SUPREME COURT OF NOVA SCOTIA

Citation: *Pictou Landing First Nation v. Nova Scotia (Aboriginal Affairs)*, 2018 NSSC 306

Date: 20181130
Docket: Hfx No. 474934
Registry: Halifax

Between:

Pictou Landing First Nation

Applicant

v.

Her Majesty the Queen in Right of the Province of Nova Scotia as represented by the Minister of Aboriginal Affairs

Respondent

Judge: The Honourable Justice D. Timothy Gabriel

Heard: July 25, 2018, in Halifax, Nova Scotia

Counsel: Brian Hebert, for the Applicant
Sean Foreman and Diane Rowe, for the Respondent

By the Court:

Introduction

[1] Northern Pulp Nova Scotia Corporation ("Northern Pulp") owns and operates a bleached kraft pulp mill and associated facilities located at Abercrombie Point, Pictou County. This latter has been referred to by the parties as "the mill" and I will continue to refer to it as such within the body of these reasons.

[2] Pictou Landing First Nation ("PLFN") has applied for Judicial Review of a decision of the office of Provincial Minister of Aboriginal Affairs to deny consultation with respect to the issue of whether the Province will or should fund the construction of a new effluent treatment facility at Boat Harbour, Pictou County, Nova Scotia. For the reasons which follow, the application is granted.

Background

[3] The mill presently includes an effluent treatment facility which has been operating since 1967. It is adjacent to Boat Harbour. I will refer to the presently existing facility as "the Boat Harbour treatment facility".

[4] The *Boat Harbour Act*, 2015 c. 4 ("*BHA*"), provides in part as follows:

> 3. On and after the earlier of January 31, 2020, and the date on which the Northern Pulp Nova Scotia Corporation ceases to use the facility, the use of the facility for the reception and treatment of effluent from the mill must cease.
>
> [Emphasis added]

[5] Key words contained in s. 3 are referenced in the interpretation provisions set out in s. 2:

> In this Act,
>
> (a) "effluent" has the same meaning as in the Pulp and Paper Effluent Regulations (Canada), as amended from time to time;
>
> (b) "Facility" means the Boat Harbour Effluent Treatment Facility, comprising

> (i) the effluent treatment system located at 340 and 580 Simpson Lane, Pictou Landing, in the County of Pictou, and consisting of two settling basins, an aerated stabilization basin, the former stabilization lagoon and all appurtenances thereof necessary to permit the receipt and disposal of effluent from the Mill, and
>
> (ii) the pipeline for the transmission of effluent from the Mill to the settling basins, which commences at a standpipe located at 260 Granton Abercrombie Branch Road, Abercrombie Point, in the County of Pictou, leads under the East River and discharges into the settling basins;
>
> (c) "Mill" means the Northern Pulp Mill, a bleached kraft pulp mill located at 260 Granton Abercrombie Branch Road, Abercrombie Point.

[6] As the Province indicates in its brief:

> 4. Northern Pulp is in the planning stages to formally apply for Environmental Assessment ("EA") approval pursuant to Part IV of the *Environmental Act* for the design, construction and operation of a new Effluent Treatment Facility ("ETF") to replace the existing Boat Harbour Treatment Facility, which must be closed as required by the *Act* ("the pending ETF Application").
>
> 5. The Province is currently engaged in active consultation with the PLFN regarding the Pending ETF Application. The Province has confirmed $70,000.00 in capacity funding to support PLFN's meaningful participation in that process.

[7] The Province continues:

> 7. The Province has disclosed it is also engaged in confidential discussions directly with Northern Pulp regarding potential crown funding that may be provided to support construction of the new ETF (the "Potential Crown Funding"). No such decision has yet been made.
>
> 8. PLFN takes the position that any such Potential Crown Funding to Northern Pulp by the Province is a separate "decision" that triggers an independent duty to consult with PLFN, as this decision "will have the effect of continuing the operation of the Mill beyond January 30, 2020" and therefore further impact the asserted rights and interests asserted by PLFN.
>
> 9. The Province disagrees that any decision to provide some form of Potential Crown Funding would be a "decision" or "action" that itself

> triggers an independent duty to consult with PLFN. Simply put, Potential Crown Funding to Northern Pulp does not meet the established legal test to trigger consultation, as any such potential decision or action itself does not authorize continued operation of the Mill beyond January 30, 2020 (as claimed by PLFN) and therefore has no additional or potential adverse impact on the rights and interests asserted by PLFN.
>
> [Emphasis in original]

[8] After reminding me that the Boat Harbour Treatment Facility and the circumstances of Boat Harbour have been publicly referred to by provincial spokespersons in the past "as an example of environmental racism" (*Applicant brief, para. 7*), PLFN goes on to point out:

> 8. The Mill requires a new treatment facility if it is to continue operating. A new treatment facility, if built, will allow the Mill to be operated for many years to come and will mean the continued release of contaminants from the Mill during the pulping process during that period. Those contaminants, some of which are toxic, will find their way to Pictou Landing First Nation and will be breathed in by the men, women and children living there.
>
> 9. The Province of Nova Scotia is considering financial assistance to Northern Pulp to assist with the construction of the new treatment facility being proposed by Northern Pulp.
>
> 10. The Province is currently consulting with Pictou Landing First Nation on the pending decision of the Province to approve the effluent treatment facility under the *Environmental Act*. The consultation focuses on the physical impacts of the design, construction and operation of the new effluent treatment facility. As such it is not focused on emissions from the ongoing pulping operations at the Mill.
>
> 11. The Province has denied Pictou Landing First Nation's request to expand the present consultation to include the funding decision, suggesting that the decision cannot lead to any adverse impacts and therefore does not trigger the duty to consult.

