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February 19, 2010

Board of Commissioners of Public Utilities  
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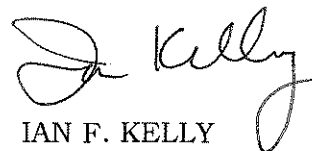
**ATTN: Cheryl Blundon, Director – Corporate Services  
and Board Secretary**

Dear Ms. Blundon:

**RE: Application by Nalcor Energy pursuant to Section 5.5(1) of the  
Electrical Power Control Act (Water Management Agreement)**

Please find enclosed the original and eight copies of Nalcor Energy's Written Submissions and six copies of the Authorities (as discussed) with regards to the above noted application.

Yours truly,



IAN F. KELLY

IFK/cv  
Encl.

cc. Peter Hickman and Jamie Smith, Counsel for CF(L)Co  
Dan Simmons, Legal Counsel for Public Utilities Board  
Jim Haynes, President, Twin Falls Power Corporation  
David Schulze, DIONNE SCHULZE, Counsel for Innu of Ekuanitshit (Mingan)  
Gary Carot, O'Reilly & Associates, Counsel for Innu of Uashat Mak Mani-Utenam et al

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

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

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**WRITTEN SUBMISSIONS  
ON BEHALF OF NALCOR ENERGY**

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

**WRITTEN SUBMISSIONS  
ON BEHALF OF NALCOR ENERGY**

***Introduction***

1. On November 10, 2009, Nalcor Energy (Nalcor) applied to the Board and requested that the Board make an Order establishing the terms of a water management agreement pursuant to Section 5.5 of the EPCA between Nalcor and Churchill Falls (Labrador) Corporation (CF(L)Co) for the Churchill River in Labrador.
2. On December 10, 2009, Nalcor and CF(L)Co filed their respective written submissions pursuant to Section 6 of the Water Management Regulations. CF(L)Co proposed the same water management agreement as had been proposed by Nalcor in its application.

3. Following due notice of Nalcor's application, the Board received requests for Intervenor status from two Quebec Innu groups: the Conseil des Innus de Ekuanitshit and the Innu of Uashat Mak Mani-Utenam. The Board also received a request for Intervenor status from Twin Falls Power Corporation Limited (Twinco), though its request for Intervenor status was limited to participation for the purpose of obtaining all documents and information filed in the proceeding.
4. Other than Twinco, no other customers of CF(L)Co have sought Intervenor status. Specifically, Hydro Quebec, the customer of the largest amount of power and energy from CF(L)Co, advised the Board by letter of December 15, 2009 as follows:

We note that the Nalcor Application, as well as the Nalcor and CF(L)Co submissions of December 10, 2009, acknowledge that the CF(L)Co/Hydro-Québec Power Contracts are protected by Section 5.7 of the EPCA, as does the water management agreement proposed by both Suppliers to the Board.

In such circumstances, Hydro-Québec has decided not to intervene in the Nalcor Application.

5. By Board Order PU-2 (2010), the Board granted Intervenor status to the Conseil des Innus de Ekuanitshit, the Innu of Uashat Mak Mani-Utenam and Twinco.
6. On February 12, 2010, the Intervenor, the Conseil des Innus de Ekuanitshit, filed a Motion to suspend the determination of Nalcor's Application on the grounds that:

- a) Section 68 of the *Environmental Protection Act* (EPA) prohibits the Board from determining the terms of the water management agreement until the Project is released under Part X of the EPA; and
- b) The Board must suspend in order to meaningfully consider the issue of the constitutional duty of consultation that has been raised by Ekuanitshit and other Intervenor.

That suspension motion will be addressed as part of these Submissions.

- 7. The Board is legally required to determine issues on the basis of the evidence before it. In addition to Nalcor's Pre-filed Evidence, Nalcor has responded to various Requests for Information from the Board's staff and the Intervenor. There is an appropriate evidentiary record before the Board with respect to Nalcor's application to establish the terms of a water management agreement.

### ***Legislative Requirements***

**The proposed Water Management Agreement fulfills the legislative requirements contained in the EPCA and the Water Management Regulations. Specifically, the proposed agreement fulfills the efficiency policy set out in subparagraph 3(b)(i) of the EPCA and the regulatory objective set out in subsection 3(1) of the Water Management Regulations. The proposed agreement also fulfills the regulatory requirements contained in subsection 3(2) of the Water Management Regulations.**

8. Subsection 5.4(1) of the EPCA provides that two or more persons who have been granted rights by the province to the same body of water as a source for the production of power and who utilize, or propose to utilize, or to develop and utilize the body of water as a source for the production of power shall enter into an agreement for the purpose of achieving, with respect to the body of water, the policy objective set out in subparagraph 3(b)(i). Subparagraph 3(b)(i) declares the policy of the province that all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner that would result in the most efficient production, transmission and distribution of power.
9. CF(L)Co already utilizes the water of the upper Churchill River for the production of power, with a generating station at Churchill Falls. Nalcor proposes to utilize the waters of the lower Churchill River for the production of power, with generating stations at Gull Island and Muskrat Falls. Consequently, the Suppliers are required to enter into a water management agreement pursuant to Section 5.4 of the EPCA.
10. The Board is required to establish the terms of an agreement pursuant to Section 5.5 of the EPCA. It should be noted that:
  - i) Subsection 5.4(1) provides that a Water Management Agreement is required when there is merely a proposal to develop and utilize the body

of water. The requirement by the Suppliers to enter into a Water Management Agreement, and the corresponding obligation of the Board to establish the terms of a Water Management Agreement, occurs at an early stage of the process.

- ii) The Board's jurisdiction and authority with respect to the proposed Lower Churchill Project is limited. The Board's only jurisdiction is to establish the terms of the Water Management Agreement. The Board does not decide whether the Lower Churchill Project will proceed. Specifically, the Board does not issue a Certificate of Public Convenience and Necessity for the Project, as is required in certain other Canadian jurisdictions.
11. Section 3(1) of the Water Management Regulations contains the regulatory objective of a water management agreement. The objective is the coordination of the power generation and energy production in the aggregate of all production facilities on the Churchill River to satisfy the delivery schedules for all Suppliers on the Churchill River in a manner that provides for the maximization of the long term energy generating potential of the Churchill River, while ensuring that the provisions of a contract for the supply of power governed by Section 5.7 of the EPCA are not adversely affected.
12. The proposed Water Management Agreement fulfills the efficiency policy of the EPCA and the regulatory objective of the Water Management Regulations.

13. Nalcor's Pre-filed Evidence and its responses to PUB-NE-1 and PUB-NE-2 explain in detail how the efficiency policy and the regulatory objective are fulfilled by the proposed agreement. Coordinating power and energy production maximizes the amount and value of power and energy that can be produced by the Churchill River. Coordination of production at the generating stations regulates the flow of water between the stations to best utilize the river system's storage capability and the facilities' generating capacity. Flow regulation increases the control and predictability of energy production at a generating station and optimizes the use of the available water within the constraints of existing contractual supply obligations. (Page 11, lines 12-18) The coordination of power and energy production in accordance with the Water Management Agreement brings greater energy production on the Churchill River by reducing the inefficient use of water at the lower Churchill facilities. (Page 11, line 27 – Page 12, line 1) Coordination reduces spillage at the lower Churchill facilities. (Page 12, line 3)

**Reference: Nalcor's Pre-filed Evidence, page 11, lines 12-18, 27, page 12, lines 1 and 3**

14. Without the Water Management Agreement, Nalcor would be limited to approximately 400 MW of continuous delivery in a long term power purchase agreement for Gull Island. Such an arbitrary constraint on lower Churchill delivery schedules is unnecessary and is incompatible with the concept of the

efficient use of the resource. (Page 14, lines 8-12) Nalcor's Evidence explains, at page 15, how spillage is reduced through coordinated operations pursuant to the Water Management Agreement.

**Reference: Nalcor's Pre-filed Evidence, page 14, lines 8-12, page 15**

15. The answers to PUB-NE-1 and PUB-NE-2 explain in more detail how the efficiency policy and the regulatory objective are fulfilled. In addition, PUB-NE-1 explains how the requirements of Section 3(2) of the Water Management Regulations have been implemented in the proposed agreement.

**Reference: PUB-NE-1 and PUB-NE-2**

16. The answer to PUB-NE-49 provides simulations which demonstrate the coordinated operation of the generating facilities on the Churchill River and demonstrate how such coordination optimizes the use of available water, minimizes spillage and enhances the continuous delivery of power and energy from the Gull Island facility. It is interesting to note that average monthly flows in the lower Churchill River will be only minimally different with water management than without water management, as indicated in the last table contained in PUB-NE-49.

**Reference: PUB-NE-49**

17. There is no evidence before the Board that the proposed Water Management Agreement does not fulfill the efficiency policy or the regulatory objective.
18. Nalcor respectfully submits that the proposed Water Management Agreement fulfills the legislative requirements, in particular, the efficiency policy contained in subparagraph 3(b)(i) of the EPCA and the regulatory objective contained in subsection 3(1) of the Water Management Regulations. The proposed agreement also fulfills the regulatory requirements contained in subsection 3(2) of the Water Management Regulations.

***Existing Contracts for the Supply of Power***

**The proposed Water Management Agreement fulfills the requirements of Section 5.7 of the EPCA. The proposed agreement does not adversely affect a provision of a contract for the supply of power entered into before the Water Management Agreement, or a renewal of that contract.**

19. CF(L)Co has entered into four contracts with its major customers for the supply of power, energy and ancillary services:
  - The HQ Power Contract;
  - The Sub-Lease between Twinco and CF(L)Co;
  - The Hydro Recall Power Contract; and
  - The Churchill Falls Guaranteed Winter Availability Contract.

**Reference: Nalcor's Pre-filed Evidence, page 5, line 13 to page 7, line 19**

20. The answers to PUB-NE-5 and PUB-NE-6 explain the mechanisms that ensure that the provisions of existing power contracts are not adversely affected. In each case, the customer will receive the power and energy required to be delivered to it, at the time, and in the amounts, required by the Prior Power Contracts. Under the Water Management Agreement, CF(L)Co will submit to the Independent Coordinator its delivery requirements for each period, subject to the limits of its own generating capability. The Independent Coordinator is required to establish production schedules that will provide CF(L)Co with the full amount of its delivery requirements for the applicable period. The Independent Coordinator cannot schedule less than CF(L)Co's full delivery requirements.

**Reference: PUB-NE-5 and PUB-NE-6**

21. Coordination of power generation and energy production through water management therefore has no effect on the amount of power and energy delivered or the timing of such delivery under any Prior Power Contract. The purchaser gets precisely the amount of power and energy at the time required under its Prior Power Contract. Consequently, the Water Management Agreement has no adverse effect on any Prior Power Contract.

**Reference: PUB-NE-6**

22. No customer has contended that the proposed Water Management Agreement adversely affects any provision of an existing contract for the supply of power.

As noted previously, CF(L)Co's largest customer, Hydro-Quebec, has recognized that the proposed Water Management Agreement acknowledges that the HQ Power Contract is protected by Section 5.7 of the EPCA.

23. Nalcor respectfully submits that the proposed Water Management Agreement does not adversely affect a provision of any contract for the supply of power entered into before the Water Management Agreement, or any renewal of that contract.

### ***Sound Public Utility Practice***

**The proposed Water Management Agreement accords with principles of generally accepted sound public utility practice.**

24. In carrying out its duties and in exercising its powers under the EPCA, the Board is required to apply tests consistent with generally accepted sound public utility practice.
25. In the context of water management, the principles of generally accepted sound public utility practice are largely subsumed in the legislative requirements. If one utility operated all of the generating stations on the Churchill River, the utility operator would be expected to manage all of its facilities to optimize the amount of power and energy which could be obtained from the available water. The requirement of the operator to do so is founded in principles of sound public utility practice. For example, Newfoundland and Labrador Hydro is expected to follow

sound public utility practice in the operation of its various generating stations on the Bay d'Espoir system.

26. The legislative requirements in relation to water management, contained in the EPCA and the Water Management Regulations, are intended to ensure that the same result is achieved where there are different operators of multiple generating stations on the same body of water. The proposed Water Management Agreement fulfills the efficiency policy contained in the EPCA and fulfills the regulatory objective and regulatory provisions contained in the Water Management Regulations. In doing so, it achieves the same result of fulfilling the efficiency policy as if one operator were operating all generating stations in accordance with generally accepted sound public utility practice.
27. Consequently, the proposed Water Management Agreement accords with principles of generally accepted sound public utility practice.

### ***Duty to Consult***

**The proposed Water Management Agreement cannot and does not adversely affect any alleged Aboriginal interest. Consultation is occurring and will continue with respect to the Lower Churchill Project itself. No amendment to the Water Management Agreement is required nor is any suspension of the Board's decision required.**

### ***Legal Principles***

28. The nature of the duty to consult with an Aboriginal group is stated in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35. 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. Consequently, it is a necessary prerequisite to engage the duty to consult that there be both the potential existence of an Aboriginal right or title and conduct that might adversely affect it.

**Reference:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35

29. A credible but unproven claim is sufficient to satisfy the first part of the test. If there is both a credible claim and conduct that might adversely affect it, the content of the duty to consult is then proportionate to the strength of the right asserted and the seriousness of the potential impact.

**Reference:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 37  
*Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at para. 22, 34

30. As the Supreme Court of Canada has noted in *Haida Nation*, the issue of consultation arises because of the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. However, the Crown is not rendered impotent. It may continue to manage the resource pending claims resolution. The consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.

**Reference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 17, 26, 27, 48**

31. The evidence to support an Aboriginal claim and, more importantly, the evidence of adverse impact, must not be expressed in generalities. To establish a breach of a duty to consult there must be evidence presented which establishes an adverse impact on a credible claim. There is no at large duty to consult that is triggered solely by the development of land for public purposes.

**Reference: *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at paras. 30-34**

32. Where a duty to consult arises in connection with projects, such as the Lower Churchill Project, it must be fulfilled at some point before final approval for the development to proceed.

**Reference: *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at para. 21**

33. In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review.

**Reference: *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, at para. 25**

***Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, at para. 44**

34. For example, consultation through the environmental assessment process may be sufficient to fulfill the Crown's duty to consult with respect to a particular project.

**Reference: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74**

*Preliminary or Substantive Issue*

35. The current state of the case law is uncertain as to whether the Board has the jurisdiction and power to decide whether the Crown has a duty to consult, whether it has fulfilled the duty and, if not, what result should follow.
36. The Board is a statutory body. As such, it only has the jurisdiction granted to it by the Legislature or arising by necessary implication from its enabling legislation. It is not a Superior Court of law, such as the Supreme Court of Newfoundland and Labrador, which has an inherent jurisdiction.
37. As already noted, even where there is a duty to consult, the Crown may consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review. The Supreme Court of Canada has held that consultation through the environmental assessment

process may be sufficient to fulfill the Crown's duty to consult with respect to a particular project.

**Reference:** *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, at para. 25  
*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, at para. 44  
*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74

38. In essence, Aboriginal groups should use the regulatory mechanisms made available to them by the Legislature. In this case, the Legislature has given the Public Utilities Board the power to establish the terms of a Water Management Agreement. The Board has in turn given notice to the Aboriginal groups and provided them with an opportunity to provide evidence to demonstrate any alleged adverse affect of the proposed Water Management Agreement.
39. On this view, the Public Utilities Board does not consider the duty to consult as a preliminary matter. Rather, the Board exercises the jurisdiction conferred on it by the Legislature to hear all parties. Then, having considered all of the evidence, including the evidence of the Aboriginal Intervenors, the Board proceeds to establish the terms of the Water Management Agreement. The evidence of the Aboriginal Intervenors is simply part of the record to be given such weight as the Board deems appropriate in the exercise of its legislative jurisdiction to establish the terms of the Water Management Agreement.

40. An alternative view has been suggested by some courts, in particular, the British Columbia Court of Appeal in cases such as *Carrier Sekani* and *Kwikwetlem*. The British Columbia Court of Appeal has held that the Board must decide, as a preliminary matter, whether there is a duty to consult and if so, whether the duty has been fulfilled. This approach is somewhat at variance with other case law indicating that existing regulatory or environmental processes should be followed. Leave to appeal has been granted by the Supreme Court of Canada in the *Carrier Sekani* case. Canada's highest court may eventually provide further guidance with respect to this issue.

**Reference: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67  
*Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 BCCA 68**

41. Nalcor submits as follows:
- i) The Board's jurisdiction is limited to fulfilling its legislative function. The Board should consider all of the evidence and should then proceed to establish the terms of the Water Management Agreement. Nalcor respectfully submits that the Aboriginal intervenors have not established that their alleged Aboriginal interests can be adversely affected by the proposed Water Management Agreement for reasons discussed later in these Submissions. The Board should therefore approve the proposed

Water Management Agreement. No amendment is necessary or appropriate.

- ii) In the alternative, if the Board determines that it should consider the issue of the duty to consult as a preliminary issue, then no duty to consult has been established with respect to the terms of the Water Management Agreement. The Water Management Agreement cannot and does not adversely affect any alleged Aboriginal interest. The Board should therefore approve the proposed Water Management Agreement. No amendment is necessary or appropriate.

- 42. Consequently, whether considered as a preliminary matter or as part of the Board's substantive jurisdiction, the same question must be addressed by the Board and the same determination should be made by the Board.

### *Consultation*

- 43. The Conseil des Innus de Ekuanitshit and the Innu of Uashat Mak Mani-Utenam have asserted a potentially credible claim of an Aboriginal interest in relation to land and resource usage. Nalcor has accepted that there is a sufficiently credible claim to engage a duty of consultation in relation to the Lower Churchill Project itself. That consultation process is occurring in conjunction with the environmental assessment process. There will be consultation with respect to

the nature and extent of any alleged Aboriginal interest and land and resource usage by the Aboriginal groups. That consultation will in turn provide important input into the environmental assessment process. The nature and extent of any accommodation, if appropriate, will also be considered.

44. Consultation is occurring with nine Aboriginal groups. Three of them are in Labrador: the Innu Nation, the Labrador Metis Nation and the Nunatsiavut Government. The remaining six are Quebec Innu groups: Uashat mak Mani-Utenam (Sept-Isle), Ekuanitshit (Mingan), Nutaskuan (Natashquan), Unamen Shipu (La Romaine), Pakua Shipi (Ste. Augustine) and Matimekush-Lake John (Schefferville).
45. The consultation process with the Aboriginal groups is continuing. The details of Nalcor's consultative efforts with the Conseil des Innus de Ekuanitshit and the Innu of Uashat mak Mani-Utenam with respect to the Lower Churchill Hydroelectric Generation Project are contained in the responses to PUB-NE-14, PUB-NE-18, PUB-NE-41, PUB-NE-44 and PUB-NE-47.

**Reference: PUB-NE-14, PUB-NE-18, PUB-NE-41, PUB-NE-44 and PUB-NE-47**

#### *No Adverse Impact*

46. The Board's sole jurisdiction is to establish the Water Management Agreement. In considering whether there is a duty to consult, and specifically whether any

Aboriginal interest may be adversely affected, the Board must consider the issue in relation to the transaction or matter before it. The transaction or matter before the Board is simply the establishment of the Water Management Agreement.

47. The matter before the Board is not the development of the lower Churchill Project. The Board does not authorize the development of the lower Churchill Project. Issues with respect to the development of the lower Churchill Project are being considered, *inter alia*, through the environmental assessment process.
48. The Water Management Agreement is simply a commercial agreement between two Suppliers on the same body of water. Because of the provisions of existing power contracts, which may not be adversely affected, water management is required on an hourly basis. These hourly management adjustments are simply the type of adjustments that would occur without a Water Management Agreement if one Supplier owned and operated both the upper and lower Churchill facilities. These types of hourly operational adjustments are not what is contemplated or required in the duty to consult founded in the Crown's honour and the goal of reconciliation with Aboriginal peoples.

**Reference: PUB-NE-23**

49. The Water Management Agreement does not involve any unilateral exploitation of resources contrary to the honour of the Crown as discussed in *Haida Nation*. The exploitation of the resource can only take place after the approval and

construction of the Project, which cannot take place until after the environmental assessment and permitting processes, including consultation with the Aboriginal intervenors.

50. The Water Management Agreement cannot affect any alleged Aboriginal interests. The Water Management Agreement does not contain any prescribed operating parameters, such as reservoir levels or water flows. The Water Management Agreement is structured to operate in relation to whatever operating parameters are established through the environmental assessment and permitting processes.
51. Matters such as reservoir levels and water flows will be subject to consultation through the environmental assessment and subsequent permitting processes. These processes will establish operating parameters for the lower Churchill facilities.
52. The Water Management Agreement will function within the existing operating parameters of the upper Churchill facilities and parameters to be established in relation to the lower Churchill facilities. Since the Water Management Agreement itself does not contain the operating parameters, the Water Management Agreement cannot affect any alleged Aboriginal interests. The environmental assessment and permitting processes will establish the operating parameters, which may result in restrictions, limitations or conditions placed, directly or

indirectly, on the power of the Independent Coordinator, or direction or guidance given to the Independent Coordinator, concerning the scheduling of the production of power at the hydroelectric facilities.

53. The Independent Coordinator must adhere to the operating parameters in scheduling the production of power at the hydroelectric facilities. For example, in scheduling the production of power, the Independent Coordinator must have regard to, *inter alia*, reservoir levels, minimum flow requirements and any other regulatory or permit requirements.
54. This is reflected in the Water Management Regulations and the Water Management Agreement in several places. Subsection 3(2)(c) of the Water Management Regulations, reflected in Subsection 6.2(a) of the Water Management Agreement requires the Independent Coordinator to establish production schedules in the exercise of reasonable judgment. It would not be an exercise of reasonable judgment to establish production schedules which are not in accordance with regulatory and permit requirements for the generating facilities.
55. Pursuant to Subsection 6.2(d) of the Water Management Agreement, the Independent Coordinator shall not act in a manner inconsistent with any provision of the Agreement, the Act, the Regulations, or any procedures, directions or guidelines established by the Water Management Committee.

56. Subsection 3(4) of the Water Management Regulations requires each Supplier to operate its facilities in a manner not inconsistent with principles of good utility practice. Section 4.2 of the Water Management Agreement expressly provides that "CF(L)Co and Nalcor shall adhere to the production schedules set by the Independent Coordinator, provided that in no event shall the Suppliers be required to operate in a manner which is inconsistent with good utility practice including...". It would not be in accordance with good utility practice to operate in contravention of regulatory and permit requirements.
57. Consequently, the Water Management Agreement contemplates that the Independent Coordinator will schedule production of power bearing in mind the facilities' operating parameters and regulatory and permit requirements.

**Reference: PUB-NE-30 and PUB-NE-32**

58. The Water Management Agreement itself can have no adverse impact. It is carefully structured to enable it to operate in relation to whatever operating parameters are established following consultation in relation to the Project and the completion of the environmental assessment and permitting processes.
59. The evidence submitted by the Aboriginal intervenors does not demonstrate any adverse affect of the Water Management Agreement with respect to any of their alleged rights. Rather, the evidentiary record establishes that their concerns and

the alleged adverse affects arise from the construction of the Lower Churchill Project itself, not from the Water Management Agreement.

60. This conclusion is clearly established by reviewing the responses to the information requests addressed to the Aboriginal intervenors. The response to PUB-CIE-3 indicate concerns with respect to flows, fish and wildlife, transportation and navigation, cultural heritage, erosion and water flows. However, all of these suggested impacts arise from the potential construction of the Lower Churchill Project itself.

**Reference: PUB-CIE-3**

61. Similarly, the responses to information requests of the Uashat Mak Mani-Utenam, in particular, the responses to PUB-IUM-3 and PUB-IUM-4 express similar concerns with respect to hydrology, use of waters, flow, water levels, water volumes and run-off and with respect to effects on the environment, plants and animals. The nature of their concerns is captured in the following paragraph in the response to PUB-IUM-3.

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

**Reference: PUB-IUM-3 and PUB-IUM-4**

62. It is clear that the concerns expressed by the Aboriginal intervenors relate to the Lower Churchill Project itself. The alleged impacts arise from the potential construction of the Project.
63. That is why the lower Churchill Project is undergoing an environmental assessment process which will consider all of these matters. That is the appropriate forum to address all of these concerns. The Aboriginal intervenors are in fact participating in that environmental assessment process.
64. Following a public hearing, the Joint Review Panel will prepare its report and recommendations to the respective Ministers with respect to the development of the lower Churchill facilities. Any potential adverse impacts will be identified in that process and will be brought to the attention of the Crown so that the Crown may consider what accommodation, if any, is appropriate in order to minimize any such identified adverse impacts. In due course, the Project will be released, subject to such conditions, limitations and restrictions as are considered appropriate. Those conditions, restrictions and limitations will become part of the operating parameters which then must be adhered to by the Suppliers and the Independent Coordinator under the Water Management Agreement.

65. It is telling that neither Aboriginal intervenor has pointed to any particular provision of the Water Management Agreement, with any specific explanation of how such provision adversely affects its interests.
66. The concerns expressed by the Aboriginal intervenors are expressed in generalities. There is no specific evidence that the Water Management Agreement, or any particular provision thereof, can or will have any adverse affect. Evidence in generalities is insufficient to establish adverse affect.

**Reference: *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, at paras. 30, 33-35**

### ***THE SUSPENSION APPLICATION***

#### *S. 68 of the EPA*

67. The Board is of course bound by Section 7 of the Water Management Regulations which requires that the Board establish a Water Management Agreement within 120 days of the filing of Nalcor's Application under Section 5.5(1) of the EPCA. The Board does not have the power to simply suspend Nalcor's application. Nor is it necessary or appropriate to do so.
68. Section 5.4(1) of the EPCA provides:

#### **Agreement to develop a source of power**

**5.4** (1) Two or more persons who have been granted rights by the province to the same body of water as a source for the production of power and who utilize,

or propose to utilize, or to develop and utilize the body of water as a source for the production of power shall enter into an agreement for the purpose of achieving, with respect to the body of water, the policy objective set out in subparagraph 3(b)(i). [Emphasis added]

69. It is clear from the language of Section 5.4 of the EPCA that a water management agreement is required early in the development process, when a person merely proposes to develop and utilize the body of water.

70. Section 68(1) of the EPA provides:

#### **Authorization**

**68.** (1) A licence, permit, approval or other document of authorization issued under another Act pertaining to an undertaking shall not be issued until the undertaking has been exempted or released under this Part.

71. Section 48 of the EPA provides:

#### **Prohibition**

**48.** A person shall not proceed with an undertaking unless that undertaking has been exempted or released under this Act.

72. Section 2(mm) of the EPA defines undertaking:

#### **Definitions**

**2.** In this Act

...

(mm) "undertaking" includes an enterprise, activity, project, structure, work or proposal and a modification, abandonment, demolition, decommissioning,

rehabilitation and an extension of them that may, in the opinion of the minister, have a significant environmental effect;

73. The fundamental principle of statutory interpretation is that statutory provisions should be given a “purposive” interpretation that best achieves the objects of the legislation. Provisions in different statutes should be interpreted in such a manner as best harmonizes their provisions so as to give effect to both statutes. The Board therefore needs to determine the most purposive interpretation of the provisions of the EPCA and the EPA.

**Reference:** *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, at para. 21  
*Bell Express Vu Ltd. Partnership v. Rex*, 2002 SCC 42, at paras. 30 and 46  
*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, at para. 30

74. The Board’s function in relation to Nalcor’s Application is to make an Order establishing the terms of a water management agreement. The Board does not issue any licence, permit, approval or other document of authorization within the meaning of Section 68 of the EPA.
75. A water management agreement is a commercial agreement between two parties with respect to the operation of existing and/or proposed hydroelectric facilities. Its terms must fulfill the policy objective of the EPCA.
76. The Board has no role with respect to the Lower Churchill Project, except to establish the terms of the water management agreement. In particular, the

Board has no statutory role or mandate to authorize the development. This is in contrast to regulatory provisions in other jurisdictions which require the regulator to issue a Certificate of Public Convenience and Necessity, or similar form of authorization, before a hydroelectric development can proceed.

77. It is also a basic principle of statutory interpretation that words must be read in their context within a statute. In Section 68, the reference to a “licence, permit, approval” must be read together with the phrase “or other document of authorization”. What is contemplated is a licence, permit, approval or other document which authorizes the undertaking in some fashion. That is not the case with respect to the Board making an order establishing a water management agreement. Establishing the terms of a water management agreement does not in any fashion authorize the undertaking which constitutes the Lower Churchill Project.

**Reference: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Ed. (Toronto: Carswell, 2002) at pgs. 173-175**

78. Consequently, Section 68 does not apply for the following reasons:
- a) Under Section 5.5 of the EPCA, the Board makes an Order; the Board does not issue any of the documents referred to in Section 68 of the EPA;

- b) The Board's Order establishes the terms of a water management agreement under Section 5.5 of the EPA. The Board does not issue a licence, permit, approval or other document of authorization.
  - c) Even if it were acting under Section 5.4(3)(a) of the EPCA to make an Order to approve a water management agreement (which the Board is not doing), such an Order would not constitute an approval, within the meaning of Section 68 of the EPA. The word "approval" in Section 68 is limited to an approval which constitutes a document of authorization. Even if the Board were making an Order approving the terms of a water management agreement, such an Order would not constitute an approval within the meaning of Section 68 since such approval does not authorize the development.
79. This interpretation of Section 68 is a purposive interpretation of both the EPCA and the EPA. Under the EPCA, the Board is intended to act early in the process, when there is merely a proposal. If Section 68 were read as precluding the Board from making an Order until after the undertaking had been exempted or released under Part X of the EPA, the undertaking would then no longer be a proposal. Once the undertaking is released under Part X of the EPA, Nalcor is entitled to proceed with the undertaking pursuant to Section 48 of the EPA. At that stage, the undertaking has moved from a proposal to an actual development and construction project. Consequently, interpreting Section 68 in a manner

which precludes the Board from making an Order until after release under Part X of the EPA fails to harmonize the meaning of both statutes and defeats the statutory intention and purpose of the EPCA.

80. The legislative principle in the EPCA that a water management agreement should be established at the proposal stage is important. As noted in the answer to PUB-NE-29, flow and reservoir draw down predictions in the Environmental Impact Statement are predicated on a water management agreement being in place. Establishing the terms of the water management agreement, in advance of the hearing by the Joint Review Panel, facilitates the environmental assessment process. The Panel will know the terms of the water management agreement as it performs its functions under the EPA. Consequently, this interpretation best harmonizes the meaning of both statutes to fulfill their statutory purposes.

**Reference: PUB-NE-29**

81. Further support is found in Section 34(1) of the EPCA which provides as follows:

**Resolving statutory conflict**

**34.** (1) An Act or contract, whether enacted before or after the commencement of this Act relating to a producer or retailer shall be read and construed subject in all respects to this Act, which in a case of conflict shall, notwithstanding a provision to the contrary contained in another Act or contract, prevail over a general or special Act enacted or a contract entered into prior to the commencement of this Act.

82. The legislative purpose of this section is clearly that the provisions of the EPCA are to take priority over other general statutes such as the EPA. This makes good legislative sense for the reasons already stated. In addition, the priority of the EPCA as special legislation is evident from a review of its provisions, in particular, Part III dealing with Power Emergencies. Obviously, the EPCA is intended to have paramountcy over all other statutory provisions of general application, such as the EPA. Otherwise the statutory objectives of the EPCA, including the statutory purpose to deal with power emergencies could be frustrated or hindered.

*Notice to the Attorneys General*

83. The requirement to give notice to the Attorneys General does not apply. That requirement is contained in the *Judicature Act* and applies to a court proceeding where the constitutional validity of an Act or regulation of the Parliament of Canada or of the Legislature is brought into question. In that eventuality, notice is required to be given to both the Attorney General of Canada and the Attorney General for the Province.

**Reference:** *Judicature Act*, RSNL 1990 c. J-4, ss. 2(p) and 57

84. This is not a court proceeding. There is no issue of the constitutional validity of an Act or regulation of the Parliament of Canada or of the Legislature. The issue

raised is simply a matter of the statutory interpretation of two statutes of the Legislature of Newfoundland and Labrador, specifically the EPCA and the EPA.

### *Suspension for Consultation*

85. The Conseil des Innus de Ekuanitshit also request a suspension of the Board's proceedings in order to permit consultation. However as explained previously, consultation is occurring and will occur with respect to the Lower Churchill Project. However, there is no separate requirement of consultation with respect to the terms of the Water Management Agreement since there cannot be any adverse affect from the Agreement itself. No basis has been demonstrated for the Board suspending Nalcor's application or the Board's decision.

### ***Reporting and Monitoring***

86. Subsection 5.6(2) of the EPCA enables the Board to create reporting commitments and monitoring requirements to ensure that Nalcor and CF(L)Co comply with the terms and conditions of the Water Management Agreement. Subsection 6.2(a)(vi) of the Water Management Agreement, in compliance with Subsection 3(2)(h)(ii) of the Water Management Regulations, requires the Independent Coordinator to provide to the Minister and, on request, the Board, an annual report summarizing its activities in a form acceptable to the Minister. Nalcor considers that the annual report should be a sufficient mechanism to

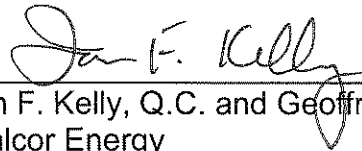
provide information to both the Minister and the Board to demonstrate compliance by Nalcor and CF(L)Co with the terms and conditions of the Agreement.

**Conclusion**

87. Nalcor respectfully submits that the Board should establish the terms of the Water Management Agreement as proposed by Nalcor and CF(L)Co.

**DATED** at St. John's, NL this 19th day of February, 2010.

**NALCOR ENERGY**

A handwritten signature in dark ink, appearing to read "Ian F. Kelly", is written over a horizontal line.

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- 10    R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Ed. (Toronto: Carswell, 2002)
- 11    *Judicature Act*, RSNL 1990 c. J-4

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2004 CarswellBC 2656

Haida Nation v. British Columbia (Minister of Forests)

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)

Weyerhaeuser Company Limited (Appellant) v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation (Respondents) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements (Intervenors)

Supreme Court of Canada

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

Heard: March 24, 2004

Judgment: November 18, 2004

Docket: 29419

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Proceedings: reversing in part *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.); additional reasons at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117, 172 B.C.A.C. 75, 282 W.A.C. 75 (B.C. C.A.); reversing *Haida Nation v. British Columbia (Minister of Forests)* (2000), 2000 BCSC 1280, 2000 CarswellBC 2434, 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83 (B.C. S.C.)

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2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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Robert C. Freedman for Intervener, Dene Tha' First Nation

Robert J.M. Janes, Dominique Nouvet for Intervener, Tenimgyet aka Art Matthews, Gitxsan Hereditary Chief

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

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

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

Subject: Natural Resources; Public; Property; Civil Practice and Procedure; Environmental; Constitutional

Timber --- Timber licences — Judicial review

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.

Crown --- Crown property — Grants of Crown lands — General

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.

Aboriginal law --- Reserves and real property — Transfer or disposition — General principles

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.

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#### Injunctions --- Injunctions involving Crown — Miscellaneous injunctions

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted — Band not required to seek injunction in order to exercise remedy.

#### Bois d'oeuvre --- Permis de coupe de bois — Contrôle judiciaire

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.

#### Couronne --- Propriété de la Couronne — Concession des terres de la Couronne — En général

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.

#### Droit autochtone --- Réserves et biens-fonds — Transfert ou disposition — Principes généraux

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.

#### Injonctions --- Injonctions impliquant la Couronne — Injonctions diverses

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication — Bandes ne sont pas obligées de demander une injonction pour exercer leur recours.

An aboriginal band lived on an island in British Columbia, where it had harvested cedar timber for many generations. The band claimed title to the island, but the claim had not been recognized at the time of the proceedings. The Province issued a tree farm licence and replaced the licence on three occasions.

The band's application to set aside the licence and replacements was dismissed. The trial judge found that no legal duty existed to negotiate with the band, although a moral duty existed.

The band's appeal was allowed. The appellate court found that the Government and the logging company had a legal duty to negotiate with the band regarding the timber licence.

The Government and the logging company appealed.

**Held:** The Government's appeal was dismissed and the logging company's appeal was allowed.

The honour of the Crown requires that the Government consult on relevant issues with Indian bands when their assertion of aboriginal rights is sufficiently strong. In appropriate circumstances, a duty to accommodate may also arise. The fact that the rights claimed had not yet been proven did not negate the duty to consult. Knowledge of a credible but unproven claim is sufficient to trigger the duty to consult and possibly accommodate. The scope of the duty is proportionate to a preliminary assessment of the strength of the band's case, and the potentially adverse effects of the impugned activity on the aboriginal title. The duty does not rest exclusively with the federal Government

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but extends to the provincial Government as well.

In the case at bar, the Province failed in its duty to consult the native band. The Province had knowledge of potential aboriginal title. Red cedar was integral to the Indian band's culture, and the logging licence covered a large amount of the island.

The logging company did not have a duty to consult or accommodate. The honour of the Crown cannot be delegated to a third party. The doctrine of "knowing receipt" was not applicable. The fact that a third party is not required to consult or accommodate native interests does not preclude findings of liability.

The band was not required to seek an interlocutory injunction rather than bring the current proceedings. The current proceedings did not prevent an application for an injunction.

Une bande indienne vivait sur une île de la Colombie-Britannique et elle coupait depuis plusieurs générations le cèdre qui y poussait. La bande a revendiqué le titre de l'île, mais sa revendication n'avait toujours pas été reconnue au moment des procédures. La province a délivré un permis, appelé concession de ferme forestière, et l'a remplacé à trois reprises.

La demande de la bande en annulation du permis et des remplacements a été rejetée. Le premier juge a conclu que seule une obligation morale, et non légale, existait de négocier avec la bande.

Le pourvoi de la bande a été accueilli. La Cour d'appel a conclu que le gouvernement et la compagnie d'exploitation du bois avaient une obligation légale de négocier avec la bande indienne relativement au permis d'exploitation du bois.

Le gouvernement et la compagnie ont interjeté appel.

**Arrêt:** Le pourvoi du gouvernement a été rejeté et le pourvoi de la compagnie a été accueilli.

L'honneur de l'État exige que le gouvernement consulte les bandes indiennes au sujet des questions pertinentes lorsque leurs revendications de titres ancestraux sont assez solides. Une obligation d'accommodement peut également naître dans des circonstances appropriées. Le fait que les droits revendiqués n'avaient pas encore été prouvés n'enlevait pas l'obligation de consulter. La connaissance d'une revendication crédible mais non prouvée suffit pour donner naissance à l'obligation de consulter et aussi, possiblement, à celle de trouver un accommodement. L'étendue de l'obligation est proportionnelle à l'évaluation préliminaire de la force de la preuve de la bande et de l'impact potentiellement négatif de l'activité contestée sur le titre ancestral. L'obligation n'appartient pas exclusivement au gouvernement fédéral; elle s'applique également au gouvernement provincial.

