IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coastal First Nations v. British Columbia (Environment),* 2016 BCSC 34

Date: 20160113
Docket: S150257
Registry: Vancouver

Between:

Coastal First Nations – Great Bear Initiative Society and Gitga'at First Nation

Petitioners

And

Minister of Environment for the Province of British Columbia, Executive Director of the British Columbia Environmental Assessment Office, and Minister of Natural Gas Development, Minister Responsible for Housing and Deputy Premier, and Northern Gateway Pipelines Limited Partnership, by its general partner Northern Gateway Pipelines Inc.

Respondents

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

On judicial review from an order of the Environmental Assessment Office dated June 21, 2010.

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Place and Date of Hearing:	Vancouver, B.C. July 13-15, 2015 September 18, 2015 November 26, 2015
Place and Date of Judgment:	Vancouver, B.C. January 13, 2016

Contents

INTRODUCTION

[1] The petitioners, Coastal First Nations – Great Bear Initiative Society and Gitga'at First Nation (collectively "CFN") seek, by way of judicial review, a series of declarations setting aside, in part, the Equivalency Agreement (the "Agreement") entered into between the Province of British Columbia, by way of the Environmental Assessment Office (the "EAO") and the National Energy Board (the "NEB").

[2] It is the decision of the Executive Director of the EAO (the "Executive Director") to enter into the Agreement dated June 21, 2010 pursuant to ss. 27 and 28 of the British Columbia *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EAA*], that is impugned. The whole of the Agreement is not attacked, only that part contained in clause 3 purporting "to remove the need for an environmental assessment certificate" ("EAC"), which the petitioners seek to have declared invalid.

[3] The declarations sought are:

> 1. A declaration that the agreement between the British Columbia Environment Assessment Office ("EAO") and the National Energy Board (the "NEB"), dated June 21, 2010 and attached as **Schedule "A"** (the "Equivalency Agreement"), is invalid and is set aside to the extent that it purports to remove the need for an environmental assessment certificate ("EAC") pursuant to the *Environmental Assessment Act,* SBC 2002, c 43 (the *"EAA").*
>
> 2. A declaration that the Minister of the Environment for the Province of British Columbia (the "Minister") and the Deputy Premier and Minister of Natural Gas Development and Minister Responsible for Housing (the "Deputy Premier") (together with the Minister, the "Ministers") are required to exercise their authority under s. 17 of the *EAA* in relation to the Enbridge Northern Gateway Project (the "Project").
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> 3. Declarations that:
>
> (a) The EAO and/or the Minister are required to consult with the petitioner Gitga'at First Nation on the process to be followed preceding the exercise of authority under s. 17 of the *EAA* in relation to the Project; and
>
> (b) The Ministers are required to consult with the petitioner Gitga'at First Nation with respect to the exercise of their authority under s. 17 of the *EAA* in relation to the Project.
>
> 4. Declarations that, unless and until a valid EAC is issued in respect of the Project:
>
> (a) A minister, or an employee or agent of the provincial government or of a municipality or regional district, is

prohibited from issuing, in relation to the Project, an approval under any other provincial enactment; and

(b) Any such approval is without effect.

…

[4] For the reasons set out below, I grant the relief sought in the Petition as set out at the conclusion of these reasons.

POSITIONS OF THE PARTIES

Position of the Petitioner

[5] The petitioners rely on two legal bases to support the relief they seek.

[6] The first is statutory interpretation. Specifically, the petitioners say that while ss. 27 and 28 of the *EAA* provide the authority for cooperation to avoid duplication of environmental assessments, the provisions do not go so far as to allow for the abdication of decision making. The petitioners agree that there is ample jurisdiction under the *EAA* to accept another jurisdiction's assessment once the Executive Director decides it is equivalent to that which would be authorized under the *EAA*. However, the petitioners say that nothing in the *EAA* authorizes the abdication of the power and responsibility to determine, after an assessment is completed and considered, whether to approve any project under s. 17 of the *EAA*. The petitioners assert that where decision-making authority under the *EAA* is affected the *Act* does so explicitly. Thus, say the petitioners, the Executive Director's decision, made pursuant to the Agreement, not to make a determination under s. 17, was *ultra vires*. They say the standard of review of this decision is correctness as it is an example of a question of true jurisdiction. In any event, it was both unreasonable and incorrect.

[7] The second is a constitutional obligation on the Province to consult with First Nations before engaging in any government action that may adversely affect First Nations' rights. The petitioners say the Province had a duty to consult with First Nations before entering into the Agreement, which, by its nature, allowed the Province to avoid its obligation to make a s. 17 decision, thus leading it to avoid its obligation to consult First Nations. Further, say the petitioners, the Agreement provided for unilateral termination; the Province would not have been bound to the decision made by the

federal government on June 17, 2014 if they had terminated the Agreement prior to the federal government's decision to approve the Enbridge Northern Gateway Project (the "Project"). The petitioners contend that the Minister was obligated to consult with CFN, and in particular the Gitga'at First Nation ("Gitga'at"), before deciding not to terminate the Agreement.

[8] The petitioners rely on the fact that the Province made submissions before the Joint Review Panel (the "JRP") raising concerns about:

1. the effect of spills on the petitioners' claimed land rights;

2. the inadequacy of information from Northern Gateway Pipelines Inc. ("NGP") about the ability to safeguard against spills on land or water; and

3. plans for and adequacy of spill response on land and water within British Columbia.

[9] The petitioners say this recognition by the Province raises the likelihood that if the Province had decision-making authority in relation to the Project going ahead, its constitutional obligation would be to consult with the petitioners and make accommodations in relation to the preservation of their Aboriginal rights and title.

Position of the Province

[10] The Province's position responding to the petitioners' claim that the decision by the Executive Director was *ultra vires* as lacking statutory authority is set out in their written argument:

> 52. The petitioners' argument amounts to a challenge to the Executive Director's interpretation of the authority granted under s. 27 of the *EAA* to conclude equivalency agreements with other jurisdictions or boards, and the Executive Director's implementation of that authority in the terms of the Equivalency Agreement.
>
> 53. More specifically, the question raised by the petitioner's argument is how to interpret the phrase "a means to accept another party's … assessment as being equivalent to an assessment required under this Act".
>
> 54. As set out below, the appropriate standard of review to be applied by the Court in its review of the Executive Director's interpretation and implementation of s. 27 is "reasonableness."
>
> …

> 96. The authority of the Minister under s. 27 of the *EAA*, and the Executive Director's exercise of that authority in the terms of the 2010 Equivalency Agreement are each a specific example of an effort by the Province to reconcile the overlap in jurisdiction between provincial and federal regulators with respect to environmental assessment.
>
> 97. Viewed in this light, both s. 27 and the Equivalency Agreement are a permissible legislative and policy choice respectively, taking into account the federal nature of this country and the need to ensure efficiency and reduce duplication of process and effort.

[11] The Province further contends that the "internal structure" of the *EAA* allows the Executive Director to exempt certain projects from obtaining an EAC. An environmental assessment conducted pursuant to an agreement under s. 27 is not specifically enumerated under s. 17(1) as a way by which a project can be referred to the Ministers for a s. 17(3) decision. The Province says it was reasonable for the Executive Director to conclude that the necessity for an EAC was an issue that could be addressed within the framework of the Agreement.

[12] The Province's response to the petitioners' assertion of a constitutional duty to consult and the failure to consult in relation to entering into and/or failing to terminate the Agreement is that no duty to consult arose in relation to entering into or terminating the Agreement for several reasons. Generally, however, the Province takes the position that the duty to consult does not arise until, in the words of the decision *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy & Resources)*, 2015 SKCA 31 at para. 104:

> [104] … actual foreseeable adverse impacts on an identified treaty or Aboriginal right or claim must flow from the impugned Crown conduct. While the test admits possible adverse impacts, there must be a direct link between the adverse impacts and the impugned Crown conduct. If adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult.

and, says the Province, there is no such direct link.

[13] Further, the duty to consult, says the Province, can be fulfilled by either level of government and was fulfilled by the federal government, through the JRP process, because it engaged in an equivalent consultation process with the petitioners, thereby exhausting any duty to consult that was owed by the Province.

Position of NGP

[14] NGP's position is that this Court should dismiss the Petition on the basis that it violates fundamental constitutional and legal principles.

[15] NGP adopts the submissions of the Province on statutory interpretation and that the standard of review for the impugned decision of the Executive Director is reasonableness. However, NGP takes a much simpler and more fundamental position. NGP says that:

> ... While the environmental assessment provisions of the *EAA* are generally valid and enforceable, the decision to approve or not approve the construction and operation of this interprovincial pipeline is an essential and vital element of a federal work and undertaking. Such a decision falls within the exclusive constitutional jurisdiction of Parliament. The requirement for a decision to approve or prohibit the construction and operation of the Project under s. 17 of the *EAA* is exempted from provincial power and is unconstitutional.

[16] Further, NGP submits that:

> 3. …
>
> (d) The petitioners submitted to and participated in the federal pipeline approval process which proceeded on the fundamental assumption and understanding that no provincial environmental assessment was required for the approval of the Project. Arguing now, for the first time, that this interprovincial pipeline Project requires a separate EAC under the provisions of the *EAA* represents a breach of the doctrines of issue and cause of action estoppel, collateral attack, improper re-litigation and an abuse of process. These doctrines preclude re-litigating in this forum issues which were and should have been addressed in the federal pipeline approval process and in the judicial review and appeal proceedings being brought in the Federal Court of Appeal;
>
> (e) Consistent with such abuse of process, the petitioners knew and understood before the JRP hearing process began that the B.C. respondents would not make a decision under s. 17 of the *EAA* whether to grant an EAC for the Project. The petitioners have given this Court no explanation to rebut the presumption that their lengthy delay bringing this petition is prejudicial to Northern Gateway and to the public interest. For this reason, the relief sought in this petition should be denied on the ground of *laches*; …
>
> …

FACTUAL BACKGROUND

[17] I adopt, in large part, the factual background as set out in the Petition as no party controverts what is adopted herein.

The Petitioners

[18] CFN is a provincially-incorporated society. It is an alliance of First Nations on British Columbia's north and central coast and Haida Gwaii. Its member First Nations are Wuikinuxv Nation, Heiltsuk, Kitasoo/Xaixais, Nuxalk Nation, Gitga'at, Metlakatla, Old Massett, Skidegate, and Council of the Haida Nation.

[19] CFN is governed by a board of directors composed of representatives of each member First Nation. The CFN represents many First Nations with claims of Aboriginal rights and title relating to those lands, waters and resources that may be adversely affected by the operation of the Project and by any spill from the Project. In 2009, CFN received a mandate from its board to protect the interests of its members by avoiding threats posed by the Project.

[20] The CFN's mandate includes participating effectively in the regulatory processes relating to the Project and assisting member First Nations in their participation. The CFN's mandate does not include engaging in consultation in relation to individual member First Nations' Aboriginal rights and title.

[21] Gitga'at is a First Nation located on British Columbia's north coast. Its main village is Hartley Bay at the confluence of the Grenville and Douglas Channels. The Gitga'at claim Aboriginal rights within their traditional territory, which includes lands and waters within and adjacent to the proposed shipping route for oil tankers connected to the Project (the "Shipping Route"). Since prior to first contact with Europeans, the Gitga'at have continuously engaged throughout their territory in practices integral to their distinctive culture, including harvesting seafood and plants and hunting animals for food, social and ceremonial purposes, and in traditional social and cultural activities.

The Respondents

[22] The respondents, the Minister and the Executive Director, have powers under the *EAA.*

[23] The respondent Deputy Premier is the responsible minister for "Energy projects – petroleum and natural gas projects" pursuant to the Responsible Minister Order, and therefore, with the Minister, would have authority under s. 17 of the *EAA* in relation to the Project but for the Agreement.

[24] The respondent Northern Gateway Pipeline Limited Partnership by its general partner [NGP] is the proponent of the pipeline project at issue.

The Project

[25] The Project is a proposal by Northern Gateway Pipelines Limited Partnership to create a new transportation route for heavy oil. The Project would consist of:

(a) A pipeline stretching from Bruderheim, Alberta to Kitimat, British Columbia that would carry an average of 83,400 cubic metres (525,000 barrels) of oil products west per day. The majority of the oil product is anticipated to be diluted bitumen. Bitumen is a viscous product obtained from oil sands. As it does not flow easily in pipelines, it is diluted with condensate to form diluted bitumen, which has some similar properties to heavy crude oil;

(b) A parallel pipeline that would carry an average of 30,700 cubic metres (193,000 barrels) of condensate per day east from Kitimat to the inland terminal at Bruderheim; and

(c) A marine terminal at Kitimat that would have 2 tanker berths, 3 condensate storage tanks, and 16 oil storage tanks.

[26] The British Columbia portion of the pipeline is approximately 660 kilometres. More than 90 per cent of the pipeline would lie on purportedly provincial Crown lands. The British Columbia portion would cross land currently and traditionally

used by First Nations, and would cross approximately 850 watercourses in British Columbia.