[9] The record filed in conjunction with this matter is miniscule. It contains merely two documents. The first is a letter from Brian Hebert (counsel for PLFN) dated January 11, 2018, seeking confirmation of the scope of consultation and capacity funding for PLFN. The second consists of a letter from the Nova Scotia Office of Aboriginal Affairs ("OAA") to Brian Hebert, PLFN counsel, in response to his January 1, 2018 letter, confirming the scope of the consultation regarding the

Northern Pulp ETF and the quantum of capacity funding for consultation ($70,000.00). This second letter is dated February 26, 2018.

[10] The second letter was written by Beth Lewis, OAA's consultation advisor. Although OAA agreed to provide funding to accommodate consultation upon potential physical impacts to Treaty Rights in relation to the design, construction and operation of the ETF, they would not commit to do so with respect to whether the Province will finance the actual construction of it.

[11] As Ms. Lewis puts it (*Record, tab. 2*):

> The current act of consultation is focussed upon potential physical impacts to Aboriginal and Treaty Rights associated with the design, construction, and operation of the proposed ETF. The intent of the ETF is to mitigate or eliminate harm to the environment by the industrial operations of the mill.
>
> A decision by the Province in regards to any or partial funding of the ETF does not create a new impact on Aboriginal or Treaty. The Province may provide information to PFLN [sic] in the event that any decision regarding funding is made, in keeping with the spirit of maintaining transparent communication on the project. (*letter, Beth Lewis, consultation advisor, Nova Scotia of Aboriginal Affairs, February 26, 2018, Record, tab 2*)
>
> [Emphasis added]

[12] An affidavit of Andrea Paul was filed by PLFN in conjunction with this application. Extrinsic evidence not before the original decision maker is not usually permitted on a judicial review application. In this case, the proffered affidavit addresses the allegations of the lack of procedural fairness extended to PLFN, and (by implication) the incompleteness of the record.

[13] Andrea Paul is Chief of the Pictou Landing First Nation. Her affidavit was filed on June 13, 2018. In both her affidavit and *viva voce* testimony, she referred to a number of matters of which she has been advised. Included was her understanding (*Paul affidavit, para. 2*) as follows:

> It is my understanding based on various discussions with representative of Northern Pulp and the Province that without provincial funding, the new treatment facility and the new pipeline will not be built.

[14] Moreover, she goes on to indicate that she has been advised by Bruce Chapman, General Manager of Northern Pulp, to the effect that, without the new treatment facility and the new pipeline, the mill cannot operate after January 31, 2020, which is, as we have seen from the *Boat Harbour Act*, the latest date mandated for the closure of the current Boat Harbour treatment facility.

[15] Among other things, Chief Paul refers to an article in the *Journal of Environmental Quality* indicating that certain of the airborne contaminants to which the PLFN community has been exposed since 1967 continue to pose deleterious health risks for its members. If the lifetime of the mill is extended beyond 2020 the adverse environmental effects will continue to be experienced by the community for the duration of the extension. She concludes, in paras. 10 and 11 of her affidavit:

> 10. I have also reviewed parts of an air dispersion modelling study that was prepared by Stantec Consulting Ltd. for Northern Pulp and filed with the Nova Scotia Department of Environment to satisfy condition 6 II d) and 6 III e) and f) of industrial approval number 2011-076657. I attach a true copy of this study as Exhibit "C" to this my Affidavit. This study is also a source of my belief that the Mill emits a number of pollutants and that the prevailing winds carry these pollutants toward Pictou Landing First Nation. The study was provided to Pictou Landing Fist Nation by the Nova Scotia Department of Environment.
>
> 11. I have examined the record provided by the Respondent in this matter and must say that I am disappointed that the Province took so little information into account when responding to our request for consultation on this issue. This affidavit and the exhibits attached are intended to provide a fuller background to our request and this is my belief that this information is available to the Respondent within its own records.

[16] Chief Paul alleges, among other things, that the Province did not consider the information available to it (of which the exhibits to her affidavit comprise merely examples) in determining whether to consult with PFLN on the issue of whether to not to fund the new ETF. In other words, the Province ought to have consulted these and other materials when determining whether the decision to fund, in and of itself, by extending the lifetime of the mill, might have a potential adverse impact upon PFLN lands and/or treaty rights. This is because (PLFN argues) without government funding, the ETF will not be built, and if the new ETF is not built, the mill will be forced to close. This is in accord with PLFN's best

interest, because of the adverse health effects upon the community of the airborne contaminants which the Mill will continue to churn out, even with a new ETF.

Issues

[17] The following issues are engaged:

1. Was PLFN treated in a procedurally fair manner by OAA?
2. Was the Province's determination that it has no duty to consult with PLFN (as to whether it will fund the ETF) correct?

Analysis

1. Was PLFN treated in a procedurally fair manner by OAA?

   a. *The affidavit of Andrea Paul dated June 13, 2018*

[18] Reference has previously been made to Chief Paul's affidavit. Fundamentally, the assertions made by PLFN in relation to procedural unfairness are summarized in that affidavit.

[19] First, we find in paras. 6 – 8:

> 6. The concern that our community has always had has been the quality of the air that we breathe. We have suffered odors from the Boat Harbour Treatment Facility for 50 years. This has caused constant fear about the effect of this on our health, especially our elders' and children's health. For many years we were told by various government officials that even though the sulphur compounds we smelled were very horrible smelling, they did not pose any health risks. However, according to an article by Susan Schiffman and C. M. Williams entitled, "*Science of Odor as a Potential Health Issue*" published in the *Journal of Environmental Quality* 34:129-138 (2005), exposure to foul smelling sulphur compounds can lead to adverse health impacts in communities exposed to them even though the exposure levels are below the level that could cause physical harm. I attach as Exhibit "A" to this my Affidavit a true copy of Schiffman article.
>
> 7. With the closure of the Boat Harbour Treatment Facility, one source of these sulphur compounds will be removed - and our community is thankful for that. But as we look toward the future we must also be concerned about the long-term impact of the operation of the Mill on our community, including adverse impacts from the airborne contaminants coming from the Mill itself. We have never had an opportunity to study

> and understand these long terms impacts as we have to date been so focused on the closure of the Boat Harbour Treatment Facility.
>
> 8. However, the Province is now in the process of determining whether to fund the New Treatment Facility and New Pipeline. If it does, the Mill will be operating for many years to come. In deciding whether to fund the New Treatment Facility and New Pipeline, we believe that the Province must take into account the potential impact of its decision on Pictou Landing First Nation. It is for this reason that we asked for a formal consultation with the Province in respect of this important decision.

