Date: 20061110

Docket: T-867-05

Citation: 2006 FC 1354

BETWEEN:

DENE THA' FIRST NATION

Applicant

and

MINISTER OF ENVIRONMENT
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA,
MINISTER OF TRANSPORT,
IMPERIAL OIL RESOURCES VENTURES LIMITED,
on behalf of the Proponents of the Mackenzie Gas Project,
NATIONAL ENERGY BOARD, AND
ROBERT HORNAL, GINA DOLPHUS, BARRY GREENLAND,
PERCY HARDISTY, ROWLAND HARRISON, TYSON PERTSCHY AND
PETER USHER, all in their capacity as panel members of a Joint Review Panel
established pursuant to the *Canadian Environmental Assessment Act*
to conduct an environmental review of the Mackenzie Gas Project

Respondents

REASONS FOR JUDGMENT

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PHELAN J.

I. INTRODUCTION

[1] A massive industrial project like the Mackenzie Gas Pipeline (MGP), one that anticipates the creation of a corridor of pipeline originating in Inuvik in the far north of the Northwest Territories and terminating 15 metres south of the Northwest Territories and Alberta border, where a proposed connecting pipeline will link it up with existing provincial pipelines for southern distribution (the "Connecting Facilities"), attracts a myriad of government obligations. The issues of environmental review go beyond the physical pipeline from the north to this connection point. Government must deal with the proponents of the project, detractors of the project, regulatory review boards, environmental review boards, and affected First Nations. The alleged failure of the Government of Canada to fulfill its obligations toward this last group, specifically the Dene Tha' First Nation (Dene Tha'), forms the subject matter of this judicial review.

[2] The Dene Tha' alleges that the Government of Canada through the Minister of Environment, the Minister of Fisheries and Oceans, the Minister of Indian and Northern Affairs Canada and the Minister of Transport (the Ministers) breached its constitutionally entrenched duty

to consult and accommodate the First Nations people adversely affected by its conduct. Specifically, the Dene Tha' identifies as the moment of this breach as its exclusion from discussions and decisions regarding the design of the regulatory and environmental review processes related to the MGP. The Ministers deny that any duty arose at this point and, in any event or in the alternative, asserts that its behavior with respect to the Dene Tha' was sufficiently reasonable to discharge its duty to consult and thus withstands judicial scrutiny. The so-called discharge of the duty to consult and accommodate consisted of (1) including the Dene Tha' in a single media release of June 3, 2004 inviting public consultation on a draft Environment Impact Terms of Reference and Joint Review Panel Agreement and (2) a 24-hour deadline on July 14, 2004 to comment on these documents. That is not sufficient to meet the duty to consult and accommodate.

[3] This Court's conclusion is that the Ministers breached their duty to consult the Dene Tha' in its conduct surrounding the creation of the regulatory and environmental review processes related to the MGP from as early as the first steps to deal with the MGP in late 2000 through to early 2002 and continued to breach that duty to the present time. The Dene Tha' had a constitutional right to be, at the very least, informed of the decisions being made and provided with the opportunity to have its opinions heard and seriously considered by those with decision-making authority. The Dene Tha' were never given this opportunity, the Ministers having taken the position that no such duty to consult had arisen yet.

[4] Quite remarkably, when the Ministers did decide to "consult" with the Dene Tha', upon the establishment of the process for the Joint Review Panel, the Dene Tha' were given 24 hours to respond to a process which had taken many months and years to establish and had involved

substantial consultation with everyone potentially affected but for the Dene Tha'. This last gasp effort at "consultation" was a case of too little, too late.

[5] To arrive at this conclusion, this Court has considered the following matters: (1) the factual background relating to the regulatory and environmental processes underlying the MGP; (2) the particular facts relating to the Dene Tha'; (3) the current state of the law relating to aboriginal consultation; and (4) how the law applies to the situation of the Dene Tha'.

[6] At the outset, it should be noted that the issue of remedy in this case is not straightforward. Hence, it will receive special attention in the final section of these Reasons. At the very least, any of the current procedures which may affect the Dene Tha' must be stayed until other remedial provisions can be completed.