En l'espèce, la province a manqué à son obligation de consulter la bande indienne. La province connaissait l'existence possible d'un titre ancestral. Le cèdre rouge faisait partie intégrante de la culture de la bande indienne, et le permis de couper du bois couvrait une large partie de l'île.

La compagnie n'avait aucune obligation de consulter ou de trouver un accommodement. L'honneur de l'État ne peut être délégué à un tiers. La doctrine de la « réception en connaissance de cause » ne trouvait pas application ici. Le fait qu'un tiers n'était pas obligé de consulter les autochtones vis-à-vis leurs intérêts ou de trouver un accommodement pour ceux-ci n'empêchait cependant pas de tirer une conclusion de responsabilité.

La bande n'était pas obligée de demander une injonction au lieu des procédures actuelles. Celles-ci n'empêchaient

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

par ailleurs pas une demande d'injonction.

#### Cases considered by *McLachlin C.J.C.*:

*Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — considered

*Canada (Director of Investigation & Research) v. Southam Inc.* (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

*Cardinal v. Kent Institution* (1985), [1985] 2 S.C.R. 643, [1986] 1 W.W.R. 577, 24 D.L.R. (4th) 44, 63 N.R. 353, 69 B.C.L.R. 255, 16 Admin. L.R. 233, 23 C.C.C. (3d) 118, 49 C.R. (3d) 35, 1985 CarswellBC 402, 1985 CarswellBC 817 (S.C.C.) — considered

*Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — followed

*Guerin v. R.* (1984), [1984] 6 W.W.R. 481, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada*) 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — followed

*Halfway River First Nation v. British Columbia (Ministry of Forests)* (1997), 1997 CarswellBC 1745, 39 B.C.L.R. (3d) 227, [1997] 4 C.N.L.R. 45, [1998] 4 W.W.R. 283 (B.C. S.C.) — referred to

*Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 129 B.C.A.C. 32, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 210 W.A.C. 32 (B.C. C.A.) — referred to

*Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107, 4 C.E.L.R. (3d) 214, 2003 BCSC 1422, 2003 CarswellBC 2294 (B.C. S.C.) — referred to

*Marshall v. Canada* (1999), (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 456, 1999 CarswellINS 262, 1999 CarswellNS 282, (sub nom. *R. v. Marshall*) 177 D.L.R. (4th) 513, (sub nom. *R. v. Marshall*) 246 N.R. 83, (sub nom. *R. v. Marshall*) 138 C.C.C. (3d) 97, (sub nom. *R. v. Marshall*) [1999] 4 C.N.L.R. 161, (sub nom. *R. v. Marshall*) 178 N.S.R. (2d) 201, (sub nom. *R. v. Marshall*) 549 A.P.R. 201 (S.C.C.) — considered

*Marshall v. Canada* (1999), (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 533, 1999 CarswellINS 349, 1999 CarswellNS 350, (sub nom. *R. v. Marshall*) [1999] 4 C.N.L.R. 301, (sub nom. *R. v. Marshall*) 247 N.R. 306, (sub nom. *R. v. Marshall*) 179 D.L.R. (4th) 193, (sub nom. *R. v. Marshall*) 139 C.C.C. (3d) 391, (sub nom. *R. v. Marshall*) 179 N.S.R. (2d) 1, (sub nom. *R. v. Marshall*) 553 A.P.R. 1 (S.C.C.) — considered

*Mitchell v. Minister of National Revenue* (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911,

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

206 F.T.R. 160 (note), [2002] 3 C.T.C. 359 (S.C.C.) — considered

*Paul v. British Columbia (Forest Appeals Commission)* (2003), 18 B.C.L.R. (4th) 207, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161, 231 D.L.R. (4th) 449, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, [2003] 2 S.C.R. 585, 2003 SCC 55, 2003 CarswellBC 2432, 2003 CarswellBC 2433 (S.C.C.) — considered

*R. c. Adams* (1996), 202 N.R. 89, [1996] 3 S.C.R. 101, 110 C.C.C. (3d) 97, 138 D.L.R. (4th) 657, [1996] 4 C.N.L.R. 1, 1996 CarswellQue 912, 1996 CarswellQue 913 (S.C.C.) — considered

*R. v. Badger* (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — considered

*R. c. Côté* (1996), 110 C.C.C. (3d) 122, 202 N.R. 161, 138 D.L.R. (4th) 385, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26, 1996 CarswellQue 1039, 1996 CarswellQue 1040 (S.C.C.) — considered

*R. v. Gladstone* (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — considered

*R. v. Nikal* (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal*) 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — considered

*R. v. Sparrow* (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — considered

*R. v. Vanderpeet* (1996), 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — followed

*RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, (sub nom. *RJR-Macdonald Inc. c. Canada (Procureur général)*) 171 N.R. 402 (note) (S.C.C.) — followed

*Roberts v. R.* (2002), (sub nom. *Wewaykum Indian Band v. Canada*) [2002] 4 S.C.R. 245, (sub nom. *Wewaykum Indian Band v. Canada*) 2002 SCC 79, 2002 CarswellNat 3438, 2002 CarswellNat 3439, (sub nom. *Wewaykum Indian Band v. Canada*) 220 D.L.R. (4th) 1, (sub nom. *Wewaykum Indian Band v. Canada*) 297 N.R. 1, (sub nom. *Wewaykum Indian Band v. Canada*) [2003] 1 C.N.L.R. 341, (sub nom. *Wewaykum Indian Band v. Canada*) 236 F.T.R. 147 (note) (S.C.C.) — followed

*Ryan v. Law Society (New Brunswick)* (2003), (sub nom. *Law Society of New Brunswick v. Ryan*) [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R.

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(3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — considered

*Sioui v. Quebec (Attorney General)* (1990), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127, 1990 CarswellQue 103, 1990 CarswellQue 103F (S.C.C.) — considered

*St. Catharines Milling & Lumber Co. v. R.* (1888), 1888 CarswellNat 20, (1889) L.R. 14 App. Cas. 46, 4 Cart. B.N.A. 107, 58 L.J.P.C. 54, 6 L.T. 197, C.R. [10] A.C. 13 (Canada P.C.) — considered

*TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 2000 CarswellOnt 1072, 186 D.L.R. (4th) 403, (sub nom. *Ontario (Minister of Municipal Affairs & Housing) v. TransCanada Pipelines Ltd.*) [2000] 3 C.N.L.R. 153, 137 O.A.C. 201 (Ont. C.A.) — referred to

#### **Statutes considered:**

*Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 109 — considered

*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 — considered

s. 35(1) — referred to

*Forest Act*, R.S.B.C. 1996, c. 157

Generally — referred to

*Forestry Revitalization Act*, S.B.C. 2003, c. 17

Generally — referred to

APPEAL by Government and logging company from judgment reported at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.), allowing Indian band's appeal from dismissal of application to set aside timber licence.

POURVOI du gouvernement et de la compagnie d'exploitation du bois à l'encontre de l'arrêt publié à *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.), qui a accueilli le pourvoi de la bande indienne à l'encontre du rejet de sa demande d'annulation du permis de coupe de bois.

***McLachlin C.J.C.:***

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## I. Introduction

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

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

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

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.S. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

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

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

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

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

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: (2000), [2001] 2 C.N.L.R. 83, 2000 BCSC 1280 (B.C. S.C.). 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

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Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147 (B.C. C.A.), with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (B.C. C.A.).

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 (S.C.C.), the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

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

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

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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 (S.C.C.), at para. 41; *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.). 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 *Vanderpeet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), 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 *Roberts*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

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

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

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

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), 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 sover-

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eighty 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 (S.C.C.), where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

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

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

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

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

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

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

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during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

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

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

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

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

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

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

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

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

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

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

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

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

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

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

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

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

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

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

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

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

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ples 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 Māori* (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 Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori 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 *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), 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

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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 *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), 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. c. Côté*, [1996] 3 S.C.R. 139 (S.C.C.), 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. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.), at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision makers.

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

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

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

54 It is also suggested (*per* Lambert J.A) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in *Roberts* 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. R.*, [1984] 2 S.C.R. 335 (S.C.C.), 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

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on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

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

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

#### ***F. The Province's Duty***

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

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

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same". 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. Catharines Milling & Lumber Co. v. R.* (1888), (1889) L.R. 14 App. Cas. 46 (Canada 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. Catharines Milling & Lumber Co.*, *supra*. There is therefore no foundation to the Province's argument on this point.

#### ***G. Administrative Review***

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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 (S.C.C.). 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: *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.); *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 & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.).

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

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

## ***H. Application to the Facts***

### ***(1) Existence of the Duty***

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

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

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

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

## *(2) Scope of the Duty*

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

### **(i) Strength of the case**

69 On the basis of evidence described as "voluminous," the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

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

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

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

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

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

### **(ii) Seriousness of the potential impact**

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

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

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

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

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

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

### *(3) Did the Crown Fulfill its Duty?*

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

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

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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

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

### **III. Conclusion**

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

*Order accordingly.*

*Ordonnance en conséquence.*

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2009 CarswellNat 1339

Brokenhead Ojibway Nation v. Canada (Attorney General)

Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation and Sandy Bay First Nation, known collectively as the Treaty One First Nations (Applicants) and The Attorney General of Canada, The National Energy Board and TransCanada Keystone Pipeline GP Ltd. (Respondents)

Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation and Sandy Bay First Nation, known collectively as the Treaty One First Nations (Applicants) and The Attorney General of Canada, The National Energy Board and Enbridge Pipelines Inc. (Respondents)

Federal Court

R.L. Barnes J.

Heard: September 2-4, 2008; January 16, 2009

Judgment: May 12, 2009

Docket: T-225-08, T-921-08, T-925-08

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Counsel: Peter W. Hutchins, Jameela Jeeroburkhan, David Kalmakoff, Wina Sioui for Applicants

Harry Gliner, Dayna Anderson for Respondent, Attorney General of Canada

Maria Yuzda for Respondent, National Energy Board

Laurent Fortier for Respondent, TransCanada Keystone Pipeline GP Inc.

Steven Mason, Harry Underwood for Respondent, Enbridge Pipelines Inc.

Lewis L. Manning for Intervenor

Subject: Public; Property; Natural Resources

Aboriginal law --- Reserves and real property — Miscellaneous

First Nations were successors to predecessor First Nation — Predecessor signed treaty with federal government in 1871 granting inherent rights and indigenous cultural rights over wide expanse of land — Respondent companies applied to energy board for approval of pipeline projects that spanned 1,235 kilometres — Respondents made some efforts to engage First Nations potentially affected by project — Board issued Order-in-Council approving project

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— Board was satisfied that First Nations were provided with opportunity to participate fully in approval and consultation process — First Nations brought application for progressive relief against respondents — Application dismissed — Consultation duty owed by Crown to First Nations was met — Impact pipeline projects had upon any land claims was negligible — Projects would be built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in future to be available for land claims settlement — Pipelines in question were largely below ground and were reasonably unobtrusive.

#### Cases considered by *R.L. Barnes J.*:

*Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)* (2007), 2007 FC 567, 2007 CarswellNat 1597, [2007] 4 C.N.L.R. 1, 2007 CF 567, 2007 CarswellNat 4308, 313 F.T.R. 247 (Eng.) (F.C.) — referred to

*Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)* (2008), 2008 CAF 212, 2008 CarswellNat 2961, 37 C.E.L.R. (3d) 89, 2008 FCA 212, 2008 CarswellNat 1935, [2008] 3 C.N.L.R. 67, 379 N.R. 297, 297 D.L.R. (4th) 722, 85 Admin. L.R. (4th) 187 (F.C.A.) — followed

*Chicot v. Canada (Attorney General)* (2007), 30 C.E.L.R. (3d) 166, (sub nom. *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*) 314 F.T.R. 178 (Eng.), 2007 FC 763, 2007 CarswellNat 2067, (sub nom. *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*) [2007] 4 C.N.L.R. 102, 2007 CarswellNat 5817, 2007 CF 763 (F.C.) — followed

*Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — followed

*Hupacasath First Nation v. British Columbia (Minister of Forests)* (2005), 2005 BCSC 1712, 2005 CarswellBC 2936, [2006] 1 C.N.L.R. 22, 51 B.C.L.R. (4th) 133, 41 Admin. L.R. (4th) 179 (B.C. S.C.) — referred to

*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — distinguished

*Standing Buffalo Dakota First Nation v. Canada (Attorney General)* (2008), 2008 FCA 222, 2008 CarswellNat 2616, 2008 CAF 222, 2008 CarswellNat 4906 (F.C.A.) — considered

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — followed

*Thorne's Hardware Ltd. v. R.* (1983), 1983 CarswellNat 530F, [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577, 46 N.R. 91, 1983 CarswellNat 530 (S.C.C.) — followed

*Tzeachten First Nation v. Canada (Attorney General)* (2008), 2008 FC 928, 2008 CarswellNat 3001, 297 D.L.R. (4th) 300, 2008 CF 928, [2008] 4 C.N.L.R. 293, 2008 CarswellNat 4647, 334 F.T.R. 169 (Eng.), 83 Admin. L.R. (4th) 45 (F.C.) — followed

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#### **Statutes considered:**

*National Energy Board Act*, R.S.C. 1985, c. N-7

s. 52 — referred to

#### **Treaties considered:**

*Treaty No. 1, 1871 (Between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba)*

Generally — referred to

APPLICATION by First Nations for progressive relief against respondents.

#### ***R.L. Barnes J.:***

1 The Applicants are the seven First Nations who are the successors to those Ojibway First Nations who entered into what is known as Treaty One with the federal Crown on August 3, 1871[FN1] . They are today organized collectively as the Treaty One First Nations and they assert treaty, treaty-protected inherent rights and indigenous cultural rights over a wide expanse of land in southern Manitoba. By these applications the Treaty One First Nations seek declaratory and other prerogative relief against the Respondents in connection with three decisions of the Governor in Council (GIC) to approve the issuance by the National Energy Board (NEB) of Certificates of Public Convenience and Necessity for the construction respectively of the Keystone Pipeline Project, the Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project (collectively, "the Pipeline Projects"). All of the Pipeline Projects involve the use or taking up of land in southern Manitoba for pipeline construction by the corporate Respondents. Because the material facts and the legal principles that apply are the same for all three of the decisions under review, it is appropriate to issue a single set of reasons.

#### **I. Regulatory Background**

##### ***The Keystone Pipeline Project***

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

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

4 During its hearings, the NEB considered submissions from Standing Buffalo First Nation near Fort Qu'Appelle, Saskatchewan and from five First Nations in southern Manitoba known collectively as the Dakota Nations of Manitoba. Keystone also engaged a number of Aboriginal communities located within 50 kilometers of the pipeline right-of-way including Long Plain First Nation, Swan Lake First Nation and the Roseau River Anishinabe First Nation.

5 In its Reasons for Decision dated September 6, 2007 the NEB approved the Keystone Project subject to condi-

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tions. Included in those reasons are the following findings concerning project impacts on Aboriginal peoples:

Although discussions with Standing Buffalo and the Dakota Nations of Manitoba began somewhat later than they could have, overall, the Board is satisfied that Keystone meaningfully engaged Aboriginal groups potentially impacted by the Project. Aboriginal groups were provided with details of the Project as well as an opportunity to express their concerns to Keystone regarding Project impacts. Keystone considered the concerns and made Project modifications where appropriate. Keystone also worked within established agreements which TransCanada had with Aboriginal groups in the area of the Project and persisted in its attempts to engage certain Aboriginal groups. The Board is also satisfied that Keystone has committed to ongoing consultation through TransCanada.

The evidence before the Board is that TransCanada, on behalf of Keystone, was not aware that Standing Buffalo and the Dakota Nations of Manitoba had asserted claims to land in the Project area. The Board is of the view that, since TransCanada has a long history of working in the area of the Keystone Project, it should have known or could have done more due diligence to determine claims that may exist in the area of the Keystone Project. The Board acknowledges that as soon as Keystone became aware that Standing Buffalo and the Dakota Nations of Manitoba had an interest in the Project area, it did take action and initiated consultation activities. The Board further notes that consultation with Carry the Kettle and Treaty 4 was based upon TransCanada's established protocol agreements and that Keystone is willing to establish similar agreements and work plans with other Aboriginal groups, including Standing Buffalo and the Dakota Nations of Manitoba.

Once an application is filed, all interested parties, including Aboriginal persons, have the opportunity to participate in the Board's processes to make their views known so they can be factored into the decision-making. With respect to the Keystone Project, the Board notes that Standing Buffalo and the Dakota Nations of Manitoba took the opportunity to participate in the proceeding and the Board undertook efforts to facilitate their application. The Board agreed to late filings by Standing Buffalo and the Elders had an opportunity to provide oral testimony in their own language at the hearing. In addition, the Board held two hearing days in Regina to facilitate the participation of Standing Buffalo and was prepared to consider hearing time in Winnipeg for the benefit of the Dakota Nations of Manitoba. The Board notes it undertook to ensure it understood the concerns of Standing Buffalo by hearing the testimony of the Elders, making an Information Request and asking questions at the hearing.

The Board is satisfied that Standing Buffalo and the Dakota Nations of Manitoba were provided with an opportunity to participate fully in its process and to bring to the Board's attention all their concerns. The hearing process provided all parties with a forum in which they could receive further information, were able to question and challenge the evidence put forward by the parties, and present their own views and concerns with respect to the Keystone Project. Standing Buffalo and the Dakota Nations of Manitoba had the opportunity to present evidence, including any evidence of potential infringement the Project could have on their rights and interests. The Dakota Nations of Manitoba did not provide evidence at the hearing.

Standing Buffalo filed affidavit evidence and gave oral evidence at the hearing, which was carefully considered by the Board in the decision-making process. Standing Buffalo also suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. In the Board's view, the evidence on this point is too speculative to warrant the Board's consideration of it as an impact given there are Crown lands available for selection and private lands available for purchase within the traditional territory claimed by Standing Buffalo.

It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board.

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Standing Buffalo presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW. The Board notes Keystone's commitment to discuss with Standing Buffalo the potential for the Project to impact sacred sites, develop a work plan and incorporate mitigation to address specific impacts to sacred sites into its Environment Protection Plan. The Board would encourage Standing Buffalo to bring to the attention of TransCanada its concerns with respect to impacts to sacred sites from existing projects and to involve their Elders in these discussions.

The Board notes that almost all the lands required for the Project are previously disturbed, are generally privately owned and are used primarily for ranching and agricultural purposes. Project impacts are therefore expected to be minimal and the Board is satisfied that potential impacts identified by Standing Buffalo which can be considered in respect of this application will be appropriately mitigated.

With respect to the request by the Dakota Nations of Manitoba for additional conditions, the Board notes that Keystone and the Dakota Nations of Manitoba have initiated consultations and that both parties have committed to continue these discussions. In addition, the Board notes Keystone's commitment to address concerns that are raised through all its ongoing consultation activities and its interest in developing agreements and work plans with Aboriginal groups in the area of the Project. The Board strongly supports the development of such arrangements and encourages project proponents to build relationships with Aboriginal groups with interests in the area of their projects. Given the commitments both parties have made to ongoing dialogue, the Board does not see a need to impose the conditions as outlined.

6 On the recommendation of the NEB the GIC issued Order in Council No. P.C. 2007-1786 dated November 22, 2007 approving the issuance of a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Keystone Project. This is the decision which is the subject of the Applicants' claim for relief in T-225-08.

***The Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project***

7 In March 2007 and May 2007 respectively, Enbridge applied to the NEB for approval of the Southern Lights Pipeline Project (Southern Lights Project) and the Alberta Clipper Pipeline Expansion Project (Alberta Clipper Project). These two projects are related. The Alberta Clipper Project consists of 1078 kilometers of new oil pipeline beginning at Hardisty, Alberta and ending at the Canada-United States border near Gretna, Manitoba.

8 The Southern Lights Project uses the same corridor as the Alberta Clipper Project. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land[FN2].

9 The record discloses that Enbridge consulted widely with interested Aboriginal communities about their project concerns. This included communities located within an 80-kilometer radius of the pipeline right-of-way and, where other interest was expressed, beyond that limit. There were discussions with Long Plain First Nation, Swan Lake First Nation, Roseau River Anishinabe First Nation and collectively with the Treaty One First Nations. Enbridge also provided funding to the Treaty One First Nations to facilitate the consultation process.

10 Furthermore, the NEB received representations from interested Aboriginal parties during its hearings. This included discussions with Standing Buffalo First Nation, the Dakota Nations of Manitoba, Roseau River Anishinabe First Nation and Peepeekisis First Nation. Among other concerns, Standing Buffalo raised the issue of unresolved land claims which the NEB characterized as follows:

Chief Redman stated in his written evidence that Standing Buffalo has been involved in extensive meetings with

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the Government of Canada and the Office of the Treaty Commissioner regarding outstanding issues concerning unextinguished Aboriginal title and governance rights of the Dakota/Lakota. Chief Redman also stated that there have been 70 meetings and yet the Government of Canada has not acknowledged its lawful obligation and continues to discriminate against Standing Buffalo regarding its lawful obligations concerning Aboriginal title, sovereign rights and allyship status by failing to resolve these outstanding issues.

Despite sending a number of letters to the Government of Canada "regarding the discussions with the Government of Canada concerning the Board interventions and how they relate to outstanding Dakota/Lakota issues," Chief Redman stated that he has received no response.

Chief Redman alleges the consultation listed in the Applicants' evidence relates to the Alida to Cromer Capacity Expansion hearing and the Applicants and Canada have failed to consult Standing Buffalo in breach of lawful obligation to the First Nation. He stated that the route of the pipeline is through traditional territories of Standing Buffalo and suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. Standing Buffalo also presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW for the Project.

11 The NEB's Reasons for Decision by which it approved the Alberta Clipper Project include the following findings:

In the case of the Project, the Board notes that fourteen Aboriginal groups participated in various ways in the proceeding. The Board is satisfied that the Aboriginal groups were provided with an opportunity to participate fully in its process, and bring their concerns to the Board's attention.

A number of Aboriginal intervenors expressed concerns regarding how the proposed Project could impact undiscovered historical, archaeological and sacred burial sites. The Board notes Enbridge's commitments to work with Aboriginal communities in the event that such sites are discovered and the implementation of a Heritage Resource Discovery Contingency Plan which includes specific procedures for the discovery and protection of archaeological, palaeontological and historical sites including the evaluation and implementation of appropriate mitigation measures. The Board also notes Enbridge's decision to route the pipeline path to avoid the Thornhill Burial Mounds site. However, in view of the importance of these sites, should the Project be approved, the Board would include a condition to direct Enbridge to immediately cease all work in the area of any archaeological discoveries and to contact the responsible provincial authorities. This would ensure the protection and proper handling of any archaeological discoveries and potential impacts to traditional use. If the Project were to be approved, the Board would also direct Enbridge to file with the Board, and make available on its website, reports on its consultation with Aboriginal groups concerning the Thornhill Burial Mounds.

In terms of the potential adverse impacts of the Project to current traditional use, the Board notes that there were suggestions of current traditional use over the proposed route, but no specific evidence was provided. The large majority of the facilities would be buried and would be completed within a short construction window and a large majority of the land required for the Project has been previously disturbed and is generally privately owned and used for agricultural purposes. In view of these facts and Enbridge's commitment to ongoing consultation with Aboriginal people throughout the life cycle of the Project, the Board is of the view that potential Project impacts to Aboriginal interests, particularly with regard to traditional use over the RoW would be minimal and would be appropriately mitigated. The Board is satisfied that ongoing discussions between the Applicant and Aboriginal people, together with the Heritage Resource Discovery Contingency Plan, would minimize potential impacts to traditional use sites, if encountered.

The Board considers that Enbridge's Aboriginal engagement program was appropriate to the nature and scope of the Project. In view of Enbridge's demonstrated understanding that Aboriginal engagement is an ongoing proc-

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ess, its commitments and the proposed conditions, the Board finds that Enbridge's Aboriginal engagement program would fulfill the consultation requirements for Alberta Clipper.

12 The NEB's findings concerning the impact of the Southern Lights Project on Aboriginal peoples included the following:

The Applicants indicated that they were not aware of any potential impacts on Aboriginal interests that had not been identified in the Southern Lights applications or subsequent filings. The Applicants submitted that, in the event that there are more interests that are identified that may be impacted, they would meet with the Aboriginal organization or community that has identified an interest and work with that community to jointly develop a course of action.

The Board is of the view that those Aboriginal people with an interest in the Southern Lights applications were provided with the details of the Project and were given the opportunity to make their views known to the Board in a timely manner so that they could be factored into the decision-making process.

Further, the Board is of the view that the Applicants' consultation program was effective in identifying the impacts of the Project on Aboriginal people.

The Project would involve a relatively brief window of construction, with the vast majority of the facilities being buried. As almost all the lands required for the Project are previously disturbed, are generally privately owned, are used primarily for agricultural purposes and are adjacent to an existing pipeline RoW, the Board is of the view that potential Project impacts on Aboriginal interests could be appropriately mitigated. The Board is therefore of the view that impacts on Aboriginal interests are likely to be minimal.

13 On the recommendation of the NEB the GIC issued Order in Council Nos. P.C. 2008-856 and P.C. 2008-857, both dated May 8, 2008, approving the issuance of Certificates of Public Convenience and Necessity authorizing the construction and operation respectively of the Southern Lights Project and the Alberta Clipper Project. These are the decisions which are the subject of the Applicants' claims for relief in T-921-08 and in T-925-08.

14 In 2006 and 2007 the Treaty One First Nations attempted to directly engage the federal Crown in "a meaningful consultation and accommodation" concerning the Pipeline Projects and their impact upon their "constitutionally protected Aboriginal and Treaty rights and title" but those efforts were ignored.

## II. Issues

15 It is the position of the Treaty One First Nations in these proceedings that the federal Crown failed to fulfill its legal obligations of consultation and accommodation before granting the necessary approvals for the construction of the Pipeline Projects in their traditional territory. Although the Treaty One First Nations acknowledge that the corporate Respondents and the NEB have engaged in consultations in connection with the Pipeline Projects and have accommodated some of their concerns, those efforts they say, are not a substitute for the larger obligations of the Crown. Indeed, while the NEB and the corporate Respondents appear to have been quite attentive to the remediation of Aboriginal construction or project-related concerns, they acknowledge an inability to resolve outstanding land claims[FN3].

16 At the root of these proceedings is the issue of the Treaty One First Nations' outstanding land claims in southern Manitoba. The primary issue before the Court is whether the Pipeline Projects have a sufficient impact on the interests of the Treaty One First Nations such that a duty to consult on the part of the Crown was engaged. If a duty to consult was engaged, the Court must also determine its content and consider whether and to what extent the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown.

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### III. Analysis

#### *Standard of Review*

17 With respect to the issue of the standard of review that applies in these proceedings, I would adopt the view of my colleague Justice Danièle Tremblay-Lamer in *Tzeachten First Nation v. Canada (Attorney General)*, 2008 FC 928, 297 D.L.R. (4th) 300 (F.C.) at paras. 23-24:

23 In *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 at paras. 91-93, my colleague Justice Edmond Blanchard, following the general principles espoused in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 61-63, indicated that a question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness and further that a question as to whether the Crown discharged this duty to consult and accommodate is reviewable on the standard of reasonableness.

24 Accordingly, when it falls to determine whether the duty to consult is owed and the content of that duty, no deference will be afforded. However, where a determination as to whether that duty was discharged is required, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

Also see: *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 (F.C.A.) at paras. 33 and 34.

18 In the result the question of the existence and content of a Crown duty to consult in this case will be assessed on the basis of correctness. The question of whether any such duty or duties were discharged by the Crown will be determined on a standard of reasonableness.

#### *To What Extent Was the Crown on Notice of the Applicants' Concerns?*

19 The Crown makes the preliminary point that much of the evidence tendered in this proceeding to establish a foundation for the asserted duty to consult was not placed before the GIC by the Treaty One First Nations. While that is true, the GIC was made aware and must be taken to have known of the Treaty One First Nations' primary concern that the Pipeline Projects traversed land that was at one time within their traditional territory and, as well, that the Treaty One First Nations have asserted a long-standing claim to additional land in southern Manitoba. In addition, the Crown is always presumed to know the content of its treaties: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) at para. 34.

20 The record before me establishes very clearly that the Treaty One First Nations diligently attempted to directly engage the Crown in a dialogue about the impact of the Pipeline Projects on their unresolved treaty claims. Over several months in 2007 letters were sent from Treaty One First Nations' Chiefs to the Prime Minister, to the Minister of Indian Affairs, to other Ministers, and to the Secretary to the GIC seeking consultation, but their letters were never answered even to the extent of a simple acknowledgement. The frustration engendered by the Crown's refusal to open a dialogue with the Treaty One First Nations prior to the commencement of this litigation is reflected in the following passage from the affidavit of Chief Dennis Meeches of the Long Plain First Nation Reserve:

38. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to consult with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the Crown has a

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Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.

39. I have no doubt that throughout all this time, the federal government, acting on behalf of the crown, has been aware of the existence of my First Nation's rights, title, and interests in the (*sic*) our traditional territory. I have brought this to the attention of federal ministers and the Canadian public many times over the years, and particularly in relation to the proposed construction of pipelines through our Territory.

40. The events in this process regarding consultation on pipeline construction have added to my serious concerns about the Federal Government's respect for me, our First Nation, my people, and our Treaty. We raised concerns about the pipelines crossing our territory and our rights, title, and interest being affected. We asked to be consulted about these matters, we told the government we would suffer serious adverse effects if the pipelines were constructed without accommodating our interests and rights. We warned that if the pipelines proceeded without our being consulted, we would have no alternative except to appeal to the Courts for relief, and that this could cause unfortunate delays with the potential to cause damages for the companies involved and the Canadian economy in general. Nonetheless the federal Ministers have ignored us to this day, and with respect to the Keystone pipeline, made their decision without any consultation whatsoever. I feel frustrated, angry, saddened and disappointed about being ignored and treated this way.

To the extent noted above the GIC was well aware of the Treaty One First Nations' broad concerns about the potential impact of the Pipeline Projects. From the NEB Reasons for Decision issued in connection with the Pipeline Projects, the GIC was also aware of the specific concerns of the Aboriginal peoples who were either consulted or who made representations at the NEB hearings. Against this evidentiary background, it is disingenuous for the Crown to assert that it was unaware of the concerns raised by the Treaty One First Nations in these proceedings. The evidence the Crown objects to adds nothing of significance to what it already knew or would be taken to have understood.

### ***Duty to Consult — Legal Principles***

21 For the sake of argument, I am prepared to accept that an approval given by the GIC under s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act) may, in an appropriate context, be open to judicial review in accordance with the test established in *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106, [1983] S.C.J. No. 10 (S.C.C.) on the basis of a failure to consult. It is enough for present purposes to say that where a duty to consult arises in connection with projects such as these it must be fulfilled at some point before the GIC has given its final approval for the issuance of a Certificate of Public Convenience and Necessity by the NEB.

22 The Crown's duties to consult and accommodate were thoroughly discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) and in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.). More recently in *Chicot v. Canada (Attorney General)*, 2007 FC 763, [2007] F.C.J. No. 1006 (F.C.), Justice Edmond Blanchard provided the following helpful summary of those and other relevant authorities:

94 The duty to consult was first held to arise from the fiduciary duty owed by the Crown toward Aboriginal peoples (see *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075). In more recent cases, the Supreme Court has held that the duty to consult and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (see *Haida Nation*, supra; *Taku River Tlingit First Nation*, supra, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71).

95 In *Haida Nation*, Chief Justice McLachlin sets out the circumstances which give rise to the duty to consult. At paragraph 35 of the reasons for decision, she wrote:

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

96 For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and that the contemplated conduct might adversely affect those rights. While the facts in *Haida Nation* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

97 While knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances. Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida Nation*, the Chief Justice wrote:

...Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

98 At paragraphs 43 to 45, the Chief Justice invokes the concept of a spectrum to assist in determining the kind of duties that may arise in different situations.

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

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

Between these two extremes of the spectrum just described, will lie other situations. Every case must be ap-

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

99 The kind of duty and level of consultation will therefore vary in different circumstances.

23 These are the general principles by which the issues raised in these proceeding must be determined. Of particular importance in this case is the principle that the content of the duty to consult with First Nations is proportionate to both the potential strength of the claim or right asserted and the anticipated impact of a development or project on those asserted interests.

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

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

25 In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133 (B.C. S.C.) at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.

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

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

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

29 It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.

30 The fundamental problem with the claims advanced in these proceedings by the Treaty One First Nations is that the evidence to support them is expressed in generalities. Except for the issue of their unresolved land claims in southern Manitoba that evidence fails to identify any interference with a specific or tangible interest that was not capable of being resolved within the regulatory process. Even to the extent that cultural, environmental and traditional land use issues were raised in the evidence, they were not linked specifically to the projects themselves. This is not surprising because the evidence was clear that the Pipeline Projects were constructed on land that had been previously exploited and which was almost all held under private ownership. For example, the evidence is clear that the Alberta Clipper and Southern Lights projects will have negligible, if any, impact upon the Treaty One First Nations outstanding land claims in southern Manitoba. The Southern Lights Pipeline uses the same corridor as the Alberta Clipper Pipeline. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land. With the exception of 700 meters of pipeline corridor crossing the Swan Lake Reserve (with that Band's consent) the Aboriginal representatives consulted by Enbridge indicated that the affected lands were not the subject of any land claim or the site of any traditional activity[FN4].

31 Although Enbridge and the NEB did receive representations from Aboriginal leaders about specific impacts upon known and unidentified archaeological, sacred, historical, and paleontological sites, the record indicates that those concerns were considered and accommodated including, in one instance, the relocation of the right-of-way to protect a burial ground. The level of engagement between Enbridge and Aboriginal communities and Band Councils (including the Treaty One First Nations) was, in fact, extensive and quite thorough. The NEB findings in relation to the Aboriginal concerns raised before it are reasonably supported by the record before me and the Treaty One First Nations have not argued otherwise except to say that they do not necessarily agree.

32 The NEB findings concerning the Keystone Pipeline were to the same general effect and are reasonably supported by the evidence in that record. In fact, the Treaty One First Nations do not dispute the NEB findings that the land affected by the Keystone Pipeline was almost all in private ownership and previously utilized for pipeline, agricultural and ranching purposes[FN5]. Once buried it is reasonable to conclude that this pipeline would have a minimal impact on the surrounding environment.

33 The inability of the Treaty One First Nations to make a case for a substantial interference with a treaty or a traditional land use claim around these projects becomes evident from the affidavits they submitted. The affidavit of Chief Terrance Nelson offers one example of this at paras. 29-34:

29. We are located near the proposed pipeline, maybe 18 miles away. Our traditional community are very concerned that their culture, which involves the use of traditional herbs and medicines, will be affected by the pipeline. They are worried about spiritual aspects of having a pipeline running through the ground.

30. The rivers are already quite polluted, and our people are concerned about further pollution if there would be a leak of the pipeline that would spread through the water ways in this low and flat area. There are tributaries of the Red River which flow south and then flow back north into Lake Winnipeg.

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31. Our people do considerable hunting. There is a concern that the pipelines could affect animal migration, or that animals would abandon the area completely.

32. Our people have been in this area for centuries. There are numerous burial sites in the area. Our elders also know of sacred sites. Our people engage in many traditional activities throughout the year. They gather many herbs, and many plants are becoming very scarce and are at risk.

33. Our First Nation has no knowledge that at any time any Treaty One First Nation, including our own First Nation, has surrendered our Treaty, Treaty-protected inherent rights or title to our traditional territory within the boundaries of Treaty 1. Our only agreement was to share lands for "immigration and settlement".

34. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to consult with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the federal government, on behalf of the Crown, has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.

34 I do not question that the above statements reflect a profoundly held concern not only of Chief Nelson but of others in the Manitoba Aboriginal community. The problem is that to establish a procedural breach around projects such as these there must be some evidence presented which establishes both an adverse impact on a credible claim to land or to Aboriginal rights accompanied by a failure to adequately consult. The Treaty One First Nations are simply not correct when they assert in their evidence that a duty to consult is engaged whenever the Government of Canada makes "any decision related to lands in our traditional territory inside the boundaries of Treaty 1"[FN6]. There is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown's duty to consult.

35 Moreover, in a number of respects, the arguments advanced by Treaty One First Nations for a duty to consult outside of the NEB process exceeded the scope of the evidence they adduced in support.

36 For example, the Treaty One First Nations assert that, had the Crown engaged in a separate consultation, it would have been told that the Pipeline Projects would disrupt "their ongoing harvesting activities" and that they were also concerned about "environmental pollution". The Treaty One First Nations also claim that they needed to be consulted about previously unidentified sacred or cultural sites which might have been threatened by the Pipeline Projects. At the same time they acknowledge that these were matters that were brought before the NEB or raised with the corporate Respondents and largely accommodated or mitigated. The advantage of a separate consultation with the Crown about such matters is not explained beyond making the point that where mitigation measures are adequate but unilaterally imposed there must still be a consultation to meet the goal of reconciliation. This argument effectively ignores the fact that the mitigatory measures adopted here by the NEB were not unilaterally created but were the product of an extensive dialogue with interested Aboriginal communities including some of the Treaty One First Nations.

37 The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.

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38 The authorities relied upon by the Treaty One First Nations to support their separate argument for a duty to consult with respect to their land claims are distinguishable because each of those cases involved fresh impacts that were, to use the words of Justice Ian Binnie in *Mikisew*, above, "clear, established and demonstrably adverse" to the rights in issue. That cannot be fairly said of the relationship between the Pipeline Projects and the Treaty One First Nations' land claims in this case where no meaningful linkage is apparent on the evidence before me.

39 This is not a case like *Mikisew* where there was compelling evidence of injurious affection to the interests of local hunters and trappers notwithstanding the limited footprint of the proposed winter road. This is made clear at para. 55 of the decision:

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

Even though the project considered in *Mikisew* involved direct and immediate interference with identified Aboriginal interests, the Court said that the Crown's consultation duty was at the lower end of the spectrum requiring notice to the Mikisew and the careful consideration of their concerns with a view to minimizing adverse impacts.

40 The development that was of concern in *Taku*, above, similarly involved the construction of an access road. Although the road was said to represent a small intrusion relative to the size of the outstanding land claim it would nonetheless "pass through an area critical to the [Taku River First Nation's] domestic economy". This was held sufficient to trigger a duty to consult that was significantly deeper than minimum requirement. Because the environmental assessment for the road mandated consultation with affected Aboriginal peoples and because the Taku River First Nation was consulted throughout the certification process, the Crown's duty was found to have been met.