[20] As we have also seen, Chief Paul refers, in other portions of her affidavit, to information that she received from the Executive Director of Corporate Initiatives at Nova Scotia Department of Transportation and Infrastructure Removal. She cites this information, and other discussions held with Bruce Chapman, General Manager for Northern Pulp, as the basis for her conclusion that without the new ETF and pipeline the mill will be forced to close after January 30, 2020. This is because, without Provincial funding, the facility will not be built.

[21] As is apparent from para. 6 (cited above) Chief Paul also references an article by Schiffman and Williams published in *The Journal of Environmental Quality* in 2005 "*Science of Odor as a Potential Health Issue*". She attaches as Exhibit "A" a copy of the Schiffman article. She also makes reference in para. 9 to a research article published by Tony Walker of Dalhousie University at the School for Resource and Environmental Studies entitled "*Pilot Study Investigating Ambient Air Toxic Emissions in Our Canadian Kraft Pulp and Paper Facility in Pictou County, Nova Scotia*" and published in *Environmental Science and Pollution Research* in 2017.

[22] Chief Paul cites both articles as the bases for her belief that the mill emits several thousand tons of pollutants annually, including "toxic volatile organic chemicals" and that they are carried on prevailing winds to other places in Pictou County, including Pictou Landing First Nation. This article is also attached as an exhibit to her affidavit.

[23] Chief Paul cites the fact that this article was based upon data collected by the Nova Scotia Department of Environment at the Granton, Nova Scotia air monitoring site, which is operated by that Department. She draws attention to "parts of an air dispersion modelling study that was prepared by Stantec Consulting for Northern Pulp and filed with the Nova Scotia Department of Environment to satisfy conditions 6(ii)(d) and 6(iii)(f) of the Industrial Approval

2011-076657". She adds that the study was provided to PLFN by the Nova Scotia Department of the Environment itself. (*Paul affidavit, para. 10*)

[24] In para. 11 she concludes:

> 11. I have examined the record provided by the Respondent in this matter and must say that I am disappointed that the Province took so little information into account when responding to our request for consultation on this issue. This affidavit and the exhibits attached are intended to provide a fuller background to our request and it is my belief that this information is available to the Respondent within its own records.

[25] The Applicant extrapolates from this that the Band was denied procedural fairness by the failure of the Province to consider all relevant information before making its decision. Information readily available to the Province, some of which was included in Chief Paul's affidavit, was not considered, the Applicant contends.

[26] As the Applicant puts it:

> 58. Whatever else procedural fairness entails, fairness requires the Minister to consider all relevant information before making a decision. The affidavit evidence establishes that information within the control of the Province establishes that the Mill does emit toxic and carcinogenic pollutants and that the prevailing winds carry these pollutants to the Pictou Landing First Nation. <u>While these adverse impacts have been occurring for many years, the decision of the Province to fund the new treatment facility will mean that these effects will continue to occur beyond January 30, 2020</u>. As discussed above, the adverse impacts beyond that date will be causally connected to the Province's decision to fund the new treatment facility and pipeline, if it decided to do so.
>
> 59. These are serious consequences and the concerns of Pictou Landing First Nation appear on the affidavit evidence to be justified. The First Nation deserves a fuller review by the Minister before dismissing the request for consultation out of hand.
>
> [Emphasis added]
> (*Applicant's brief*)

[27] The Applicant refers to the court statement in *Haida Nation* (*Haida Nation v. British Columbia (Minister of Forests)*, (2004) SCC 73) that "the foundation of the duty to consult is found in the Crown's honour. The goal of reconciliation,

suggests that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it". (*Haida Nation, para. 35*)

[28] According to the Applicant, "it follows from this that the Province is required to consider all of the information that bears on the question that is in its possession or available to it". (*Applicant's reply brief, para. 27)*

[29] The Applicant further submits that it may be impractical or impossible for a First Nation to access the information available to the government, such as any representations Northern Pulp may have made to the Province by way of an economic case. Therefore, the Applicant argues, the honour of the Crown would suggest that the Crown should consider all extraneous information available to it (some examples of which Chief Paul has provided) before deciding whether a duty to consult as to potential funding exists. (*Applicant's reply brief, paras. 29 and 30)* By necessary implication, that additional information should form part of the record because it was available to the Province before it made its decision.

[30] With respect, I am unable to accept the Applicant's contentions in this regard. First, I have serious reservations with respect to many portions of Chief Paul's affidavit. It is replete with references to conversations that she has had with various named and unnamed individuals, and contains further submissions as to conclusions that she has drawn on the basis of those conversations with respect to the potential adverse effects of the emissions of the mill (and, by extension, the potential for adverse effects as a result of the new mill with the ETF under discussion), and also the <u>impossibility</u> of the new ETF being built without government funding.

[31] We are not dealing here with evidence concerning ancient practices, customs and traditions of Mi'kmaq people before written records existed. There is, therefore, no basis for a departure from the "…evidentiary standards that would be applied, for example, in a private law torts case…" (*R. v. Van der Peet*, [1996] 2 SCR 507 – para.68).

