, s. 10] — considered

s. 142.2 [en. 2009, c. 12, Sched. G, s. 10] — considered

s. 145.2.1 [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2)(a) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(2)(b) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(3) [en. 2009, c. 12, Sched. G, s. 13] — considered

s. 145.2.1(4) [en. 2009, c. 12, Sched. G, s. 13] — considered
Health Protection and Promotion Act, R.S.O. 1990, c. H.7
Generally — referred to
Regulations considered:
Environmental Protection Act, R.S.O. 1990, c. E.19
Renewable Energy Approvals under Part V.0.1 of the Act, O. Reg. 359/09

Generally — referred to

s. 53(1) — considered

s. 54 — considered

APPEAL from decision of Ministry of Environment to issue renewable energy approval for construction, installation, operation, use and retiring of wind facility.

***Decision of the Board*:**

Background

1 On August 1, 2013, Vic Schroter, Director, Ministry of the Environment ("MOE"), issued Renewable Energy Approval No. 8980-95RSLP (the "REA") to Kerwood Wind Inc. (the "Approval Holder") for the construction, installation, operation, use

and retiring of a Class 4 wind facility, known as the Adelaide Wind Energy Centre, with 37 wind turbine generators with a total name plate capacity of 60 megawatts ("MW"). The location is described in the REA as multiple addresses south of Townsend Line, west of Centre Road, north of Napperton Drive and east of Sexton Road, in the Township of Adelaide Metcalfe, County of Middlesex, Ontario (the "Project" or "Adelaide Project").

2 The REA was issued pursuant to Part V.0.1, s. 47.5 of the *Environmental Protection Act* ("*EPA*").

3 On August 16, 2013, Esther Wrightman, Harvey Wrightman, and Middlesex-Lambton Wind Action Group Inc. ("MLWAG") filed notices of appeal with the Environmental Review Tribunal (the "Tribunal") with respect to the REA. The Appellants raised issues related to both the health and natural environment grounds under s. 142.2 of the *EPA*.

4 Also on August 16, 2013, the Appellant Harvey Wrightman served and filed a Notice of Constitutional Question, arguing that the renewable energy approval process violated his right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Ms. Wrightman also raised the s. 7 *Charter* violation issue in her notice of appeal.

5 Under s. 52 of the *Constitution Act, 1982*, the Appellants challenged the constitutional validity of s. 142.1 and s. 47.5 of the *EPA*. The parties reached an agreement during the hearing that the Appellants would not proceed with their challenge to the constitutional validity of s. 47.5 of the *EPA*, which included a challenge to s. 54 of Ontario Regulation ("O. Reg.") 359/09 made under the *EPA*. The parties also agreed that the Appellants would not proceed with a challenge to any conduct or actions of the Director under s. 47.5 of the *EPA*, including any consideration by the Director of s. 54 of O. Reg. 359/09, so as to give rise to a remedy under s. 24(1) of the *Charter*.

6 On September 16, 2013, the Tribunal held the preliminary hearing in Strathroy, Ontario. At the preliminary hearing, presenter status was granted to Robert Lewis, Kelly Dortmans and Stephana Johnston. The Tribunal subsequently denied a request by Kathryn Minten for party status, but granted her participant status. Further details can be found in the Tribunal's orders dated October 10, 2013 and January 9, 2014 [2014 CarswellOnt 413 (Ont. Environmental Review Trib.)], which also granted a request to change the venue for the main hearing and denied a request to video record the proceeding.

7 On October 8 and 10, 2013, the Tribunal heard a motion to focus evidence, brought by the Approval Holder, and motions for disclosure and to exclude certain evidence, brought by the Director. On October 11, 2013, the Tribunal issued an order granting the motions in part, with written reasons issued on December 18, 2013 [2013 CarswellOnt 18504 (Ont. Environmental Review Trib.)].

8 The Tribunal's order of January 9, 2014 refers, at para. 27, to the Approval Holder's submission during the preliminary hearing (on the issue of whether party status should be granted to Ms. Minten) that "the Appellants are not pursuing the second ground in s. 142.1(3) of the *EPA*, namely, whether the project will cause serious and irreversible harm to plant life, animal life or the natural environment." However, during the main hearing, this panel was not advised that this ground of the appeal had been formally withdrawn, and evidence in relation to this ground was adduced at the hearing. The Tribunal observes that this ground was not struck from the notices of appeal during the preliminary hearing.

9 The hearing began on October 15, 2013. Ms. Wrightman appeared at the hearing on her own behalf. Mr. Wrightman and MLWAG were both represented by Eric K. Gillespie Professional Corporation. However, at the outset of the hearing, Mr. Wrightman advised the Tribunal that he appeared on his own behalf and on behalf of MLWAG, indicating that Mr. Gillespie would attend if required. It transpired that Mr. Gillespie did not attend at the hearing.

10 The Tribunal heard evidence over ten days in October and November 2013, and conducted a site visit on October 18, 2013. The parties and the participant provided written closing submissions, as directed by the Tribunal, over November and December 2013.

11 Numerous procedural rulings were made over the course of the hearing. They are found at Appendix A.

12 For the reasons that follow, the Tribunal dismisses the appeals.

Relevant Legislation

13 *Environmental Protection Act*

1. (1) "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario; ("environnement naturel")

145.2.1 (2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.

(3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;

(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or

(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

Issues

14 The issues are:

Issue No. 1: Whether engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment.

Issue No. 2: Whether engaging in the Project as approved will cause serious harm to human health.

Issue No. 3: Whether the renewable energy approval process violated Mr. Wrightman's and Ms. Wrightman's rights to security of the person under s. 7 of the *Charter*.

Issue No. 1: Whether engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment.

Bald Eagles

Evidence of the Appellants respecting Bald Eagles

15 Ms. Wrightman provided evidence in relation to her allegation that the Project will cause harm to bald eagles. She also called Muriel Allingham as a witness. The Appellants did not tender expert opinion evidence in relation to bald eagles.

16 Ms. Wrightman expressed concerns that a bald eagle nest located near the Project substation (also referred to as the Project switchyard) would be impacted by the construction of the Project or that the nesting tree might be cut down. She testified to her understanding that the Project substation would be 187 metres ("m") from the nest. While she noted the presence of wind turbines 634 m and 741 m from the bald eagle nest, she acknowledged under cross-examination that those turbines are part of

the Bornish wind farm project (the "Bornish Project"), which is a different wind farm project in the area, and that the closest turbine in the Adelaide Project is approximately 12 kilometres ("km") away from the nest.

17 Ms. Wrightman raised concerns that the Approval Holder would be permitted to destroy or remove the nest without an approval from the Ministry of Natural Resources ("MNR") based on a recent regulatory change under the *Endangered Species Act* ("*ESA*").

18 Ms. Allingham, who lives in North Middlesex County, also testified to her belief that the Project substation would be located 187 m from the bald eagle nest, and to her concern that the nest would be destroyed.

19 Both Ms. Wrightman and Ms. Allingham referred to the removal, in January 2013, of a bald eagle nest and tree in proximity to the Summerhaven Wind Energy Centre ("Summerhaven Project") located in Haldimand County. Ms. Wrightman described the circumstances concerning the removal of that nest and stated that the incident had raised concerns for her that the bald eagle population in the vicinity of the Adelaide Project would not be protected. Ms. Allingham also expressed concern about the removal of the Haldimand County nest.

Evidence of the Respondents respecting Bald Eagles

20 The Approval Holder called the following witnesses to testify concerning bald eagles: Benjamin Greenhouse; Andrew Ryckman; and Dr. Paul Kerlinger. The Director called Joseph Halloran to testify in relation to bald eagles. Mr. Ryckman was qualified by the Tribunal to give opinion evidence as an expert terrestrial and wetland biologist, with expertise conducting environmental assessments of wind projects and assessing their impacts on wildlife and the natural environment. Dr. Kerlinger was qualified by the Tribunal as an expert on birds and the effects of wind energy on birds, including bald eagles and other species.

21 Mr. Greenhouse, Director of Wind Development at NextEra Energy Canada, ULC ("NextEra") and the Adelaide Project Director, provided evidence concerning the Haldimand County bald eagle nest. He was also the Project Director responsible for the development of the Summerhaven Project. He stated that the bald eagle nest in the area of the Summerhaven Project appeared to be newly built, and was discovered after completion of the natural heritage assessment for that project. He testified that, after consultation with the MNR, NextEra removed the nest and implemented a plan for mitigation and compensation, which included the construction of three alternate nesting platforms in the area of the original nest. He indicated that, after the platforms were installed, a pair of eagles nested on one of them and two eaglets subsequently hatched.

22 Mr. Greenhouse noted that the Project switchyard is co-owned by three different wind projects in the area, including the Adelaide Project. He testified that there is no intention to remove the bald eagle nest near the Project switchyard. He gave evidence that the Approval Holder has consulted with the MNR on the appropriate mitigation to ensure that the nest is not disturbed, and will not build any permanent infrastructure within 400 m of the nest. He said that temporary construction activity may take place within 200 to 400 m of the nest, but not during the "most critical period" as set out in the MNR's 1987 Bald Eagle Habitat Management Guidelines (the "Eagle Guidelines"), which were developed by the MNR, prior to the establishment of the renewable energy approval regime, to protect bald eagle habitat.

23 To better understand this submission, the Tribunal notes, in overview, that the Eagle Guidelines set out four periods of sensitivity to disturbance identified for nesting areas: most critical period; moderately critical period; low critical period; and not critical period. The critical periods relevant in this case are described at pages 4 - 5 of the Eagle Guidelines. The most critical periods are prior to egg laying when bald eagles engage in courtship activities and nest building, and during the incubation period, when they are most intolerant of external disturbances and may readily abandon the area. The moderately critical period includes approximately one month before the most critical period, and four weeks after hatching. Although disturbance can keep adults from the nest during this period, they are protective of the nest as long as one or more healthy chicks are present, so this period is less critical than during the pre-laying and incubation period.

24 Mr. Greenhouse testified that, during the most critical period, there is a prohibition on any construction activity within 200 to 400 m of the nest.

25 Mr. Halloran, who is employed as the acting Renewable Energy Program Coordinator with the MNR, provided evidence concerning the assessment of the bald eagle nest in an addendum report to the Project Natural Heritage Assessment ("NHA"). In addition to those mitigation measures outlined by Mr. Greenhouse above, he noted that deterrents to prevent perching and roosting would be installed on the transmission line, and there would be monitoring requirements during and after construction. Mr. Halloran also gave evidence regarding the MNR's involvement in the removal of the nest near the Summerhaven Project.

26 Mr. Ryckman is a terrestrial and wetland biologist with Natural Resources Solutions Inc. ("NRSI"), an environmental consulting firm retained by the Approval Holder to conduct the NHA. He gave evidence concerning the identification of the bald eagle nest, noting that there was only one bald eagle nest habitat found in the Project area. He testified that, while the closest edge of the property on which the substation is located will be 187 m away from the nest, the Project substation itself will be further than 400 m away, at approximately 405 m from the nest. He testified that an assessment and behavioural study of bald eagle activity at the nest have been completed and a report is being prepared. He stated that an addendum report to the NHA (the "NHA Addendum II Report") was prepared following identification of the bald eagle nest.

27 Mr. Ryckman testified that the current status of the bald eagle under the *ESA* in Ontario has changed from "endangered" to "special concern", which suggests that the population is increasing in Ontario. He noted that the Eagle Guidelines set out three buffer zones to protect a nest habitat: the primary zone is the first 100 m from the nest; the secondary zone is 100 to 200 m from the nest; and the tertiary zone is 200 to 400 m from the nest, and may extend up to 800 m from the nest depending on topography, vegetation and potential activities within this area. He stated that human activities and habitat alterations are restricted to varying degrees in these buffer zones, ranging from the greatest restrictions in the primary zone to the least restrictions in the tertiary zone. He gave further evidence concerning the mitigation measures described by Mr. Halloran.

28 Mr. Ryckman also stated that the "most critical period" is from about March to mid-May, and the "moderately critical period" includes approximately one month prior to the above period and four weeks after hatching, and occurs in February and from mid-May to mid-June.

29 Mr. Ryckman provided his opinion that the Project would not cause any significant impact to bald eagles or their habitat. Mr. Ryckman testified that the bald eagle nest is on the west side of the woodland, providing a buffer from construction activities and eliminating any sight line from the nest to the substation. Mr. Ryckman acknowledged, under cross-examination, that the tertiary zone would be extended to 800 m if there was a sight line from the nest, but maintained that there is no sight line in this case. He also stated, in cross-examination, that the risk to bald eagles from the cumulative effects of the three proposed wind farms in the Adelaide Metcalfe area is very low because they fly above the turbines.

30 Dr. Kerlinger holds a PhD in biology, with specialization in bird behaviour, ecology and research design/statistics. It is his opinion that, because eagles fly between different areas, the geographic scope of the relevant bald eagle population in relation to the Project is the Great Lakes population in Ontario and parts of Michigan, New York and possibly Ohio.

31 Dr. Kerlinger stated that this bald eagle population has been increasing dramatically over the past two decades into a robust and healthy population, and its size over the Great Lakes region is estimated to be several thousand individuals. He estimates that there are as many as 300 bald eagles in Southern Ontario. He said that, while formerly an endangered species, the bald eagle is now listed as a species of "special concern" under the *ESA*, and noted that the increase in population results from the discontinuation of the use of DDT and other toxins, and protection from shooting.

32 Dr. Kerlinger noted that bald eagles are generally at very low mortality risk from wind projects because they can see turbines and are good at avoiding them while flying. He also stated that bald eagles are habituating to human activities and infrastructure, including wind turbines. When asked, in cross-examination, about the cumulative impacts of the wind farm projects in the Adelaide Metcalfe area on bald eagles, he responded that he did not expect any bald eagle mortality. In Dr. Kerlinger's opinion, there is no possibility that the Project could have any population level impact to bald eagles.

33 Dr. Kerlinger also testified that he did not expect the Project to adversely affect the bald eagle nest located near the Project substation, or the eagles using it because: the nest is located 12 km from the closest turbines for this Project; no infrastructure

will be constructed within 400 m of the nest; substations and transmission lines pose little risk to eagles; and it is unlikely that there will be nest abandonment or reduced nest productivity because there is evidence that eagles are adapting quickly to human activities. Dr. Kerlinger testified that there is low likelihood that the bald eagles would abandon their nest because of noise disturbance due to construction, given that there can be no construction in the tertiary zone during the primary season for nesting, which is when the eagles would be most sensitive.

34 Dr. Kerlinger testified that the mitigation measures required for the Project are appropriate, noting as follows at para. 32 of his Witness Statement:

> With respect to the bald eagle nest, the [Environmental Effects Monitoring Plan ("EEMP")] (April 2013) stipulates that all construction activity be done outside a 200 metres buffer surrounding next locations, as well as "primary and secondary habitat zones". In addition, I understand that all infrastructure will be set back from the nest a minimum of 400 meters and no construction will occur within the "tertiary zone" between March 1 and May 15. Other measures outlined in the EEMP for the existing bald eagle nest are also appropriate, including an activity assessment and a behavioural study during construction. Finally, mitigation measures for the transmission line, including perch-guarding the transmission poles and marking the lines within 800 metres of a nest, are appropriate for reducing potential impacts to these birds. The mitigation measures in place will therefore minimize the risk of any impact.

35 Dr. Kerlinger commented on the mitigation measures in the REA conditions, noting that, in his opinion, it was highly unlikely that the operational mitigation measures for birds would be needed at the Project because the mortality thresholds established in the REA will not be exceeded, based on his opinion that any level of bird fatalities is likely to be minimal. He stated that mitigation measures in the REA would be appropriate if, by some remote possibility, mortality thresholds were reached or exceeded. He concluded in his Witness Statement that the Project "will cause no impact of any significance to bald eagles or their habitat, and certainly no population level impact".

Submissions of the Appellants respecting Bald Eagles

36 Ms. Wrightman refers to the Tribunal's decision in *Lewis v. Director, Ministry of the Environment*, [2013] O.E.R.T.D. No. 70 (Ont. Environmental Review Trib.) ("*Lewis*") which addressed the same bald eagle nest in the context of the Bornish Project. She notes that the Tribunal in *Lewis* stated, at para. 23, that "the fact that the bald eagle is a species at risk is an important factor in assessing serious and irreversible harm."

37 Ms. Wrightman submits that the bald eagle population in the Project area could be eliminated by one or more of the following threats: the potential removal of the nest; disruption from construction activities; and the potential for bald eagles to collide with Project components. She asserts that the bald eagle nest should not be removed, and notes that the Tribunal in *Lewis* agreed, at para. 21, with the approach of leaving the nest intact.

38 Ms. Wrightman submits that there could be cumulative impacts on the bald eagles in the future due to the various proposed and developed wind farm projects in Southern Ontario, including destruction of the bald eagle's habitat, breeding and foraging areas as a result of hundreds of turbines in the area, and hundreds of kilometres of transmission lines threatening flight paths and roosting areas. She urges the Tribunal to consider the impacts on the eagles at the local scale, citing *Lewis* as follows, at para. 42:

> Serious and irreversible harm, especially at a local ecosystem level ... can occur well before the overall viability of a larger population is put at risk. Numerous individual local decisions may appear to be relatively insignificant at a provincial scale but over time may accumulate to create very severe consequences.

39 Ms. Wrightman argues that the death of one bald eagle in the area of the Project would constitute serious and irreversible harm.

40 Ms. Wrightman submits that the Approval Holder is not following the Eagle Guidelines properly. She states that protecting the bald eagles from disturbance only during the "most critical period" under the Eagle Guidelines is inadequate, and that

protection during the "moderately critical period" is also required. She also asserts that construction should not be permitted in the tertiary zone because there is a direct line of sight from the nest to the field.