41 In *Ka'a'Gee*, above, Justice Blanchard dealt with an application for judicial review from a decision by the federal Crown to approve an oil and gas development in the Northwest Territories. That project was extensive and involved the drilling of up to 50 wells, the excavation of 733 kilometers of seismic lines, the construction of temporary camps, the use of water from area lakes and the disposal of drill waste. Justice Blanchard found that the project would have significant and lasting impact on an area over which the affected First Nation asserted Aboriginal title and where they carried out harvesting activity. This, he said, triggered a duty to consult that was higher than the minimum described in *Mikisew*. Up to a point, Justice Blanchard was satisfied that the comprehensive regulatory process was sufficient to fulfill the Crown's duty to consult. It was only when the Crown unilaterally modified the process and made fundamental changes to important recommendations that had come out of the earlier consultations that the duty to consult was found to have been breached.

42 I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party

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to meet or participate: see *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212, [2008] F.C.J. No. 946 (F.C.A.) at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.

43 It cannot be seriously disputed that the Pipeline Projects have been built on rights-of-way that are not legally or practically available for the settlement of any outstanding land claims in southern Manitoba. Even the Treaty One First Nations acknowledge that the additional lands they claim were intended to be taken from those lands not already taken up by settlement and immigration[FN7]. In the result, if the Crown had any duty to consult with the Treaty One First Nations with respect to the impact of the Pipeline Projects on their unresolved land claims, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice: see *Haida Nation*, above, at para. 37. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more: also see *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2007 FC 567, [2007] F.C.J. No. 827 (F.C.) at para. 32, aff'd 2008 FCA 212, [2008] F.C.J. No. 946 (F.C.A.) at para. 37.

44 I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to consult would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context.

#### IV. Conclusion

45 The consultation duty owed by the Crown to the Treaty One First Nations has been met. This is not to say that the Treaty One First Nations do not have a credible land claim but only that the impact these Pipeline Projects have upon those claims is negligible. The Pipeline Projects have been built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in the future to be available for land claims settlement. The pipelines in question are also largely below ground and are reasonably unobtrusive. There is no evidence before me or, more importantly that was before the NEB or the GIC, to prove that the Pipeline Projects would be likely to interfere with traditional Aboriginal land use or would represent a meaningful interference with the future settlement of outstanding land claims in southern Manitoba. To the extent that any duty to consult was engaged, it was fulfilled by the notices that were provided to the Treaty One First Nations and to other Aboriginal communities in the context of the NEB proceedings and by the opportunities that were afforded there for consultation and accommodation.

46 These applications are, accordingly, dismissed. If any of the Respondents are seeking costs against the Applicants, I will receive further submissions in that regard. Any such submissions shall not exceed 5 pages in length and must be submitted within 7 days of this Judgment. I will then allow the Applicants an additional 10 days to respond with their own submissions which individually shall not exceed 5 pages in length.

#### Judgment

*THIS COURT ADJUDGES* that these applications are dismissed with the matter of costs to be reserved pending further submissions, if any, from the parties.

*Application dismissed.*

FN1 Treaty One was the first of several treaties entered into from 1871 to 1877 between the federal Crown and the First Nations peoples who then occupied much of the lands of the southern prairies and the south-western corner of what is now Ontario.

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FN2 See Affidavit of Lyle Neis sworn September 19, 2008 at paras. 6 to 9.

FN3 The NEB Reasons for Decision by which the Keystone Pipeline Project was approved clearly acknowledge this limitation in the following passage: "It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board." The same limitation was noted by the Federal Court of Appeal in *Standing Buffalo Dakota First Nation v. Canada (Attorney General)*, 2008 FCA 222 (F.C.A.) at para. 15.

FN4 See affidavit of Lyle Neis sworn September 19, 2008 at paras. 36-37.

FN5 Paragraph 4 of the Applicants' Memorandum of Fact and Law in T-225-08 states: "While the lands required for the project are generally 'previously disturbed' agricultural lands and generally privately owned, the NEB determined that the project 'has the potential to adversely affect several components of the environment, as detailed in the ESR'. An almost identical passage is set out at para. 12 of the Applicants' Memorandum of Fact and Law in T-921-08.

FN6 See affidavit of Chief Francine Meeches at para. 36.

FN7 See para. 52 of the Applicants' Memorandum of Fact and Law in T-225-08.

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2009 CarswellNat 3493

Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.

Standing Buffalo Dakota First Nation, and Chief Rodger Redman, Councillor Wayne Goodwill, Councillor Dion Yuzicappi, Councillor Vergil Bear, Councillor Herman Goodpipe, Councillor Stella Isnana, and Councillor Conrad Tawiyaka as representatives of the Members of Standing Buffalo Dakota First Nation, Appellants and Enbridge Pipelines Inc., Canadian Association of Petroleum Producers and National Energy Board, Respondents and Attorney General of Saskatchewan, the Attorney General of Alberta and the Attorney General of Canada, Interveners

Standing Buffalo Dakota First Nation, and Chief Rodger Redman, Councillor Wayne Goodwill, Councillor Dion Yuzicappi, Councillor Vergil Bear, Councillor Herman Goodpipe, Councillor Stella Isnana, and Councillor Conrad Tawiyaka as representatives of the Members of Standing Buffalo Dakota First Nation, Appellants and Enbridge Southern Lights GP Inc. on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc., National Energy Board, and Canadian Association of Petroleum Producers, Respondents and Attorney General of Saskatchewan, Intervener

Standing Buffalo Dakota First Nation, and Chief Rodger Redman, Councillor Wayne Goodwill, Councillor Dion Yuzicappi, Councillor Vergil Bear, Councillor Herman Goodpipe, Councillor Stella Isnana, and Councillor Conrad Tawiyaka as representatives of the Members of Standing Buffalo Dakota First Nation, Appellants and Transcanada Keystone Pipeline GP Ltd., National Energy Board, and Canadian Association of Petroleum Producers, Respondents and The Attorney General of Canada, Intervener

The Sweetgrass First Nation, and the Moosomin First Nation, Appellants and The National Energy Board, Enbridge Pipelines Inc., Attorney General of Canada, and the Canadian Association of Petroleum Producers, Respondents and The Attorney General of Alberta and the Attorney General for Saskatchewan, Interveners

Federal Court of Appeal

C. Michael Ryer J.A., Carolyn Layden-Stevenson J.A., Marc Noël J.A.

Heard: October 13, 2009

Judgment: October 23, 2009

Docket: A-537-08, A-541-08, A-542-08, A-475-08

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2009 CarswellNat 3493, 2009 FCA 308

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James Mallett, for Intervener, Attorney General of Alberta

Subject: Natural Resources; Public; Property; Constitutional

Natural resources --- Oil and gas — Statutory regulation — Federal boards — National Energy Board

National Energy Board held hearings with respect to applications for approvals of three proposed pipeline projects, K project, S project and A project — SB first nation intervened in hearings of all projects, S first nation and M first nation participated in A project hearing through B Inc., which intervened in hearing — In K project hearing, SB first nation gave evidence it had been in negotiations with Crown from 1997 to 2006 with respect to asserted claims to lands — SB first nation stated Crown broke off negotiations in 2006, so SB first nation intervened in K project hearing to advance its interests — Applicant in A project hearing introduced without prejudice letter in which Crown took position that DK first nations, including SB first nation, did not have aboriginal rights in Canada — In A project hearing, B Inc. expressed concerns on behalf of S first nation and M first nation about potential adverse effects that A project would have on sacred sites and plant gathering for traditional and medicinal purposes — S first nation and M first nation asserted possibility of land claims affected by A project — Board made three separate decisions granting approvals to applicants in each of K project, S project and A project — Board also denied review of K project decision along similar lines of S project and A project decisions — Board held its mandate was to consider application in accordance with public interest and that aboriginal concerns were taken into account because applicants were required to consult with affected first nations and mitigative accommodations of first nation concerns could be ordered — Board stated it had no jurisdiction to settle aboriginal land claims — Board concluded that since it had jurisdiction to deal with applications without having to adjudicate land claims, it was not obligated to require Crown to attend — First nations appealed Board's decisions — Appeals dismissed — Standard of review was correctness, as issue raised true question of Board's jurisdiction — Board did not determine existence of Crown duty to consult — Decisions could not be taken as encompassing any conclusions on whether consultations by applicants of projects were or were not sufficient to discharge Crown duty to consult — Applications were made by private sector entities that were not the Crown nor its agents — Board was not required to undertake Crown duty to consult analysis before considering merits of applications by applicants — Board itself as quasi-judicial body was also not under Crown duty to consult — Board must act within dictates of Constitution when exercising its decision-making function — Process ensured applicants for projects had due regard for existing aboriginal rights that were recognized and affirmed in s. 35(1) of Constitution Act, 1982 — Board demonstrated it exercised its decision-making function in accordance with s. 35(1) when it ensured applicants respected such aboriginal rights — First nations were unable to point to any provision in National Energy Board Act or any other legislation which prevented Board from issuing certificates without first undertaking Crown duty to consult analysis — Assertions of S first nation and M first nation that Act was inconsistent with s. 35(1) fell well short of burden to establish Act had effect of interfering with any aboriginal or treaty rights — Assertions that entire Act infringed aboriginal or treaty right was entirely unsubstantiated.

Aboriginal law --- Reserves and real property — Rights and title — General principles

National Energy Board held hearings with respect to applications for approvals of three proposed pipeline projects, K project, S project and A project — SB first nation intervened in hearings of all projects, S first nation and M first nation participated in A project hearing through B Inc., which intervened in hearing — In K project hearing, SB first nation gave evidence it had been in negotiations with Crown from 1997 to 2006 with respect to asserted claims to lands — SB first nation stated Crown broke off negotiations in 2006, so SB first nation intervened in K project hear-

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#### **Cases considered by C. Michael Ryer J.A.:**

*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228, 76 R.P.R. (4th) 159, 89 B.C.L.R. (4th) 298, [2009] 4 W.W.R. 381, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.) — distinguished

*Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — followed

*Kwikwetlem First Nation v. British Columbia Transmission Corp.* (2009), [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, 76 R.P.R. (4th) 213, 89 B.C.L.R. (4th) 273, 41 C.E.L.R. (3d) 159, 308 D.L.R. (4th) 285, [2009] 9 W.W.R. 92, 2009 BCCA 68, 2009 CarswellBC 341 (B.C. C.A.) — distinguished

*New Brunswick (Board of Management) v. Dunsmuir* (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — considered

*Paul v. British Columbia (Forest Appeals Commission)* (2003), 2003 CarswellBC 2432, 2003 CarswellBC 2433, 2003 SCC 55, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, 18 B.C.L.R. (4th) 207, [2003] 2 S.C.R. 585,

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231 D.L.R. (4th) 449, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161 (S.C.C.) — distinguished

*Quebec (Attorney General) v. Canada (National Energy Board)* (1994), (sub nom. *Québec (Procureur général) v. Office national de l'énergie*) 163 N.R. 241, [1994] 3 C.N.L.R. 49, 1994 CarswellNat 8, 1994 CarswellNat 1496, 112 D.L.R. (4th) 129, [1994] 1 S.C.R. 159, 14 C.E.L.R. (N.S.) 1, 20 Admin. L.R. (2d) 79 (S.C.C.) — considered

*R. v. Sparrow* (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — considered

#### **Statutes considered:**

*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 — referred to

s. 35(1) — considered

*Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159

s. 96 — referred to

*National Energy Board Act*, R.S.C. 1985, c. N-7

Generally — referred to

s. 21(1) — considered

s. 22(1) — considered

s. 52 — considered

APPEALS by first nations to set aside three decisions of National Energy Board that granted approval to three pipeline projects.

#### **C. Michael Ryer J.A.:**

1 In the four appeals that were before the Court, the appellants seek to set aside three decisions of the National Energy Board (the "NEB") that granted applications for approvals in respect of three western Canadian pipeline projects following hearings in which those applications were considered.

2 The appellants raise the novel question of whether, before making its decisions in relation to those applications, the NEB was required to determine whether by virtue of the decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.), the Crown, which was not a party to those applications or a participant in the hearings, was under a duty to consult the appellants with respect to potential adverse

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impacts of the proposed projects on the appellants and if it was, whether that duty had been adequately discharged.

3 The four appeals were heard together by order of this Court. These reasons dispose of each of the appeals and will be filed as reasons for judgment in Court files A-537-08, A-541-08, A-542-08 and A-475-08.

### Relevant Statutory Provisions

4 The statutory provisions that are relevant to the appeals are subsections 21(1), 22(1) and section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the "NEB Act") and subsection 35(1) of the *Constitution Act, 1982* (the "Constitution"). These provisions are reproduced in the appendix to these reasons.

### Background

5 The NEB held hearings with respect to applications for approvals in respect of three proposed pipeline projects (the "Keystone Project", the "Southern Lights Project" and the "Alberta Clipper Project", collectively, the "Projects"). The Standing Buffalo First Nation ("SBFN"), a Dakota band, participated as an intervener in the hearings with respect to all of the Projects. The Sweetgrass First Nation and the Moosomin First Nation ("SFN/MFN") participated in the hearing with respect to the Alberta Clipper Project through Battleford Agency Tribal Chiefs Inc. ("BATC"), which intervened in that hearing on their behalf.

6 In the Keystone hearing, SBFN gave evidence that it had been in negotiations with Canada, through the auspices of the Office of the Treaty Commissioner, from 1997 to 2006, with respect to asserted claims in respect of unextinguished Aboriginal title to lands, self-government rights and *ochechea* (its status as an ally of the Crown). According to SBFN, the Crown broke off these negotiations in 2006 and for that reason, SBFN decided to intervene in the Keystone hearing to advance its interests. To that end, SBFN informed the Crown of its decision to intervene in the proceedings and reiterated its desire to resume the negotiations that had broken off.

7 In the Alberta Clipper hearing, the applicant introduced a without prejudice letter, dated July 25, 2007, in which the Crown took the position that the Dakota First Nations, including SBFN, "do not have Aboriginal rights in Canada".

8 In the Alberta Clipper hearing, BATC expressed concerns on behalf of SFN/MFN about potentially adverse effects that the Alberta Clipper Project would have on sacred sites and plant gathering for traditional and medicinal purposes. In this Court, counsel for SFN/MFN raised the concern that the SFN/MFN have interests in land that will be affected by the Alberta Clipper Project. More particularly, SFN/MFN asserted that the possibility that their claims to land under the Treaty Land Entitlement Process might be satisfied by lands affected by this Project formed part of the basis of their right to *Haida* consultation.

9 The NEB made three separate decisions (the "Decisions") with respect to the Projects. In particular:

- a. in Hearing Order OH-1-2007 (the "Keystone Decision"), dated September 20, 2007, the NEB granted approvals that were requested by TransCanada Keystone Pipeline GP ("Keystone") in relation to the Keystone Project, including a Certificate of Public Convenience and Necessity (a "Section 52 Certificate") under section 52 of the NEB Act;
- b. in Hearing Order OH-3-2007 (the "Southern Lights Decision"), dated February 19, 2008, the NEB granted approvals that were requested by Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc. (collectively "Enbridge Southern Lights") in relation to the Southern Lights Project, including a Section 52 Certificate; and

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c. in Hearing Order OH-4-2007 (the "Alberta Clipper Decision"), dated February 22, 2008, the NEB granted approvals that were requested by Enbridge Pipelines Inc. ("Enbridge") in relation to the Alberta Clipper Project, including a Section 52 Certificate.

10 The issue referred to at the beginning of these reasons was squarely raised in motions that were made by SBFN in the hearings with respect to the Southern Lights and Alberta Clipper Projects. The motion made in the Southern Lights hearing is summarized at page 6 of the Southern Lights Decision as follows:

The Notice of Motion ... requested the following decision of the Board

(a) a decision that the Board has no jurisdiction to consider the Southern Lights Application on its merits without first determining whether Standing Buffalo has a credible claim within the meaning of the Supreme Court's decision in *Haida Nation*...;

(b) a decision that the duty of fairness requires that the Crown be required to attend and respond to Standing Buffalo's claim, and that, in absence of any such response from the Crown, Standing Buffalo's claim should be accepted as uncontradicted and the Board should then determine that it is without jurisdiction to determine the substantive merits of the Southern Lights applications.

11 This motion also raises the collateral issues of the requirement for Crown participation in the hearing process and the consequences in the event that the Crown does not participate in that process.

12 The NEB determined that the motion should not be decided as a preliminary matter because evidence in the hearing would provide a further factual basis that would be relevant to the motion and that completing the hearing without first deciding the motion would not prejudice the SBFN.

13 In its reasons for the Southern Lights Decision, the NEB denied this motion and held that its mandate was to consider the application before it in accordance with the public interest. In doing so, the NEB stated that Aboriginal concerns were taken into account because the applicant was required to consult with affected Aboriginal groups and mitigative accommodations of Aboriginal concerns could be ordered. The NEB stated that requirements that may be imposed upon other governmental authorities with respect to a proposed federal pipeline project are not relevant to the NEB decision making process in respect of that project. In addition, the NEB stated that recourse should be to the courts, and not the NEB, in relation to issues of whether other governmental authorities have met their legal obligations with respect to a project that also falls under NEB oversight. The NEB further stated that it had no jurisdiction to settle Aboriginal land claims. Finally, the NEB concluded that because it had the jurisdiction to deal with the applications before it, without having to adjudicate the existence of a credible claim within the meaning of *Haida*, it was not obligated to require the Crown to attend the hearing to participate in such an adjudication.

14 The motion brought by SBFN in the Alberta Clipper hearing is essentially the same as the motion that it brought in the Southern Lights hearing and was dealt with by the NEB in a similar fashion.

15 The issue raised in the motions brought by SBFN in the Southern Lights and Alberta Clipper hearings was not raised by way of a formal motion in the Keystone hearing. As a consequence, the Keystone Decision does not deal with that issue in the same way as it was dealt with in the Southern Lights and Alberta Clipper Decisions. However, the issue was raised in an application for a review of the Keystone Decision, in accordance with subsection 21(1) the NEB Act, that was made by SBFN on October 12, 2007. Paragraph 9.c. of that application reads as follows:

... the NEB erred when, without having first satisfied itself that adequate Crown consultation had taken place, it

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implicitly concluded that it had jurisdiction to consider the application for the certificate of public convenience and necessity on its merits;

16 By correspondence (the "Keystone Review Decision"), dated February 13, 2008, the NEB denied SBFN's request for a review of the Keystone Decision.

17 The appellants obtained leave to appeal the Decisions as required by subsection 22(1) of the NEB Act.

### Issues

18 The issues in this appeal are as follows:

(a) before considering the applications for Project approvals, was the NEB required to determine

(i) whether the Crown had a duty to consult, and if appropriate, accommodate the appellants in relation to the Projects; and

(ii) if the Crown had such a duty, whether that duty had been discharged; and

(b) does section 52 of the NEB Act violate subsection 35(1) of the Constitution?

### Analysis

#### *The Haida Duty*

19 The duty to consult that is at issue in these appeals is the Crown's duty to consult as described in *Haida*. Paragraph 35 of the Supreme Court of Canada's decision in that case stipulates 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 ...

20 Guidance with respect to how to determine whether the Crown is subject to a *Haida* duty, and, if such a duty exists, how to determine the scope of that duty, is provided at paragraph 37 of that decision, which reads as follows:

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.

21 The final phase in the *Haida* analysis is whether the duty to consult, and if appropriate accommodate, has been discharged by the Crown.

22 It is evident that the existence, scope and fulfillment of a *Haida* duty are matters that can be agreed upon by the Crown and the affected Aboriginal groups. However, where agreement on any or all of these matters cannot be reached, adjudication may be required. In addition to references to adjudication in paragraph 37 of *Haida*, at para-

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graph 60 of that decision, the Court states:

... 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.

### ***The Jurisdictional Issue***

23 In the context of these appeals, the appellants assert that before the NEB could decide whether or not to grant the requested Project approvals, it was required to determine whether the Crown was subject to a *Haida* duty to consult the appellants in respect of the Projects. If such a duty was found to exist, the appellants assert that the NEB was then required to determine the scope of that duty and whether the Crown discharged it. Thus, the appellants assert that the NEB was required to undertake the full *Haida* analysis before it could make the Decisions.

### ***Standard of Review***

24 In my view, this issue squarely raises a true question of the jurisdiction of the NEB, a question that is to be reviewed on the standard of correctness (see *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9 (S.C.C.), at para. 59).

### ***NEB did not undertake the Haida analysis***

25 Nowhere in the Decisions did the NEB make any finding that the Crown was or was not subject to a *Haida* duty. In other words, the NEB did not determine the existence of a *Haida* duty. It follows, in my view, that submissions with respect to the scope of such a duty, and whether or not the Crown has fulfilled it, need not be considered in these appeals. If I were to conclude that the NEB erred in not undertaking the initial step in the *Haida* analysis, I would remit the entire *Haida* analysis to the NEB for its consideration.

26 I would also add that because the NEB did not undertake the *Haida* analysis prior to making the Decisions, in my view, it follows that the Decisions cannot be taken as encompassing any conclusions with respect to whether the consultations that were undertaken by the proponents of the Projects were, or were not, capable of discharging, or sufficient to discharge, any *Haida* consultation duty that the Crown may have in respect of the Projects.

### ***The Paul and Kwikwetlem Decisions***

27 Counsel for SFM/MFN argued that the decisions in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55 (S.C.C.), and *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 BCCA 68, [2009] 9 W.W.R. 92 (B.C. C.A.), authoritatively determine this jurisdictional question. I disagree.

28 In *Paul*, the B.C. Forest Appeals Commission found that Mr. Paul, an Aboriginal, had contravened section 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, by cutting down four trees that he intended to use to build a deck on his home. The question in the case was whether the British Columbia legislature had validly conferred on that Commission the power to decide questions relating to Aboriginal rights and title in the course of adjudicating whether Mr. Paul had contravened section 96 of the Code, including the question of whether in cutting down the trees Mr. Paul was engaged in the exercise of the Aboriginal rights.

29 The Supreme Court of Canada answered these questions in the affirmative and at paragraph 47 of its decision, Bastarache J. added an illuminating observation:

My conclusions mean that the Commission has jurisdiction to continue hearing all aspects of the matter of Mr.

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Paul's four seized logs. Unless he moves in the Supreme Court of British Columbia for a declaration respecting his aboriginal rights, Mr. Paul must present evidence of his ancestral right to the Commission. As yet he has merely asserted his defence. If he is unsatisfied with the Commission's determination of the relationship between his s. 35 rights and the prohibition against cutting trees in s. 96 of the Code, he can move for judicial review in the Supreme Court of British Columbia. The standard of review for the Commission's determinations concerning aboriginal law will be correctness.

30 In my respectful view, *Paul* provides no authoritative support for the proposition that the NEB was required to undertake the *Haida* analysis before considering the merits of the Project approval applications. If anything, paragraph 47 of *Paul* appears to me to indicate that the courts are the appropriate venue for the adjudication of Aboriginal issues.

31 In *Kwikwetlem First Nation*, the British Columbia Utilities Commission considered an application for an approval of an electrical transmission project by the British Columbia Transmission Corporation. In that case, the Commission accepted that it was under a *Haida* duty and negotiations were undertaken by the parties on that basis. The question before the Court was whether the Commission could issue an approval without first having decided whether the duty to consult had been discharged to that point in the proceedings. It is noteworthy that all parties accepted that British Columbia Transmission Corporation was the Crown or a Crown agent for the purposes of the *Haida* analysis and that the consultations undertaken by it took place in furtherance of its *Haida* duty. Thus, the question of whether or not the British Columbia Utilities Commission was required to undertake the entire *Haida* analysis to determine whether the applicant before it was under a duty to consult was not before the Commission. The existence of the *Haida* duty was not contested.

32 In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.

33 I note as well that the applicant before the British Columbia Utilities Commission in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298 (B.C. C.A.), was accepted by the parties as being the Crown or its agent. Accordingly, I am of the view that this case provides no support for SFN/MFN's argument on this issue.

34 Finally, I would add that the NEB itself is not under a *Haida* duty and, indeed, the appellants made no argument that it was. The NEB is a quasi-judicial body (see *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), at page 184, and, in my view, when it functions as such, the NEB is not the Crown or its agent.

*Failure to undertake Haida analysis infringes subsection 35(1) of the Constitution*

35 Subsection 35 of the Constitution reads as follows:

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

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

36 In asserting that the NEB erred in failing to undertake the *Haida* analysis before reaching its Decisions, the

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appellants state that the NEB must exercise its decision-making function in accordance with the dictates of the Constitution, including subsection 35(1) thereof. I agree with that statement, which is supported by the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)*, at page 185.

37 The appellants then contend that while the NEB's mandated consultation by the Project proponents may have addressed potential infringements of Aboriginal rights *by those proponents*, the failure of the NEB to undertake the *Haida* analysis means that potential infringements of those rights *by the Crown* would not be addressed. Thus, the argument goes, by failing to undertake the *Haida* analysis, the NEB could be sanctioning potential infringements of Aboriginal rights by the Crown, thereby breaching subsection 35(1) of the Constitution.

38 The appellants further argue that in the context of an application for a Section 52 Certificate, the NEB must "have regard to all considerations that appear to it to be relevant", as specifically stated in section 52 of the NEB Act. And, according to the appellants, whether the Crown has, and has satisfied, a *Haida* duty, are matters that are relevant to, and therefore must be addressed by, the NEB. A failure to do so, their argument continues, would result in breach by the NEB of its obligation to make its decisions in accordance with the dictates of the Constitution.

39 For several reasons, I cannot accede to these arguments.

40 First, as noted above, the decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision-making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable Project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution.

41 Secondly, the appellants were unable to point to any provision of the NEB Act or any other legislation that prevents it from issuing a Section 52 Certificate without first undertaking a *Haida* analysis or that empowers it to order the Crown to undertake *Haida* consultations.

42 Thirdly, the Province of Saskatchewan argued that the NEB lacks jurisdiction to undertake a *Haida* analysis where the Crown that is alleged to have a *Haida* duty is the Crown in right of a province. The appellants did not contest this limitation on the ability of the NEB to conduct a *Haida* analysis in relation to the Crown in right of a province.

43 Fourthly, a determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making the Decisions does not preclude the adjudication of those matters by a court of competent jurisdiction. Indeed, the quotations from paragraphs 37 and 60 of *Haida* and paragraph 47 of *Paul* point towards recourse to the courts in such circumstances.

44 I would add that the ability of an Aboriginal group to have recourse to the courts to adjudicate matters relating to the existence, scope and fulfillment of a *Haida* duty in respect of the subject matter of an application for a Section 52 Certificate should not be taken as suggesting that the Aboriginal group should decline to participate in the NEB process with respect to such an application. As previously stated, the NEB process focuses on the duty of the applicant for a Section 52 Certificate. That process provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of con-

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cern to it. While the Aboriginal group is free to determine the course of action it wishes to pursue, it would be unfortunate if the opportunity afforded by the NEB process to have Aboriginal concerns dealt with in a direct and non-abstract matter was not exploited.

### **The Constitutional Question**

45 The SFN/MFN argue that the NEB Act or portions thereof are invalid on the basis that they violate subsection 35(1) of the Constitution. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), the validity of a regulation that prescribed limits on the length of fishing nets was impugned by an Aboriginal person on the basis that the particular regulation was inconsistent with subsection 35(1) of the Constitution. In that case, the Supreme Court of Canada held that the party impugning a piece of legislation has the onus of establishing that the legislation has the effect of interfering with an existing Aboriginal right. If that onus has been satisfied, the onus then shifts to the Crown to establish that the interference is justified.

46 In the present circumstances, the assertions of SFN/MFN fall well short of what is required of them to meet their burden of establishing that the NEB Act or any portion of it has the effect of interfering with any Aboriginal or treaty rights they may possess. The assertion that the entire NEB Act infringes an existing Aboriginal or treaty right of the SFN/MFN is entirely unsubstantiated.

47 SFN/MFN make reference to a single provision of the NEB Act, section 52, and argue that it is invalid because it does not include a specific provision stating that, in making decisions required of it under that legislation, the NEB must adhere to the protection afforded to existing Aboriginal and treaty rights of Aboriginal peoples of Canada. I am unable to accept this argument.

48 It is clear from the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)* that the NEB is required to conduct its decision-making process in a manner that respects the provisions of subsection 35(1) of the Constitution. In my view, the failure of the NEB Act to specifically refer to this requirement in section 52, or elsewhere in the NEB Act, is insufficient to invalidate that provision.

### ***The A-542-08 Appeal***

49 Keystone argued that SBFN's appeal should be limited to an appeal from the Keystone Review Decision alone and not from the Keystone Decision itself. And, since SBFN's memorandum of fact and law says nothing about the Keystone Review Decision, Keystone contends that SBFN's appeal must be dismissed. In view of my proposed disposition of the jurisdictional and constitutional issues, I do not propose to deal with this issue.

### **Disposition**

50 For the foregoing reasons, I would dismiss each of the appeals, with costs to the respondent Enbridge Pipelines Inc. in Court files A-537-08 and A-475-08, the respondent Enbridge Southern Lights GP Inc. in Court file A-541-08 and the respondent TransCanada Keystone Pipeline GP Ltd. in A-542-08.

***Marc Noël J.A.:***

I agree.

***Carolyn Layden-Stevenson J.A.:***

I agree

*Appeals dismissed.*

## **Appendix**

*National Energy Board Act*, R.S.C. 1985, c. N-7, subsections 21(1) and 22(1) and section 52

21(1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it 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 of participating 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 granting or the refusing of the application.

21(1) Sous réserve du paragraphe (2), l'Office peut réviser, annuler ou modifier ses ordonnances ou décisions, ou procéder à une nouvelle audition avant de statuer sur une demande.

22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

52. Sous réserve de l'agrément du gouverneur en conseil, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat à l'égard d'un pipeline; ce faisant, il tient compte de tous les facteurs qu'il estime pertinents, et notamment 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'ingé-

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nierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir sa décision.

*Constitution Act, 1982*, subsection 35(1)

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

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

END OF DOCUMENT

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

2004 CarswellBC 2654

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

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development (Appellants) v. Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd. (Respondents) and Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit and Union of British Columbia Indian Chiefs (Interveners)

Supreme Court of Canada

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

Heard: March 24, 2004  
Judgment: November 18, 2004  
Docket: 29146

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Proceedings: reversing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.); varying *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers])

Counsel: Paul J. Pearlman, Q.C., Kathryn L. Kickbush for Appellants

Arthur C. Pape, Jean Teillet, Richard B. Salter for Respondents, Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation

Randy J. Kaardal, Lisa Hynes for Respondents, Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.

Mitchell Taylor, Brian McLaughlin for Intervener, Attorney General of Canada

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Pierre-Christian Labeau for Intervener, Attorney General of Quebec

Kurt J.W. Sandstrom, Stan Rutwind for Intervener, Attorney General of Alberta

Charles F. Willms, Kevin G. O'Callaghan for Interveners, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Court of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia

Jeffrey R.W. Rath, Allisun Rana for Intervener, Doig River First Nation

Hugh M.G. Braker, Q.C., Anja Brown, Arthur C. Pape, Jean Teillet for Intervener, First Nations Summit

Robert J.M. Janes, Dominique Nouvet for Intervener, Union of British Columbia Indian Chiefs

Subject: Environmental; Public; Property; Constitutional

Environmental law --- Statutory protection of environment — Environmental assessment — Aboriginal interests

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Aboriginal law --- Reserves and real property — Rights and title — General principles

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Crown --- Crown property — Miscellaneous issues

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Évaluation environnementale — Intérêts autochtones

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

Droit autochtone --- Réserves et biens-fonds — Droits et titres — Principes généraux

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

Couronne --- Biens de la Couronne — Questions diverses

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande

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pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

R Ltd. sought permission from the British Columbia government to reopen an old mine. R Ltd.'s proposal was accepted for review under the former Mine Development Assessment Act, and a project committee was established in November 1994. Invited to participate was an Indian band, which objected to R Ltd.'s plan to build a 160-km road from the mine to a town through a portion of the band's traditional territory. When the Environmental Assessment Act was instituted in 1995, the project committee was formally constituted under s. 9 with the band as one of its members. After a three-and-one-half-year assessment process, project approval was granted on March 19, 1998, by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines. The Indian band successfully brought a petition in February 1999 under the Judicial Review Procedure Act to quash the Ministers' decision. The Crown's appeal was dismissed. The Crown appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed.

The process engaged in by the Crown under the Environmental Assessment Act fulfilled the requirements of its duty. The band was part of the project committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Crown was under a duty to consult. It did so, and proceeded to make accommodations. The Crown was not under a duty to reach agreement with the band, and its failure to do so did not breach the obligations of good faith that it owed the band.

R Ltd. a demandé au gouvernement de la Colombie-Britannique l'autorisation de rouvrir une ancienne mine. On a accepté d'examiner sa proposition présentée en vertu de la Mine Development Assessment Act, et un comité responsable du projet a été mis sur pied en novembre 1994. Une bande indienne, qui avait été invitée à participer au processus, s'est objectée au projet de R Ltd. consistant en la construction, sur une partie de son territoire traditionnel, d'une route de 160 km entre la mine et une ville. Lorsque l'Environmental Assessment Act a été promulguée en 1995, le comité responsable du projet a été formellement constitué en vertu de l'art. 9, la bande étant un de ses membres. Le processus d'évaluation a duré trois ans et demie, au terme duquel le projet a été approuvé le 19 mars 1998 par le ministre de l'Environnement, des Terres et des Parcs et par le ministre de l'Énergie et des Mines. En février 1999, la bande indienne a présenté avec succès une demande en vertu de la Judicial Review Procedure Act afin d'obtenir l'annulation de la décision des ministres. Le pourvoi de la Couronne a été rejeté. Celle-ci a interjeté appel devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été accueilli.

La Couronne s'est acquittée de son obligation en engageant le processus prévu à l'Environmental Assessment Act. La bande a fait partie du comité responsable du projet, ce qui lui a permis de participer pleinement au processus d'évaluation environnementale. Elle a été déçue lorsque, après trois ans et demie, le processus a pris fin sur ordre du Bureau des évaluations environnementales. Elle a cependant eu l'opportunité de faire valoir son point de vue devant les ministres, et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La Couronne avait l'obligation de consulter. Elle l'a fait et elle a pris des mesures d'accommodement. Elle n'avait pas l'obligation de s'entendre avec la bande; le fait qu'elle n'y soit pas parvenue ne constituait pas un manquement à son obligation d'agir de bonne foi avec la bande.

**Cases considered by *McLachlin C.J.C.*:**

*Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

*Haida Nation v. British Columbia (Minister of Forests)* (2004), 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, [2005] 3 W.W.R. 419, 2004 SCC 73 (S.C.C.)

*R. v. Gladstone* (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — referred to

*R. v. Nikal* (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal*) 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — referred to

*R. v. Sparrow* (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — 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. 35(1) — considered

*Environmental Assessment Act*, R.S.B.C. 1996, c. 119

Generally — considered

s. 2(a) — considered

s. 2(b) — considered

s. 2(c) — considered

s. 2(d)(i) — considered

s. 2(e) — considered

s. 7 — referred to

s. 9 — considered

s. 9(1) — considered

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

s. 9(2)(d) — considered

s. 9(6) — considered

s. 10 — considered

ss. 14-18 — considered

s. 19(1) — considered

s. 21(a) — considered

s. 21(b) — considered

s. 22 — considered

s. 23 — considered

s. 29 — considered

s. 29(1) — considered

s. 29(4) — considered

s. 30(1)(a) — considered

s. 30(1)(b) — considered

s. 30(1)(c) — considered

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

Generally — referred to

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

Generally — referred to

APPEAL by provincial Crown from judgment reported at *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.), varying *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers]), which al-

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

lowed Indian band's application for judicial review with respect to Crown approval of project under *Environmental Assessment Act*.

POURVOI de la Couronne provinciale à l'encontre de l'arrêt publié à *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.), qui a modifié le jugement publié à *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers]), qui avait accueilli la demande de la bande indienne visant à obtenir le contrôle judiciaire de la décision de la Couronne approuvant un projet en vertu de l'*Environmental Assessment Act*.

**McLachlin C.J.C.:**

## **I. Introduction**

1 This case raises the issue of the limits of the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation ("TRTFN") participated in a three and a half year environmental assessment process related to the efforts of Redfern Resources Ltd. ("Redfern") to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

## **II. Facts and Decisions Below**

3 The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of north-western British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

4 The Redfern proposal was assessed in accordance with British Columbia's *Environmental Assessment Act*. The environmental assessment process is distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual proposals.

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The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

- (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
- (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
- (c) to prevent or mitigate adverse effects of reviewable projects,
- (d) to provide an open, accountable and neutrally administered process for the assessment
  - (i) of reviewable projects, and

. . . . .

- (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

6 "The proponent of a reviewable project may apply for a project approval certificate" under s. 7 of the Act, providing a "preliminary overview of the reviewable project, including" potential effects and proposed mitigation measures. If the project is accepted for review, "the executive director must establish a project committee" for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the vicinity of the project" (s. 9(2)(d)). Under s. 9(6), the committee "may determine its own procedure, and provide for the conduct of its meetings".

7 Redfern's proposal was accepted for review under the former *Mine Development Assessment Act*, and a project committee was established in November 1994. Invited to participate were the TRTFN, the British Columbia, federal, Yukon, United States, and Alaskan governments, as well as the Atlin Advisory Planning Commission. When the *Environmental Assessment Act* was instituted, the Project Committee was formally constituted under s. 9. Working groups and technical sub-committees were formed, including a group to deal with Aboriginal concerns and a group to deal with issues around transportation options. The TRTFN participated in both of these groups. A number of studies were commissioned and provided to the Project Committee during the assessment process.

8 The project committee becomes the primary engine driving the assessment process. It must act in accordance with the purposes of a project committee, set out in s. 10 as:

- (a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and
- (b) to analyze and advise the executive director, the minister and the responsible minister as to,
  - (i) the comments received in response to an invitation for comments under this Act,

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(ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,

(iii) the potential effects, and

(iv) the prevention or mitigation of adverse effects.

9 The proponent of the project is required to engage in public consultation and distribution of information about the proposal (ss. 14-18). After the period for receipt of comments has expired, the executive director must either "refer the application to the [Ministers] ... for a decision ... or order that a project report be prepared ... and that the project undergo further review" (s. 19(1)). If a project report is to be prepared, the executive director must prepare draft project report specifications indicating what information, analysis, plans or other records are relevant to an effective assessment, on the recommendation of the project committee (s. 21(a)). Sections 22 and 23 set out a non-exhaustive list of what matters may be included in a project report. These specifications are provided to the proponent (s. 21(b)).

10 In this case, Redfern was required to produce a project report, and draft project report specifications were provided to it. Additional time was granted to allow the executive director and Project Committee to prepare specifications.

11 When the proponent submits a project report, the project committee makes a recommendation to the executive director, whether to accept the report for review or to withhold acceptance if the report does not meet the specifications. Redfern submitted a multiple volume project report in November 1996. A time limit extension was granted to allow extra time to complete the review of the report. In January 1997, the Project Committee concluded that the report was deficient in certain areas, and Redfern was required to address the deficiencies.