[32] Second, it does not appear to me that the Province is denying the potential physical impacts to Treaty Rights of the mill (even with a new ETF) in any event. What it appears to be saying is that these potential airborne physical impacts are part of the <u>present</u> operation of the mill – funding of a new ETF will not result in any new impact in that respect.

[33] Moreover, the Province has implicitly conceded that an improper design or construction of the "new" ETF could have a potential physical impact (albeit, as a result of the discharge of effluent, rather than airborne pollution). It acknowledges that PLFN has a legitimate interest in the specifications to which the new ETF is to be subject. In fact, it reminds the court repeatedly that these are the very things that it is prepared to consult about, and for which it has put up $70,000.00 in capacity funding. This will, it argues, enable the PFLN to meaningfully consult with respect to these very concerns.

[34] The Province's argument, in a nutshell, is to the effect that there are no "new" physical impacts to Treaty Rights which could even potentially arise merely out of the decision as to whether it should fund the project or not.

[35] Finally, there is no indication in the record (specifically, in the letter written at the outset by counsel for PLFN (Tab 1)) to any of the specific material cited by Chief Paul, in her affidavit.

[36] As a result, PLFN's claim that there was a denial of procedural fairness, or that the record is incomplete, is somewhat inchoate under the circumstances. The Applicant has provided no authority – beyond general references to the honour of the Crown – to support the position that the Crown had a duty in this situation to bring forward any and all information in its possession bearing upon the operation of the mill. The Province's reply was responsive to the letter from the Applicant's counsel. It is not clear what the principal basis would be to find a breach of procedural fairness in these circumstances.

[37] As a consequence, I conclude that there is no substance to the Applicant's assertion of procedural unfairness in relation to this matter.

[38] That being said, although I cannot conclude on the basis of the evidence before me that a new ETF will not be built without Provincial funding, I can conclude, upon the facts:

> a) that the current Boat Harbour Treatment Facility is an integral part of the current operation of the mill as a whole (*BHA*, s. 2(b));
>
> b) that the current Boat Harbour Treatment Facility must close no later than January 31, 2020 (*BHA*, s. 3);
>
> c) that the new ETF which will replace the existing facility will be integral to the continued operation of the mill, beyond January 31, 2020

> (it must replace those functions discharged by the current Boat Harbour Treatment Facility (described in *BHA*, s. 2(b));
>
> d) each additional potential source of funding that is available for the project makes it incrementally more likely that the new ETF project will come to fruition; and
>
> e) that as a consequence, a Provincial decision to fund the project, even if it is not the only potential source of funding, would make it incrementally more likely that the mill will remain open and be able to continue operations past 2020.

2. Was the Province's determination that it had no duty to consult with PLFN (as to whether it will fund the new ETF) correct?

a. *The scope of the duty*

[39] The Supreme Court of Canada has described the duty to consult in many cases. We may begin with *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. Therein, Chief Justice Lamer, speaking for the court, said that:

> …Aboriginal title encompasses within it a right to choose to what ends a piece of land can be put … This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law … The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[40] This duty to consult has been expansively discussed by the court in subsequent decisions. Although this is a non-exhaustive list, some of these cases

include *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), 2005 SCC 69 ("*Mikisew Cree 2005*")

[41] In "*Mikisew Cree 2005*", Justice Binnie, writing for the court, incorporated earlier remarks by Chief Justice Beverly McLachlin in *Haida Nation*:

> … The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:
>
> > 19. The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (Badger, at para. 41). Thus in Marshall, supra, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship".
> >
> > ...
> >
> > 35. But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
>
> [Emphasis added]

[42] Justice Binnie went on to point out (at para. 55 of *Mikisew Cree 2005*) that the duty to consult is "triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty".

[43] In the recently decided *Mikisew Cree First Nation v. Canada (Governor General in Council)* 2018 SCC 40 ("*Mikisew Cree 2018"*), many of the Justices had opportunity to further elaborate upon the concepts of the "honour of the Crown" and the "duty to consult". For example, Justice Karakatsansis wrote with respect to the former:

> 23. The honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; Manitoba Metis, at paras. 68-72). As it emerges from the Crown's assertion of sovereignty, it binds the Crown qua sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct (see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1110 and 1114; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 231, per McLachlin J., as she then was, dissenting; Haida Nation; Manitoba Metis, at para. 69).
>
> 24. As this Court stated in Haida Nation, the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances" (paras. 16 and 18). When engaged, it imposes "a heavy obligation" on the Crown (*Manitoba Metis*, at para. 68). Indeed, because of the close relationship between the honour of the Crown and s. 35, the honour of the Crown has been described as a "constitutional principle" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42). That said, this Court has made clear that the duties that flow from the honour of the Crown will vary with the situations in which it is engaged (*Manitoba Metis*, at para. 74). Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances (*Haida Nation*, at para. 38; *Taku River*, at para. 25; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 36-37).
>
> [Emphasis added]

[44] As to the latter, she continued:

> 25. The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult (see e.g. *Haida Nation, Taku River, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Little Salmon*). This obligation has also been applied in the context of statutory decision-makers that -- while not part of the executive - - act on behalf of the Crown (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 29). These cases demonstrate that, in certain circumstances, Crown conduct may not constitute an "infringement" of established s. 35 rights; however, acting unilaterally in a way that may adversely affect such rights does not reflect well on the honour of the Crown and may thus warrant intervention on judicial review.