II. FACTS

A. Dene Tha'

(1) Dene Tha' People and Territory

[7] The Dene Tha' is an Aboriginal group within the meaning of section 35 of the *Constitution Act, 1982* and an Indian Band under the *Indian Act*. Currently, there are approximately 2500 members of the Dene Tha', the majority of which resides on the Dene Tha's seven Reserves. All Dene Tha' Reserves are located in Alberta. The three most populous Reserve communities are Chateh, Bushe River, and Meander.

[8] The Dene Tha' defines its "Traditional Territory" as lying primarily in Alberta, but also extending into northeastern British Columbia and the southern Northwest Territories (NWT). In the NWT, the Dene Tha' claims that its territory overlaps with that of the Deh Cho First Nation, with whom the Dene Tha' shares significant familial and cultural relationships. The Crown asserts that the phrase "Traditional Territory" imports no legal significance with respect to the Aboriginal rights claimed by the Dene Tha' north of the 60 parallel – the division between the NWT and the Province of Alberta.

(2) Dene Tha' – Treaty 8 Rights in Alberta

[9] In 1899 the Dene Tha' signed Treaty 8. Treaty 8 is a classic surrender treaty whereby the Government promised payment and various rights, including the rights to hunt, trap, and fish in exchange for the surrender of land. The territory defined by Treaty 8 does not extend into the traditional territory claimed by the Dene Tha' in the NWT. The Dene Tha' asserts that this means its rights in the NWT remain unextinguished as they are outside the bounds contemplated by Treaty 8. Conversely, if the Ministers are correct and the Dene Tha's rights in the NWT are extinguished by Treaty 8, the Dene Tha' submits that this is an admission by the Ministers that the Dene Tha' has Treaty 8 rights in the NWT. Dene Tha's allegation of unextinguished aboriginal rights in the NWT is discussed more fully later in these Reasons.

[10] The proposed course of the MGP travels through the NWT, ending just south of the NWT and Alberta border. The portion of the pipeline stemming from the Alberta border to its southern terminus runs through territory of the Dene Tha' defined by Treaty 8. The proposed Connecting

Facilities pass through Bitscho Lake which runs through Trap Line 99, a trap line owned by a Dene Tha' member. None of that pipeline runs directly through Dene Tha' Reserves.

[11] The NGTL pipeline which connects the southern terminus of the MGP with the existing Nova Gas Transmission Line also runs through territory over which the Dene Tha' has Treaty 8 rights to hunt, trap, fish, and gather plants for food.

[12] That the pipeline does not run through a reserve, contrary to the Ministers' implied submission, is insignificant. A reserve does not have to be affected to engage a Treaty 8 right as held in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388. What is important is that the pipeline and the regulatory process, including most particularly environmental issues, are said to affect the Dene Tha'.

(3) Dene Tha' – Aboriginal Rights in NWT

[13] The Dene Tha' posits unrecognized Aboriginal rights to hunt, trap, fish, and gather plants for food in the southern portion of the NWT. As proof of Government recognition of said rights, the Dene Tha' points to government archives from the 1930's regarding the proposal for a creation of an Indian Hunting Preserve for the Dene Tha' in this area.

[14] The Court was not asked to determine the legitimacy of the Dene Tha's claim to Aboriginal rights in the NWT. Moreover, as the Dene Tha's Treaty 8 rights in Alberta are sufficient to trigger a duty to consult, there is no need to make such a determination in order to resolve this judicial review.

B. Mackenzie Gas Pipeline – Regulatory and Environmental Matrices

[15] The MGP is an enormous and complex industrial undertaking. Its proposed routing envisions a starting point in the gas fields and central processing facilities near Inuvik in the northwest corner of the Northwest Territories. From these collecting facilities, the envisioned pipeline will transport the extracted natural gas through the NWT to just south of the Alberta border. At this point, Nova Gas Transmission Limited (NGTL) in Alberta will build the Connecting Facilities up from its existing facilities to connect with the MGP. In this manner, natural gas can be transported from the northern gathering facilities to a southern distribution terminus.

[16] Initially the participants in the project envisaged the MGP extending 65 kilometres to the connecting point with NGTL's distribution system. It appears that in the hopes of keeping the gas which flows into Alberta within Alberta jurisdiction, it was decided to have the connection point with NGTL be located just 15 metres inside the NWT-Alberta border.

[17] The Dene Tha's initial judicial review application had sought to raise the constitutional issue of the original proposal as a single federal work or undertaking. This aspect of judicial review has been discontinued.