12 Through the environmental assessment process, the TRTFN's concerns with the road proposal became apparent. Its concerns crystallized around the potential effect on wildlife and traditional land use, as well as the lack of adequate baseline information by which to measure subsequent effects. It was the TRTFN's position that the road ought not to be approved in the absence of a land use planning strategy and away from the treaty negotiation table. The environmental assessment process was unable to address these broader concerns directly, but the project assessment director facilitated the TRTFN's access to other provincial agencies and decision makers. For example, the Province approved funding for wildlife monitoring programs as desired by the TRTFN (the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program). The TRTFN also expressed interest in TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of the use of the access road by third parties. It was informed that these issues were outside the ambit of the certification process and could only be the subject of later negotiation with the government.

13 While Redfern undertook to address other deficiencies, the Environmental Assessment Office's project assessment director engaged a consultant acceptable to the TRTFN, Mr. Lindsay Staples, to perform traditional land use studies and address issues raised by the TRTFN. Redfern submitted its upgraded report in July 1997, but was requested to await receipt of the Staples Report. The Staples Report, prepared by August 1997, was provided for inclusion in the Project Report. The Project Report was distributed for review in September 1997, with public comments received for a 60-day period thereafter. However, the TRTFN, upon reviewing the Staples Report, voiced additional concerns. In response, the Environmental Assessment Office engaged Staples to prepare an addendum to his report, which was completed in December 1997 and also included in the Project Report from that time forward.

14 Under the Act, the executive director, upon accepting a project report, may refer the application for a project

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

approval certificate to the Ministers for a decision (s. 29). "In making a referral ... the executive director must take into account the application, the project report and any comments received about them" (s. 29(1)). "A referral ... may be accompanied by recommendations of the project committee" (s. 29(4)). There is no requirement under the Act that a project committee prepare a written recommendations report.

15 In this case, the staff of the Environmental Assessment Office prepared a written Project Committee Recommendations Report, the major part of which was provided to committee members for review in early January 1998. The final 18 pages were provided as part of a complete draft on March 3, 1998. The majority of the committee members agreed to refer the application to the Ministers and to recommend approval for the project subject to certain recommendations and conditions. The TRTFN did not agree with the Recommendations Report, and instead prepared a minority report stating their concerns with the process and the proposal.

16 After a referral under s. 29 is made, "the ministers must consider the application and any recommendations of the project committee" (s. 30(1)(a)), in order to either "issue a project approval certificate", "refuse to issue the ... certificate", or "refer the application to the Environmental Assessment Board for [a] public hearing" (s. 30(1)(b)). Written reasons are required (s. 30(1)(c)).

17 The executive director referred Redfern's application to the Ministers on March 12, 1998. The referral included the Project Committee Recommendations Report, the Project Approval Certificate in the form that it was ultimately signed, and the TRTFN Report (A.R., Vol. V, p. 858). In addition, the Recommendations Report explicitly identified TRTFN concerns and points of disagreement throughout, as well as suggested mitigation measures. The Ministers issued the Project Approval Certificate on March 19, 1998, approving the proposal subject to detailed terms and conditions.

18 Issuance of project approval certification does not constitute a comprehensive "go-ahead" for all aspects of a project. An extensive "permitting" process precedes each aspect of construction, which may involve more detailed substantive and information requirements being placed on the developer. Part 6 of the Project Committee's Recommendations Report summarized the requirements for licences, permits and approvals that would follow project approval in this case. In addition, the Recommendations Report made prospective recommendations about what ought to happen at the permit stage, as a condition of certification. The Report stated that Redfern would develop more detailed baseline information and analysis at the permit stage, with continued TRTFN participation, and that adjustments might be required to the road route in response. The majority also recommended creation of a resource management zone along the access corridor, to be in place until completion of a future land use plan; the use of regulations to control access to the road; and creation of a Joint Management Committee for the road with the TRTFN. It recommended that Redfern's future Special Use Permit application for the road be referred to the proposed Joint Management Committee.

19 The TRTFN brought a petition in February 1999 under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash the Ministers' decision to issue the Project Approval Certificate on administrative law grounds and on grounds based on its Aboriginal rights and title. Determination of its rights and title was severed from the judicial review proceedings and referred to the trial list, on the Province's application. The chambers judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their decision might infringe Aboriginal rights, and that they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001 (B.C. S.C. [In Chambers])). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59 (B.C. C.A.)). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

### III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.), heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Mine had the potential to adversely affect the substance of the TRTFN's claims.

22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

#### ***A. Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?***

23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

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).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at p. 1119, *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.); *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 168. The obligation to consult

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

26 The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

27 When Redfern applied for project approval, in its efforts to reopen the Tulsequah Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

### ***B. What was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?***

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida, supra*, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

31 The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

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

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

### ***C. Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?***

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications (the "Specifications") detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

36 The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

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37 With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

38 While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful consultation. After more than three years, numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain "information deficiencies": Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (at para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982*, is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

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44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

#### **IV. Conclusion**

47 In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

*Appeal allowed.*

*Pourvoi accueilli.*

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2009 CarswellBC 340

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)

The Carrier Sekani Tribal Council (Appellant / Applicant / Intervenor) and The British Columbia Utilities Commission and British Columbia Hydro and Power Authority and Alcan Inc. and The Attorney General of British Columbia (Respondents / Respondents)

British Columbia Court of Appeal

Donald, Huddart, Bauman JJ.A.

Heard: November 24-25, 2008

Judgment: February 18, 2009

Docket: Vancouver CA035715, CA035791

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Subject: Public; Constitutional; Property; Environmental

Aboriginal law --- Constitutional issues — Miscellaneous

Provincial hydro and power authority (BCH) decided to buy electricity from A Inc. which was surplus to A Inc.'s smelter requirements, in accordance with energy purchase agreement (EPA) made in 2007 — BCH needed approval of provincial utilities commission for EPA to be enforceable pursuant to s. 71 of Utilities Commission Act (UCA) — Tribal council (CSTC) sought to be heard in s. 71 proceeding on issue of whether Crown had fulfilled duty to consult and if necessary accommodate aboriginal interests before BCH entered into EPA — Commission reconsidered issue of impact of water flows arising from EPA and dismissed CSTC's reconsideration motion by concluding that EPA had no impact on volume, timing or source of water released into rivers in question — Commission determined that since there were no new physical impacts created by EPA, duty to consult was not triggered and therefore it did not have to address question as to whether BCH had duty to consult — CSTC appealed — Appeal allowed — It could be inferred from UCA that commission had authority to decide relevant questions of law including whether Crown had duty to consult and whether it had fulfilled duty — Appropriate forum for enforcement of duty to consult is in first instance tribunal with jurisdiction over subject matter, and in this case that was commission in relation to EPA — Also, commission had skill, expertise and resources to hear and decide consultation issue — Furthermore, honour of Crown obliged commission to do so, since as body to which powers have been delegated by Crown, it must not deny CSTC timely access to decision-maker with authority over subject matter — Fault of com-

2009 CarswellBC 340, 2009 BCCA 67, [2009] B.C.W.L.D. 1574, [2009] B.C.W.L.D. 1749, 76 R.P.R. (4th) 159, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228

mission was in not entertaining issue of consultation within scope of full hearing when circumstances demanded inquiry — Accordingly, proceeding was to be re-opened for sole purpose of determining whether duty to consult, and if necessary, accommodate CSTC existed and if so, whether duty had been met in respect of filing of EPA.

Public law --- Public authorities — Provincial boards and commissions — Miscellaneous

Provincial hydro and power authority (BCH) decided to buy electricity from A Inc. which was surplus to A Inc.'s smelter requirements, in accordance with energy purchase agreement (EPA) made in 2007 — BCH needed approval of provincial utilities commission for EPA to be enforceable pursuant to s. 71 of Utilities Commission Act (UCA) — Tribal council (CSTC) sought to be heard in s. 71 proceeding on issue of whether Crown had fulfilled duty to consult and if necessary accommodate aboriginal interests before BCH entered into EPA — Commission reconsidered issue of impact of water flows arising from EPA and dismissed CSTC's reconsideration motion by concluding that EPA had no impact on volume, timing or source of water released into rivers in question — Commission determined that since there were no new physical impacts created by EPA, duty to consult was not triggered and therefore it did not have to address question as to whether BCH had duty to consult — CSTC appealed — Appeal allowed — It could be inferred from UCA that commission had authority to decide relevant questions of law including whether Crown had duty to consult and whether it had fulfilled duty — Appropriate forum for enforcement of duty to consult is in first instance tribunal with jurisdiction over subject matter, and in this case that was commission in relation to EPA — Also, commission had skill, expertise and resources to hear and decide consultation issue — Furthermore, honour of Crown obliged commission to do so, since as body to which powers have been delegated by Crown, it must not deny CSTC timely access to decision-maker with authority over subject matter — Fault of commission was in not entertaining issue of consultation within scope of full hearing when circumstances demanded inquiry — Accordingly, proceeding was to be re-opened for sole purpose of determining whether duty to consult, and if necessary, accommodate CSTC existed and if so, whether duty had been met in respect of filing of EPA.

#### Cases considered by *Donald J.A.*:

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

*British Columbia Hydro & Power Authority, Re* (November 29, 2007), Doc. L-95-07 (B.C. Utilities Comm.) — referred to

*British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 36 Admin. L.R. (2d) 249, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 271, 117 W.A.C. 271, 1996 CarswellBC 352 (B.C. C.A.) — considered

*British Columbia Transmission Corp., Re* (2006), 2006 CarswellBC 3694 (B.C. Utilities Comm.) — referred to

*British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.) — referred to

*Dene Tha' First Nation v. Alberta (Energy & Utilities Board)* (2005), 2005 ABCA 68, 2005 CarswellAlta 203, 12 C.E.L.R. (3d) 19, 363 A.R. 234, 343 W.A.C. 234, 45 Alta. L.R. (4th) 213 (Alta. C.A.) — considered

*Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

2009 CarswellBC 340, 2009 BCCA 67, [2009] B.C.W.L.D. 1574, [2009] B.C.W.L.D. 1749, 76 R.P.R. (4th) 159, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228

*Kwikwetlem First Nation v. British Columbia (Utilities Commission)* (2009), 2009 BCCA 68, 2009 CarswellBC 341, 76 R.P.R. (4th) 213 (B.C. C.A.) — referred to

*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — considered

*New Brunswick (Board of Management) v. Dunsmuir* (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)* (2001), 2001 SCC 52, 2001 CarswellBC 1877, 2001 CarswellBC 1878, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 155 B.C.A.C. 193, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 254 W.A.C. 193, [2001] 10 W.W.R. 1, 34 Admin. L.R. (3d) 1, 204 D.L.R. (4th) 33, 274 N.R. 116, 93 B.C.L.R. (3d) 1, [2001] 2 S.C.R. 781 (S.C.C.) — considered

*Paul v. British Columbia (Forest Appeals Commission)* (2003), 2003 CarswellBC 2432, 2003 CarswellBC 2433, 2003 SCC 55, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, 18 B.C.L.R. (4th) 207, [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161 (S.C.C.) — followed

*Quebec (Attorney General) v. Canada (National Energy Board)* (1994), (sub nom. *Québec (Procureur général) v. Office national de l'énergie*) 163 N.R. 241, [1994] 3 C.N.L.R. 49, 1994 CarswellNat 8, 1994 CarswellNat 1496, 112 D.L.R. (4th) 129, [1994] 1 S.C.R. 159, 14 C.E.L.R. (N.S.) 1, 20 Admin. L.R. (2d) 79 (S.C.C.) — considered

#### **Statutes considered:**

*Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

Pt. II — referred to

s. 35 — considered

s. 35.1 [en. SI/84-102] — referred to

*Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212

s. 3 — considered

s. 4 — considered

s. 5 — considered

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s. 12(1)(m) — considered

*Utilities Commission Act*, S.B.C. 1980, c. 60

Generally — referred to

*Utilities Commission Act*, R.S.B.C. 1996, c. 473

Generally — referred to

s. 3 — considered

s. 5(0.1) "minister" [en. 2008, c. 13, s. 4(a)] — considered

s. 71 — considered

s. 71(2.1)(a) — considered

s. 79 — considered

s. 99 — considered

s. 101 — considered

s. 105 — considered

APPEAL by tribal council from decision of British Columbia Utilities Commission dismissing council's reconsideration motion on issue as to whether Crown fulfilled its duty to consult before hydro and power authority entered into Energy Purchase Agreement.

**Donald J.A.:**

## Introduction

1 This is one of those cases foreseen by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), where the broad general principles of the Crown's duty to consult and, if necessary, accommodate Aboriginal interests are to be applied to a concrete set of circumstances.

2 Consultation arises here in relation to the decision of British Columbia Hydro and Power Authority (B.C. Hydro) to buy electricity from Rio Tinto Alcan Inc. (Alcan) which is surplus to its smelter requirements, in accordance with an Energy Purchase Agreement (EPA) made in 2007.

3 For the EPA to be enforceable, B.C. Hydro needs the approval of the British Columbia Utilities Commission (Commission) under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

4 The Carrier Sekani Tribal Council (the appellant) sought to be heard in the s. 71 proceeding before the Com-

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mission on the issue of whether the Crown fulfilled its duty to consult before B.C. Hydro entered into the EPA.

5 The appellant's interest (asserted both in a pending action for Aboriginal title and within the treaty process) is in the water and related resources east of the discharge of the Nechako Reservoir created by Alcan in the early 1950s to drive its generators in Kemano for use at the Kitimat aluminum smelter.

6 The appellant claims that the diversion of water for Alcan's use is an infringement of its rights and title and that no consultation has ever taken place.

7 The Commission considered the appellant's request as a reconsideration of its decision, made prior to the appellant's involvement, that consultation was not relevant and, thus, not within the scope of its proceeding and oral hearing (the Scoping Order). It was held not to be relevant then because the only First Nations groups involved at that point were the Haisla First Nation and the Haisla Hereditary Chiefs, who did not press the issue of consultation.

8 The Commission addressed the reconsideration in two phases. At Phase I, the Commission "concluded that the CSTC [Carrier Sekani Tribal Council] established a prima facie case sufficient to warrant a reconsideration of the Scoping Order", and that the ground for reconsideration was "the impacts on the water flows arising from the 2007 EPA": Reasons for Decision, "Impacts on Water Flows", [*British Columbia Hydro & Power Authority, Re* (November 29, 2007), Doc. L-95-07 (B.C. Utilities Comm.)]. Within Phase I, the Commission conducted a fact-finding hearing into water flow impacts and concluded as follows:

The Commission Panel accepts the submissions of counsel for BC Hydro regarding the determinations that should be made at this time in the proceeding. The Commission Panel concludes as a matter of fact that:

- a) the 2007 EPA will have no impact on the volume, timing or source of water flows into the Nechako River;
- b) the 2007 EPA will not change the volume of water to be released into the Kemano River; and
- c) the 2007 EPA may cause reservoir elevations to vary approximately one or two inches which will be an imperceptible change in the water levels of the Nechako Reservoir. This change to reservoir levels will not affect water flows other than the timing of releases to the Kemano River.

9 Then, in Phase II, the Commission received argument based on, *inter alia*, the facts found as described above and on certain assumptions built into the question framed by the Commission as follows:

Assuming there has been a historical, continuing infringement of aboriginal title and rights and assuming there has been no consultation or accommodation with CSTC on either the historical, continuing infringement or the 2007 EPA, would it be a jurisdictional error for the Commission to accept the 2007 EPA?

10 On December 17, 2007, the Commission dismissed the appellant's reconsideration motion for reasons given in the overall s. 71 decision, January 29, 2008.

11 In brief, the Commission rejected the appellant's motion because it found as a fact that since there were no "new physical impacts" created by the EPA, the duty to consult was not triggered:

... assuming a failure of the duty of consultation for the historical, continuing infringement and no consultation on the 2007 EPA, the Commission Panel concludes that acceptance of the 2007 EPA is not a jurisdictional error because a duty to consult does not arise by acceptance of the 2007 EPA and because a failure of the duty of consultation on the historical, continuing infringement cannot be relevant to acceptance of the 2007 EPA where

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there are no new physical impacts.

12 Among other points taken in the appeal, the appellant says that the Commission was wrong in narrowing the inquiry to "new physical impacts" and ignoring other "non-physical impacts" affecting the appellant's interests.

13 But of greater importance from my viewpoint as a reviewing judge is the Commission's decision not to decide whether B.C. Hydro had a duty to consult. It decided that it did not need to address that question because of its conclusion on the triggering issue. As I will explain later, I consider that to be an unreasonable disposition for, amongst other reasons, the fact that B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation. In my view, that is sufficient to put the Commission on inquiry whether the honour of the Crown was upheld in the making of the EPA.

14 There is an institutional dimension to this error. The Commission has demonstrated in several cases an aversion to assessing the adequacy of consultation. In three other decisions, the Commission deferred the consultation question to the environmental assessment process: *British Columbia Transmission Corp., Re* [2006 CarswellBC 3694 (B.C. Utilities Comm.)], B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06; *British Columbia Hydro & Power Authority, Re*, (July 12, 2007), Doc. C-8-07, (B.C. Utilities Comm.); *British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.), First Nations Scoping Issue. (The appeal from the last decision (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*) [2009 CarswellBC 341 (B.C. C.A.)], CA035864) was heard together with the appeal in the present case.)

15 The Commission is a quasi-judicial tribunal with authority to decide questions of law. As such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 (S.C.C.). That obligation is not met by deciding, as a preliminary question, an adverse impact issue that properly belongs within an inquiry whether a duty is owed and has been fulfilled.

16 B.C. Hydro may be able to defend the Crown's honour on a number of powerful grounds, including the impact question, but this should happen in a setting where the tribunal accepts the jurisdiction to make a decision on the duty to consult.

### **Factual Background**

17 I have said that the infringement, if such it is, associated with the Alcan/Kemano Power Project is on a massive scale. The project involved reversing the flow of a river and the creation of a watershed that discharges west into a long tunnel through a mountain down to sea level at Kemano where it drives the generators at the power station and then flows into the Kemano River. To the east the watershed discharges into the Nechako River which eventually joins the Fraser River at Prince George. The westerly diversion is manmade. The natural water flows into the Nechako River system were altered by the project with implications for fish and wildlife, especially salmon. Alcan holds a water licence in perpetuity for the reservoir. It is obliged by the licence and an agreement made in 1987 settling litigation involving the Provincial and Federal Governments to maintain water flows that meet specifications for migratory fish.

18 At the outset of the project in the late 1940s, Alcan envisioned a smelter at Kitimat and power station at Kemano roughly twice their present size. The water licence and related permits for the Nechako Reservoir were issued provisionally with the idea that when the plants were enlarged as planned, the licence would be made permanent.

19 In the course of an expansion project, sometimes referred to as Kemano II, the Government of British Columbia changed its mind about allowing the full utilization of the reservoir. This shut down the project and prompted a law suit by Alcan. The parties settled the dispute in 1997 on terms which included a power deal whereby the Prov-

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ince would supply Alcan should it enlarge the smelter and need more electricity. The settlement also granted Alcan the water licence on a permanent basis.

20 Alcan has been selling its excess power since the beginning of its operations, at first directly to neighbouring industries and communities, and later to those customers through the B.C. Hydro grid and to B.C. Hydro for general distribution, and to Powerex Corporation (B.C. Hydro's exporting affiliate).

21 The Commission found as a fact in the decision under appeal that (1) Alcan can sell its electricity to anyone — B.C. Hydro is not the only potential customer; and (2) water flows will not be influenced by the EPA.

22 In written submissions on the motion for reconsideration, the appellant articulated a number of ways in addition to "new physical impacts" where the EPA might affect their interests:

18. There are many aspects of the EPA which demonstrate that it is an important decision in relation to the infringements of the Intervenor's rights and title, within the context set out by recent caselaw. This decision:

- (a) Approves an EPA that will confirm and mandate extended electricity sales for a very long time — to 2034;
- (b) Approves the sale to BC Hydro of all electricity which is surplus to Alcan's power needs — and therefore authorizes the sale of power resulting from diversions of water that are causing existing impacts and infringements;
- (c) Removes or affects the flexibility to release additional water, because that power is now the subject of an agreement with BC Hydro;
- (d) Changes the 'operator' — by creating a "Joint Operating Committee" (s.4.13), by authorizing B.C. Hydro to 'jointly develop' the reservoir operating model (s.4.17), and by requiring B.C. Hydro approval for any amendments to operating agreements "which constrain the availability of Kemano to generate electricity" (App.1, 70 "Operating Constraints");
- (e) Changes in objective — this agreement confirms that power will now be devoted to long-term 'capacity' for B.C. Hydro (Even if there had been a 'compelling social objective' to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new 'objective' requires further consultation.);
- (f) Creates added incentives to maximize power sales (rather than release water for conservation);
- (g) Provides incentives to Alcan to 'optimize' efficiency of their operations (meaning additional power sales);
- (h) Encourages sales (i.e. diversion of water) through financial incentives in the most significant low water months (January to March);
- (i) Affects the complexity required for proper environmental management — e.g. temperature, variable flows, timing, over-spills etc. — in order to accommodate BC Hydro sales;
- (j) Approves an agreement that contains no positive conditions protecting fish and First Nations rights and which will preclude (by financial disincentives) those conditions from being added later;
- (k) Fails to include First Nations in any way in management decisions.

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19. If, despite the jurisprudence pointing to the contrary, the BC Utilities Commission is not prepared to examine the impacts of existing operations, and instead views the EPA solely as a financial model, there are nevertheless clear impacts on the Intervenor's interests arising from this agreement:

- (a) Increases the cost of compensation to Alcan;
- (b) Any change to the 1987 Settlement Agreement flows will be more difficult to achieve;
- (c) Additional sales (and therefore diversions) may well occur (evidence of other purchasers — under all conditions and at all times of the year — is speculative).

[Emphasis in original.]

23 To the extent that the Commission addressed those points, it did so broadly by distinguishing between issues relating to the use of power and the production of power and by noting that its authority under s. 71 is limited:

There may be steps contemplated by the Crown that have no new impacts that would nevertheless trigger the duty to consult because of a historical, continuing infringement. However, a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing would not be a jurisdictional error. That is, it is the combination of no new physical impacts together with the limited scope of a section 71 review that answers the principal question — there is no jurisdictional error in this Decision. Alcan states: "The Crown's fiduciary duty arises in specific situations, in particular, when the Crown assumes discretionary control over specific Aboriginal interests" (Alcan Submission, para. 5.3). The decision to accept or declare unenforceable the 2007 EPA under section 71 of the Act does not affect underlying water resources or any CSTC aboriginal interests there may be in that resource (Alcan Submissions, para. 5.5).

The CSTC submits:

"The 2007 EPA will also constitute a significant change in use (from power produced for aluminum smelting purposes to power for general provincial consumption) which, if approved by the BCUC, will amount to approval by the Crown of that change in use — without consultation" (CSTC Submission, para. A6).

The 2007 EPA may change the use of power in the sense suggested by the CSTC. However, such change in the use of the power could be effected by Alcan without the 2007 EPA and by means that are beyond the authority of the Commission. Nevertheless, the important question is whether or not there is a change in water flows, not whether or not there is a change in use of power. And, as found by the Commission in Letter No. L-95-07, water flows will not change.

## Relevant Enactments

24 The Commission's authority regarding energy supply contracts comes from s. 71 of the *Utilities Commission Act*, which, including amendments effective May 1, 2008, now reads:

71.(1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and

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(b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

(2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,

(c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,

(d) the interests of persons in British Columbia who receive or may receive service from the public utility,

(e) the quantity of the energy to be supplied under the contract,

(f) the availability of supplies of the energy referred to in paragraph (e),

(g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and

(h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

(2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

(2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.

(2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.

(2.5) In considering the public interest under subsection (2.4), the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1,

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(c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and

(d) the interests of persons in British Columbia who receive or may receive service from the public utility.

(2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract

(a) entered into exclusively on the terms and conditions, and

(b) as a result of the process

referred to in subsection (2.3).

(3) If subsection (2) applies, the commission may

(a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

(5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

25 Provisions of that Act bearing on the relationship between the British Columbia Government and the Commission include:

3(1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.

(2) The commission must comply with a direction issued under subsection (1), despite

(a) any other provision of

(i) this Act, except subsection (3) of this section, or

(ii) the regulations, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

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(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

.....

5 (0.1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

(3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.

(4) The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.

(5) An inquiry under subsection (4) must begin

(a) by March 31, 2009, and

(b) at least once every 6 years after the conclusion of the previous inquiry,

unless otherwise ordered by the Lieutenant Governor in Council.

(6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).

(7) The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4).

(8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.

(9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

.....

2009 CarswellBC 340, 2009 BCCA 67, [2009] B.C.W.L.D. 1574, [2009] B.C.W.L.D. 1749, 76 R.P.R. (4th) 159, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228

71 ...

(2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider

(a) the government's energy objectives, ...

26 The provisions of the *Utilities Commission Act* dealing with the Commission's jurisdiction and appeals are:

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

.....

99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

.....

101 (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

(2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.

(3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

(4) The commission and the Attorney General may be heard by counsel on the appeal.

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

.....

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

27 B.C. Hydro's relationship with government is defined in the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, as follows:

3(1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an

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agent of the government.

(2) The Minister of Finance is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

4(1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.

(2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.

(3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.

5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may

(a) exercise the powers conferred on them under this Act,

(b) exercise the powers of the authority on behalf of the authority, and

(c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

28 The authority to purchase power is found in s. 12(1)(m) of the *Hydro and Power Authority Act*:

12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

. . . . .

(m) purchase power from or sell power to a firm or person;

29 Section 35 of the *Constitution Act, 1982* reads:

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

## Issues

30 The appellant frames the grounds for appeal in its factum as follows:

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22. The appellant submits that the Commission committed errors of law and jurisdiction in determining:

- a) That the failure of the Crown to consult and, if necessary, accommodate the member tribes of the CSTC was not relevant to the proceeding;
- b) to refuse to allow evidence or cross-examination on the on-going existing impacts of the operations of the Nechako reservoir and the Kemano Project on the aboriginal rights and title of the member tribes of the CSTC; and
- c) that the acceptance of the EPA between BC Hydro and Alcan does not trigger a duty to consult and, if necessary accommodate the member tribes of the CSTC.

31 The Attorney General's factum identifies the question of law in the appeal as follows:

23. The Attorney General says that the question of law in this appeal is whether the Commission correctly refused to amend the Scoping Order to consider the adequacy of Crown consultation with First Nations regarding the impact of the Kemano System upon their asserted Aboriginal rights. In particular:

Is the duty to consult triggered by the Crown contemplating conduct which does not adversely impact claimed Aboriginal rights, but is nonetheless related to historical Crown conduct which does impact claimed Aboriginal rights?

32 Alcan poses a threshold question about the Commission's jurisdiction and a further question on the merits:

35. This proposition [the appellant's contention that the Commission had a duty to ensure consultation took place] raises a threshold question about the jurisdiction of the Commission:

In a s. 71 review of an energy supply contract, does the Commission have the jurisdiction to decide whether the Crown's duty to consult under s. 35 of the *Constitution Act, 1982* arises and has been met in relation to that contract?

36. If the answer is "no", the appeal must be dismissed, because the CSTC's complaint about consultation will have been taken to the wrong forum. If the answer is "yes", then this Court must address a second question:

Did the 2007 EPA or the Commission's review of the 2007 EPA give rise to a duty to consult under s. 35 of the *Constitution Act, 1982*?

33 B.C. Hydro's breakdown of the issues is this:

BC Hydro submits that the primary issue on appeal is as follows:

1. Did the review conducted by the BCUC in respect of the 2007 EPA pursuant to s. 71 of the UCA amount to the Crown contemplating conduct that might adversely affect the CSTC's aboriginal interests so as to give rise to the duty to consult with the CSTC?

2. If and only if the primary question is answered in the affirmative, then BC Hydro submits that there is a secondary issue on appeal as follows:

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If the answer to question 1 is yes, does the UCA empower and require the Commission to adjudicate a dispute between the Crown and the CSTC regarding the sufficiency of consultation to discharge the Crown's obligation in respect of the original authorization, construction and operation of the Nechako Reservoir before the BCUC can exercise its jurisdiction under s. 71?

3. If and only if the secondary question is answered in the affirmative, then BC Hydro submits that there is a third issue on appeal as follows:

If the answer to both questions 1 and 2 is yes, what remedy is appropriate?

34 I will analyze the issues according to this framework:

A. Was the Commission, in reviewing the enforceability of the EPA under s. 71 of the *Utilities Commission Act*, obliged to decide whether the Crown had a duty to consult and whether it fulfilled the duty?

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question defined too strictly and in terms which did not include all of the interests asserted by the appellant?

C. What is the appropriate remedy if the appellant establishes a reviewable error?

## Discussion

### A. The Power and Duty to Decide

#### 1. The Power

35 Under the heading of power to decide, I will discuss three propositions:

(a) As a quasi-judicial tribunal with authority to decide questions of law, the Commission is competent to decide relevant constitutional questions, including whether the Crown has discharged a duty to consult.

(b) Section 71 of the *Utilities Commission Act* mandates review of the enforceability of an energy purchase agreement according to factors which include the public interest. This agreement engages the honour of the Crown in its dealings with Aboriginal peoples.

(c) The Commission has the capacity to address the adequacy of consultation.

#### (a) Competency

36 The Commission has not explicitly declared that it has no jurisdiction to decide a consultation issue. But since the Commission has shown a disinclination to grapple with the issue, and the proponents of the EPA have questioned whether it lies within the Commission's statutory mandate, I think the court should settle the point.

37 In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court of Canada decided, at para. 38, "there is no principled basis for distinguishing s. 35 rights from other constitutional questions."

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38 Moving on to whether administrative tribunals have the power to decide constitutional law questions, the Court in *Paul* stated, at para. 39:

The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

39 I take those statements to be of broad application and not limited to the facts particular to *Paul*. In my opinion, they apply to the instant case, notwithstanding that the determination for the Forest Appeals Commission would have had a more direct effect on Mr. Paul's use of the forest resource than would the effects of B.C. Hydro's involvement in the EPA on the appellant's interests in the water resource.

40 It can be inferred from the *Utilities Commission Act* that the Commission has the authority to decide relevant questions of law. Section 79, "findings of fact conclusive", implies that the right to appeal under s. 101 is restricted to questions of law or jurisdiction. Further, consideration of the exclusive jurisdiction clause in s. 105 indicates that the Legislature must have empowered the Commission to decide questions of law, otherwise the appellate review would be meaningless.

41 The Commission is therefore presumed to have the jurisdiction to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled the duty. These are issues of law arising from Part II of the *Constitution Act, 1982*, ss. 35 and 35.1 that the Commission is competent to decide.

#### **(b) Construction of Section 71**

42 Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner. As I will develop later, the rationale for the duty to consult, explained in *Haida Nation v. British Columbia (Minister of Forests)*, discourages resort to the ordinary courts for injunctive relief and encourages less contentious measures while reconciliation is pursued. It would seem to follow that the appropriate forum for enforcement of the duty to consult is in the first instance the tribunal with jurisdiction over the subject-matter — here the Commission in relation to the EPA.

43 B.C. Hydro cites this Court's decision in *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106 (B.C. C.A.), as support for the argument that s. 71 should not be interpreted to include the power to assess adequacy of consultation. It was held in that case that the governing statute, then the *Utilities Commission Act*, S.B.C. 1980, c. 60, did not confer jurisdiction on the Commission to enforce as mandatory the guidelines it developed on resource planning. One of the guidelines required public consultation, the inadequacy of which, as perceived by the Commission, led it to issue directions to B.C. Hydro in connection with an application for a certificate of public convenience and necessity. The Court examined the contested power to enforce guidelines against the language of the *Act*, its purpose and object, and found that no explicit provision enabled the Commission to promulgate mandatory guidelines which intruded on the management of the utility and none should be implied.

44 On the strength of that case, B.C. Hydro turns to *New Brunswick (Board of Management) v. Dunsmuir*, 2008

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SCC 9, 291 D.L.R. (4th) 577 (S.C.C.), for the following general proposition that it says applies to the present matter:

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.

[Emphasis added.]

45 I do not accept B.C. Hydro's argument. The rule in question sought to be enforced through proceedings before the Commission arises not as an internal prescription, as in the *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* decision just discussed, but from the *Constitution* itself. *Haida*, at paras. 60-63, contemplates review of consultation by administrative tribunals. It is not necessary to find an explicit grant of power in the statute to consider constitutional questions; so long as the Legislature intended that the tribunal decide questions of law, that is sufficient.

46 It is necessary to address a case cited by all the respondents as standing for the proposition that a tribunal's power to decide the adequacy of consultation requires an explicit provision in the constituent statute. In *Dene Tha' First Nation v. Alberta (Energy & Utilities Board)*, 2005 ABCA 68, 363 A.R. 234 (Alta. C.A.), the Alberta Court of Appeal held that the Board's refusal to accept an intervention in the matter of licences for well drilling and access roads was not reviewable as it was based on a factual finding that the First Nation seeking to intervene had not demonstrated an adverse impact. The court said it had no jurisdiction to review findings of fact. Therein lies the *ratio decidendi* of the judgment. The court noted at para. 24 that it was common ground that neither the Utility nor the Board had a duty to consult. As to the duty on the Crown, the court said, *obiter dicta*:

[28] A suggestion made to us in argument, but not made to the Board, was that the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

47 The court went on to record that consultation was not addressed at the Board level. I regard the above quoted remarks as having been made *en passant* in an oral judgment rather than a definitive judicial opinion made with the benefit of full argument. With respect, I do not find it persuasive authority for the proposition advanced by the respondents in the present case.

### (c) Capacity to decide

48 I turn to consider the Commission's capacity to decide. As I understand Alcan's submission, the issues surrounding the consultation duty are so remote from the Commission's usual terms of reference that the Commission should not be expected to decide them. Alcan argues that the appellant should go to court for redress. I quote from

2009 CarswellBC 340, 2009 BCCA 67, [2009] B.C.W.L.D. 1574, [2009] B.C.W.L.D. 1749, 76 R.P.R. (4th) 159, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228

paras. 88 and 89 of Alcan's factum:

88. ... to accept the CSTC's invitation [to entertain the consultation issue] would mire the Commission in complex questions of fact and law to which its mandate, statutory powers and remedies are ill-suited.

89. In the end, the argument comes full circle: the CSTC are seeking redress for their grievances in the wrong forum.

49 *Paul* rejected the argument that Aboriginal law issues may be too complex and burdensome for an administrative tribunal, at para. 36:

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

50 I heard nothing in the appeal which causes me to doubt the capacity of the Commission to hear and decide the consultation issue. Expressed in more positive terms, I am confident that the Commission has the skill, expertise and resources to carry out the task.

## 2. The Duty to Decide

51 Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

52 The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 35:

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

As to timing, see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) at para. 3:

... the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples.

53 If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation. Otherwise, the First Nations are driven to seek an interlocutory injunction, which, according to *Haida* at para. 14, is often an unsatisfactory route:

Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the

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full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

54 While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. It is useful to remember the relationship between government and administrative tribunals generally.

55 In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.), the issue was the independence of members of the Liquor Appeal Board given their terms of appointment. The Court contrasted the ordinary courts with administrative tribunals in the following analysis at para. 24:

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

56 No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.

57 The honour of the Crown as a basis for the duty to decide is compelling on the facts here: one Crown entity, the responsible Ministry, granted the water licence, allegedly infringing Aboriginal interests without prior consultation; another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement on a long-term contract; and a third, the tribunal, dismisses the appellant's claim for consultation on a preliminary point.

***B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question?***

58 In this part, I identify the appropriate standard of review and apply the standard to the decision under appeal.

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I conclude that (1) the standard is reasonableness; (2) the Commission set an unreasonably high threshold for the appellant to meet; and (3) it took too narrow a view of the Aboriginal interests asserted.

### 1. Standard of Review

59 The appellant argues that the Commission has to be correct in disposing of constitutional issues such as those that arise here. The respondents submit the standard is reasonableness.

60 I accept the respondents' position. The Commission's decision involves matters of fact, some assumed and others actually found, some questions of mixed fact and law and procedure. While I think the Commission took the wrong approach to the dispute, I cannot isolate a pure question of law for review on a correctness standard. Guidance on the standard is provided by *Haida*, at para. 61:

On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

### 2. Reasoning Error

61 In my respectful judgment, the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the appellant would win the point as a precondition for a hearing into the very same point.

62 I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. I refer to the assumed facts, namely, that there is an infringement without consultation and on the unquestioned fact that B.C. Hydro, a Crown agent, takes advantage of the power produced by the infringement by signing the EPA. In my opinion, this is enough to clear any reasonable hurdle. As stated in *Mikisew*, at para. 55:

The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty.

[Emphasis added.]

Whether the EPA triggered a duty is for a hearing on the merits.

63 Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The

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process deprived the appellant the opportunity to develop a case for the non-physical impacts listed in their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least *participate* in the infringement.

64 Again, these points may not carry the day for the appellant, but the appellant should have had the opportunity to develop them.

65 Finally, the consultation duty is not a concept that lends itself to hard-edged tests. The trigger formula in *Haida* is to be applied within the proceeding, not on a threshold inquiry. The duty is to discuss, not necessarily to agree or to make compromises. It is to be open to accommodation, if necessary. The discussion itself has intrinsic value as a tool of reconciliation. It is not always possible to say in advance that consultation would be either productive or futile — the Crown may be influenced by the Aboriginal perspective in the way it carries out a project. At the very least, the First Nation will have had a chance to put its views forward.

66 In reviewing the history of the duty to consult, the Court in *Haida* said, at para. 24:

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

67 According to *Haida*, at para. 38, the consultation may advance the goal of reconciliation by improving the relationship between the Crown and First Nations:

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

[Emphasis added.]

68 In summary, I would allow the appeal on the ground that the Commission unreasonably refused to include the consultation issue in the scope of the proceeding and oral hearing.

## Remedy

69 As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for consideration. The order I would make is in terms similar to those suggested by B.C. Hydro in the event the appeal is allowed:

THAT the proceeding identified as "Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electricity Purchase Agreement with RTA as an Energy Supply

2009 CarswellBC 340, 2009 BCCA 67, [2009] B.C.W.L.D. 1574, [2009] B.C.W.L.D. 1749, 76 R.P.R. (4th) 159, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228

Contract Pursuant to section 71" be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.

***Huddart J.A.:***

I agree.

***Bauman J.A.:***

I agree.

*Appeal allowed.*

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2009 CarswellBC 341

Kwikwetlem First Nation v. British Columbia Transmission Corp.