[27] The oil products would be shipped by tanker through confined channels among the fiords and islands of British Columbia's north coast out to the open ocean and on to world markets. Once in operation, about 220 tankers would call at the Kitimat Terminal annually to deliver condensate or load oil products. The largest tankers would carry about three times as much oil as the tankers that have historically visited British Columbia ports. First Nations, including the Gitga'at, currently, and traditionally, use much of the coastal land and water along the proposed shipping route.

[28] In order for the Project to proceed, the Province will have to issue approximately 60 permits, licences and authorizations.

The EAA

[29] The *EAA* provides for the environmental assessment of "reviewable projects" prescribed by the *Reviewable Projects Regulation,* B.C. Reg. 370/2002 (the "Regulation"), promulgated under the *Act*. A person must not undertake a reviewable project without first obtaining an EAC. Permits or approvals for a reviewable project cannot be issued under any other enactment until an EAC is obtained and a project meets the criteria of a reviewable project under the *EAA* and the Regulation.

[30] In 2008 and again in 2010, the EAO and the NEB entered into equivalency agreements regarding all reviewable projects, which also require approval under both the *EAA* and the *National Energy Board Act,* R.S.C. 1985, c. N-7 (the "*NEB Act*"), with the later agreement superseding and replacing the earlier one. In the agreements, the EAO accepted that any NEB assessment of these projects constitutes an equivalent assessment under the *EAA,* and that these projects do not require an additional assessment under the *EAA.* The agreements also provide that these projects may proceed without an EAC. The Project is the first project to which the agreements apply.

[31] The full text of the EA is Schedule A to these reasons.

An Overview of the Federal Regulatory Process

[32] Because the Project includes an interprovincial pipeline, the NEB was required to consider whether Certificates of Public Convenience and Necessity ("CPCNs") ought to be issued, such that the Project could proceed. The Project also triggered an environmental assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the "*CEA Act*") then in force.

[33] NGP filed its initial Preliminary Information Package (the "PIP") with the NEB on November 1, 2005, a copy of which was also sent to the EAO. Among other things, the PIP described the proposed pipeline, including its route.

[34] In the PIP, NGP suggested that the NEB and the Canadian Environmental Assessment Agency ("CEAA") form a joint review panel to review the Project. The NEB and the federal Minister of the Environment agreed to refer the Project to a JRP in September of 2006. Ultimately, an agreement to that effect (the "JRP Agreement") was signed on January 15, 2010. NGP filed with the JRP the formal application for the Project on May 27, 2010.

[35] The JRP issued its report (the "JRP Report") on December 19, 2013, recommending approval of the Project, subject to a number of conditions. By order issued on June 17, 2014 (the "Federal Order"), the Governor in Council decided, under the CEAA that certain significant adverse environmental effects are justified in the circumstances, and it directed the NEB to issue the CPCNs on the same conditions in the JRP Report. The NEB issued the CPCNs on June 18, 2014.

The Province's Intervention in the Enbridge Northern Gateway Project JRP

[36] The Province participated before the JRP as an intervenor.

[37] During the course of the proceedings, the Province set out "Five Conditions" it stated were "minimum requirements that must be met before we will consider support for any heavy oil pipeline projects in our province." The five conditions are:

(a) Successful completion of the environmental review process. In the case of Enbridge, that would mean a recommendation by the NEB Joint Review Panel that the Project proceeds;

(b) World-leading marine oil-spill response, prevention and recovery systems for British Columbia's coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;

(c) World-leading practices for land oil-spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;

(d) Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and

(e) British Columbia receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the Province, the environment and taxpayers.

[38] The Province stated in its final submissions to the JRP (the "Province's JRP Submission") that it opposed approval of the Project. The Province's central reason for its opposition was that "the evidence on the record does not support NGP's contention that it will have a world-class spill response capability in place." The Province's JRP Submission stated:

> The project before the JRP is not a typical pipeline. For example: the behavior in water of the material to be transported is incompletely understood; the terrain the pipeline would cross is not only remote, it is in many places extremely difficult to access; the impact of spills into pristine river environments would be profound. In these particular and unique circumstances, [Northern Gateway] should not be granted a certificate on the basis of a promise to do more study and planning once the certificate is granted. The standard in this particular case must be higher. And yet, it is respectfully submitted, for the reasons set out below, [Northern Gateway] has not met that standard. "Trust me" is not good enough in this case.

[39] The Province went on to recommend the imposition of additional conditions on the Project in the event the JRP did recommend approval of the s. 52 certificate. A

number of the conditions were not adopted by the JRP, including those relating to spill response capacity, spill response plans, geographic response plans, the requirement that NGP obtain and use a pipeline simulator, and the periodic review of road access.

[40] On June 17, 2014 the federal government approved the Project subject to the fulfillment of 209 conditions set by the JRP. However, four of the Province's five stated requirements were not accepted. The only requirement met was the completion of the environmental review process.

CONSTITUTIONAL QUESTION

Is the application of the EAA to this interprovincial pipeline unconstitutional?

[41] The arguments of NGP, if accepted, would dispose of this matter completely. Thus, I will deal with the submission that any resort to s. 17 or s. 8 of the *EAA*, in relation to the Project would be unconstitutional on several grounds. As well, I will deal with NGP's submissions regarding abuse of process and laches as those submissions would also dispose of the Petition, if successful.

[42] NGP served a notice of constitutional question on March 11, 2015, alleging that any conditions or requirements that might attach to the Project by the EAO under the *EAA* would be *ultra vires*. The Attorney General of Canada received notice but chose not to intervene.

[43] NGP asserts that the interprovincial nature of the Project renders it a federal undertaking, such that it resides within the exclusive jurisdiction of the federal government. As such, NGP submits that any requirement for statutory compliance with British Columbia's environmental assessment process is unconstitutional. NGP cites the doctrines of pith and substance, inter-jurisdictional immunity and paramountcy in support of its position on the *vires* of the application of s. 17 of the *EAA* to the Project. NGP argued that the unconstitutionality of the application of the Province's environmental assessment regime to the Project provides a complete answer to this Petition and any analysis of the merits of the Petition is unnecessary.

[44] The Province made limited submissions in this regard, but acknowledges that the environment is within the shared jurisdiction of the provincial and federal

governments. The Province's submissions on shared jurisdiction centered on the developments it is making in environmental protection outside of the *EAA*, and it argued that the Project is accountable under these new measures. In addition, the Province's position evolved slightly over the course of these proceedings. The Province took the position that there was or is a role for the Province to play other than that assigned to it as a result of having signed the 2010 Agreement and having failed to terminate it prior to the issuance of the approval by the NEB. The Province says that if this Court accedes to the petitioners' position and sets aside the Agreement to the extent of its abdication of jurisdiction under s. 17 of the *EAA*, then there is room constitutionally for the Province to "scope" the assessment process and to impose conditions, if it decides to do so. However, to determine the constitutionality of the effect of any provincially-imposed conditions now is premature.

[45] Beyond this, the Province has not articulated its support for NGP's position on unconstitutionality, nor has it advanced similar arguments.

[46] The petitioners say that any constitutional analysis is premature as it is not yet known what, if any, conditions would be placed on the Project by the Province, beyond those already imposed by the NEB. It is possible that the Province, in making a s.17 decision under the *EAA*, could simply issue an EAC without conditions. Further, the petitioners submit it is possible the Province might issue an EAC with conditions that do not substantially impair the Project or render it inoperable.

[47] In consideration of the positions advanced by the petitioners and the Province with regard to the constitutional question, I agree that absent concrete conditions imposed by the Province in conjunction with an EAC, it would be premature to make a finding based on hypothetical conditions. The constitutional doctrines of inter-jurisdictional immunity and paramountcy cannot be adequately determined on merely speculative provincial conditions. As such, for the reasons that follow, there is currently no factual basis to make such a determination.

[48] At this stage of the proceedings, then, the only relevant constitutional analysis that can be undertaken is an assessment of the constitutional validity of s. 17 of the *EAA*; that is, is NGP correct in this factual situation, that the Province has no jurisdiction pursuant to the *EAA*? To complete this analysis, I must determine, "[i]f in pith and

substance" the statutory provision is "within the jurisdiction of the legislature that enacted it": *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 26. If it is determined that British Columbia's environmental assessment regime is valid with respect to regulating the Project then that is the end of the constitutional analysis until actual conditions have attached to an EAC and are brought forward for constitutional consideration.

Pith and Substance

[49] NGP suggests that the application of s. 17 of the *EAA* to the Project in pith and substance "prohibits the construction and operation of the pipeline in B.C." NGP asserts that to the extent the provincial environmental assessment regime interferes with the construction and operation of an interprovincial undertaking it is invalid.

[50] To determine the validity of an impugned statutory provision the Supreme Court of Canada has held that the pith and substance of the provision must be determined by looking at two aspects of the law in question: its purpose and its effect. Once the true purpose and effect of the law is established, its validity will depend on whether it falls within the powers of the enacting government: *Canadian Western Bank* at para. 27; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 17; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 16 (*COPA*).

[51] The "dominant characteristic" or purpose central to the *EAA* is the regulation of environmental impacts in British Columbia. The Province has a known constitutional right to regulate environmental impacts within its provincial boundaries. As the Supreme Court of Canada held in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 64:

> …
> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867*, and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.
> …
> …

[52] It is unassailable in the present matter that provincial interests are substantially affected by the construction of this Project. Although it is correct to state that this project is an interprovincial pipeline, the majority of it lies within the borders of British Columbia. The proposed pipeline route extends more than 600 kilometres across the Province on predominantly Crown land. The pipeline will also traverse over 800 watercourses in the Province, and the marine terminal aspect of the Project will have substantial impact on British Columbia's coastal lands and water. These lands are also subject to claims of rights and title by multiple First Nations groups. The existence of Gitga'at claims and their rights to engage in harvesting and other resource-gathering activities within their territory are acknowledged by the Province; these rights have also been, and still are, the subject of ongoing negotiations and agreements between the Province and the Gitga'at.

[53] This Project is clearly distinguishable from past division of powers jurisprudence dealing with aviation or telecommunications; the proposed Project, while interprovincial, is not national and it disproportionately impacts the interests of British Columbians. To disallow any provincial environmental regulation over the Project because it engages a federal undertaking would significantly limit the Province's ability to protect social, cultural and economic interests in its lands and waters. It would also go against the current trend in the jurisprudence favouring, where possible, co-operative federalism: *Canadian Western Bank* at paras. 24, 42; *COPA* at para. 44.

[54] Indeed, the very premise of the Agreement assumes a cooperative approach to environmental assessment where both federal and provincial interests are at stake. The Supreme Court of Canada noted in *Quebec (Attorney General)*, at para. 193, the co-existence of environmental assessment responsibility is "neither unusual nor unworkable". Further, even if the co-operative approach to environmental assessment was to break down in the instant case, the existence of the termination clause in the Agreement presumes that the Province has a constitutionally valid right to conduct an environmental assessment independent of the federal process.

[55] Yet, NGP's position goes so far as to assert that the entire *EAA* is of no force and effect in relation to an interprovincial undertaking. It argues that because s. 8 prohibits the operation of any project unless it has received an EAC in accordance with s. 17, and

pursuant to s. 17 the Minister can refuse to issue a certificate, the *EAA* is invalid because it is beyond the jurisdiction of the Province to refuse the Project, which would be the effect if it used its discretion and refused to issue an EAC. While I agree that the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding, I do not agree with the extreme position of NGP that this invalidates the *EAA* as it applies to the Project.

[56] As the Court held in *Canadian Western Bank*, at para. 29, the doctrine of pith and substance "is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government." It is not enough for NGP to argue that s. 17 of the *EAA* affects matters beyond the Province's jurisdiction. As long as the "dominant purpose" of the legislation is *intra vires*, any secondary effects are not relevant to the question of constitutional validity: *Canadian Western Bank* at para. 28. The Province has a constitutional right to regulate territorial environmental impacts. Since it is established law that regulation of the environment is shared jurisdiction among all levels of government, it flows logically that the *EAA*, whose purpose is to regulate environmental concerns in British Columbia while advancing economic investment in the Province, is valid legislation, even where it applies to an interprovincial undertaking.

Inter-Jurisdictional Immunity and Paramountcy

[57] The fact that s. 17 of the *EAA* affects a federal undertaking is not enough to demonstrate that the provision is unconstitutional; NGP must establish that the legislation's effects on federal powers render it inapplicable or inoperable. To establish inter-jurisdictional immunity, NGP must prove that the "core" of a federal legislative power has been "impaired" by the provincial enactment: *Canadian Western Bank* at para. 48. To make out the doctrine of paramountcy the respondents must show either a conflict between the provincial and federal legislation such that "compliance with one is defiance of the other", or, if dual compliance is possible, that provincial legislation frustrates the purpose of the federal statute: *COPA* at para. 64.

