*Enge* v. *Mandeville et al*, 2013 NWTSC 33

Date: 2013 06 20
Docket: S-1-CV-2012000002

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WILLIAM ENGE, on his own behalf and
on behalf of the members of the North Slave Métis Alliance

Applicant

- and -

FRED MANDEVILLE in his capacity as Superintendent, North Slave Region, of the Department of Environment and Natural Resources, for the Government of the Northwest Territories and MICHAEL MILTENBERGER in his capacity as Minister of the Department of Environment and Natural Resources, for the Government of the Northwest Territories

Respondents

## MEMORANDUM OF JUDGMENT

## INTRODUCTION

[1] In June 2009, a government survey revealed that the Bathurst caribou herd had declined from more than 100,000 caribou in 2006 to an estimated 31,900. The Government of the Northwest Territories' ("GNWT") response to this precipitous decline was to put in place interim emergency measures which resulted in the closing of the harvest of the Bathurst caribou herd, effective January 1, 2010.

[2] Prior to and following the emergency interim measures being instituted, several organizations, both government and Aboriginal, engaged in discussions regarding how to manage the conservation of the Bathurst caribou herd. By May 31, 2010, the Tłı̨cho Government ("Tłı̨cho") and the Department of Environment and Natural Resources, Government of the Northwest Territories ("ENR") had submitted a *Revised Joint Proposal on Caribou Management Actions in Wek'èezhìi* to the Wek'èezhìi Renewable Resources Board ("WRRB") in which the Tłı̨cho and ENR agreed that the annual harvest of Bathurst caribou should be 300 caribou.

[3] This proposal was ultimately adopted and an annual harvest of 300 caribou was established for the 2010-2011 hunting season and later renewed for the 2011-2012 hunting season. The allocation of the 300 caribou was shared between the Tłı̨cho and the Yellowknives Dene First Nation ("YKDFN").

[4] Throughout this process, the North Slave Métis Alliance ("NSMA") had participated, to an extent, in various meetings regarding caribou management. The NSMA made several unsuccessful requests for a share of the annual harvest of the Bathurst caribou herd, culminating in a written request to Michael Miltenberger, the Minister responsible for ENR, on November 18, 2011. In a letter dated December 8, 2011, Mr. Miltenberger denied the NSMA's request and referred them to the Tłı̨cho or YKDFN to make their own arrangements for caribou tags.

[5] The Applicant William Enge, on behalf of the NSMA, filed an Originating Notice seeking judicial review of the Minister's decision. In his application, the Applicant alleges that the Respondents, as representatives of the GNWT, breached their duty to consult with the NSMA and their duty to accommodate the NSMA's Aboriginal rights, pursuant to section 35(1) of the *Constitution Act, 1982*.

PRELIMINARY ISSUES

[6] The parties do not agree on the contents of the record for the purposes of the judicial review and each have filed documents that they claim should be considered in this proceeding.

[7] The Respondents filed, on February 8, 2012, a Certificate pursuant to Rule 598(1) (now Rule 601) of the *Rules of the Supreme Court of the Northwest Territories* attaching four volumes of materials comprising 1977 pages. The Respondents subsequently filed an Affidavit of Fred Talen on April 27, 2012 which briefly outlines the history of land claim and self-government negotiations in the Northwest Territories.

[8] The Applicant filed several affidavits which exhibited a number of documents. At the hearing, counsel for the Applicant also filed a "Chambers Record" which comprised three volumes and contained the affidavits he had previously filed. Included in the affidavits are many documents which were included in the return filed by the Respondents. There are also a number of documents which were not included in the return. They include, for example, affidavits filed by the Applicant, Lawrence Mercredi, Wayne Mercredi and Edward Jones, all members of the NSMA; the Affidavit of Patricia A. McCormack, Ph.D. which contains her research report prepared for the North

Slave Métis Alliance: *The Ethnogenesis of the Northern Métis of the Great Slave Lake Area* (2011)[unpublished, prepared for Counsel for the Applicant](the "*McCormack Report"*); and a document entitled "A Management Plan for the Bathurst Caribou Herd" prepared by the Bathurst Caribou Management Planning Committee on November 4, 2004. There are a number of other documents which I have not listed. Some are documents which appear to have been generated by ENR or elsewhere in the GNWT; others are documents emanating from the NSMA or historical documents.

[9] The Respondents are opposed to the Applicant's materials being considered on the judicial review. Their position is that a judicial review is based upon the record before the decision-maker and as stipulated in Rule 598. Further, that the Applicant should have brought an application to amend the record, compel production of specific documents, admit fresh evidence or have the Court establish the contents of the record if he was not satisfied with the contents of the Certificate filed by the Respondents.

[10] The Applicant argues that a judicial review of a decision made by an administrative decision-maker is different from that of an adjudicative tribunal and that the record before the decision-maker constitutes only part of the record. Moreover, an administrative decision is often made in circumstances where there is no hearing or other opportunity to place evidence before the decision-maker.

[11] The Applicant also claims that the failure of the government to follow a proper consultation process deprived the Applicant of the opportunity to present evidence regarding the strength of their claim and the nature of the right in issue. To rely upon the record as compiled by the Respondents would impact on the ability of the Court to properly assess the consultation process and would deny the Applicant procedural fairness.

[12] While the Respondents are correct that a judicial review is usually based upon the record before the decision-maker and that issues regarding the content of the record should often be dealt with prior to the hearing, I agree with the arguments of the Applicant that, in this situation, the record is not the only evidence that can be considered on the judicial review.

[13] An application for judicial review requires the decision-maker, pursuant to Rule 598, to return a number of items to the Clerk. They include:

(a) The judgment, order or decision, as the case may be;
(b) The process commencing the proceeding;

(c) The evidence and all exhibits filed, if any;
(d) All things touching the matter;
(e) The originating notice served on the person; and
(f) A certificate in the following form:

"Pursuant to the accompanying originating notice, I hereby return to the Honourable Supreme Court the following papers and documents:

(a) The judgment, order or decision, as the case may be, and the reasons for it;
(b) The process commencing the proceeding;
(c) The evidence taken at the hearing and all exhibits filed;
(d) All other papers or documents touching the matter.

And I hereby certify to the Honourable Supreme Court that I have enclosed in this return all the papers and documents in my custody relating to the matter set forth in the originating notice."

[14] The documents returned under Rule 598 frequently form the evidentiary basis for a judicial review application. However, the language used in the Rules suggests that they may not always constitute the entire record. Under Rule 595(2) (now Rule 601(5)), the return required by Rule 598 was considered to constitute part of the record. In addition, Rule 597 contemplated the use of affidavits by establishing a requirement for the applicant to serve the application for judicial review and supporting affidavits on the tribunal, Attorney General for the Territories and every person directly affected by the proceeding.

[15] Aside from the certified record and affidavits, the Rules also permit the parties to agree on the contents of the record for the purposes of a judicial review application: Rule 598(6) (now Rule 601(7)). If parties are unable to agree on the contents of the record or object to the admissibility of an affidavit, there are various methods available to the parties to resolve issues regarding the record: Jones and deVillars, *Principles of Administrative Law,* 5th Ed. at p. 469. In this case, the Respondents filed a certified record and an affidavit, the Applicant filed multiple affidavits yet neither party chose to resolve the issue of the record prior to the hearing.

[16] The nature of this judicial review is also relevant. Judicial review is a process intended "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes." *Dunsmuir* v. *New Brunswick,* [2008] 1

S.C.R. 190 at para. 28. In a duty to consult case, the focus is on the process of consultation and accommodation rather than the outcome. This requires a preliminary assessment of the strength of the claim and the seriousness of the potential impact upon the affected right: *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 39, 63. In determining whether the government has met its duty to consult obligations, the Court is required to review evidence relating to the preliminary assessment: *Adams Lake Indian Band* v. *British Columbia (Lieutenant Governor in Council)* 2011 BCSC 266 at para. 32.

[17] Where the claim is that the government failed to conduct the preliminary assessment and failed to meet its duty to consult, it is difficult to see how all of the relevant evidence could be included in the record that the government has filed: *Tsuu T'ina Nation* v. *Alberta (Environment)*, [2008] A.J. No 980 (Q.B.) at para. 26. Indeed, the argument of the Applicant is that, had the Respondents engaged in meaningful consultation, the evidence in issue would have been included in the return because the documents would have been before the Minister. I agree. Had the Respondents conducted a preliminary assessment, the issues of the strength of the claim and seriousness of the impact upon the affected right would likely have resulted in dialogue and the exchange of information between the parties.

[18] Further, the duty to consult regarding Aboriginal rights is a constitutional issue which should not be discussed in a factual vacuum: *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at para. 46. Courts require evidence regarding a claimant's Aboriginal rights in order to assess the merits of a claim and whether the government has met its duty to consult. The honour of the Crown grounds the duty to consult and accommodate Aboriginal peoples and it would be inconsistent with the honour of the Crown to limit the evidence which might assist the court in making that determination: *Haida Nation, supra* at para. 16; *Tsuu T'ina, supra* at para. 29.

[19] This approach is consistent with the that taken by the Saskatchewan Court of Appeal in *Hartwig* v. *Saskatoon (City) Police Assn.*, 2007 SKCA 74 at para. 31-32:

> [I]n my view, it is necessary to revisit and revise traditional notions about the scope of the materials properly before a court on a judicial review application.
>
> As indicated, I prefer to base my conclusion in this regard on the straightforward proposition that the parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make.

[20] Much of the content of the Chambers Record is included in the return filed by the Respondents. While the Respondents' position is that the only evidence that should be permitted on the judicial review is the return, I note that no objections were raised to any specific item in the Chambers Record and, in submissions, counsel for the Respondents did not dispute any specific facts or evidence alleged by the Applicant. That being said, I am mindful that much of this evidence has not been tested as it would be during a trial. However, this is not a trial and I am of the view that it is incumbent on the Court to accept at face value the documents filed by both parties in order to fulfill my obligation to conduct a preliminary assessment of the nature and extent of the Respondents' duty to consult and accommodate and whether the Respondents fulfilled that duty.

[21] There are also two issues which were addressed in the Applicant's written materials but which, at the outset of submissions, the Respondents conceded were not in issue. The first is that the Applicant has standing to bring this application and the second is that the GNWT is the proper Crown to be brought as a Respondent in this judicial review.

STANDARD OF REVIEW

[22] There are a number of issues which arise on this application, each requiring consideration of the appropriate standard of review. There are two standards of review which might be applicable to each issue: correctness or reasonableness. The reasonableness standard is one of deference and involves the review and analysis of the decision-maker's reasoning process and decision. The question is not whether the decision is correct but whether it is within a range of acceptable and rational outcomes. The focus is on the outcome and on the process of articulating the reasons. Applying the reasonableness standard involves a search for justification, transparency and intelligibility in the decision-making process. *Dunsmuir* v. *New Brunswick,* 2008 SCC 9 at paras. 47-49.

[23] The correctness standard does not involve deference to the decision-maker and a reviewing court will undertake its own analysis of the issues. If the court does not agree with the decision, it will provide the correct answer. The question is whether the decision was correct. *Dunsmuir, supra* at para. 50.

[24] The Respondents' position is that considerable deference is owed to the Minister's decision and that the reasonableness standard should apply. The Respondents further argue that the issues involve questions of fact, of discretion and policy, and of law, and that the combination of those circumstances results in

the automatic application of the reasonableness standard. In addition, where a decision-maker interprets its own statute or statutes closely connected with its function, deference is applicable. As the Minister was dealing with the *Wildlife Act* and the amendment of its regulations, he was acting within the scope of his authority and expertise. I agree with the Respondents that reasonableness applies to some of the issues before the Court but not all of them.

[25] Determining the appropriate standard of review involves a two-step process: first, ascertaining whether the standard of review has already been determined in a satisfactory manner; and second, where the first step is unsuccessful, undertaking an analysis of the *Dunsmuir* factors. *Dunsmuir, supra* at para. 62.

[26] The standard of review in duty to consult cases has been determined in several cases. The existence and extent of the duty to consult are questions of law which are reviewable on a standard of correctness. To the extent that the Crown's assessment of its duty to consult is premised on findings of facts, a degree of deference may be appropriate with respect to findings of fact. The Crown's preliminary assessment of the strength of the claim and the assessment of the potential impact on the right must be correct. *Haida Nation, supra* at paras. 61, 63; *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 48; *Adams Lake Indian Band, supra* at para. 139; *West Moberly First Nations* v. *British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para. 174; *Hupacasath First Nation* v. *British Columbia (Minister of Forests)*, [2009] 1 C.N.L.R. 30 (B.C.S.C.) at para. 187.

[27] The process used for consultation and the results of the consultation are subject to the reasonableness standard. Determining whether the Crown has complied with its duty to consult is subject to the standard of reasonableness. The focus is on the process of consultation and accommodation rather than the outcome. The Crown's choice of process will be reasonable as long as it falls within a range of possible, acceptable choices. *Haida Nation, supra* at paras. 61, 63; *West Moberly, supra* at para. 174; *Hupacasath, supra* at para. 187; *Huu-Ay-Aht First Nation* v. *British Columbia (Minister of Forests)*, [2005] C.N.L.R. 74 at para. 95; *Wii'litswx* v. *British Columbia (Minister of Forests)*, 2008 BCSC 1139 at paras. 14-16.