41 Ms. Wrightman further submits that there has not been adequate study of the bald eagle pair in the Project area, and cites the recommendation of the Tribunal in *Lewis*, at para. 79, in relation to the two turbines in the Bornish Project proposed to be located near the nest:

> Relocating or postponing construction of these two turbines would also allow more behavioural studies to be undertaken within the context of the rest of the Project being in place as well as other nearby projects. Further study could provide better information in determining the tertiary habitat zone and deciding whether to build the two turbines in question.

Submissions of the Respondents respecting Bald Eagles

42 The Approval Holder submits that the evidence shows that the bald eagle nest in the vicinity of the Adelaide Project substation will not be removed. The Approval Holder further submits that the nest is outside the Project location and far from any turbines in the Project, the closest being 12 km away. The Approval Holder notes that the nest is closer to the turbines in the Bornish Project, and that the Tribunal dismissed the Bornish Project appeal in the *Lewis* decision, finding that it had not been established that serious and irreversible harm would be caused. The Tribunal concluded in *Lewis* that the nest is not directly in harm's way from the Bornish Project (para. 19 to 20).

43 The Approval Holder submits that a number of mitigation measures, approved by the MNR, have been put in place to ensure the protection of the bald eagles and their nest. The Approval Holder further submits that these mitigation measures comply with the Eagle Guidelines.

44 The Approval Holder asserts that the risk of either direct or indirect harm to the bald eagles is very low. The Approval Holder also asserts that the relevant population scale is the Great Lakes region, and that there is no risk to this population from the Project.

45 The Approval Holder argues that the removal of the bald eagle nest in the vicinity of the Summerhaven Project is irrelevant to this appeal. The Approval Holder further argues that there is no evidence that there is a risk of potential cumulative impacts to bald eagles from the wind farm projects in the region. The Approval Holder submits that the Appellants have not demonstrated that the Project will cause serious and irreversible harm to bald eagles.

46 The Director's submissions support those of the Approval Holder. The Director asserts that the Appellants' concerns are based on uninformed speculation, and submits that Dr. Kerlinger and Mr. Ryckman provided un-contradicted opinion evidence that the Project would not cause any significant impact to bald eagles or their habitat.

Findings respecting Bald Eagles

47 As noted above, the Appellants bear the onus, under s. 145.2.1 of the *EPA*, of proving that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment. The recent Tribunal decision in *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* (2013), 76 C.E.L.R. (3d) 171 (Ont. Environmental Review Trib.) ("*APPEC*") summarized the applicable guidance from previous Tribunal decisions on this test at paras. 185-186 (citations omitted):

> **Previous decisions of the Tribunal**
>
> Previous decisions of the Tribunal have considered some aspects of the second branch of the renewable energy approval test.
>
> - An appellant is required to show such harm on the civil standard of a balance of probabilities.

- Regarding the phrase "in accordance with" the terms of the REA, the Tribunal has held: "Any harm that may be caused by exceedances will not be relevant to the Tribunal's decision."
- Evidence that only raises the potential for harm does not meet the onus of proof.
- "Will cause" must be proved on a balance of probabilities.
- The Tribunal can consider whether both "direct" and "indirect" effects will be caused.
- The word "serious" should be interpreted in a way that suits both branches of the test.

Serious and irreversible harm

The phrase of the test that the parties focus on in their submissions is "serious and irreversible harm". Previous decisions of the Tribunal have not considered this phrase in depth, but have found that:

- the word "serious", and the phrase "serious and irreversible", must be interpreted on a case-by-case assessment according to all relevant factors.
- one bird or bat mortality will not always constitute "serious and irreversible harm to plant life, animal life or the natural environment", but may be sufficient in certain circumstances.
- the test would be meaningless if it were to be interpreted to always be met or to never be met.

48 The Tribunal in *APPEC* noted the principle of an ecosystem approach, and found that, "in determining serious and irreversible harm to plant life, animal life or the natural environment, the relevant factors, and their respective importance and weight, must be assessed on a case by case basis" (para. 206). The Tribunal in *Lewis* further noted, at paras. 10-11, that an ecosystem approach does not carry with it an automatic scale but can be used at many different scales, and the Tribunal will sometimes be called on to determine the most appropriate scale in respect of an individual species, group of species, ecosystem or habitat. The Tribunal in *Lewis* stated, at para. 12, that, "[u]nder s. 145.2.1(2)(b) of the *EPA*, the Tribunal utilizes a relevant factor-based analysis conducted within the context of the circumstances and evidence of each case."

49 The Tribunal's decision in *Lewis* made findings with respect to the bald eagle nest that is at issue in this proceeding. The bald eagle nest is located in proximity to two wind turbines in the Bornish Project, which was under appeal in the *Lewis* matter. In *Lewis*, as in the appeal of the Adelaide Project before this Tribunal panel, Mr. Greenhouse and Mr. Ryckman testified that the approval holder was not seeking to remove the nest (paras. 19-20). The Tribunal in *Lewis* also heard testimony from Dr. Kerlinger that was very similar to the evidence before this Tribunal panel.

50 The Tribunal in *Lewis* observed, at para. 23, that the risk status of a species is "highly relevant in assessing serious and irreversible harm under the *EPA*". As noted at para. 23 in *Lewis*, the bald eagle is listed as a species of "special concern" under the *ESA* and does not receive the same high level of protection that threatened or endangered species receive, but is a regulated species subject to management guidelines developed by the MNR. The Tribunal in *Lewis* determined, at para. 29, that the Tribunal's central role in a renewable energy approval appeal is to look at the potential harm to the listed species at risk in question, including harm to its habitat, according to the s. 145.2.1(2)(b) test.

51 Given that the Approval Holder does not seek to remove the nest, the issue before this Tribunal panel, as in *Lewis*, is whether construction or disturbance from the proposed development of the Adelaide Project would cause serious and irreversible harm. Ms. Wrightman submitted that there will be harm to the bald eagle population in the Project area through either disturbance from the construction of the Project, or mortality due to contact with Project components. She further submitted that the death of one bald eagle would constitute serious and irreversible harm.

52 The Approval Holder submitted, based on Dr. Kerlinger's expert opinion evidence, that the relevant population scale for the bald eagle is the Great Lakes region, which he estimates to have a population of several thousand individuals. He estimates that there are approximately 300 bald eagles in Southern Ontario.

53 This Tribunal panel adopts the reasoning of the Tribunal in *Lewis*, set out in detail at paras. 35-49, regarding the question of the appropriate scale in respect of the bald eagles at this nest. The Tribunal in *Lewis* noted, at para. 38, that a provincial or regional scale is not necessarily the appropriate scale to automatically use in assessing serious and irreversible harm. The Tribunal in *Lewis* went on to point out several implications of such a narrow interpretation: the argument in favour of an automatic provincial scale for harm appears to be predicated on the "serious", rather than the "irreversible" element of the test (para. 39); an automatic provincial scale for harm to animal life would likely lead to an absurd result in that the test would be impossible to meet in virtually any case, even where there was an extensive loss of animal life in the vicinity of a project (para. 40); and the Legislature could have indicated that the provincial scale must be applied, had that been its intent (para. 41).

54 The Tribunal in *Lewis* was not persuaded that the renewable energy approval appeal test can only apply at a very large scale and did not limit its application of that section of the *EPA*, instead adopting a fact-specific, case by case approach to serious and irreversible harm, consistent with prior Tribunal decisions (para. 43). This Tribunal panel, which has heard very similar evidence and argument in relation to the same bald eagles and their habitat as in the *Lewis* matter, agrees and takes the same approach as the Tribunal in *Lewis*.

55 As in *Lewis*, at para. 47, this Tribunal panel adopts the finding in *APPEC* that assessing serious and irreversible harm involves a multi-factor case by case analysis in which the extent of harm, in the sense of a factor such as the scale of population being affected where appropriate, is just one factor among many.

56 This Tribunal panel also finds, as the Tribunal did in *Lewis* (para. 48), that it is most appropriate to use the local scale to assess serious and irreversible harm to bald eagles in this case, particularly given the evidence that: this is the only known bald eagle's nest in the vicinity of the Project; at 300, the number of bald eagles in Southern Ontario is low relative to the several thousand over the Great Lakes region; and the bald eagle is listed as a species of special concern under the *ESA*. As indicated in *Lewis*, at para. 48, "the death or displacement of this pair would constitute a loss of bald eagles from the immediate area, as there was no evidence of any other documented nest near this site".

57 The Tribunal turns now to the evidence concerning the potential for harm to the bald eagles in the vicinity of the Project. As stated in *Lewis*, at para. 63, "it is important for the Tribunal to examine the mitigation measures being proposed with specific reference to their impact on the serious and irreversible harm test at the appropriate scale, which in this case is the local level".

58 Ms. Wrightman submitted that there will be harm to the bald eagles present in the Project area as a result of disturbance from the construction of the Project. However, she did not provide any expert evidence to demonstrate that the construction of the Project will cause serious and irreversible harm to the bald eagles or their habitat. The Tribunal heard expert opinion evidence from Mr. Ryckman that the substation would be approximately 405 m away from the nest, and that a tertiary zone extending to 400 m around the nest was adequate, given that there is a buffer and no sight line from the nest to the substation. Mr. Greenhouse stated that the Approval Holder will not build permanent infrastructure within 400 m of the nest. The Tribunal finds that this proposed mitigation is appropriate to ensure that the bald eagles and their nest will not be disturbed.

59 Ms. Wrightman also asserted that there will be harm to the bald eagles if they are not protected from disturbance during the "moderately critical period" in addition to the "most critical period". Again, Ms. Wrightman did not provide any expert evidence to show that construction during the moderately critical period will cause serious and irreversible harm to the bald eagles or their habitat.

60 Mr. Ryckman noted the degree to which activity is restricted in the different buffer zones and provided his opinion that, given the mitigation measures in place, the Project would not cause any significant adverse impact on bald eagles or their habitat. Dr. Kerlinger also testified that these mitigation measures would minimize the risk of any impact.

61 Ms. Wrightman submitted that the bald eagles may have contact with Project components, resulting in death. She is also concerned that adequate study has not been done concerning the bald eagles and their habitat. Beyond raising these concerns, she did not provide opinion evidence (and, in fact, no evidence other than her views and the views of Ms. Allingham) to demonstrate that the Project will cause serious and irreversible harm.

62 The Adelaide Project components closest to the bald eagle's nest are the switchyard and transmission lines. Mr. Halloran and Mr. Ryckman reviewed mitigation measures to address these concerns, such as deterrents that would be installed on the transmission line to prevent perching and roosting, which are included in the NHA Addendum II Report. Dr. Kerlinger noted mitigation measures in the EEMP, including those addressing perching on the transmission line, and provided his opinion that they would be appropriate for reducing potential impacts to the bald eagles and would minimize the risk of any impact. The Tribunal notes that the mitigation measures in the NHA Addendum II Report and the EEMP are incorporated into conditions in the REA.

63 In addition to the mitigation measures in the EEMP, the REA contains detailed conditions and requirements addressing the bald eagles, with respect to pre-construction and post-construction monitoring of habitat, mortality thresholds and mitigation, and reporting and review of results. These conditions include the preconstruction requirement of baseline survey of a bald eagle nesting, foraging and perching habitat. Dr. Kerlinger provided his opinion that it was highly unlikely that the operational mitigation measures for birds would be needed at the Project because, in his opinion, mortality thresholds established in the REA will not be exceeded.

64 In *Monture v. Ontario (Director, Ministry of the Environment)*, 2012 CarswellOnt 12208 (Ont. Environmental Review Trib.) ("*Monture*"), the Tribunal addressed whether one bird kill would constitute serious and irreversible harm. The Tribunal in that case found, at paras. 73-75:

> The purpose of the threshold is to establish a standard to delineate when the Tribunal may act, and when it may not. No one disputes that the construction and operation of a wind energy project, of necessity, will cause the death of some individual plants or animals. ...
>
> The fact that section 23.1 of the Regulation [O.Reg. 359/09] adopts the Bird Guideline and the Bat Guideline, both of which prescribe mortality thresholds, is an indication that it is anticipated that wind energy projects can be approved notwithstanding that some mortalities will occur. ...
>
> With respect to section 145.2.1(2) in particular, the Tribunal finds that it is intended to act as a filter that determines whether the Tribunal will then exercise its discretion under section 145.2.1(4). It follows, therefore, that interpretations that automatically result either in screening out no appeals, or screening out all appeals, do not accord with the Legislature's intention.

65 The Tribunal in that case then went on to find, at paras. 80-81:

> Accordingly, the Tribunal finds that the threshold respecting "serious and irreversible harm to plant life, animal life or the natural environment", as set out in section 145.2.1(2)(b) of the *EPA*, is not automatically satisfied by demonstrating that one bird or bat mortality will occur. This finding does not preclude the possibility that a single mortality in some circumstances could constitute "serious and irreversible harm". Whether the threshold has been met must be determined on the individual circumstances of each case.
>
> The Tribunal also observes that the test under section 145.2.1 of *EPA* is not whether a proponent's application has satisfied the requirements of the Regulation, or is within the bounds of the Guidelines. Accordingly, it remains open to an Appellant to adduce evidence to establish that serious and irreversible harm will occur, even where a proponent has demonstrated compliance with the requirements of the Regulation.

66 Although the Tribunal, in this case, is not bound by the above findings, the Tribunal finds this analysis is persuasive, and adopts these conclusions. It follows, therefore, that the question the Tribunal must address is whether the test has been met in the circumstances of this case. In this regard, the Tribunal has considered Dr. Kerlinger's evidence that:

- the bald eagle population is growing in Ontario;
- there is only a remote possibility that the bald eagle mortality threshold, as set out in Part K7 of the REA would be reached or exceeded;
- bald eagles are generally at very low mortality risk from wind projects because they can see turbines and are good at avoiding them while flying;
- substations and transmission lines pose little risk to eagles, and that it is unlikely that there will be nest abandonment or reduced nest productivity, because there is evidence that eagles are adapting quickly to human activities;
- there is low likelihood that the bald eagles would abandon their nest because of noise disturbance due to construction, given that there can be no construction in the tertiary zone during the primary season for nesting, which is when the eagles would be most sensitive; and
- the mitigation measures required for the Project are appropriate.

67 The Tribunal notes that, although the Appellants disagree with Dr. Kerlinger's opinions, they adduced no opinion evidence to contradict his evidence. The Tribunal also finds that they adduced no other probative evidence to counter his opinions. Consequently, the Tribunal accepts the opinion evidence of Dr. Kerlinger. This evidence establishes that the risk to the bald eagle population, considered either in the local or regional context, is low. Furthermore, there is no evidence to suggest that a single mortality could constitute serious and irreversible harm in the circumstances of this case. Based on this evidence, the Tribunal concludes that the Appellants have adduced insufficient evidence to establish that engaging in the Project in accordance with the REA will cause serious and irreversible harm to bald eagles.

68 In reaching this conclusion, the Tribunal has considered Ms. Wrightman's submission that there will be cumulative impacts on the bald eagles in the future due to the various proposed and developed wind farm projects in Southern Ontario that could lead to the destruction of the bald eagle's habitat, breeding and foraging areas. However, Ms. Wrightman did not provide any evidence, expert or otherwise, to support this concern. When questioned by Ms. Wrightman about cumulative impacts, neither Mr. Ryckman nor Dr. Kerlinger had concerns about the cumulative effects of the various wind farm projects in the Adelaide Metcalfe area.

69 The Tribunal has also considered that the MNR has detailed Eagle Guidelines in place. As noted in *Lewis*, at para. 57, the Eagle Guidelines were developed when the bald eagle was listed as an endangered species, a higher category of risk. However, the Tribunal adopts the finding in *Lewis* that the Eagle Guidelines "remain a useful source of guidance for protecting bald eagles as a special concern species" (para. 57). The purpose of the Eagle Guidelines is to provide criteria for the protection and maintenance of bald eagle breeding habitat and for the protection of bald eagles from human disturbance during the breeding season. Ms. Wrightman called no evidence to establish that the Eagle Guidelines are deficient or not being met.

Other Wildlife Species and Dairy Cattle

Evidence of the Participant and Presenters respecting other Wildlife Species and Dairy Cattle

70 Ms. Minten owns and operates an organic dairy farm, with her husband, in the Township of Adelaide Metcalfe. She raised concerns about harm to wildlife, in particular, bobolinks and eastern meadowlarks, snapping turtles and bats. She also expressed concern about the impact of stray voltage on her cattle.

71 Ms. Minten testified that she has worked with the MNR to set strips of grassland for bobolink and eastern meadowlark, both threatened species, on her farm to help restore their breeding habitat. She expressed concern that the Project transmission lines, proposed to be located near the grassland habitat on her farm, will result in habitat loss for these species.

72 Ms. Minten stated that she is concerned about the impact of the Project on snapping turtles, a species of special concern under the *ESA*, which she has observed crossing the road and nesting on her property. She said that she has also found baby snapping turtles in window wells and sandboxes on the property. She raised concerns that: the turtles will face an increased risk of mortality due to increased heavy traffic on the roads; proposed transmission lines will be located in snapping turtle habitat; and a proposed amphibian culvert will not be sufficient mitigation.

73 Ms. Minten also gave evidence on her concerns about bats, including endangered bat species, stressing the importance of bats to pest reduction in agriculture because they eat insects. She testified that, although the NHA did not identify significant bat habitat in the area, she has seen bats in the vicinity of homes and barns in the area. She stated that damage to bats' nesting sites and fatalities caused by wind turbines would have a significant impact on the bats.

74 Ms. Minten raised concerns that stray voltage and ground current from the Project transmission lines would cause adverse health effects on her dairy cattle, including reproductive, digestive and behavioural problems.

75 Ms. Dortmans expressed a number of concerns about how the Project may affect her two properties: the property where her house is located; and a vacant lot that she owns. She provided photographs of snapping turtles on her vacant lot, upon which there is a creek and wetlands. She expressed concern that the Project is located in an environmentally sensitive area.