> 26. The duty to consult jurisprudence makes clear that the duty to consult is best understood as a "valuable adjunct" to the honour of the Crown (*Little Salmon*, at para. 44). The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims (*Clyde River*, at para. 1; *Haida Nation,* at paras. 14 and 32; *Mikisew Cree*, at para. 63).
>
> 27. The duty to consult has been recognized in a variety of contexts. For example, in *Haida Nation*, this Court recognized a duty to consult when the Crown contemplated the replacement and transfer of tree farm licences that had the potential to affect asserted but unproven Aboriginal rights. In *Mikisew Cree [No. 1]*, the Court recognized that the contemplation of "taking up" lands under Treaty No. 8 could adversely affect the Mikisew's rights under the treaty and thus required consultation. Crown conduct need not have an immediate impact on lands and resources to trigger the duty to consult. This Court has recognized that "high-level management decisions or structural changes to [a] resource's management" may also trigger a consultative duty (*Carrier Sekani*, at para. 47; see also para. 44). However, to date, the duty to consult has only been applied to executive conduct and conduct taken on behalf of the executive.
>
> [Emphasis added]

[45] Next, Justice Abella:

> 60. But the honour of the Crown is not itself a cause of action. Rather, it speaks to the way in which the Crown's specific obligations must be fulfilled (*Manitoba Metis Federation*, at para. 73). These obligations vary depending on the circumstances. In negotiating and applying treaties, the Crown must act with integrity and honour, and avoid even the appearance of sharp dealing (*Haida Nation*, at para. 19; *Badger*, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 4). Where the government enacts regulations that infringe on Aboriginal rights, the honour of the Crown demands that those measures be justified (*Sparrow*, at p. 1109). And when the government contemplates conduct that might adversely affect Aboriginal or treaty rights, the honour of the Crown gives rise to a duty to consult and accommodate.

> 61. Grounded in the honour of the Crown, the duty to consult arises from the assertion of Crown sovereignty and aims to advance the process of reconciliation (*McCabe*, at p. 90; *Haida Nation*, at paras. 45 and 59). It serves an important role in the "process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (*Haida Nation*, at para. 32). Where the duty arises, it requires meaningful consultation between the government and the affected group. This means a meaningful effort by the government to act in a manner that is consistent with the honour of the Crown in that particular context (Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples (2014)*, at pp. 88-89). Consultation obligations can be viewed as falling on a spectrum, which accommodates the different contexts in which more or less consultation is necessary to fulfill its purpose (*Newman*, at p. 89; *Haida Nation*, at para. 43).
>
> 62. I see this duty as being more than a "means" to uphold the honour of the Crown. The obligation arises because it would not be honourable to make important decisions that have an adverse impact on Aboriginal and treaty rights without efforts to consult and, if appropriate, accommodate those interests. The Crown must act honourably in defining the rights guaranteed by s. 35 and in reconciling them with other societal rights and interests. This implies a duty to consult (*Haida Nation*, at para. 20). The question is not whether the duty to consult is appropriate in the circumstances, but whether the decision is one to which the duty to consult applies.
>
> [Emphasis added]

[46] As to the duty to consult, Justice Abella continued:

> 70. …the Court affirmed that the Crown's obligation to consult and accommodate Indigenous groups arises independently from its obligation to justify infringements of Aboriginal and treaty rights. In the duty to consult context, the controlling question is not whether the limit on rights is justified, but "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation*, at para. 45). In this sense, the trilogy represents a shift towards mutual reconciliation between Aboriginal and Crown sovereignty, and a further step towards embracing the honour of the Crown as a limit on Crown sovereignty in relation to Indigenous peoples (Mark D. Walters, "*The Morality of Aboriginal Law*" (2006), 31 Queen's L.J. 470, at pp. 513-14).
>
> [*Haida Nation, Taku River, and Mikisew*]
> [Emphasis added]

[47] Finally, Justice Rowe noted:

> 157. This Court stated in *Rio Tinto* that any potential for adverse impact as a result of Crown conduct will trigger the duty to consult and accommodate. The Court further stated that the duty may arise with respect to "high-level managerial or policy decisions" (para. 87). The policy decisions at issue in *Rio Tinto* were made by the executive in regards to a particular development project; in that case, the impugned decision concerned the sale of power produced from a hydroelectric dam on the Nechako River. The Court's statement needs to be understood in the context in which it was made; it does not support the proposition that a duty to consult is constitutionally mandated in the law-making process. This is reinforced by the requirement that the impugned decision would result in potential adverse impacts. This Court held that there must be a "causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (para. 45 (emphasis added)). Counsel for the Mikisew rely heavily on the reasons given by this Court in *Rio Tinto*. But *Rio Tinto* does not support the conclusion that the duty to consult must apply to the legislative process. In fact, this Court explicitly left open the question of whether "government conduct" attracting the duty to consult includes the legislative process (para. 44).
>
> [Emphasis in original]

[48] Earlier Chief Justice McLaughlin had summarized the criteria which will engage the duty to consult in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43. They consist of:

1. Actual or constructive knowledge by the Crown of a potential Aboriginal claim or right;
2. Contemplated Crown conduct; and that
3. The proposed conduct or decision may have an adverse impact upon Aboriginal claim or right.

[49] With respect to the first element:

> 40. To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, [2005]

> 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong prima facie case is absent, may attract a mere duty of notice…
>
> 41. The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed …

[50] It is difficult to separate the second and third elements, which are centered around the need for potential impact upon Treaty right or claims by the Crown conduct in question. In addressing this point, the Chief Justice continued:

> 43. This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers … This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> 44. Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights … Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager*), 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment*), 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re, 2009 CarswellBC 3637 (B.C.U.C.)).
>
> [Emphasis added]

[51] As to "adverse effect" the court continued:

> 45. The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant

must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

46. Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47. Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see Haida Nation, at paras. 72-73.