[28] While the Supreme Court of Canada's decision in *Dunsmuir* post-dates the decision in *Haida Nation,* I agree with the Federal Court of Appeal's conclusion that the standard of review in this case has not been changed by the Supreme Court of Canada's decision in *Dunsmuir*: *Ahousaht Indian Band* v. *Canada (Minister of*

*Fisheries and Oceans)*, [2008] 3 C.N.L.R. 67 (F.C.A.) at para. 34. See also *Hupacasath, supra* at paras. 185-187.

WILDLIFE MANAGEMENT REGIME

[29] The GNWT has been granted plenary jurisdiction over wildlife management by virtue of its delegated authority to make ordinances for the "preservation of game" pursuant to sections 16 and 18 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27.

[30] The GNWT exercises its jurisdiction over wildlife through the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4, and its associated regulations, subject to various land claim agreements that have been negotiated throughout the Northwest Territories. This jurisdiction over wildlife is also subject to Aboriginal and treaty rights that exist pursuant to section 35(1) of the *Constitution Act, 1982*.

[31] Conservation of the Bathurst caribou herd in the Northwest Territories is subject to what has been called a co-management regime administered through the *Wildlife Act* and its associated regulations and the WRRB.

[32] The *Tłį̨cho Land Claims and Self-Government Agreement ("Tłį̨cho Agreement")*, signed by the Tłį̨cho, the GNWT and the Government of Canada ("Canada") on August 25, 2003, created the WRRB and gave it powers over wildlife management in Wek'èezhìi, an area of land covered by the *Tłį̨cho Agreement*. The no hunting zone is located in Wek'èezhìi. The WRRB has the authority to make recommendations or determinations regarding, among other things, the total allowable harvest for wildlife or allocations of the total allowable harvest to groups of persons.

[33] Section 12.11.2 of the *Tłį̨cho Agreement* requires the Tłį̨cho and GNWT to, separately or jointly, prepare a comprehensive proposal for the management of the Bathurst caribou herd and submit it to the WRRB for review.

[34] The provisions of the *Tłį̨cho Agreement* require the WRRB to review the proposal and to consult with the GNWT, the Tłį̨cho and any other bodies with management powers over a national park or any body with authority over wildlife outside Wek'èezhì when dealing with migratory wildlife. As part of the review, the WRRB is permitted to consult with other Aboriginal groups, Tłį̨cho community representatives and the public through informal meetings or public hearings.

[35] Upon completing their review, the WRRB is required, pursuant to section 12.5.5(a)(iii) of the *Tłı̨cho Agreement*, to make a final determination of the proposal for the management of the Bathurst caribou herd. In making the determination, the WRRB is required to do so in accordance with sections 12.6 or 12.7 of the *Tłı̨cho Agreement*.

[36] The WRRB also has the authority to set total allowable harvest levels. Sections 12.6 and 12.7 of the *Tłı̨cho Agreement* establish the guidelines that the WRRB must follow in setting a total allowable harvest level.

[37] Section 12.7.1 requires the WRBB to give priority to the Tłı̨cho and other Aboriginal people in making an allocation of a total allowable harvest level:

> 12.7.1 When the *Wek'èezhìi* Renewable Resources Board makes an allocation of a total allowable harvest level, it shall allocate
>
> (a) a sufficient portion
>
> (i) for the Tłı̨cho First Nation to exercise its rights to harvest wildlife in *Wek'èezhìi,* and
>
> (ii) for any other Aboriginal people to exercise its rights to harvest wildlife in *Wek'èezhìi*;
>
> (b) portions of any remainder of the total allowable harvest level among other groups of person or for other purposes.

[38] The WRRB has the authority to establish limits on harvesting for conservation purposes pursuant to section 12.6 of the *Tłı̨cho Agreement*. When establishing limits on harvesting in Wek'èezhìi, the WRRB is required to give priority to Aboriginal people, specifically "Tłı̨cho Citizens and members of an Aboriginal people, with rights to harvest wildlife in *Wek'èezhìi,* over other persons." Section 12.6.5(b)(i), *Tłı̨cho Agreement*.

[39] The *Wildlife Act* permits the Commissioner of the Northwest Territories, on the recommendation of the Minister responsible for ENR, to establish wildlife management zones and to make regulations regarding wildlife management. The *Big Game Hunting Regulations*, R-019-92, set out the applicable quotas for big game, including the Bathurst caribou herd, in the established wildlife management zones and also establishes the distribution system for tags to hunt big game.

## FACTS

### North Slave Métis Alliance

[40] The North Slave Métis Alliance is a society which was incorporated under the *Societies Act*, R.S.N.W.T. 1988, c. S-11 on November 22, 1996. The Constitution of the NSMA outlines its purposes and objects, which include:

> 2.1. [U]nite the membership of the community of Indigenous Métis of the North Slave area of the Northwest Territories;
>
> 2.2 [P]romote pride of Métis culture and heritage amongst the community of Indigenous Métis of the North Slave area of the Northwest Territories;
>
> 2.3 [N]egotiate, ratify and implement a North Slave area of the Northwest Territories land claim agreement between the community of Indigenous Métis of the North Slave area of the Northwest Territories, the federal Crown as represented by the Government of Canada and the territorial Crown as represented by the Government of the Northwest Territories;
>
> 2.5 [P]romote in support the recognition of the Aboriginal Rights and Title and Treaty Rights of the community of Indigenous Métis of the North Slave area of the Northwest Territories;
>
> 2.9 [A]dvance and support the constitutional, legal, political, social and economic rights of the community of Indigenous Métis of the North Slave area in the Northwest Territories.

[41] Membership in the NSMA is limited to Indigenous Métis who are defined in their bylaws as:

> 1.6 [A] person who is descendant of the Métis People of the Northwest Territories including the North Slave area and is recognized by the Community of Indigenous Métis of the North Slave area as a descendant of the Métis People who resided in or used and occupied the Northwest Territories including the North Slave area prior to the federal Crown taking effective control of their traditional lands including the North Slave area.

[42] According to the bylaws, no one is permitted to be a member of the NSMA if they are registered as an Indian under the *Indian Act,* R.S.C. 1985, c. I-5, or if they are a member of the Tłįcho First Nation or the Yellowknives Dene First Nation, or of any other Aboriginal rights or claims process.

[43] The Applicant is the President of the NSMA. The Applicant self-identifies as a Métis person and as a member of the Métis community in the Great Slave area of the Northwest Territories.

[44] Over the past few years, the NSMA has had interactions with the Mackenzie Valley Land and Water Board, Indian and Northern Affairs Canada, the National Energy Board, and Parks Canada regarding the NSMA's desire to be consulted on issues which the NSMA has asserted impact upon their Aboriginal rights. The government response has frequently been that the NSMA's status as an identifiable Aboriginal group was uncertain and needed to be clarified.

[45] On July 22, 2011, Trish Merrithew-Mercredi, Regional Director General of Aboriginal Affairs and Northern Development Canada wrote to the Applicant to advise that Canada would be determining the status and role of the NSMA with respect to consultation matters. There is no evidence that Canada has subsequently come to any conclusion with respect to the status of the NSMA.

Chronology of Events Related to the Bathurst Caribou Herd

[46] The NSMA has also had contact with the WRRB and ENR on a variety of wildlife issues including caribou management. The NSMA's involvement in caribou management extends as far back as 2004.

[47] On November 4, 2004, the Bathurst Caribou Management Planning Committee (the "Bathurst Committee") completed "*A Management Plan for the Bathurst Caribou Herd*." This plan resulted from the *Bathurst Barren Ground Caribou Management Planning Agreement* (the "*Bathurst Agreement*") which was agreed to on April 27, 2000, between the Department of Indian and Northern Affairs, Canada, the Department of Resources, Wildlife and Economic Development ("RWED"), GNWT, the Dogrib Treaty 11 Council (a predecessor to the Tłı̨chǫ), the YKDFN, the NSMA and other Aboriginal organizations.

[48] The *Bathurst Agreement* recognized that "a special relationship exists between Aboriginal users and the caribou." It also created the Bathurst Committee whose objective was to prepare a management plan for the Bathurst caribou herd in accordance with the a number of principles. One of the principles guiding the development of the management plan was the recognition and protection of "the harvesting rights of Dogrib, Yellowknives and… the North Slave Métis."

[49] The Bathurst Committee was composed of one representative from Indian and Northern Affairs Canada, RWED, the NSMA, and the other signatories to the *Bathurst Agreement*.

[50] The management plan created by the Bathurst Committee recognized that the size of the Bathurst caribou herd was declining and recommended various conservation measures to ensure the long-term survival of the herd.

[51] After the implementation of the *Tłįcho Agreement* and the creation of the WRRB, the Applicant wrote on April 21, 2007 to Michael McLeod, then Minister responsible for ENR, asserting Aboriginal rights with respect to caribou on NSMA members' traditional lands and requesting to be consulted on the development of a new management plan for the caribou. There is no record in the evidence of a response to this letter.

[52] On August 28, 2008, Susan Fleck, the Director of the Wildlife Division at ENR, sent an e-mail to Fred Talen, the Director of Negotiations, seeking his advice on the proposed Species at Risk legislation and how the GNWT could consult with Aboriginal groups on wildlife management decisions. Consultation with the NSMA was specifically precluded as Ms. Fleck wrote "we would not consider adding the NSMA to this list."

[53] Fred Talen responded on September 9, 2008 by e-mail and advised Ms. Fleck about the government's duty to consult. He stated:

> Consultation with affected Aboriginal groups on planned actions taken to protect species at risk is likely necessary. While the legislation may not need to confirm this – government's duty to consult should be understood (by government). I would suggest you seek legal advice on the extent of the duty to consult. (I would note that I would anticipate that the duty to consult will likely extend to the NSMA as well as to non-resident Aboriginal groups who have harvesting rights in the NWT)
>
> Your suggestion of completing consultation protocols with the various Aboriginal groups is, I believe a good one. While the upfront effort to complete these protocols might be heavy, being able to rely on established process in the future should be worth the upfront investment.

[54] There is no evidence that the GNWT or ENR have developed consultation protocols for consulting with any Aboriginal groups.

[55] In June 2009, representatives from the NSMA, Lutsel K'e Dene First Nations, Tłįcho, and YKDFN participated in the Bathurst Caribou Herd Calving Ground Survey conducted by ENR. It was this survey that revealed the decline of the Bathurst caribou herd from more than 100,000 caribou in 2006 to an estimated 31,900.

[56] On July 31, 2009, the WRRB requested that ENR and the Tłįcho submit a joint wildlife management proposal addressing the decline of the Bathurst caribou herd by the end of October 2009.

[57] ENR officials met with NSMA members on August 14, 2009 to discuss the results of the survey. Following this meeting, the "Engagement/Consultation Log" completed by ENR indicates that the NSMA requested funding to increase their ability to engage in consultation. The ENR response was "ENR will always try to support NSMA members be involved in surveys, community hunts, workshops, etc."

[58] The NSMA sent three members to attend a Bathurst Caribou Recovery Workshop hosted by ENR on October 1-2, 2009. A second workshop was held on October 5-6, 2009. Workshop participants included representatives from ENR, other government departments and boards, caribou outfitters and Aboriginal groups. The purpose of the workshops was to review the survey results and to discuss management actions to assist in the recovery of the herd.

[59] Gary Bohnet, then Deputy Minister of ENR, wrote to the NSMA on October 23, 2009 to propose meeting to "obtain guidance" in managing the conservation of the Bathurst caribou herd. This letter was sent to a number of Aboriginal groups on the same date.

[60] The Applicant wrote to the Deputy Minister on November 10, 2009 responding to the request and repeated the NSMA's request to be consulted and, if necessary, accommodated. The Applicant claimed that the NSMA was entitled to "the same level of Consultation and Accommodation as other First Nations your Department deals with."

[61] In November and December 2009, there were attempts made by the ENR meeting coordinator to set up a meeting with the NSMA. Sheryl Grieve, Environment and Resource Manager for the NSMA, replied by e-mail on December 1, 2009 that the NSMA was not prepared to meet to discuss caribou management until ENR provided funding to "support our meaningful engagement" on the issue.

[62] On November 5, 2009, ENR and the Tłįcho submitted to the WRRB a "Joint Proposal on Caribou Management Actions in Wek'eezhii" (the "joint proposal"). This joint proposal contemplated a limited Aboriginal harvest of the Bathurst caribou herd. The proposal did not specify how the harvest would be allocated between various Aboriginal groups.

[63] The Interim Chair of the WRRB wrote to the Deputy Minister of ENR on November 23 and 24, 2009. In both letters, the issue of consultation with the NSMA was raised. In the first letter, the WRRB sought information on ENR's consultations with Aboriginal groups in the North and South Slave areas. In the second letter, the WRRB requested evidence that the GNWT had consulted with the Métis people about the joint proposal.

[64] On December 17, 2009, the GNWT announced that interim emergency measures had been put into place to help conserve the Bathurst caribou herd. Effective January 1, 2010, harvesting of the Bathurst caribou herd was prohibited. This was accomplished by amending the *Big Game Hunting* Regulations to ban the hunting of caribou in wildlife management area R/BC/02 and reducing to zero the allowable tags for caribou in wildlife management area R/BC/01. Two new bison hunting zones were created in the North Slave region to alleviate any hardship that communities would face.