76 Mr. Lewis showed a video that addressed the complexity of ecology and the importance of preserving wildlife and wildlife habitat.

Evidence of the Respondents respecting other Wildlife Species and Dairy Cattle

77 Dr. Kerlinger provided his opinion that the Project would have no impact of any significance on the bobolink or eastern meadowlark for the following reasons: these species are not present in the Project area in significant numbers; there is no significant habitat, such as large, high-quality grasslands fields, present in the Project area; there will be no bobolink habitat removal and only negligible eastern meadowlark habitat removal; and bobolink and eastern meadowlark are at very low risk of mortality from wind energy projects in general based on his research.

78 Mr. Ryckman testified that there is not a significant amount of suitable habitat present for either the bobolink or eastern meadowlark in the Project area, and that no bobolink habitat disturbance is expected to occur due to the Project. He said that minimal temporary eastern meadowlark habitat removal would occur after the breeding season, but considerable habitat restoration would occur prior to the next breeding season and there would be negligible long-term removal. He also gave evidence concerning the mitigation measures relating to the bobolink and eastern meadowlark, and gave evidence that these species are rarely impacted by turbines and that the risk of mortality or displacement at this Project is minimal.

79 Mr. Ryckman also provided his opinion that the Project is unlikely to have any impact on snapping turtles or their habitat, and will not have any population level impact. He based this opinion on the following: the NHA determined there was no significant snapping turtle habitat in the Project area; no snapping turtles were observed in the Project area during fieldwork; and the wetlands in the Project area are not expected to be affected by the construction or operation of the Project. He said that Ms. Minten's and Ms. Dortmans' observations of snapping turtles on their properties may indicate significant habitat in the vicinity, but testified that there is no significant habitat within the Project area. He stated that there would be no Project construction in wetland areas. He further stated that, in his opinion, additional road traffic during the construction period would be marginal compared to existing road use and would not increase the risk to turtles.

80 Mr. Ryckman gave opinion evidence that the Project would not have any significant impact on bats or their habitats. He stated that the level of bat activity and habitat at the Project location is relatively low because the landscape is not suitable bat

habitat, and there are no bat hibernacula and there is relatively little maternity colony habitat. He said there was no evidence that the Project area is a migratory pathway for bats. Mr. Ryckman testified that there would not be any removal of significant bat habitat during the construction and operation of the Project, and that the bat mortality risk from the Project is very low. He noted that the endangered bat species are listed as endangered due to the impact of White Nose Syndrome and not wind projects. He also noted the mitigation measures to reduce risk and minimize any impact on bats. With respect to bats in houses, he testified that houses are not considered significant habitat by the MNR, but that the risk of harms to those bats is also minimal.

81 Mr. Ryckman concluded with his opinion that the Project would not cause any significant harm to any of these species or their habitat.

82 James Arkerson, who was called as an expert witness by the Approval Holder, was qualified by the Tribunal as an expert in the design and operation, and management of electrical issues related to transmission lines. He provided his opinion that the design of the Project transmission system would comply with applicable Ontario regulations, including the Electrical Safety Code.

83 The focus of Mr. Arkerson's testimony was on the potential for stray voltage to have an impact on human health, and this is described in greater detail in that section below. He acknowledged that the Electrical Safety Code is based on human interaction with electricity, although he said that the testing that produced the values used in modern safety codes included animal testing. He testified that stray voltage may occur on surfaces that animals contact, and explained why it would not be created given the design of the Project transmission lines. In his opinion, the design of the Project transmission system would ensure safe levels of stray voltage, ground current, induced current and harmonics.

Submissions of the Participant respecting other Wildlife Species and Dairy Cattle

84 Ms. Minten submits that the assessment of bat maternity colonies and hibernacula in the NHA is flawed, and that many of the individuals who conducted the bat monitoring were inexperienced. She further submits that the mortality threshold of bats permitted for the Project is too high. She also asserts that the NHA studies should have identified snapping turtles and their habitat in the area.

85 Ms. Minten argues that Approval Holder too easily deemed species and habitats to be insignificant during its site investigations. She submits that wildlife, the environment and farmland will be seriously harmed by the Project and requests that the REA be revoked.

Submissions of the Respondents respecting other Wildlife Species and Dairy Cattle

86 The Approval Holder submits the evidence of Ms. Minten and Ms. Dortmans amounted, at most, to general expressions of concern regarding potential risk to wildlife, and notes that neither are expert witnesses. The Approval Holder further submits that they did not lead any evidence to establish that the Project will cause serious and irreversible harm.

87 The Approval Holder asserts that the evidence of Dr. Kerlinger and Mr. Ryckman demonstrated that the Project would not have any significant impact on the species of wildlife identified by Ms. Minten and Ms. Dortmans, or the habitats of these species.

88 The Approval Holder submits that, based on Mr. Arkerson's evidence, the transmission line meets or exceeds all relevant Ontario safety requirements, and stray voltage, ground current, induced current and harmonics will be kept to safe levels.

89 The Director's submissions support those of the Approval Holder. The Director submits that the evidence provided by the Appellants, Ms. Minten and Ms. Dortmans was not sufficient to meet the statutory test that the Project will cause serious and irreversible harm. The Director further submits that Dr. Kerlinger provided un-contradicted opinion evidence that the Project would not cause any significant impact to bobolinks or eastern meadowlarks, and Mr. Ryckman provided un-contradicted opinion evidence that the Project would not cause any significant impact to bobolinks or eastern meadowlarks, snapping turtles or bats.

Findings respecting other Wildlife Species and Dairy Cattle

90 As stated above, the Appellants bear the onus, under s. 145.2.1 of the *EPA*, of proving that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

91 Ms. Minten and Ms. Dortmans raised concerns regarding potential impacts of the Project on a number of wildlife species, including bobolink, eastern meadowlark, snapping turtles and bats, which they said they had observed in the Adelaide Metcalfe area. Ms. Minten and Ms. Dortmans, however, were not qualified to give opinion evidence. As noted in the evidence section above, Mr. Ryckman and Dr. Kerlinger specifically addressed the concerns raised about the different wildlife species, and provided opinion evidence that the risk to these species from the Project would be minimal.

92 Given the nature of the evidence before it, the Tribunal was not provided with sufficient information to make a determination regarding the appropriate population scale to consider in assessing harm with respect to the wildlife species noted by Ms. Mintens and Ms. Dortmans. Based on the evidence before it, the Tribunal finds that the Appellants have not met the onus of showing that engaging in the Project in accordance with the REA will cause serious and irreversible harm to any wildlife species regardless of which scale is used.

93 Ms. Minten also testified to her understanding of the potential for stray voltage to affect cattle on her dairy farm. Mr. Arkerson provided his opinion that the Project transmission system design would ensure that stray voltage, ground current, induced current and harmonics would be kept to safe levels.

94 As noted in greater detail below respecting stray voltage and human health, the Tribunal found that Ms. Minten, who testified as a fact witness in this proceeding, should be allowed to express her views concerning the impacts of stray voltage, and accepted that, where appropriate, she could refer to scientific, technical or other forms of expert information, solely on the basis that it informs or clarifies her views, but not as proof of such supporting information.

95 The Tribunal finds that Ms. Minten's evidence in respect of stray voltage is technical and scientific evidence for which opinion or interpretative evidence is required. Ms. Minten's evidence can only be accepted as a statement of her concerns respecting the issues she has raised. Mr. Arkerson was qualified to give opinion evidence in this area. Accordingly, his is the only opinion evidence before the Tribunal in this proceeding. As Mr. Arkerson's expert opinion evidence has not been contradicted by any expert evidence adduced by the Appellants, the Tribunal finds that the Appellants have failed to establish that engaging in the Project in accordance with the REA will cause serious and irreversible harm to dairy cattle.

Findings on Issue No. 1

96 Based on the evidence before the Tribunal, the Appellants have not met their onus to prove that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

Issue No. 2: Whether engaging in the Project as approved will cause serious harm to human health.

Noise

Evidence of the Appellants respecting Noise Impacts

97 William Palmer, who appeared as a witness on behalf of Ms. Wrightman, was qualified by the Tribunal to give opinion evidence regarding the application of engineering principles to risk and public safety assessment and in the area of acoustics. Mr. Palmer, a retired professional engineer, began conducting acoustics research in relation to wind farms after a wind farm was proposed near his home. Prior to his retirement, he worked in various roles at Ontario Power Generation's Bruce Nuclear Power facility, including as a section manager for operations performance assessment, a reactor safety superintendent and a training and safety superintendent.

98 Mr. Palmer gave evidence, based on information from the 2013 Wind Turbine Noise Conference in Denver, Colorado. He stated that the most up-to-date science shows that: International Standard ISO 9613-2, *Acoustics — Attenuation of sound during propagation outdoors — Part 2: General method of calculation* ("ISO 9613-2") underestimates the highest sound levels received at receptors; weather and ground attenuation can give a 14 decibel ("dB") variability in expected wind turbine sound level; and amplitude modulation has been shown to occur 18% of the time at 1 km and 44% of the time at 500 m.

99 Mr. Palmer testified that cyclical amplitude modulation in the sound emitted by wind turbines is the predominant cause for complaints, and that measuring the one hour average sound level will not be sufficient to determine the annoyance level for a cyclically varying sound. He stated that the sound of wind turbine equipment at 40 A-weighted decibels ("dBA") is not the same as an office ventilation system at 40 dBA because of the cyclical amplitude modulation of wind turbine sound. He noted that international experience, based on the scientific papers at the 2013 Denver conference, showed that annoyance may occur even where regulatory limits are met.

100 Mr. Palmer stated that a higher wind shear coefficient should have been used in the Noise Impact Assessment ("NIA") for the Project. He said that the values permitted by the MOE for ground attenuation factor, temperature and humidity underestimate sound levels, compared to a worst-case predictable value in winter conditions. He also noted the acoustic emissions of the turbine used in the NIA did not match the Wind Turbines Specifications Report provided with the application for the Project.

Evidence of the Respondents respecting Noise Impacts

101 Shant Dokouzian, who was qualified by the Tribunal to give opinion evidence as an engineer with expertise in noise and shadow flicker, and the design, impact assessment and post-construction monitoring of wind farms, testified on behalf of the Approval Holder. He is the Team Leader for project development services at GL Garrad Hassan, a consultant for the Approval Holder, and was the lead engineer for the NIA conducted for the Project.

102 Mr. Dokouzian described the NIA conducted for the Project, as required by O. Reg. 359/09, and testified that the NIA concluded that the Project is predicted to operate in compliance with the sound level limits in the MOE's October 2008 Noise Guidelines for Wind Farms ("Noise Guidelines"), at all receptor points within 1,500 m of the Project turbines. He stated that the noise predictions for the Project used conservative assumptions to address the predictable worst-case scenario. He said that the NIA took into consideration the potential noise contributions from other wind farms within 5 km of the Project.

103 In response to Mr. Palmer's evidence about amplitude modulation, Mr. Dokouzian testified that the MOE's sound level limits account for noise variability as they are expressed in terms of the hourly, A-weighted, equivalent sound level, which is a widely adopted environmental noise measurement. He stated, in his Reply Witness Statement, that the Noise Guidelines provide that no special adjustments are necessary to address the variation in wind turbine sound level.

104 Mr. Dokouzian also addressed Mr. Palmer's concerns about wind shear, noting that wind shear is an adjustment to a turbine manufacturer's specified acoustic emissions for a specific turbine at a specific site, and is only significant to the extent that the model does not use the maximum sound power level. He stated that the wind shear value of 0.35 in the Project NIA resulted in the use of the maximum sound power level at each of the wind speeds modelled, meaning that a higher wind shear value would not have made a difference to the results.

105 Mahdi Zangeneh, who was qualified by the Tribunal to give opinion evidence as a noise engineer with experience and expertise in the application of MOE's Noise Guidelines, appeared on behalf of the Director. He is a senior noise engineer at the MOE and was the review engineer responsible for the Project NIA.

106 Mr. Zangeneh testified that the Project NIA complied with the requirements of the MOE's Noise Guidelines, incorporating the predictable worst-case scenario. He provided his opinion that application of the Noise Guidelines results in a conservative prediction due to both the assumption that all turbines are always propagating sound downwind towards each noise receptor, and the need to account for the noise contributions of all turbines within a 5 km radius of a receptor.

107 In response to Mr. Palmer's concerns in relation to the MOE's values for ground attenuation factor, temperature and humidity, Mr. Zangeneh noted the MOE's position that noise surveys and acoustical modelling should be done in seasons when members of the public are likely to keep windows open and spend more time outdoors, so that the predictable worst-case scenario incorporates spring, summer and early fall conditions.

108 In response to the issues raised by Mr. Palmer concerning amplitude modulation and wind shear, Mr. Zangeneh gave evidence consistent with that of Mr. Dokouzian. He also stated that, at the minimum setback distance of 550 m, amplitude modulation is significantly reduced, and the sound level of 40 dBA from wind turbines is comparable to the same sound level from other types of equipment. He pointed out that the REA includes conditions requiring that an independent acoustical consultant prepare an acoustical audit, which is to be submitted to the Director.

109 In response to Mr. Palmer's evidence that the acoustic emissions of the turbine used in the NIA do not match the Wind Turbines Specifications Report, Mr. Zangeneh testified that the April 25, 2013 NIA is based on a new turbine with a Low Noise Trailing Edge ("LNTE") blade, while the Wind Turbine Specifications Report was based on an earlier model without LNTE, and that the REA was granted for the LNTE turbines.

110 In response to concerns expressed by Ms. Wrightman, Mr. Zangeneh noted the NIA predicted that the sound level for Adelaide-W.G. MacDonald Public School would be 34.9 dBA outside the school, measured at 4.5 m above grade. His own calculation of the sound level was 34.8 dBA. He added that the sound level would be about 32.9 dBA at the ear level of children in the playground, and that the sound level inside the school would be approximately 10 dBA lower.

Submissions of the Appellants respecting Noise Impacts

111 MLWAG and Mr. Wrightman submit that there were numerous errors in the assessments of the Project's noise impact by Mr. Dokouzian and Mr. Zangeneh.

Submissions of the Respondents respecting Noise Impacts

112 The Director submits that Mr. Palmer's evidence on noise is, at most, a critique of the Noise Guidelines and a wish list for parameters to be included in a noise assessment.

113 The Approval Holder submits that Mr. Palmer's evidence about the variability of wind turbine noise does not assist the Tribunal in determining the issue under s. 145.2.1(2)(a) of the *EPA*, and maintains that his concern about the variability of wind turbine noise is plainly directed at establishing that the Project will operate out of compliance with the REA. The Approval Holder submits that the *EPA* requires the Tribunal to assume there will be compliance with the REA, so Mr. Palmer's assertions are irrelevant to this proceeding. The Approval Holder further submits that, to the extent Mr. Palmer's evidence is directed at establishing that wind turbine noise might result in a health related annoyance, such opinion is clearly beyond Mr. Palmer's expertise.

Findings respecting Noise Impacts

114 The Appellants' position is that the REA should be revoked. Under s.145.2.1 of the *EPA*, respecting the ground of harm of human health, the Tribunal has the jurisdiction to do so, only if an appellant establishes that engaging in the Project in accordance with the REA will cause serious harm to human health (the "Health Test"). O. Reg. 359/09, made under the *EPA*, requires that an approval holder conduct noise modelling in accordance with the Noise Guidelines. Under this regulatory regime, the maximum sound level limit applicable to the Project is 40dBA for wind speed from 4 to 6 m per second, and slightly higher levels for higher wind speeds. These sound levels are measured at "receptors" as this term is defined in the Noise Guidelines. For ease of reference, the Tribunal more simply describes the noise level requirement as being 40 dBA. This requirement is expressly incorporated in Part C of the REA. Consequently, the Appellants must demonstrate that the Health Test will be met at sound levels at 40 dBA or less before the Tribunal would have jurisdiction to revoke the REA. If the Appellants establish that engaging in the Project will result in a sound level which exceeds 40 dBA, then the Director would be required to take action to

ensure the Approval Holder's compliance with the REA. However, this still would not satisfy the requirements that must first be met under the Health Test, before the Tribunal would have jurisdiction to revoke the REA.

115 It is important to understand this regulatory context, when considering the evidence regarding noise modelling required under the Noise Guidelines. In this appeal, the noise modelling conducted by the Approval Holder's consultant has been adduced by the Approval Holder in response to the evidence which has been adduced by the Appellants to meet their onus to establish that the Health Test has been met. To meet their onus, it is not sufficient that the Appellants establish only that the results of the noise modelling may not be accurate. The Appellants have a positive onus to establish that noise levels at or below 40 dBA will cause serious harm to human health.

116 Regarding the opinion evidence adduced by the Appellants respecting the noise modelling conducted by the Approval Holder's consultant, the Tribunal finds that this opinion evidence, assessed from a perspective that is the most favourable to the Appellants, only establishes that there are conflicting opinions regarding: (i) the accuracy of the data inputs used to conduct the noise modelling; (ii) the impact of weather and ground attenuation on sound levels; (iii) the extent to which the noise modelling accounts for amplitude modulation, and the extent to which such modulation is reduced at the minimum setback distance of 550 m; and (iv) the extent to which the noise modelling represents a conservative estimate. Therefore, the Tribunal finds that the evidence adduced by the Appellants falls short of establishing that the sound levels are higher than those predicted by noise modelling conducted on behalf of the Approval Holder. Even if it did, the test, as noted above, is that the Health Test must be met at sound levels of 40 dBA or less. At most, this evidence would establish that the Director would be required to take action to ensure the Approval Holder's compliance with the REA. In this regard, the Tribunal notes that the Director has proactively addressed this matter, as section F of the REA requires an acoustical audit, by an independent acoustical consultant, once turbines have been constructed.