[58] In the face of such arguments, NGP comes back to its position that there is no room in the application of constitutional doctrines for provincial legislation that could

disallow the operation of an interprovincial undertaking. However, the argument rests on a reading of the *EAA* without any statutory interpretation. It is true that if the Province, in the exercise of its jurisdiction under s. 17, were to refuse outright any interprovincial project, the effect of s. 8 would ensure the conditions for a finding of *ultra vires*, or unconstitutionality would be plain. However, the totality of the relevant sections of the *EAA*, including ss. 27 and 28, all demonstrate an avenue clearly aimed at allowing a cooperative approach between overlapping environmental jurisdictions. Absent the abdication of decision making pursuant to s. 17 as contemplated by the Agreement, an equivalency agreement such as those developed in earlier incarnations, and referred to later in these reasons, is the manifestation of carrying out this concept of cooperative federalism.

[59] NGP relies on *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140, to support its paramountcy and inter-jurisdictional immunity submissions because the Court determined, at para. 60, that "the power over interprovincial pipelines rests with Parliament. The *NEB Act* is comprehensive legislation enacted to implement that power." NGP asserts that the salient finding in this case is that interprovincial pipelines fall within the power of the federal government and, as such, so should the Project.

[60] The petitioners argue that although this case deals with an interprovincial pipeline, it is distinguished on the grounds of opposition put forth against the Project. In *Trans Mountain* the City of Burnaby opposed the proposed location of the pipeline; whereas in the case at bar, the petitioners submit there is no real opposition. The petitioners argue they are not saying the Province should say "no" to the Project or any fundamental part of it, merely, they assert, the Province should say "yes, but with some conditions", after proper consultation with the petitioners.

[61] In assessing this, I find the Court's comments at para. 62 to be of great importance:

> [I]t is not the case that validly-enacted provincial laws, in this case municipal bylaws, somehow cease to be valid enactments when they come up against the federal undertaking. Indeed, courts seek to give effect to validly-enacted provincial laws in those situations when they can. However, a test has emerged over many years that says, in essence, provincial laws must give way and be rendered inoperative when they interfere with the core functioning of the federal

> undertaking ... It must always come down to an assessment, case by case, of what the impact would be of the provincial law on the federal undertaking.

[62] NGP has given short shrift to such considerations, but it remains an important exercise for courts to give effect to validly-enacted provincial laws unless they interfere with the core functioning of a federal undertaking. This is to be done on a case-by-case basis, and since there are different considerations at stake here, it is not enough to do as NGP says and find that the federal government has exclusive power because the case at bar also involves an interprovincial pipeline.

[63] In *Trans Mountain*, at para. 65, the Court held that, "At the core of federal power over pipelines is determining where pipelines are located. ... It would be unworkable to take away from the NEB the power to order the engineering feasibility work by giving to a provincial entity a veto power". The Court went on to say, at para. 67, that if the NEB did not have the power to overrule when it came to the location of pipelines, virtually no pipeline could ever be built.

[64] I agree with the petitioners that the aspect of location is a vital and distinguishable factor. The strength of Trans Mountain's case came from the fact that Burnaby's bylaws were effectively prohibiting the expansion of the pipeline in certain locations and trying to control routing of the pipeline, despite NEB being granted explicit jurisdiction over the routing and location of pipelines under ss. 31-40 of the *NEB Act*: *Trans Mountain* at para. 22.

[65] I do not find that at this point any aspect of British Columbia's laws or environmental protection regime amount to a prohibition, or are in anyway rendering the Project inoperative. I agree with the petitioners' submissions that it is premature to engage in this analysis until the parties know whether the Province chooses to issue any conditions and, if it does, until it becomes clear what those conditions are.

[66] NGP has also brought to this Court's attention the recent Supreme Court of Canada decisions *Moloney* and *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, which it says further support its position that the British Columbia laws are in conflict with the federal laws that apply to the Project. As such, NGP says that the provincial laws should be inoperative to the extent of the conflict.

[67] I do not find these cases to be persuasive for NGP. In *Moloney* the laws in question were found to contradict each other, and since I do not find that to be an issue in the case at bar, much of *Moloney* has no application. However, the Court made several statements that I do find to be relevant and applicable. First, the Court reiterated the constitutional doctrine of federal paramountcy at para. 16 by affirming *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 and *Canadian Western Bank*. The Court then went on to highlight examples of situations where overlapping legislation would not lead to a conflict. For instance, it held that "duplicative federal and provincial provisions will generally not conflict": *Moloney* at para. 26; *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 80; *Canadian Western Bank* at para. 72. Following that statement, the Court held, "Nor will a conflict arise where a provincial law is more restrictive than a federal law ...": *Moloney* at para. 26; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 at para. 25; *Marine Services* at paras. 76 and 84. The Court then explained that a more restrictive provincial law could frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement.

[68] In *407 ETR* there was also a clear conflict; under federal legislation creditors were prohibited from enforcing debt, but under the provincial laws they were entitled to. The Court summarized the issue at para. 25 when it said, "One law allows what the other precisely prohibits." When the two laws operated side-by-side, it was not possible to comply with both and so, at para. 27, the provincial law was found to offend the doctrine of paramountcy. The Court also held, at para. 28, that the provincial law frustrated the purpose of the *BIA*, which was to provide a bankrupt with a fresh start, because the provincial legislation allowed creditors to continue to burden a discharged bankrupt until full repayment of the debt was complete.

[69] I find the same rational applies to the application of *407 ETR* as applied to *Moloney* and, as such, I do not find the case helpful in advancing NGP's position.

[70] NGP has argued that in the case at bar the federal law provides a positive entitlement in that it is entitled to proceed with the pipeline in accordance with the 209 conditions; therefore, a more restrictive provincial scheme would frustrate the federal purpose because any conditions would amount to a prohibition of a federal

undertaking. In essence, it argues that the federal government has said "yes", and that any provincial conditions would have the effect of saying "no". It points to para. 60 in *Moloney* where the Court says the "laws at issue give inconsistent answers to the question whether there is an enforceable obligation: one law says yes and the other says no".

[71] In my view, the federal laws in question are merely permissive in that the Project is permitted to proceed so long as it complies with the federal conditions. In this way, the petitioners argue, if the Province chooses to issue further conditions, the provincial laws will also be permissive so long as certain further or more narrow conditions are complied with.

[72] I agree with the petitioners. The mere existence of a condition does not amount to a prohibition. The conditions placed on the Project by the NEB are imposed in accordance with environmental protection legislation in an effort to balance the economic interests of the Project with important environmental protection concerns. Further conditions imposed by the Province that seek to advance environmental protection interests would therefore fall squarely in line with the purpose of federal environmental protection legislation governing the Project.

[73] This is not to say that any or all conditions would be permissible. This is just to say that on its face there are no obvious problems with the imposition of provincial environmental protection conditions. I agree with the petitioners that the problem that arose in *Moloney* does not arise here. While the federal law says "yes with conditions", the provincial law, if conditions were issued, could also say "yes, with further conditions".

[74] Therefore, no further finding can be made unless and until specific conditions are imposed. The questions of "impairment" in the case of inter-jurisdictional immunity and "operational conflict" in the case of paramountcy cannot be effectively answered without an examination of any specific conditions imposed by the Province under s. 17 of the *EAA.*

[75] Under NGP's present application the only aspect of constitutionality of the *EAA* that can be answered is the validity of the Province's regulation of the environmental

impacts of an interprovincial undertaking. Given that the dominant purpose of the *EAA* is regulation of the environment within British Columbia (which will be discussed more fully in the sections that follow), the statute represents a valid exercise of provincial power even inasmuch as it may affect certain aspects of an interprovincial pipeline.

[76] NGP's concerns with respect to the doctrines of inter-jurisdictional immunity and paramountcy are valid. However, such doctrines can only be considered once the Province has made a decision under s. 17 of the *EAA* and any conditions placed on the Project are delineated.

Abuse of Process

[77] NGP also raised the issue of re-litigation or abuse of process and laches. I find little merit in either submission. The entire premise of the abuse of process argument is in paragraph 41 of NGP's written argument:

> A thorough and extensive environmental assessment was conducted by the JRP under the provisions of the *NEB Act* and the *CEAA, 1992* and *CEAA, 2012.* This led to the JRP Report and Recommendations dated December 19, 2013 followed by the decision of the Governor in Council dated June 17, 2014 to approve the Project. Subject to judicial review on leave by the Federal Court of Appeal, the decisions of the NEB and the Governor in Council are final and conclusive. The petitioners were interveners and active participants in the entire JRP process leading up to and including the June 17, 2014 decision of the Governor in Council. The Gitga'at First Nation, the Haida Nation, the Kitasoo and Heiltsuk Councils are applicants in the judicial reviews being conducted before the Federal Court of Appeal. The entire federal pipeline approval process, including the judicial review applications now before the Federal Court of Appeal, was conducted on the fundamental assumption and understanding that no provincial environmental assessment was required for the approval of the Project. Challenging now, for the first time, this fundamental assumption and understanding represents re-litigation and a clear abuse of process which should not be tolerated by this Court.

[78] In my respectful view, the premise of NGP, as set out in this paragraph, is that there is no distinction between no provincial environmental assessment and no provincial decision pursuant to s. 17(3) of the *EAA*. As will be clear later in these reasons, there is a distinction between "assessment" and "decision based on the assessment", and that distinction is a full answer to NGP's submission on abuse of process.

Laches

[79] Again, there is a short answer to this submission. Until the Province chose not to terminate the Agreement prior to June 17, 2014, the clear meaning and intent of the Province in regard to its interpretation of the Agreement was at the very least unclear. That issue was raised by the petitioners in correspondence between the petitioners and Premier Clark wherein the Premier was requested to seek an opinion from the Attorney General as to the boundaries on decision making presented by the Agreement. There is simply no basis in fact for a finding of laches.

LEGAL ANALYSIS

Statutory Interpretation

[80] The petitioners suggest that the Agreement is invalid in its entirety because there is no evidence that the Minister officially delegated the Minister's authority to the Executive Director. There is no merit to this submission as on the face of the Agreement that delegation is referenced as:

> WHEREAS the Minister's section 27 powers have been delegated to the Executive Director of the EAO.

[81] The real issue pressed by the petitioners is that although the Agreement is otherwise valid, this Court should find the Agreement invalid to the extent it purports to abdicate the Province's jurisdiction to make a decision pursuant to s. 17(3) of the *EAA*.

[82] The petitioners take no issue with the implementation of the JRP review process as an equivalent environmental assessment pursuant to ss. 27 and 28 of the *EAA*; they assert that the Province must maintain its authority under s. 17(3) and ultimately make a decision whether to issue an EAC approving the Project with or without further conditions. The petitioners say it is beyond the Province's authority to enact clause 3 of the Agreement and permit reviewable projects to proceed without an EAC and thus the Agreement as it stands is *ultra vires*.

[83] The Province's position is that the Agreement is valid and that it expressly provides that projects that fall within its scope do not require an assessment under the *EAA* and can proceed without an EAC. It submits that ss. 17, 27 and 28, when read

together, give it the necessary discretion to enact clause 3, and abdicate its s. 17(3) authority. It submits that where an assessment process has been deemed equivalent according to s. 27 (as is the case for projects falling within the scope of the Agreement), then the approval decision will be deemed equivalent, and will follow the NEB decision. The Province confirmed this as meaning that it no longer has any ability to approve, refuse or issue conditions in relation to any project that falls within the scope of the Agreement. Further, the Province confirmed that the Agreement is intended to apply not only to this Project, but also to all projects that fall within the scope and definitions enumerated within the Agreement. This implies that the Province no longer has any ability to approve, refuse or issue conditions in accordance with s. 17 of the *EAA*, in relation to any project that falls within the scope of the Agreement, unless either party invokes clause 6 of the Agreement and terminates the Agreement.

[84] Clause 6 of the Agreement provides that either party may terminate the Agreement at any time on 30 days' notice. However, such termination will have no effect on any project already approved by the NEB.

[85] The Province's first position was that clause 6 means that if it was to terminate the Agreement it would affect all projects not just this Project and, further, that it would necessitate the parties and NGP going back to square one such that the Province would need to do an environmental assessment under the *EAA*.

[86] When pressed, counsel for the Province conceded it would be possible for the Province – upon termination of the Agreement – to "scope" the project under s. 11 of the *EAA* and essentially accept the JRP assessment as an equivalent environmental assessment under the *EAA*.

[87] Though the termination clause may appear to retain the decision-making authority of the invoking party, it appears to be somewhat illusory, as there appears to be no mechanism or provision related to s. 17(3) factors, which would trigger the use of that discretion.

[88] Because the termination of the Agreement is not specific to the Project under consideration and because termination does not affect a project already approved by

the NEB, one can well understand the reluctance of a party to terminate the Agreement as a whole when there are potentially unintended consequences to other projects.