[65] The Deputy Minister of ENR responded to the Applicant's November 10, 2009 letter on December 18, 2009 and outlined ENR's approach to "consult with other Aboriginal governments and organizations" following the submission of the joint proposal to the WRRB. He also wrote:

> Engagement and consultation are of prime importance to the Department. ENR is pleased to share information with you on any wildlife management issue and hear your concerns or suggestions in regard to the management of wildlife…. By undertaking these discussions with the NSMA, the GNWT is not recognizing, affirming or denying any asserted Aboriginal or treaty right or Aboriginal title claim made by, or on behalf of, the NSMA.

[66] On February 8, 2010, the Deputy Minister of ENR responded to the WRRB's letters of November 23 and 24, 2009. He outlined the consultation that ENR had conducted with Aboriginal groups on the joint proposal. With respect to the consultation that had occurred with the NSMA, he referred to: the August 14$^{th}$ presentation on the Bathurst survey; the October 2009 workshop; the invitation that ENR had extended to meet with NSMA and subsequent attempts to arrange that meeting; and the letter of December 18$^{th}$ from ENR to the NSMA. The Deputy

Minister also assured the WRRB that ENR would continue to consult with Aboriginal governments, organizations and other groups prior to public hearings on the joint proposal.

[67] The Applicant wrote to the Deputy Minister of ENR on February 15, 2010 and again complained that ENR had failed to live up to its obligation to consult with the NSMA. He was also critical of the steps that ENR had taken to that date and claimed that the funding provided was not adequate to support the NSMA in its efforts to consult with ENR. The Applicant requested increased funding and urged ENR to "prepare a proposed Consultation Plan and proposed budget to… [consult] on wildlife management issues." He also requested that the NSMA be provided with a seat on the WRRB and other boards in the Northwest Territories. The letter concluded with an invitation to attend a meeting that the NSMA had scheduled for March 1, 2010 to discuss caribou conservation.

[68] E-mails were exchanged between NSMA and ENR officials to confirm their attendance at the March 1, 2010 meeting. In an e-mail sent February 23, 2010, Sheryl Grieve, the Environment and Resource Manager for the NSMA, advised that "this meeting is only to talk about the actual research that has been done, not politics or legislation."

[69] The Deputy Minister responded on March 1, 2010 advising that he could not attend the meeting but that representatives from ENR would attend. He responded to the issue of consultation as follows:

> ENR does not have a consultation protocol with any Aboriginal Governments or Organizations at this time, and is not prepared to enter into a consultation protocol with the NSMA. ENR recognized that the NSMA has asserted Aboriginal rights and title. ENR is prepared to consult with the NSMA on matters that may affect the NSMA's asserted rights. Any consultation with respect to asserted rights should not be construed as an acknowledgement or recognition of established rights by the GNWT.
>
> ENR understands to date the Government of Canada has not recognized the NSMA as a distinct Aboriginal people or community having Aboriginal rights or title in the North Slave Region. Without confirmation that the NSMA represents a distinct Aboriginal people with Aboriginal or treaty rights, ENR is not in a position to support NSMA membership on Northwest Territories (NWT) renewable resources or regulatory review boards.

[70] Representatives from ENR attended the NSMA meeting on March 1, 2010 and updated NSMA members on the latest research and monitoring of wildlife in

the North Slave Region. The decline of the Bathurst caribou herd was discussed at this meeting.

[71] In March 2010, the WRRB held a 5 day hearing on the joint proposal. The NSMA attended the hearing and made a presentation on caribou management. The hearing was adjourned to May 30, 2010 to permit the Tłįcho and ENR to revise the joint proposal.

[72] The Deputy Minister of ENR wrote to the NSMA on April 12, 2010 to advise that the WRRB had discussed the joint proposal and requested that ENR and the Tłįcho submit a refined proposal. He requested a meeting to update the NSMA on the process and to discuss caribou management. He also wrote:

> ENR recognizes that the North Slave Métis Alliance (NSMA) has asserted Aboriginal rights and title and is prepared to consult with the NSMA on matters that may affect the NSMA's asserted rights. Any consultation with respect to asserted rights should not be construed as an acknowledgement of recognition of established rights by the Government of the Northwest Territories.

[73] Despite discussions between ENR and NSMA, the meeting did not occur. There appear to have been issues with scheduling the meeting as well as issues with funding. On May 21, 2010, Ernie Campbell, then Assistant Deputy Minister of ENR, wrote to the NSMA proposing a one-day workshop on caribou management. His letter also included the paragraph stated above acknowledging that the NSMA had asserted Aboriginal rights and that ENR was prepared to consult with the NSMA.

[74] ENR and the Tłįcho submitted a "Revised Joint Proposal on Caribou Management Actions in Wek'eezhii" (the "revised joint proposal") to the WRRB on May 31, 2010. This proposal allowed a limited Aboriginal harvest of Bathurst caribou in the no hunting zone created by the GNWT in January 2010. The annual harvest of Bathurst caribou was to be limited to 300 caribou (plus or minus 10%). This was to be accomplished by the use of a harvesting target rather than a Total Allowable Harvest because:

> [It] seems most appropriate in light of confidence levels for current herd population and harvest data, and as the means considered most supportive of innovative and effective implementation of proposed hunting targets.

[75] Allocation of the harvest was to be determined after further discussion between the Tłįcho, ENR and other Aboriginal groups. The revised joint proposal noted that it did "not preclude the right to harvest for other Aboriginal groups, and

it does not diminish the GNWT's requirement to consult with other Aboriginal groups."

[76] The Applicant replied to Mr. Campbell's letter on June 14, 2010 accepting the offer of a workshop and requesting information in order to prepare "to be consulted in a meaningful manner." The NSMA requested specific information on several items, including:

- An explanation of how NSMA members' rights had been protected and accommodated in the new proposal.
- How ENR proposed to allocate the caribou between the Métis, Dene, and Inuit?
- An explanation of how the NSMA would be represented in caribou management programs within and outside of the Wek'èezhìi Settlement Area.
- Why there was no estimate of Métis harvests for… Tłįcho communities… or Yellowknife?
- Why there was no assessment of the Métis community country food needs and effects of caribou scarcity on community and individual well-being?

[77] Prior to the workshop, ENR provided a written response to some of the questions posed by the NSMA. ENR indicated that it wished to discuss allocation of the caribou hunt with the NSMA. Addressing the NSMA's rights, ENR stated:

> There are several statements in the revised joint proposal by the Tłįcho Government and ENR that indicate the proposal does not preclude the right to harvest for other Aboriginal groups, and it does not diminish the GNWT's requirement to consult with other Aboriginal groups.

[78] At the workshop, which occurred on August 8, 2010, the decline of the Bathurst caribou herd was discussed as well as options for managing the recovery of the herd. In discussing the allocation of the harvesting target of 300 caribou, the response from Susan Fleck was "From the discussion we have with the YKDFN, if there are tags they want it to just go to them… Métis will have to go to them for tags."

[79] There is no indication that estimates of Métis harvests, Métis community country food needs and the effects of caribou scarcity on community and individual well-being were discussed at the workshop.

[80] When pressed on how ENR planned to consult with the NSMA on the allocation of the caribou harvest, Ms. Fleck responded:

> I know NSMA has for a long time asked about a formal consultation plan or a formal consultation process… We have consistently written back to NSMA that we will not do it and this part of this is because NSMA has asserted right[s] not confirmed rights. Legal counsel indicated that we recognize rights but not the NSMA as a party that represents those rights… no formal consultation, even this meeting is not consultation, just engagement.

[81] Following the meeting, Ms. Fleck sent an e-mail to Ernie Campbell summarizing the meeting. On the issue of consultation, she wrote:

> Recognize NSMA has asked for formal consultation since 2007 public hearing, this is not a consultation session but engagement, GNWT does not recognize NSMA as asserted rights and traditional territory have not been affirmed, no intent to not recognize harvesting rights of people in attendance.

[82] Mr. Campbell wrote to the NSMA on September 14, 2010 to thank the NSMA for participating in the workshop. In his letter, he again noted that:

> The Government of the Northwest Territories is not, by undertaking this consultation with the NSMA, recognizing, affirming or denying any asserted Aboriginal or treaty right or Aboriginal claim made by, or on behalf of the NSMA.

He also committed to involving the NSMA in data collection and information sharing as well as having an additional meeting if necessary.

[83] On October 7, 2010, the YKDFN and GNWT signed an agreement giving the YKDFN a limited harvest of the Bathurst caribou herd within the no hunting zone. The YKDFN were permitted to harvest 150 Bathurst caribou up to April 2011. The YKDFN were also permitted to hunt limited numbers of caribou from other herds (Ahiak, Bluenose- East) in the no hunting zone.

[84] The WRRB released its Recommendation Report on the revised joint proposal on October 8, 2010. The recommendations specifically did not take into account the agreement signed between the YKDFN and GNWT the previous day.

[85] The WRRB report stated that the WRRB was in support of implementing a harvest target rather than a Total Allowable Harvest and that the target should be 300 Bathurst caribou per year for three years. The WRRB recommended that the allocation of the annual harvest target should be 225 caribou to Tłįcho citizens and

75 caribou to members of an Aboriginal people with rights to hunt in Mowhi Gogha De Niitlee, the traditional area of the Tłįcho. The WRRB also recommended that ENR determine the allocation to members of an Aboriginal people with rights to hunt in Môwhì Gogha Dè Nîîtåléè in consultation with those groups.

[86] On October 14, 2010, the Applicant wrote to the Minister for ENR, noting the agreement signed by the GNWT and YKDFN and the Recommendation Report of the WRRB, and asked to negotiate a similar agreement with ENR to establish a caribou harvest allocation for the NSMA.

[87] The Minister replied to the Applicant's letter on November 3, 2010. He referred to the August 8, 2010 workshop wherein ENR advised the NSMA that their members "would be expected to make their own arrangements with the Tłįcho Government or the YKDFN to access potential tags for the no hunting zone."

[88] The Minister also advised that ENR refused to negotiate a harvest agreement with the NSMA stating:

> ENR understands that to date the Government of Canada has not recognized the NSMA as distinct Aboriginal people or community that have Aboriginal rights or title in the North Slave Region. Without confirmation that the NSMA represents a distinct Aboriginal people with Aboriginal or treaty rights, ENR is not in a position to negotiate a harvest agreement with the NSMA.
>
> ENR recognizes that the NSMA has asserted Aboriginal rights and title, and Department representatives met with the NSMA regarding potential effects on those asserted rights on August 8, 2010. As indicated during that meeting, any discussion with respect to asserted rights should not be construed as an acknowledgement, or recognition of, those asserted rights by the Government of the Northwest Territories.

[89] On December 8, 2010, ENR amended the *Big Game Hunting Regulations* to implement the agreements that ENR had concluded with the Tłįcho and YKDFN. A new management zone, R/BC/03, was created and caribou tags for hunting in R/BC/02 and R/BC/03 were permitted.

[90] On February 25, 2011 the Minister wrote to a number of Aboriginal groups including the NSMA regarding the Draft NWT Barren-ground Caribou Management Strategy which was to cover a five year period from 2011 to 2015.

[91] The NSMA replied on April 15, 2011 advising that they had been unable to review the strategy and discuss with their members because of a lack of funding and staff. The letter also included a request to provide sufficient resources so that the NSMA could participate in consultation with ENR.

[92] On June 17, 2011, ENR and the Tłįcho submitted to the WRRB an Implementation Plan (the "Plan") that they had developed in consultation with WRRB staff to "demonstrate how the parties will implement proposed management and monitoring actions to promote the recovery and stabilization of the Bathurst Caribou herd."

[93] In discussing the division of the Aboriginal harvest, the Plan noted that while the WRRB recommendation had proposed that the Tłįcho harvest 225 out of the allocation of 300 caribou, the revised joint proposal had called for an equal division of the 300 Bathurst caribou between the Tłįcho and YKDFN. Further, ENR and the YKDFN had signed a separate agreement which agreed to that division. There was no reference to other Aboriginal groups receiving any portion of the allocation of Bathurst caribou harvest target.

[94] The Plan also discussed how the Bathurst caribou hunt would be administered. ENR, the Tłįcho and YKDFN had developed an authorization card which would be required for Tłįcho and YKDFN members to harvest Bathurst caribou in R/BC/02 and R/BC/03. One card was equal to one caribou and once the limit of 300 caribou had been reached, the Bathurst caribou hunting season would be declared closed by the Tłįcho and ENR.

[95] On June 22, 2011, the Applicant provided ENR a binder containing information about the NSMA, a genealogy for the Applicant and secondary authorities which discussed the historic community of Métis in the Great Slave Lake area.

[96] On June 30, 2011, the WRRB accepted the Plan.

[97] The NSMA wrote to the WRRB on July 22, 2011 regarding the Plan and noted a number of concerns with the plan, including that the NSMA had not been consulted, none of the harvest target of 300 caribou had been allocated to the North Slave Métis, and there was no reference to NSMA involvement in several aspects of the Plan.

[98] The letter requested that the NSMA be provided at least 60 caribou from the harvest target set for the Bathurst caribou herd, that the NSMA be consulted on the

caribou management zones, and that the NSMA be represented on boards and committees which had the potential to impact upon their Aboriginal rights.

[99] The Barrenground Technical Working Group completed the "Barren-Ground Caribou Harvest Summary Winter 2011" on July 26, 2011. The total estimated winter harvest for the Bathurst herd was 213 caribou of which the Tłįcho harvested 152 caribou and the YKDFN harvested 61 caribou.