117 The Tribunal notes that Mr. Palmer, in his written Witness Statement, acknowledges that his testimony is primarily focussed on public safety and the impact of public safety on human health, and that he only briefly comments on the matters relating to noise. The Tribunal notes that his opinions addressed the above-mentioned concerns respecting the noise modelling, but he did not personally conduct or provide any noise modelling assessment or study, or other specific data respecting predicted noise levels for any of the Project components.

118 As noted above, Mr. Dokouzian testified that the Noise Guidelines account for noise variability as they are expressed in terms of the hourly, A-weighted, equivalent sound level, which is a widely adopted environmental noise measurement. He also stated that the Noise Guidelines provide that no special adjustments are necessary to address the variation in wind turbine sound level. Section 6.4.8 of the Noise Guidelines states:

> **6.4.8 Adjustment for Special Quality of Sound**
>
> Should the manufacturer's data indicate that the wind turbine acoustic emissions are tonal, the acoustic emissions must be adjusted by 5 dB for tonality, in accordance with Publication NPC-104, Reference [1]. Otherwise, the prediction should assume that the wind turbine noise requires no adjustments for special quality of sound described in Publication NPC-104, Reference [1].
>
> No special adjustments are necessary to address the variation in wind turbine sound level (swishing sound) due to the blade rotation, see Section 4. This temporal characteristic is not dissimilar to other sounds to which no adjustments are applied. It should be noted that the adjustments for special quality of sound described in Publication NPC-104 were not designed to apply to sounds exhibiting such temporal characteristic.

119 Section 4 of the Noise Guidelines states:

> In general, the significant noise sources associated with the operation of a Wind Farm are the wind turbines and the Transformer Substation.

> Noise from wind turbines consists of the aerodynamic noise caused by blades passing through the air, and mechanical noise created by the operation of mechanical elements of the drive-train. Close to the turbine, the noise typically exhibits a swishing sound as the blades rotate; and the whirr of the drive-train and generator. However, as distance from the turbine increases, these effects are reduced. The wind turbine noise perceived at receptors is typically broadband in nature. Any tonal character associated with the wind turbine noise is generally associated with maintenance issues.

120 The import of Mr. Palmer's evidence is that this averaging does not account for the impact of amplitude modulation, a component of wind turbine noise where noise levels periodically fluctuate. Such amplitude modulation is commonly referred to as "blade swish". Consequently, there clearly is a difference of opinion whether the effects of amplitude modulation are adequately assessed by noise modelling conducted in accordance with the Noise Guidelines.

121 While Mr. Palmer did speak to annoyance, he only made general reference to papers presented at a 2013 Wind Turbine Noise Conference which he attended. He states that papers presented at this conference indicate that it is the special characteristics of the sound which caused annoyance, not just amplitude modulation. He did not provide any analysis respecting the effects of noise attenuation, particularly as it specifically relates to wind turbines in the Project, nor any analysis of the effects of amplitude modulation where the hourly, A-weighted, equivalent sound level is 40 dBA or less, other than to assert that annoyance is expected to occur. However, Mr. Palmer does not assert that he is qualified to give opinion evidence of the impact of annoyance on human health.

122 In light of this difference of professional opinion as to whether the effects of amplitude modulation are adequately considered and addressed by the Noise Guidelines, and absent any more detailed evidence regarding these effects, particularly as they apply to the Project wind turbines, the Tribunal finds this evidence, at best, is exploratory in nature. In *Erickson v. Ontario (Director, Ministry of Environment)*, [2011] O.E.R.T.D. No. 29 (Ont. Environmental Review Trib.) *("Erickso*n"), at para. 838, the Tribunal states "It is, therefore, no surprise that the legal test, which requires proof of harm, has not been satisfied when the applicable scientific evidence is in such an early stage of development." The Tribunal, in this case, finds this conclusion applies equally to the sound level evidence adduced in this proceeding.

123 In summary, the Tribunal finds that the Appellants' evidence respecting noise does not establish that the Health Test has been satisfied.

Health Impacts generally

Evidence of the Appellants, Participant and Presenters respecting Health Impacts generally

124 Mr. Wrightman called, as witnesses, four individuals who live in the vicinity of existing wind turbine projects in Ontario, who each report that they have experienced adverse health effects, which they assert have been caused by these wind turbine projects (the "post-turbine witnesses").

125 The post-turbine witnesses testified concerning a range of adverse health effects that one or more of them had experienced, including: nausea; headaches; sinus pressure and pain; dry eyes; sleep disturbance; mood swings; emotional instability; depression; vibrations in the body; heart palpitations; loss of concentration and memory; ringing in the ears; swollen glands; vertigo; and dizziness. In addition to their oral testimony, the post-turbine witnesses provided the Tribunal with witness information forms and the medical records that they were able to obtain.

126 The post-turbine witnesses gave evidence that these adverse health effects began at the time that the wind farm near them began to operate, or shortly after that. They stated that when they are away from the wind farm, they experience relief from their symptoms, and that their symptoms return when they go home. They testified to their belief that their adverse health effects are caused by their exposure to the wind farm project.

127 While some of the medical records provided by the post-turbine witnesses included documents setting out medical opinions respecting specific conditions, none of these witnesses provided a medical opinion that attributed exposure to the wind farm project as the cause of their symptoms.

128 Ms. Wrightman raised concerns that the Project would have adverse effects on the health of her own children and other children who attend Adelaide-W.G. MacDonald Public School. She testified to her understanding that there will be 11 wind turbines from the project within 2 km of the school, 15 turbines within 3 km of the school and 35 turbines within 5 km of the school. She stated that the Approval Holder had advised that the school's noise level would be increased to 35.7 dBA. Ms. Wrightman expressed concern about the impacts of shadow flicker and noise, including both low frequency noise and infrasound, on the children's health and their ability to concentrate and learn at school. She also said that she was concerned that the Project's transmission lines may be located near the school.

129 Ms. Wrightman referenced the World Health Organization ("WHO") definition of "health", which states that health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. She stated that the "human habitat", within which she lives, includes her home, community, surroundings, school and local organizations. She noted that many rural families work and farm together and testified that the Project has created stress in families within the community because some individuals have signed leases for wind turbines and others oppose them. She said that there may be adverse impacts on her health and well-being, and the health and well-being of those in her community, because these family and social units are threatened by the Project.

130 Ms. Minten also expressed concerns about the impacts of the Project on human health. She gave evidence that she had lived near a small (100 foot, 30 kilowatt) wind turbine, which became operational on the farm in 2006. She said that she did not become ill enough to go to a doctor and has no medical records, but stated that she did experience shadow flicker that was, at times, disorienting. She testified that she was aware of a pulsating noise that frequently woke her at night and contributed to tiredness. Ms. Minten also raised concerns about: electromagnetic hypersensitivity; impacts of sleep disorders on the farming community; health risks of noise for children; health effects of financial stress; and health inequality in rural Ontario.

131 Mr. Lewis showed a video relating to his concerns about wilful blindness in organizations and institutions concerning adverse health impacts. He emphasized the importance of speaking out about his concerns regarding impacts on health.

132 Ms. Dortmans testified that she lives on a road that will be a main access road to the Project, with collector lines for five of the turbines. Her house is close to the road, and she is concerned about adverse effects on her family's health due to the air quality and water well impacts of gravel dust and diesel exhaust from trucks during Project construction, and due to power surges from the collector lines. She also raised concerns about traffic safety as her children play outside, cycle on the road and travel on a school bus that uses the road. Ms. Dortmans also gave evidence concerning her concerns about the health impacts of noise and shadow flicker from the ten turbines that will be within 10 km of her home, and the potential impacts if she builds a home on her vacant property, as planned.

133 Ms. Johnston raised concerns about the legislative and policy framework governing the assessment of the impact of the Project on human health. She testified that the Haldimand-Norfolk Health Board and Health Unit, and the acting Haldimand-Norfolk Medical Officer of Health, have refused to engage with Ontario's Chief Medical Officer of Health to determine whether a health hazard exists, under the *Health Promotion and Protection Act*, in response to concerns raised in a petition and deputation. She also raised concerns about wind energy.

Evidence of the Respondents respecting Health Impacts generally

134 The Director and the Approval Holder did not call any witnesses specifically to respond to the Appellants' evidence. Instead, the Director and the Approval Holder rely on their cross-examination of the Appellants' witnesses.

Submissions of the Appellants and Participant respecting Health Impacts generally

135 Ms. Wrightman submits that the children at Adelaide-W.G. MacDonald Public School will be affected by the wind turbines in the Project, and are at risk of severe harm. She further submits that the Project will impact the learning environment at the school. She argues that many Adelaide Metcalfe area residents will experience adverse health effects, such as sleep disturbance, vertigo, migraines and depression, from the turbines.

136 Ms. Wrightman asserts that the Project will have adverse effects on human health, as defined by the WHO, including impacts on income and social status, social support networks, employment, working conditions, social and physical environments and healthy child development.

137 Ms. Minten states that, in the course of the past months, she heard more and more stories of people who are being affected in negative ways from wind turbines in Southwestern Ontario. Although she acknowledges that she is not a qualified medical expert, she asserts that even qualified medical experts, and the current medical research surrounding industrial wind turbines, are unable to answer the questions that should be answered first, before construction and operation of the Project.

Submissions of the Respondents respecting Health Impacts generally

138 The Approval Holder submits that the Appellants have fallen short of meeting their onus of proving on a balance of probabilities that engaging in the Project in accordance with the REA will cause serious harm to human health. The Approval Holder notes that the Appellants did not call any expert evidence on the human health effects of noise. The Approval Holder says that, at most, the Appellants, participant and presenters have raised concerns about the potential for harm from the Project.

139 The Approval Holder asserts that the Tribunal should not give any weight to lay evidence about what has been said about the health effects of noise in the publications of various experts, which is hearsay, and notes that any statements of opinion offered by lay witnesses is inadmissible. The Approval Holder also asserts that some of the Appellants' evidence was directed at establishing that the Project will operate out of compliance with the REA, and that the Tribunal must assume that the Project will operate in accordance with the REA, which includes a condition requiring compliance with the MOE's noise level limits. The Approval Holder submits that Mr. Palmer's evidence on amplitude modulation was also directed at establishing that the Project will operate out of compliance with the REA.

140 With respect to the evidence of the post-turbine witnesses, the Approval Holder notes that no health professionals were called to testify to any diagnoses reflected in their medical records, and that the medical records entered as exhibits at the hearing have not been admitted for the truth of the contents. The Approval Holder observes that none of the medical records contained any diagnosis by a medical professional that an illness had resulted from exposure to wind turbines.

141 The Approval Holder submits that the Tribunal should find, consistent with its findings in *APPEC*, at para. 176, that the individual experiences of the post-turbine witnesses cannot be extrapolated to conclude that engaging in the Project, in accordance with the REA, will cause serious harm to human health because it has not been proven that their health complaints were caused by wind turbines. The Approval Holder argues that, to the extent that Mr. Palmer's evidence was directed at establishing that wind turbine noise might result in a health-related annoyance, such an opinion is beyond his expertise.

142 The Approval Holder submitted that the following issues raised by the participant and presenters are beyond the scope of the health appeals either because they do not relate to human health or were not raised in the notices of appeal: Ms. Dortmans' construction-related concerns, Ms. Johnston's complaints about wind energy; and Ms. Minten's concerns about financial stress and health inequality.

143 The Approval Holder summarizes its position, submitting there is no evidentiary basis on which the Tribunal could conclude that noise from the Project will be an issue, let alone cause serious harm to human health. In support of this position, the Approval Holder maintains that: there was a complete dearth of expert evidence on the impact of noise on human health; the Appellants relied on evidence that has already been rejected in previous cases before the Tribunal (i.e., the post-turbine witnesses' evidence); the evidence that the Tribunal heard from those opposed to the project was limited to expressions of

concern that were, at best, speculative; and the limited expert evidence that the Tribunal heard from the Appellants was not health-related, and focused on a matter (alleged non-compliance with the REA) that is irrelevant to the statutory test.

144 The Director's submissions support those of the Approval Holder. The Director submits that the Appellants have not brought any new evidence that would warrant a conclusion that is different from previous Tribunal cases in relation to harm to human health, and did not provide any expert medical evidence.

145 The Director notes that none of the post-turbine witnesses provided noise level measurements to assist the Tribunal in determining whether they were experiencing symptoms at sound pressure levels below 40 dB, and that the turbines located near the homes of the post-turbine witnesses are not the same as those approved in the Project REA.

Findings respecting Health Impacts generally

146 The Tribunal first turns to the evidence of the post-turbine witnesses. It is not disputed that each of these witnesses have previously testified, among others, in one or more proceedings before the Tribunal, including *APPEC* and *Bovaird v. Director, Ministry of the Environment*, 2013 CarswellOnt 18046 (Ont. Environmental Review Trib.) ("*Bovaird*"). Their testimony in this proceeding is consistent with their testimony in those other proceedings. In *Bovaird*, paras. 300 and 301 summarize the evidence given by the post-turbine witnesses in that proceeding:

> All of the post-turbine witnesses provided a witness information form which essentially sets out their responses to a list of questions regarding their medical history, self-reported health symptoms, and other personal information. They each provided medical records that they were able to obtain in time to present at the hearing. Some of these medical records included documents setting out medical opinions respecting specific conditions. None of these witnesses provided a medical opinion which attributed exposure to wind project components as the cause of their complaints. ... Despite any pre-existing medical condition these witnesses may have, they each testified that, after the wind turbines became operational in their environs, they have experienced adverse health effects which they had not experienced before. They state their views that exposure to the wind farm project in the vicinity of their residences has caused these adverse health effects. They maintain that they had no negative perceptions or expectations respecting the impacts of wind turbine projects prior to experiencing adverse health effects.
>
> They cite one or both of the following reasons to support their assertion regarding causality:
>
> • The adverse health effects they have experienced manifested when the wind farm project commenced operation, or shortly thereafter, and they have been unable to find any other explanation for their condition; and
>
> • They have gained respite from their various symptoms when they leave their homes, more specifically, when they are no longer in the vicinity of the wind farm for a period of time (where symptom relief is either immediate or gradual). Their symptoms resume upon returning to their homes either immediately or shortly thereafter.

147 The Tribunal finds that this is an accurate summation of the evidence adduced by the post-turbine witnesses in this appeal.

148 In *Bovaird*, at para. 313, the Tribunal made the following finding with respect to this evidence:

> The Tribunal does not question the sincerity of the post-turbine witnesses in giving their evidence. They acknowledge that the identification of their adverse health effects is through their own self-diagnosis. They also acknowledge that they have reached personal conclusions regarding the issue of causation. Several of them assert that they have had to do so, because they maintain that medical professionals either have no knowledge regarding the effects of wind turbines, or are skeptical or dismissive of the possibility that wind turbines can negatively affect human health. Nevertheless, none of the post-turbine witnesses adduced any medical opinion from their health practitioners which confirms that they have experienced symptoms caused by wind turbines. The Tribunal does not question that the post-turbine witnesses have experienced the symptoms they have described. After all, only they can say how they feel. However, in order to arrive at a reliable conclusion respecting causation, personal assessments which do not consider the full range of potential causes of these

symptoms, are incomplete. Furthermore, the exercise of arriving at a diagnosis requires a level of education, training and experience, which none of the post-turbine witnesses possess. In this regard, the Tribunal notes that in *Kawartha Dairy* [*Kawartha Dairy v. Ontario (Director, Ministry of the Environment)* (2008), 41 C.E.L.R. (3d) 184], the Tribunal found that confirmation of medical conditions requires the diagnostic skills of a qualified health professional. This conclusion was accepted in *APPEC*, and the Tribunal accepts that it applies in the circumstances of this case.

149 While the Tribunal is not bound by the decision in *Bovaird*, the Tribunal finds this analysis is persuasive, and concludes that the above findings apply equally in this case.

150 In addition to the fact that the medical records provided by the post-turbine witnesses do not include any medical opinion that their symptoms are caused by wind turbines, the Tribunal also notes that no other independent medical opinion was adduced as evidence in this regard. As is noted below, the Tribunal excluded the proposed medical opinion evidence of Dr. Nina Pierpont. However, the Tribunal notes that Dr. Pierpont's written Witness Statement did not include any medical diagnosis in respect of any of the post-turbine witnesses.

151 In conclusion, the Tribunal finds, (as the Tribunal found in *APPEC*, at para. 176), that the individual experiences of the post-turbine witnesses who testified in this proceeding cannot be extrapolated to conclude that engaging in the Project, in accordance with the REA, will cause serious harm to human health, because it has not been proven that their health complaints have been caused by wind turbines.

152 The Tribunal now turns to the other more general submissions made by the Appellants, the presenter, and the participants. The Tribunal does not find it necessary to address each submission individually. None of the submissions expressing concerns respecting harm to human health were supported by the expert opinion of a qualified health practitioner. Other submissions, as was the case with Ms. Johnston in particular, only addressed policy considerations. At best, this evidence amounts to the expression of concerns that engaging in the Project will cause harm to human health. The Tribunal finds that these expressions of concern fall short of establishing that engaging in the Project in accordance with the REA will cause serious harm to human health.

Public Safety Risks

Evidence of the Appellants respecting Public Safety Risks

153 Mr. Palmer testified that there would be a risk of ice throw, blade throw, tower collapse and fire from the turbines in the Project, stating that each of these types of failures had already occurred in Ontario. He presented a chart, compiled using data from the Caithness Wind Farm Information Forum website (the "Caithness data") as well as media and industry reports, which listed industrial wind turbine failures internationally from January 2009 to August 2013. Based on his evidence that there were two blade failures and one fire at Ontario turbines in approximately "3400 turbine years in service" during that time period, he estimated the Ontario failure rate to be approximately 0.001 failures per year. Mr. Palmer acknowledged, under cross-examination, that the Caithness organization is concerned about wind farms but said that its data provided a comprehensive list of wind turbine failures.