[89] NGP argues, as set out above, that the federal government has exclusive jurisdiction over the Project. It submits that any interpretation of the *EAA* is irrelevant because British Columbia has no jurisdiction over this Project in any event. In the alternative, NGP agrees with, and relies on, the submissions of the Province and maintains that ss. 27 and 28 of the *EAA* confer the necessary discretionary powers on the Minister to enter the Agreement. It submits that as a result the Agreement is deemed to vary the s. 8 requirement that reviewable projects obtain an EAC.

[90] The parties have devoted some paragraphs in their written submissions to the appropriate standard of review. The petitioners submit it is one of correctness as, in their view, it is a matter of "true jurisdiction".

[91] The Province and NGP both submit that the standard is one of reasonableness because it is a matter of the discretion of the Executive Director to interpret his own statute.

[92] This case throws up a factual and legal matrix, which provides sound arguments for both "correctness" and "reasonableness" as an appropriate standard of review.

[93] In my view, choosing which standard is to be applied will have no impact on the outcome of this decision. Given my analyses and conclusions, which follow, the decision of the Executive Director in interpreting the *EAA* to allow abdication of a s. 17(3) decision is neither correct nor reasonable.

[94] It is clear that the parties disagree as to the authority granted to the EAO under the *EAA*, but there is no dispute as to the applicable principles of statutory interpretation. In *Re: Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the Supreme Court of Canada enunciated the "modern approach to statutory interpretation." Iacobucci, J. (for the Court), at para. 21, cited Elmer Driedger in *Construction of Statutes (*2d ed. 1983), where he stated:

> Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense

> harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

[95] This approach requires a contextual inquiry "examining the history of the provision at issue, its place in the overall scheme of the *Act*, the object of the *Act* itself, and Parliament's intent both in enacting the *Act* as a whole, and in enacting the particular provision at issue": *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para. 34.

[96] To determine parliamentary intent, the legislative history of a provision is identified as an appropriate tool for consideration: *Rizzo*, at para. 31; *R v. Vasil*, [1981] 1 S.C.R. 469, at p. 487. External interpretative aids are also considered to determine the true intention of the legislature and the purpose of the statute: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 29.

[97] When applying the aforementioned tools of statutory interpretation, there is an overriding principle dictating that the legislature does not intend to produce absurd consequences. An interpretation "can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment": *Rizzo* at para. 27.

[98] Applying these principles, it is clear that the objective of the legislation in question must guide the interpretation. One important objective of the *EAA* is the need "to balance the potentially competing interests of environmental protection with those of economic development", as was identified in *Friends of Davie Bay v. British Columbia*, 2011 BCSC 572 [*Friends of Davie Bay*], aff'd 2012 BCCA 293 [*Friends of Davie Bay BCCA*], at para. 107. On appeal, the objective of the legislation was stated to be simply environmental protection: *Friends of Davie Bay BCCA* at para. 34, which I understand to be a matter of emphasis only.

[99] To guide my interpretation of the *EAA*, I also adopt the approach of the Court in *Friends of Davie Bay BCCA*, at para. 35:

> I adopt, as a correct approach to the interpretation of environmental legislation, the following passages from *Labrador Inuit Association v. Newfoundland*

(Minister of Environment and Labour) (1997), 152 D.L.R. (4th) 50 (N.L.C.A.) at paras. 11-12, to which the chambers judge also referred at para. 72:

> [11] Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA*); *Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.
>
> [12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

[100] The interpretation required to resolve this issue in the Petition is not confined to a single phrase, word or provision, but instead requires an interpretation of multiple provisions, both on their own and when read in conjunction with the *Act* as a whole. For this reason, the most effective method of resolving this issue is to highlight and evaluate each provision relating to this matter, and then discuss how that provision fits into the scheme of the *Act* as a whole, keeping in mind the objectives of the legislation and of the legislature in enacting and amending it. These reasons are organized accordingly, and the established tools of statutory interpretation have been applied throughout.

[101] As a starting point, the *EAA* provides for the environmental assessment of "reviewable projects", which are prescribed by the *Reviewable Projects Regulation*, B.C. Reg. 370/2002 (the "Regulation"). All parties agree that the Project is reviewable pursuant to the *Act* and the Regulation.

[102] Once a project is designated reviewable, whether by operation of the Regulation or otherwise under the *Act*, the project must undergo an environmental assessment and obtain an EAC, indicating that it has been approved.

[103] Section 8 is the relevant provision in the *Act* requiring reviewable projects to obtain an EAC:

> **8**(1) Despite any other enactment, a person must not
>
> (a) undertake or carry on any activity that is a reviewable project, or
>
> (b) construct, operate, modify, dismantle or abandon all or part of the facilities of a reviewable project,
>
> unless
>
> (c) the person first obtains an environmental assessment certificate for the project, or
>
> (d) the executive director, under section 10 (1) (b), has determined that an environmental assessment certificate is not required for the project.
>
> (2) Despite any other enactment, if an environmental assessment certificate has been issued for a reviewable project, a person must not
>
> (a) undertake or carry on an activity that is authorized by the certificate, or
>
> (b) construct, operate, modify, dismantle or abandon all or part of the project facilities that are authorized by the certificate,
>
> except in accordance with the certificate.

[104] The Province contends that *Friends of Davie Bay BCCA* stands for the principle that designation as a "reviewable project" does not automatically make an environmental assessment mandatory. It is true that the Court, at para. 13, held that "an environmental assessment is mandatory in some circumstances and discretionary in others"; however, it went on to find that an assessment would not be mandatory where a project does not meet the threshold for being designated as a "reviewable project". On appeal, there were no further discussions as to the discretionary provisions relating to environmental assessments. But, at para. 40, the Court held that the proponent "first determines whether there will be a mandatory environmental assessment by stipulating its intended production capacity" to determine if it meets the threshold for designation as a "reviewable project": if it reaches the threshold it has the potential to bring about the adverse consequences listed in the *Act* "such that an environmental assessment is required."

[105] This language indicates little to no discretion with regard to an assessment once a project has met the threshold and been designated as a "reviewable project" and, indeed, this mirrors the mandatory nature of the language found in s. 8 of the *EAA*.

[106] However, there is discretion in the *Act* with regard to assessment and EAC requirements. Discretion is granted to the Minister and the Executive Director under ss. 6 and 7 respectively. The Minister has the power to designate a project as reviewable under s. 6, regardless of the operation of the Regulation. The Executive Director also has the authority to designate a project as reviewable based on consideration of an application made under s.7. These provisions of the *EAA* are indeed discretionary and are examples of "safeguards in place preventing environmentally damaging projects from slipping through without an environmental assessment at all": *Friends of Davie Bay BCCA* at para. 41. These sections, however, do not provide the discretion necessary to grant relief from the requirement for a reviewable project to obtain an assessment and an EAC.

[107] Based on the language of s. 8(1)(d), the only mechanism to grant such relief is by a determination made under s. 10(1)(b). Section 10 states:

> **10**(1) The executive director by order
>
> (a) may refer a reviewable project to the minister for a determination under section 14,
>
> (b) if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that
>
> (i) an environmental assessment certificate is not required for the project, and
>
> (ii) the proponent may proceed with the project without an assessment, or
>
> (c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that
>
> (i) an environmental assessment certificate is required for the project, and
>
> (ii) the proponent may not proceed with the project without an assessment.
>
> (2) The executive director may attach conditions he or she considers necessary to an order under subsection (1)(b).
>
> (3) A determination under subsection (1)(b) does not relieve the proponent from compliance with the applicable requirements pertaining to the reviewable project under other enactments.

[108] The result of reading these provisions, together with the findings of the Court in *Friends of Davie Bay*, can be simplified in the following manner. Under the *EAA* a project may be designated as either "reviewable" or not, by operation of the Regulation or by the discretion of the Minister or the Executive director. Once a project is deemed to be "reviewable", as is the case for the Project, s. 8 mandates an assessment and an EAC unless relief is granted under s. 10(1)(b) "if the executive director considers that a reviewable project will not have significant adverse environmental, economic, social, heritage or health effect[s]".

[109] Drawing from this, and the entirety of s. 10, it becomes apparent that a reviewable project, such as the Project, with the potential for significant adverse effects, must undergo an environmental assessment and obtain an EAC, unless it was granted relief under s. 10(1)(b).

[110] In considering this point, I find that the potential for significant adverse effects from the Project has not been, nor was it ever, disputed. This is sufficiently evidenced by the existence of the joint review process as a means of satisfying the assessment requirements under both federal and provincial legislation. In addition, it is supported by the fact that the Province had such significant concerns regarding the potential environmental impact, that it participated before the JRP as an intervenor, where it opposed approval of the Project based on environmental and other concerns that it felt had not been adequately addressed. Regardless of any implication that can be drawn from the Province's actions, it is clear there was never a determination under s. 10(1)(b) that the Project would not have a significant adverse effect.

[111] Thus, in the absence of a s. 10(1)(b) determination, unless there are other provisions in the *Act* that provide for relief from the requirement to obtain an EAC, s. 8 mandates that the Project obtain an EAC following an assessment.

[112] The Province has submitted that s. 17, read together with ss. 27 and 28, provide such relief.

[113] Section 17 of the *EAA* provides:

> **17**(1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied

(a) under section 11 or 13 by the executive director,

(b) under section 14 or 15 by the minister, or

(c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person

the executive director, commission, hearing panel or other person, as the case may be, must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,

(b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and

(c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

[114] When the environmental assessment of a project is complete, it is referred to the Ministers pursuant to s. 17(1), together with an assessment report and recommendations with reasons pursuant to s. 17(2). This allows the Ministers to make a determination under s. 17(3), as to whether to issue an EAC with or without conditions, refuse to issue an EAC, or to order further assessment.

[115] The Province submits that s. 17(1) lists the ways that projects are brought before the Ministers for a decision under s. 17(3). It submits that the Agreement is legitimate pursuant to the broad authority granted to the Minister under s. 27, and that the language of s. 27 is inclusive of the authority to enter an agreement for an equivalent

assessment process, which includes the ultimate approval decision as part of that process. It then submits that since s. 17(1) makes no specific reference to projects dealt with by way of agreements under s. 27, there is no requirement for the Ministers to review and thus make a decision in regard to any project dealt with under these agreements, including the Project.

[116] One of the rules of statutory interpretation relied upon by the Province is that meaning should, if possible, be given to every word in a statute. It relies on *Hill v. William Hill (Park Lane Ltd.),* [1949] A.C. 530 (H.L.), for this rule, and the corresponding implication that unless there is a good reason to the contrary, the words add something that would not be there if the words were left out. It goes on to submit, at para. 23 of its response to the Petition, that "different words mean different things. The expression of one thing is the exclusion of the other."

[117] While I agree with the Province on the validity of the stated principle of statutory interpretation, I cannot agree with its interpretation of its application to ss. 17 and 27, when read together in conjunction with the *Act* as a whole, taking into consideration the history of the legislation and the intention of the legislature.

[118] Section 27 of the *Act* states:

> **27**(1) The minister may enter into an agreement regarding any aspect of environmental assessment with another jurisdiction including but not limited to
>
> (a) Canada,
>
> (b) one or more provinces or territories,
>
> (c) one or more municipalities or regional districts in British Columbia, or
>
> (d) one or more neighbouring jurisdictions outside Canada.
>
> (2) The minister may enter into an agreement regarding any aspect of environmental assessment with any agency, board, commission or other organization, of British Columbia or of another jurisdiction.
>
> (3) An agreement under this section may
>
> (a) provide for arrangements with any other party or jurisdiction regarding research and development,
>
> (b) provide for special assessment procedures and methods with any other party or jurisdiction, arising from innovation, technological developments or changing approaches to environmental assessment,
>
> (c) establish notification and information-sharing arrangements with any other party or jurisdiction,

> (d) provide for a means to accept another party's or jurisdiction's assessment as being equivalent to an assessment required under this *Act*,
>
> (e) determine which aspects of a proposal or project are governed by the laws of each jurisdiction, and
>
> (f) establish procedures with another party or jurisdiction to cooperatively complete an environmental assessment of a project through
>
> (i) acknowledging, respecting and delineating the roles of each jurisdiction in the process,
>
> (ii) providing for efficiency measures in environmental assessment to avoid overlap and duplication and to ensure timely results,
>
> (iii) providing for cost recovery or cost-sharing measures,
>
> (iv) establishing a means of resolving disputes regarding environmental assessment, and
>
> (v) adopting any other measure considered necessary by each party or jurisdiction.

[119] Section 28 of the *Act* follows, which has the effect of varying the *EAA* to accommodate any agreement made under s. 27:

> **28** Effective on the date of an agreement under section 27, and for as long as the agreement remains in effect, both this *Act* and the regulations are by this section deemed to be varied, in their application to or in respect of a reviewable project that is the subject of the agreement, to the extent necessary to accommodate that agreement.

[120] The Province relies on *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, arguing that s. 27 of the *EAA* allows the Province to enter into agreements with other jurisdictions. This is a logical and permissible legislative/policy choice, taking into account the federal nature of our country and to ensure efficiency and reduce duplication of processes and effort, including for proponents and interested parties who may be opposed to projects.