[100] The Chair of the WRRB wrote to the Minister of ENR and the Grand Chief of the Tłįcho on September 26, 2011 advising that the WRRB had reviewed the Harvest Summary and the results were clear that the efforts of the Tłįcho and GNWT had resulted in a reduction in the harvest of the Bathurst caribou herd. The WRRB's view was that there was no need to introduce a Total Allowable Harvest and recommended that the harvest target of 300 Bathurst caribou remain in place until the 2012 survey was completed.

[101] On October 11, 2011, the WRRB e-mailed a Draft "Bathurst Caribou Comprehensive Proposal" (the "Proposal") for comments. This e-mail was sent to ENR and possibly other groups. The Proposal was to be the "process that wildlife management authorities will follow to develop a long-term management plan for the Bathurst caribou herd." Pursuant to the *Tłįcho Agreement*, the Proposal noted that the WRRB was required to "invite any body with jurisdiction over any part of the Bathurst caribou range and representatives of any Aboriginal peoples who traditionally harvest the Bathurst Caribou herd to participate."

[102] The Proposal called for three levels of participation for the development of the comprehensive proposal. The Bathurst Caribou Committee would guide the overall development of the long-term management plan and membership on the committee would include the WRRB, Tłįcho, GNWT, Canada, Government of Nunavut, Akaitcho Territory Government, NWT Métis Nation, Nunavut Wildlife Management Board, Kitikmeot Regional Wildlife Board, Nunavut Tunngavik Inc., Sahtu Renewable Resources Board and Athabasca (Saskatchewan) Denesuline.

[103] The Technical Working Group would work closely with a consultant to develop the long-term management plan. Its membership would include the same groups as the Bathurst Caribou Committee.

[104] The Advisory Committee would advise the Bathurst Caribou Committee and the Technical Working Group on the development of the management plan. The members of the committee might include the NWT/NU Chamber of Mines, NWT

Wildlife Federation, tourism representatives, non-government organizations, regulatory boards and the NSMA.

[105] On October 20, 2011, the Minister announced the final version of the 5 year NWT Barren-ground Caribou Management Strategy to cover the years 2011 to 2015.

[106] The Barrenground Technical Working Group completed the "Barren-Ground Caribou Harvest Summary – Fall 2011" on October 31, 2011. For the Tłįcho, 28 Bathurst caribou had been harvested and 122 authorization cards remained for the harvest year which ended on July 31, 2012. The YKDFN had harvested 46 Bathurst caribou by that point in the harvest year.

[107] On November 16, 2011, representatives from ENR met with the NSMA to discuss the draft management plan for the Bluenose-East caribou herd, to update the status of the Bathurst caribou herd and discuss North Slave wildlife research and monitoring programs.

[108] At the meeting, Fred Mandeville, the Superintendent of the North Slave Region with ENR, confirmed to the NSMA the limited Bathurst caribou herd harvest agreements that had been negotiated with the YKDFN and Tłįcho. He also discussed the process of issuing the authorization cards and advised that 150 cards had been issued to the Tłįcho in mid-August and that there were 150 cards for the YKDFN but they had only been given 50 for their fall hunt. 100 authorization cards had been held back but would be given to the YKDFN in December.

[109] When the Applicant asked whether ENR would be prepared to give the Métis any authorization cards, Mr. Mandeville said that there was a process to follow which involved ENR, the Tłįcho and WRRB. Mr. Mandeville advised the Applicant that if the NSMA wanted an allocation of the authorization cards, they would have to request it from someone higher than Mr. Mandeville, such as the Minister.

[110] On November 18, 2011, the Applicant wrote to the Minister requesting an allocation of the authorization cards for the harvest of the Bathurst caribou herd. He attached to the letter a copy of a report "*Historical Profile of the Great Slave Lake Area's Mixed European-Indian Ancestry Community*" by Gwynneth Jones (1998)[unpublished, prepared for Justice Canada](the "*Jones Report*") which he advised detailed the ethnogenesis[1] of the historic Métis community in the Great

---

[1] Ethnogenesis means "the formation or emergence of an ethnic group" according to the *Oxford Dictionary of*

Slave Lake area. He also referred to the Genealogy Binder that the NSMA had delivered on June 22, 2011 which he claimed answered questions about the status of the NSMA and its members.

[111] The Applicant claimed that:

> It is clear to us that ENR in its capacity as the Crown has failed to consult and accommodate the NSMA about the decisions and actions it took regarding the harvesting ban it imposed on caribou generally, the limited Bathurst caribou harvest agreements it has made with the Tłįcho and the Yellowknives Dene specifically. Those decisions and actions have adversely affected the Métis harvesting rights of NSMA members.

[112] The Applicant proposed a solution whereby ENR would allocate authorization cards to the NSMA for the 2011-2012 caribou harvesting season. The Applicant noted that, in the previous year, the YKDFN had used less than half of their 150 cards which left 89 authorization cards unused. As a result, the Applicant concluded that the YKDFN did not require 150 cards and that between 50 and 75 cards could be allocated to the NSMA.

[113] On November 21, 2011, Ray Case, the Acting Assistant Deputy Minister of ENR, wrote to the WRRB in response to the e-mail of October 11, 2011 which had requested comments on the Proposal. In the letter, Mr. Case advised that ENR generally approved of the Proposal subject to some revisions. He also recommended that the first meeting in Winter 2011 be limited to the Bathurst Caribou Committee as they were required to finalize the membership and responsibilities of the Technical Working Group and the Advisory Committee.

[114] On November 27, 2011, the NSMA e-mailed the Minister to request a response to the Applicant's letter of November 18, 2011. The Applicant called the Minister's office on November 30, 2011 and December 2, 2011 to request a response his letter. The Minister was not available to speak to the Applicant. The Applicant wrote again to the Minister on December 6, 2011 and requested a response to his letter of November 18, 2011.

[115] On December 8, 2011, the Minister replied to the Applicant. In his letter, he acknowledged that the NSMA had provided genealogical information to the GNWT and Canada. However, he wrote:

> It is the GNWT's understanding that Canada has yet to make a determination regarding this information and to date has not recognized the NSMA as a distinct Aboriginal people or community that have Aboriginal rights or title in the North Slave Region.

[116] The Minister denied the request of the NSMA for an allocation of the authorization cards for the Bathurst caribou harvest by noting that NSMA members could harvest Bison in zone R/WB/02 and Caribou in R/BC/01. With respect to hunting Bathurst caribou in the no hunting zone, the Minister reiterated that "NSMA members would be expected to make their own arrangements with the Tłįcho Government or the YKDFN."

[117] The Minister also addressed the NSMA's concerns about consultation and stated that "ENR met with the NSMA on numerous occasions while preparing and implementing the joint management plan to discuss NSMA issues with the plan."

<u>Chronology of Events Related to Other Wildlife Issues</u>

[118] During the same period, the NSMA and ENR interacted with respect to other caribou herds, bison management and proposed wildlife legislation.

*Bison Management*

[119] On September 20, 2008, ENR wrote to the NSMA requesting input on a proposed amendment to the *Big Game Hunting Regulations* which would establish an additional bison management zone and allocate bison tags to the Tłįcho. On October 27, 2008, the NSMA wrote to ENR and expressed their objection to the establishment of "any wildlife management zone without first having participated in a meaningful, honorable and adequately funded Crown Consultation process conducted in good faith."

[120] On November 5, 2008, Lance Schmidt, Acting Superintendent of the North Slave Region with ENR wrote to the NSMA and indicated that ENR would be consulting with the NSMA on a draft Bison Strategy and Management Plan.

[121] In an e-mail between ENR officials on November 6, 2008, the position of ENR was stated: "ENR would be prepared to issue bison tag(s) if approached by

the NSMA. By issuing tags to NSMA we will not adversely affect NSMA's asserted harvesting rights."

[122] On January 15, 2009, ENR released a draft "Wood Bison Management Strategy for the Northwest Territories, 2009-2019" and requested public comments on the draft strategy.

[123] Ernie Campbell sent an e-mail to Lance Schmidt on January 19, 2009 regarding the draft bison strategy requesting that a meeting be scheduled with the NSMA and noting that "We should be able to accommodate them as well with tags and seasons that are reasonable."

[124] On March 26, 2009, officials from ENR met with the NSMA to discuss the draft bison strategy.

[125] On April 2, 2009, the NSMA requested 6 bison tags from ENR. On April 6, 2009, the NSMA requested funding from ENR to enable them to participate in consultation regarding bison conservation and management.

[126] On March 1, 2010, ENR informed the NSMA that 5 bison tags were available to the NSMA to be used in zone R/WB/01. The tags had to be used by March 15, 2010.

[127] At the August 8, 2010 workshop with ENR and NSMA, referred to above, the allocation of bison tags was discussed. ENR's approach was stated by Fred Mandeville: "There are other Métis that are not represented by the NSMA… treat them with parity." Susan Fleck added that "of the 45 tags there were…10 to Métis organizations… it was up to them to come to us."

[128] On November 24, 2011, the Applicant wrote to ENR accepting an invitation to participate in a working group that would develop a management plan for the Mackenzie Wood Bison population.

*Other Caribou Herds*

[129] On November 11, 2008, ENR released a draft "Action Plan for Boreal Woodland Caribou Conservation in the Northwest Territories" and sought comments from wildlife co-management boards, Aboriginal governments, community residents, stakeholders and the public on the plan.

[130] The Minister wrote to the NSMA and a number of other organizations regarding the Draft Bluenose Caribou Herds Management Plan on June 23, 2011. The draft plan had been prepared by an advisory committee who requested that the GNWT "consult with Aboriginal organizations in non-land claim regions whose members harvest these caribou."

[131] A representative from ENR, in an e-mail sent September 21, 2011, indicated that they would like to meet with the NSMA and "consult on the Bluenose-East Caribou Herd Management Plan." One of the objectives of the meeting on November 16, 2011, referred to above, was to consult with the NSMA on the draft plan.

[132] On November 30, 2011, the NSMA wrote to the Minister regarding the Bluenose-East Caribou Management Plan. The NSMA claimed that there had not been adequate consultation and accommodation of the NSMA's Aboriginal rights, and they requested that the NSMA be fully consulted on the plan.

*Proposed Wildlife Legislation*

[133] In June 2008, the Minister requested consultation on the proposed *Species at Risk Act*. On July 3, 2008, a representative from ENR met with the NSMA to discuss the *Species at Risk Act*.

[134] In September 2009, the NSMA was invited to participate in a NWT Wildlife Act Elders Workshop which was scheduled for October 15-16, 2009. The purpose of the workshop was to discuss traditional values which would provide a foundation for a new *Wildlife Act*.

[135] On October 22, 2009, the Minister requested input on the development of a new *Wildlife Act*. He described the drafting process as involving a working group which would work collaboratively in drafting the legislation. The group consisted of "members from the four land claims groups, four wildlife co-management boards, the Northwest Territory Métis Nation and the Dehcho First Nations." It apparently did not include the NSMA.

<u>Other Consultation / Recognition of the NSMA</u>

[136] On March 13, 1997, Stephen Kakfwi, then Minister responsible for RWED formally endorsed the NSMA "as the representative of the Métis people for the purposes of the Environmental Agreement between Canada, GNWT and BHP

Diamonds Inc., dated January 6, 1997 and the Environment Protocol Agreement that was signed on October 31, 1996."

[137] In the Socio-Economic Monitoring Agreement concluded on October 2, 1999 between Diavik Diamond Mines Inc., the GNWT and a number of other signatories including the NSMA, the GNWT acknowledged that the NSMA had "Aboriginal and treaty rights which are being defined, recognized and protected in a variety of forums."

[138] BHP and the GNWT met with the NSMA in December 2007 to consult on the BHP-Billiton Socio-Economic Agreement.

[139] On August 26, 2009, ENR wrote to the Applicant to invite the NSMA to participate in the Diamond Mine Wildlife Monitoring Workshop scheduled for September 22-23, 2009.

ANALYSIS

[140] Section 35 of the *Constitution Act, 1982* recognized and affirmed Aboriginal rights for the Métis people in Canada:

> (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.

[141] The government has a duty to consult with and accommodate the interests of Aboriginal peoples which is grounded in the honour of the Crown. This applies to both proven and asserted rights. *Haida Nation, supra* at paras. 16, 34.

[142] The duty to consult and accommodate arises when the Crown "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." *Haida Nation, supra* at para. 35.

[143] When the Crown has knowledge of a credible but unproven claim that will be sufficient to trigger the duty to consult and accommodate. This is a low threshold that will be triggered by even dubious, peripheral or weak claims. *Haida Nation, supra* at paras. 37, 43; *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 205 SCC 69 at para. 55; *Ahousaht Indian Band, supra* at para. 35.

[144] The content of the duty to consult and accommodate will depend upon the circumstances of each case. In general, the Supreme Court of Canada described the extent of the duty to consult as:

> [T]he 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.
>
> *Haida Nation, supra* at para. 39.

[145] Where the duty to consult has been triggered, the Crown is required, at the outset of the process to:

> make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights. The Crown's obligations also extend to providing the affected Aboriginal group with an opportunity to comment on these preliminary assessments.
>
> *Adams Lake Indian Band, supra* at para. 131.

See also *Wii'litswx, supra* at para. 147; *Klahoose First Nation* v. *Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 at para. 18; *Halalt First Nation* v. *British Columbia (Minister of Environment)*, 2011 BCSC 945 at paras. 639-641.

[146] The Crown is required to complete a preliminary assessment because "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." *Haida Nation, supra* at para. 36.