154 Mr. Palmer also testified, based on his review of reports of wind power developments in the Adelaide Metcalfe area conducted in December 2012, that the Project would pose a threat to human health due to shadow flicker along Highway 402. He stated that 8 km of Highway 402 would be subject to 30 to 59 hours of shadow flicker per year, causing five minutes of sustained shadow flicker for drivers during morning and afternoon, which would be distracting and create an adverse impact on a safe driving environment. He based his analysis on his experience assessing changing radiation fields at the Bruce Nuclear Power facility.

Evidence of the Respondents respecting Public Safety Risks

155 Mr. Greenhouse testified as to the specific measures taken by the Approval Holder to prevent the build-up of ice on turbines and to ensure that safety precautions are taken if ice build-up occurs. He stated that the Approval Holder proactively

shuts down turbines when conditions that would allow for ice build-up are imminent. He noted in his Supplementary Witness Statement that if ice accumulation on the blades is avoided, "the safety risk of falling ice is practically zero." He added that, even if ice were to build up on a rotating blade, the increased load and vibration on the turbine would be detected electronically and the turbine would be shut down automatically and restarted only after a visible inspection, eliminating the risk of falling ice.

156 Mr. Dokouzian provided evidence in response to Mr. Palmer's concerns about ice throw, blade throw, tower collapse, fire and shadow flicker. In his opinion, the risk of harm from ice throw from the Project turbines is very low due to NextEra's ice throw and ice build-up prevention protocol, described by Mr. Greenhouse.

157 Mr. Dokouzian is also of the opinion that the Project would not pose any significant safety risk to the public due to blade failure, tower collapse or fire. He noted that Mr. Palmer's statistics were generated from a very small set of data and therefore prone to statistical error. He also stated that there are no independent sources confirming that blades or tower parts were ejected from the turbines in the two Ontario blade failure events referred to by Mr. Palmer.

158 Mr. Dokouzian testified that blade failure events are rare (1 in 2,400 turbines per year based on 2005 Dutch research by Braam *et al*.) and, when they occur, it is more likely that the damaged structure remains attached to the turbine. He was not aware of any injuries caused by blade failure. He stated that the probability of tower collapse is even lower than that of blade failure (1 in 7,700 turbines per year based on the Dutch research). He also noted that turbine fires are extremely rare and described the safeguards with which modern turbines are equipped.

159 Mr. Dokouzian also addressed the issue raised by Mr. Palmer concerning shadow flicker on Highway 402. He stated that the effect of shadow flicker is much less perceived in a moving vehicle outdoors than inside a dwelling while stationary, due to the diffusion of light outdoors and the lesser exposure time for a driver moving through the area. He further explained the conservative nature of the shadow flicker assessment prepared in relation to the Project.

Submissions of the Appellants respecting Public Safety Risks

160 Ms. Wrightman submits that incidents involving turbines toppling, blade throw and ice throw happen regularly. She says that the minimum regulatory setbacks are not sufficient. She asserts that shadow flicker on Highway 402 will create a hazard that has not been assessed as part of the approval process.

Submissions of the Respondents respecting Public Safety Risks

161 The Approval Holder submits that Mr. Palmer's testimony concerning ice throw, blade failure, tower collapse, fire and shadow flicker does not demonstrate that the Project will cause serious harm to human health. The Approval Holder asserts that Mr. Palmer's evidence merely raised concerns about theoretical risks of harm from wind farms in general, and that Mr. Dokouzian's expert evidence established that the Project, operated in accordance with the REA, will not cause serious harm to human health.

162 The Director submits that Mr. Palmer's statements about the risk posed by ice throw, blade throw, fire or tower collapse are not supported by any evidence, and his opinion should not be given any weight. The Director further submits that assessing risks posed by shadow flicker is different than assessing risks posed by nuclear radiation.

Findings respecting Public Safety Risks

163 In *Erickson*, at para. 629, the Tribunal discussed causation in the context of the "will cause" requirement in the Heath Test, stating:

> With regard to the "will cause" arguments of the Parties, the Tribunal finds that there are some aspects of the case law cited by the Parties which are applicable here. For example, there is a distinction between medical (or scientific) causation and legal causation. The Tribunal is to determine whether specified harms will be caused according to the applicable legal standard, which is a balance of probabilities. That standard is not the exact same standard used by scientists, statisticians or medical experts. The Tribunal will take its direction on determining whether the Appellants have proven that harm will

> be caused according to the legal concepts of proof and causation. In doing so, it will assess the scientific evidence and consider which approaches to causation and proof were used in that evidence.

The Tribunal adopts these findings.

164 Mr. Palmer asserts that serious harm to human health will occur as a result of any of the following events: blade throw, tower collapse, damage resulting from a tower fire, ice throw, and shadow flicker distraction for drivers using Highway 402 (the "public safety events"). It is perhaps trite to observe that the Health Test does not require proof at a level of absolute certainty. Such certainty could only be established once the wind turbines are built and operating, and a public safety event occurs. Instead, an appellant must demonstrate that harm will occur on a balance of probabilities. Accordingly, the Appellants are not required to establish that there is absolute certainty that any of these events will occur. However, it is also important to note that the Director and the Approval Holder, in responding to the Appellants' case, are similarly not required to establish with absolute certainty that any of these events will not occur. Therefore, the probability (risk) that these events will occur, is a relevant consideration when determining whether harm will be caused according to legal concepts of proof and causation.

165 Mr. Palmer was qualified to give opinion evidence regarding the application of engineering principles to risk and public safety assessment. Based on the evidence heard in this proceeding, the Tribunal understands that the key components of such a risk assessment are: (i) to identify plausible events that could cause serious harm to human health; (ii) determine the probability that such types of event will occur; and (iii) determine the probability that such an event, if it did occur, will cause serious harm. In terms of legal concepts of causation, the Tribunal will also consider whether mitigation measures are available to reduce this risk, and, if so, to what extent.

166 No one disputes that each of the public safety events identified by Mr. Palmer could potentially occur. However, the Respondents dispute that shadow flicker distraction for drivers using Highway 402 could result in serious harm. Respecting the other public safety events, they dispute both Mr. Palmer's assessment of the probability that these events will occur, and his assessment of the probability that serious harm would be caused if an event occurred.

Shadow Flicker

167 The Tribunal first addresses the issue of shadow flicker affecting drivers using Highway 402. The Tribunal notes that, in his evidence, Mr. Palmer baldly states that shadow flicker will occur and states his opinion that it will distract drivers. However, Mr. Palmer was not qualified to give opinion evidence on the impact of shadow flicker. The Tribunal notes that this would not preclude him from addressing shadow flicker in his risk assessment, but it does require him to include in his assessment, technical information from a reliable source respecting the nature of the shadow flicker to be produced by the 14 Project wind turbines which he states will be situated along Highway 402. In this regard, Mr. Palmer relies on the Shadow Flicker Assessment conducted on behalf of Approval Holder. He acknowledges that this assessment confirms that Highway 402 will be subject to 30 to 59 hours of shadow flicker per year. However, he critiques this assessment, stating:

> This value assumes average hours of sunshine per day, yet what it does not say is that, for many days of the year, drivers along a major traffic artery will be subjected to not only the distraction of moving wind turbines along side of the highway at a setback of barely 120 metres, but also will be subject at this distance to an immersion in pronounced shadow flicker for 5 minutes during morning and afternoon. It is clear that this will have an adverse impact on the safe driving environment for many drivers. This highway traffic safety issue is not addressed in the shadow flicker report.

168 The Tribunal notes, however, that Mr. Palmer does not provide any explanation or definition for what he describes as "pronounced shadow flicker", or how he determined that it will occur for five minutes during the morning and afternoon. In addition, Mr. Palmer does not provide any explanation, nor was he qualified to give opinion evidence, on how a driver might respond to such flicker, and, to the extent it caused distraction, whether the nature of the distraction could interfere with a driver's ability to safely drive the vehicle. The Tribunal also notes that, in cross-examination, Mr. Palmer acknowledged that he had no statistical evidence demonstrating that people driving by wind farms are in fact distracted by shadow flicker, and admitted that he is not aware of any accidents having been caused by shadow flicker. In his evidence, Mr. Palmer simply assumes both

that distraction will occur and that it will interfere with driver safety. The Tribunal finds this to be a significant deficiency in his assessment.

169 Mr. Dokouzian was qualified to give opinion evidence on shadow flicker. He conducted a shadow flicker assessment for the Project, and it was his un-contradicted opinion that the effect of shadow flicker is much less perceived in a moving vehicle outdoors than inside a dwelling while stationary, due to the diffusion of light outdoors and the lesser exposure time for a driver moving through the area.

170 In light of the deficiency in Mr. Palmer's assessment and the un-contradicted opinion evidence of Mr. Dokouzian, the Tribunal finds that the Appellants have not established that shadow flicker will cause serious harm to drivers on Highway 402.

Ice throw

171 No one disputes that a person could be seriously harmed, if struck by ice thrown from a wind turbine blade. However, the Tribunal finds that Mr. Palmer's assessment in respect of ice throw from wind turbine blades only establishes that this is a plausible event. In this regard, the Tribunal notes that he does not provide any information or analysis respecting the formation of ice on wind turbine blades, or the incidence and conditions where such an event may have occurred in the past. He only provides an assertion that Project wind turbines are located sufficiently close to Highway 402 and other receptors to impact them by ice throw. Furthermore, his assessment does not contain any technical information respecting the Project wind turbines related to the management of ice conditions to prevent ice build-up on turbine blades. The Tribunal finds this to be another significant deficiency in his assessment.

172 The Approval Holder has provided detailed evidence related to the management of ice conditions to prevent ice build-up on turbine blades, which has been summarized earlier in this decision. Mr. Dokouzian, who was qualified to give opinion evidence respecting this matter, has expressed his opinion that the safety risk of falling ice is practically zero. This evidence was not contradicted.

173 In light of the deficiency in Mr. Palmer's assessment and the un-contradicted opinion evidence of Mr. Dokouzian, the Tribunal finds that the Appellants have not established that ice throw from wind turbine blades will cause serious harm to human health.

Blade throw, tower collapse, damage resulting from a tower fire

174 Blade throw, tower collapse, and damage resulting from a tower fire are collectively referred to as "turbine failure". Blade throw refers to an event whereby a turbine blade becomes detached from the hub and, if the turbine blades are spinning, will then be thrown some distance from the turbine tower. This could be caused by mechanical failure, or due to damage if the wind turbine catches fire. Collapse of the wind turbine tower could similarly occur due to mechanical failure or if the tower catches fire. The Tribunal first turns to an evaluation of how these events could plausibly result in serious harm to human health. In his assessment, Mr. Palmer referred to a report, described only as the "Copes report" which he states identifies that blade parts have been known to have travelled to a distance of 500 m from a wind turbine base. He also refers to a report that, due to a turbine fire at the Kingsbridge I Wind Project North of Goderich, Ontario, burning parts have travelled up to 200 m from the wind turbine tower. Mr. Palmer noted that, in this case, the collapse of a Project wind turbine "can put blade parts...at distances of over 130 metres from the tower". Mr. Palmer also provided a listing of source data describing wind turbine failures at wind farm projects worldwide from January 2009 to August 2013, which he obtained from the Caithness data. In cross-examination, Mr. Palmer acknowledged, as noted above, that the Caithness organization is a group of people concerned about wind farms, and stated that it is a member of a European association of groups which oppose wind farms.

175 The Respondents did not dispute that these are plausible events which could cause serious harm to human health. However, they dispute Mr. Palmer's assessment of the probability that these events will occur. They also maintain that Mr. Palmer did not assess the probability that any of these events would cause serious harm to human health, if these events were to occur. The Tribunal will assess each factor in turn.

176 Regarding the probability that wind turbine failure will occur, Mr. Palmer's assessment does not present a probability for each of these three types of events individually. Instead, he calculates the probability of turbine failure which could include any of the events. His Witness Statement states his conclusion solely in respect of the probability of turbine failure in Ontario, indicating that it is approximately 0.001 failures per year. An alternative way of stating this probability is 1 failure for every 1000 wind turbines each year. Mr. Palmer provides the basis for his calculation. He stated that there were three known incidents of wind turbine failure in Ontario from January 2009 to August 2013, for approximately 3400 turbine years in service during this same time period.

177 In response, Mr. Dokouzian testified that these wind turbine failure events are very rare, and referred to a 2005 Dutch study which states that the risk of blade failure was calculated to be 1 in 2,400 turbines per year and the risk of tower collapse was stated to be 1 in 7,700 turbines per year. He explained that even these low probabilities are very conservative by today's standards, given the evolution and improvement of wind turbine design since 2005.

178 Mr. Dokouzian also expressed his opinion that Mr. Palmer's conclusion respecting the probability of wind turbine failure is unreliable. In support of this opinion, he notes that Mr. Palmer's calculation was based on limited data, restricted to turbine failure events in Ontario, over a limited time period. On this basis he asserts that Mr. Palmer's calculation is statistically unreliable. The Tribunal notes, however, that Mr. Dokouzian was not qualified to give opinion evidence on statistics, so no weight is given to this aspect of Mr. Dokouzian's evidence.

179 The Tribunal finds, however, that Mr. Palmer's assessment did not include consideration of the 2005 Dutch study, nor did Mr. Palmer explain why a calculation of probability should be based on data respecting only wind turbines in Ontario. The Tribunal finds these to be significant deficiencies in his assessment. In this regard, the Tribunal notes that Mr. Palmer did include a calculation of probability for known international events, based on the Caithness data (116 incidents of turbine failures for 570,000 turbine years) which showed that the failure rate is approximately 0.0002 failures per year, but he did not explain why he did not adopt this probability, or factor it into his conclusion regarding what the risk of Project failure would be.

180 In summary, for the purpose of expressing an opinion respecting the probability of wind turbine failure, the Tribunal does not accept that use of only the Ontario data, as Mr. Palmer has done, is adequate. The Tribunal accepts that the Dutch study demonstrates that the probability could be much lower than Mr. Palmer has calculated. However, the Tribunal was not provided with a full report of this study. As such, the Tribunal finds that the evidence adduced in this proceeding is insufficient for the Tribunal draw any firm conclusion regarding the probability that wind turbine failure will occur.

181 The Tribunal now turns to the probability that wind turbine failure, if it occurred, would cause serious harm to human health. It is clear that the mechanism of the harm to be addressed here, is that a person could be seriously injured if struck by any part of the wind turbine. Therefore, key to Mr. Palmer's risk assessment, is the determination of the maximum distance that wind turbine parts may be thrown in the event of turbine failure ("striking range"), and the probability that anyone would be within this striking range. The evidence Mr. Palmer adduced respecting striking range is very limited. As noted above, Mr. Palmer quotes one source as describing an event where blade parts were thrown 500 m. However, he did not provide a copy of this report, nor any description of the wind turbine. Therefore, the Tribunal finds it is not possible to draw any firm conclusion respecting striking range for parts throw for Project wind turbines in this case. The striking range for tower collapse for Project wind turbines is relatively straightforward. It is not disputed that the tower height is 80 m, and the blade length is 50 m, so the maximum striking distance would be 130 m. However, the Tribunal notes that this assumes that a tower falls over without first being itself thrown forward from its base. The Tribunal notes that it did not receive any evidence respecting whether a tower could first be thrown forward from its base if a collapse occurred.

182 The Tribunal observes that, as the striking distances for parts throw and tower collapse appear to be different, the probability of event occurrence should, ideally, be calculated separately for parts throw and tower collapse. As noted above, Mr. Palmer's assessment does not do so. The Tribunal finds this to be a significant deficiency in his assessment.

183 The Tribunal now turns to the probability that anyone would be within these striking ranges. Mr. Palmer correctly points out that the non-participating owner and occupants of a property, which is adjacent to the property on which a wind turbine is situated, are entitled to be present anywhere within the boundary of their property. He notes that s. 53 of O. Reg. 359/09, which specifies the minimum setback distance for wind turbines, states:

> **Class 3, 4 and 5 wind facilities**
>
> 53.(1) No person shall construct, install or expand a wind turbine that is to form part of a Class 3, 4 or 5 wind facility unless,
>
> (a) the distance between the centre of the base of the wind turbine and any public road rights of way or railway rights of way is equivalent to, at a minimum, the length of any blades of the wind turbine, plus 10 metres; and
>
> (b) the distance between the centre of the base of the wind turbine and all boundaries of the parcel of land on which the wind turbine is constructed, installed or expanded is equivalent to, at a minimum, the height of the wind turbine, excluding the length of any blades.

184 Therefore, Project wind turbines may be located a minimum of 60 m from public road or railway rights of way, and a minimum of 80 m to the boundary lines of the property where a Project wind turbine is located. Assuming striking distance due to parts throw could be up to 500 m, or even a more conservative estimate of 200 m (as demonstrated by the other data provided by Mr. Palmer discussed above), there clearly is the potential for persons on adjacent properties or on public roadways to be within striking distance, based on these minimum setbacks. However, a proper risk assessment respecting the Project requires consideration of the actual proposed setback for each individual turbine from adjacent property boundaries and public roads and railways. For example, assuming that the maximum striking distance is 500 m, an adjacent property owner would not be exposed to any risk if a wind turbine is actually located more than 500 m from the property line. The Tribunal notes that Mr. Palmer's assessment does not include or consider this data. The Tribunal finds that this is a significant deficiency in his assessment.

185 As noted above, the assessment of risk of injury due to parts throw or tower collapse must also include the probability that anyone would be within striking range. Although Mr. Dokouzian was not qualified to give opinion evidence respecting risk assessment, he testified that a proper risk assessment of turbine failure should not only consider the failure rate and striking distance, but also the probability of a person being at that specific location at a given time. This evidence was not contradicted by the Appellants.

186 The Tribunal notes that Mr. Palmer's assessment did not include consideration of the probability that a person would be within striking ranges of wind turbine parts throw or tower collapse. The Tribunal finds that this is a significant deficiency in his assessment.