48. An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation,* at para. 33. The duty arises when the Crown has knowledge, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

[Emphasis added]

[52] I conclude that the duty to consult as described in the authorities (of which such as *Mikisew Cree 2005*, *Mikisew Cree 2018*, *Haida Nation* and *Carrier Sekani* are examples) is a derivative of the honour of the Crown. It confines the duty to consult to adverse effects flowing from the specified Crown action at issue – not to the larger adverse effects of the project of which it is a part. "The subject of the consultation is the impact on the claimed rights of the current decision under consideration" (see *Carrier Sekani*, para. 53 [emphasis in original]).

[53] A "generous, purposive approach" is adopted when the question of causation is considered, but merely speculative impacts will not suffice (*Carrier Sekani*, para. 46). The process is grounded in the Crown's duty to act honourably. In any decision as to whether to consult or not, the Crown's honour must infuse the process. It must also be seen to be acting with such honour. Even the appearance of "sharp dealing" must be avoided (*Haida Nation*, para. 19).

[54] I am also mindful of *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, in which the court said that:

> It may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context… Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult…(*Chippewas of the Thames*, para. 42)

b. What is the proper standard of review?

[55] The parties both begin with the assertion that an application for judicial review is the appropriate mechanism by which to seek a determination as to whether there has been a breach of the duty to consult. I agree.

[56] Indeed, the summary provided in *Pimicikamuk v. Manitoba*, 2014 MBQB 143, in my respectful view, accurately reflects the current law in this respect:

> 48. Administrative law remedies have been provided for by the Supreme Court of Canada in respect of alleged failures to comply with the duty of consultation. In other words, where a First Nation or Aboriginal community alleges a failure of the Crown to discharge its duty of consultation, the issue is normally determined pursuant to administrative law principles in the context of a judicial review.

[57] The court in *Pimicikamuk* continues:

> 49. In *Haida*, the Supreme Court of Canada has directed the courts to review the consultation process on a standard of reasonableness. As it relates to the government's initial assessment of the existence or extent of the duty, the Supreme Court in *Haida* has directed the courts to review that assessment on the correctness standard to the extent that "the issue is one of pure law and can be isolated from issues of fact". See *Haida*, *supra*, at para. 61-63; *Rio Tinto*, *supra*, at para. 64; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para. 187, 173 A.C.W.S. (3d) 330; *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 197 at para. 34.

[58] The Applicant has argued:

> 43. Accordingly, in the present case the Applicant acknowledges that the standard of reasonable [sic] applies to the decision itself subject to the application of the higher standard of correctness where errors of law can be isolated. This is consistent with the leading case on judicial review of administrative tribunals in *Dunsmuir v. New Brunswick*, 2008 SCC 9.
>
> *(Applicant's brief, para. 43*)

[59] With respect, here the court is not being asked to review a completed process of consultation replete with an extensive activity record. If it were, this would ordinarily trigger the application of a more deferential or relaxed standard (one of reasonableness).

[60] Rather, in circumstances such as this, the extant case law frames the applicable standard of review as one of correctness. Either the duty to consult exists or it does not.

[61] This accords with the recent decision of *Mi'kmaq of Prince Edward Island v. Prince Edward Island* [2018] PESC 20, where the court stated:

> 62. There are three points at which the standard of review is to be considered. They include when a tribunal is determining the existence of a duty to consult, deciding the extent of consultation required (as per the *Haida* spectrum), and assessing the extent of consultation that occurred. While McLachlin C.J. expressed that the existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty, she immediately went on to express, in para. 61 of *Haida*, that a contextual assessment of the factual background may lead to deference being shown even with respect to deciding on the two questions of the

> existence and extent of the duty to consult. In other words, she allowed for reasonableness to be the standard of review to apply to the determination of those questions, depending upon the circumstances of each case.
>
> 63. At the hearing of this matter, in line with the conclusion in *Ahousaht*, all counsel submitted the applicable standard of review was correctness in respect of assessing both the existence and extent of the duty to consult and accommodate, and reasonableness with respect to assessing whether the Province met their duty to consult to the extent required. I will review the decisions upon the basis of these suggested standards of review.
>
> [Emphasis added]

[62] I conclude that the appropriate standard of review to be applied herein is one of correctness.

c. Is the Crown's decision not to consult with respect to the possibility of its funding of the new ETF correct?

[63] The Province does not deny that the first element set forth in *Carrier Sekani* "knowledge of a potential Aboriginal claim or right" exists. Rather it maintains that the central issues concern the second and third elements. These latter, taken together, raise the question of whether the contemplated conduct (which is to say, the potential funding decision) might adversely affect an Aboriginal claim or right so as to trigger a duty to consult.

[64] Among other authorities, the Province refers to *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, wherein it was determined that the posting for sale and eventual grant of mining exploration permits with respect to Treaty lands did not suffice to trigger a duty to consult.

[65] In *River Dene*, the court concluded that the Applicant had not shown a causal link between the granting of the permit and any possible impact upon its rights. The court held that the sale of the permits, on its own, could not lead to adverse impacts. This was because more regulatory requirements had to be met before any actual entry, exploration, mineral extraction or other activity upon or involving the First Nation land could occur. It also meant that the decision was not of the "strategic, higher level" kind referred to in *Haida Nation* and *Carrier Sekani*.