[147] The preliminary assessment informs the content of the duty to consult. *Adams Lake, supra* at para. 132; *Wii'litswx, supra* at para. 245. Once the Crown has completed a preliminary assessment, the Crown must then design a process for consultation that meets the needs of the duty to consult. *Huu-Ay-Aht First Nation, supra* at para. 113.

[148] What is required of the Crown is a commitment to a meaningful and reasonable process of consultation. There is no requirement or obligation on the

Crown to reach an agreement but good faith consultation is required. *Haida Nation, supra* at para. 42; *West Moberly First Nations, supra* at para. 141.

[149] Meaningful, good faith consultation means that the Crown must be willing to make changes based upon information that is exchanged during the consultation process. Consultation must be intended to substantially address the concerns of Aboriginal peoples; otherwise it does not fulfill the obligations of the Crown. As stated in *Mikisew Cree, supra* at para. 54:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.

See also *Huu-Ay-Aht, supra* at para. 117.

[150] In situations where the Aboriginal claim is weak, the right is limited or the infringement is minor, the Crown's obligation may be one of giving notice and disclosure and to discuss issues raised in response. *Haida Nation, supra* at para. 43.

[151] Where a there is a strong *prima facie* case for the claim, the right and infringement are of significance to the Aboriginal group, and the risk of damage is high, the Crown may be required to engage in deep consultation. What deep consultation encompasses will vary with the circumstances but it may include:

> [T]he opportunity to make submissions for consideration, formal participation in the decision making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.

> *Haida Nation, supra* at para. 44.

[152] There will be claims which fall between these two situations and each case must be treated individually and flexibly, as the level of consultation required may change over the course of the process and new information arises. *Haida Nation, supra* at para. 45.

[153] As discussed in *Mikisew Cree*¸ the duty to consult has both informational and response components. The Crown has an obligation:

> [T]o reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

> *Halfway River First Nation* v. *British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 cited in *Mikisew Cree, supra* at para. 64.

[154] In assessing whether the Crown has fulfilled its duty to consult and accommodate in this instance, an analytical framework has been suggested by a number of cases. *Hupacasath, supra* at paras. 29, 161; *Halalt, supra* at para. 445. The questions are:

Does the Crown have a duty to consult in the circumstances?

a) Did the Crown have knowledge, real or constructive, of a potential Aboriginal claim or right?
b) Did the Crown's conduct have the potential to adversely affect the claim or right?
c) If so, what was the scope and content of the duty to consult and accommodate in the circumstances of the particular case considering the
   i) Preliminary assessment of the strength of the claim, and
   ii) The seriousness of the potentially adverse effect?

Has the Crown met its duty to consult and, if necessary, accommodate the NSMA?

a) Did the Crown correctly determine the extent of its duty to consult?
b) Were the steps the Crown took to consult with the NSMA reasonable?
c) Was the accommodation offered by the Crown reasonable?

Does the Crown have a duty to consult in the circumstances?

[155] The Respondents acknowledge that the Crown owed the NSMA a duty to consult. The real issues in this judicial review are whether the Crown was required

to conduct a preliminary assessment and whether it has met its duty to consult and accommodate. However, it is necessary to answer all of the questions because the content and scope of the duty to consult are in issue.

a) Did the Crown have knowledge, real or constructive, of a potential Aboriginal claim or right?

[156] The Crown had knowledge of the NSMA's claim which is apparent from the materials filed and, in any event, is not in dispute. In 2004, the NSMA was a signatory to the Bathurst Agreement which created the Bathurst Committee whose responsibility was to prepare a management plan for the Bathurst caribou herd. The Bathurst Agreement, concluded between the GNWT and a number of Aboriginal groups, recognized that a special relationship existed between Aboriginal groups and the caribou. The Bathurst Agreement also recognized the harvesting rights of the North Slave Métis.

[157] If there was any uncertainty regarding whether the NSMA was claiming an Aboriginal right, it would have been clarified when the Applicant wrote to the Minister in April 2007, asserting Aboriginal rights with respect to caribou on behalf of the NSMA. This letter also included a request to be consulted on the development of a new caribou management plan.

b) Did the Crown's conduct have the potential to adversely affect the claim or right?

[158] Counsel for the Respondents acknowledged that the restrictions imposed on the harvest of the Bathurst caribou herd had adversely affected the NSMA's ability to hunt caribou in the no hunting zone. The Respondents' position is that an Aboriginal right to hunt is not an unlimited right but is subject to the conservation efforts of the government which, in this case, were aimed at preventing the extirpation of the species. The result is that many groups, including the NSMA, and the public have had their ability to hunt caribou restricted in order to achieve the conservation of the Bathurst caribou herd.

c) If so, what was the scope and content of the duty to consult and accommodate in the circumstances of the particular case considering the

i) Preliminary assessment of the strength of the claim, and

ii) The seriousness of the potentially adverse effect?

[159] As previously stated, the Supreme Court of Canada in *Haida Nation* held that 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 and to the seriousness of the potentially adverse effect upon the right.

[160] The Respondents acknowledge that the GNWT had a duty to consult with the Applicant and claims that the duty was met through consultation with the NSMA on caribou management on numerous occasions over the past few years. The acknowledgement of a duty to consult presumes an acceptance or belief that the NSMA had a credible claim sufficient to trigger the duty to consult. However, the acknowledgement that the duty to consult has been triggered does not define the content or the scope of the duty to consult.

[161] The caselaw seems clear that where the Crown has notice of a claim of an Aboriginal right and where the duty to consult has been triggered, the Crown has an obligation to conduct a preliminary assessment of the strength of the claim and the potential impact on the asserted rights. In addition, the Crown is required to give the Aboriginal group an opportunity to comment on the preliminary assessment. See paragraphs 145-146 above.

[162] The Respondents acknowledge that a preliminary assessment was not completed and claim that there was no obligation to conduct one because the NSMA had not been recognized by Canada as an Aboriginal rights-bearing organization. The Respondents claim that Canada bears the responsibility for recognizing Aboriginal groups pursuant to their exclusive legislative authority over Indians, and lands reserved for Indians under section 91(24) of the *Constitution Act, 1867*. As a result, the Respondents assert that Canada is responsible for reviewing and accepting the claims of Aboriginal people and when that occurs, the GNWT would be bound by Canada's decision and would then, if invited, enter into negotiations with the Aboriginal group. While the NSMA may not have been recognized by Canada, in my view, it did not absolve the GNWT of its responsibility to conduct a preliminary assessment of the strength of the NSMA's claim.

[163] The GNWT is responsible for wildlife management pursuant to the *Northwest Territories Act*; this is an authority delegated to it by Canada. The practical result is that decisions regarding the conservation of the Bathurst caribou herd and actions taken to achieve that purpose are made by the GNWT, not Canada. Decisions regarding wildlife management will often impact upon the Aboriginal right to hunt and those decisions can trigger the duty to consult. The

duty to consult and its attendant obligation to conduct a preliminary assessment fall to the government making the decision which is the GNWT and not Canada.

[164] The duty to consult is a legal and constitutional duty which is grounded in the honour of the Crown: *Haida Nation, supra* at para. 16; *Behn* v. *Moulton Contracting Ltd.*, 2013 SCC 26 at para. 28. The duty to consult and accommodate is part of the process of fair dealing and reconciliation which flows from the Crown's duty to deal honourably with Aboriginal peoples. The duty to deal honourably in turn, arises from the assertion of sovereignty by the Crown. The duty to consult applies prior to proof of claims which is consistent with the concept of reconciliation and reduces the risk that when Aboriginal people's rights are finally recognized, they are not rendered meaningless by intervening actions and the passage of time. *Haida Nation, supra* at paras. 32-34.

[165] To await the recognition by Canada of the NSMA as the proper organization to represent the North Slave Métis runs the risk that the Aboriginal rights which the NSMA asserts being eroded or rendered meaningless by the decisions of the GNWT. It is the responsibility of the GNWT to make a preliminary assessment of the NSMA's strength of claim and to define the scope of their obligation to consult.

[166] The Respondents also argue that even though no preliminary assessment was undertaken, the GNWT consulted with the NSMA on many occasions regarding the management of the Bathurst caribou herd. While I will address this argument later in these reasons, the evidence shows that the Respondents have been inconsistent in their approach to the NSMA which further demonstrates the need for a preliminary assessment to have been conducted. Counsel for the Respondents acknowledged that the GNWT had been inconsistent in how it described its interactions with the NSMA. They have been variously referred to, within the government and with the NSMA, as discussions, engagement and consultation.

[167] The GNWT was a party to the Bathurst Agreement which dealt with the Bathurst caribou herd and recognized the harvesting rights of the North Slave Métis. The signatory representing the North Slave Métis was the NSMA. Yet in 2008, it seems that ENR's position, based upon Susan Fleck's August 28, 2008 e-mail to Fred Talen was that the GNWT would not consult with the NSMA on wildlife management decisions. Fred Talen's response on September 9, 2008, was to advise Ms. Fleck that the GNWT's duty to consult "will likely extend to the NSMA."

[168] When ENR officials met with members of the NSMA in August 2009, their oblique response to NSMA's request for consultation funding was that "ENR will always try to support NSMA members be involved in surveys, community hunts, workshops, etc." There was no acknowledgement that the GNWT might have a duty to consult with the NSMA on the Bathurst caribou herd until after the Interim Chair of the WRRB wrote to the Deputy Minister in November 2009 inquiring about the GNWT's efforts to consult with the NSMA on the joint proposal.

[169] Following this, correspondence from ENR to the NSMA started to refer to the GNWT's willingness to consult with the NSMA. This acknowledgement was subject to the caveat that consultation with respect to asserted rights should not be considered as recognition or denial of those rights by the GNWT.

[170] At a meeting between ENR officials and the NSMA in August 2010, Ms. Fleck, when asked about how ENR planned to consult with the NSMA, responded that they would not consult with the NSMA and that "even this meeting is not consultation, just engagement." During this same period of time, correspondence from ENR officials continued to refer to the consultation that ENR was undertaking with the NSMA.

[171] It seems that within ENR, some officials were unclear about what their obligations were with respect to consulting with the NSMA on their asserted Aboriginal rights over the management and harvesting of the Bathurst caribou herd. Based on these inconsistencies, it would not be surprising if members of the NSMA were confused about whether they were engaged in consultation with the GNWT.

[172] Consultation cannot be considered consultation if the parties do not intend to consult. As stated in *Dene Tha' First Nation* v. *Canada (Minister of Environment)*, 2006 FC 1354 at para. 113: "Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*." Further, the GNWT cannot take the position with the NSMA that they were not engaged in consultation, and then later argue that what occurred was consultation. This is inconsistent with the government's duty to deal honourably with Aboriginal peoples. *Dene Tha' First Nation, supra* at para. 113.

[173] All of this underscores the necessity of completing a preliminary assessment prior to undertaking the consultation process so that all parties understand their obligations. As stated in *West Moberly, supra* at para. 151, the scope of the process is defined by the parties' understanding of the right and its content:

> When MEMPR entered in to the consultation process without a full and clear understanding of what the Treaty meant, the process could not be either reasonable or meaningful. A consultation that proceeds on a misunderstanding of the Treaty, or a mischaracterization of the rights that the Treaty protects, is a consultation based on an error of law, and cannot therefore be considered reasonable.

See also *Adams Lake, supra* at para. 132.

[174] Situations where a preliminary assessment has not been required have often been ones where the rights have been proven, not asserted: *Adams Lake, supra* at para. 137. In situations where there are asserted rights, it is incumbent upon the Crown to conduct a preliminary assessment of the strength of the claim and provide the Aboriginal group an opportunity to comment on the preliminary assessment.

[175] The failure of the GNWT or ENR to conduct a preliminary assessment of the strength of the NSMA's claim was an error of law. The inconsistency in the GNWT's approach to consultation tends to show that the consultation they undertook was not based on a full and clear understanding of the NSMA's asserted rights.

[176] As a matter of law and fairness, the NSMA were also entitled to a preliminary assessment conducted by the GNWT so that they could review it and provides comments on the preliminary assessment. Only then would they be in a position to approach the process with a clear understanding of the GNWT's conception of their rights.

i) Preliminary assessment of the strength of the claim

[177] The Respondents argue that the Court should not conduct a preliminary assessment because the determination of the NSMA's rights and status should be made at trial on a complete evidentiary record or following an assessment by Canada. I do not agree.

[178] A preliminary assessment is not intended to be a conclusive determination of the status of the right but is intended to determine whether there is a *prima facie*

basis for the claim. As stated in *Haida Nation, supra* at para. 66, "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."

[179] To determine the extent of the GNWT's obligation to consult, the Court is required to conduct a preliminary assessment of the strength of the claim and the potentially adverse effect on the asserted rights. This independent assessment is required to assess the consultation that actually occurred and is required regardless of my conclusion that the GNWT erred in law by failing to conduct their own preliminary assessment. Determining the reasonableness of the GNWT's consultation process requires an understanding of the strength of the claim and the impact on the asserted rights. *Adams Lake, supra* at para. 167; *Klahoose, supra* at para. 26; *Halalt, supra* at para. 463.

[180] As the GNWT did not complete a preliminary assessment, there was no analysis of the strength of the NSMA's claim and it is not clear from the record that the GNWT took any specific position about the strength of the NSMA's claim during this process. The record does establish that the GNWT viewed the NSMA's claim as an asserted claim and that the process they undertook would not result in recognition or denial of the claim. It appears from the course of events, and this was confirmed during the hearing, that the GNWT viewed the Tłįcho and YKDFN as having a stronger claim in this area than the NSMA as they had concluded Treaties, and a land-claim agreement in the case of the Tłįcho, which recognized their rights. This is not an unreasonable view but beyond that, there appears to have been little consideration of the strength of the NSMA's claim.