187 In his testimony, Mr. Dokouzian expressed his opinion that the probability that a person would be within striking distance when an event occurred would be very low. However, the Tribunal notes that he provided no data or analysis to support this conclusion. Mr. Dokouzian stated that, if this probability is included in the risk assessment, the probability of harm to a person, as a result of an event, would be much lower than the probability that the event would occur. He further asserted that this risk would be lower than the risk of being hit by lightning, which he stated is often used as a benchmark in risk assessments. However, the Tribunal again notes that Mr. Dokouzian was not qualified as an expert in conducting risk assessments, and, like Mr. Palmer, he did not provide any data regarding actual turbine setback distances, in support of his conclusion. Consequently, the Tribunal finds that it cannot make any definitive findings based on this evidence.

188 In summary, due to the numerous deficiencies in Mr. Palmer's assessment, and limitations respecting the evidence adduced in response to Mr. Palmer's evidence, the Tribunal finds that it has received insufficient evidence to make any definitive findings regarding the probability that blade throw, tower collapse, and damage resulting from a tower fire, would cause harm to human health. As such, the Tribunal finds that the Appellants have provided insufficient evidence to meet their onus to establish that such turbine failure will cause serious harm to human health.

189 In light of this finding, the Tribunal finds that it is unnecessary to address the Respondents' submissions respecting bias. These submissions are summarized in the procedural ruling respecting Mr. Palmer's qualification to give expert evidence, which is set out in Appendix A to this decision, as described below.

Summary conclusion

190 The Tribunal has found that the Appellants have failed to establish that the Health Test has been met based on the public safety risks cited by the Appellants, namely: shadow flicker; ice throw; and blade throw, tower collapse, and damage resulting from a tower fire.

Stray Voltage

Evidence of the Participant respecting Stray Voltage

191 Ms. Minten gave evidence on her concerns about stray voltage, which she described as power acting in unintended ways, including ground current, earth potential rise, step and touch potential, induced current and harmonic frequency. She testified concerning her understanding of each of these topics.

192 Ms. Minten raised concerns that having the Project's high voltage transmission lines near her property would create stray voltage problems, causing electrical shock, which could have adverse health effects on her and her family. She expressed concern that increased levels of electrical exposure could result in injury, pain, respiratory arrest, severe muscular contractions, adverse impacts on pregnant women, and potentially death.

Evidence of the Respondents respecting Stray Voltage

193 Mr. Arkerson described the layout and components of the Project transmission facilities in relation to Ms. Minten's property. He testified that all transmission line designs used in the Project are signed by Ontario Licensed Professional Engineers, ensuring the safety of the transmission lines and their compliance with applicable Ontario regulations, including the Electrical Safety Code.

194 Mr. Arkerson noted that NextEra does not narrow the definition of stray voltage to the concerns set out by Ms. Minten, and stated that stray voltage is a general term used to describe low-level voltages that may occur on surfaces that animals contact. He said that distribution systems use the neutral wire as a return path for current flow and, based on local service loading, may have unbalanced flows on the phase wires, creating stray voltage issues. He testified that the Project transmission line is not a distribution line and is not impacted by local service loading because it is not directly connected to the local distribution system. He stated that, due to its design, the Project transmission line would have balanced current conditions.

195 Mr. Arkerson specifically explained how the design of the transmission line and mitigation measures would address Ms. Minten's concerns with respect to ground potential rise, step and touch potential limits, induced voltage and harmonic distortion, and ensure that they are kept to safe levels. He testified that, given the nature and design of the transmission line and the mitigation measures implemented by NextEra, the transmission line would not cause harm to human health.

Submissions of the Participant respecting Stray Voltage

196 Ms. Minten submits that the health of people in her community will be seriously harmed by the Project, and requests that the REA be revoked.

Submissions of the Respondents respecting Stray Voltage

197 The Approval Holder submits that all of the potential problems that Ms. Minten raised have been given consideration by the Approval Holder's professional engineers and addressed where appropriate. The Approval Holder further submits that Mr. Arkerson's expert evidence should be preferred to Ms. Minten's non-expert, lay opinion.

198 The Director submits that Ms. Minten's evidence and the documents she referred to should be deemed inadmissible and irrelevant, and should not be considered by the Tribunal. The Director asserts that it is clear from Mr. Arkerson's testimony that Ms. Minten's evidence is inaccurate and that there is no basis for her concerns.

Findings respecting Stray Voltage

199 Ms. Minten testified as a fact witness in this proceeding. As noted elsewhere in this decision, the Respondents challenged the admissibility of her evidence on the basis that she does not have the requisite expert qualification to give the opinions she has expressed in her Witness Statement. Ms. Minten acknowledges that she is not an expert for the purpose of providing opinion evidence, nor does she have expertise in interpreting scientific and technical evidence. The Tribunal found that she should be allowed to express her views, as this may assist the Tribunal's understanding of the issues. The Tribunal also accepted that, where appropriate, she could refer to scientific, technical or other forms of expert information, solely on the basis that it informs or clarifies her views, but not as proof of such supporting information.

200 In her evidence, Ms. Minten provided detailed commentary on a variety of technical topics related to stray voltage, including ground current and earth potential rise, induced current along high voltage transmission lines, harmonic frequency and its effect, and health effects of electrical currents on humans. None of the parties disputed that this subject matter involves scientific and technical information. Ms. Minten does not dispute that, in her evidence, she presents and analyzes this technical information and provides her views on the implications of this analysis as it relates to harm to human health.

201 The Tribunal finds that Ms. Minten's evidence in respect of stray voltage is technical and scientific evidence for which opinion or interpretative evidence is required. Although she gave a thoughtful, detailed, and well-organized presentation, Ms. Minten's evidence can only be accepted as a statement of her concerns respecting the issues she has raised. Mr. Arkerson was qualified to give opinion evidence in this area. Accordingly, his is the only opinion evidence before the Tribunal in this proceeding on this issue. For this reason, the Tribunal does not find it necessary to discuss Ms. Minten's evidence in detail.

202 Mr. Arkerson's overall opinion and conclusion, as stated in his Witness Statement, is:

> Due to the nature and design of the transmission system for the Adelaide project, stray voltage, ground current, induced current and harmonics will be kept to safe levels. NextEra's transmission line also meets or exceeds all relevant Ontario safety requirements.

203 As Mr. Arkerson's expert opinion evidence has not been contradicted by any expert evidence adduced by the Appellants, the Tribunal finds that the Appellants have failed to establish that the Health Test has been satisfied.

Findings on Issue No. 2

204 Based on the evidence before the Tribunal, the Appellants have not met their onus to prove that engaging in the Project in accordance with the REA will cause serious harm to human health.

Issue No. 3: Whether the renewable energy approval process violated Mr. Wrightman's and Ms. Wrightman's rights to security of the person under s. 7 of the Charter.

205 Although Mr. Wrightman and Ms. Wrightman raised the s. 7 *Charter* violation issue in their notices of appeal, and Mr. Wrightman filed a Notice of Constitutional Question, neither Appellant made submissions on the *Charter* question. As noted above, the parties agreed that the Appellants would not proceed with a constitutional challenge under s. 47.5 of the *EPA*. However, the Appellants did not withdraw their constitutional challenge to s. 142.1 of the *EPA*.

206 Ms. Wrightman's submissions did not address this issue at all, and Mr. Wrightman merely included a copy of the Notice of Constitutional Question in his written submissions. While the Appellants called evidence concerning human health, as described above, they did not identify any specific evidence in relation to the constitutional issue.

207 As a result, these Appellants did not proceed with their constitutional challenge to s. 142.1 of the *EPA*.

208 In the absence of sufficient evidence and legal submissions from Mr. Wrightman and Ms. Wrightman to establish their case on the constitutional issue, the Tribunal finds that it is not appropriate to make any formal rulings on this issue. For that reason, the constitutional issue in these appeals is dismissed.

209 The Tribunal did receive submissions on the constitutional issue from the Director, but in light of its finding above, it is unnecessary to summarize them.

Decision

210 The Tribunal finds that the Appellants have not established that engaging in the Project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment.

211 The Tribunal finds that the Appellants have not established that engaging in the Project as approved will cause serious harm to human health.

212 The Tribunal dismisses the constitutional challenge to s. 142.1 of the *EPA* on the basis that the Appellants did not proceed with this issue in their appeal.

Appeal dismissed.

AppendixA

Procedural Rulings

The Tribunal made a number of procedural rulings over the course of the hearing. These rulings are set out in this section of the decision.

Motion to Strike paragraphs in notices of appeal

The Approval Holder brought a motion to strike out paras. 30 and 35 of Ms. Wrightman's, and para. 17 of MLWAG's and Mr. Wrightman's, notices of appeal. Ms. Wrightman's notice of appeal refers to "any other issues which the community feels would cause harm to human health and safety, and to plants, animals and the natural environment", and both notices of appeal refer to "such further and other grounds as counsel may advise and this Tribunal may permit." The Approval Holder submitted that these allegations are vague and unparticularized, and asserted that the Tribunal does not have jurisdiction under the *EPA* to consider them.

At the commencement of the hearing, the Tribunal heard submissions and issued an oral ruling, as follows:

> Regarding the motion to strike certain grounds in the notices of appeal, the Tribunal finds it unnecessary to do so. The witness statements have been filed, so the issues have been identified for this proceeding. The Tribunal confirms, therefore, that no additional grounds can be raised.

Motion to exclude evidence of Larry Cook and Harvey Wrightman

Prior to the commencement of the hearing, the Approval Holder brought a motion to exclude the testimony of Ms. Wrightman's witnesses, Larry Cook and Harvey Wrightman, regarding lease negotiations. In its order dated October 11, 2013, the Tribunal ordered that this issue be determined by the panel hearing the appeals.

At the commencement of the hearing, the Tribunal heard submissions and issued an oral ruling, as follows:

> The Tribunal finds that the Appellants have not established that the evidence proposed to be given is relevant to the test under 142.1 of the *EPA*. While the Appellants have concerns regarding the leasehold negotiations, how these negotiations

> came about does not indicate one way or the other, whether engaging in the Project in accordance with the REA will cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment.
>
> Respecting the last sentence in Mr. Wrightman's Witness Statement, which asserts that the documents of the wind companies reveal that the effects of these projects will cause serious harm to human health, the Tribunal notes that this statement is in the nature of a submission, and Mr. Wrightman is entitled to make closing submissions, based on the evidence, at the end of the hearing.

Motion to exclude evidence of Linda Rogers

In response to Ms. Wrightman's request that Linda Rogers be permitted to give evidence in this proceeding, the Tribunal heard submissions and issued an oral ruling at the hearing, as follows:

> Pursuant to the schedule of events, all reply witness statements were to be filed by Sept. 24, 2013. In this regard, the Tribunal notes that the purpose of establishing a final date for the filing of witness statements, is to establish a date by which the Tribunal can identify the witnesses who will be called to give evidence by each party, so that the Tribunal can set the hearing schedule for the main hearing. In the case of renewable energy appeals, the timely scheduling of hearing dates is of particular importance, given the strict legislative timeline for completion of these appeals.
>
> At a continuation of the preliminary hearing held on Sept 27, 2013, the Tribunal granted Ms. Wrightman, at her request, an extension of the filing due date to Oct. 1, 2013. The Tribunal made it clear that this was the final date by which the Appellants' witness statements were to be filed. It is not disputed that Ms. Rogers' witness statement was served and filed on October 9. The commencement date of the hearing is October 15, 2013, which is insufficient time to allow the Respondents a fair opportunity to identify whether they would need to call a witness or witnesses to respond to Ms. Rogers' evidence if she were allowed to testify, nor for the Tribunal to schedule such response witnesses within the days which have already been scheduled to hear the respondents' case.
>
> The Tribunal will not comment on Ms. Rogers' qualification to give opinion evidence, or the evidence she proposes to adduce. The Tribunal is prepared to accept that Ms. Rogers' testimony is not solely to replace the testimony of Ben Lansink and Michael McCann, whom the Tribunal has ruled cannot testify in this proceeding. However, the Tribunal notes that the Appellant has not established any basis on which to conclude that Ms. Rogers' proposed evidence could not have been identified, and her Witness Statement served and filed by the October 1 st deadline.
>
> For these reasons, the Tribunal does not grant Ms. Wrightman's request that Ms. Rogers be allowed to given evidence in this proceeding.

Motion to exclude evidence of Dr. Nina Pierpont

Prior to the commencement of the proceeding, the Director brought a written motion dated October 4, 2013, requesting an order prohibiting Dr. Pierpont from testifying in this proceeding. This motion was adjourned to be heard by the Hearing Panel in this proceeding. The Hearing Panel then heard this motion and gave an oral ruling as follows:

> It is regrettable that this particular issue has not been avoided, and therefore the Tribunal has had to make a very difficult decision. The Tribunal grants the Director's request that Dr. Pierpont be prohibited from testifying at this hearing. The Tribunal will provide written Reasons to follow.

The Tribunal now provides its reasons for this disposition.

Background

On September 24, 2013, Ms. Wrightman disclosed a witness statement for Dr. Pierpont (the "Witness Statement"). This brief Witness Statement states:

BACKGROUND AND AREA OF EXPERTISE

I am a physician (MD, Johns Hopkins University School of Medicine, 1991) and ecologist (PhD, Princeton University, 1985), and the author of Wind Turbine Syndrome: A Report on a Natural Experiment (K-Selected Books, 2009), a peer-reviewed book of original, primary research data and analysis, addressing specifically the issue of why some people are affected by symptoms in the presence of wind turbines and others not, and placing the symptoms in the context of the known physiology and pathophysiology of the ear, balance system, and brain. A CV is attached.

INTRODUCTION

I will attempt to teach the representatives of NextEra and the Ontario Ministry of the Environment, as well as the members of the Tribunal, enough about brain and ear physiology and pathophysiology, population-level studies in free-living organisms, and medical interviewing that they can understand the wind turbine-associated health issues. I will review and discuss studies since 2009 that have supported my conclusions and reports that oppose them.

I will also review the history since 1987 of the stratagems used by the wind industry and its consultants to deny health effects. These include:

- The assertion that wind turbines with upwind blades do not cause the same problems to nearby residents as wind turbines with downwind blades.
- The assertion that if a sound cannot be heard, it cannot have any other effects on the ear or body.
- The assertion that internally generated infrasound is more apparent to the ear than wind turbine-generated infrasound.
- The assertion that differences in susceptibility mean that the people with symptoms are either consciously or unconsciously making up their symptoms.
- The assertion that my book and other descriptions of turbine-associated symptoms are creating these symptoms in other people by suggestion.

DOCUMENTS REVIEWED

Pierpont, N. 2009. Wind Turbine Syndrome: A Report on a Natural Experiment. K-Selected Books, Santa Fe, NM, 294 pp.

Remainder of list in file submitted is pending.

SUMMARY OF OPINION

Current evidence makes the denial of health effects from wind turbines an increasingly untenable position by the wind industry and Ontario government.

By email dated September 25, 2013, Katie Clements, counsel for the Director, wrote to Ms. Wrightman:

I am in receipt of the witness statement and 52 supporting documents that you provided for Nina Pierpoint. In Dr. Pierpont's witness statement, she does not specifically reference these supporting documents or what portions of those documents she will be referencing.

Rule 170 of the Tribunal's Rules requires that a witness statement include not only a summary of the opinions, conclusions and recommendations of the witness, but also reference to those portions of other documents which form an important part of the opinions, conclusions and recommendations of the witness.

> In its Practice Direction for Technical and Opinion Evidence, the Tribunal states that "where the opinion and evidence are based on information contained in other documents, detailed references should be provided in any report prepared by the expert" [10(f)]. The Practice Direction also states that the report "provide enough information on the assumptions made, procedures used, and conclusions drawn to allow comprehension of the report as it stands, and to permit a fair and efficient cross-examination [10(c)].
>
> Dr. Pierpont's witness statement is incomplete and we are not able to properly prepare a reply witness statement. I would ask that you forward to us a complete witness statement in accordance with the Rules forthwith.

Ms. Wrightman then responded the same day:

> Dear Ms. Clements,
>
> I re-read Dr. Pierpont's witness statement and believe it is sufficient.
>
> You will note in her Documents Reviewed, Dr. Pierpont states one reference: "Pierpont, N. 2009. Wind Turbine Syndrome: A Report on a Natural Experiment. K-Selected Books, Santa Fe, NM, 294 pp."
>
> I am sending you this book today and encourage you to read it entirely as an extension of her witness statement. It clearly details how Dr. Pierpont formed her, "opinions, conclusions and recommendations". As well, this book has sixteen pages of footnoted references throughout.

Ms. Clements then responded on September 26, 2013:

> Ms. Wrightman,
>
> The 52 documents that you provided are not reference[d] in either Dr. Pierpont's book or her witness statement. As such, I will assume, unless you indicate otherwise, that Dr. Pierpont will not be relying upon any of those 52 documents you provide[d] on Tuesday night. If Dr. Pierpont does want to rely upon the 52 documents, a detailed witness statement with references is required in accordance with the Rules.
>
> In accordance with Rule 170, could you provide us with the passages of the book that Dr. Pierpont will be relying on in her evidence? As you mentioned there are 16 pages of references, which you have not disclosed to us. If Dr. Pierpont is relying on some of those book references in her evidence, the disclosure rules would dictate that we should receive a copy of at least the references relating to the most significant portions of the book that Dr. Pierpont would be relying on.

Ms. Wrightman then replied September 26, 2013:

> I do not have Dr. Pierpont's witness statement and evidence in comic book form.
>
> Luckily when she wrote her book, she divided it into two sections: for physicians, and for non-physicians. At the very least read through the non-physician portion if you want a clear understanding of what she will speak to.
>
> Although, as you are a professional, it would be best if you made it through the physician portion as well, which is written in a very comprehensible format.