[121] The Province submits that the term "assessment" in s. 27 includes the decision-making authority of s. 17(3). I agree with the Province that entering into agreements for joint review processes is not only a logical and permissible legislative choice, but also a preferred one. Further, the Province is entitled to broad discretion to enter into agreements of this nature. However, this case requires me to consider the Agreement that is in place, and the implications that flow from the language of the Agreement, read together with the *EAA* and considering the positions of the parties.

[122] In consideration of all relevant factors, I cannot accept that *MiningWatch* can be interpreted to support a finding that s. 27 permits the EAO to abdicate its s. 17(3) authority.

[123] In *MiningWatch* a provincial environmental assessment was completed for a reviewable project and through the assessment it was determined that the project was not likely to cause significant adverse environmental effects, so an EAC was issued. The project also triggered the federal *CEA Act*, which required a federal assessment and approvals. A report was issued approving the project based on the British Columbia assessment. MiningWatch filed an application for judicial review of the decision to conduct a screening report as opposed to a separate comprehensive study. The Court held, at para. 41, that "federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments…[and that] full use of this authority would serve to reduce unnecessary, costly and inefficient duplication"; however, it ultimately held that the *CEA Act* required a comprehensive study, not just a screening. It found there was no discretion granted under the *Act* allowing the responsible authority (generally a federal department or agency) to change the track of the assessment as was done.

[124] While I agree with the Province that this case articulates the benefits of a cooperative process, the decision is limited to an interpretation of the *CEA Act*, and makes no mention of any *EAA* provisions. Furthermore, while the Court does highlight the importance of efficiency and cooperation, it ultimately holds that this does not provide sufficient justification for exercising discretion not clearly granted within the empowering legislation.

[125] Significantly, the federal government maintained its ultimate decision-making ability throughout the process, even when attempting to utilize the equivalent assessment, which was held to be an inappropriate exercise of jurisdiction. For these reasons and because *MiningWatch* deals only with *CEA Act* provisions, I do not accept that *MiningWatch* stands as authority on s. 27 and I find that an independent interpretation of the *EAA* must follow.

[126] There is no doubt that based on a plain reading of s. 27, the Minister has broad discretion to enter agreements with other jurisdictions regarding environmental

assessments. Of particular relevance to this Petition is s. 27(3)(d), which permits an agreement to provide for a means by which to accept another party's or jurisdiction's assessment as being equivalent to an assessment required under this *Act*. The Province submits that this gives the Minister the authority to enter into agreements such as this Agreement, which, by definition, equates "equivalent" assessment with "equivalent" decision making. This conflation of assessment with decision is the heart of the Province's position.

[127] In order to consider whether general assessment can include decisions, it is necessary to look at the plain and ordinary meaning of the word "assessment". I first look to the definition provided at s. 1 of the *EAA*. The *Act* defines the term assessment as:

> **"assessment"** means an assessment under this *Act* of a reviewable project's potential effects that is conducted in relation to an application for
>
> (a) an environmental assessment certificate, or
>
> (b) an amendment of an environmental assessment certificate;

[128] Environmental assessment certificate is also defined at s. 1:

> **"environmental assessment certificate"** means an environmental assessment certificate issued by the ministers under section 17 (3);

[129] While the respondents have submitted that an assessment is inclusive of the s. 17(3) decision, I respectfully find that the *Act* and the interpretive tools indicate otherwise.

[130] In *Pharmascience Inc. v. Binet*, 2006 SCC 48, at para. 30, LeBel J. wrote that ordinary meaning refers to the "first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context". When defining the term "assessment" the *Act* clearly separates the review process from the "application" for an EAC. It describes two separate processes that are conducted "in relation" to one another. The impression that arises when two processes are conducted "in relation" to one another is that they are separate; a process would rarely be described as being conducted in relation to itself.

[131] Furthermore, "assessment" is defined as an "evaluation, estimation; an estimate of worth", in the *Shorter Oxford English Dictionary on Historical Principles*, vol 1, 6th ed. (Oxford: Oxford University Press, 2007) *sub verbo* "assessment".

[132] To read this word in its immediate context gives the impression that an assessment is an evaluation of a reviewable project's potential effects, as opposed to an ultimate decision in relation to that project.

[133] But this is not the end of the interpretation. As noted at the outset of the analysis, *Rizzo* and *Chieu* highlight the importance of a contextual analysis, which requires the court to "to read the provisions of an *Act* as a harmonious whole": *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54 at para. 10.

[134] The legislative choice to separate the assessment from the ultimate certification decision is made first in the definitions at s. 1 and then continuously throughout the *Act*. For example, when outlining the options available to the Executive Director in s. 10, instead of combining the assessment and certification processes, the *Act* distinguishes the two at s. 10(b)(i) and (ii) when outlining the option that the Executive Director can determine that:

> (i) an environmental assessment certificate is not required for the project, and
>
> (ii) the proponent may proceed with the project without an assessment, or
>
> …

[135] The same distinction is made at s. 10(c) and ongoing throughout the *Act.*

[136] The *Act* also makes distinctions when reading ss. 11-17 together in context. Sections 11-15 outline the mechanisms and discretion granted under the *Act* for determining the scope, procedures and methods that will apply for a given assessment. Section 16 then requires that a proponent apply for an environmental assessment certificate, and s. 17(1) makes clear that on completion of "an assessment" the proponent's application for an environmental certificate must be referred to the Ministers for a decision under s. 17(3).

[137] A quotation from *Friends of Davie Bay* can sheds further light on this matter. At para. 8, the Court said:

> ...For any project which requires an environmental assessment certificate under the *Act*, the proponent must successfully complete an environmental assessment and receive a certificate from the EAO ...

[138] That the Court separated the assessment from the ultimate approval/ issuance of a certificate is significant because it indicates that a party must 1) successfully complete an environmental assessment and 2) receive a certificate from the EAO.

[139] This is consistent with a reading of the *Act* that considers the Oxford Dictionary's definition of an "assessment" as an "evaluation". It flows logically that where a decision is to be made, an evaluation would precede this decision, for the purpose of highlighting all relevant factors needed to make an informed decision that would further the objectives of the *Act*. This is further supported by s. 17(2) and (3). Those sections require the report, recommendations and reasons that arise from an assessment, be passed along to the Minister and considered in the ultimate decision.

[140] Under this *Act*, it has been established that the goals are to protect the environment, while advancing the economic interests of British Columbia. To appropriately and effectively balance these interests and obtain these objectives, the Province would be best served by a process that provided it with the tools to complete a thorough evaluation and review it before making the decision that will impact the Province. This is especially true in the case of environmental concerns because projects considered under this *Act* have the potential to have irreversible effects.

[141] This is also supported by *Friends of the Oldman River Society*, at para. 95, where the Court held that an "environmental impact assessment, is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making."

[142] Based on the aforementioned treatment and clear distinction between the two requirements and processes throughout the *Act*, I cannot find that at s. 27 the legislature had the intent to incorporate the process of obtaining or issuing an EAC into the term "assessment", when it had not done so elsewhere in the *Act*. I find the Province's submission with regard to statutory interpretation supports this finding: "different words mean different things. The expression of one thing is the exclusion of the other."

[143] The Province also argued that legislative history is an important tool for determining the intention of the legislature. It relies on *Rizzo* and *D.R. Fraser and Co. Ltd. v. Minister of National Revenue*, [1948] 4 D.L.R. 776 (P.C.), and submits that when the language of a provision has been changed by an amendment, the change must be taken to have been made deliberately by the legislators and must be presumed to have some significance.

[144] The Province submits that the words of s. 27 are broader than in the predecessor provision, *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, s. 86. It points to the new language, which says an agreement can be made regarding "any aspect of environmental assessment" to support the proposition that there is no restriction under the current *EAA* on a s. 27 agreement, including a term that no provincial EAC is required.

[145] I agree with the Province that legislative history can assist in determining the intention of the legislature, and that as per *Rizzo* changes have been made deliberately by the legislators. But, again, I harken back to the submissions of the Province that the expression of one thing is the exclusion of the other. In drafting this new provision, the legislators had it within their means to include in s. 27 a provision specifically referring to agreements relating to obtaining or issuing an EAC.

[146] In fact, the current *EAA* is the result of comprehensive changes to the older version of the *Act*, the assessment process was significantly transformed. Since much of the language of the *Act* was changed, and the assessment process varied, I find that if the legislators had intended to include the EAC processes within s. 27, they would have. At every other point in the *Act* where an EAC is relevant, the legislature has clearly made separate and distinct reference to the certification as apart from the assessment and I see no reason to find that any other intention should be assigned singularly to the language used at s. 27.

[147] I find further support from the statements made by Hon. S. Hagen at the time the *EAA* (then Bill 38) was before the legislature. The following statements have been taken from British Columbia, *Official Report of Debates of the Legislative Assembly*, Volume 7, number 14, (May 14, 2002) at p. 3464:

> The bill continues to provide for cooperative review arrangements with federal environmental assessment procedures to help minimize overlap and duplication.
>
> …
>
> The goal of Bill 38 is to establish more streamlined and flexible environmental assessment procedures for major projects.
>
> …
>
> The new process will continue to produce high-quality environmental assessments on projects, ensuring that project development is consistent with the demanding standards this government has set for itself in protecting the environment.
>
> …
>
> …enhanced federal-provincial review cooperation — very, very important now that we're trying to attract investment back to the province of British Columbia — so that we can make the procedures move in tandem between the province and the federal government instead of one after the other.

[148] And one further statement taken from British Columbia, *Official Report of Debates of the Legislative Assembly*, Volume 8, number 8, (May 29, 2002) at p. 3694:

> The bill allows broad discretion to customize review procedures and to adapt to strategic government priorities in order to improve the province's investment climate without compromising the environment.

[149] In all these statements reference is made only to the "assessment" or "review" portion of the procedure with reference to intent to avoid duplication, and overlap, to streamline "assessment procedures", and to ensure that project development is consistent with the demanding standards of "this government", all in an effort to improve the Province's investment climate.

[150] The combination of the specific language, coupled with the distinct goals of the Province relating to the investment climate and other demanding standards, are more consistent with the intent to maintain ultimate s. 17(3) discretion. Streamlining the review process alone is an important objective, as doing so allows all parties involved to save time and other valuable resources by avoiding duplication, which is in line with the above statements. To include the s. 17(3) decision as part of the process, however, would have the effect of denying the Province the ability to meet its other objectives stated above.

[151] British Columbia, within its own jurisdiction, has unique objectives, political and social goals, and legal obligations. If the Province had no discretion with regard to any

project that fell within the scope of the Agreement then it would no longer have any means by which to obtain its objectives including, as mentioned above "ensuring that project development is consistent with the demanding standards this government has set for itself in protecting the environment", and "improv[ing] the province's investment climate without compromising the environment."

[152] For these reasons, I cannot agree with the Province's submissions that it is either correct or reasonable to interpret "assessment" in s. 27, to include a s. 17(3) decision.

[153] Thus, I find that s. 27 permits the Minister to enter an agreement regarding any aspect of environmental assessment (as the *Act* states), but not including the abdication of a s. 17(3) decision.

[154] I agree with the submissions of the petitioners that s. 28 relates to the effect of an agreement under s. 27. In order for such an agreement to have the effect of varying the *EAA* and the regulations in respect of any projects that are subject to the agreement, the agreement must not be outside what is contemplated by s. 27. Thus, to vary the *EAA* an agreement must be a valid exercise of the discretion granted under s. 27.

[155] Finally, the Province submits that a s. 17(3) decision is not required because s. 27 is not contemplated by s. 17(1) in terms of the ways that projects are brought before the Ministers for a decision under s. 17(3).

[156] Section 17(1) states:

> **17**(1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied
>
> (a) under section 11 or 13 by the executive director,
>
> (b) under section 14 or 15 by the minister, or
>
> (c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person
>
> the executive director, commission, hearing panel or other person, as the case may be, must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

[157] To fully appreciate how a project is brought before the Ministers, consideration must be given to ss. 11-15 of the *Act.* Once a determination has been made under s. 10, the assessment process under this *Act* can proceed in two ways:

1. if a determination is made under s. 10(1)(c), the Executive Director is responsible for determining the scope, procedures and methods for the project's assessment pursuant to ss. 11, 12 and 13 of the *Act*;

2. but if a referral is made under s. 10(1)(a), then the Minister is responsible for determining the scope, procedures and methods for the project's assessment pursuant to ss. 14 and 15 of the *Act*.

[158] The relevant provisions are copied and discussed below:

> **11**(1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order
>
> (a) the scope of the required assessment of the reviewable project, and
>
> (b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.
>
> (2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:
>
> (a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;
>
> (b) the potential effects to be considered in the assessment, including potential cumulative environmental effects;
>
> (c) the information required from the proponent
>
> (i) in relation to or to supplement the proponent's application, and
>
> (ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);
>
> (d) the role of any class assessment in fulfilling the information requirements for the assessment of the reviewable project;
>
> (e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);
>
> (f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

> (g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;
>
> (h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2)(a).
>
> (3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

[159] Section 11(1) grants the Executive Director the discretion to determine the scope, procedures and methods of an environmental assessment if the Executive Director makes a determination under s. 10(1)(c).