[181] As previously stated, section 35(1) of the *Constitution Act, 1982* recognized and affirmed Aboriginal rights for Métis peoples. However, s. 35 does not define Métis peoples. The Supreme Court of Canada in *R.* v. *Powley,* 2003 SCC 43, provided a framework for analyzing Métis claims under s. 35. The Court noted, at para. 10, that the term Métis under s. 35 does not just refer to the mixed ancestry of individuals but encompasses more:

> [I]t refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.

[182] In determining whether there is a Métis community or whether the claimant belongs to a Métis community, courts must confirm that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific Aboriginal right. A Métis community can be defined as a

group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. *Powley, supra* at para. 12.

[183] The analysis in *Powley* established a ten part test:

(1) Characterization of the Right
(2) Identification of the Historic Rights-Bearing Community
(3) Identification of the Contemporary Rights-Bearing Community
(4) Verification of the Claimant's Membership in the Relevant Contemporary Community
(5) Identification of the Relevant Time Frame
(6) Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture
(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted
(8) Determination of Whether or Not the Right was Extinguished
(9) If There Is a Right, Determination of Whether There Is an Infringement
(10) Determination of Whether the Infringement Is Justified

[184] The Applicant has provided a significant amount of evidence relating to the preliminary assessment of the strength of his claim. This material, as previously mentioned, includes affidavits from the Applicant and other NSMA members and a number of reports relating to the ethnogenesis of the Métis community in the Great Slave Lake area. I have reviewed the material and am satisfied that the Applicant has established a *prima facie* Aboriginal claim based on the *Powley* test. I do not intend to review the evidence in detail as the Applicant is only required to establish a *prima facie* case; this proceeding is not a trial; and the Respondents has not seriously challenged the Applicant's basic claim.

(1) *Characterization of the Right*

[185] In this case, the Appellant has characterized the right as the right to hunt bush meat of which the primary source is caribou in the Great Slave Lake area. The Appellant has provided evidence regarding the historical land use of the area north of the Great Slave Lake by the Métis as well as evidence regarding the historical and current importance of caribou to the Métis.

[186] In *Powley*, the Court stated (at para. 19) that "Aboriginal hunting rights, including Métis rights, are contextual and site-specific." In that case, the right in

question was determined to be the right to hunt for food and not the right to hunt for moose in the specific area. In *West Moberly, supra* at para. 162, the conclusion of the majority was that the right to hunt in Treaty 8 included the right to hunt caribou. As I see it, the issue is whether the right in this case is the right to hunt for food or the right to hunt caribou in the specified area.

[187] In *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 53, the Supreme Court of Canada stated that, in order to characterize a claim:

> [A] court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to the establish the right.

[188] In *Van der Peet*, the nature of the action in question was a prosecution that arose from an allegation of illegal fishing where the defendant claimed an Aboriginal right to fish commercially. In this case, the Applicant is claiming the Aboriginal right to hunt bush meat, specifically caribou, but there is no corresponding allegation that he pursued this right illegally.

[189] The nature of the governmental action relates to the restrictions imposed on the harvest of the Bathurst caribou herd in wildlife management zone R/BC/02. The closing of the harvest and the later limited Aboriginal harvest which permitted the Tłįcho and YKDFN to harvest 300 caribou per hunting season forms the background to the decision in question which is the Minister's decision not to grant the NSMA an allocation of the 300 caribou.

[190] The evidence provided by the Applicant demonstrates that the members of the NSMA clearly view their traditional harvesting and land use areas as covering an area that overlaps significantly with R/BC/02.

[191] The evidence provided by the Applicant also demonstrates that hunting and trapping has been undertaken by Métis, both historically and in recent years, in the area north of Great Slave Lake. The evidence of the Applicant, Lawrence Mercredi, Wayne Mercredi and Edward Jones, all members of the NSMA, indicate that each of them has hunted or trapped in the no hunting zone for many years.

[192] Historical evidence suggests that Métis people, including Francois Beaulieu II, a historical Métis figure and a common ancestor of the Applicant, Lawrence Mercredi, Wayne Mercredi and Edward Jones, travelled over a wide geographic area, including within R/BC/02, and undertook activities such as hunting, fishing,

guiding and trading. Historic Sites and Monuments Board of Canada, Agenda Paper 1999-51 "Francois Beaulieu II: Son of the last *coureurs de bois* in the Far Northwest", by Chris Hanks (1999) (the "*Hanks Paper*").

[193] Hunting included the hunting of caribou:

> Indian and mixed-ancestry people who traded at Fort Resolution and Fort Chipewyan typically struck off for the "barren lands" to the east of Great Slave Lake to hunt caribou in the fall.
>
> *Jones Report, supra* at p. 129-130.

[194] In considering the evidence and the nature of the impugned decision, I am satisfied that the right in question can be characterized as the right to hunt for food, more specifically caribou, in the no hunting zone.

(2) *Identification of the Historic Rights-Bearing Community*

[195] The identification of the historic rights-bearing community requires demographic evidence as well as "proof of shared customs, traditions and a collective identity" and this community "must be demonstrated with some degree of continuity and stability in order to support a site-specific Aboriginal rights claim." *Powley, supra* at para. 23.

[196] The Applicant has presented evidence that a broad Métis community emerged in the Great Slave Lake area following contact with European explorers and traders. The conclusion of Patricia McCormack was that:

> The evidence from multiple sources shows that northern Métis developed independently in the Mackenzie Basin, including the Great Slave Lake area, albeit with close and [ongoing] relationships of kinship and economic and political cooperation with their First Nations Dene and Cree neighbors.
>
> *McCormack Report, supra* at p. 52.

[197] Those who lived in the Great Slave Lake area, including the Métis, subsisted on wildlife harvesting and the fur trade and this population travelled frequently throughout this larger area. Marriage networks were created between Métis families and demonstrate that these families extended to all parts of the Great Slave Lake and into nearby areas including Fort Simpson and Great Bear Lake. *Jones Report, supra* at p. 125-126.

[198] The community that developed was a distinct community with shared customs, traditions and a collective identity. As stated in the *Jones Report, supra* at p. 128:

> Mixed-ancestry people were prized as fur-trade employees for their language ability, skills in living on the land, and influence with the Indian population…. Mixed-ancestry people relied to a greater or lesser degree on waged employment, from full-time lifelong fur trade employment at one extreme to leader of "Indian" fur-hunting groups on the other.

[199] The historical evidence also suggests that the Métis developed a collective identity:

> The marriage and baptismal records speak to a group who constructed connections across geographic, occupation and ethnic lines, and this may be the most convincing evidence of self-perception of common identity.

*Jones Report, supra* at p. 127.

[200] The Respondents argue that the Applicant's conception of community is too broad and it stretches the meaning of the term to suggest that there was a Métis community in the area north of Great Slave Lake.

[201] I am not convinced that a Métis community had to be located in one settlement or small geographic area. The evidence establishes that the Métis were highly mobile and travelled over a wide area in the vicinity of Great Slave Lake. As in *R.* v. *Laviolette*, [2005] S.J. No 454 and *R.* v. *Goodon,* [2009] M.J. No 3, it is possible to have a Métis community which is regionally based. In the circumstances, I am satisfied that the Applicant has established on a *prima facie* basis that there was a historic rights-bearing Métis community with shared customs, traditions and a collective identity which developed following European contact with the local Aboriginal population.

(3) *Identification of the Contemporary Rights-Bearing Community*

[202] Since Aboriginal rights are communal rights, "they must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community." *Powley, supra* at para. 24.

[203] The Applicant has presented some evidence that he and other members of the NSMA are part of a contemporary rights-bearing Métis community in the Great

Slave Lake area who are descended from the historic, rights-bearing Métis community which developed in the same area.

[204] The Applicant, Lawrence Mercredi, Wayne Mercredi and Edward Jones all trace their ancestry back to Francois Beaulieu II, who has been officially recognized as one of the founding fathers of the Métis in the Northwest Territories: Historic Sites and Monuments Board of Canada, Excerpt From the Minutes of the November 1999 Meeting.

[205] They are also all members of the NSMA which was incorporated as a society in 1996. As stated in paragraph 41 above, the Constitution of the NSMA limits membership in the NSMA to Indigenous Métis who are descendants of the Métis People of the Northwest Territories who emerged prior to the Crown taking effective control of their traditional lands including the North Slave area.

[206] The NSMA's Constitution, referred to in paragraph 40 above, states that the NSMA's goals involve promoting the interests and rights of the Métis in the North Slave area of the Northwest Territories. This is different from the stated goals of the Northwest Territory Métis Nation whose goals involve the interests and rights of the Métis from the South Slave area of the Northwest Territories.

[207] I am satisfied that there is some evidence that establishes on a *prima facie* basis that there is a contemporary rights-bearing Métis community in the Great Slave Lake area of which the Applicant and other members of the NSMA are members.

(4) *Verification of the Claimant's Membership in the Relevant Contemporary Community*

[208] The claimant's membership in the Métis community must be determined by "taking into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable." *Powley, supra* at para. 29. The Supreme Court of Canada declined to establish a comprehensive definition of a Métis person but instead emphasized the need to define membership before a dispute arose. Three broad factors serve as indicia of determining Métis identity: self-identification, ancestral connection, and community acceptance. *Powley, supra* at para. 30.

[209] Self-identification requires that the claimant self-identify as Métis and the claim should be one that is longstanding. *Powley, supra* at para. 31. The evidence

presented by the Applicant demonstrates that he has self-identified as a Métis person since at least 1996.

[210] An ancestral connection requires “proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means.” *Powley, supra* at para. 32. The Applicant has also presented evidence that his ancestors have belonged to the historic Métis community as his mother is a direct descendant of Francois Beaulieu II.

[211] The claimant must be accepted by the modern community which is established by past and ongoing participation in the shared culture, customs and traditions of the Métis community. Other evidence of community acceptance can include evidence of participation in community activities and confirmation from other members about the claimant’s connection to the community and its culture. *Powley, supra* at para. 33.

[212] The evidence presented by the Applicant demonstrates that he has regularly participated in community activities, such as Aboriginal Day, as a Métis person and has worn his Métis sash to those events. He is an accepted member of the NSMA and has been the elected President of the NSMA since 2004.

[213] I am satisfied that the Applicant has presented *prima facie* evidence that he is a Métis person through his long-term self-identification as a Métis, his ancestral connection to a historic Métis figure, and community acceptance by other Métis people.

(5) *Identification of the Relevant Time Frame*

[214] The identification of the relevant time frame should focus on identifying “Métis practices, customs and tradition that are integral to the Métis community’s distinctive existence and relationship to the land.” *Powley, supra* at para. 37. A post-contact but pre-control test is appropriate where the focus is on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. *Powley, supra* at para. 18.

[215] The evidence that the Applicant has provided indicates that the Métis community emerged prior to the Crown exerting effective control of the Great Slave Lake area.

[216] The involvement of the government in the Great Slave Lake region was limited prior to 1890 and the presence of European persons in the Northwest Territories was very limited prior to 1920. *Jones Report, supra* at p. 91, 133.

[217] While it is difficult to determine the exact point at which the ethnogenesis of the Métis community occurred, the *McCormack Report* and the *Jones Report* confirm that it occurred prior to the Crown taking effective control of the Northwest Territories. The conclusion in the *Jones Report, supra* at p. 129 is that:

> It is clear from the documents that outsiders recognized a "half breed" group, of varying characteristics, in the Great Slave Lake population from at least the second decade of the nineteenth century."

[218] I am satisfied that there is *prima facie* evidence of a distinct Métis community which developed following contact with Europeans but also pre-dates the effective establishment of control by the Crown in the Great Slave Lake area.

(6) *Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture*

[219] Evidence must establish that the practice in question was "an important aspect of Métis life and a defining feature of their special relationship to the land." *Powley, supra* at para. 41.

[220] The evidence presented by the Applicant demonstrates that caribou was an integral part of the Métis culture. As stated in the *McCormack Report, supra* at p. 51:

> Clearly, everyone relied on caribou meat, including… the Métis…. Such reliance has long antiquity; the early explorers north and east of Great Slave Lake such as George Back and Warburton Pike all relied on caribou. It was clear from Back's narrative (1970) that when the caribou failed to come, people starved.

[221] Archeological evidence suggests that a small Métis community lived in the area around Old Fort Rae in the late 1700's and the evidence also suggests that the community hunted caribou. Stevenson, Marc, Ph.D., *Old Fort Rae's "Old Fort" An Early Métis Settlement on Great Slave Lake: Preliminary Excavations,* (2001)[unpublished, prepared for the North Slave Métis Alliance](the *"Stevenson Report"*) at p. 19, 22, 35.

[222] Métis hunters were well-known for their ability to hunt for meat, specifically caribou and were relied upon to supply meat to trading posts and expeditions.

Hudson Bay Company records from Fort Rae indicate that Métis employees hunted caribou to provide meat and pemmican to trading posts. Francois Beaulieu also hunted in the Great Bear Lake area and supplied meat for the 2nd Franklin expedition. *Jones Report, supra* at p. 60-62, 79.

[223] I am satisfied that there is *prima facie* evidence that the hunting of caribou was an integral part of the Métis culture and a defining feature of their special relationship with the land.