In the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Project

The Kwikwetlem First Nation (Appellant / Applicant / Intervenor) and British Columbia Transmission Corporation, British Columbia Hydro and Power Authority, and British Columbia Utilities Commission (Respondents)

In the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior To Lower Mainland Project

Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band (Appellants / Applicants / Intervenor) and British Columbia Utilities Commission, British Columbia Transmission Corporation, and British Columbia Hydro and Power Authority (Respondents)

British Columbia Court of Appeal

Donald, Huddart, Bauman JJ.A.

Heard: November 26-27, 2008

Judgment: February 18, 2009

Docket: Vancouver CA035864, CA035928

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K.B. Bergner, A. Besspflug for Respondent, British Columbia Hydro and Power Authority

A.W. Carpenter for Respondent, British Columbia Transmission Corporation

Subject: Public; Property; Environmental

Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Miscellaneous

Duty to consult — First Nations intervenor made application for certificate of public convenience and necessity

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

("CPCN") for transmission line project proposed by respondent, British Columbia Transmission Corporation ("BCTC") — First Nations intervenor appealed decision of British Columbia Utilities Commission ("Commission") — Appeal allowed — Order was made that Commission reconsider scoping decision — Duty to consult with regard to CPCN process was acknowledged — Commission had obligation to inquire into adequacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide whether consultation efforts up to point of decision were adequate.

Aboriginal law --- Reserves and real property — Fiduciary duty

Duty to consult — First Nations intervenor made application for certificate of public convenience and necessity ("CPCN") for transmission line project proposed by respondent, British Columbia Transmission Corporation ("BCTC") — First Nations intervenor appealed decision of British Columbia Utilities Commission ("Commission") — Appeal allowed — Order was made that Commission reconsider scoping decision — Duty to consult with regard to CPCN process was acknowledged — Commission had obligation to inquire into adequacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide whether consultation efforts up to point of decision were adequate.

#### Cases considered by *Huddart J.A.*:

*British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 36 Admin. L.R. (2d) 249, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 271, 117 W.A.C. 271, 1996 CarswellBC 352 (B.C. C.A.) — referred to

*British Columbia Transmission Corp., Re* (2006), 2006 CarswellBC 3694 (B.C. Utilities Comm.) — considered

*British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.) — considered

*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), 2009 CarswellBC 340, 2009 BCCA 67, 76 R.P.R. (4th) 159 (B.C. C.A.) — followed

*Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

*Kwikwetlem First Nation v. British Columbia Transmission Corp.* (2008), 2008 CarswellBC 958, 2008 BCCA 208 (B.C. C.A. [In Chambers]) — considered

*Osoyoos Indian Band v. Oliver (Town)* (2001), 95 B.C.L.R. (3d) 22, [2002] 1 W.W.R. 23, 2001 SCC 85, 2001 CarswellBC 2703, 2001 CarswellBC 2704, 45 R.P.R. (3d) 1, 278 N.R. 201, 75 L.C.R. 1, [2002] 1 C.N.L.R. 271, 206 D.L.R. (4th) 385, [2001] 3 S.C.R. 746, 160 B.C.A.C. 171, 261 W.A.C. 171 (S.C.C.) — referred to

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*)

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

**Statutes considered:**

*Business Corporations Act*, S.B.C. 2002, c. 57

Generally — referred to

*Environmental Assessment Act*, R.S.B.C. 1996, c. 119

Generally — referred to

*Environmental Assessment Act*, S.B.C. 2002, c. 43

Generally — referred to

s. 8(1)(a) — considered

s. 8(1)(c) — considered

s. 9 — referred to

s. 9(1)(a) — considered

s. 9(1)(c) — considered

s. 9(2) — considered

s. 10(1)(c) — considered

s. 11 — referred to

s. 11(1) — considered

s. 11(2)(f) — considered

s. 11(2)(g) — considered

s. 11(3) — considered

s. 16 — considered

s. 17 — referred to

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

s. 17(1) — considered

s. 17(2)(a) — considered

s. 17(2)(b) — considered

s. 17(2)(c) — considered

s. 17(3) — considered

s. 17(4) — considered

s. 30 — considered

s. 50(2)(e) — considered

*Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212

Generally — referred to

*Transmission Corporation Act*, S.B.C. 2003, c. 44

Generally — referred to

*Utilities Commission Act*, R.S.B.C. 1996, c. 473

Generally — referred to

s. 45 — referred to

s. 45(1) — considered

s. 45(3) — considered

s. 45(6) — considered

s. 45(7) — considered

s. 45(8) — considered

s. 45(9) — considered

s. 46(1) — considered

s. 46(3) — considered

s. 46(3.1) [en. 2008, c. 13, s. 9(b)] — considered

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

s. 46(3.2) [en. 2008, c. 13, s. 9(b)] — considered

s. 71 — referred to

s. 99 — considered

s. 101 — pursuant to

s. 101(1) — considered

s. 101(5) — considered

### **Regulations considered:**

*Environmental Assessment Act*, S.B.C. 2002, c. 43

*Concurrent Approval Regulation*, B.C. Reg. 371/2002

s. 3(2)(a) — referred to

APPEAL by First Nations intervenor from decision of British Columbia Utilities Commission.

### **Huddart J.A.:**

1 This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

2 The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

3 The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title, requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

4 The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola In-

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

dian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

5 The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

6 The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.), First Nations Scoping Issue (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

7 The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *British Columbia Transmission Corp., Re* [2006 CarswellBC 3694 (B.C. Utilities Comm.)], B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("VITR") and *British Columbia Hydro & Power Authority, Re* (July 12, 2007), Doc. C-8-07, (B.C. Utilities Comm.) ("Revelstoke"). It is the reasoning in VITR, amplified in Revelstoke and the scoping decision, this Court is asked to review.

8 As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (B.C. C.A.) at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

9 The Commission is a regulatory agency of the provincial government which operates under and administers that Act. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin. L.R. (2d) 249 (B.C. C.A.), at paras. 46 and 48.)

10 BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

## The Issues

11 It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

12 In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2008 BCCA 208 (B.C. C.A. [In Chambers]). It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

13 The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

14 As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

15 I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

## The Relevant Statutory Regimes

### The CPCN Process

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

***Utilities Commission Act***

45.(1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

.....

(3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

.....

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46.(1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

.....

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

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(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and

(c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

.....

99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

.....

101.(1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

.....

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

16 The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.

CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

## 2. Project Description

.....

(iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

.....

### 3. Project Justification

.....

(ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;

(iii) a statement identifying any significant risks to successful completion of the project;

.....

### 4. Public Consultation

(i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.

.....

### 6. Other Applications and Approvals

(i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and

(ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

### The EAC Process

#### *Environmental Assessment Act*

8.(1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project,

.....

unless

(c) the person first obtains an environmental assessment certificate for the project, or

.....

9.(1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the

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government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project,

.....

unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

.....

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10.(1) The executive director by order

.....

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

.....

11.(1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

.....

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

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(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

. . . . .

16.(1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

. . . . .

17.(1) On completion of an assessment of a reviewable project ... the executive director ... must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

- (a) an assessment report prepared by the executive director ...,
- (b) the recommendations, if any, of the executive director, ..., and
- (c) reasons for the recommendations, if any, of the executive director, ....

(3) On receipt of a referral under subsection (1), the ministers

- (a) must consider the assessment report and any recommendations accompanying the assessment report,
- (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
- (c) must
  - (i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,
  - (ii) refuse to issue the certificate to the proponent, or
  - (iii) order that further assessment be carried out, in accordance with the scope, procedures and methods speci-

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fied by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

. . . . .

30.(1) At any time during the assessment of a reviewable project under this Act, and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate ..., the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

(a) is being or will be conducted by any of the following or any combination of the following:

- (i) the government of British Columbia, including any agency, board or commission of British Columbia;
- (ii) the government of Canada;
- (iii) a municipality or regional district in British Columbia;
- (iv) a jurisdiction bordering on British Columbia;
- (v) another organization, and

(b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.

(2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

17 The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18, "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

18 The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

19 The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires

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the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

20 The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

### Relevant Background

21 This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

22 BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

23 Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

24 In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

25 In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

4.1 The scope of assessment for the Project will include consideration of the potential for:

4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,

4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

26 In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required.

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At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

27 The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

28 The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

29 On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

30 In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

31 On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

32 At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

33 Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

34 On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Com-

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mission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

### The Scoping Decision

35 The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

36 The Commission Secretary explained (at p. 2-3):

In both the *VITR* Decision and the *Revelstoke* Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the *VITR* Decision:

The government has legislated regulatory approvals that must be obtained before *VITR* proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for *VITR*. Given the Section 11 Procedural Order and the Terms of Reference for *VITR*, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of *VITR*, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).

In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before *Revelstoke* Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order ... and the draft Terms of Reference ... the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

37 In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 51 (also quoted at p. 47 of the *VITR* decision):

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It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

38 To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitksan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4<sup>th</sup>) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. ... [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

39 The Commission summarized its analysis (at p. 5):

... The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

40 The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

41 After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *British Columbia Transmission Corp., Re* (August 5, 2008), Doc. C-4-08, (B.C. Utilities Comm.) (the "CPCN decision"). At page 96 of those reasons, it concluded:

The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

42 The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting

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at p. 32:

... although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

43 From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

44 On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

## Discussion

45 The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

46 The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *BC Gas Utility Ltd., Re*, (May 21, 1999), Doc. G-51-99, (B.C. Utilities Comm.)). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

47 At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking, BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

48 BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify

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without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

49 On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

50 The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

51 Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.). The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

52 BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

53 The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

54 It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

55 As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking

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into account factors relevant to the question on which they are required to form an opinion.

56 Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

57 The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act*.

58 Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

59 By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

60 In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

61 This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

62 The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity

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was an error in law.

63 The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

64 If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

65 Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

## Summary

66 BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

67 When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices — accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746 (S.C.C.), at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

68 Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida*, at paras. 46-47.

69 The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

70 If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

71 For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

***Donald J.A.:***

I agree.

***Bauman J.A.:***

I agree.

*Appeal allowed.*

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1998 CarswellOnt 1

Rizzo & Rizzo Shoes Ltd., Re

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittler, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Supreme Court of Canada

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997  
Judgment: January 22, 1998  
Docket: 24711

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Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.

*Raymond M. Slattery*, for the respondent.

*David Vickers*, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Labour and Employment; Insolvency

Bankruptcy --- Priorities of claims — Preferred claims — Wages and salaries of employees — Type of wages claimable

Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Employment law --- Termination and dismissal — Termination of employment by employer — Severance pay under employment standards legislation

Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40 (1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Faillite --- Priorité des créances — Créances prioritaires — Traitements et salaires des employés — Types de traitements exigibles

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

Droit du travail --- Cessation d'emploi et indemnité de congédiement — Résiliation du contrat d'emploi par l'employeur — Indemnité de cessation d'emploi en vertu de la législation sur les normes du travail

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

An employer which operated a chain of shoe stores was petitioned into bankruptcy on April 13, 1989. A receiving order was made the following day, and on that day the employment of the employer's employees ended. The trustee in bankruptcy paid all wages, salaries, commissions, and vacation pay which had been earned by the employees up to the date on which the receiving order was made. A few months later, the provincial Ministry of Labour audited the employer's records, and determined that the former employees were owed termination pay and vacation pay thereon. The Ministry accordingly filed a proof of claim for these amounts with the trustee. The trustee subsequently disallowed the claims, inter alia, on the grounds that the bankruptcy of the employer did not constitute a dismissal of the employees from employment; thus, no entitlement to severance, termination or vacation pay was triggered under the *Employment Standards Act* (the "ESA"), and there was no claim provable in bankruptcy. The Ministry's appeal to the Ontario Court of Justice (General Division) was allowed. On appeal to the Ontario Court of Appeal, the court overturned the decision and restored the trustee's decision. The employees resumed an appeal to the Supreme Court of Canada which had been discontinued by the Ministry.

**Held:** The appeal was allowed.

Section 40(7) of the ESA provided that where an employee's employment was terminated contrary to the ESA's minimum notice provisions, the employer was required to pay termination pay equal to the amount the employee would have received for the applicable notice period. Section 40a of the ESA further provided that the employer must pay severance pay to each employee whose employment had been terminated, and who had been employed for

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

five years or more. Section 2(3) of the *Employment Standards Amendment Act, 1981* (the "ESAA"), which enacted s. 40a of the ESA, also included a transitional provision such that the amendments did not apply to bankrupt or insolvent employers whose assets had been distributed among creditors or whose proposal under the *Bankruptcy Act* (the "BA") had been accepted prior to the day the amendments received royal assent. A fair, large, and liberal construction of the words "terminated by the employer" was mandated by s. 10 of the *Interpretation Act* if the provisions of the ESA were to be given a meaning consistent with its spirit, purpose, and intention. The purpose of the various provisions of the ESA is to protect employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. Interpreting ss. 40 and 40a of the ESA to apply only to non-bankruptcy-related terminations was incompatible with the object of that statute, and the objects of the termination and severance pay provisions themselves. Moreover, if the ESA's amendments were not intended to apply to terminations caused by operation of the BA, then the transitional provisions of s. 2(3) of the ESAA would have no readily apparent purpose. The inclusion of s. 2(3) of the ESAA necessarily implied that the severance pay obligation did in fact extend to bankrupt employers. To limit the application of those provisions only to employees not terminated through bankruptcy would lead to absurd results, and defeat the purpose of the ESA. Therefore, termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. A declaration that the employer's former employees were entitled to make claims for termination pay, including vacation pay due thereon and severance pay as unsecured creditors, was substituted for the order of the Court of Appeal.

Un employeur, qui exploitait une chaîne de magasins, a fait l'objet de procédures en faillite et a été déclaré failli en date du 13 avril 1989. Une ordonnance de séquestre a été émise le jour suivant et c'est à ce moment que les contrats d'emploi entre l'employeur et ses employés ont pris fin. Le syndic a versé tous les traitements, salaires, commissions et paies de vacances gagnés par les employés à la date de l'ordonnance de séquestre. Quelques mois plus tard, le ministère du Travail de la province a procédé à la vérification des livres de l'employeur et déterminé que les employés avaient droit à une indemnité de cessation d'emploi de même que le montant y afférent à titre de paie de vacances. Le ministère a donc soumis une preuve de réclamation à l'égard de ces montants au syndic. Le syndic a rejeté la preuve de réclamation au motif, notamment, que la faillite ne constituait pas un congédiement des employés, et ne donnait donc pas droit à une indemnité de cessation d'emploi, une indemnité de licenciement ni une paie de vacances en vertu de la *Loi sur les normes d'emploi* (la « LNE »). Par conséquent, il ne pouvait y avoir de réclamation prouvable à ce titre. Le pourvoi du ministère à la Cour de l'Ontario (Division générale) a été accueilli. En appel à la Cour d'appel de l'Ontario, la Cour a infirmé le jugement de première instance et a confirmé la décision du syndic. Le ministère s'est désisté de son pourvoi et les employés ont repris le pourvoi à la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été accueilli.

L'article 40(7) de la LNE prévoyait que, lorsque le contrat d'emploi était résilié sans respecter les dispositions de la LNE relatives à l'avis minimal de cessation d'emploi, l'employeur était tenu de verser une indemnité égale au montant que l'employé aurait reçu pour la période d'avis applicable. D'autre part, l'art. 40a de la LNE prévoyait que l'employeur devait verser une indemnité de cessation d'emploi à chaque employé dont le contrat d'emploi a été résilié et qui travaillait pour l'employeur depuis cinq ans ou plus. L'article 2(3) de la *Employment Standards Amendment Act, 1981* (la « ESAA »), qui édictait l'entrée en vigueur l'art. 40a de la LNE, comprenait aussi une disposition transitoire afin que les amendements ne s'appliquent pas aux employeurs faillis ou insolubles dont les biens avaient été distribués aux créanciers et dont la proposition concordataire en vertu de la *Loi sur la faillite et l'insolvabilité* (la « LFI ») avait été acceptée avant le jour où les amendements ont reçu la sanction royale. L'article 10 de la *Loi d'interprétation* commandait une interprétation juste, généreuse et libérale des mots « l'employeur licencie » afin que les dispositions de la LNE aient un sens qui s'accorde avec l'esprit, l'objet et l'intention de cette loi. L'objectif des diverses dispositions de la LNE est de protéger les employés contre les effets nuisibles d'un bouleversement économique soudain qui peuvent survenir en raison de l'absence de la possibilité de chercher un autre emploi. Interpréter les art. 40 et 40a de la LNE de manière à ce qu'ils s'appliquent uniquement lorsque des cessations d'emploi ne résultent pas d'une faillite était contraire à l'objet de cette loi et même à l'objet des dispositions sur l'indemnité de

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

cessation d'emploi. En outre, si les amendements à la LNE n'étaient pas censés s'appliquer aux cessations d'emploi opérées par la LFI, alors les dispositions transitoires de l'art. 2(3) de la ESAA sembleraient dépourvues d'objet. L'inclusion de l'art. 2(3) de la ESAA impliquait nécessairement que l'obligation de verser une indemnité de cessation d'emploi s'étendait aussi aux employeurs faillis. Restreindre l'application de ces dispositions aux seuls employés non licenciés par suite d'une faillite mènerait à des résultats absurdes et viderait la LNE de son objet. Ainsi, aux termes de l'art. 121 de la LFI, la cessation d'emploi découlant de la faillite de l'employeur donne lieu à une réclamation prouvable ordinaire dans la faillite, à titre d'indemnité de licenciement et d'indemnité de cessation d'emploi, conformément aux art. 40 et 40a de la LNE. Une ordonnance déclarant que les anciens employés de l'employeur ont le droit de présenter des demandes d'indemnité de licenciement, y compris la paie de vacances y afférent, et des demandes d'indemnité de cessation d'emploi en tant que créanciers ordinaires a été substituée à l'ordonnance de la Cour d'appel.

#### Cases considered by / Jurisprudence citée par *Iacobucci J.*:

*Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2, 142 D.L.R. (3d) 1, 46 N.R. 185, 83 C.L.L.C. 14,010 (S.C.C.) — referred to

*British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)*, 40 C.B.R. (3d) 25, [1996] 7 W.W.R. 652, 21 B.C.L.R. (3d) 91 (B.C. S.C.) — considered

*Canada (Procureure générale) c. Hydro-Québec*, (sub nom. *R v. Hydro-Québec*) 118 C.C.C. (3d) 97, (sub nom. *R. v. Hydro-Québec*) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. *R. v. Hydro-Québec*) 217 N.R. 241, (sub nom. *R. v. Hydro-Québec*) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167 (S.C.C.) — referred to

*Friesen v. R.*, 95 D.T.C. 5551, (sub nom. *Friesen v. Canada*) [1995] 3 S.C.R. 103, (sub nom. *Friesen v. Minister of National Revenue*) 186 N.R. 243, (sub nom. *Friesen v. Minister of National Revenue*) 102 F.T.R. 238 (note), (sub nom. *Friesen v. Canada*) 127 D.L.R. (4th) 193, (sub nom. *Friesen v. Canada*) [1995] 2 C.T.C. 369 (S.C.C.) — referred to

*Hills v. Canada (Attorney General)*, 88 C.L.L.C. 14,011, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, 84 N.R. 86, 30 Admin. L.R. 187 (S.C.C.) — referred to

*Kemp Products Ltd., Re* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.) — distinguished

*Machtinger v. HOJ Industries Ltd.*, 40 C.C.E.L. 1, [1992] 1 S.C.R. 986, (sub nom. *Lefebvre v. HOJ Industries Ltd.*; *Machtinger v. HOJ Industries Ltd.*) 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, (sub nom. *Lefebvre v. HOJ Industries Ltd.*; *Machtinger v. HOJ Industries Ltd.*) 136 N.R. 40, 92 C.L.L.C. 14,022 (S.C.C.) — considered

*Malone Lynch Securities Ltd., Re*, [1972] 3 O.R. 725, 17 C.B.R. (N.S.) 105, 29 D.L.R. (3d) 387 (Ont. S.C.) — not followed

*Mills-Hughes v. Raynor* (1988), 19 C.C.E.L. 6, 47 D.L.R. (4th) 381, 25 O.A.C. 248, 38 B.L.R. 211, 68 C.B.R. (N.S.) 179, 63 O.R. (2d) 343 (Ont. C.A.) — considered

*R. v. Morgentaler*, 157 N.R. 97, 125 N.S.R. (2d) 81, 349 A.P.R. 81, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179 (S.C.C.) — considered

*R. v. Paul*, [1982] 1 S.C.R. 621, 27 C.R. (3d) 193, 67 C.C.C. (2d) 97, 138 D.L.R. (3d) 455, 42 N.R. 1 (S.C.C.)

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

— referred to

*R. v. TNT Canada Inc.* (1996), 17 C.C.E.L. (2d) 1, 131 D.L.R. (4th) 289, 96 C.L.L.C. 210-015, 87 O.A.C. 326, 27 O.R. (3d) 546 (Ont. C.A.) — considered

*R. v. Vasil*, [1981] 1 S.C.R. 469, 20 C.R. (3d) 193, 58 C.C.C. (2d) 97, 35 N.R. 451, 121 D.L.R. (3d) 41 (S.C.C.) — referred to

*R. v. Z. (D.A.)*, 16 C.R. (4th) 133, [1992] 2 S.C.R. 1025, 76 C.C.C. (3d) 97, 5 Alta. L.R. (3d) 1, 140 N.R. 327, 131 A.R. 1, 25 W.A.C. 1 (S.C.C.) — referred to

*Royal Bank v. Sparrow Electric Corp.*, 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank*) 97 D.T.C. 5089 (S.C.C.) — referred to

*Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.) — considered

*U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86, 70 O.R. (2d) 455, 63 D.L.R. (4th) 603 (Ont. S.C.) — referred to

*Verdun v. Toronto Dominion Bank*, 94 O.A.C. 211, 203 N.R. 60, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415, 28 B.L.R. (2d) 121, 12 C.C.L.S. 139 (S.C.C.) — referred to

*Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1, 219 N.R. 161 (S.C.C.) — referred to

#### **Statutes considered / Législation citée:**

*Bankruptcy and Insolvency Act/Faillite et l'insolvabilité, Loi sur la*, R.S.C./L.R.C. 1985, c. B-3

Generally — referred to

s. 121(1) — considered

*Employment Standards Act*, R.S.O. 1970, c. 147

s. 13 — referred to

s. 13(2) — considered

*Employment Standards Act, 1974*, S.O. 1974, c. 112

s. 40(7) — considered

*Employment Standards Act*, R.S.O. 1980, c. 137

Generally — referred to

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

s. 7(5) [en. 1986, c. 51, s. 2] — considered

s. 40 [am. 1981, c. 22, s. 1; am. 1987, c. 30, s. 4] — considered

s. 40(1) [rep. & sub. 1987, c. 30, s. 4(1)] — considered

s. 40(2) — referred to

s. 40(5) [rep. & sub. 1981, c. 22, s. 1(1)] — referred to

s. 40(7)(a) [en. 1981, c. 22, s. 1(3)] — considered

s. 40a [en. 1981, c. 22, s. 2(1)] — considered

s. 40a(1) [en. 1981, c. 22, s. 2(1)] — considered

s. 40a(1)(a) [en. 1981, c. 22, s. 2(1)] — referred to

s. 40a(1a) [en. 1987, c. 30, s. 5(1)] — considered

*Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22

s. 2(1) — considered

s. 2(3) — considered

*Interpretation Act*, R.S.O. 1980, c. 219

s. 10 — considered

*Interpretation Act/Interprétation, Loi d'*, R.S.O./L.R.O. 1990, c. I.11

s. 10 — considered

s. 17 — considered

*Labour Relations and Employment Statute Law Amendment Act, 1995/Relations de travail et l'emploi, Loi de 1995 modifiant des lois en ce qui concerne les*, S.O./L.O. 1995, c. 1

s. 74(1) — considered

s. 75(1) — considered

APPEAL by employees of bankrupt employer from decision reported at (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*) 95 C.L.L.C. 210-020, (sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt)*) 80 O.A.C. 201 (C.A.), reversing decision reported at (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), reversing disallowance of claim by trustee in

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 bankruptcy.

POURVOI interjeté par les employés d'un employeur failli à l'encontre d'un arrêt publié à (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*) 95 C.L.L.C. 210-020, (sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt)*) 80 O.A.C. 201 (C.A.), infirmant un arrêt publié à (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), infirmant le rejet par le syndic d'une preuve de réclamation dans la faillite.

### **The judgment of the court was delivered by Iacobucci J.:**

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

#### **1. Facts**

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittler, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately \$2.6 million and for severance pay totalling \$14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

#### **2. Relevant Statutory Provisions**

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively:

*Employment Standards Act*, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
- (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
- (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
- (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
- (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
- (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
- (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

.....

**40a** ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

*Employment Standards Amendment Act, 1981, S.O. 1981, c. 22*

**2.--**(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

*Bankruptcy Act, R.S.C. 1985, c. B-3*

**121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

*Interpretation Act, R.S.O. 1990, c. I.11*

**10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

.....

**17.** The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

### 3. Judicial History

#### *A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)*

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

#### *B. Ontario Court of Appeal (1995), 22 O.R. (3d) 385*

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focusing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

#### 4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

#### 5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40a(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, (sub nom. *R. v. Hydro-Québec*) [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.)). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40a, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. ...

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

(3) Section 40a of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

.....

...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

1998 CarswellOnt 1, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 221 N.R. 241, (sub nom. Adrien v. Ontario Ministry of Labour) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

## 6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

*Appeal allowed.*

*Pourvoi accueilli.*

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2002 CarswellBC 851

Bell ExpressVu Ltd. Partnership v. Rex

Bell ExpressVu Limited Partnership, Appellant v. Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', Richard Rex, c.o.b. as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them, Respondents and The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada, Interveners

Supreme Court of Canada

L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: December 4, 2001  
Judgment: April 26, 2002[FN\*]  
Docket: 28227

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Proceedings: reversing (2000), [2000] 9 W.W.R. 205, 2000 BCCA 493, 2000 CarswellBC 1793, 79 B.C.L.R. (3d) 250, 191 D.L.R. (4th) 662, 142 B.C.A.C. 230, 233 W.A.C. 230 (B.C. C.A.); affirming 1999 CarswellBC 3031 (B.C. S.C. [In Chambers])

Counsel: *K. William McKenzie, Eugene Meehan, Q.C., Jessica Duncan*, for Appellant

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*Robert T. Hughes, Q.C.*, for Intervener, Canadian Motion Picture Distributors Association

*Christopher D. Bredt, Jeffrey D. Vallis, Davit D. Akman*, for Intervener, DIRECTV Inc.

*Ian W.M. Angus*, for Intervener, Canadian Alliance for Freedom of Information and Ideas

*Alan Riddell*, for Intervener, Congres Iberoamerican du Canada

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Subject: Intellectual Property; Property; Public; Constitutional; Civil Practice and Procedure

Communications law --- Regulation of radio and television — Miscellaneous issues

Section 9(1)(c) of Radiocommunication Act prohibited decryption of encrypted signals emanating from U.S. broadcasters — Radiocommunication Act, R.S.C. 1985, c. R-2, s. 9(1)(c).

Droit des communications --- Réglementation de la radio et de la télévision — Questions diverses

Article 9(1)c) de la Loi sur la radiocommunication interdisait le décodage des signaux encodés émanant des radio-diffuseurs américains — Loi sur la radiocommunication, L.R.C. 1985, c. R-2, art. 9(1)c).

The plaintiff was licensed by the Canadian Radio-television and Telecommunications Commission to broadcast "direct to home" (DTH) television programming via satellite to Canadian subscribers. The plaintiff, like all other DTH broadcasters, encrypted its signal to control reception. To decode the plaintiff's signal, customers had to have a decoding system that was specific to the plaintiff. The defendants were engaged in the business of selling decoding systems to Canadians who wished to subscribe to services offered by U.S. DTH broadcasters. As U.S. broadcasters would not knowingly authorize their signals to be decoded by people outside the U.S., the defendants supplied customers with U.S. mailing addresses.

The plaintiff brought an action pursuant to ss. 9(1)(c) and 18(1) of the *Radiocommunication Act* including a request for an injunction to prohibit the defendants from assisting Canadian residents in subscribing to and decoding U.S. DTH programming.

The chambers judge declined to grant the injunctive relief, and the plaintiff's appeal was dismissed.

The plaintiff appealed.

**Held:** The appeal was allowed.

Under s. 9(1)(c) of the *Radiocommunication Act*, no person should decode an encrypted subscription programming signal or encrypted network feed otherwise than in accordance with authorization from the lawful distributor of the signal or feed. What was prohibited was the decoding of any encrypted subscription programming signal subject to the ensuing exception. The definition of subscription programming signal encompassed signals originating from foreign distributors and intended for reception by a foreign public.

As the *Radiocommunication Act* did not prohibit the broadcasting of subscription programming signals and concerned only the decrypting that occurred in locations specified in s. 3(3) of the *Radiocommunication Act*, it did not give rise to extraterritorial exercise of authority.

Parliament chose language that prohibited the decoding of all encrypted signals, regardless of their origin, otherwise than under and in accordance with an authorization from the person holding the necessary lawful rights under Canadian law. If no lawful distributor existed to grant an authorization, the general prohibition remained in effect.

The interpretation of s. 9(1)(c) of the *Radiocommunication Act*, resulting from the grammatical and ordinary sense of the provision, accorded well with the objectives set out in the *Broadcasting Act* and complemented the scheme of the *Copyright Act*.

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

Section 9(1)(c) of the *Radiocommunication Act* prohibited decryption of encrypted signals emanating from U.S. broadcasters.

La demanderesse était titulaire d'une licence que lui avait accordée le Conseil de la radiodiffusion et des télécommunications canadiennes, licence qui lui permettait de faire de la radiodiffusion directe (SRD) par satellite des émissions de télévision aux abonnés canadiens. Comme tous les autres radiodiffuseurs SRD, la demanderesse encodait ses signaux pour en circonscrire la réception. Pour pouvoir décoder les signaux de la demanderesse, ses clients devaient avoir le dispositif de décodage qui lui était propre. Les défendeurs exploitaient des entreprises qui vendaient des dispositifs de décodage aux Canadiens qui voulaient s'abonner aux services offerts par les radiodiffuseurs SRD américains. Puisque les radiodiffuseurs n'autorisaient pas sciemment le décodage de leurs signaux par des personnes se trouvant à l'extérieur des États-Unis, les défendeurs fournissaient une adresse postale américaine à leurs clients.

La demanderesse a intenté une action en vertu des art. 9(1)(c) et 18(1) de la *Loi sur la radiocommunication* et a aussi demandé une injonction interdisant aux défendeurs d'aider les résidents canadiens à s'abonner aux émissions transmises par des services SRD américains et à décoder les signaux pertinents.

Le juge en chambre a refusé l'injonction; le pourvoi interjeté par la demanderesse a été rejeté.

La demanderesse a interjeté appel.

**Arrêt:** Le pourvoi a été accueilli.

En vertu de l'art. 9(1)(c) de la *Loi sur la radiocommunication*, il est interdit de décoder des signaux d'abonnement encodés ou une alimentation réseau encodée, à moins d'avoir une autorisation du distributeur légitime du signal ou du réseau. Il était donc interdit de décoder tout signal d'abonnement encodé, sous réserve de l'exception prévue. La définition du signal d'abonnement incluait les signaux provenant des distributeurs étrangers qui étaient destinés à être reçus par un public étranger.

Puisque la *Loi sur la radiocommunication* n'interdisait pas la radiodiffusion des signaux d'abonnement et ne portait que sur le décodage qui avait lieu dans les endroits spécifiés à l'art. 3(3) de la *Loi sur la radiocommunication*, elle ne soulevait aucune question touchant à l'exercice extraterritorial de certains pouvoirs.

Le législateur a choisi un libellé interdisant le décodage de tout signal encodé, quelle que soit leur origine, à moins d'avoir une autorisation de la personne détenant les droits légitimes nécessaires en vertu du droit canadien. S'il n'existait aucun distributeur légitime pour donner une autorisation, alors l'interdiction générale demeurait en vigueur.

L'interprétation de l'art. 9(1)(c) de la *Loi sur la radiocommunication*, qui découle du sens grammatical et ordinaire de la disposition, se conciliait bien avec les objectifs exprimés dans la *Loi sur la radiodiffusion* et complétait bien le régime prévu par la *Loi sur le droit d'auteur*.

L'article 9(1)(c) de la *Loi sur la radiocommunication* interdisait le décodage des signaux encodés émanant des radiodiffuseurs américains.

#### **Cases considered by Iacobucci J.:**

*Baron v. R.*, 93 D.T.C. 5018, (sub nom. *Baron v. Minister of National Revenue*) 146 N.R. 270, 18 C.R. (4th) 374, (sub nom. *Baron v. Canada*) 99 D.L.R. (4th) 350, (sub nom. *Baron v. Canada*) [1993] 1 S.C.R. 416, (sub nom. *Baron v. Canada*) [1993] 1 C.T.C. 111, (sub nom. *Baron v. Canada*) 78 C.C.C. (3d) 510, (sub nom. *Baron*

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*v. Canada*) 13 C.R.R. (2d) 65, 1993 CarswellNat 845, 1993 CarswellNat 1375 (S.C.C.) — referred to

*Bisaillon c. Keable*, [1983] 2 S.C.R. 60, 2 D.L.R. (4th) 193, 51 N.R. 81, 4 Admin. L.R. 205, 7 C.C.C. (3d) 385, 37 C.R. (3d) 289, 1983 CarswellQue 28, 1983 CarswellQue 96 (S.C.C.) — considered

*Borowski v. Canada (Attorney General)*, [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, [1989] S.C.J. No. 14 (S.C.C.) — considered

*Canada v. Pharmaceutical Society (Nova Scotia)*, 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2)*) 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353, [1992] S.C.J. No. 67 (S.C.C.) — referred to

*Canada (Attorney General) v. Mossop*, 93 C.L.L.C. 17,006, 13 Admin. L.R. (2d) 1, 46 C.C.E.L. 1, 149 N.R. 1, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349, 1993 CarswellNat 1365, 1993 CarswellNat 1377, [1993] S.C.J. No. 20 (S.C.C.) — considered

*Canada (Procureure générale) c. Pearlman*, 2001 CarswellQue 1676, [2001] R.J.Q. 2026 (C.Q.) — considered

*Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CarswellBC 776, 29 C.E.L.R. (N.S.) 1, 133 C.C.C. (3d) 426, 171 D.L.R. (4th) 733, 23 C.R. (5th) 259, 122 B.C.A.C. 1, 200 W.A.C. 1, [1999] 1 S.C.R. 743, 1999 CarswellBC 777 (S.C.C.) — considered

*Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, 2002 CarswellNat 5, 2002 CarswellNat 6, 18 Imm. L.R. (3d) 93, 208 D.L.R. (4th) 107, [2002] S.C.J. No. 1 (S.C.C.) — considered

*Cloutier c. Langlois*, 53 C.C.C. (3d) 257, [1990] 1 S.C.R. 158, 105 N.R. 241, 74 C.R. (3d) 316, 46 C.R.R. 37, 30 Q.A.C. 241, 1990 CarswellQue 8, 1990 CarswellQue 110, [1990] S.C.J. No. 10 (S.C.C.) — referred to

*Corbiere v. Canada (Minister of Indian & Northern Affairs)*, 239 N.R. 1, 1999 CarswellNat 663, 1999 CarswellNat 664, (sub nom. *Corbière v. Canada (Minister of Indian & Northern Affairs)*) 173 D.L.R. (4th) 1, (sub nom. *Canada (Minister of Indian & Northern Affairs) v. Corbiere*) 61 C.R.R. (2d) 189, [1999] 3 C.N.L.R. 19, [1999] 2 S.C.R. 203, 163 F.T.R. 284 (note), [1999] S.C.J. No. 24 (S.C.C.) — considered

*Danson v. Ontario (Attorney General)*, 43 C.P.C. (2d) 165, 73 D.L.R. (4th) 686, [1990] 2 S.C.R. 1086, 50 C.R.R. 59, 41 O.A.C. 250, 112 N.R. 362, 1990 CarswellOnt 366, 74 O.R. (2d) 763 (note), 1990 CarswellOnt 1004 (S.C.C.) — referred to

*Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, 38 C.C.L.T. 184, 71 N.R. 83, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.*) [1986] 2 S.C.R. 573, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.*) 9 B.C.L.R. (2d) 273, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*) 87 C.L.L.C. 14,002, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*) 33 D.L.R. (4th) 174, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*) 25 C.R.R. 321, [1987] D.L.Q. 69 (headnote only), (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*) [1987] 1 W.W.R. 577, 1986 CarswellBC 411, 25 C.C.R. 321, 1986 CarswellBC 764 (S.C.C.) — referred to

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

*ExpressVu Inc. v. NII Norsat International Inc.* (1997), 134 F.T.R. 264, [1998] 1 F.C. 245, 1997 CarswellNat 1158, [1997] F.C.J. No. 1004 (Fed. T.D.) — followed

*ExpressVu Inc. v. NII Norsat International Inc.*, 222 N.R. 213, 1997 CarswellNat 2189, 141 F.T.R. 240 (note), 81 C.P.R. (3d) 345, [1997] F.C.J. No. 1563 (Fed. C.A.) — referred to

*Hills v. Canada (Attorney General)*, 88 C.L.L.C. 14,011, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, 84 N.R. 86, 30 Admin. L.R. 187, 1988 CarswellNat 654, 1988 CarswellNat 757 (S.C.C.) — referred to

*Idziak v. Canada (Minister of Justice)*, 17 C.R. (4th) 161, 9 Admin. L.R. (2d) 1, 12 C.R.R. (2d) 77, [1992] 3 S.C.R. 631, 59 O.A.C. 241, 77 C.C.C. (3d) 65, 97 D.L.R. (4th) 577, 144 N.R. 327, 1992 CarswellOnt 113, 1992 CarswellOnt 1000 (S.C.C.) — considered

*King v. Canada (Attorney General)*, 1996 CarswellNB 441, [1996] N.B.J. No. 449 (N.B. Q.B.) — referred to

*King v. Canada (Attorney General)*, 187 N.B.R. (2d) 185, 478 A.P.R. 185, 1997 CarswellNB 142, [1997] N.B.J. No. 106 (N.B. C.A.) — referred to

*Marcotte v. Canada (Deputy Attorney General)* (1974), [1976] 1 S.C.R. 108, 19 C.C.C. (2d) 257, 3 N.R. 613, 51 D.L.R. (3d) 259, 1974 CarswellOnt 252, 1974 CarswellOnt 252F (S.C.C.) — considered

*Moysa v. Alberta (Labour Relations Board)*, 34 C.P.C. (2d) 97, [1989] 1 S.C.R. 1572, [1989] 4 W.W.R. 596, 60 D.L.R. (4th) 1, 96 N.R. 70, 67 Alta. L.R. (2d) 193, 97 A.R. 368, 89 C.L.L.C. 14,028, 40 C.R.R. 197, 1989 CarswellAlta 86, 1989 CarswellAlta 616 (S.C.C.) — considered