[160] The Executive Director's discretion to make determinations regarding the assessment is limited by s. 12, which prevents the ability to consign the assessment of the reviewable project:

> **12** The executive director's discretion to make a determination under section 11(1) for a reviewable project does not include the discretion to consign the assessment of the reviewable project to
>
> (a) a commission,
>
> (b) a hearing panel, or
>
> (c) a person not employed in or assigned to the environmental assessment office.

[161] Based on a plain reading of this provision, the Executive Director does not have the discretion to enter into a s. 27 agreement regarding an assessment because s. 12 prohibits the relegation of the Executive Director's assessment authority to anyone not employed in or assigned to the EAO. This is supported by the language of s. 27, which grants authority under the provision to the Minister only.

[162] For the reasons that follow, I find this to be a legitimate exercise of the discretion granted to the Minister under s. 14.

[163] If an assessment is not to be determined by the Executive Director in accordance with s. 10(1)(c) and s. 11, it means that the Executive Director made a determination in accordance with s. 10(1)(a) and referred the project to the Minister for a determination under s. 14, which states:

14(1) If the executive director under section 10 (1) (a) refers a reviewable project to the minister, the minister by order

(a) may determine the scope of the required assessment of the reviewable project, and

(b) may determine procedures and methods for conducting the assessment, including for conducting as part of the assessment a review, under section 16 (6), of the proponent's application.

(2) The minister's discretion under this section to determine scope, procedures and methods includes but is not limited to the discretion by order to exercise any of the powers in section 11 (2).

(3) An order of the minister making a determination under this section may

(a) require that the assessment be conducted

(i) by a commission that the minister may constitute for the purpose of the assessment, consisting of one or more persons that the minister may appoint to the commission,

(ii) by a hearing panel, with a public hearing to be held by one or more persons that the minister may appoint to the hearing panel, or

(iii) by any other method or procedure that the minister considers appropriate and specifies in the order, and by the executive director or other person that the minister may appoint, and

(b) delegate any of the minister's powers under this section to make orders determining scope, procedures and methods to

(i) the executive director, or

(ii) a commission member, hearing panel member or another person, depending on which of them is responsible for conducting the assessment.

(4) For the purposes of an assessment conducted under this section by a commission or hearing panel, the minister, by order, may confer on the commission or hearing panel, as the case may be, the powers, privileges and protection of a commission under sections 16, 17, 22 (1), 23 (a), (b) and (d) to (f) and 32 of the *Public Inquiry Act*.

[164] Section 14(1), on a plain reading, grants the Minister discretion to determine the scope, procedures and methods for an environmental assessment. Additionally, s. 14(3)(a)(iii) grants the Minister broad discretion to require that the assessment in question be conducted by "any other method or procedure that the minister considers appropriate and specifies in the order, and by the Executive Director or other person that the minister may appoint". Section 14(3)(b) then gives the Minister the discretion to delegate any of its powers under s. 14 regarding the assessment, its scope, methods

and procedures to "another person, depending on which one of them is responsible for conducting the assessment", based on the discretion exercised under s. 14(3)(a).

[165] The Minister in this case, did exercise this discretion and delegated this authority to the Executive Director, who, according to the language of s. 14, assumes all of the authority and power granted to the Minister under this provision.

[166] In my opinion, this provision when read alone and together with the remaining provisions of the *Act*, including s. 27, grants the Minister (and now the Executive Director, by nature of the delegation) the discretion necessary to exercise its authority under s. 27 and enter the agreements referred to, that relate to equivalent assessment processes. The result would be that any agreement made pursuant to s. 27 falls within, and is captured under, s. 14, making it eligible under s. 17(1) as one of the ways a project can be brought before the Ministers for a decision.

[167] Based on this determination, I reject the Province's submission that the failure to reference s. 27 in s. 17(1) means that a s. 17(3) determination does not need to be made for a project that falls within a s. 27 agreement. I find that s. 14 sufficiently incorporates s. 27 agreements within its reach.

[168] Further, and of significant importance in this analysis, is that the s. 17(3) discretion is important to the Province going forward because the nature of the Agreement is that it applies to any project that meets the definition agreed upon at its outset. I highlighted above certain objectives of the legislature with regard to the *EAA* and, in addition to these, I re-iterate that British Columbia also has legal responsibilities, social and political goals and other important objectives that are unique to this province. Without maintaining the s. 17(3) decision and the corresponding ability to review all projects to which the Agreement applies, the Province has no mechanism by which to ensure it meets its objectives and responsibilities with regard to any project. I cannot find that the legislature intended this result when enacting the *EAA* or any of its amendments. Such a finding would, in my respectful opinion, thwart the objectives of the *EAA* and, as was held in *Rizzo*, the legislature does not intend to produce absurd consequences that are unreasonable, inequitable, illogical or incompatible with other provisions or the enactment.

[169] In *Friends of Davie Bay BCCA*, Bennett J.A. stated, at para. 39, that "an interpretation of legislation that creates a loophole through which the object of the legislation can be thwarted is rarely reasonable." In *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180, the Court found the EAO's interpretation unreasonable, at para. 199. Its reason was that the EAO's interpretation "undercut the environmental protection objects of the *Act* in favour of purely commercial interests [such] that it distorts the balancing sought to be achieved by the Legislature as identified by the Court of Appeal in *Friends of Davie Bay.*"

[170] At para. 271 Davies J. went on to say that the EAO has been given an important environmental protection and oversight role by the legislature, such that it must "attempt to balance environmental protection with other legitimate societal concerns." In order to fulfill this important role for British Columbia, the EAO must maintain even some shred of discretion in respect of every project that has the potential to affect this province. Achieving this balance is of critical importance. The Court in *Friends of Davie Bay* held, at para. 108, that "the public must be satisfied that the *Act* is being adhered to and that the public interest is being properly safeguarded."

[171] This means that there must be some measure by which the Province can enforce and uphold the standards that it sets. The Government of British Columbia has highlighted the importance of this and the role that the *EAA* plays in achieving these objectives. In the "Briefing to the House of Commons Standing Committee on Environment and Sustainable Development Concerning the Statutory Review of the Canadian Environmental Assessment Act", 41st Parliament, 3rd Session ("Standing Committee"), the Province of British Columbia made recommendations that the federal government make substantive changes to the *CEA Act*. Many of the recommendations made shed light on the issues under consideration in this case.

[172] The Province stated, at p. 8:

> One of the strengths of the B.C. process and an area where B.C. exceeds the federal requirements is the issuance of an environmental assessment certificate which includes conditions that are legally-binding on project proponents. Through these conditions, provincial ministers have a mechanism to ensure that proponents adhere to appropriate requirements identified through the assessment to avoid or mitigate potential adverse impacts. The EAO is able to

> conduct inspections of certified projects and undertake measures to correct instances of non-compliance.

[173] The Province submitted that without a decision similar to the issuance of an EAC in environmental protection legislation there would be no mechanism to require and enforce environmental assessment conditions. It further identified the EAO as the "single entity established under the [*EAA*] responsible for environmental assessment."

[174] It is noteworthy that the federal government, when taking recommendations to streamline the assessment process and create provisions in the *CEA Act* to allow for recognition of equivalent assessments, maintained their ultimate decision-making authority. Section 36 of the *CEA Act* requires the responsible authority to consider the relevant report from the substituted assessment when making decisions in accordance with s. 52(1).

[175] One major argument behind the Province's submissions to the Standing Committee – urging the federal government to accept equivalent processes – was to highlight the strength and rigor of the *EAA*, and this province's process for environmental assessment. It pointed out that the *EAA* was more protective in nature than the *CEA Act* because it not only focuses on "environmental effects", but also on potential "economic, social, health and heritage effects". As such, it was put forward that the federal government would be safe to yield to the more rigorous process in British Columbia and to rely on the assessments done under the *EAA*. However, the Province, in making these submissions, acknowledged that there will be certain circumstances where the federal government would have a strong interest in conducting its own assessment, for example of projects of national significance.

[176] The Province's position that the Agreement does not allow it to utilize its discretion under s. 17, and the implications that arise from the Agreement based on this interpretation, means there are no safeguards maintained by the Province to have input into the assessment process or the ultimate decision in relation to projects under the Agreement. It has not maintained the ability to play a role in projects with significant provincial impact, which is a safeguard it recommended the federal government maintain, while pushing for greater acceptance of equivalent processes. Since the Agreement applies automatically to any project that meets the definitions within it, I find

it to be significant that given the Province's submissions concerning the review of the *CEA Act*, its position now is to provide a blanket yield to what it views as a less protective scheme, while maintaining no safeguards for involvement, input and enforcement for projects having significant provincial impact, as this one does.

[177] Finally, it is important to reflect again on the objectives of the *EAA*, and to consider the interpretation and finding that best advances the will of the legislature. I have previously identified one important objective as the need to balance environmental protection with economic development, and from *Hansard* it is clear that the legislative intent behind this objective relates to the high standards of protection set by this government, and the need to stimulate this province's investment climate. I find that none of these objectives has any chance of being met, or even considered, if British Columbia is giving up its decision-making authority before it has a chance to review a project (which would be the case for any project falling within the scope of the Agreement. The effect of its interpretation leads to a sort-of blanket pre-approval before any evaluation is conducted on a project that falls within the scope of the Agreement, and it leaves no possible method of making enforceable conditions after the assessment is complete and environmental and other effects are identified.

[178] I therefore find that it cannot be the intention of the legislators to allow the voice of British Columbia to be removed in this process for an unknown number of projects, when the purpose behind the *EAA* is to promote economic interest in this province, and to protect its land and environment.

[179] In my view, given the responsibilities that the Province is required to uphold, together with the important role of the EAO as identified in case law, the important objective of environmental protection and the specific objectives and interpretation of the *EAA*, I cannot find that it was reasonable or correct for the Province to exercise its discretion as it did.

[180] For this reason, and the reasons discussed above, I find that s. 27 agreements require a s. 17(3) determination.

[181] Finally, it is important to make clear that at the decision-making stage the Province has complete and ultimate discretion. I am making no order in relation to what

the Province should have or must now decide. I only order that the Province maintain the ability to be meaningfully involved in the review and approval of projects that fall within its borders. The Province is free to issue an EAC with no conditions for this Project, or it can impose conditions that can be reviewed later should any party to these proceedings take issue with any that are imposed. Total discretion in this regard rests with the Province.

[182] In summary, I have made the following determinations with regard to statutory interpretation.

1. Reviewable projects must obtain an EAC before any activity in relation to the project can begin.

2. The only relevant discretion granted under the *Act* that supports a determination that no EAC is required for a project is if the project is found to not be reviewable by operation of the *Act* or Regulation, or if it is granted relief under s. 10(1)(b) because it is determined that there is no potential for significant adverse environmental effects.

3. The term "assessment" in the *EAA* does not incorporate within it a s. 17(3) determination with regard to an EAC.

4. The Minister has broad discretion under s. 27 to enter agreements that relate to any aspect of environmental assessment (which does not include the s. 17(3) decision).

5. A s. 27 agreement falls within the scope of s. 14.

6. A s. 27 agreement is therefore brought before the Ministers in accordance with s. 17(1), by way of s. 14 and thus requires a s. 17(3) decision with regard to an EAC.

[183] Based on these findings, I conclude that the Agreement is invalid to the extent that it purports to remove the need for an EAC pursuant to the *EAA*, and I order that the Project requires a s. 17(3) decision.

Honour of the Crown

[184] If I am wrong and the Executive Director has the authority to exempt a project from the requirement to obtain an EAC, I then consider whether the decision to enter into the Agreement was consistent with the honour of the Crown or a breach of the Province's duty to consult by failing to consult with the petitioners before entering the Agreement. If there was no duty to consult before entering the Agreement, was there a breach of that duty, as alleged by the petitioners, by failing to consult the petitioners prior to deciding not to terminate the Agreement between December 2013 and June 2014?

Relevant Factual Background

[185] The Crown's interpretation of the Agreement is that the Province is exempt from making any decisions in relation to approval of the NGP pipeline because the federal government takes over all decision making and with that obligation, the duty to consult First Nations in relation to any such decision making shifted to the federal government. It is agreed that the federal government through the JRP did consult with First Nations, including the petitioners. Any issues about the adequacy of that consultation are currently before the federal court. It is uncontradicted that the Province in its role as intervenor made submissions to the JRP wherein the Province determined that the Project should not be approved without additional study or additional conditions relating to spill response on land and marine environments –which mitigating conditions could be seen as appropriate accommodation of known adverse effects on Aboriginal rights.