In a continuation of the preliminary hearing by telephone conference call ("TCC") with the parties on September 27, 2013, Tribunal Vice-Chair, Paul Muldoon, who chaired the preliminary hearing, directed that Ms. Wrightman be permitted the opportunity to file additional witness statements no later than October 1, 2013. In this TCC, the Tribunal confirmed the Tribunal's requirement that each witness statement must fully summarize all of the evidence the witness intended to adduce at the hearing.

On September 30, 2013, Ms. Wrightman delivered an updated version of Dr. Pierpont's Witness Statement (the "updated Witness Statement"), although it remained signed and dated September 24, 2013. Para. 1 was amended as follows:

INTRODUCTION

I will attempt to teach the representatives of NextEra and the Ontario Ministry of the Environment, as well as the members of the Tribunal, enough about brain and ear physiology and pathophysiology, population-level studies in free-living organisms, and medical interviewing that they can understand the wind turbine-associated health issues **(ref. 1-3).** I will review and discuss studies, reports, and submitted evidence since 2009 that have supported my conclusions **(ref. 4-30)** and reports that oppose them **(ref. 34-46).**

This updated Witness Statement also includes a new section entitled "Documents Reviewed" and lists 46 documents which include Dr. Pierpont's book, published papers, and other articles.

Submissions of the Director and Approval Holder

The Director provided written submissions in his motion record, which are supported by the Approval Holder. The Director relies on Rule 170, particularly Rules 170(b), (e), (f), and (g), and paras. 2 and 10(c), (e), and (f) of the Practice Direction for Technical and Opinion Evidence. The Director made the following submissions:

• Dr. Pierpont's Witness Statement is deficient and does not allow the Director to know the case to meet and to prepare a responding case. The Director submits that the Pierpont Statement should be excluded from evidence as it prejudices the Director's ability to prepare a responding case.

• In light of the expedited timelines enshrined in the REA appeal process, it is critical that the responding parties receive as much information as possible to be able to understand the case that each of the Appellants intends to advance. One of the key ways that this is achieved is by providing detailed witness statements in advance of the hearing. Complete witness statements in accordance with the Rules are necessary so that the responding parties can understand the case to be met and can adequately prepare their responding cases within the strict timelines set out by the Tribunal

• The Tribunal has continually emphasized the need for detailed witness statements and adequate particularization of the Appellants' case in this proceeding as well as other REA appeal proceedings. Given the limited time available for hearings, it is imperative that parties provide detailed witness statements in order that opposing parties know the case to meet and have the opportunity to meet it.

• The need to promote efficiency and fairness in the Tribunal's process and to decrease delay has a heightened significance in REA appeal proceedings relative to other appeals under the *EPA*. In *Preserve Mapleton Inc. v. Ontario (Director, Ministry of the Environment)* (2012), 67 C.E.L.R. (3d) 246 (Ont. Environmental Review Trib.), at para. 64, the Tribunal held that the "expedited nature of the REA appeal process demands that the parties make their best efforts to provide as much information to each other as early as possible...".

• Dr. Pierpont's Witness Statement does not reference those specific portions of other documents which form an important part of the opinions, conclusions and recommendations of the witness. Nor does it provide basic information about the content of her opinions and conclusions. Given that there is no explanation of the reasons and facts supporting the opinion, it is not obvious what portions of the references are being relied upon. Furthermore, the Pierpont Statement does not indicate whether Dr. Pierpont has an interest in the proceeding or not.

• Dr. Pierpont's Witness Statement states "I will review and discuss studies, reports, and submitted evidence since 2009 that have supported my conclusions (ref. 4-30) and reports that oppose them (ref. 34-46)." It is insufficient to simply say that a proposed witness will review 42 documents that support or oppose her conclusions, without providing any content to the review that is proposed to be conducted. The failure to provide a basic outline of the proposed witness' opinions and conclusions about these articles does not permit fair and efficient cross-examination, as required by the Tribunal.

• Similarly, Dr. Pierpont's Witness Statement provides that she will "review the history since 1987 of the stratagems used by the wind industry and its consultants to deny health effects" and she lists five (5) of these "stratagems." In effect, Dr.

Pierpont lists five (5) statements that she opines are false. However, there is no summary or commentary as to why these five (5) statements are false and how Dr. Pierpont came to the conclusion that these statements are false.

• Dr. Pierpont's Witness Statement meets neither the heightened requirements for statements in renewable energy appeal proceedings nor even basic compliance with the letter of the Rules.

• As such, the Director submits that the Tribunal should decline to accept the evidence of Dr. Pierpont.

• The Tribunal states very clearly in para.15 of its Practice Directions the consequences of failing to comply with Practice Directions:

> If this Practice Direction is not complied with, the Tribunal may:
>
> (a) decline to accept the opinions or evidence of an otherwise qualified witness;
>
> (b) admit the evidence, but accord it little weight;
>
> (c) adjourn the date of the Hearing until such time as this Practice Direction is complied with;....

In order for the responding parties to provide meaningful additional disclosure and witness statements in accordance with the subsequent disclosure deadlines, they must be substantially aware of the case each of the Appellants intends to call. In particular, it is essential that the parties know what witnesses will be called by each Appellant, the content of each witness's evidence and how each witness's evidence will assist the Tribunal in determining whether the statutory test has been met.

• Given that the Tribunal has already extended the deadline for Ms. Wrightman to provide a revised witness statement that complies with the Rules, Ms. Wrightman's failure to do so, and the impending commencement of the hearing, the Director requests that the Tribunal strike the evidence of Dr. Pierpont. Ms. Wrightman has been provided with the opportunity twice to provide a detailed witness statement that permits for fair and efficient cross-examination. Ms. Wrightman has refused to provide a detailed witness statement. It would be unjust and unfair to permit Ms. Wrightman to benefit from her non-compliance with the *Rules*, despite an additional opportunity to comply.

Submissions of Ms. Wrightman and Mr. Wrightman/MLWAG

The Appellants did not respond to the Director's motion in writing. Their response submissions were given orally by Ms. Wrightman. Mr. Wrightman and MLWAG support her position. In summary, her submissions are:

• Ms. Wrightman states her belief that there is no restriction as to the length of a witness statement. She submits that the second version of Dr. Pierpont's Witness Statement listed the documents to be reviewed by Dr. Pierpont and specified which of these documents she would be relying on in support of her conclusions.

• Ms. Wrightman points out that she provided the Respondents with a document entitled *Wind Turbine Syndrome — A Twenty Minute Crash Course* (the "Crash Course Document"), which is a written transcript of a video-conference presentation given by Dr. Pierpont in Shelburne Falls, Massachusetts on January 28, 2012. She asserts that this document provides an outline of what Dr. Pierpont's evidence will be in this proceeding. She stated that she assumed she would have heard from the Respondents if this was not satisfactory.

• Ms. Wrightman submits that if Dr. Pierpont's Witness Statement is an expert report, it should have been called that. She indicated that it is surprising that Dr. Pierpont's Witness Statement could take the place of direct evidence. She notes that Dr. Pierpont included her book, *Wind Turbine Syndrome: A Report on a Natural Experiment* described in her Witness Statement ("Dr. Pierpont's Book") which Ms. Wrightman submits is an extension of her Witness Statement. She emphasizes that this book was written by Dr. Pierpont, and extensively addresses what Dr. Pierpont referenced in her Witness Statement. Ms. Wrightman asserts that it is there if you read Dr. Pierpont's Book.

• Ms. Wrightman asserts that there has been no delay, and maintains that Dr. Pierpont's Witness Statement was delivered on time and Dr. Pierpont is prepared to attend and testify as scheduled.

• Ms. Wrightman emphasizes that para. 15 of the Tribunal's Practice Directions, which addresses the consequences of failing to comply with the Practice Directions, states that the Tribunal *may*, not shall, decline to accept the evidence of a witness. She submits that the prejudice to her case far outweighs any prejudice to the Respondents, whose resources are limitless, as compared to hers, which hardly exist.

• Ms. Wrightman asserts that the Respondents have indicated their right to have evidence admitted "may" be prejudiced, or there "may" be a delay in the hearing. She submits that her Witness Statement was filed in time, and she doesn't see what the problem is.

• In summary, she asks that the Tribunal "not throw the baby out with the bathwater". She submits that fairness requires that Dr. Pierpont should be heard, and that the Tribunal should listen to her testimony and then apply weight. She submits that there is no reason to decline her evidence, and that the Director's request is frivolous.

Findings respecting the request for an order prohibiting Dr. Pierpont from testifying in this proceeding

The Tribunal finds that Rule 170, particularly Rules 170(b), (f), and (g), and paras. 2 and 10(a), (c), (e), and (f) of the Practice Direction for Technical and Opinion Evidence apply in the circumstances of this case.

Rule 170 states:

Witness Statements

170. If the Tribunal requires the production of witness statements, the Parties and Participants shall serve those statements on each other and file them with the Tribunal within the time directed by the Tribunal, which is usually no later than 15 days before the commencement of the Hearing. Each witness statement shall include, where applicable:

(a) the name, address and telephone number of the witness;

(b) **whether the evidence will be factual evidence or, if the witness is qualified, opinion evidence;**

(c) a resume of the witness' qualifications, where the witness is to give opinion evidence;

(d) a signed form in accordance with Form 5 in Appendix F, where the witness is to give opinion evidence;

(e) whether or not the witness has an interest in the application or appeal and, if so, the nature of the interest;

(f) **a summary of the opinions, conclusions and recommendations of the witness;**

(g) **reference to those portions of other documents which form an important part of the opinions, conclusions and recommendations of the witness;**

(h) a summary of answers to any interrogatories to or from other Parties that will be relied upon at the Hearing;

(i) where applicable, a discussion of proposed conditions of approval that are in controversy among the Parties or agreed upon conditions that may be related to issues in dispute;

(j) the date of the statement; and

(k) the signature of the witness.

[emphasis added]

Paragraphs 10 (a), (c), (e), and (f) and para. 15 of the Practice Direction for Technical and Opinion Evidence (the "Practice Direction") state:

> **Preparing Reports**
>
> 10. In preparing reports to be used by the witness' employer or client in determining the issues to be raised and the employer or client's position on those issues and for use as evidence, and *in testifying before the Tribunal, the witness has the following disclosure duties*:
>
> (a) It is the responsibility of the witness to make fair and full disclosure.
>
> . . .
>
> (c) To provide enough information on the assumptions made, procedures used, and conclusions drawn to allow comprehension of the report as it stands, and to permit fair and efficient cross-examination.
>
> . . .
>
> (e) The witness should state all the material facts and assumptions upon which his or her opinion is based. He or she should consider and acknowledge material facts which could detract from the opinion. Where the facts are in dispute, the Tribunal expects that the witness will give his or her view of the facts and the proof relied upon before giving the opinion.
>
> (f) Where the opinion and evidence are based on information contained in other documents, detailed references should be provided in any report prepared by the expert, and copies of those documents made available on request before and during the Hearing.
>
> **Compliance**
>
> 15. If this Practice Direction is not complied with, the Tribunal may:
>
> (a) decline to accept the opinions or evidence of an otherwise qualified witness;
>
> (b) admit the evidence, but accord it little weight;
>
> (c) adjourn the date of the Hearing until such time as this Practice Direction is complied with;
>
> . . .
>
> [emphasis added]

The Tribunal turns first to the requirement of Rule 170.

The Tribunal first notes that Dr. Pierpont's proposed evidence is to address the issue of whether engaging in the Project, in accordance with the REA, will cause serious harm to human health. The adequacy of her Witness Statement must be assessed in this context.

In reviewing Dr. Pierpont's updated Witness Statement, the Tribunal finds she clearly provides only one conclusory opinion, in the section entitled Summary of Opinion. She states "Current evidence makes the denial of health effects from wind turbines an increasingly untenable position by the wind industry and Ontario government."

However, the Tribunal finds that statement is better described as a summation. In this regard, she refers to "current evidence", but provides no indication of the specific evidence on which she relies. Even if the Tribunal accepts Ms. Wrightman's assertion that the list of documents reviewed should be read as an extension of Dr. Pierpont's Witness Statement, the Witness Statement

itself states that this list include documents that both support and oppose her conclusions. Consequently, there is no indication of the specific evidence on which she will rely to support this conclusion.

Clearly, Dr. Pierpont's Witness Statement, at best, can be described as setting out a list of topics that she intends to address in her evidence. Her Witness Statement does not provide any of her substantive opinions on any of these topics. There appears to be a misunderstanding on her part, when she states in the introduction that she "will attempt to teach" the parties and the Tribunal about the topics she specified. In the context of being a teacher it may be sufficient to simply provide an outline of the topics to be addressed. However, if she were an expert witness in this proceeding, her role would be to provide her expert opinion regarding the issues to be addressed in this proceeding. As with all witnesses, her evidence may be challenged by the other parties through cross-examination, and by calling response witnesses. The other parties can only do so if they have been provided with a clear statement of what her specific opinions will be.

It is not sufficient, as Ms. Wrightman suggests, that the parties be left to read through the documents Dr. Pierpont has listed for review. This only leaves them to guess which opinions, analysis, data, or other information Dr. Pierpont will adopt as her evidence. Ms. Wrightman's answer to this, particularly as it relates to Dr. Pierpont's book, is that Dr. Pierpont relies on all of it. The Tribunal does not accept this position. The documents listed by Ms. Wrightman, including her book, were not written to respond to the issues in this proceeding. Furthermore, other parties are not required to respond to the portions of these documents which will not be referenced by Dr. Pierpont. Therefore, it is incumbent on Dr. Pierpont to identify, in her Witness Statement, her specific opinions as they relate to the issue in this proceeding, and to quote the specific parts of the documents listed on which she relies in support her opinions. Without this information, the other parties will be unable to determine precisely what her evidence will be, and, as a consequence, have no fair opportunity to respond to her evidence.

The Tribunal's finding in this regard is clearly supported by the Rules and the Practice Direction. Rule 170(f) requires that a witness statement include a summary of the opinions, conclusions and recommendations of the witness. Rule 170(f) does not say that a witness is merely required to provide an agenda respecting the subjects of the opinions to be provided.

Rule 170(g) requires that a witness statement include "reference to those portions of other documents which form an important part of the opinions, conclusions and recommendations of the witness". This section clearly underscores that there is a difference between the opinions, conclusions, and recommendations that are to be included in the witness statement under Rule 170(f), and the portions of other documents referenced in support of those positions. Apart from this, Rule 170(g) clearly requires reference to the specific portions of the documents on which she relies. It is clear that Dr. Pierpont's Witness Statement does not comply with this provision. Her Witness Statement only lists the titles of the documents reviewed. The Tribunal also notes that the requirement of Rule 170(g) is substantially repeated in para. 10(f) of the Practice Direction.

Regarding para. 10 of the Practice Direction, although Ms. Wrightman questions whether there is a difference between an expert report and a witness statement, the Tribunal finds that any distinction between the two is not a probative consideration. Paragraph 10 expressly states that it applies in preparing reports *and* when giving testimony before the Tribunal. Clearly the report is evidence. Therefore, the Tribunal finds that, for expert witnesses, requirements for reports also apply to witness statements. The Tribunal notes that the wording of sub-paras, 10 (a), (c), and (e) are clear. It is the responsibility of the witness to make full disclosure, to provide enough information on assumptions, procedures, and conclusions to allow comprehension of the report or witness statement as it stands. This means that the witness statement itself must allow comprehension of the opinion evidence, without further reference to the information contained in other documents that have been cited in support of the opinion evidence. Clearly, Dr. Pierpont's Witness Statement does not satisfy this requirement. It also does not satisfy the requirement of para. 10(e). Dr. Pierpont's Witness Statement does not include all the material facts and assumptions upon which her opinions are based.

Ms. Wrightman also submits that the Crash Course Document provides an outline of what Dr. Pierpont's evidence will be in this proceeding. The Tribunal does not accept this submission. The Tribunal has reviewed this document. As noted above, it is a transcript of a public lecture given by Dr. Pierpont. As such it does not indicate the evidence which Dr. Pierpont intends to adduce in respect of the issues in this proceeding.

In summary, based on the above analysis and findings, the Tribunal finds that Dr. Pierpont's Witness Statement does not satisfy the applicable requirements of Rule 170 and the Practice Direction.

Having found that Dr. Pierpont's Witness Statement does not comply with Rule 170 and the Practice Direction, the Tribunal turns to its analysis of the appropriate response. As noted in para. 15 of the Practice Direction, the Tribunal may: decline to accept the opinions or evidence of an otherwise qualified witness; admit the evidence, but accord it little weight; or adjourn the date of the Hearing until such time as the Practice Direction is complied with. The Tribunal accepts Ms. Wrightman's submission that, because para. 15 says it may take any of the listed responses, the Tribunal has discretion to allow Dr. Pierpont to testify. The question, therefore, is whether the Tribunal should do so.

The least intrusive response is to adjourn the hearing until the Practice Direction has been complied with. The Tribunal finds that this is not a feasible option. Based on the witness schedule, approximately half of the hearing is devoted to the Health Test. Ms. Wrightman made no alternative submissions regarding whether Dr. Pierpont would comply with the Practice Direction, and, if so, when. In any event, rescheduling this part of the proceeding would significantly delay completion of the hearing, bearing in mind that the hearing must be completed and the appeals disposed of within six months from the filing of the appeals. The Tribunal finds that such an adjournment would seriously prejudice the Tribunal's ability to complete the hearing of these appeals and dispose of them within six months.

The Tribunal next considers whether it should admit the evidence but afford it little weight. The Tribunal finds there is no purpose to be served by this approach in the circumstances of this case. Dr. Pierpont's Witness Statement, in and of itself, contains virtually no substantive evidence, so allowing Dr. Pierpont to testify, but restricting her evidence to the contents of her Witness Statement, would be of no assistance to the Tribunal.