*Murphy v. Welsh*, 18 C.P.C. (3d) 137, 65 O.A.C. 103, 156 N.R. 263, 106 D.L.R. (4th) 404, 47 M.V.R. (2d) 1, 18 C.C.L.T. (2d) 101, 1993 CarswellOnt 987, [1993] 2 S.C.R. 1069 (S.C.C.) — referred to

*Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*) 2002 SCC 8, 2002 CarswellSask 22, 2002 CarswellSask 23, 2002 C.L.L.C. 220-008, 208 D.L.R. (4th) 385 (S.C.C.) — referred to

*Perka v. R.*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1, 55 N.R. 1, [1984] 6 W.W.R. 289, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, 1984 CarswellBC 823, 1984 CarswellBC 3 (S.C.C.) — considered

*Pointe-Claire (Ville) c. S.E.P.B., Local 57* (1997), 1997 CarswellQue 86, (sub nom. *Pointe-Claire (Ville) v. Syndicat des employées & employés professionnels-les & de bureau, section locale 57 (S.E.P.B. - U.I.E.P.B. - C.T.C. - F.T.Q.)*) 211 N.R. 1, (sub nom. *Pointe-Claire (City) v. Quebec (Labour Court)*) 146 D.L.R. (4th) 1, (sub nom. *Pointe-Claire (City) v. Quebec (Labour Court)*) [1997] 1 S.C.R. 1015, (sub nom. *Pointe-Claire (City) v. Quebec (Labour Court)*) 97 C.L.L.C. 220-039, 28 C.C.E.L. (2d) 177, 46 Admin. L.R. (2d) 1, [1997] L.V.I. 2841-1, 1997 CarswellQue 87 (S.C.C.) — referred to

*Québec (Communauté urbaine) c. Notre-Dame de Bonsecours (Corp.)* (1994), (sub nom. *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*) 171 N.R. 161, 63 Q.A.C. 161, (sub nom. *Corp. Notre-Dame de Bon-Secours c. Québec (Communauté urbaine)*) 95 D.T.C. 5091 (Fr.), (sub nom. *Notre-Dame de Bon-Secours (Corp.) v. Quebec (Communauté urbaine)*) [1995] 1 C.T.C. 241, 95 D.T.C. 5017, (sub nom. *Corp. Notre-Dame de Bon-Secours v. Communauté Urbaine de Québec*) 3 G.T.C. 8071, 1994 CarswellQue 115, [1994] 3 S.C.R. 3 (S.C.C.) — referred to

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

*Québec (Procureur General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, (sub nom. *P.G. Quebec c. Carrières Ste-Thérèse Ltée*) 13 Admin. L.R. 144, (sub nom. *Quebec v. Carrières Ste-Thérèse Ltée*) 59 N.R. 391, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée*) 20 C.C.C. (3d) 408, (sub nom. *Attorney General of Québec v. Carrières Ste-Thérèse Ltée*) 20 D.L.R. (4th) 602, 1985 CarswellQue 85, 1985 CarswellQue 109 (S.C.C.) — considered

*R. v. Araujo*, 2000 SCC 65, 2000 CarswellBC 2438, 2000 CarswellBC 2440, 193 D.L.R. (4th) 440, 38 C.R. (5th) 307, 149 C.C.C. (3d) 449, 262 N.R. 346, 143 B.C.A.C. 257, 235 W.A.C. 257, [2000] 2 S.C.R. 992, 79 C.R.R. (2d) 1, [2000] S.C.J. No. 65 (S.C.C.) — referred to

*R. v. Branton*, 2001 CarswellOnt 1288, 154 C.C.C. (3d) 139, 144 O.A.C. 187, 199 D.L.R. (4th) 321, 53 O.R. (3d) 737, 44 C.R. (5th) 275, 82 C.R.R. (2d) 285, [2001] O.J. No. 1445 (Ont. C.A.) — not followed

*R. v. D'Argy* (June 13, 2001), Doc. 405-36-000044-003 (Que. S.C.) — not followed

*R. v. Ereiser*, 1997 CarswellSask 233, 156 Sask. R. 71, [1997] 7 W.W.R. 522, [1997] S.J. No. 276 (Sask. Q.B.) — not followed

*R. v. Gayle*, 54 O.R. (3d) 36, 154 C.C.C. (3d) 221, 2001 CarswellOnt 1322, 145 O.A.C. 115, 201 D.L.R. (4th) 540, 83 C.R.R. (2d) 268 (Ont. C.A.) — referred to

*R. v. Gayle*, 2002 CarswellOnt 159, 2002 CarswellOnt 160, 89 C.R.R. (2d) 188 (note) (S.C.C.) — referred to

*R. v. Gladue*, 1999 CarswellBC 778, 1999 CarswellBC 779, 133 C.C.C. (3d) 385, 171 D.L.R. (4th) 385, [1999] 2 C.N.L.R. 252, 23 C.R. (5th) 197, 238 N.R. 1, [1999] 1 S.C.R. 688, 121 B.C.A.C. 161, 198 W.A.C. 161, [1999] S.C.J. No. 19 (S.C.C.) — referred to

*R. v. Golden*, 2001 SCC 83, 2001 CarswellOnt 4253, 2001 CarswellOnt 4301, 47 C.R. (5th) 1, 159 C.C.C. (3d) 449, 207 D.L.R. (4th) 18, 279 N.R. 1, 153 O.A.C. 201, [2001] S.C.J. No. 81 (S.C.C.) — referred to

*R. v. Goulis*, 33 O.R. (2d) 55, 20 C.R. (3d) 360, 37 C.B.R. (N.S.) 290, 60 C.C.C. (2d) 347, 125 D.L.R. (3d) 137, 1981 CarswellOnt 164 (Ont. C.A.) — referred to

*R. c. Gregory Électronique inc.* (October 16, 2000), Doc. Montréal 500-73-000903-985, 500-73-000904-983, [2000] J.Q. No. 4923 (C.Q.) — not followed

*R. c. Gregory Électronique inc.* (May 29, 2001), Doc. Montréal 500-36-002314-006, [2001] J.Q. No. 4925 (Que. S.C.) — not followed

*R. v. Hasselwander*, 20 C.R. (4th) 277, 81 C.C.C. (3d) 471, 152 N.R. 247, 62 O.A.C. 285, 14 O.R. (3d) 800 (note), 1993 CarswellOnt 979, [1993] 2 S.C.R. 398, 1993 CarswellOnt 87, [1993] S.C.J. No. 57 (S.C.C.) — referred to

*R. v. Knibb*, 1997 CarswellAlta 466, 198 A.R. 161, [1997] 8 W.W.R. 115, 51 Alta. L.R. (3d) 294, [1997] A.J. No. 513 (Alta. Prov. Ct.) — followed

*R. v. LeBlanc*, 1997 CarswellNS 568, [1997] N.S.J. No. 476 (N.S. S.C.) — not followed

*R. v. Love*, 117 Man. R. (2d) 123, 1997 CarswellMan 168, [1997] M.J. No. 109 (Man. Q.B.) — not followed

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

*R. v. Lucas*, 224 N.R. 161, 123 C.C.C. (3d) 97, 157 D.L.R. (4th) 423, 1998 CarswellSask 93, 1998 Carswell-Sask 94, 50 C.R.R. (2d) 69, 163 Sask. R. 161, 165 W.A.C. 161, 14 C.R. (5th) 237, [1998] 1 S.C.R. 439, [1999] 4 W.W.R. 589, 5 B.H.R.C. 409 (S.C.C.) — referred to

*R. v. Mills*, [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1, [1999] S.C.J. No. 68 (S.C.C.) — referred to

*R. v. Open Sky Inc.* (November 1, 1994), Chartier Prov. J. (Man. Prov. Ct.) — referred to

*R. v. Open Sky Inc.*, (sub nom. *R. v. O'Connor*) 110 Man. R. (2d) 153, (sub nom. *R. v. O'Connor*) 118 W.A.C. 153, 1996 CarswellMan 169 (Man. C.A.) — referred to

*R. v. Quality Electronics (Taber) Ltd.*, 1998 CarswellAlta 489, [1998] A.J. No. 628 (Alta. Q.B.) — referred to

*R. v. Russell*, 2001 SCC 53, 2001 CarswellOnt 3085, 2001 CarswellOnt 3086, 157 C.C.C. (3d) 1, 44 C.R. (5th) 231, 203 D.L.R. (4th) 1, 274 N.R. 247, 150 O.A.C. 99 (S.C.C.) — referred to

*R. v. Salituro*, 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 124, 1991 CarswellOnt 1031 (S.C.C.) — referred to

*R. c. Scullion*, 2001 CarswellQue 566, [2001] R.J.Q. 2018, [2001] J.Q. No. 324 (C.Q.) — referred to

*R. v. Sharpe*, 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1, [2001] S.C.J. No. 3 (S.C.C.) — referred to

*R. c. Thériault*, 2000 CarswellQue 1923, [2000] R.J.Q. 2736, [2000] J.Q. No. 3094 (C.Q.) — not followed

*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, 2001 CarswellNfld 239, 2001 CarswellNfld 240, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201 (S.C.C.) — considered

*R. v. Zundel*, 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, 10 C.R.R. (2d) 193, (sub nom. *R. v. Zundel (No. 2)*) 56 O.A.C. 161, [1992] 2 S.C.R. 731, (sub nom. *R. v. Zundel (No. 2)*) 140 N.R. 1, 95 D.L.R. (4th) 202, 1992 CarswellOnt 109, 1992 CarswellOnt 995 (S.C.C.) — referred to

*Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, [1998] S.C.J. No. 2 (S.C.C.) — referred to

*Ryan v. 361779 Alberta Ltd.*, 208 A.R. 396, 1997 CarswellAlta 666 (Alta. Prov. Ct.) — referred to

*R. c. S.D.S. Satellite Inc.* (31 Octobre 2000), no C.Q. Laval 540-73-000055-980 (C.Q.)

*Slaight Communications Inc. v. Davidson*, 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.*) 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) — referred to

*Stuart Investments Ltd. v. R.*, [1984] C.T.C. 294, 84 D.T.C. 6305, [1984] 1 S.C.R. 536, 10 D.L.R. (4th) 1, (sub nom. *Stuart Investments Ltd. v. Minister of National Revenue*) 53 N.R. 241, 1984 CarswellNat 222, 1984 CarswellNat 690 (S.C.C.) — referred to

*Symes v. R.*, 94 D.T.C. 6001, (sub nom. *Symes v. Canada*) [1993] 4 S.C.R. 695, (sub nom. *Symes v. Canada*) 19 C.R.R. (2d) 1, (sub nom. *Symes v. Canada*) [1994] 1 C.T.C. 40, (sub nom. *Symes v. Canada*) 110 D.L.R. (4th) 470, (sub nom. *Symes v. Minister of National Revenue*) 161 N.R. 243, 1993 CarswellNat 1178, 1993 CarswellNat 1387 (S.C.C.) — considered

*Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211, 156 D.L.R. (4th) 385, 50 C.R.R. (2d) 1, 224 N.R. 1, 212 A.R. 237, 168 W.A.C. 237, 31 C.H.R.R. D/1, [1998] 1 S.C.R. 493, 98 C.L.L.C. 230-021, 67 Alta. L.R. (3d) 1, [1999] 5 W.W.R. 451, 4 B.H.R.C. 140, [1998] S.C.J. No. 29 (S.C.C.) — considered

*Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182, [1966] 1 All E.R. 114 (U.K. H.L.) — considered

*WIC Premium Corp. v. General Instrument Corp.*, 2000 ABQB 628, 2000 CarswellAlta 969, 8 C.P.R. (4th) 308, [2001] 3 W.W.R. 488, 87 Alta. L.R. (3d) 162, 272 A.R. 201, 5 C.P.C. (5th) 152, [2000] A.J. No. 1063 (Alta. Q.B.) — referred to

*Willick v. Willick*, 6 R.F.L. (4th) 161, 119 D.L.R. (4th) 405, 173 N.R. 321, 125 Sask. R. 81, 81 W.A.C. 81, [1994] 3 S.C.R. 670, [1994] R.D.F. 617, 1994 CarswellSask 48, 1994 CarswellSask 450, [1994] S.C.J. No. 94 (S.C.C.) — referred to

## Statutes considered:

*Broadcasting Act*, S.C. 1991, c. 11

Generally — considered

s. 2(1) "broadcasting" — considered

s. 2(1) "broadcasting undertaking" — considered

s. 2(1) "distribution undertaking" — considered

s. 2(2) — considered

s. 2(3) — considered

s. 3(1)(a) — considered

s. 3(1)(b) — considered

s. 3(1)(d) — considered

s. 3(1)(t) — considered

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

s. 3(1)(a)-3(1)(t) — referred to

s. 3(2) — 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 — considered

s. 1 — referred to

s. 2(b) — referred to

s. 33 — referred to

*Copyright Act*, R.S.C. 1985, c. C-42

Generally — referred to

s. 21(1) — considered

s. 21(1)(c) — considered

s. 21(1)(d) — considered

s. 31(2) — considered

*Interpretation Act*, R.S.C. 1985, c. I-21

s. 10 — considered

s. 12 — considered

*Radiocommunication Act*, R.S.C. 1985, c. R-2

Generally — considered

s. 2 — referred to

s. 2 "broadcasting" — considered

s. 2 "encrypted" — considered

s. 2 "lawful distributor" — considered

s. 2 "radiocommunication" or "radio" — considered

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s. 2 "subscription programming signal" — considered

s. 3(3) — considered

s. 3(3)(a)-3(3)(c) — considered

s. 5(1)(a) — referred to

s. 9 — referred to

s. 9(1)(c) [en. 1991, c. 11, s. 83(1)] — considered

s. 9(1)(e) — referred to

s. 10(1)(b) — considered

s. 10(2.1) [en. 1991, c. 11, s. 84(2)] — considered

s. 10(2.5) [en. 1991, c. 11, s. 84(2)] — considered

s. 18(1) — considered

s. 18(1)(a) — considered

s. 18(1)(c) — considered

s. 18(6) — considered

#### **Rules considered:**

*Rules of the Supreme Court of Canada*, SOR/83-74

R. 32 — considered

#### **Regulations considered:**

*Broadcasting Act*, S.C. 1991, c. 11

*Direction of the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192

Generally

#### **Words and phrases considered:**

**direct to home broadcasting****ambiguity****an encrypted subscription programming signal****lawful right**

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DTH [direct-to-home] broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal. What, then, in law is an ambiguity? To answer, an ambiguity must be "real" [*Marcotte v. Canada (Deputy Attorney General)* (1974), [1976] 1 S.C.R. 108 (S.C.C.) at 115]. The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182 (U.K. H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations . . . For this reason, ambiguity cannot reside in the mere fact that several courts — or, for that matter, several doctrinal writers — have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger ["Construction of Statutes" (3rd ed. 1994)], and *thereafter* to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" [John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at pp. 4, 5]. What is interdicted by s. 9(1)(c) [of the *Radiocommunication Act*, R.S.C. 1985, c. R-2] is the decoding of "an encrypted subscription programming signal" (in French, « un signal d'abonnement ») (emphasis added). The usage of the indefinite article here is telling: it signifies "one, some [or] any" (*Canadian Oxford Dictionary* (1998)). Thus, what is prohibited is the decoding of *any* encrypted subscription programming signal, subject to the ensuing exception. . . . the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Section 2 [of the *Radiocommunication Act*, R.S.C. 1985, c. R-2] provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the phrase "lawful right" (« légitime autorisation ») comprehends factors in addition to licences granted by the CRTC. In defining "lawful distributor", Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(c)) or a Minister's licence (s. 5(1)(a)). Instead, it deliberately chose broader language. I therefore agree with the opinion of Létourneau J.A. in the Federal Court of Appeal decision in [*ExpressVu Inc. v. NII Norsat International Inc.* (1997), 222 N.R. 213] at para. 4, that: [t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the *Act*, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

#### Termes et locutions cités:

#### radiodiffusion directe ambiguïté un signal d'abonnement légitime autorisé

Les fournisseurs de services de radiodiffusion directe transmettent leurs signaux aux téléspectateurs au moyen de satellites. Ils possèdent tous un ou plusieurs satellites en orbite géosynchrone, ou ont accès à de tels appareils. Seulement quelques degrés de longitude terrestre séparent habituellement les satellites, qui occupent les créneaux orbitaux attribués par convention internationale à chacun des différents pays signataires. À partir de stations terrestres de transmission sens terre-satellite, les fournisseurs de services de radiodiffusion directe transmettent leurs signaux aux satellites, qui les rediffusent sur une large portion de la surface terrestre, qu'on appelle l'« empreinte » du satellite. Les signaux relayés par satellite ont une portée qui ne respecte pas les frontières internationales et s'étend

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souvent à de nombreux pays. Toute personne qui se trouve à l'intérieur de l'empreinte et dispose du matériel requis (en général une petite antenne parabolique de réception, un amplificateur et un récepteur) peut capter les signaux. Qu'est-ce donc qu'une ambiguïté en droit? Une ambiguïté doit être « réelle » [*Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, 115]. Le texte de la disposition doit être [traduction] « raisonnablement susceptible de donner lieu à plus d'une interprétation » (*Westminster Bank Ltd. c. Zang*, [1966] A.C. 182 (Ch. des lords), p. 222, lord Reid). Il est cependant nécessaire de tenir compte du « contexte global » de la disposition pour pouvoir déterminer si elle est raisonnablement susceptible de multiples interprétations . . . Voilà pourquoi on ne saurait conclure à l'existence d'une d'ambiguïté du seul fait que plusieurs tribunaux — et d'ailleurs plusieurs auteurs — ont interprété différemment une même disposition. Autant il serait inapproprié de faire le décompte des décisions appuyant les diverses interprétations divergentes et d'appliquer celle qui recueille le « plus haut total », autant il est inapproprié de partir du principe que l'existence d'interprétations divergentes révèle la présence d'une ambiguïté. Il est donc nécessaire, dans chaque cas, que le tribunal appelé à interpréter une disposition législative se livre à l'analyse contextuelle et téléologique énoncée par Driedger [« Construction of Statutes » (3rd ed. 1994)], puis se demande si [traduction] « le texte est suffisamment ambigu pour inciter deux personnes à dépenser des sommes considérables pour faire valoir deux interprétations divergentes » [John Willis, « Statute Interpretation in a Nutshell » (1938), 16 Can. Bar Rev. 1, p. 4 et 5]. Aux termes de l'al. 9(1)c) [de la *Loi sur la radiocommunication*, L.R.C. 1985, c. R-2], il est interdit de décoder « un signal d'abonnement » (en anglais « an encrypted subscription programming signal ») (je souligne). L'emploi de l'article indéfini est révélateur. Le mot « un » a notamment le sens suivant : « ... 2. (Avec une valeur générale au sens de « les ») ... » (*Le Grand Robert de la langue française* (2<sup>e</sup> éd. 2001)). La loi interdit donc de décoder tous les signaux d'abonnement, sous réserve de l'exception prévue. . . . la définition de « signal d'abonnement » vise les signaux émanant de distributeurs étrangers et destinés par un public étranger. Aux termes de l'article 2 [de la *Loi sur la radiocommunication*, L.R.C. 1985, c. R-2] « distributeur légitime » s'entend de « la personne légitimement autorisée, au Canada, à transmettre un signal d'abonnement [...] et à en permettre le décodage ». À cet égard, le seul fait qu'une personne soit autorisée dans un autre pays à transmettre des signaux n'a pas pour effet de faire de celle-ci le distributeur légitimement autorisé de ces signaux au Canada. En outre l'expression « légitimement autorisée » (« lawful right ») suppose le respect d'autres conditions que la seule obtention d'une licence du CRTC. En définissant ce terme, le législateur aurait pu mentionner expressément qu'il s'agit d'une personne titulaire d'une licence délivrée par le CRTC (comme il l'a fait à l'al. 18(1)c)) ou par le ministre (al. 5(1)a)). Il a plutôt opté pour une formulation plus générale. En conséquence, je partage l'opinion suivante, exprimée par le juge Létourneau de la Cour d'appel fédérale dans l'affaire [*ExpressVu Inc. v. NII Norsat International Inc.* (1997), 222 N.R. 213], précitée, au par. 4 : La personne « légitimement autorisée » est celle qui possède les droits réglementaires en vertu de la licence qui lui est régulièrement délivrée conformément à la Loi, l'autorisation du Conseil de la radiodiffusion et des télécommunications canadiennes ainsi que les droits contractuels et les droits d'auteur se rapportant nécessairement au contenu qu'implique la transmission d'un signal d'abonnement ou d'une alimentation réseau.

APPEAL by plaintiff from judgment reported at 2000 BCCA 493, 2000 CarswellBC 1793, [2000] 9 W.W.R. 205, 79 B.C.L.R. (3d) 250, 191 D.L.R. (4th) 662, 142 B.C.A.C. 230, 233 W.A.C. 230, [2000] B.C.J. No. 1803 (B.C. C.A.), dismissing appeal from refusal to grant injunction prohibiting defendants from assisting subscription to and decoding of U.S. direct-to-home programming.

POURVOI de la demanderesse à l'encontre de l'arrêt publié à 2000 BCCA 493, 2000 CarswellBC 1793, [2000] 9 W.W.R. 205, 79 B.C.L.R. (3d) 250, 191 D.L.R. (4th) 662, 142 B.C.A.C. 230, 233 W.A.C. 230, [2000] B.C.J. No. 1803 (B.C. C.A.), qui a rejeté son appel à l'encontre du refus d'ordonner une injonction interdisant aux défendeurs d'aider à s'abonner à la radiodiffusion directe américaine et à la décoder.

**Iacobucci J.:**

## **I. Introduction**

1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(c) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2, as am. by S.C. 1991, c. 11, s. 83. In practical terms, the

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issue is whether s. 9(1)(c) prohibits the decoding of *all* encrypted satellite signals, with a limited exception, or whether it bars only the unauthorised decoding of signals that emanate from licensed Canadian distributors.

2 The respondents facilitate what is generally referred to as "grey marketing" of foreign broadcast signals. Although there is much debate — indeed rhetoric — about the term, it is not necessary to enter that discussion in these reasons. Rather, the central issue is the much narrower one surrounding the above statutory provision: does s. 9(1)(c) operate on these facts to prohibit the decryption of encrypted signals emanating from U.S. broadcasters? For the reasons that follow, my conclusion is that it does have this effect. Consequently, I would allow the appeal.

## II. Background

3 The appellant is a limited partnership engaged in the distribution of direct-to-home ("DTH") television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission ("CRTC") as a DTH distribution undertaking under the *Broadcasting Act*, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of which possesses a CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.

4 DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

5 The appellant makes use of satellites owned and operated by Telesat Canada, a Canadian company. Moreover, like every other DTH broadcaster in Canada and the U.S., the appellant encrypts its signals to control reception. To decode or unscramble the appellant's signals so as to permit intelligible viewing, customers must possess an additional decoding system that is specific to the appellant: the decoding systems used by other DTH broadcasters are not cross-compatible and cannot be used to decode the appellant's signals. The operational component of the decoding system is a computerized "smart card" that bears a unique code and is remotely accessible by the appellant. Through this device, once a customer has chosen and subscribed to a programming package, and rendered the appropriate fee, the appellant can communicate to the decoder that the customer is authorized to decode its signals. The decoder is then activated and the customer receives unscrambled programming.

6 The respondent, Richard Rex, carries on business as Can-Am Satellites. The other respondents are employees of, or independent contractors working for, Can-Am Satellites. The respondents are engaged in the business of selling U.S. DTH decoding systems to Canadian customers who wish to subscribe to the services offered by the U.S. DTH broadcasters, which make use of satellites owned and operated by U.S. companies and parked in orbital slots assigned to the U.S. The footprints pertaining to the U.S. DTH broadcasters are large enough for their signals to be receivable in much of Canada, but because these broadcasters will not knowingly authorize their signals to be decoded by persons outside of the U.S., the respondents also provide U.S. mailing addresses for their customers who do not already have one. The respondents then contact the U.S. DTH broadcasters on behalf of their customers, providing the customer's name, U.S. mailing address, and credit card number. Apparently, this suffices to satisfy the U.S. DTH broadcasters that the subscriber is resident in the U.S., and they then activate the customer's smart card.

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7 In the past, the respondents were providing similar services for U.S. residents, so that they could obtain authorization to decode the Canadian appellant's programming signals. The respondents were authorized sales agents for the appellant at the time, but because this constituted a breach of the terms of the agency agreement, the appellant unilaterally terminated the relationship.

8 The present appeal arises from an action brought by the appellant in the Supreme Court of British Columbia. The appellant, as a licensed distribution undertaking, commenced the action pursuant to ss. 9(1)(c) and 18(1) of the *Radiocommunication Act*. As part of the relief it sought, the appellant requested an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. The chambers judge hearing the matter declined to grant the injunctive relief, and directed that the trial of the matter proceed on an expedited basis. On appeal of the chambers judge's ruling, Huddart J.A. dissenting, the Court of Appeal for British Columbia dismissed the appellant's appeal.

9 The appellant applied for leave to appeal to this Court, which was granted on April 19, 2001, with costs to the applicant in any event of the cause ([2001] 1 S.C.R. vi). The Chief Justice granted the respondents' subsequent motion to state constitutional questions on September 4, 2001.

### III. Relevant Statutory Provisions

10 The *Radiocommunication Act* is one of the legislative pillars of Canada's broadcasting framework. It and another of the pillars, the *Broadcasting Act*, provide context that is of central importance to this appeal. I set out the most pertinent provisions below. I will cite other provisions throughout the course of my reasons as they become relevant.

11 *Radiocommunication Act*, R.S.C. 1985, c. R-2

#### 2. In this Act,

"broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;

"encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;

"lawful distributor" in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

"radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;

"subscription programming signal" means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

#### 9. (1) No person shall

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

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**10. (1) Every person who**

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

(2.1) Every person who contravenes paragraph 9(1)(c) or (d) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

(2.5) No person shall be convicted of an offence under paragraph 9(1)(c), (d) or (e) if the person exercised all due diligence to prevent the commission of the offence.

**18. (1) Any person who**

(a) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

(c) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*,

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c), (d) or (e) or 10(1)(b), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

(6) Nothing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act*.

*Broadcasting Act*, S.C. 1991, c. 11

**2. (1) In this Act,**

"broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network;

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

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(2) For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

**3. (1)** It is hereby declared as the broadcasting policy for Canada that

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation

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and supervision of the Canadian broadcasting system by a single independent public authority.

*Copyright Act*, R.S.C. 1985, c. C-42

**21.** (1) Subject to subsection (2), a broadcaster has a copyright in the communication signal that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

- (a) to fix it,
- (b) to reproduce any fixation of it that was made without the broadcaster's consent,
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

**31. ...**

(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

- (a) the communication is a retransmission of a local or distant signal;
- (b) the retransmission is lawful under the *Broadcasting Act*;
- (c) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and
- (d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

#### **IV. Judgments Below**

*Supreme Court of British Columbia*, [1999] B.C.J. No. 3092 (B.C. S.C. [In Chambers])

12 In a judgment delivered orally in chambers, Brenner J. (now C.J.B.C.S.C.) noted that there is conflicting jurisprudence on the interpretation of s. 9(1)(c). It was the chambers judge's opinion, however, that the provision is unambiguous, and that it poses no contradiction to the remainder of the *Radiocommunication Act*. He interpreted s. 9(1)(c) as applying only to the theft of signals from "lawful distributors" in Canada, and not applying to the "paid subscription by Canadians to signals from distributors outside Canada" (para. 20). He reasoned (at paras. 18-19):

The offence in that section that was created by the language Parliament chose to use was the offence of stealing encrypted signals from distributors in Canada. In my view, if Parliament had intended in that section to make it an offence in Canada to decode foreign encrypted transmissions originating outside Canada as contended by the [appellant], it would have said so. In s. 9(1)(c) Parliament could have used language prohibiting the unauthorized decoding of all or any subscription programming in Canada. This, it chose not to do.

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

The interpretation of s. 9(1)(c) asserted by the [appellant] makes no distinction between those who subscribe and pay for services from non-resident distributors and those who steal the signals of lawful distributors in Canada. That interpretation would create a theft offence applicable to persons in Canada who are nonetheless paying for the services they receive. If Parliament had intended s. 9(1)(c) to apply to such conduct, it would have said so in clear language. In my view the *quasi* criminal provisions in the *Radiocommunication Act* should not be interpreted in this manner in the absence of such clear parliamentary language.

13 Brenner J. therefore refused to grant the injunctive relief sought by the appellant. He directed that the trial of the matter proceed on an expedited basis.

***Court of Appeal for British Columbia (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493 (B.C. C.A.)***

14 The majority of the Court of Appeal, in a judgment written by Finch J.A. (now C.J.B.C.), identified two divergent strands of case law regarding the proper interpretation of s. 9(1)(c). The majority also noted that judgments representing each side had found the provision to be unambiguous; in its assessment, though, "[l]egislation which can reasonably be said to bear two unambiguous but contradictory, interpretations must, at the very least, be said to be ambiguous" (para. 35). For this reason, and the fact that s. 9(1)(c) bears penal consequences, the majority held that the "narrower interpretation adopted by the chambers judge ... must ... prevail" (para. 35). Conflicting authorities aside, however, the majority was prepared to reach the same result through application of the principles of statutory construction.

15 Section 9(1)(c) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed" (emphasis added). The majority interpreted the legislator's choice of the definite article "the", underlined in the above phrase, to mean that the prohibition applies only "to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal" (para. 36). In other words, "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding". Consequently, according to the majority, there is no contravention of s. 9(1)(c) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies.

16 The majority characterized s. 9(1)(c) as being clearly directed at regulation of the recipient rather than the distributor, but stated that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin. Rather, in the majority's view, Parliament elected to regulate merely in respect of signals transmitted by parties who are authorized by Canadian law to do so. Dismissing the appellant's argument regarding the words "or elsewhere" in the definition of "subscription program signal", the majority held that "the fact that a subscription programming signal originating outside Canada was intended for reception outside Canada, does not avoid the requirement in s. 9(1)(c) that the decoding of such signals is only unlawful if it is done without the authorization of a lawful distributor" (para. 40).

17 Basing its reasons on these considerations, the majority held that it was unnecessary to address "the wider policy issues" or the issues arising from the *Charter* (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

18 Dissenting, Huddart J.A. considered the text of s. 9(1)(c) in light of the definitions set out in s. 2, and concluded that Parliamentary intent was evident: the provision "simply render[s] unlawful the decoding in Canada of all encrypted programming signals ... regardless of their source or intended destination", except where authorization is given by a person having the lawful right in Canada to transmit and authorize the decoding of the signals (para. 48). She stressed that the line of cases relied upon by the chambers judge "[a]t most ... provides support for a less inclusive interpretation of s. 9(1)(c) than its wording suggests on its face because it has penal consequences" (para. 54), and proceeded to set out a number of reasons for which these cases should not be followed.

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

19 For one, "the task of interpreting a statutory provision does not begin with its being typed as penal. The task of interpretation is a search for the intention of Parliament" (para. 55). As well, the more restrictive reading of s. 9(1)(c) "ignores the broader policy objective" of the governing regulatory scheme, this being "the maintenance of a distinctive Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger" (para. 49). Huddart J.A. also referred to the existence of copyright interests, and stated that "[i]t can reasonably be inferred that U.S. distributors have commercial or legal reasons apart from Canadian laws for not seeking a Canadian market. ... Yet only Canada can control the reception of foreign signals in Canada" (para. 50).

20 Huddart J.A. declined the respondents' invitation to read s. 9(1)(c) in a manner that "respect[s] section 2(b) of the *Charter*" (para. 57), relying on *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), in this regard. She then concluded (at para. 58):

In summary, I am not persuaded the line of cases on which the chambers judge relied establish the provision is ambiguous or capable of contradictory meanings. I do not consider courts have found two entirely different unambiguous meanings for the provision. The words of section 9(1)(c), taken alone, provide a clear basis for the determination of Parliament's intention. That meaning is consistent with the purpose of the entire regulatory scheme in the context of the international copyright agreements, with the purpose of the *Act* within that scheme, and with the scheme of the *Act* itself. Those cases interpreting the provision differently have done so with the purpose of narrowing its application to avoid penal consequences of what Parliament clearly intended to have penal consequences, as at least one of the judges taking that view explicitly acknowledged in his reasons. In my view it takes a convoluted reading of the provision to produce the result reached by the court in *R. v. Love* [(1997), 117 Man. R. (2d) 123 (Q.B.)], and the decisions that have followed it.

Huddart J.A. would have allowed the appeal and granted the declaration requested by the appellant.

## V. Issues

21 This appeal raises three issues:

1. Does s. 9(1)(c) of the *Radiocommunication Act* create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?
2. Is s. 9(1)(c) of the *Radiocommunication Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
3. If the answer to the above question is "yes", can the statutory provision be justified pursuant to s. 1 of the *Charter*?

## VI. Analysis

### A. Introduction

22 It is no exaggeration to state that s. 9(1)(c) of the federal *Radiocommunication Act* has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (Man. Prov. Ct.), at

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

para. 36, aff'd (*sub nom. R. v. O'Connor*) (1995), 106 Man. R. (2d) 37 (Man. Q.B.), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (Man. C.A.); *King v. Canada (Attorney General)*, [1996] N.B.J. No. 449 (N.B. Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (N.B. C.A.); *R. v. Knibb* (1997), 198 A.R. 161 (Alta. Prov. Ct.), aff'd (*R. v. Quality Electronics (Taber) Ltd.*, [1998] A.J. No. 628 (Alta. Q.B.); *ExpressVu Inc. v. NII Norsat International Inc.* (1997), [1998] 1 F.C. 245 (Fed. T.D.), aff'd (1997), 222 N.R. 213 (Fed. C.A.); *WIC Premium Corp. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628 (Alta. Q.B.), at para. 72; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at para. 81.

23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: *R. v. Love* (1997), 117 Man. R. (2d) 123 (Man. Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Sask. Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (N.S. S.C.); *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Alta. Prov. Ct.), at para. 12; *R. c. Thériault*, [2000] R.J.Q. 2736 (C.Q.); aff'd *R. v. D'Argy* (June 13, 2001), Doc. 405-36-000044-003 (Que. S.C.); *R. c. Gregory Électronique inc.*, [2000] J.Q. No. 4923 (C.Q.), aff'd *R. c. Gregory Électronique inc.*, [2001] J.Q. No. 4925 (Que. S.C.); *R. v. S.D.S. Satellite Inc.* (31 octobre 2000), no C.Q. Laval 540-73-000055-980; *R. c. Scullion*, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (Ont. C.A.).

24 As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

25 In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(c). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(c). Third, it did not direct sufficient attention to the context of the *Radiocommunication Act* within the regulatory *régime* for broadcasting in Canada, and did not consider the objectives of that *régime*, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(c) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

***B. Does s. 9(1)(c) of the Radiocommunication Act create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?***

#### *(1) Principles of Statutory Interpretation*

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd. v. R.*, [1984] 1 S.C.R.

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

536 (S.C.C.), at p. 578, *per* Estey J.; *Québec (Communauté urbaine) c. Notre-Dame de Bonsecours (Corp.)*, [1994] 3 S.C.R. 3 (S.C.C.), at p. 17; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.), at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 (S.C.C.), at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3 (S.C.C.), at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (S.C.C.), at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Murphy v. Welsh*, [1993] 2 S.C.R. 1069 (S.C.C.) [a.k.a. *Stoddard v. Watson*], at p. 1079; *Pointe-Claire (Ville) c. S.E.P.B., Local 57*, [1997] 1 S.C.R. 1015 (S.C.C.), at para. 61, *per* Lamer C.J.)

28 Other principles of interpretation - such as the strict construction of penal statutes and the "Charter values" presumption - only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Canada (Deputy Attorney General)* (1974), [1976] 1 S.C.R. 108 (S.C.C.), at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (Ont. C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398 (S.C.C.), at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53 (S.C.C.), at para. 46. I shall discuss the "Charter values" principle later in these reasons.)

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte, supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182 (U.K. H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts — or, for that matter, several doctrinal writers — have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and *thereafter* to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).

## (2) Application to this Case

31 The interpretive factors laid out by Driedger need not be canvassed separately in every case, and in any event are closely related and interdependent (*Chieu, supra*, at para. 28). In the context of the present appeal, I will group my discussion under two broad headings. Before commencing my analysis, however, I wish to highlight a number of issues on these facts. First, there is no dispute surrounding the fact that the signals of the U.S. DTH broadcasters

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

are "encrypted" under the meaning of the Act, nor is there any dispute regarding the fact that the U.S. broadcasters are not "lawful distributors" under the Act. Secondly, all of the DTH broadcasters in Canada and the U.S. require a person to pay "a subscription fee or other charge" for unscrambled reception. Finally, I note that the "encrypted network feed" portion of s. 9(1)(c) is not relevant on these facts and can be ignored for the purposes of analysis.

### (a) Grammatical and Ordinary Sense

32 In its basic form, s. 9(1)(c) is structured as a prohibition with a limited exception. Again, with the relevant portions emphasized, it states that:

#### No person shall

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with authorization from the lawful distributor of the signal or feed. [Emphasis added.]

#### Il est interdit:

c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau[.] [Emphasis added.]

The provision opens with the announcement of a broad prohibition ("No person shall"), follows by announcing the nature ("decode") and object ("an encrypted programming signal") of the prohibition, and then announces an exception to it ("otherwise than under and in accordance with authorization from the lawful distributor"). The French version shares the same four features, albeit in a modified order (see Provost C.Q.J. in *Pearlman*, *supra*, at p. 2031).

33 The forbidden activity is decoding. Therefore, as noted by the Court of Appeal, the prohibition in s. 9(1)(c) is directed towards the *reception* side of the broadcasting equation. Quite apart from the provenance of the signals at issue, where the impugned decoding occurs within Canada, there can be no issue of the statute's having an extra-territorial reach. In the present case, the reception that the appellant seeks to enjoin occurs entirely within Canada.

34 The object of the prohibition is of central importance to this appeal. What is interdicted by s. 9(1)(c) is the decoding of "*an* encrypted subscription programming signal" (in French, « *un* signal d'abonnement ») (emphasis added). The usage of the indefinite article here is telling: it signifies "one, some [or] any" (*Canadian Oxford Dictionary* (1998)). Thus, what is prohibited is the decoding of *any* encrypted subscription programming signal, subject to the ensuing exception.