[186] The petitioners, in their July 2015 written submissions (set out in summary form), reflect the Province's position as publically stated. I adopt the following paragraphs as accurately reflecting the Province's position:

> 42. The Province found that NG's plans for responses to pipeline spills were "preliminary," that NG's assessment of the geohazards along the pipeline route were "not complete" and "inadequate," and that "further investigations and more detailed geohazard mapping are required." The Province found that mitigation strategies and locations identified to date by NG were "both preliminary and imprecise."

43. The Province also stated that little weight should be given to the spill frequency predictions set out by NG, since the information provided by NG was "incomplete, and may downplay the potential for both large and smaller spills."

44. The Province stated that there was a real potential that spills would occur, and that NG had failed to show it could respond effectively to a spill. The Province's position was that it is "indisputable" "[t]hat severe acute effects on fish and other wildlife populations could result from a spill."

45. The Province was of the view that NG had failed to explain how it would deal with the particular challenges of dealing with diluted bitumen ("**dilbit**") in the face of considerable uncertainty about how dilbit will interact with water, when it will sink, how it could be removed from the water column, and how it would behave in fast moving water. The Province noted that Environment Canada had "also made it very clear that the evidence provided to date by NG does not allow for a full understanding of the behaviour of spilled dilbit."

46. The Province found that the evidence of NG's remediation strategies was "preliminary and indeed contradictory" and noted that NG's proposed tactics have not been evaluated for use in British Columbia. The Province also found it unacceptable that NG had not yet developed detailed spill response plans. It noted that much of the pipeline would be located in remote areas of British Columbia which pose challenges for access, challenges that would be exacerbated by heavy snow, steep terrain and high flow conditions. The Province noted that NG had not yet determined locations it could access to respond to a spill, including control points for capturing and recovering passing oil. The Province was concerned that NG's estimated travel times to control points did not take into account mobilization time, and assumed all roads were drivable.

47. The Province stated:

> 63. Given the incompleteness of NG's evidence in this regard, the Province submits that NG cannot currently assert that there would in fact be viable control points where a spill could travel to. In addition, even if accessibility to control points had been fully validated, in order for NG to assert that it could respond effectively to a spill, it would also have to know the means by which personnel and equipment would gain access to respond to oil that had come ashore or sunken to the sediment. Given the preliminary nature of the evidence presented by NG, this is of course not known.
>
> 64. The Province is very concerned that, in the event of a spill, some places where a spill could reach will be inaccessible, and therefore not amenable to spill recovery actions. <u>While NG states that it will be able to access control points at any location along the pipeline, it has simply not provided the evidence in this proceeding to substantiate this assertion. The Province submits that, as of today, it is not possible for NG to assert, nor for the JRP to conclude, that NG will be able to access all those places where a spill may travel, and to respond effectively.</u> [Petitioner's emphasis.]

48. The Province noted specific concerns that had been raised about spill response challenges in particular areas, including the Clore River (feeding into the Copper River) the Morice River, the Sutherland River and Upper Kitimat Valley.

49. The Province expressed concern with NG's failure to appropriately identify and respond to spills in other areas, and with the fact that NG would not commit to a precise leak detection threshold before construction of the pipeline takes place. The Province noted that, with the techniques NG planned to use, slow rate leaks will not be detectable,

which can lead to large spills. The Province noted that alternative leak detection techniques, such as aerial surveillance and third party notification, may be less effective in British Columbia than in other locations because of the remoteness of the location and snow cover.

50. The Province stated:

> 113. The Province submits that requiring NG to show now that it will in fact have the ability to respond effectively to a spill is particularly important because there will be no subsequent public process in which that ability can be probed and tested. NG has pointed out that its oil spill response plans will be provided to the NEB for review, and has committed to a third party audit of its plans. However, it also acknowledges that there will be no means by which those plans could be tested through a public process.
>
> TR Vol. 92, lines 13917; 14473-4
>
> 114. As the JRP stated during the course of this proceeding, it is often difficult to determine how much information is needed at this stage of the approval process. In some cases, and for some aspects of a project, it may be sufficient to require a proponent to, for example, commit to the preparation of plans post-certification. However, the Province submits that this does not apply, in this particular case, to the preparation of oil spill response plans. Although a spill of dilbit may not be likely in any particular location of the project at a particular time when considered in isolation, the possibility of a spill is very real, as Enbridge's track record demonstrates; the potential for devastating effects on watercourses is obvious; and there is serious reason to question NG's ability to respond effectively to a spill. Given these facts, in this particular case the Province submits that NG should be able to show, in advance of certification, that it will be in a position, once operations commence, to live up to its spill response assertions. NG has not done so. The Province submits that the JRP should, in making its recommendations, give this factor significant consideration. [Petitioner's emphasis.]

51. The Province went on to detail additional significant concerns it had with Northern Gateway's proposed marine spill response, noting that the spill response plans were largely "conceptual," and that NG was not prepared to provide Geographic Response Plans ("**GRPs**"), which would identify equipment and personnel needed to respond to spills effectively at particular locations. The Province's conclusion on this topic was as follows:

> In the absence of detailed plans, and in particular GRPs, the Province remains deeply concerned that any response to a significant spill, were it to occur, would be limited in its effect, and that serious impacts on the marine environment, and the livelihoods of those who rely on it, would result. For this reason, the Province is not able to support approval of the project, and submits that its concerns respecting NG's ability to respond to a spill should be given serious consideration by the JRP.

52. The Province also noted the following:

> 150. Finally, the Province wishes to address in particular one statement made by NG during the proceedings in Edmonton. The following exchange took place on September 18:

> Ms. Boye: ... I just want to ask whether you can recognize that it's not possible to know from Northern Gateway's Application the exact extent to which the project will have impacts beyond the [Project Development Area] and into the [Project Effects Assessment Area]?
>
> MR. MARK ANIELSKI: Let me say that it's - no, it's not possible, and **the onus, I would say, is on provincial governments to have done their due diligence on assessing the cumulative impact of linear disturbance at the watershed level.** In the ideal world, we would have that evidence. I could tell you a 25-metre right-of-way isn't much bigger than old seismic lines in Alberta which were 15 metres.
>
> So the **cumulative impact of all this linear disturbance really should be assessed by provincial governments** to help us in any project evaluation to assess the incremental impacts of the next project or the next seismic line. We lack that evidence. We lack that Information. So this is really an onus on governments, in my opinion. [Petitioner's emphasis.]
>
> TR Vol. 75, lines 22682-4

151. These statements by Mr. Anielski are simply incorrect. The onus in this proceeding is not on governments, including the government of British Columbia, but on NG. This includes information with respect to cumulative impacts, which are referenced on p. 25 of the Hearing Order.

53. The Province stated in its final submissions that it opposed approval of the project. The Province's central reason for its opposition was that "the evidence on the record does not support NG's contention that it will have a world-class spill response capability in place." The Province stated in its submissions:

> The project before the JRP is not a typical pipeline. For example: the behavior in water of the material to be transported is incompletely understood; the terrain the pipeline would cross is not only remote, it is in many places extremely difficult to access; the impact of spills into pristine river environments would be profound. In these particular and unique circumstances, NG should not be granted a certificate on the basis of a promise to do more study and planning once the certificate is granted. The standard in this particular case must be higher. And yet, it is respectfully submitted, for the reasons set out below, NG has not met that standard. "Trust me" is not good enough in this case."

[187] The JRP issued its report on December 19, 2013 recommending approval of the Project subject to 209 conditions.

[188] There is unclear evidence before this Court as to how many of those conditions directly address the four remaining requirements set out by the Province, when the Province wrote that without them it cannot and will not "support" the Project. During the course of this hearing in July 2015, I asked if any of the conditions addressed the two "requirements" relating to world-leading spill response on land or marine

environments. I was advised they did not. However, it was suggested later, during the November hearing, that some of the conditions imposed by the NEB do address, in some measure, parts of the Province's spill response requirements. Counsel for the Province acknowledged, however, that there remains a significant gap between the approval conditions of the federal government and those required for Provincial "support".

[189] The Court received further written submissions in October and early November from all parties relating primarily to whether the honour of the Crown in relation to consultation and accommodation has been and is being upheld by what the Province says is a more than adequate means of addressing and accommodating the petitioners' concerns about the Project. The Province provided affidavit material appending several technical papers, workshop meetings and public announcements regarding what the Province is doing to develop a comprehensive, world-leading, land-based spill preparedness and response regime. I excerpt from the Province's further supplemental submissions the "overview" of its efforts in this regard and what the Province says is the relevance of this new evidence to the issues before this Court:

> 2. The important facts in the development of the Province's land-based spill regime include the following:
>
> - In July 2012, the Province released its "Technical Analysis: Requirements for British Columbia to Consider Support for Heavy Oil Pipelines". The technical analysis paper has its source in the Province's concerns over the spill risks posed by the Northern Gateway project and those of heavy oil projects more generally. With respect to the need to bolster land based spill preparedness and response in B.C., the paper served to outline the policy direction being considered by the Province and to inform the position to be taken by the Province on Northern Gateway before the Joint Review Panel ("JRP"). The paper was released approximately in the middle of the JRP hearing process, prior to the examination of Northern Gateway and the presentation of final arguments to the JRP. The technical analysis paper is also the source of the Province's "five requirements" respecting support for heavy oil projects.
> - In November 2012, the Province released a policy intentions paper for public consultation in which the Province sought comment on a proposed general framework for the creation of a "world-leading" land based spill preparedness and response regime.
> - In March 2013 the Province held a three day policy symposium dedicated to identifying and exploring world-leading spill preparedness and response regimes and practices.

- In April 2014, the Province released a second policy intentions paper for consultation. The April 2014 paper sought comment on a more defined proposal to implement a new spill response regime built around three key features: implementing new preparedness, response and restoration requirements, creating a provincially regulated and industry funded "provincial response organization" ("PRO"), and enhancements to the existing Provincial Environmental Emergency Program.
- In her June 12, 2015 mandate letter to the Minister of Environment, the Premier directed the Minister to complete the land-based spill studies and consultations and make a recommendation to Cabinet as to how to implement a world-leading land based spill regime.
- On June 15, 2015, the Minister of Environment announced the Province's intention to implement a new land-based spill regime with legislation in place in spring 2016, and the regime becoming operational in 2017. In the announcement, ongoing engagement with First Nations on all aspects of the design, implementation and operation of the new system was stated to be a guiding principle to the Province's proposal.

3. The evidence respecting the Province's actions to advance its land-based spill response initiative since 2012 is relevant to:

i. the petitioners' allegation that the Province failed to act in accordance with the honour of the Crown in entering into, and later declining to terminate the equivalency agreement with the National Energy Board ("NEB");

ii. the petitioners' allegation that the Province owed a duty to consult with the Gitga'at in connection with the decision to enter into the equivalency agreement;

iii. the interpretation of s. 27 of the *Environmental Assessment Act ("EAA")*; and

iv. the issue of remedy, in the event the court finds the Province to have breached either the honour of the Crown or a duty to consult.

[190] In summary, it is the Province's position that even after signing the Agreement and abdicating its decision-making authority under the *EAA*, it remained in a position to consult and accommodate the petitioners' rights.

[191] It is the petitioners' position on this new evidence that, in essence, in relation to the duty to consult and the honour of the Crown, it is too little too late.

[192] First, in my view, it is important to acknowledge the significant and useful work the Province has undertaken since at least 2012 (that is two years following signing the 2010 Equivalency Agreement and four years following the 2008 Equivalency

Agreement). It is sought to be, and appears to be, a comprehensive attempt to provide world-leading, land-based spill preparedness and response for the Province, and thus seeks to cover all the projects under the Agreement.

LEGAL ANALYSIS OF THE DUTY TO CONSULT

[193] It is useful to be reminded of the basic principles that must guide any discussion of whether a government has upheld the honour of the Crown by engaging its duty to consult and accommodate. The duty to consult is a major component of carrying out government obligations pursuant to s. 35 of the *Constitution*. The honour of the Crown, in this case, is engaged by the duty to consult and accommodate as set out in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, wherein the Supreme Court of Canada held at para. 16:

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

[194] A test for when the duty to consult arises was recently set out in *Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2015 BCSC 16 at paras. 226 and 228:

> [226] The duty to consult arises where three elements are present: (1) the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated Crown conduct may adversely affect the Aboriginal claim or right. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 31.
>
> ...
>
> [228 In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances: see *Haida*, at para. 41. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake: see *Haida*, at para. 45. The stage of accommodation is reached when the consultation process suggests amendment of Crown policy. "Thus the effect of good faith consultation may be to reveal a duty to accommodate." See *Haida*, at para. 47.

[195] The Province does not say in relation to the Project that there is no duty to consult and accommodate the petitioners. In fact, the Province's position is that pursuant to the Agreement the duty is assumed by the federal Crown. It is in this context that the Province says the Crown's duty is indivisible.