[66] As to the threshold for consultation, Caldwell, J.A. stated in *River Dene*:

> 91. … The duty to consult is triggered at a low threshold, but it must remain a meaningful threshold - the applicant has to establish some sort of appreciable or discernible impact flowing from the impugned Crown conduct before a duty to consult in relation to that impact will arise. This is both logical and practical because there has to be something for the Crown and the Aboriginal group to consult about -- the duty to consult is, at core, a practical doctrine. Put another way, it makes little sense for the duty to consult to arise where, as the Chambers judge concluded here, there is nothing to consult about, i.e., nothing to reconcile.
>
> 92. What I mean by this is that, here, Buffalo River DN has not established that a foreseeable impact on Treaty 10 lands (and, consequently, on its members' hunting, trapping, and fishing rights) could possibly arise without the occurrence of a subsequent or second-stage approval from the Crown. However, once any form of surface access is contemplated, then actual impact on Treaty 10 land becomes possible. It is at this point in the process that the Permit-Holder is required to provide a plan for its proposed exploration or development of minerals lying under the surface of Treaty 10 lands. It is at this point that the Crown and Buffalo River DN would have something meaningful, in the sense of quantifiable, to consult about, to reconcile. And, indeed, the Crown seems to acknowledge that it would have a duty to consult with Buffalo River DN if this matter were to reach this point in the regulatory process.
>
> [Emphasis added]

[67] The key feature, it seems to me, upon which *River Dene* turned, was the inability of the (then) currently contemplated action, which is to say, the transfer of the permits *simpliciter*, to have any type of impact upon the area in question. In fact, such impact would simply not be possible, without something further. This "something" was the requirement for permission by the permit holder (whoever it might be at the relevant time) to submit a plan, and undergo an approval process (a "next step") with respect to its proposed exploration or exploitation of the minerals below Treaty lands.

[68] This next step was required whether the current ownership of the permit remained extant, or whether the permit was transferred, as proposed. This status quo remained whether current or new permit owner(s) took that next step – either would have to undergo the regulatory process before there was any possibility of physical impact upon Treaty lands. It was, therefore, not until this "next step" was

taken that consultation was required. Quite literally, there was nothing to consult about when it came to the mere sale of the mining exploration permits in question.

[69] The Respondent argues that the situation in the case at bar is apposite. In essence, the Province (in paraphrase) says "Look, any new ETF which replaces the existing Boat Harbour Treatment Facility triggers a need for an Environmental Assessment approval pursuant to Part IV of the *Environment Act.* We have agreed, therefore, that the pending ETF application including its design and specifications, should be (and is) the subject of active consultation with PLFN. We have provided $70,000.00 in capacity funding so that PLFN may have meaningful participation in the process". (*see Respondent brief, para. 4 – 5*)

[70] It is this process (the Province continues) which has the potential to impact upon Treaty Rights *a propos* potential impacts on the environment. However, the question of whether it is the Province or some other entity who actually funds the new ETF (if it is approved) cannot (in and of itself) have <u>any</u> physical impact upon Treaty Rights.

[71] This arguement misses the mark, in my respectful view, for a number of reasons. First, we know that the process of consultation does not <u>require</u> the Crown to accede to the views of the Applicant.

[72] Could the Crown proceed (after consultation) with a particular design or construction of the new ETF against the strong opposition of PLFN? It could, conceivably. But if it did so, and then also provided the very funding by which the new ETF was to become a reality, would that too, be compatible with the honour of the Crown?

[73] Where the Crown is required to consult it must do so meaningfully. Would the act of funding a project opposed by PLFN reflect on the "meaningfulness" of the antecedent efforts of the Crown to consult? "Meaningful consultation" requires a:

> "… meaningful effort by the government to act in a manner that is consistent with the honour of the Crown in that particular context".
>
> (*Mikisew Cree 2018*, para. 61 per Abella, J.)

[74] Second, does the potential involvement of the Crown in the funding of the new ETF make it more or less likely that the required *Environmental Act* approval will ultimately be granted? While (as the Respondent points out) it would be a

different "department" of the Crown involved in the approval process, it would essentially boil down to the Crown (wearing one hat) being called upon to determine whether a project which the Crown (wearing another hat) has funded, passes muster. This will do nothing to assuage whatever cynicism has been engendered in the past by the already significant environmental impact which has been visited upon Treaty lands and environs by the mill and its facilities to date.

[75] Further, and as we have seen, the duty to consult, when is arises, flows from the Honour of the Crown. This honour "binds the Crown *qua* Soverign". (*Misikew Cree 2018*, per Karakatsansis, J., para. 23) We have seen that even the appearance of sharp dealing is to be avoided. In my view, Treaty people are entitled to treat with the Crown as though it speaks with one voice.

[76] To put it more bluntly, in the event that the Province were to become the lender financing the project, it would have a very tangible interest in Northern Pulp's success. That company's success would become directly related not only to the Province's prospect of recovering its investment, but also as to its prospect of (possibly) making a profit upon it.

[77] Related to this is the practical question of what quantity of "sunk costs" would the Province be required to invest if it funds the project, before the project is submitted for environmental approval. At a minimum, someone must draw up design specifications and plans, and undertake the work ancillary to this before approval is requested. Will the increasing extent of this sunk cost create increasing incentive for all Crown departments to keep the mill operating? While past wrongs do not create a new impact, they may certainly inform the imperative need for transparency and consultation in relation to all aspects of the present process.

[78] As we have seen from *Carrier Sekani*, the potential for adverse impact suffices to trigger a duty to consult (para. 44). It is clear that the duty extends to "strategic, higher level decisions" that may have an impact upon the claim or right (*Rio Tinto*, para. 47). The Province's interest as lender funding the new ETF will undoubtedly influence "higher level" strategic decision making.

[79] Indeed, if one accepts (as I do) that the longer the mill continues to operate the longer that treaty rights may potentially be impacted by the discharge of effluent from a improperly designed ETF or, even if properly designed, by a subsequent malfunction of same, then one accepts that the best case scenario, from the vantage of PLFN, would be the closure of the mill and the ETF in its entirety. If the Province is to become the lender, not only is it providing the means by which

the ETF will be built, but it will have an interest to insure that the mill will continue to remain in operation into the future so as to at least recover the taxpayers' investment.

[80] In addition, Part IV of the *Environment Act* (and Regulations enacted pursuant thereto) contains standards which must be achieved in order to obtain approval of the project as a whole. If the Province funds, will it fund to the extent necessary to merely achieve minimal (often less expensive) standards, or is it prepared to consult with the PLFN as to whether, in the unique circumstances of what the people in this area have endured, upgraded (more expensive) safeguards should be implemented?