35 The definition of "subscription programming signal" suggests that the prohibition extends to signals emanating from other countries. Section 2 of the Act defines that term as, "radiocommunication that is intended for reception either directly or indirectly by the public in Canada *or elsewhere* on payment of a subscription fee or other charge" (emphasis added). I respectfully disagree with the respondents and Weiler J.A. in *Branton*, *supra*, at para. 26, "that the wording 'or elsewhere' is limited to the type of situation contemplated in s. 3(3)" of the Act. Subsection 3(3) reads:

### 3. ...

(3) This Act applies within Canada and on board

(a) any ship, vessel or aircraft that is

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

(i) registered or licensed under an Act of Parliament, or

(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

(b) any spacecraft that is under the direction or control of

(i) Her Majesty in right of Canada or a province,

(ii) a citizen or resident of Canada, or

(iii) a corporation incorporated or resident in Canada; and

(c) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

36 This provision is directed at an entirely different issue from that which is at play in the definition of "subscription programming signal". Section 3(3) specifies the geographic scope of the *Radiocommunication Act* and all its constituent provisions, as is confirmed by the marginal note accompanying the subsection, which states "*Geographical application*". To phrase this in the context of the present appeal, any person within Canada or on board any of the things enumerated in ss. 3(3)(a) through (c) could potentially be subject to liability for unlawful decoding under s. 9(1)(c); in this way, s. 3(3) addresses the "where" question. On the other hand, the definition of "subscription programming signal" provides meaning to the s. 9(1)(c) liability by setting out the class of signals whose unauthorized decoding will trigger the provision; this addresses the object of the prohibition, or the "what" question. These are two altogether separate issues.

37 Furthermore, it was not necessary for Parliament to include the phrase "or elsewhere" in the s. 2 definition if it merely intended "subscription programming signal" to be interpreted as radiocommunication intended for direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words "or elsewhere" were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain". (*Québec (Procureur General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831 (S.C.C.), at p. 838.) Parliament has provided express direction to this effect through its enactment of s. 10 of the *Interpretation Act*, which states in part that "[t]he law shall be considered as always speaking". In any event, "or elsewhere" (« ou ailleurs », in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

38 In my opinion, therefore, the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament *did* in fact choose language in s. 9(1)(c) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed". I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(c) ("the signal"), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words "lawful distributor" confirms that the provision "is only intended to operate where there is a lawful distributor". Finally, the respondents draw to our attention the French language version of the provision, and particularly the word « leur » that modifies « distributeur légitime »: a number of cases consid-

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

ering the French version of s. 9(1)(c) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in *Thériault*, *supra*, at p. 2739; *Gregory Électronique inc.*, *supra*, at paras. 24-26; and *S.D.S. Satellite*, *supra*, at p. 7. See also *Branton*, *supra*, at para. 25).

40 I do not agree with these opinions. The definite article "the" and the possessive adjective « leur » merely identify the party who can authorize the decoding in accordance with the exception (see *Pearlman*, *supra*, at p. 2032). Thus, while I agree with the majority of the Court of Appeal that "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding" (para. 36), I cannot see how it necessarily follows that decoding unregulated signals "cannot therefore be in breach of the *Radiocommunication Act*". Such an approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in *Pearlman*, *supra*, at p. 2031: [translation] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author."

41 In my view, the definite articles are used in the exception portion of s. 9(1)(c) in order to identify from amongst the genus of signals captured by the prohibition (*any* encrypted subscription programming signal) that species of signals for which the rule is "otherwise". Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for *the* (definite) particular signal that is decoded, the person has received authorization from *the* (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.

42 Although I have already stated that the U.S. DTH distributors in the present case are not "lawful distributors" under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the phrase "lawful right" (« légitime autorisation ») comprehends factors in addition to licences granted by the CRTC. In defining "lawful distributor", Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(c)) or a Minister's licence (s. 5(1)(a)). Instead, it deliberately chose broader language. I therefore agree with the opinion of Létourneau J.A. in the Federal Court of Appeal decision in *Norsat*, *supra*, at para. 4, that:

[t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the *Act*, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

As pointed out by the Attorney General of Canada, this interpretation means that even where the transmission of subscription programming signals falls outside of the definition of "broadcasting" under the *Broadcasting Act* (i.e., where the transmitted programming is "made solely for performance or display in a public place") and no broadcasting licence is therefore required, additional factors must still be considered before it can be determined whether the transmitter of the signals is a "lawful distributor" for the purposes of the *Radiocommunication Act*.

43 In the end, I conclude that when the words of s. 9(1)(c) are read in their grammatical and ordinary sense, taking into account the definitions provided in s. 2, the provision prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

#### **(b) Broader Context**

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

44 Although the *Radiocommunication Act* is not, unfortunately, equipped with its own statement of purpose, it does not exist in a vacuum. The Act's focus is upon the allocation of specified radio frequencies, the authorisation to possess and operate radio apparatuses, and the technical regulation of the radio spectrum. The Act also places restrictions on the reception of and interference with radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., *Communications Law in Canada* (loose-leaf ed.), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:

The *Radiocommunication Act* embraces all private and public use of the radio spectrum. The close relationship between this and the telecommunications and broadcasting Acts is determined by the fact that telecommunications and broadcasting are the two principal users of the radioelectric spectrum.

45 The *Broadcasting Act* came into force in 1991, in an omnibus statute that also brought substantial amendments to the *Radiocommunication Act*, including the addition thereto of s. 9(1)(c). Its purpose, generally, is to regulate and supervise the transmission of programming to the Canadian public. Of note for the present appeal is that the definition of "broadcasting" in the *Broadcasting Act* captures the encrypted DTH programme transmissions at issue and that DTH broadcasters such as the appellant receive their licences under, and are subject to, that Act. The *Broadcasting Act* also enumerates 20 broad objectives of the broadcasting policy for Canada (in s. 3(1)(a) through (t)). The emphasis of the Act, however, is placed on *broadcasting* and not reception.

46 Ultimately, the Acts operate in tandem. On this point, I agree with the following passage from the judgment of LeGrandeur Prov. Ct. J. in *Knibb, supra*, at paras. 38-39, which was adopted by Gibson J. in the Federal Court Trial Division decision in *Norsat, supra*, at para. 35:

The *Broadcasting Act* and the *Radiocommunication Act* must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and consideration must be given to each statute's roll [*sic*] in the overall scheme. [Cite to R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 286.]

The addition of s. 9(1)(c), (d) and (e) and other sections to the *Radiocommunication Act* through the provisions of the *Broadcasting Act*, 1991 are supportive of that approach in my view. Subsections 9(1)(c), (d) and (e) of the *Radiocommunication Act* must be seen as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled.

47 Canada's broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that Canadian ownership and control of the broadcasting system should be a base premise, and that the programming offered through the broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". Sections 3(1)(d) and 3(1)(t) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for distribution undertakings (including DTH distribution undertakings) in particular. Finally, s. 3(2) declares that "the Canadian broadcasting system constitutes a single system" best regulated and supervised "by a single independent public authority".

48 In this context, one finds little support for the restrictive interpretation of s. 9(1)(c). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

open for unregulated, foreign broadcasting to come in and sweep all of that aside? What purpose would have been served?

49 On the other hand, the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the *Broadcasting Act*. The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.

50 There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception. As I have noted above, the concept of "lawful right" in the definition of "lawful distributor" incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no *lawful right* to authorise decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

51 In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster DIRECTV has advocated the same interpretation of s. 9(1)(c) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.

52 I also believe that the reading of s. 9(1)(c) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(c) and 21(1)(d) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(c) as an absolute prohibition against decoding except where authorization is granted by the person with the *lawful right* to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs: see F. P. Eliadis and S. C. McCormack, "Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals" (1993), 3 *M.C.L.R.* 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(a) and 18(6) of the *Radiocommunication Act* both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

### **(c) Section 9(1)(c) as a "Quasi-Criminal" Provision**

53 I wish to comment regarding the respondents' argument regarding the penal effects that the "absolute prohibition" interpretation would bring to bear. Although the present case only arises in the context of a civil remedy the appellant is seeking under s. 18(1) of the Act (as a person who "has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c)") and does not therefore directly engage the penal aspects of the *Radiocommunication Act*, the respondents direct our attention to ss. 10(1)(b) and 10(2.1). These provisions, respectively, create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 and for every person who in fact contravenes s. 9(1)(c). Respondents' counsel argued before us that, if s. 9(1)(c) is inter-

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

preted in the manner suggested by the appellant, "hundreds of thousands of Canadians can expect a knock on their door, because they will be in breach of the statute" and that "the effect of [the appellant's] submissions is to criminalise subscribers even if they pay every cent to which DIRECTV is entitled". The thrust of the respondents' submission is that the presence of ss. 10(1)(b) and 10(2.1) in the *Radiocommunication Act* provides context that is important to the interpretation of s. 9(1)(c), and that this context militates in favour of the respondents' position.

54 Section 9(1)(c) does have a "dual aspect", in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(b) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, *for the purpose* of contravening section 9" (emphasis added), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(c) ... if the person exercised all due diligence to prevent the commission of the offence". Since it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so.

#### (d) Conclusion

55 After considering the entire context of s. 9(1)(c), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, I find no ambiguity. Rather, I can conclude only that Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. There is no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation.

#### C. The Constitutional Questions

56 As I will discuss, I do not propose to answer the constitutional questions that have been stated in this appeal.

57 Rule 32 of the *Rules of the Supreme Court of Canada*, SOR/83-74 mandates that constitutional questions be stated in every appeal in which the constitutional validity or applicability of legislation is challenged, and sets out the procedural requirements to that end. As recognized by this Court, the purpose of Rule 32 is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to intervene: *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), at para. 49, *per* L'Heureux-Dubé J.; see also B.A. Crane and H.S. Brown, *Supreme Court of Canada Practice 2000* (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

58 On the whole, the parties to an appeal are granted "wide latitude" by the Chief Justice or other judge of this Court in formulating the questions to be stated: *Bisaillon c. Keable*, [1983] 2 S.C.R. 60 (S.C.C.), at p. 71; *Corbiere*, *supra*, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (*Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.), at p. 240; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at pp. 643-44, *per* Cory J.). Like many general rules, however, this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: *Perka*, *supra*; *Idziak*, *supra*; *R. v. Gayle* (2001), 54 O.R. (3d) 36 (Ont. C.A.), at para. 69, leave to appeal refused January 24, 2002 [*R. v. Gayle*, 2002 CarswellOnt 159 (S.C.C.)].

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

59 In like manner, even where constitutional questions are stated under Rule 32, it may ultimately turn out that the factual record on appeal provides an insufficient basis for their resolution. The Court is not obliged in such cases to provide answers: *Bisaillon, supra*; Crane and Brown, *supra*, at p. 254. In fact, there are compelling reasons not to: while we will not deal with abstract questions in the ordinary course, "[t]his policy ... is of particular importance in constitutional matters" (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (S.C.C.), at p. 1580; see also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1099; *Baron v. R.*, [1993] 1 S.C.R. 416 (S.C.C.), at p. 452; *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at para. 38, *per* McLachlin and Iacobucci JJ.). Thus, as Sopinka J. stated for the Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), at p. 357: "The procedural requirements of Rule 32 of the *Supreme Court Rules* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record". (Emphasis added.)

60 Respondents' counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions. Rather, he argued that "*Charter* values" must inform the interpretation given to the *Radiocommunication Act*. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*: *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), at p. 603, *per* McIntyre J.; *Cloutier c. Langlois*, [1990] 1 S.C.R. 158 (S.C.C.), at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 675; *R. v. Golden*, 2001 SCC 83 (S.C.C.), at para. 86, *per* Iacobucci and Arbour JJ.; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8 (S.C.C.), at paras. 18-19. One must keep in mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role *vis-à-vis* statute law.

62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

63 This Court has striven to make this point clear on many occasions: see, e.g., *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 558, *per* L'Heureux-Dubé J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1078, *per* Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.), at p. 771, *per* McLachlin J. (as she then was); *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at p. 660; *Mossop, supra*, at pp. 581-82, *per* Lamer C.J.; *R. v. Lucas*, [1998] 1 S.C.R. 439 (S.C.C.), at para. 66, *per* Cory J.; *Mills, supra*, at paras. 22 and 56; *R. v. Sharpe, supra*, at para. 33.

64 These cases recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "*Charter* values" rule was expressed in *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), at p. 752:

[T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose,

2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), at pp. 679-80, *per* Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.), at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)" (*Vriend*, *supra*, at para. 139).

66 To reiterate what was stated in *Symes* and *Willick*, *supra*, if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret *this* sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

67 It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(c) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(c), and, if they are, whether they are justified under s. 1.

## VII. Disposition

68 In the result, I would allow the appeal with costs throughout, set aside the judgment of the Court of Appeal for British Columbia, and declare that s. 9(1)(c) of the *Radiocommunication Act* creates a prohibition against all decoding of encrypted programming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal. No answer is given to the constitutional questions stated by order of the Chief Justice.

*Appeal allowed.*

*Pourvoi accueilli.*

FN\* A corrigendum issued by the court on May 13, 2002 has been incorporated herein.

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2002 CarswellBC 851, 2002 SCC 42, [2002] B.C.W.L.D. 366, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] 2 S.C.R. 559, REJB 2002-30904, J.E. 2002-775, 93 C.R.R. (2d) 189

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

2001 CarswellNfld 239

R. v. Ulybel Enterprises Ltd.

Her Majesty the Queen, Appellant v. Ulybel Enterprises Limited, Respondent

Supreme Court of Canada

Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: January 16, 2001  
Judgment: September 27, 2001  
Docket: 27543

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Proceedings: reversing in part (1999), 544 A.P.R. 321 (Nfld. C.A.); affirming (1997), 470 A.P.R. 308 (Nfld. T.D.)

Counsel: *Graham Garton, Q.C., Gordon Campbell*, for Appellant

*John R. Sinnott, Q.C.*, for Respondent

Subject: Criminal; Public

Criminal law.

Fish and wildlife --- Practice and procedure — Sentencing — Forfeiture

Vessel was seized for illegal fishing pursuant to Fisheries Act, and sold upon application by Crown pursuant to Federal Court Rules — Upon finding owner guilty, trial judge disposed of portion of proceeds of sale of vessel — Court of Appeal determined that trial judge did not have jurisdiction to order disposition of sale of proceeds of vessel — Crown appealed — Appeal allowed — Trial judge had authority to order disposition of proceeds of sale of vessel under s. 72(1) of Fisheries Act, despite fact that order of sale was not made under Act — Fisheries Act, R.S.C. 1985, c. F-14, s. 72(1) — Federal Court Rules, C.R.C. 1978, c. 663.

Fish and wildlife --- Practice and procedure — Jurisdiction of court

Vessel was seized for illegal fishing pursuant to Fisheries Act, and sold upon application by Crown pursuant to Federal Court Rules — Upon finding owner guilty, trial judge disposed of portion of proceeds of sale of vessel — Court of Appeal determined that trial judge did not have jurisdiction to order disposition of sale of proceeds of vessel — Crown appealed — Appeal allowed — Trial judge had authority to order disposition of proceeds of sale of vessel under s. 72(1) of Fisheries Act, despite fact that order of sale was not made under Act — Fisheries Act, R.S.C. 1985, c. F-14, s. 72(1) — Federal Court Rules, C.R.C. 1978, c. 663.

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

Poissons et faune --- Procédure — Détermination de la peine — Confiscation

Navire a été saisi pour pêche illégale conformément à la Loi sur les pêches et a été vendu à la suite d'une demande de la Couronne conformément aux Règles de la Cour fédérale — Juge de première instance ayant déclaré coupable le propriétaire, il a ordonné confiscation du produit de la vente du navire — Cour d'appel a conclu que le juge de première instance n'avait pas la compétence pour ordonner la confiscation du produit de la vente d'un navire — Couronne a interjeté appel — Pourvoi accueilli — Article 72(1) de la Loi sur les pêches autorisait le juge de première instance à ordonner la confiscation du produit de la vente du navire en dépit du fait que la vente n'avait pas été faite en vertu de la Loi — Loi sur les pêches, L.R.C. 1985, c. F-14, art. 72(1) — Règles de la Cour fédérale, C.R.C. 1978, c. 663.

Poissons et faune --- Procédure — Compétence du tribunal

Navire a été saisi pour pêche illégale conformément à la Loi sur les pêches et a été vendu à la suite d'une demande de la Couronne conformément aux Règles de la Cour fédérale — Juge de première instance ayant déclaré coupable le propriétaire, il a ordonné confiscation du produit de la vente du navire — Cour d'appel a conclu que le juge de première instance n'avait pas la compétence pour ordonner la confiscation du produit de la vente d'un navire — Couronne a interjeté appel — Pourvoi accueilli — Article 72(1) de la Loi sur les pêches autorisait le juge de première instance à ordonner la confiscation du produit de la vente du navire en dépit du fait que la vente n'avait pas été faite en vertu de la Loi — Loi sur les pêches, L.R.C. 1985, c. F-14, art. 72(1) — Règles de la Cour fédérale, C.R.C. 1978, c. 663.

The defendant corporation U Ltd. owned a vessel of which one of shareholders was the owner. The vessel was observed fishing in Canadian waters without the proper licence. Officials from the Department of Fisheries seized the vessel and the Crown took possession of it. U Ltd. was charged with two counts of fishing without registration and two counts of fishing without a license contrary to the *Fisheries Act*. The mortgagee of the vessel brought an action in the Federal Court against the owner for the return for the balance of the mortgage. Soon after, the other shareholders of U Ltd. brought an action against the owner in the Federal Court, claiming an interest in the vessel. As a result, two arrest orders against the vessel were issued in the Federal Court. The Crown intervened in the proceedings begun by the other shareholders of U Ltd., and obtained an order for sale of the vessel to compensate for the storage costs the Crown had incurred.

Soon after, the owner was convicted in the Newfoundland Supreme Court. The sentence included fines totalling \$120,000, forfeiture of proceeds of sale of the vessel's cargo of fish, and forfeiture of a portion of the proceeds from the sale of the vessel. The Court of Appeal upheld the conviction, but found that the Act did not give the trial judge the authority to order the forfeiture of any of the proceeds of the sale of the vessel. The Court of Appeal held that physical detention of the vessel was necessary for a subsequent order of forfeiture. Because the vessel was released from seizure when sold, the court had no further authority to order forfeiture.

The Crown appealed the portion of the order of the Court of Appeal which reversed the forfeiture of some of the proceeds of the sale of the vessel.

**Held:** The appeal was allowed.

A provincial court has the authority to make an order regarding the disposition of proceeds of the sale of a vessel that has been seized under the *Fisheries Act*, but then sold pursuant to the authority of the Federal Court. An ordinary reading of s. 72(1) of the Act contemplates such an arrangement. This authority is not limited to orders regarding the disposition of perishable goods. The Act deals extensively with disposition of seized property, and the *Criminal Code* was not the applicable legislation. The Act properly observes the presumption of innocence by not allowing disposition of the accused's goods until a final determination of the matter has been made. The Court of

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

Appeal erred by interpreting s. 72(1) of the Act too narrowly.

Continued physical detention of the vessel by the Crown is not a precondition for the order of sale. The inclusion of such a condition as a prerequisite for forfeiture would interfere with the release of seized property on payment of a security deposit, which was a beneficial arrangement for all stakeholders. Furthermore, the Act contemplates parallel proceedings, such as third party claims brought in Admiralty Court for a declaration of interest in rem in a seized vessel.

La société défenderesse U ltée était propriétaire d'un navire duquel un des actionnaires était également propriétaire. On a vu des personnes à bord du navire pêcher dans des eaux canadiennes en l'absence du permis requis. Des fonctionnaires du ministère des Pêches et Océans ont saisi le navire et la Couronne en a pris possession. U ltée a été inculpée de deux chefs d'accusation d'avoir pêché en l'absence d'enregistrement et de deux chefs d'accusation d'avoir pêché en l'absence de permis, en violation de la *Loi sur les pêches*. Le créancier titulaire de l'hypothèque détenue sur le navire a intenté une action en Cour fédérale contre le propriétaire pour obtenir le remboursement du solde de l'hypothèque. Peu de temps après, les autres actionnaires de U ltée ont intenté une action en Cour fédérale contre le propriétaire; ils revendiquaient un droit de propriété sur le navire. Par conséquent, la Cour fédérale a délivré deux ordonnances de saisie contre le navire. La Couronne est intervenue à l'action intentée par les autres actionnaires de U ltée et a obtenu une ordonnance de vente du navire pour l'indemniser pour les coûts d'entreposage qu'elle avait dû déboursier.

Peu de temps après, le propriétaire a été déclaré coupable par la Cour suprême de Terre-Neuve. La peine comprenait des amendes s'élevant à 120 000 \$, la confiscation du produit de la vente des cargaisons de poissons du navire et la confiscation d'une partie du produit de la vente du navire. La Cour d'appel a confirmé la déclaration de culpabilité, mais a conclu que la Loi ne conférait pas au juge de première instance le pouvoir d'ordonner la confiscation du produit de la vente d'un navire. La Cour a estimé que la rétention matérielle du navire était requise pour ordonner subseqüement la confiscation. Puisque la vente du navire avait entraîné la mainlevée de la saisie, le tribunal n'avait plus la compétence nécessaire pour ordonner la confiscation.

La Couronne a interjeté appel à l'encontre de la partie de l'ordonnance de la Cour d'appel qui a infirmé la confiscation d'une partie du produit de la vente du navire.

**Arrêt:** Le pourvoi a été accueilli.

Une cour provinciale a le pouvoir de rendre une ordonnance relativement à la confiscation du produit de la vente d'un navire qui a été saisi en vertu de la *Loi sur les pêches* puis vendu en vertu d'une ordonnance de la Cour fédérale. La lecture de l'art. 72(1) de la Loi en fonction de son sens ordinaire démontre que ce type d'arrangement est prévu. Ce pouvoir ne se limite pas aux ordonnances relatives à la confiscation de marchandises périssables. La Loi traite énormément de la confiscation des biens saisis, et le *Code criminel* ne s'appliquait pas. La Loi respecte la présomption d'innocence en empêchant la confiscation des marchandises de l'accusé jusqu'à ce qu'une décision finale sur la question ait été rendue. La Cour d'appel a commis une erreur en interprétant l'art. 72(1) trop restrictivement.

La rétention matérielle continue du navire par la Couronne n'est pas une condition préalable à l'obtention d'une ordonnance de vente. L'inclusion d'une telle condition comme condition préalable à la confiscation entrerait en conflit avec la mainlevée de la saisie des biens lorsqu'un dépôt de garantie est fait, lequel constituait un arrangement avantageux pour tous les actionnaires. De plus, la Loi prévoit la possibilité d'instances parallèles, telles que des réclamations de tiers intentées devant le tribunal d'amirauté pour obtenir le droit de propriété *in rem* d'un navire saisi.

#### **Cases considered by *Iacobucci J.*:**

*Amos v. Insurance Corp. of British Columbia*, [1995] 9 W.W.R. 305, 127 D.L.R. (4th) 618, 10 B.C.L.R. (3d) 1,

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

[1995] I.L.R. 1-3232, 186 N.R. 150, 31 C.C.L.I. (2d) 1, 63 B.C.A.C. 1, 104 W.A.C. 1, 13 M.V.R. (3d) 302, [1995] 3 S.C.R. 405 (S.C.C.) — considered

*Canada (Attorney General) v. Savory* (1992), (sub nom. *R. v. Savory*) 108 N.S.R. (2d) 245, (sub nom. *R. v. Savory*) 294 A.P.R. 245 (N.S. C.A.) — considered

*Gravel v. St. Leonard (City)* (1977), [1978] 1 S.C.R. 660, 17 N.R. 486 (S.C.C.) — considered

*Neves v. "Kristina Logos" (The)* (1996), (sub nom. *Neves v. Ship Kristina Logos*) 124 F.T.R. 167 (Fed. T.D.) — referred to

*Neves v. "Kristina Logos" (The)*, 1997 CarswellNat 445 (Fed. T.D.) — referred to

*Neves v. "Kristina Logos" (The)* (1998), (sub nom. *Neves v. Ship Kristina Logos*) 225 N.R. 32, 147 F.T.R. 304 (note) (Fed. C.A.) — referred to

*Neves c. "Kristina Logos" (The)* (1999), (sub nom. *Neves v. Ship Kristina Logos*) 173 F.T.R. 31 (Fed. T.D.) — referred to

*New Brunswick (Minister of Municipal Affairs) v. Bathurst Paper Ltd.* (1971), [1972] S.C.R. 471, 4 N.B.R. (2d) 96, 22 D.L.R. (3d) 115 (S.C.C.) — considered

*R. v. Chute* (1997), 160 N.S.R. (2d) 378, 473 A.P.R. 378 (N.S. C.A.) — referred to

*R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318, 475 A.P.R. 318 (Nfld. T.D.) — referred to

*R. v. Vautour* (2000), 226 N.B.R. (2d) 226, 579 A.P.R. 226 (N.B. Q.B.) — referred to

*Rizzo & Rizzo Shoes Ltd., Re*, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

#### **Statutes considered:**

*Criminal Code*, R.S.C. 1985, c. C-46

s. 489.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 72; am. 1993, c. 40, s. 17; am. 1997, c. 18, s. 49] — referred to

*Federal Court Act*, R.S.C. 1985, c. F-7

Generally — referred to

*Fisheries Act*, R.S.C. 1985, c. F-14

Generally — referred to

s. 50 — considered

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

s. 51 — pursuant to

s. 70 — considered

s. 70(1) [en. 1991, c. 1, s. 21] — considered

s. 70(3) [en. 1991, c. 1, s. 21] — considered

s. 71(1) [rep. & sub. 1991, c. 1, s. 21] — considered

s. 71(2) [rep. & sub. 1991, c. 1, s. 21] — considered

s. 71(3) — considered

s. 71.1 [en. 1991, c. 1, s. 21] — considered

s. 72 — considered

s. 72(1) [rep. & sub. R.S.C. 1985, c. 31 (1st Supp.), s. 96] — considered

s. 72(1) [rep. & sub. 1991, c. 1, s. 21] — pursuant to

s. 72(2) [rep. & sub. 1991, c. 1, s. 21] — considered

s. 72(3) [rep. & sub. 1991, c. 1, s. 21] — considered

s. 73.1 [en. 1991, c. 1, s. 21] — considered

s. 73.1(2) [en. 1991, c. 1, s. 21] — considered

s. 75 — considered

s. 75(1) [rep. & sub. 1991, c. 1, s. 21] — considered

s. 75(4) — considered

**Rules considered:**

*Federal Court Rules*, C.R.C. 1978, c. 663

Generally — referred to

R. 1007 — considered

R. 1007(1) — considered

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

R. 1007(2)(a)(vi) — considered

R. 1007(2)(b) — considered

R. 1007(3) — referred to

R. 1007(7) — considered

R. 1008 — considered

R. 1008(1) — considered

R. 1010 — referred to

R. 1010(1) — considered

#### **Regulations considered:**

*Fisheries Act*, R.S.C. 1985, c. F-14

*Atlantic Fisheries Regulations*, SOR/86-21

Generally

s. 13(1)(a)

s. 13(1)(b)

#### **Words and phrases considered:**

##### **anything seized**

... [S]ection 72(1) [of the *Fisheries Act*, R.S.C. 1985, c. F-14] provides: **72.** (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty. [Emphasis added.] The possessive pronoun in the phrase "any proceeds realized from *its* disposition" clearly refers to the antecedent "*any thing seized under the Act*" in the preceding clause. Section 51 is the exclusive source of the power to seize property under the *Fisheries Act*. It provides for the seizure of "any fishing vessel, vehicle, fish or other thing that [a fishery] officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act...". Therefore, in light of the kinds of property subject to seizure under s. 51, reading the words in s. 72(1) in their ordinary and grammatical sense, the provision clearly contemplates the making of an order of forfeiture of the proceeds of disposition of a vessel seized under the *Fisheries Act*. Furthermore, it is notable that the proceeds subject to forfeiture are not limited to those proceeds realized through dispositions made under the *Fisheries Act*.

#### **Termes et locutions cités:**

##### **tout objet saisi**

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

... [C]ette disposition [article 72(1) de la *Loi sur les pêches*, L.R.C. 1985, c. F-14] prévoit: **72.** (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté. [Je souligne.] Le pronom possessif figurant dans l'expression « le produit de son aliénation » renvoie manifestement à l'antécédent « *tout objet saisi* » figurant dans la proposition qui précède. L'article 51 constitue l'unique source du pouvoir de saisir des biens prévu par la *Loi sur les pêches*. Cette disposition permet de saisir « les bateaux de pêche, les véhicules, le poisson et tous autres objets dont [l'agent des pêches ou le garde-pêche] a des motifs raisonnables de croire qu'ils ont été obtenus par la perpétration d'une infraction à la présente loi [...] ». En conséquence, si on interprète les termes utilisés au par. 72(1) dans leur sens ordinaire et grammatical, en tenant compte du type de biens susceptibles de saisie aux termes de l'art. 51, il est clair que la portée du par. 72(1) s'étend au prononcé d'une ordonnance de confiscation du produit de l'aliénation d'un navire saisi en vertu de la Loi. Il faut en outre souligner que le produit susceptible de confiscation n'est pas uniquement le produit d'une aliénation faite en vertu de la *Loi sur les pêches*.

APPEAL from judgment reported at 1999 CarswellNfld 222, 178 Nfld. & P.E.I.R. 321, 544 A.P.R. 321, [1999] N.J. No. 232 (Nfld. C.A.), setting aside order of forfeiture of portion of proceeds of sale of vessel.

POURVOI à l'encontre de l'arrêt publié à 1999 CarswellNfld 222, 178 Nfld. & P.E.I.R. 321, 544 A.P.R. 321, [1999] N.J. No. 232 (Nfld. C.A.), qui a annulé l'ordonnance de confiscation d'une partie du produit de la vente d'un navire.

### **The judgment of the court was delivered by Iacobucci J.:**

1 This appeal raises the question of whether a provincial superior court can order forfeiture of the proceeds of sale of a vessel pursuant to s. 72(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14, as amended, by S.C. 1991, c. 1, even when the vessel has been sold under the authority of the Federal Court of Canada and the proceeds are held by that court in the exercise of its admiralty jurisdiction.

## **I. Background**

### **A. The Vessel and its Seizure**

2 The "Kristina Logos" (the "vessel") is a factory freezer trawler built in 1976 and registered in Canada in 1981. On February 3, 1992, José Pratas purchased the vessel from Peches Nordiques Inc., formerly Kosmos P/F Fishery Canada Ltd., by way of bill of sale. On the same day that he purchased the vessel, Mr. Pratas registered three documents with the Canadian Registry of Shipping: the bill of sale by which ownership of the vessel was transferred to him, a mortgage he had executed in favour of Peches Nordiques Inc. (later transferred to Hillsdown International Ltd. and ultimately to Clearwater Atlantic Seafoods Inc.), and a declaration of ownership stating he was entitled to be registered as owner.

3 On October 16, 1992, Mr. Pratas sold the vessel to Ulybel Enterprises Limited (the "respondent"). The respondent was incorporated in Nova Scotia on November 22, 1989, and Mr. Pratas was its sole director and shareholder. On December 9, 1992, the bill of sale by which ownership of the vessel was transferred to the respondent, and a declaration of ownership stating that the respondent was qualified to own a Canadian ship were filed with the Canadian Registry of Shipping. At the same time, the Registry was informed that Mr. Pratas was appointed manager. Therefore, at all material times, the vessel was a Canadian vessel, of which the respondent was the registered owner, subject to a registered mortgage.

4 In 1993, the respondent entered into a Bareboat Charter with a Portuguese company named Marqueirapesca Lda. The shareholders of that company are Mr. Pratas owning 51 percent of the outstanding shares, and Carlos and

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

Mario Neves (the "Neves Brothers") owning 49 percent. It was not contested that in 1993 and 1994 Marqueirapesca Lda. fished the vessel off the coast of Newfoundland and in the NAFO Convention Area, divisions 3M, 3N and 3O.

5 NAFO is an international body implemented to optimize the utilization, management and conservation of the Northwest Atlantic fisheries stocks in a quadrant of ocean and coastal waters with a Northern border extending from the Hudson Strait below Baffin Island to Greenland and a Western border extending from Baffin Island to Northern North Carolina. Divisions 3M, 3N and 3O fall south and west of Newfoundland. Significant parts of the Grand Banks are within two of these divisions.

6 On April 2, 1994, the vessel was observed fishing in the NAFO Convention Area without the required licence or registration card and in contravention of ss. 13(1)(a) and 13(1)(b) of the *Atlantic Fisheries Regulations, 1985*, SOR/86-21 (the "Regulations"). The vessel and its cargo of fish were seized by officials of the Department of Fisheries and Oceans pursuant to s. 51 of the *Fisheries Act* and escorted to St. John's, Newfoundland. The Crown in Right of Canada thereby took physical possession of the vessel.

### ***B. The Litigation: One Vessel but Two Courts***

7 On April 4 and 5, 1994, two informations were sworn charging the respondent with two counts of permitting the use of the vessel for fishing without a licence and two counts of permitting the use of the vessel for fishing without a registration card contrary to ss. 13(1)(a) and 13(1)(b) of the Regulations.

8 On April 5, 1994, three days after the vessel was seized under the *Fisheries Act*, an action was commenced in the Federal Court of Canada by the mortgagee of the vessel, Clearwater Atlantic Seafoods Inc., seeking \$125,000, alleged to be the balance of purchase monies owing from the sales of the vessel to Mr. Pratas and the respondent. On the same day, the Federal Court of Canada issued an arrest order against the vessel being held by the Crown. On May 23, 1995, a second action was brought in the Federal Court of Canada, this time by the Neves Brothers claiming an ownership interest in the vessel valued at \$512,750. A second arrest order was issued on that same day.

9 On September 28, 1995, the respondent was indicted on the same charges as those contained in the informations sworn on April 4 and 5, 1994. The trial was scheduled to commence in the Newfoundland Supreme Court, Trial Division on November 28, 1996.

10 Meanwhile, the Crown continued in possession of the vessel and began to incur costs for its storage and maintenance. On November 12, 1996, approximately 19 months after the vessel was first seized and arrested, the Crown applied to intervene in the action commenced by the Neves Brothers in the Federal Court of Canada as a person claiming an interest in the property pursuant to Rule 1010 of the *Federal Court Rules*, C.R.C. 1978, c. 663. The application to intervene was supported by the Crown's claim for costs and expenses for the care and preservation of the vessel amounting to over \$500,000. That amount represented the costs incurred by the Crown in seizing the vessel under the *Fisheries Act*, and the on-going cost of maintaining the ship (approximately \$60,000 per year). At the same time, the Crown brought a motion for the lifting of the arrest and an order for the sale of the vessel pursuant to *Federal Court Rule* 1007(3). Rule 1007(3) provides that the court may, before judgment, order property under arrest to be sold if it is deteriorating in value.

11 The respondent brought a motion in the Newfoundland Supreme Court, Trial Division for a declaration that the Crown was not entitled to proceed in another court to seek the sale of the vessel and an order for its release from seizure. That motion was denied on December 6, 1996.

12 On December 9, 1996, a prothonotary of the Federal Court found that the Crown had the necessary interest to intervene in the action since it had incurred expenses after the arrest of the vessel, characterized as expenses *in custodia legis*. The prothonotary found that this was an appropriate case for the Federal Court to grant an order of

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

sale as costs and expenses would continue to mount until the ship was sold. Further, the ship's classification certificate would soon expire, which would significantly reduce the ship's value. Therefore, the prothonotary found that the case met the test found in Rule 1007(3) of the *Federal Court Rules*. Accordingly, on December 18, 1996, the Federal Court ordered the sale of the vessel (*Neves v. "Kristina Logos" (The)* (1996), 124 F.T.R. 167 (Fed. T.D.)).

13 The respondent applied for a stay of the order for sale pending its appeal, but the order for sale was confirmed by the Federal Court, Trial Division (*Neves v. "Kristina Logos" (The)*, [1997] F.C.J. No. 200 (Fed. T.D.)). The vessel was sold on May 15, 1997 for \$605,000 and, pursuant to the order of sale, the proceeds were deposited with the Receiver General in an interest bearing account for the benefit of the Federal Court. The respondent then appealed the order for sale to the Federal Court of Appeal, but since the vessel had already been sold that appeal was dismissed as being moot (*Neves v. "Kristina Logos" (The)* (1998), 225 N.R. 32 (Fed. C.A.)).

14 On May 21, 1997, the respondent was convicted of the charges brought against it in the Supreme Court of Newfoundland, Trial Division: (1997), 150 Nfld. & P.E.I.R. 308 (Nfld. T.D.). On July 2, 1997, the Newfoundland Supreme Court, Trial Division imposed a sentence on the respondent that included fines totalling \$120,000, the forfeiture of the proceeds of sale of the cargo of fish (\$58,989.34), and the forfeiture of \$50,000 of the proceeds of the sale of the vessel.

15 The respondent appealed its conviction and sentence to the Newfoundland Court of Appeal. Before that appeal could be heard, on August 11, 1999, a prothonotary of the Federal Court of Canada determined the ranking of the claims of the parties in the actions before it, including the claims of the mortgagee, the Neves brothers, and the Crown for fines, forfeiture and costs. The ranking of claims was conditional on the outcome of the respondent's appeal of sentence (*Neves c. "Kristina Logos" (The)* (1999), 173 F.T.R. 31 (Fed. T.D.)).

16 Another appeal was brought by the defendants to the action in the Federal Court, including Ulybel and Pratas, against the Prothonotary's ranking of claims. That appeal was heard before McKay J. of the Federal Court, Trial Division and judgment has been reserved.

17 On August 17, 1999, the Newfoundland Court of Appeal upheld the respondent's conviction and found that the sentence imposed was not excessive. However, the Court of Appeal held that the *Fisheries Act* did not provide the Newfoundland Supreme Court, Trial Division with the jurisdiction or authority to order the forfeiture of any of the proceeds of sale of a vessel. The Court of Appeal held that physical detention of a thing seized under the *Fisheries Act* is a necessary precondition to an order of forfeiture. In this case, the Court of Appeal held that the vessel must have been released from seizure when sold under the authority of the Federal Court, thereby precluding a subsequent order of forfeiture under the *Fisheries Act*. Accordingly, the Court of Appeal overturned the order of forfeiture made by the court below.

18 The respondent's application to this Court for leave to appeal its conviction and sentence was denied. The Crown's application to this Court for leave to appeal the decision of the Court of Appeal was granted.

19 It is important to keep in mind that none of the decisions of the Federal Court of Canada is on appeal before this Court. In fact, nothing in these reasons should be interpreted as commenting on those proceedings. The only decision on appeal is the Newfoundland Court of Appeal's reversal of the sentencing court's order of forfeiture against the proceeds of sale of the vessel.

## II. Relevant Legislation

20 *Fisheries Act*, R.S.C. 1985, c. F-14, as amended by S.C. 1991, c. 1

50. Any fishery officer, fishery guardian or peace officer may arrest without warrant a person who that fishery offi-

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

cer, guardian or peace officer believes, on reasonable grounds, has committed an offence against this Act or any of the regulations, or whom he finds committing or preparing to commit an offence against this Act or any of the regulations.

**70.** (1) A fishery officer or fishery guardian who seizes any fish or other thing under this Act may retain custody of it or deliver it into the custody of any person the officer or guardian considers appropriate.