[196] I agree that the Crown is indivisible when it comes to such concepts as the "honour of the Crown". However, where action is required on the part of the Crown in right of the Province or federal government, or has been undertaken by either – the manifestation of the honour of the Crown, such as the duty to consult and accommodate First Nations, is clearly divisible by whichever Crown holds the constitutional authority to act. In this case, where environmental jurisdictions overlap, each jurisdiction must maintain and discharge its duty to consult and accommodate. Illustrative of this concept are discussions in several Supreme Court of Canada decisions, in differing contexts, demonstrating that each Crown has specific responsibilities to consult First Nations as their respective legislative powers intersect and affect s. 35 guarantees.

[197] In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 148, the Court made observations particularly apt in relation to the facts before this Court:

> Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. ...

Also see *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 and *Quebec (Attorney General) v. Moses*, 2010 SCC 17.

[198] The spirit of cooperative federalism and divisible obligations is captured in several MOUs between Canada and British Columbia; both the Province and the petitioners exhibited several MOUs that are in place allowing projects that engage both jurisdictions. The petitioners, at paragraph 160 of their July written submissions, quote from the VAFD Project and the 2013 Substitution MOU to make this point:

> 160. The 2013 Substitution MOU is even more explicit. Again, this MOU provides for the EA process to be conducted by the EAO, with the report going to the relevant Ministers of both levels of government so that a decision is made at each level. Section 5 set[s] out in five paragraphs their agreement on "procedural delegation of Aboriginal consultation." The key paragraphs are:
>
> a) The Parties acknowledge the respective duties of Canada and British Columbia to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or establish[ed] Aboriginal or treaty rights.
>
> b) The written approval by the Federal Minister of a request for substitution of an environmental assessment process will also, where appropriate, include procedural delegation to British Columbia of the gathering of information from Aboriginals groups about the impact of the proposed project on their potential or established aboriginal or treaty rights and ways to prevent, mitigate or otherwise address those impacts as appropriate.
>
> c) The Parties acknowledge that, notwithstanding the delegation of the procedural aspects of consultation, Canada and British Columbia each retain the responsibility to ensure that the duty to consult has been satisfied, including determining the Aboriginal groups to be consulted and determining the scope, content and adequacy of consultation.

[199] The petitioners say that the honour of the Crown required the Province to consult with the petitioners before the Province entered into the first Agreement, abdicating its decision-making power under s. 17 of the *EAA*.

[200] The Province responds that there was, and is, no causal connection between the Agreement and any adverse impact on the petitioners' ability to exercise their Aboriginal rights. In addition, says the Province, the Agreement is of general application, meaning there was no realistic opportunity for practical consultation respecting specific possible adverse effects.

[201] The Province relies on *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, to point out that not every Crown-contemplated action having an impact on Aboriginal rights, triggers a duty. At paragraph 107 of their written submissions, the Province accurately summarizes relevant parts of that decision:

> As to the question of when contemplated Crown conduct will impact an Aboriginal right so as to trigger the duty, the relevant findings from *Rio Tinto* are:
>
> i. For a duty to consult to arise, there must be Crown conduct that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the right in question. (para. 42)

ii. The claimant must show a causal relationship between the government conduct and a potential for adverse impacts on pending Aboriginal claims or rights. (para. 45)

iii. The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice (para. 46).

iv. The duty to consult can extend to higher-level, strategic decisions in cases where such decisions set the stage for future decisions that may have such an impact. (para. 42) However, the duty is only triggered by the prospect of an adverse impact of a specific Crown action or decision, "not to larger adverse impacts of the project of which it is part". The subject of the consultation is the impact on the claimed rights of the current decision under consideration. (paras. 52-53)

[202] Also see the Federal Court of Appeal decision *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para. 100. At para. 102 of that Court's decision, a distinction was made between speculative and possible adverse impacts:

> ... An impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the speculative side of the line, the side that does not trigger the duty to consult. As the Federal Court found on the facts, this case falls on that side of the line.

[203] In *Buffalo River Dene*, at para. 104, the Saskatchewan Court of Appeal set out a required degree of connection between Crown conduct at issue and an adverse impact on an Aboriginal right:

> The jurisprudence is clear: there is a meaningful threshold for triggering the duty to consult. To trigger it, actual foreseeable adverse impacts on an identified treaty or Aboriginal right or claim must flow from the impugned Crown conduct. While the test admits possible adverse impacts, there must be a direct link between the adverse impacts and the impugned Crown conduct. If adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult.

[204] I find that the link between the Province entering into the 2008 and then the 2010 Agreement is weak: it carries only a thin thread of connection to possible adverse impacts on the exercise of the petitioners' Aboriginal rights. Especially noting, in the 2010 agreement, clause 6, which allows either party to unilaterally terminate the agreement on 30 days' notice. I find that the Province is entitled to enter these kinds of agreements without the requirement for consultation, subject of course to any

circumstances that might arise and require it. Thus, in this case, there was no duty to consult owed by the Province on signing the Agreement.

[205] I turn now to consider whether the Province owed a duty commensurate with the honour of the Crown to consult with the petitioners between December 2013 and June of 2014, when it knew that the concerns expressed by the petitioners, which were entirely consistent with those concerns expressed by the Province both before the JRP and after, had not been substantially addressed, if at all, by the recommended conditions of the JRP for approval of the Project.

[206] It is agreed that the Province did not consult in that period, and in fact, did not respond to two letters sent by CFN, asking for consultation during that period, until after the Project received approval by the NEB and its ability to terminate and affect this Project ended.

[207] The Province did not terminate the Agreement and the petitioners quite fairly point out that if it had consulted the petitioners and others prior to June 2014 and terminated the Agreement, it would have then been in a position, if it chose, to scope the Project under s. 11 of the *EAA* or even accept the JRP assessment as equivalent and invoke its s. 17(3) decision-making process. In doing this, it could have imposed no further conditions or whatever conditions, including its version of world-leading spill response on land and marine environments, it chose to.

[208] The Province points out that since it has been working on a world-leading spill response for the Province since 2012, as set out in the summary above, it really has given up nothing that impacts adversely upon the petitioners' exercise of their Aboriginal rights. Yet however important, and however comprehensive the Province's current spill response initiative is, in relation to its failure to consult with the petitioners prior to June 2014, there are two fundamental flaws in its submission.

[209] First, consultation/accommodation, as already described above, entails early and meaningful dialogue with First Nations whenever government has in its power the ability to adversely affect the exercise of Aboriginal rights. Consultation does not mean explaining, however fulsome, however respectfully, what actions the government is going to take that may or may not ameliorate potential adverse effects. Such a means

of dealing with an admittedly difficult issue looks very like "we know best and have your best interests at heart". First Nations, based on past experience, quite rightly are distrustful and even offended at such an approach. In any event, the Supreme Court of Canada has made abundantly clear, this is a paternalistic and now discredited means of attempting to give meaning to s. 35 rights. Consultation, to be meaningful, requires that affected First Nations be consulted as policy choices are developed on how to deal with potential adverse effects of government action or inaction. Hobson's choices are no longer sufficient.

[210] Second, the Province has given up a significant ability to give effect to its obligation not only to consult, but also to accommodate the petitioners, by failing to terminate the Agreement. Section 17 of the *EAA*, as was pointed out by the Province in public statements referred to above, is the means by which the Province can ensure and enforce whatever mitigating conditions any project may require in order to protect the environment. For ease of reference, the Province's submissions to the Standing Committee are set out:

> One of the strengths of the B.C. process and an area where B.C. exceeds the federal requirements is the issuance of an environmental assessment certificate which includes conditions that are legally-binding on project proponents. Through these conditions, provincial ministers have a mechanism to ensure that proponents adhere to appropriate requirements identified through the assessment to avoid or mitigate potential adverse impacts. The EAO is able to conduct inspections of certified projects and undertake measures to correct instances of non-compliance. By contrast, the CEA Act does not provide a decision similar to the issuance of an environmental assessment certificate and therefore does not have a mechanism to require and enforce environmental assessment conditions.

[211] Without s. 17 authority the Province cannot, within its constitutional bounds, do more than ask the federal government or NGP to do more to protect British Columbians, particularly those First Nations residing in such places as the Douglas Channel.

[212] Thus, much has been given up by the Province in full consideration of what was to be carried out based on what it appeared to believe was "required" for its support of the Project. And much has been given up in terms of trust of the government to live up to its obligations to First Nations by failing to consult with them prior to taking actions that could have significant deleterious consequences on the petitioners' way of life.

[213] For these reasons, I find that there has been a breach of the Province's duty to consult, and thus the honour of the Crown, by the failure of the Province to consult with the petitioners prior to June 2014.

RESULT

[214] I find the Agreement invalid to the extent it removes the need for the Ministers to exercise their discretion pursuant to s. 17 of the EAA.

[215] I find the Province has breached the honour of the Crown by failing to consult with the CFN, and the Gitga'at specifically, prior to deciding not to terminate the Agreement pursuant to clause 6.

REMEDIES

Statutory Interpretation

1. A declaration that the Agreement is invalid and is set aside to the extent it purports to remove the need for an EAC pursuant to clause 3 of the Agreement.

BREACH OF DUTY TO CONSULT

1. A declaration that the Ministers are required to exercise s. 17 authority under the *EAA* in relation to the Project.

2. A declaration that the Province has a duty to consult, which is triggered by any decision of the Province in relation to clause 6 of the *EAA*.

3. The Province is required to consult with the Gitga'at about the potential impacts of the Project on areas of provincial jurisdiction and about how those impacts may affect the Gitga'at's Aboriginal rights, and how those impacts are to be addressed in a manner consistent with the honour of the Crown and reconciliation.

COSTS

[216] The petitioners will have their costs. In oral submissions, the petitioners sought an order of full indemnity special costs, relying in part on *Carter v. Canada (Attorney General)*, 2015 SCC 5.

[217] I invite the parties to provide written submissions relating solely to their view of which level of costs is most appropriate.

"KOENIGSBERG J."

SCHEDULE A

ENVIRONMENTAL ASSESSMENT EQUIVALENCY AGREEMENT

PARTIES:

NATIONAL ENERGY BOARD
("NEB")

AND

ENVIRONMENTAL ASSESSMENT OFFICE OF BRITISH COLUMBIA
"(EAO")

WHEREAS certain Projects are subject to the *National Energy Board Act* and also may meet or exceed thresholds established pursuant to the British Columbia *Environmental Assessment Act,* S.B.C. 2002, e. 43 ("BCEAA");

WHEREAS the Parties wish to promote a coordinated approach to achieve environmental assessment process efficiencies with respect to such Projects;

WHEREAS sections 27 and 28 of the BCEAA allow the British Columbia Minister of Environment to enter into an agreement regarding any aspect of environmental assessment with Canada or its agencies, boards or commissions and provides for accepting another party's or jurisdiction's assessment as being equivalent to an assessment required under the BCEAA;

WHEREAS any assessment of a Project pursuant to the *National Energy Board Act* would take into account any comments submitted during the assessment process by the public and Aboriginal peoples; and,

WHEREAS the Minister's section 27 powers have been delegated to the Executive Director of the EAO.

NOW THEREFORE:

1. In this Agreement,

"Project" means a project that constitutes a reviewable project under British Columbia's *Reviewable Projects Regulation,* B.C. Reg. 370/2002, including but not limited to:

i. an electric transmission line;

ii. a transmission pipeline;

iii. an off-shore oil or gas facility;

iv. a natural gas processing plant; or,

v. an energy storage facility;

as defined in the *Reviewable Projects Regulation*, where the Project also requires a decision on whether or not to approve the Project pursuant to the *National Energy Board Act.*

2. EAO accepts under the terms of this Agreement that any NEB assessment of a Project conducted either before or after the effective date of this Agreement, constitutes an equivalent assessment under sections 27 and 28 of the BCEAA.

3. The BCEAA and the regulations enacted under it, are deemed to be varied in their application to or in respect of Projects subject to this Agreement to the extent necessary to accommodate this Agreement, and the Projects to which this Agreement applies do not require assessment under the BCEAA and may proceed without a BCEAA certificate.

4. The Parties agree to develop a joint strategy to enhance the exchange of information related to proposed Projects covered by this Agreement. The NEB will notify the EAO on receipt of an application, for a Project that would potentially be covered by this Agreement, and subsequently of any NEB decision on whether or not to approve the Project.

5. This Agreement is not to be interpreted in a manner that would fetter the discretion of statutory decision-makers. Projects covered by this Agreement must still obtain all applicable British Columbia provincial permits or authorizations.

6. Either Party may terminate this Agreement upon giving 30 days written notice to terminate to the other Party, The termination of this Agreement will not affect the acceptance of equivalency for any Project that has received a decision on whether or not to approve the Project pursuant to *the National Energy Board Act* prior to the date of termination.

7. EAO and NEB will post this Agreement on their respective public websites.

8. The Parties agree that, effective the date below, this Agreement replaces and supersedes the agreement executed by the Parties as of November 26, 2008.

THIS AGREEMENT is dated for reference the 21st day of June, 2010.