[81] In *Dene Tha' First Nation v. Canada (Minister of Environment),*2006 FC 1354, aff'd 2008 FCA 20, (*Dene Tha'*) the federal government began designing a regulatory and environmental review procedure in anticipation of the MacKenzie Gas Pipeline ("MGP") project without consulting the Dene Tha'.

[82] At the Federal Court level, the Court rejected the Crown's argument that there was no duty to consult at that stage, observing that:

> 100. …conduct contemplated here is the construction of the MGP. It is not, as the Crown attempted to argue, simply activities following the Cooperation Plan and the creation of the regulatory and environmental review processes. These processes, from the Cooperation Plan onwards, were set up with the intention of facilitating the construction of the MGP. It is a distortion to understand these processes as hermetically cut off from one another. The Cooperation Plan was not merely conceptual in nature. It was not, for example, some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be exposed to the public. Rather, it was a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of MGP.
>
> …
>
> 106. The precise moment when the duty to consult was triggered is not always clear. In *Haida*, the Court found that the decision to issue a Tree Farm License (T.F.L) gave rise to a duty to consult. A T.F.L. is a license that does not itself authorize timber harvesting, but requires an additional cutting permit. The Court held that the "T.F.L. decision reflects the strategic planning for utilization of the resource" and that "[d]ecisions

> made during strategic planning may have potentially serious impacts on Aboriginal right and title". [Emphasis added. See *Haida* paragraph 76]
>
> 107. From the facts, it is clear that the Cooperation Plan, although not written in mandatory language, functioned as a blueprint for the entire project. In particular, it called for the creation of a JRP to conduct environmental assessment. The composition of the JRP was dictated by the JRP Agreement, an agreement contemplated by the Cooperation Plan. The composition of this review panel and the terms of reference adopted by the panel are of particular concern to the Dene Tha'. In particular, the Dene Tha had unique concerns arising from its unique position. Such concerns included: the question of the enforceability of the JRP's recommendations in Alberta and funding difficulties encountered by the Dene Tha' as result of its not qualifying for the "north of 60 funding programs" (a funding program apparently available only to those First Nations bands north of the 60 degrees parallel). The Dene Tha' also had other issues to discuss including effects on employment, skill levels training and requirements and other matters directly affecting the lives of its people.
> 108. The Cooperation Plan in my view is a form of "strategic planning". By itself it confers no rights, but it sets up the means by which a whole process will be managed. It is a process in which the rights of the Dene Tha' will be affected.
>
> [Emphasis added]

[83] When *Dene Tha'* reached the Appellate level, the Federal Court of Appeal observed:

> 9. This case turns entirely on its own facts. Having regard to the evidence on the record, it was open to Justice Phelan to find as a fact that, given the unique importance of the Mackenzie Gas Pipeline, and the particular environmental and regulatory process under which the application for approval of the Mackenzie Gas Pipeline would be considered by the Joint Review Panel and the National Energy Board, the process itself had a potential impact on the rights of the Dene Tha'. It was also open to him to find as a fact that, at some point during the period from 2002 and 2004, it was sufficiently certain that there would be an application for approval of the Mackenzie Gas Pipeline that the obligation to consult was triggered. He was not required, as a matter of law, to conclude that no consultation obligation arose until the formal application for approval was filed. The test framed by the Supreme Court of Canada in the cases cited above does not dictate such a rigid or inflexible approach.

[Emphasis added]

[84] A consideration of the above factors, and others, makes it seem very implausible that a government decision to fund a new effluent treatment facility less than fourteen months before the statutorily mandated closure of the existing facility and the expiry of the mill's industrial approval, would not carry with it a potential for further adverse effect on PLFN's right to occupy lands already polluted by the Boat Harbour Treatment Facility. The new adverse impacts would include the increased likelihood of a new ETF being built (in the short term) and of the mill remaining open (in the longer term) prompted by (at least the appearance of) the interest of the Province to either recover its investment or profit from it. Provincial involvement in funding would set the stage for further decisions that have (at the very least) the potential to impact the "strategic, higher level decisions" of the Province in precisely the manner contemplated by *Rio Tinto* (para. 47).

[85] Finally, the bifurcation of issues ("design and construction" from the "actual funding" of the ETF) artificially compartmentalizes a process which, in my view, should be treated more holistically.

[86] One (obvious) example, arises from the legitimate concern on the part of PLFN (presumably the Province as well – hence the consultation with respect to the design and construction) about the potential for deleterious effects upon the environs, which could potentially result from an inadequate design of the ETF. Separation of the potential funding issue would result in the loss of an opportunity for the two sides to discuss whether the financing (if it was to be provided by the Province) should or could be tied into a system of penalties and/or rewards for achieving and/or failing to achieve proposed emission or effluent discharge targets. This may (potentially) impact upon the likelihood that these targets would be attained.

[87] Put differently, and unlike the situation in *River Dene*, it seems clear to me that the parties have plenty to consult about with respect to the topic of the potential Provincial funding of the new ETF. Some of the discussion points have been noted herein. Beyond these earlier comments (which serve as examples only), it would not be appropriate for the court to circumscribe or exhaustively attempt to define the parameters or the topics encompassed by the Province's duty to consult in relation to this potential funding. Such discussions cannot be isolated or hermetically sealed off from the overall design and approval process, in any event, for the reasons noted above.

Conclusion:

[88] The application is granted. The consultations between the parties must necessarily include *inter alia* whether the Province should fund the construction and design of the ETF and pipeline, and, if so, what form that financing will take.

[89] This application had some novel aspects to it. It is one in relation to which each side sought guidance from the court in good faith. I decline to award costs to either party as a result.

Gabriel, J.