(7) *Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted*

[224] The claimant must establish that the historic right has been continuously practiced. The protection of existing rights under section 35 reflects a commitment to protecting practices that were historically important to Métis communities. Protection of these rights may involve some flexibility to "ensure that Aboriginal practices can evolve and develop over time." *Powley, supra* at para. 45.

[225] The Applicant has presented evidence that caribou hunting continues to be important to Métis hunters. As stated in the affidavits of Lawrence Mercredi, Wayne Mercredi and Edward Jones, the hunting and consumption of caribou has been important to them and their families. This is echoed in the "Can't Live Without Work" report prepared by the NSMA in which the importance of caribou to the Métis is documented and a number of Métis persons speak about the personal and historical significance of caribou to the Métis.

[226] I am satisfied that there is *prima facie* evidence that there is continuity between the historic Métis right to hunt caribou and the contemporary Métis right to hunt caribou.

(8) *Determination of Whether or Not the Right Was Extinguished*

[227] Section 35 of the *Constitution Act, 1982* recognized existing Aboriginal and treaty rights. In order to determine that the Métis have an existing right to harvest caribou, it is necessary to determine whether the right has been extinguished. In order to find that an Aboriginal right has been extinguished, it must be clear and plain that the Crown intended to do so. *R.* v. *Sparrow,* [1990] 1 S.C.R. 1075.

[228] The Applicant has argued that there is a *prima facie* case that the Métis right to harvest caribou has not been extinguished and has pointed to the treaty making and scrip process and caselaw which supports this argument. However, the

Respondents have not claimed that the Métis right to harvest caribou has been extinguished. Implicit in the Respondents' acceptance of the GNWT's duty to consult is an acknowledgement that the Métis right to harvest caribou continues to exist. In the circumstances, I accept that there is a *prima facie* basis for concluding that the harvesting rights of the Métis have not been extinguished.

[229] The last two parts of the *Powley* test are not relevant in this situation as they are concerned with infringement of a right and justification of the infringement. In this case, the issue is whether there is a Métis right which is determined by reference to the first eight steps of the test.

[230] I conclude based on the above, that the Applicant has an arguable case that he and the NSMA have a right to hunt caribou based upon their asserted rights as Métis people who have traditionally hunted in the Great Slave Lake area. As previously stated, the issue is the *prima facie* strength of the Applicant's claim. In my view, the Applicant has a good *prima facie* claim to the right to harvest caribou in the no hunting zone. Final determination of the Applicant's and the NSMA's rights are not the subject of these proceedings and will be decided at another time, either through a negotiated treaty or further court proceedings.

ii) The seriousness of the potentially adverse effect

[231] The Respondents have not specifically addressed the seriousness of the potentially adverse effects of the Minister's decision on the NSMA beyond an acknowledgement that the restrictions that were imposed on hunting the Bathurst caribou herd had a significant impact on everyone, including Aboriginal people.

[232] The initial decision to establish a no hunting zone in R/BC/02 and eliminate hunting of the Bathurst caribou herd in this area is not in question. That decision, undeniably, had an adverse effect on everyone, including those who held an Aboriginal right to hunt in that area. The establishment of a limited Aboriginal harvest of 300 caribou is also not in question. The decision which is being challenged is the decision of the Minister not to give the NSMA any portion of the harvest of 300 caribou.

[233] The evidence supports the conclusion that the Minister's decision not to grant the NSMA an allocation of the 300 caribou which could be hunted in the no hunting zone had an adverse effect on the NSMA's right to harvest caribou. There is *prima facie* evidence that the Métis traditionally hunted and trapped in the North Slave area. While the Métis hunted and trapped a variety of animals on their

traditional lands, the evidence suggests that caribou had significance as a food source to the Métis and was an important part in Métis culture.

[234] It appears that the adverse effects of the government's decision were implicitly recognized by the GNWT. In response to the NSMA's inquiries, the GNWT offered members of the NSMA the unlimited right to hunt the Bluenose-East caribou herd outside the no hunting zone. The Applicant asserts that this was not a practicable solution as the area where the Bluenose-East herd is located is a considerable distance from where NSMA members are located and is outside the traditional hunting areas of the North Slave Métis. While this was a possibility, given the challenges associated with it, I cannot conclude that this significantly reduced the adverse effects of the NSMA not being able to hunt the Bathurst caribou herd in the no hunting zone. The accommodation offered to the NSMA by the GNWT reduced somewhat the seriousness of the adverse effects but did not eliminate them.

[235] Overall, I am satisfied that the decision not to grant the NSMA an allocation of the harvest of the Bathurst caribou herd in the no hunting zone had an adverse effect on their ability to exercise their right to hunt caribou in their traditional lands.

[236] Based on the evidence, I am satisfied that, on a preliminary assessment, that the NSMA has a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands. The GNWT's decision not to permit the Applicant or other NSMA members to participate in the limited Aboriginal harvest had an adverse effect on this right and the effect was not an insignificant one.

<u>Scope and Content of the Duty to Consult</u>

[237] In every consultation and at all stages, good faith is required by both sides. The government must approach the consultation with the intention of substantially addressing the concerns of Aboriginal peoples. There is no requirement to agree but there must be a commitment to a meaningful consultation process. *Haida Nation, supra* at para. 42.

[238] Earlier, I referred to *Haida Nation* where the Supreme Court spoke of a spectrum of consultation between two extremes (see paragraphs 150-153 above). This not a situation where the Aboriginal claim is weak, the right is limited or the infringement is minor so that the government's obligation might be limited to giving notice and disclosure and discussing issues raised by the NSMA. Similarly, I cannot conclude that the situation was such that there was a strong *prima facie*

case for the claim, the right and infringement were of significance to the NSMA, and the risk of damage was high so that deep consultation was required.

[239] In *Ahousaht Indian Band, supra* and *Mikisew Cree First Nation, supra,* it was held that the duty to consult fell at the lower end of the spectrum. Those cases involved clear, established hunting and trapping rights which were significantly impacted by the government's proposed actions. In *Ahousaht Indian Band*, the government's actions were aimed at conservation. This situation is somewhat different than the one in *Ahousaht Indian Band*. The issue in this case is not conservation itself; the Applicant does not dispute the GNWT's decision to limit the harvest of the Bathurst caribou herd. The Applicant's claim is that once the GNWT decided to allow a limited Aboriginal harvest of the Bathurst caribou herd, the GNWT had an obligation to consult with the NSMA and if necessary, accommodate the NSMA's concerns.

[240] In *Mikisew Cree First Nation*, while the court held that the duty to consult fell at the lower end of the spectrum, the Crown was still required to not only listen to the Mikisew Cree's concerns but also to attempt to minimize adverse impacts on their Aboriginal rights. *Mikisew Cree First Nation, supra* at para. 64.

[241] In the circumstances, I conclude that the GNWT's obligations fell somewhere between the two extremes referred to in *Haida Nation* and towards the lower end of the spectrum. The GNWT had an obligation to give notice and disclosure and to discuss issues raised by the NSMA. They also had an obligation to consider the submissions made by the NSMA, to advise the NSMA that their concerns were considered and to provide the NSMA reasons which addressed their concerns and the impact they had on the decision. The NSMA had a right to know why the GNWT was not going to permit them any portion of the harvest of the Bathurst caribou herd.

Has the Crown met its duty to consult and, if necessary, accommodate the NSMA?

a. Did the Crown correctly determine the extent of its duty to consult?

[242] As noted above, the GNWT did not conduct a preliminary assessment which I have concluded was an error in law. It is not clear from the evidence that the Respondents took any steps to determine the extent of the duty to consult. The inconsistencies, referred to in paragraphs 166-172 above, demonstrate that the

GNWT approached consultation without a clear understanding of what the NSMA's rights were.

[243] There is no indication that, at any time, anyone from GNWT or ENR discussed with the Applicant or the NSMA the Crown's view of the *prima facie* strength of the NSMA claim. The NSMA had no opportunity to learn the GNWT's position on the strength of claim or to respond to concerns raised by the GNWT.

[244] The correspondence from ENR demonstrates that the GNWT had consistently taken the position that the NSMA had asserted rights not proven rights and that until Canada conducted an assessment, the GNWT was not prepared to recognize, affirm or deny the NSMA's asserted rights. In my view, this does not amount to an assessment of the strength of the NSMA's claims and it is not a position that the NSMA could possibly respond to in the hopes of allaying any concerns the GNWT might have. It does not involve an assessment of the strength of the NSMA's claims and, at most, it is a deferral to consider the strength of the NSMA's claims at a future, undetermined date.

[245] The GNWT's approach to consultation changed during the process, seemingly in response to concerns raised by the WRRB and the NSMA. While the process is intended to be flexible so that new information or concerns can be considered and which might potentially alter the conduct of the consultation process, there is no indication in the evidence that the GNWT gave ongoing consideration to the extent of the duty to consult.

b. Were the steps the Crown took to consult with the NSMA reasonable?

[246] The Respondents argues that the GNWT did consult with the NSMA and points to the meetings, workshops, and high level correspondence between the NSMA and ENR as demonstrating that the GNWT undertook a reasonable consultation process.

[247] The NSMA had made requests to ENR that they be included in the management of the Bathurst caribou herd following the Bathurst Agreement and the creation of the WRRB. It was only following the Bathurst Caribou Herd Calving Ground Survey in June 2009 that the GNWT began to respond to the NSMA's concerns.

[248] The first contact was when ENR met with members of the NSMA on August 14, 2009 to discuss the results of the survey. At that time, there was no clear

commitment to consultation by ENR but instead a commitment to "try to support NSMA members be involved in surveys, community hunts, workshops, etc."

[249] A public Bathurst Caribou Recovery Workshop was hosted by ENR in October 2009. Members of the NSMA attended the workshop along with other Aboriginal groups, caribou outfitters, ENR representatives and other government departments and boards. At the workshop, management actions for the recovery of the herd were discussed.

[250] While the NSMA would have had an opportunity to express their concerns, the public forum process is not a substitute for formal consultation. *Dene Tha' First Nation, supra* at para. 104; see also *Mikisew Cree First Nation, supra.* When the workshop was held, the GNWT had not yet instituted the interim emergency measures closing the harvest of the Bathurst caribou herd, effective January 1, 2010.

[251] The Deputy Minister's letter of October 23, 2009 to the NSMA (and other organizations) proposing a meeting to seek guidance on the conservation of the Bathurst caribou herd marks the beginning of a process more specific to the NSMA. Despite efforts, the parties were unable to set up a meeting and the NSMA's response, on December 1, 2009, was that the NSMA was not prepared to meet to discuss caribou management until ENR provided funding to the NSMA to do so.

[252] The Deputy Minister wrote to the Applicant again on December 18, 2009, the day after the announcement of the interim emergency measures. In the letter, he committed to consulting with "other Aboriginal governments and organizations" and promised to share information with the NSMA and to hear their concerns or suggestions. Interestingly, the letter was sent after the Interim Chair of the WRRB had written to the Deputy Minister in November 2009 on two occasions to inquire about ENR's consultation efforts with the Métis.

[253] The Deputy Minister responded to the WRRB's concerns in February 2010 and stated that the NSMA had been consulted on the joint proposal. According to the Deputy Minister, the consultation to that point consisted of the August 14, 2009 meeting, the October 2009 workshop, the invitation to the meeting that had not occurred and the December 18, 2009 letter.

[254] The next meeting that occurred between the NSMA and ENR representatives was a meeting held by the NSMA on March 1, 2010 to discuss caribou conservation. The meeting was intended to be limited to discussing the

research and "not politics or legislation." Presumably, this meant that the discussion would be focused on the results of the calving survey and its methodology rather than discussing joint proposal or how conservation efforts should be managed.

[255] The Deputy Minister wrote to the NSMA in April 2010 to propose a meeting to discuss caribou management and refining the joint proposal. Despite efforts, this meeting did not occur.

[256] ENR arranged a one day workshop with the NSMA in August 2010 to discuss the decline of the Bathurst caribou herd as well as options for managing its recovery. By this time, the revised joint proposal had been submitted to the WRRB which proposed a limited Aboriginal harvest of 300 caribou from the Bathurst caribou herd.

[257] At the workshop, NSMA members asked about the allocation of the harvesting target of 300 caribou. The response from ENR was that the NSMA would have to go to the YKDFN for tags to hunt caribou. There is no indication that ENR gave any consideration to this request or to the needs of the Métis or the effects of this decision on the Métis community. Further, the NSMA was advised that the meeting was not consultation but engagement.

[258] Following this workshop, Ernie Campbell wrote to the NSMA to thank the NSMA for participating in the workshop and to reiterate that the consultation undertaken by ENR was not intended to recognize, affirm or deny the NSMA's asserted rights.

[259] Following the announcement of the agreement signed by the GNWT and YKDFN in October 2010 which gave the YKDFN permission to hunt 150 Bathurst caribou in the no hunting zone, the Applicant wrote to the Minister requesting that the GNWT negotiate a similar agreement with the NSMA. The response from the Minister in November 2010 was that the NSMA was expected to make their own arrangements with the Tłı̨cho or YKDFN in order to access tags for the Bathurst caribou herd. There is no indication that the Minister seriously considered the request and the explanation for not negotiating a harvesting agreement with the NSMA was that Canada had not yet recognized the NSMA.

[260] It was over a year later when the next substantive interaction occurred between ENR and the NSMA on the Bathurst caribou herd. ENR representatives met with the NSMA to update the status of the herd and discuss management of the Bluenose-East herd.