The remaining option is to decline to accept Dr. Pierpont's evidence. Ms. Wrightman asserts that it would be unfair to do so, and submits that Dr. Pierpont should be allowed to testify. Each case must be determined on its own merits. The Tribunal accepts that an overall consideration of fairness is relevant, and has given this matter serious consideration, particularly as the Appellants assert that Dr. Pierpont's evidence is important for their case. However, the Tribunal must also consider whether the current situation could have been avoided. In this regard, the Tribunal has considered the following:

- Ms. Clements, in her emails dated September 25 and 26, 2013, clearly alerted Ms. Wrightman to the requirements of Rule 170. Ms. Wrightman's reply email dated September 26, 2013, can be characterized as a flippant response.

- The Tribunal extended the filing due date for her witness statements to October 1, 2013, in order to allow Ms. Wrightman a further opportunity to provide a witness statement for Dr. Pierpont which would satisfy the requirements of Rule 170 and the Practice Direction, but Ms. Wrightman did not do so.

- The Director's motion is dated October 4, 2013, and was originally brought before the Tribunal on October 8, 2013, so the Appellants were well aware of the issues being raised by the Director, and the relief being sought, prior to the commencement of the hearing on October 15, 2013.

- All parties were aware of the Tribunal's direction that examination-in-chief would be restricted to less than hour, and, therefore, it would be necessary for witness statements to contain all the witness's evidence, so the witness could adopt the witness statement when testifying. Clearly, given the scope of the topics described in Dr. Pierpont's Witness Statement, oral examination-in-chief could not possibly be completed within this time frame.

Based on these considerations, the Tribunal finds that reasonable efforts were made to: (i) alert Ms. Wrightman to the requirements for Dr. Pierpont's Witness Statement; (ii) allow her the opportunity, and sufficient time, to prepare and file an adequate witness statement; and (iii) provide her with notice of the potential consequences if she did not do so. Consequently, the Tribunal finds that Ms. Wrightman could have avoided this situation had she chosen to do so.

Based on the above analysis and findings, the Tribunal has, as stated in its oral ruling, exercised its discretion to prohibit Dr. Pierpont from testifying in this proceeding.

Request for qualification of William Palmer as an expert witness

The Appellants and Mr. Palmer requested that he be qualified by the Tribunal to give opinion evidence as a professional engineer in the province of Ontario with experience and qualification in the operation, public safety, risk assessment and environmental assessment related to the electrical power generating system. This includes evaluating operation of electrical generating systems, including wind turbines, and advising and reporting specific to the professional engineering aspects of safeguarding of life, health, property and the public welfare requiring the application of engineering principles of risk assessment, and evaluation of operating experience.

The Respondents opposed this request as discussed in greater detail below.

The Tribunal provided an oral ruling as follows:

> The Tribunal qualifies Mr. Palmer to give opinion evidence regarding the application of engineering principles to risk and public safety assessment, and in the area of acoustics.
>
> Our reasons will follow. However, to assist the parties in proceeding with Mr. Palmer's evidence, the Tribunal makes two observations:
>
> • Submissions regarding bias and advocacy will be assessed by the Tribunal when giving weight to the evidence; and
>
> • This witness may speak to the areas for which he has been qualified, and the Tribunal will assess the extent to which his opinions apply to the subject areas addressed in his Witness Statement.

The Tribunal now provides its reasons for this ruling.

Mr. Palmer prepared a written Witness Statement dated September 24, 2013, and a Supplemental Witness Statement dated October 1, 2013, jointly referenced as the "Witness Statements".

Regarding Mr. Palmer's qualifications, he is a professional engineer, having a Bachelor of Applied Science degree, which included auditing a course on acoustics. He has taken courses at the Massachusetts Institute of Technology in nuclear power reactor safety and risk-informed operation management. His Witness Statement indicates that these courses include areas of risk assessment (deterministic and probabilistic) and evaluation of operating experience of generation systems. He is a member of the Acoustical Society of America. His Witness Statement also indicates that he has attended several international conferences respecting wind turbine noise. In terms of his work experience, he has worked for approximately 30 years at the Bruce Power facility in various positions, the most recent as the section manager for performance assessment. Since his retirement in 2007, he has continued to maintain his registration as a professional engineer.

Mr. Palmer testified that he has expertise in conducting shadow analysis respecting nuclear radiation, which he asserted is expertise which can also be applied to shadow flicker analysis.

Regarding the field of acoustics, Mr. Palmer testified that professional engineers in Ontario are not specifically registered as acoustical engineers. He noted that there is a consulting engineer association which designates consulting acoustic engineers, but the only standard to be met is primarily to pay a registration fee. He explained that the MOE has specifically identified within their compliance protocols for industrial wind turbines a set of criteria for persons who would do acoustical audits. He also stated that persons other than engineers may be qualified as acousticians, pointing out that the Acoustical Society of America has associate and full members, where full membership is granted based on recognition of work done in the field of acoustics. Mr. Palmer testified that, since he retired, he has worked the equivalent of six or seven years of full time self-training and work, the majority of this time being devoted to the area of acoustics, with the remaining time including work on risk assessment.

Respecting his experience relate to industrial wind turbines, his Witness Statements list papers he has presented, conferences he attended, his involvement in proceedings before the Ontario Municipal Board and the Ohio Power Siting Board, and as technical advisor to a Multi Municipality Wind Turbine Working Group. He states that he has also personally viewed all the major wind turbine arrays in Ontario.

The Respondents objected to several areas addressed in Mr. Palmer's Witness Statement and Supplemental Witness Statement, including Mr. Palmer's comments on medical evidence, natural environmental resource assessment, and greenhouse gas emissions. In reviewing his Witness Statements, the subject matter of some of his opinions clearly fall outside his qualification as requested by the Appellants. In addition, the Tribunal notes the Witness Statements include opinions in response to witnesses who did not testify in this proceeding, which includes the subject area of greenhouse gas emissions. Mr. Palmer acknowledges that he does not have special expertise respecting health matters. He testified that he has no qualifications in the fields of ecology and biology, and his experience respecting environmental assessment was in working on a team where he received input from other persons with expertise in those areas. For the above reasons, the Tribunal concludes that he should be not be qualified in the areas of health, or natural resource environmental assessment.

The Respondents assert that Mr. Palmer is not qualified to give expert opinion on shadow flicker. The Tribunal accepts that Mr. Palmer does not have direct experience respecting shadow flicker, *per se*, but he does have related expertise, which the Tribunal finds qualifies him to comment on shadow flicker, in the context of applying engineering principles to risk and public safety assessment.

The Respondents assert that Mr. Palmer is not qualified to give expert opinion evidence on acoustics, noting that he is not an acoustical engineer. However, the evidence adduced indicates that acousticians are not legislatively regulated as a professional occupation. Mr. Palmer is a professional engineer who has audited one academic course in acoustics, and has engaged in significant amount of self-study in acoustics as it relates to industrial wind turbines, and has presented papers on this subject at several conferences. Therefore, the Tribunal finds that he has sufficient education, training and expertise to be qualified to give opinion evidence on acoustics.

The Respondents do not challenge that Mr. Palmer has significant experience in public safety and risk assessment in the nuclear energy field, but they argue that it cannot be assumed that this experience is transferable to industrial wind turbine energy. The Tribunal accepts this submission in part. Mr. Palmer did not clearly state that he had direct experience in conducting public safety and risk assessment. But he is a professional engineer who has considerable related work experience in the nuclear energy field. Therefore, the Tribunal is satisfied that he is qualified to give opinion evidence on the application of engineering principles to risk and public safety assessment.

The Tribunal finds that the wording of the qualification sought by the Appellants for Mr. Palmer is imprecise, and his training, education and experience only support a more circumscribed qualification, as stated in the Tribunal's oral ruling. Finally, the Tribunal notes, that this ruling is only in respect of his qualification to give opinion evidence. It is not an acceptance that all opinions, as presented in his Witness Statements, fall within the areas for which he has been qualified, nor is it an indication of the weight to be given to Mr. Palmer's opinion evidence.

The Respondents have also raised concerns respecting Mr. Palmer's qualification as an expert on the grounds that he has, in the past, been affiliated with an organization which opposes industrial wind farms, and has been an advocate against wind farm development. As noted in the Tribunal's oral ruling, these submissions regarding bias and advocacy will be assessed by the Tribunal when weighing his evidence.

Request to strike witness statement of Kathryn Minten

During the proceeding, the Approval Holder brought an oral motion to request that Ms. Minten's Witness Statement be struck and that her evidence in this proceeding be restricted to oral evidence of a lay (fact) witness. One of the Approval Holder's grounds in support of this motion, was that portions of Ms. Minten's Witness Statement speak to issues which were not raised in the Appellants' notices of appeal. In this regard, the Approval Holder had, earlier in the proceeding, raised a request to strike

certain parts of these appeals on the grounds that they were so broadly drafted that they did not disclose a discrete ground in support of the appeals. The Approval Holder asserted that these clauses included phrases such as "any other issues which the community feels will cause harm" or "such further or other grounds as counsel may advise and this Tribunal may permit".

The Tribunal's ruling on the motion to strike Ms. Minten's Witness Statement was prepared in writing, and delivered by the Tribunal's case coordinator to the parties by electronic mail:

> Regarding the Tribunal's earlier ruling respecting the Approval Holder's motion to strike what has been described as the "basket clause" grounds of appeal (Paragraph 17 of the MLWAG/Harvey Wrightman Notice of Appeal, and paragraphs 30 and 35 of the Esther Wrightman appeal), the Tribunal clarifies that it did not find it necessary to rule on this request, as the Tribunal expected that the issues should have been adequately identified through the witness statements filed in this proceeding. As a further clarification of this ruling, the Tribunal notes that it does not accept that these "basket clauses" can be relied on when determining whether proposed evidence is relevant. However, this does not mean, as the Approval Holder has submitted, that relevance is to be determined in the context of the scope of the witness statements of the parties' witnesses. The Tribunal finds that relevance is to be determined having regard to the grounds set out in the notices of appeal (other than the basket clauses).
>
> As Ms. Minten has been granted participant status in a later stage of this proceeding, she was directed to file her Witness Statement by October 16. The Approval Holder requests that the Tribunal strike Ms. Minten's Witness Statement in its entirety, and that she only be allowed to testify orally to evidence that is generally accepted from a lay fact witness. In this regard, the Approval Holder refers to the Tribunal's Practice Direction for Technical and Opinion evidence. The Approval Holder's submissions in support of this request fall into two categories: (i) matters addressed in Ms. Minten's Witness Statement are not relevant to the grounds of appeal of any of the Appellants; and (ii) her Witness
>
> Statement includes technical or opinion evidence which a lay fact witness is not allowed to give. In addition, the Approval Holder notes that Ms. Minten's Witness Statement reports evidence of other persons, and states that these parts of her Witness Statement should be struck as they are hearsay. The Approval Holder also asserts that Ms. Minten refers to health effects regarding a wind turbine owned by her father-in-law, to which her family was exposed. The Approval Holder asserts that her testimony in this regard should not be accepted, as she has filed no documents regarding her medical history.
>
> The Approval Holder asserts that the following areas of Ms. Minten's Witness Statement are not relevant:
>
> • The impact of stray voltage on animals
>
> • Soil compaction (as set out in the following sections in Ms. Minten's Witness Statement: Serious and irreversible harm to the natural environment — effects of soil compaction, Wet Weather, Tracks and Subsoiling, Soil Rehabilitation, and Mitigation is not sufficient)
>
> • Impact to wildlife, including specific evidence regarding individual species.
>
> • Health effects experienced by Ms. Minten regarding a wind turbine purchased and installed by her father-in-law.
>
> For reasons to be provided later, the Tribunal finds that Paragraph 27 of Ms. Wrightman's Notice of Appeal sets out grounds to which subject areas #1 and #3 are relevant. The Tribunal finds that neither notice of appeal sets out grounds of appeal to which area #2 is relevant. Therefore, in respect of area #2, the Tribunal will strike the previously mentioned sections of her Witness Statement.
>
> Turning to the second category of the Approval Holder's submissions, Ms. Minten acknowledges that she is not an expert for the purpose of providing opinion evidence, nor that she has expertise in interpreting scientific and technical evidence. On this basis, the Tribunal cannot accept any opinion evidence or any evidence interpreting scientific or technical evidence. However, for reasons to be provided later, the Tribunal accepts that participants and presenters may be allowed to express their views even though they may be giving evidence as fact witnesses, as this may assist the Tribunal's understanding of

> the issues. The Tribunal also accepts that, and, where appropriate, they may refer to scientific, technical or other forms of expert information, solely on the basis that it informs or clarifies any views they may have stated, but not as proof of such supporting information. In this case, the Tribunal finds that the portions of Ms. Minten's Witness Statement which are otherwise relevant and admissible, may be accepted subject to this caveat.
>
> To the extent that Ms. Minten's evidence regarding her personal exposure to a wind turbine includes conclusions regarding the health impact of the turbine, the Tribunal will not accept this evidence. However, consistent with previous Tribunal rulings, she can describe any symptoms she personally experienced.
>
> The Tribunal finds that the evidence of other persons quoted by Ms. Minten are hearsay, and, for reasons to follow, will not be admitted.

The Tribunal now provides its reasons respecting its ruling, as identified in the above disposition.

Regarding the issue of relevance, para. 27 of Ms. Wrightman's notice of appeal states:

> **Animals health, safety and habitat at risk**
>
> **The Adelaide Wind Energy Centre poses serious and irreversible harm to wildlife, livestock**, and household pets **in the project area** — and even outside the project area, when cumulative impacts are taken into consideration. Bats, eagles, and **other** flora and **fauna are at risk from the installation of** the turbines**, transmission lines, substations**, access roads and other general destruction and disruption made by the wind company.
>
> [emphasis added]

The Tribunal notes that this paragraph does not contain one of the basket clauses to which the Approval Holder objects. The Tribunal finds that this paragraph of Ms. Wrightman's appeal clearly alleges harm to wildlife and livestock, and identifies the installation of transmission lines and substations as one of the alleged causes of the harm.

The Tribunal now turns to its reasons respecting the issue whether a participant or presenter may express their views even though they may be giving evidence as fact witnesses. The Tribunal notes that, under Rules 63, 66, and 69, two of the relevant matters that the Tribunal may consider in deciding whether to grant participant or presenter status are whether:

- a person has a genuine interest, whether public or private, in the subject matter of the proceeding; and
- a person is likely to make a relevant contribution to the Tribunal's understanding of the issues in the proceeding.

For this reason, even if a participant or presenter is a fact witness, Tribunal practice is typically to allow them to state their views on issues, and to either state their understanding of technical information or opinions which inform their views, or to file what is commonly referred to as supporting documents, such as published reports. This evidence is typically not accepted as proof of this supporting evidence. Rather it is accepted on the basis that it describes the information on which the participant or presenter has relied to inform the views which they have expressed.

The Approval Holder argues that the complexity of the information provided by Ms. Minten in her Witness Statement transcends the latitude normally allowed to participants and presenters, in essence crossing the boundary into giving expert technical or opinion evidence. However, Ms. Minten acknowledges that she is not an expert for the purpose of providing opinion evidence, nor that she has expertise in interpreting scientific and technical evidence, and the Tribunal has clearly indicated her evidence is not being accepted as such.

Regarding the hearsay evidence, the Tribunal notes that it is factual evidence, and the Tribunal received no explanation why the persons who provided the evidence to Ms. Minten could not have been called to testify. The nature of the hearsay evidence is such that the Respondents should be able to cross-examine on this evidence, and it is clear that Ms. Minten would not be able to

adequately respond to such cross-examination, as she had no independent personal knowledge relating to this evidence. For these reasons the Tribunal excluded this evidence, notwithstanding that the Tribunal has the jurisdiction to accept hearsay evidence.

During the hearing, the Tribunal ruled that, to the extent that Ms. Minten's evidence regarding her personal exposure to a wind turbine included conclusions regarding the health impacts of the turbine, the Tribunal would not accept this evidence. However, consistent with previous Tribunal rulings, Ms. Minten was permitted to describe any symptoms she personally experienced.

Request by Stephana Johnston to give evidence about the impacts of wind turbines on her own health

After the hearing commenced, Ms. Johnston indicated that she wished to give evidence about the impacts of wind turbines on her own health. When Ms. Johnston sought presenter status at the preliminary hearing, she raised concerns about the legislative and policy framework governing the assessment of the impact of the Project on human health. She did not indicate at that time that she wished to testify concerning the impacts of turbines on her health, and she did not subsequently provide medical records. As a result, the Tribunal ruled that Ms. Johnston was not permitted to provide evidence concerning her health.

Closing Submissions of the Appellants and Participant

The Appellants raised a number of concerns regarding the fairness of the hearing in their written closing submissions, in relation to disclosure of medical records, accessibility and video recording, and access to transcripts. These concerns were addressed and determined as preliminary issues or during the hearing. At this stage, the Tribunal's role is to make a decision on the issues raised in these appeals, according to the legislative tests set out below, and not to revisit or make further findings concerning its procedural rulings made over the course of the hearing. The Tribunal has, therefore, considered only the portions of the Appellants' submissions that address the issues to be determined in this decision.

The Tribunal notes that numerous final submissions made by the Appellants and the participant included, and referred to, evidence that was not adduced at the hearing, and therefore cannot be considered. Some of the submissions also refer to evidence from a different appeal before another panel of the Tribunal. Also, MLWAG and Mr. Wrightman made submissions concerning the Witness Statement of Richard James, an expert witness who was not called at the hearing, and in particular his evidence directed at showing that the Project will not meet the terms and conditions of the REA, which the Tribunal excluded in its orders of October 11 and December 18, 2013. This evidence was disregarded by the Tribunal.

New Evidence

Ms. Wrightman and Ms. Minten both included new evidence in their written closing submissions. The Tribunal has not considered this new evidence. The Tribunal clearly stated in its opening remarks at the hearing that no new evidence would be accepted in closing statements.