.....

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

**71.** (1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

(2) Subject to subsection 72(4), a court may order any fish or other thing seized under this Act to be returned to the person from whom it was seized if security is given to Her Majesty in a form and amount that is satisfactory to the Minister.

.....

**71.1** (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order the person to pay the Minister an amount of money as compensation for any costs incurred in the seizure, storage or disposition of any fish or other thing seized under this Act by means of or in relation to which the offence was committed.

(2) Where a court orders a person to pay an amount of money as compensation under subsection (1), the amount and any interest payable on that amount constitute a debt due to Her Majesty and may be recovered as such in any court of competent jurisdiction.

**72.** (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(2) Where a person is convicted of an offence under this Act that relates to fish seized pursuant to paragraph 51(a), the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(3) Where a person is charged with an offence under this Act that relates to fish seized pursuant to paragraph 51(a) and the person is acquitted but it is proved that the fish was caught in contravention of this Act or the regulations, the court may order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

**73.1** (1) Subject to subsection (2), any fish or other thing seized under this Act, or any proceeds realized from its disposition, that are not forfeited to Her Majesty under section 72 shall, on the final conclusion of the proceedings relating to the fish or thing, be delivered to the person from whom the fish or thing was seized.

(2) Subject to subsection 72(4), where a person is convicted of an offence relating to any fish or other thing seized

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under this Act and the court imposes a fine but does not order forfeiture,

- (a) the fish or thing may be detained until the fine is paid;
- (b) it may be sold under execution in satisfaction of the fine; or
- (c) any proceeds realized from its disposition may be applied in payment of the fine.

.....

**75.** (1) Where any thing other than fish is forfeited to Her Majesty under subsection 72(1) or (4), any person who claims an interest in the thing as owner, mortgagee, lienholder or holder of any like interest, other than a person convicted of the offence that resulted in the forfeiture or a person from whom the thing was seized, may, within thirty days after the forfeiture, apply in writing to a judge for an order pursuant to subsection (4).

.....

(4) Where, on the hearing of an application made pursuant to subsection (1), it is made to appear to the satisfaction of the judge,

- (a) that the applicant is innocent of any complicity in the offence or alleged offence that resulted in the forfeiture and of any collusion in relation to that offence with the person who was convicted of, or who may have committed, the offence, and
- (b) that the applicant exercised all reasonable care in respect of the person permitted to obtain the possession of the thing in respect of which the application is made to satisfy himself that the thing was not likely to be used contrary to this Act or the regulations, or, in the case of a mortgagee or lienholder, that he exercised such care with respect to the mortgagor or the liengiver,

the applicant is entitled to an order declaring that his interest is not affected by the forfeiture and declaring the nature and extent of his interest.

*Federal Court Rules*, C.R.C. 1978, c. 663

*Rule 1007.* (1) The Court may, either before or after final judgment, order any property under the arrest of the Court, to be appraised, or to be sold with or without appraisal, and either by public auction or by private contract, and may direct what notice by advertisement or otherwise shall be given or may dispense with the same.

(2) Without limiting paragraph (1), the Court may, either before or after final judgment, order

(a) that, where any property is under the arrest of the Court, it be advertised for sale in accordance with directions contained in the order, which may include any or all of the following:

.....

- (vi) any other direction that seems appropriate to the circumstances of the particular case; or
- (b) that an agent be employed for the sale of any such property, with authority to sell subject to such conditions

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent for his services as may be stipulated in the order.

(3) If the property is deteriorating in value, the Court may order it to be sold forthwith.

.....

(7) As soon as possible after the execution of a commission of sale, the marshal shall pay into court the gross proceeds of the sale, and shall with the commission file his accounts and vouchers in support thereof.

.....

*Rule 1008.* (1) When an application is made for payment out of any money paid into court under Rule 1007(7), the Court has the power to determine the rights of all claimants thereto and may make such order and give such directions as will enable the Court to adjudicate upon the rights of all claimants to such money and to order payment out to any person of any such money or portion thereof in accordance with its findings.

.....

*Rule 1010.* (1) Where property against which an action in *in rem* has been brought is under arrest or money representing the proceeds of sale of property against which such an action has been brought is in court, a person who claims an interest in the property or money but who is not a defendant in the action may, with leave of the Court, intervene in the action.

.....

### III. Issue and Principal Arguments of the Parties

21 The basic issue on appeal is whether the Newfoundland Court of Appeal erred in reversing the sentencing judge's order for forfeiture of proceeds of the vessel. The focus of argument is on the proper interpretation of the scope of the power to order the forfeiture of proceeds under s. 72(1) of the *Fisheries Act*: can it cover proceeds from the sale of a ship or is it limited to those proceeds realized from a sale of perishables pursuant to s. 70(3) of the Act?

22 The appellant submits that the Court of Appeal erred by interpreting the power to make an order of forfeiture under s. 72(1) of the *Fisheries Act* too narrowly. She argues that the plain language of s. 72(1) supports a broader interpretation, one that permits the court to make an order of forfeiture against the proceeds of sale of a vessel, even where the sale of the vessel was made under the authority of another court. The appellant says that such an interpretation is necessary to harmonize the *Fisheries Act*, with the *Federal Court Act*, R.S.C. 1985, c. F-7, and the *Federal Court Rules*.

23 The respondent adopts the position taken by the Newfoundland Court of Appeal in this case. The respondent argues that the only proceeds that are subject to forfeiture under the *Fisheries Act* are the proceeds of perishables sold pursuant to s. 70(3). The respondent says that the *Fisheries Act* should be interpreted as requiring the continued physical detention of a thing seized as a necessary precondition to an order of forfeiture of that thing. Thus, in this case, the sale of the vessel under the authority of the Federal Court precluded the sentencing court from imposing a valid order of forfeiture against the proceeds of the vessel as part of the sentence in this case. The respondent says that such an interpretation is consistent with the scheme of the *Fisheries Act* and the presumption of innocence.

### IV. Analysis

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

### **A. Background: The Fisheries Act and the Power of Forfeiture**

24 It is convenient at this stage to provide some background to the *Fisheries Act* and the specific provision at issue in this appeal. The principal object of the *Fisheries Act* has been found by a number of appellate courts to be that as summarized by the Nova Scotia Court of Appeal in *Canada (Attorney General) v. Savory* (1992), 108 N.S.R. (2d) 245 (N.S. C.A.), at para. 14:

The *Act* and the *Regulations* have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the *Act* and the *Regulations* is to properly manage and control the commercial fishery.

See also *R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318 (Nfld. T.D.), at paras. 22-25; *R. v. Vautour* (2000), 226 N.B.R. (2d) 226 (N.B. Q.B.), at paras. 10-11 and 13; *R. v. Chute* (1997), 160 N.S.R. (2d) 378 (N.S. C.A.).

25 As noted by the sentencing judge in this case, serious problems exist in the Atlantic fishing industry:

It is common knowledge that the fish stocks on the Grand Banks as well as elsewhere in the Atlantic fishery waters of Canada have been seriously depleted.

Canada has passed certain laws to enable this country to carry out proper conservation measures. NAFO was organized for the conservation of fish stocks by setting various quotas and regulations. The regulations are aimed at the regulation of the fishing industry with a view to the preservation of fishery resources which are crucial to the operation and continuation of an important Canadian industry.

In order to garner support for Canadian concerns over excessive fishing on the nose and tail of the Grand Banks, Canada has to demonstrate its ability to control its own vessels.

26 One of the ways that Parliament has seen fit to support the proper management and control of the commercial fishery is to provide the courts with the power to impose significant penalties upon conviction of offences under the *Fisheries Act*. The most recent amendments to the *Fisheries Act*, enacted in 1991, were primarily concerned with increasing the severity of penalties to deter the abuse of the fishery resource and make it uneconomical for rogue fishermen to flout the *Fisheries Act* and the Regulations. For instance, Parliament increased the fines for those who violate the Regulations in the Convention Area to a maximum of \$500,000.

27 Parliament also amended the power to order forfeiture of property seized under the *Fisheries Act* and the proceeds of sale of such property. The power of forfeiture has long been one of the penalties available to courts in sentencing persons convicted of offences under the *Fisheries Act*. That power is contained in s. 72, the provision at issue in this appeal. Prior to the 1991 amendments, the authority to order forfeiture of proceeds was limited to proceeds arising from a sale of perishables under s. 71(3) (now s. 70(3)). Section 72 provided as follows:

**72.** (1) Where a person is convicted of an offence under this Act or the regulations, the convicting court or judge may, in addition to any punishment imposed, order that any thing seized pursuant to subsection 71(1), or the whole or any part of the proceeds of a sale referred to in subsection 71(3), be forfeited and, on such an order being made, the thing so ordered to be forfeited is forfeited to Her Majesty in right of Canada.

Section 71(3), for its part, provided:

**71.** ...

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(3) Where, in the opinion of the person having custody of any thing seized pursuant to subsection (1), the thing will rot, spoil or otherwise perish, that person may sell the thing in such manner and for such price as that person may determine.

However, since the 1991 amendments, and at all times material to this appeal, s. 72 has provided as follows:

**72.** (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

## **B. Principles of Statutory Interpretation**

28 In numerous cases, this Court has endorsed the approach to the construction of statutes set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. ...

29 This famous passage from Driedger "best encapsulates" our Court's preferred approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at paras. 21 and 23. Driedger's passage has been cited with approval by our Court on frequent occasions in many different interpretive settings which need not be mentioned here.

30 Because of the interaction in this case between the *in personam* jurisdiction of the Newfoundland Supreme Court under the *Fisheries Act* and the *in rem* admiralty jurisdiction of the Federal Court under the *Federal Court Act*, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to keep in mind the principles for harmonizing different statutes. Professor Ruth Sullivan expressed these principles as follows, in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 288:

The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. ... Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

## **C. Application of Principles of Statutory Interpretation: Section 72 and the Scope of the Power to Order Forfeiture**

### ***1. Grammatical and Ordinary Meaning***

31 In interpreting the scope of the power to order forfeiture of proceeds under the *Fisheries Act*, it is natural to begin by considering the grammatical and ordinary meaning the words of s. 72(1). As already noted, s. 72(1) provides:

**72.** (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty. [Emphasis added.]

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

32 The possessive pronoun in the phrase "any proceeds realized from *its* disposition" clearly refers to the antecedent "*any thing* seized under the Act" in the preceding clause. Section 51 is the exclusive source of the power to seize property under the *Fisheries Act*. It provides for the seizure of "any fishing vessel, vehicle, fish or other thing that [a fishery] officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act...". Therefore, in light of the kinds of property subject to seizure under s. 51, reading the words in s. 72(1) in their ordinary and grammatical sense, the provision clearly contemplates the making of an order of forfeiture of the proceeds of disposition of a vessel seized under the *Fisheries Act*. Furthermore, it is notable that the proceeds subject to forfeiture are not limited to those proceeds realized through dispositions made under the *Fisheries Act*.

## 2. Legislative History and the Intention of Parliament

33 To understand the scope of s. 72(1), it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute: *Gravel v. City of St-Leonard* (1977), [1978] 1 S.C.R. 660 (S.C.C.), at p. 667, *per* Pigeon J., cited approvingly by Major J. in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.), at para. 13. As noted above, a former version of the forfeiture provision *did* limit the scope of the power to order forfeiture of proceeds to the proceeds of a disposition of perishables made under s. 71(3) of the Act (now s. 70(3)). However, in 1991, s. 72(1) was amended and the language limiting the scope of the power to order forfeiture of proceeds was removed. Indeed, this was the only meaningful change made to s. 72(1). A review of the Minutes of Proceedings of the Legislative Committee and the Parliamentary debates in Hansard offers little insight into the intention of Parliament in making this change in the forfeiture provision. In fact, no references were made to this specific provision in either the Committee hearings or the Parliamentary debate that preceded its amendment. However, it is clear that as a whole, the 1991 amendments to the *Fisheries Act* were intended to modernize the legislation, and to increase the flexibility and severity of penalties for *Fisheries Act* offences.

34 It is possible that the removal of the reference to the proceeds of a disposition of perishables, in favour of a general reference to the proceeds of "any thing seized under the Act", was intended by the drafters merely to streamline the language of the section, and not to broaden the scope of forfeiture as it relates to proceeds. However, there is a presumption that amendments to the wording of a legislative provision are made for some intelligible purpose, such as to clarify the meaning, to correct a mistake, or to change the law: see Sullivan, *supra*, at p. 450. Laskin J. (as he then was) applied this presumption in *New Brunswick (Minister of Municipal Affairs) v. Bathurst Paper Ltd.* (1971), [1972] S.C.R. 471 (S.C.C.), at p. 477. Writing for the Court, he held that "[l]egislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended." In this case, through its wholesale removal of specific limiting language, the effect of the 1991 amendment to s. 72(1) is to broaden the scope of the forfeiture provision to include the power to forfeit proceeds of the sale of a vessel. This effect is consistent with the intention of Parliament, as recorded in Hansard, to increase the flexibility and severity of available penalties for *Fisheries Act* offences.

35 Before this Court, counsel did not initially refer to the legislative history of the forfeiture provision. It appears that the Court of Appeal did not benefit from argument on the effect of the 1991 amendments on the proper interpretation of the scope of the power to order forfeiture. Nevertheless, in combination, the grammatical and ordinary meaning of the words in s. 72(1) and the intention of Parliament as indicated by the legislative history of the provision do support a broader interpretation of the scope of the forfeiture power than was given by the Court of Appeal.

## 3. The Scheme of the Act

36 As noted above, the *Fisheries Act* creates offences and imposes penalties in order to further its object of the

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

proper management and control of the commercial fishing industry. In this appeal, we are particularly concerned with the scheme of that part of the *Fisheries Act* falling under the heading "Disposition of Seized Things". The provisions in that part of the *Fisheries Act* provide authority to deal with the property of a person accused of an offence under the *Fisheries Act*. Fisheries officers have the authority to seize property that they have reasonable grounds to believe was involved in the commission of an offence under the *Fisheries Act* (s. 51). Seized property can be detained until forfeiture or the close of proceedings (s. 71(1)), or returned to the owner upon the posting of security (s. 71(2)). Persons convicted of an offence may be responsible to compensate the Crown for costs incurred in the seizure, storage, or disposition of seized property (s. 71.1). Except in respect of perishables (s. 70(3)), there is no authority to dispose of or forfeit property before conviction and the close of proceedings under the *Fisheries Act*. Upon conviction, property can be ordered forfeited to Her Majesty (s. 72) or applied to the payment of fines (s. 73.1(2)). An innocent party that claims an interest in forfeited property may apply for an order declaring that his or her interest is not affected by the forfeiture (s. 75(1)).

37 It makes sense that the *Fisheries Act* would deal exhaustively with property seized under the *Fisheries Act* given the special nature of the kinds of property at issue: fish, fishing vessels, and equipment. The respondent argues that s. 489.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, also applies to the seized property of a person accused of an offence under the *Fisheries Act*. However, s. 489.1 begins with the words, "Subject to this or any other Act of Parliament...". Therefore, because the federal *Fisheries Act* also deals with the property of a person accused of an offence under that Act, in my view, s. 489.1 of the *Criminal Code* has no application in this case.

38 In general, there is no authority under the Act to dispose of seized property before the close of proceedings. Thus, the scheme of the *Fisheries Act* properly reflects the presumption of innocence and the related principle that the property of an accused should be preserved until culpability is finally determined. The rationale for excepting seized perishables from the application of these principles is obvious: the quality and value of perishables will deteriorate in storage, hence it is in the interest of an accused that the *Fisheries Act* allow for the timely disposition of seized perishables (see s. 70(3)). However, that the *Fisheries Act* otherwise preserves the property of an accused person is not fatal to the broader interpretation of the power to order forfeiture advanced by the appellant. The property of an accused person is protected under the *Fisheries Act vis-à-vis* the quasi-criminal process under that Act, but there is nothing in the scheme of the *Fisheries Act* that would extend that protection *vis-à-vis* another civil authority. In other words, a person charged with an offence under the *Fisheries Act* cannot rely on the presumption of innocence to prevent or delay a person with an *in rem* claim against his property from obtaining a remedy. Similarly, where the culpability of a person charged with an offence under the *Fisheries Act* has been finally determined, the presumption of innocence is spent and there is nothing expressed in the *Fisheries Act* that would immunize proceeds of sale realized pursuant to a civil authority from forfeiture. In this way, the scheme of the *Fisheries Act* is, at once, strict enough to preserve the seized property of an accused subject to prosecution under the *Fisheries Act*, and flexible enough to preserve the availability of the penalties necessary to achieve the object of the *Fisheries Act*.

#### **4. The Legislative Context**

##### *(a) Treatment of Proceeds under the Fisheries Act*

39 The remaining factor to consider is the legislative context in which s. 72(1) exists. In interpreting the s. 72(1) power to order forfeiture narrowly, the Court of Appeal relied in part on the treatment of proceeds in the preceding, consecutive ss. 70(3) and 71(1). Taken together, those subsections read as follows:

**70. ...**

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

**71.** (1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

40 It has been argued that because the phrase "any proceeds realized from its disposition" first appears in s. 70(3), and in that context is limited to proceeds of perishables, the phrase should continue to be read as being so limited when it appears in subsequent sections of the *Fisheries Act*. Furthermore, as an illustration of the above proposition, it is argued that s. 71(1) makes better sense if "any proceeds realized from its disposition", as it appears in that subsection, refers only to s. 70(3) proceeds. It would be unusual that s. 71(1) of the *Fisheries Act* would purport to authorize the detention of the proceeds of disposition of a vessel made pursuant to an authority other than the *Fisheries Act*. The usual course would be for the authority under which the order for sale was made to detain any proceeds arising from that order. For example, in this case, the proceeds of the sale of the Kristina Logos are currently detained by the Receiver General for the benefit of the Federal Court, the source of the order for sale. This reasoning, it is argued, justifies applying the limited interpretation of "any proceeds" found in s. 70(3) to all subsequent subsections, including s. 72(1).

41 However, although a limited interpretation of "any proceeds" may arguably make better sense of s. 71(1), a purely grammatical interpretation of "any proceeds" is not beyond the rationale of that provision, nor does it render it absurd. As noted above in respect of s. 72(1), read according to its ordinary and grammatical meaning, the phrase "any proceeds realized from its disposition" in s. 71 includes proceeds of vessels seized under the *Fisheries Act*. Thus, s. 71 merely makes a grant of authority to detain proceeds that is partly superfluous in that only in unusual circumstances could the s. 71 power to detain proceeds be practically exercised in respect of proceeds realized pursuant to an authority other than the *Fisheries Act*. Such circumstances could arise if the Federal Court were to make an order pursuant to *Federal Court Rule* 1007 that proceeds of sale be paid into court and held for the benefit of orders made by other courts. In addition, although there is no authority to dispose of seized property until after the close of proceedings, s. 71(1) of the *Fisheries Act* does provide for the detention of the proceeds of "any thing seized under the Act". Furthermore, *Federal Court Rule* 1008 provides that the Federal Court has the power to determine the rights of all claimants to moneys paid into court pursuant to Rule 1007(7). Thus, it is difficult to differentiate, on a principled basis, between a situation where the Crown establishes a claim in the provincial court which is then executed in the Federal Court and the situation in this case where the provincial court purports to order forfeiture of monies in the hands of a Federal Court. In the result, one is not necessarily driven to infer, as the Court of Appeal concluded, that, taken together, s. 70(3) and 71(1) serve to limit the grant of power to order forfeiture in s. 72(1).

42 Indeed, had Parliament intended the phrase "any proceeds of its disposition" to be limited to proceeds of perishables in ss. 71(1) and 72(1), it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it refers more generally to all forms of property seized under the Act and proceeds thereof.

43 In addition, it is notable that ss. 70(3) and 71(1) are directed at the property of a person at a stage in the proceedings where the person is only accused of an offence. Whereas s. 72(1) is directed at the property of a person who has been convicted of an offence. Thus, ss. 70(3) and 71(1) are distinct from s. 72(1) in that the former address procedural matters and the latter is in effect a sentencing provision. In this sense, s. 72 stands alone and apart from the immediately preceding sections. This would seem to run against the argument that one must read ss. 70(3), 71(1) and 72(1) together in interpreting the phrase "any proceeds of its disposition".

*(b) Continued Physical Detention*

44 The appellant argues that the Court of Appeal erred by finding that continued physical detention of seized

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

property is a precondition to an order of forfeiture under s. 72(1). The only clear and express preconditions to such an order is the conviction of the accused. Otherwise, the words in s. 72(1) are equivocal on this point. A continued physical detention precondition might make sense were the word "seized" to be read only in the present tense. However, the word "seized" can also be read in the past tense and so may also refer to things formerly seized under the Act. Furthermore, the legal definition of "forfeiture" is "a divestiture of specific property rights without compensation": see *Black's Law Dictionary* (6<sup>th</sup> ed. 1990), at p. 650. It may be that after a bare divestiture of the property rights of the owner, without more, the title to property would necessarily vest in the party holding possession, i.e. the Crown, where the property was detained under its authority up until forfeiture. However, s. 72(1) reads "the court may ... order that any thing ... or any proceeds ... *be forfeited to Her Majesty*." Thus, once forfeiture has been ordered under s. 72(1), any rights to the property vest in Her Majesty, regardless of who has possession at the time of forfeiture. In other words, a continued physical detention is not *expressly* stated as a precondition to an order of forfeiture on the face of s. 72(1).

45 However, the Court of Appeal *inferred* that continued physical detention is a necessary precondition to forfeiture after reviewing the powers to seize, retain custody of and detain property in ss. 51, 70 and 71. The Court of Appeal at para. 34 determined that:

... Following a seizure, there are two possibilities: the vessel or other object seized will be detained by the fishery officer or his agent; or, it will be returned to the owner, at which time the seizure will be at an end.

But the Court of Appeal's analysis in this regard did not, with respect, go far enough. First, the Court of Appeal did not deal with the fact that property could be released from seizure, but not returned to the owner for being subject to an arrest order or an order for sale made under the authority of another court. This is significant since, as noted above, the *Fisheries Act* was amended in 1991 to remove the limitation that only those proceeds realized by a disposition under the *Fisheries Act* are subject to forfeiture. Second, the Court of Appeal did not consider the effect of a continued physical detention precondition on the process by which a vessel may be returned to its owner upon the deposit of security under s. 71(2).

46 Under s. 71(2) of the *Fisheries Act*, the process by which a security deposit obtains the release of seized property is a kind of bailment. Section 71(2) provides that, if security is given to Her Majesty in a form and amount satisfactory to the Minister, the court has a discretionary power to order that the seized property be returned to the person from whom it was seized. In the result, a contract is formed between the Crown and the person seeking the return of the property whereby the person pledges something of value, usually money in an amount equal to or exceeding the market value of the seized property, in order to assure the performance of an obligation by furnishing a resource to be used in case of failure in the principal obligation. This arrangement is mutually beneficial since the person from whom the property was seized is able to reacquire the property and put it to good use, while the Crown need not incur expenses for the storage and maintenance of seized property. In this way, both parties, as well as any creditors, are protected from the diminution of equity that can occur when storage costs accumulate while property is detained. There are, therefore, sound and compelling reasons to interpret this legislation in a way that will harmonize the interests of the accused, the Crown, the employees and creditors that have an interest in getting productive, income-earning property back into circulation. Given the potential for a lengthy period of pre-trial detention, the benefits to be obtained by the return of property on the deposit of security are significant and recourse to this process should not be discouraged.

47 However, for the reasons that follow, recourse to this process would be less attractive if an order of forfeiture were subject to a precondition of continued physical detention. There appears to be no power under the Act to order the forfeiture of a security deposit, only the vessel or other property for which it is exchanged. The right to claim the security deposit is contractual and arises out of the failure of the person to whom the property was returned to perform the obligations undertaken upon the return of seized property. The parties ought to be free to include in such a contract, an obligation to deliver-up the vessel if an order of forfeiture is made against it. There is nothing in the Act to indicate an intention to constrain the parties from contracting in this way.

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

48 Furthermore, if continued physical detention were a precondition to an order of forfeiture, to preserve the availability of the penalty of forfeiture, either the Crown would have to refuse to accept a security deposit, or the court would have to exercise its discretion and refuse to order the return of the property. There is nothing in the *Fisheries Act* to indicate that the interim, interlocutory measure of the return of property on the deposit of security should trump or foreclose the remedy of forfeiture. Such an interpretation is inconsistent with the mutual benefits available under this process, the harmonization of the interests of the parties and innocent third parties, the intention of Parliament to increase the severity and flexibility of penalties under the *Fisheries Act*, and the deterrent effect of the power of forfeiture. Taking all of this into consideration, I believe it follows that s. 72(1) contemplates the making of an order of forfeiture against a vessel that has been released from seizure and returned on the deposit of security. It also follows that when s. 72(1) authorizes the forfeiture of "any thing seized under the Act", that includes things that have been formerly seized under the *Fisheries Act*, but released from seizure.

*(c) Relief from Forfeiture*

49 In addition, the Court of Appeal did not consider the implications of s. 75 of the *Fisheries Act*. Section 75 permits innocent parties with an interest against property to apply to a provincial superior court for an order that their interest is not affected by the forfeiture and declaring the extent of their interest. It is open to an innocent party to assert its interest in the form of an *in rem* claim against a vessel in the Federal Court, under its admiralty jurisdiction. Notwithstanding the respondent's argument that the courts in Newfoundland have retained their admiralty jurisdiction intact, such a course of action is natural, especially in jurisdictions where the superior courts' admiralty jurisdiction has been ceded to the Federal Court of Canada. Indeed, it would be perverse to force a litigant claiming an *in rem* interest in a seized vessel to wait for an order of forfeiture under the *Fisheries Act* in order to have the extent of its interest determined by a court of admiralty jurisdiction. Thus, it is evident from s. 75 that the *Fisheries Act* does contemplate the possibility of parallel proceedings, *in personam* and *in rem*, involving the same vessel. This lends further support to the view that s. 72(1) authorizes the forfeiture of proceeds realized pursuant to an authority other than the *Fisheries Act*.

*(d) Harmonization of Statutes*

50 As noted above, because of the interaction in this case between the *in personam* jurisdiction of the Newfoundland Supreme Court under the *Fisheries Act* and the *in rem* jurisdiction of the Federal Court under the admiralty provisions of the *Federal Court Act*, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to apply the principles for harmonizing different statutes in this case.

51 The admiralty provisions of the *Federal Court Act* and the provisions of the *Fisheries Act* can and should be read as a consistent, harmonious scheme for the regulation of maritime matters. Fishing vessels and their use are at the heart of the activities governed by each regime, and the law in one area will inevitably exert an influence on the law in the other. For example, it is a likely scenario that many fishing vessels are mortgaged and must be active and producing income in order to discharge the mortgage. A seizure of such a vessel under the *Fisheries Act* can result in a lengthy pre-trial detention. If an owner is unable to obtain the return of the vessel by posting security, by taking the vessel out of the working ocean, it is likely that a period of detention that curtailed the income producing activities of the vessel would precipitate a civil claim against the vessel in a court of admiralty jurisdiction such as the Federal Court of Canada. Therefore, a reasonable and obvious explanation of the 1991 amendments to s. 72(1) is that the above scenario was anticipated by the legislators, who, in order to preserve the jurisdiction of the courts to impose forfeiture as a penalty, broadened the power to make an order of forfeiture to include in its scope the proceeds of a disposition of a seized vessel realized under an authority other than the *Fisheries Act*, thus giving effect to Parliament's intention to increase penalties for fisheries offences while also preserving the operation of the presumption of innocence *vis-à-vis* the quasi-criminal processes of the *Fisheries Act*.

2001 CarswellNfld 239, 2001 SCC 56, 45 C.R. (5th) 1, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, [2001] 2 S.C.R. 867, 2001 CarswellNfld 240, REJB 2001-25833, J.E. 2001-1823

52 If the Court of Appeal's narrow interpretation of s. 72(1) is adopted, an order for sale emanating from the Federal Court would terminate the jurisdiction of the Newfoundland Supreme Court to order forfeiture. As between the *Fisheries Act* and the grant of admiralty jurisdiction in the *Federal Court Act*, such a result does not comply with the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.

## V. Conclusion

53 Considering the various issues in this appeal, the jurisdictional questions they raise, and the reconciliation of jurisdictions *in rem* and *in personam*, criminal and commercial, maritime and penal, and Federal Court and provincial court, I conclude that s. 72(1) does authorize the sentencing court to make an order of forfeiture against the proceeds of disposition of a vessel formerly seized under the *Fisheries Act*, but sold under the jurisdiction of the Federal Court of Canada. The sale of the vessel was contemplated, but not effected, under the *Fisheries Act*. Furthermore, the Crown in this case did not institute proceedings in the Federal Court, and its application to intervene and motion for an order for sale were not an end run around limitations in the *Fisheries Act*.

54 For the foregoing reasons, I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of forfeiture made by the sentencing judge.

*Appeal allowed.*

*Pourvoi accueilli.*

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**' Sullivan and Driedger  
on the  
Construction of Statutes '**

**Fourth Edition**

by

Ruth Sullivan

Professor of Law  
University of Ottawa



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## ASSOCIATED WORDS

*The associated words rule (noscitur a sociis).* The associated words rule is properly invoked when two or more terms linked by “and” or “or” serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator. As Martin J.A. explained in *R. v. Goulis*:

When two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general.<sup>91</sup>

The question in the *Goulis* case was whether a bankrupt who failed to reveal the existence of certain commercial property to his trustee in bankruptcy had “concealed” the property within the meaning of s. 350 of the *Criminal Code*. It provided:

350. Every one who,  
 (a) with intent to defraud his creditors,  
     (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or  
     (ii) removes, conceals or disposes of any of his property  
     ...  
 is guilty of an indictable offence....

Although the term “conceals” in subparagraph (ii) could be understood broadly to include a failure to disclose, Martin J.A. relied on the associated word principle to justify his adoption of a narrower meaning:

In this case, the words which lend colour to the word “conceals” are, first, the word “removes”, which clearly refers to a physical removal of property, and second, the words “disposes of”, which, standing in contrast to the kind of disposition which is expressly dealt with in subpara. (i) of the same para. (a), namely, one which is made by “gift, conveyance, assignment, sale, transfer or delivery”, strongly suggests the kind of disposition which results from a positive act taken by a person to physically part with his property.<sup>[92]</sup> In my view the association of “conceals” with the words “removes” or “disposes of” in s. 350(a)(ii) shows that the word “conceals” is there used by Parliament in a sense which contemplates a positive act of concealment.<sup>93</sup>

<sup>91</sup> (1981), 33 O.R. (2d) 55, at 61 (C.A.).

<sup>92</sup> Martin J.A. here implicitly relies on the presumption against tautology. See *supra*, at pp. 159-61.

<sup>93</sup> *R. v. Goulis*, *supra* note 91, at 61.

Having identified the shared feature of the three linked words as a physical act of some sort, Martin J.A. then uses this feature to narrow the range of possible meanings of "conceal".

In *Ontario v. Canadian Pacific Ltd.*,<sup>94</sup> the Supreme Court of Canada had to determine the validity of Ontario's *Environmental Protection Act*, an issue which turned in part on the Court's interpretation of the following provision:

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;
  - (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.

The issue was whether the prohibition set out in s. 13(1)(a) was unconstitutionally vague. In the view of the Court it was not. Gonthier J. wrote:

As I observed in *Nova Scotia Pharmaceutical Society*,<sup>[95]</sup> ... legislative provisions must not be considered in a vacuum. The content of a provision "is enriched by the rest of the section in which it is found ....". Thus, it is significant that the expression challenged by CP as being vague ... appears in s. 13(1)(a) alongside various other environmental impacts which attract liability. It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal threat to the environment is not prohibited by s. 13(1). Instead, the potential impact of a contaminant must have some significance in order for s. 13(1) to be breached. The contaminant must have the potential to cause injury or damage to property or to plant or animal life (s. 13(1)(b)), cause harm or material discomfort (s. 13(1)(c)), adversely affect health (s. 13(1)(d)), impair safety (s. 13(1)(e)), render property or plant or animal life unfit for use by man (s. 13(1)(f)), cause loss of enjoyment of normal use of property (s. 13(1)(g)), or interfere with the normal conduct of business (s. 13(1)(h)). The choice of terms in s. 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair a use of the natural environment in a manner which is more than trivial. Therefore, a citizen may not be convicted under s. 13(1)(a)

<sup>94</sup> [1995] 2 S.C.R. 1031.

<sup>95</sup> *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at 647-48.

EPA for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment.<sup>96</sup>

[Emphasis in original]

Although the language of s. 13(1)(a) was vague and potentially quite broad, Gonthier J. relied on a shared feature of paragraphs (a) through (h) to narrow its scope.

While words must always be read in context, determining the impact of a given context on the meaning of a disputed word or phrase is a matter of judgment that must be exercised on a case by case basis, taking into account all relevant sources of legislative meaning. The appropriate approach is well illustrated in the judgment of Cory J. in *R. v. McCraw*.<sup>97</sup> The accused was charged with the offence of threatening "to cause death or serious bodily harm to any person" under s. 264.1(1)(a) of the *Criminal Code*. It was argued that because the expression "serious bodily harm" is associated with the word "death" in this provision, the offence should be limited to threats of harm that are similar in quality and seriousness to threats of death. However, this suggestion was inconsistent with the purpose of the provision, which was to preserve a secure environment in which individuals could move about freely without fear of harm. That purpose would be undermined by any serious threat, not just threats of death or near-death.<sup>98</sup> The Court also noted that the threat of harm to persons in para. (a) must be read in the context of the entire provision which criminalized other types of threat as well: para. (b) dealt with threats to damage property, while para. (c) dealt with threats to harm pets or farm animals. The association with these less serious types of threat offset the reference to death in para. (a).

### LIMITED CLASS

**The limited class rule (*ejusdem generis*).** In *National Bank of Greece (Canada) v. Katsikonouris* La Forest J. explained the limited class rule as follows:

Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.<sup>99</sup>

<sup>96</sup> *Supra* note 94, at para. 64. Compare the reasoning of Lamer C.J. at para. 20. See also *Quebec v. Regie d'alcool*, *supra* note 14, at para. 196, *per* L'Heureux-Dubé J.

[1991] 3 S.C.R. 72.

<sup>98</sup> See also *R. v. Two Young Men and Kootenay* (1979), 101 D.L.R. (3d) 598 (Alta. C.A.), *per* Prowse J.A. at 608: "When general and specific words are associated together, and where they are capable of analogous meaning, the general words should be restricted to their more specific analogous meaning, *noscitur a sociis*, except where doing so would be contrary to the clear intention of the statute as a whole."

<sup>99</sup> (1990), 74 D.L.R. (4th) 197, at 203 (S.C.C.).

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RSNL1990 CHAPTER J-4

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Amended:

1991 c39; 1993 c41; 1993 c53 s17; 1995 c6; 1996 cJ-1.1 s194;  
1997 c43 s1; 1998 c6 s16; 1999 c37; 2001 cN-3.1 s2; 2001 c42 s24; 2004 c36 s20; 2006 c40 s21; 2008 c28; 2009  
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1. This Act may be cited as the *Judicature Act* .

1986 c42 s1

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2. In this Act

- 
- (a) "affidavit " includes a solemn declaration, or statutory declaration, and an agreed statement of facts;
  - (b) "central registry" means the principal office of the registrar at St. John's ;
  - (c) "court " means,
    - (i ) in the Court of Appeal, the court or a judge or the judges of the court, whether sitting in court or chambers, and
    - (ii) in the Trial Division, the court or a judge or the judges of the court, whether sitting in court or chambers;

- (d) "court of appeal" means the appeal division of the Supreme Court of Newfoundland and Labrador ;
- (e) "decision " means the reasons given by the court for its judgment or other order;
- (f) "defendant" means a person served with an originating document, or served with notice of or entitled to attend a proceeding but does not include a respondent;
- (g) "judge " means a judge of the Court of Appeal or the Trial Division as the circumstances may require and includes a judge sitting in chambers;
- (h) "judicial centre" means a judicial centre of the Trial Division continued under this Act;
- (i ) "master " means a Master of the Supreme Court or a person who may be appointed by the court or a judge to so act;
- (j) "minister " means the minister appointed under the *Executive Council Act* to administer this Act;
- (k) "oath " includes solemn affirmation and statutory declaration;
- (l) "order " means an order of the court and includes a judgment, decree or ruling;
- (m) "party " means a person served with notice of, or entitled to attend a proceeding, even if that person is not named in the record;
- (n) "petitioner " includes a person making an application to the Supreme Court, other than as against a defendant;
- (o) "plaintiff " means a person asking relief against another person by a form of proceeding, other than by counterclaim as a defendant but does not include a petitioner;
- (p) "proceeding" means a civil or criminal action, suit, cause or matter, or an interlocutory application, including a proceeding formerly started by a writ of summons, 3rd party notice, counterclaim, petition, originating summons, originating motion or in another manner;
- (q) "reference " means a reference to the Court of Appeal under section 13;
- (r) "registrar " means the Registrar of the Supreme Court;
- (s) "registry " means the office of the registrar in each judicial centre as well as the office of the registrar in the Court of Appeal;
- (t) "rules " means
  - (i ) the Rules of the Supreme Court of Newfoundland and Labrador , 1986 and includes the forms in those rules, and
  - (ii) the Rules of the Supreme Court of Newfoundland and Labrador made under section 55 that replace, amend or revoke the rules and forms;
- (u) "Supreme Court" means the Supreme Court of Newfoundland and Labrador referred to in section 3, and where the subject or context requires, the Court of Appeal or the Trial Division; and
- (v) "Trial Division" means the Trial Division of the Supreme Court.

1986 c42 s2; 1990 c62 s16; 2001 cN-3.1 s2 2006 c40 s21

**Constitutional questions**

57. (1) Where in a proceeding the constitutional validity of an Act or regulation of the Parliament of Canada or of the Legislature is brought into question, it shall not be heard until notice has been given to the Attorney General for Canada and to the Attorney General for the province.

(2) The notice shall state what Act, regulation or part of an Act or regulation is in question and the day on which the question is to be argued, and shall give other particulars that are necessary to show the constitutional point proposed to be argued.

(3) Subject to the rules, the notice shall be served 10 days before the day named for the argument.

(4) The Attorney General for Canada and the Attorney General for the province are entitled as of right to be heard either in person or by counsel notwithstanding that the Crown is not a party to the proceeding.

(5) Where in a proceeding to which this section applies the Attorney General for Canada or the Attorney General for the province appears in person or by counsel, each shall be considered to be a party to the proceeding for the purpose of an appeal from an adjudication as to the constitutional validity of an Act or regulation in question in the proceeding and each has the same rights with respect to an appeal as another party to the proceeding.

(6) Where the court considers it appropriate, the court may order that a notice under this section be given to the Attorney General of a province.

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