[261] The Applicant again requested an allocation of the authorization cards for the Bathurst caribou herd to which the ENR response was that there was a process which involved ENR, the Tłįcho and WRRB. The Applicant would have to contact someone in a higher position, like the Minister, to make his request.

[262] The Applicant wrote the Minister requesting an allocation of the authorization cards in November 2011. The Minister's response on December 8, 2011 was to deny the NSMA's request and noted that the NSMA could instead harvest bison in zone R/WB/02 and caribou in R/BC/01. If the NSMA wished to hunt Bathurst caribou in the no hunting zone, they would have to make their own arrangements with the Tłįcho or YKDFN.

[263] In examining whether the consultation undertaken by the GNWT was reasonable, the process of consultation is the focus. Generally, I have few concerns, at this level of consultation, about a process that involves workshops, meetings and the high-level exchange of correspondence. It is clear that the GNWT repeatedly engaged or attempted to engage the NSMA on the management of the Bathurst caribou herd. However, in my view, reasonable consultation involves more than this and the consultation process revealed a number of concerns.

[264] The GNWT's failure to conduct a preliminary assessment of the strength of the NSMA's claim and the potential impact of the adverse effects had an inexorable effect on the consultation process. The GNWT made no effort to conduct a preliminary assessment and there is no evidence that they attempted to determine what the NSMA's rights were. The failure to conduct a preliminary assessment also meant that some officials with ENR do not appear to have understood the GNWT's duty to consult with the NSMA and what that involved. As previously stated, the inconsistencies in ENR's approach with the NSMA cannot result in the process being *ex post facto* labeled consultation. When the GNWT entered into the consultation process without a clear and full understanding of what the NSMA's rights were and what the GNWT's obligations were, the process could not have been reasonable or meaningful. *West Moberly, supra* at para. 151.

[265] Consultation must be meaningful which is characterized by good faith and an effort by both parties to understand each other's concerns and attempt to address them. Consultation cannot be simply a process of giving the Aboriginal group an opportunity to state their concerns before the Crown continues along the same path it had contemplated all along. *Mikisew Cree, supra* at para. 54

[266] While there were multiple opportunities for the NSMA to express their concerns, it is not apparent that the GNWT understood their concerns or made an attempt to address them. The NSMA's repeated requests for consultation, for an allocation of the harvest of the Bathurst caribou herd and for a negotiated harvest agreement were met with denial and the discounting of the NSMA's rights as only being asserted and not proven. While the GNWT may have listened to the NSMA's concerns, there is no indication that they gave any consideration to attempting to address them or altering the GNWT's proposed course of action.

[267] In considering the concerns raised by both parties, a reasonable consultation process also involves the exchange of information and an explanation for continuing on or altering the proposed course of action. As stated in *West Moberly, supra* at para. 144:

> To be considered reasonable, I think the consultation process, and hence the "Rationale", would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation.

[268] Throughout this process, the Applicant wrote on numerous occasions to complain that the GNWT had failed to live up to its obligations to consult with the NSMA and to request that the NSMA be consulted regarding the Bathurst caribou herd. The Deputy Minister and other officials invariably responded that ENR was prepared to consult with the NSMA on matters affecting the NSMA's asserted rights. The only explanation for the denial of the NSMA's position that was provided to the NSMA was that the NSMA had not been recognized by Canada and the NSMA's rights were asserted and not proven. As previously stated, it was the GNWT's duty to consult the NSMA on their asserted rights and I am not satisfied that this explanation amounts to a reasoned basis for rejecting the NSMA's position. It does not let the NSMA know that their position had been fully considered, or that there were persuasive reasons why their request was not necessary, impractical or otherwise unreasonable.

[269] The Respondents argue that the Applicant did not approach the consultation in good faith and points to two examples. Firstly, that the Applicant repeatedly tied the request for consultation to funding for NSMA to participate in consultation. Essentially, that if the GNWT did not fund the NSMA's efforts to consult, that the NSMA would not participate in the consultation. The record

demonstrates that the Applicant and the NSMA made repeated requests for funding in order to meaningfully participate in consultation on the Bathurst caribou herd. This does not demonstrate that the NSMA approached consultation in bad faith. Consultation has previously involved the Crown funding an Aboriginal group's participation in the consultation process. The duty to consult lies with the Crown and "the issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a "level playing field."" *Platinex Inc.* v. *Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 2214 at para. 27; see also *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74.

[270] Secondly, the Respondents argue that the NSMA is now taking the position that consultation did not occur when they had previously acknowledged that it had occurred. The NSMA made requests for information to prepare for consultation to which ENR responded and provided information prior to the meeting. This also does not demonstrate that the NSMA approached consultation in bad faith. The NSMA made a number of requests for information to prepare for consultation. ENR responded to some but not all of the requests for information. And at the workshop, which occurred on August 8, 2010, the NSMA was specifically told that the meeting was "not consultation, just engagement." So it appears that the NSMA has a basis for claiming that this workshop was not consultation. Moreover, the Applicant has throughout this process claimed that the GNWT had failed to consult with the NSMA.

[271] For these reasons, I am of the view that the consultation process that was undertaken by the GNWT was not a reasonable one.

c. Was the accommodation offered by the Crown reasonable?

[272] While the Crown must consider the concerns of the Aboriginal group, there is no duty to reach an agreement. Good faith and an attempt by both parties to understand each other's concerns, and an attempt to address them with the goal of reconciliation characterize meaningful consultation. Reasonable accommodation arises from and is the result of meaningful consultation. *Halalt First Nation, supra* at para. 683; *Wii'litswx, supra* at para. 178.

[273] In the final analysis,

> [T]he adequacy of the Crown's approach will be judged by whether its actions, viewed as a whole, provided reasonable interim accommodation for the asserted aboriginal interests, given the context of balance and compromise that is required.

*Wii'litswx, supra* at para. 178.

[274] The Respondents argues that the GNWT did attempt to accommodate the NSMA's rights in several ways: by offering the NSMA an allocation of 5 tags to harvest bison and the unrestricted ability to harvest the Bluenose-East caribou herd outside the no hunting zone; and by suggesting that the NSMA could negotiate directly with the Tłįcho and YKDFN to obtain tags to harvest the Bathurst caribou herd.

[275] The suggestion that the NSMA go to the Tłįcho or YKDFN for tags first arose at the August 2010 workshop. The Minister's letter in November 2010 referred to the expectation that NSMA members would have to make their own arrangements for tags with the Tłįcho or YKDFN. ENR met with NSMA members again on November 16, 2011 and reference again was made to the NSMA having to make their own arrangements with the Tłįcho or YKDFN for tags to hunt Bathurst caribou. The Minister's letter of December 8, 2011 reiterated that NSMA members had to make their own arrangements for tags. In my view, requiring an Aboriginal group to make their own arrangements with another group is not a reasonable form of accommodation. The duty to accommodate, if necessary, lies with the Crown and cannot be deferred to another organization.

[276] During this period, ENR was also consulting with the NSMA on the management of bison. In November 2008, ENR's position was that they were prepared to issue bison tags to the NSMA if approached. The GNWT's willingness to issue tags to harvest bison to NSMA members appears to pre-date the release of the Bathurst Calving Ground Survey.

[277] When the interim emergency measures were announced in December 2009, the GNWT also announced the creation of two new bison hunting zones to alleviate hardship on communities. On March 1, 2010, ENR informed the NSMA by e-mail that 5 bison tags were available to the NSMA. The tags had to be used by March 15, 2010. Aside from the limited amount of time to utilize the tags, there is no indication that this form of accommodation arose from a request from the NSMA or any acknowledgement by the NSMA that this was an appropriate method of accommodation.

[278] The letter from the Minister on December 8, 2011 reminded the Applicant that NSMA members could harvest bison. This appears to be a restatement of ENR's position that the NSMA could access tags to hunt bison rather than a new attempt at accommodation.

[279] At the workshop in August 2010, ENR officials discussed the Bluenose-East caribou herd and the ability to hunt that herd which was located in the Great Bear Lake area. The Minister's letter to the Applicant on November 3, 2010 referred to that discussion and stated that "access to Bluenose-East caribou outside the no hunting zone remains unrestricted." This offer of accommodation again does not appear to arise from a request from the NSMA or an acknowledgement that this was an appropriate method of accommodation. The Applicant argues that this is not a reasonable form of accommodation because of the distance for NSMA members to access the herd and that the area in which the herd is located is outside of the NSMA's traditional hunting grounds.

[280] The offer to hunt bison and the Bluenose-East caribou herd does appear to be an attempt by the GNWT to offer the NSMA an alternative to hunting the Bathurst caribou herd in the no hunting zone. As previously stated, there is no obligation to reach an agreement. The NSMA cannot unilaterally choose their form of accommodation. Taking into account the NSMA's asserted rights, the important object of conserving the Bathurst caribou herd and the balance that must be struck between competing interests, it may be that the GNWT's efforts at accommodation were reasonable.

[281] There is an obligation to undertake consultation in good faith and to conduct meaningful consultation. Meaningful consultation can result in reasonable accommodation. Given that I have found that the GNWT did not engage in a meaningful or reasonable consultation process and that the GNWT failed to offer a reasonable explanation for why the NSMA's request could not be accommodated, I am not prepared to conclude that their attempts at accommodation were reasonable. Only after undertaking a reasonable consultation process and meaningfully responding to the NSMA's concerns can a determination be made about whether the duty to accommodate has been met.

## CONCLUSION

[282] In conclusion, the Respondents have erred in failing to conduct a preliminary assessment of the strength of the Applicant's claim and the potential adverse effects of denying the Applicant and the NSMA a portion of the limited Aboriginal harvest of the Bathurst caribou herd. The Respondents have also erred in fulfilling their duty to consult by failing to conduct a reasonable consultation process. Because of these errors and their effect on the consultation and accommodation process, it is unclear whether the Respondents have failed to fulfill their duty to accommodate, if necessary, the Applicant and the NSMA.

[283] The Applicant is requesting several remedies including:

a. A declaration that the GNWT owes the NSMA members a duty to consult about their participation in the limited Aboriginal harvest of the Bathurst caribou herd for the 2011-2012 hunting season;
b. A declaration that the GNWT breached that duty by failing to consult NSMA at all about the Decision to exclude them from the limited Aboriginal harvest of the Bathurst caribou herd for the 2011-2012 hunting season;
c. An order in the nature of *certiorari* that the Decision be quashed;
d. That the Respondents be directed to consult with the Applicant and NSMA with respect to their participation in the limited Aboriginal harvest of the Bathurst caribou herd with respect to their Aboriginal harvesting rights and to accommodate those rights by providing an allocation of Bathurst caribou for the 2011-2012 hunting season;
e. That until such time as such consultation takes place, authorization of the limited 2011-2012 Aboriginal harvest for Bathurst caribou be set aside or suspended; and
f. Costs.

[284] Since this matter was argued before me in June 2012, the 2011-2012 hunting season has ended. The issue is still one that has relevance as it appears that the limited Aboriginal harvest of 300 Bathurst caribou has been continued for this current hunting season and for future hunting seasons. As the decision in question related to the 2011-2012 hunting season, *certiorari* is no longer available. There is no indication that any decisions about the NSMA's participation in the limited Aboriginal harvest have been made since December 8, 2011.

[285] For the reasons stated, the GNWT owed the Applicant and NSMA members a duty to consult about the management of the Bathurst caribou herd and the NSMA's ability to participate in the limited Aboriginal harvest. The GNWT has breached their duty to consult by failing to conduct meaningful and reasonable consultation. The Superintendent and the Minister, or their authorized representatives are directed to consult with the Applicant and the NSMA about the management of the Bathurst caribou herd and the NSMA's ability to participate in any current and future limited Aboriginal harvests.

[286] For the reasons stated, I am not prepared to direct that the GNWT accommodate the NSMA with an allocation of the limited Aboriginal harvest of the Bathurst caribou herd.

[287] In determining whether to set aside or suspend the limited Aboriginal harvest until the GNWT undertakes consultation with the NSMA, I must consider the timeliness of the judicial review, the conduct of the Applicant and the balance of convenience which includes consideration of any disproportionate impact on the parties or the interests of third parties. *MiningWatch Canada* v. *Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 52. In my view, the balance of convenience weighs against setting aside or suspending the limited Aboriginal harvest pending the GNWT's consultation with the NSMA. The Tłįcho and YKDFN, who have recognized Treaty and/or land claim agreements, would be adversely affected by this action. They were not parties to this judicial review and they should not be penalized because they were able to successfully negotiate a harvesting agreement with the GNWT.

[288] The parties did not address costs before me. If they wish to do so, they may contact the Registry within 30 days of the filing of these Reasons and make arrangements to do so. Otherwise, the Applicant is entitled to his costs.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
20th day of June 2013

Counsel for the Applicant: Christopher G. Devlin
Kate Gower

Counsel for the Respondents: Karen Lajoie

**S-1-CV-2012000002**

---

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

---

BETWEEN

WILLIAM ENGE, on his own behalf and on behalf of the members of the North Slave Métis Alliance

Applicant

- and -

FRED MANDEVILLE in his capacity as Superintendent, North Slave Region, of the Department of Environment and Natural Resources, for the Government of the Northwest Territories and MICHAEL MILTENBERGER in his capacity as Minister of the Department of Environment and Natural Resources, for the Government of the Northwest Territories

Respondents

---

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD

---