[18] Given the enormity of this project and its inherent cross-jurisdictional character, its conception triggered the involvement of a multitude of regulatory mechanisms. As the Dene Tha's case rests on its exclusion from the discussions and processes surrounding this regulatory machinery, it is necessary to describe in some detail the respective geneses of the regulatory

arrangements and mandates of each of these regulatory bodies. Hence, the purpose of this section is to outline the geographical, regulatory, and environmental matrices that overlay the MGP.

[19] The backdrop of the MGP consists of seven major regulatory and environmental layers: (1) the Cooperation Plan, (2) the Regulators' Agreement, (3) the Joint Review Panel Agreement, (4) the Environmental Impact Terms of Reference, (5) the Joint Review Panel Proceedings, (6) the National Energy Board Proceedings, and (7) the Crown Consultation Unit. Each is discussed below in what is roughly chronological order – from oldest to most recent.

(1) The "Cooperation Plan"

(a) *The Genesis*

[20] Four years prior to the filing of an application for the MGP with the National Energy Board (NEB), representatives from various regulatory agencies began to consult with one another about how to coordinate the regulatory and environmental impact review process for such an application. The regulators and authorities involved included: Indian and Northern Affairs Canada (INAC), the Canadian Environmental Assessment Agency (CEAA), the NEB, the Mackenzie Valley Environmental Impact Review Board (MVEIRB), the Mackenzie Valley Land and Water Board (MVLWB), the Gwich'in Land and Water Board, the Sahtu Land and Water Board, the Inuvialuit Land Administration, and the Inuvialuit Game Council.

[21] In addition to these core regulatory bodies, other parties were included in the development of the Cooperation Plan. Representatives from the Government of the Yukon and the Government of the NWT were included as observers in the negotiations. The Deh Cho First Nation (Deh Cho)

also, through its MVEIRB delegate, obtained observer status. As it is a helpful counterpoint to the exclusion of the Dene Tha' from this stage of the process, a fuller discussion of the participatory role played by the Deh Cho will be developed later in these Reasons.

[22] The parties involved with developing the Cooperation Plan also heard presentations from gas producers and potential proponents of the MGP. In particular, the parties met with the Mackenzie Delta Gas Producers Group in December 2000, with the Alaska Gas Producers Group in May of 2001, and with Imperial Oil Resources Ventures Limited (IORVL).

[23] As a result of these meetings and information-gathering sessions, in June 2002, the *Cooperation Plan for Environmental Impact Assessment and Regulatory Review of a Northern Gas Project through the Northwest Territories* ("Cooperation Plan") was finalized. Suffice it to say that the Dene Tha' are noticeably absent from the list of persons, organizations and first nations people who were involved in the development of the regulatory framework.

(b) *The Mandate*

[24] The Cooperation Plan had a laudable objective, namely, to reduce duplication of the environmental and regulatory processes. To this end, the Cooperation Plan set up a framework for the environmental and regulatory processes to follow. This framework focused on how these processes would be integrated, how joint hearings would be conducted, and how the terms of reference for any future environmental assessment process would be developed.

(2) The Agreement for Coordination of the Regulatory Review of the MGP ("Regulators' Agreement")

(a) *The Genesis*

[25] The Cooperation Plan recommended the filing of a Preliminary Information Package (PIP) by the proponents of the pipeline. On June 18, 2003, IORVL filed a PIP for the MGP. Subsequent to this filing, the parties to the Cooperation Plan resumed discussions on the review process for the MGP and on April 24, 2004, a number of government ministries and agencies entered into an *Agreement for Coordination of the Regulatory Review of the MGP*.

(b) *The Mandate*

[26] In addition to implementing the provisions of the Cooperation Plan and ensuring compliance with applicable legislation, like the Cooperation Plan, the Regulators' Agreement contained as its mandate the avoidance of unnecessary duplication. In particular, the parties to the Regulators' Agreement agreed to incorporate the final Joint Review Panel Report and other relevant materials from this process into the record of their respective regulatory processes.

(3) The Agreement for an Environmental Impact Review of the MGP (Joint Review Panel Agreement – JRP Agreement)

(a) *The Genesis*

[27] On August 3, 2004, the federal Minister of the Environment, the MVEIRB, and the Inuvialuit Game Council concluded an *Agreement for an Environmental Impact Review of the Mackenzie Gas Project*. The JRP Agreement specified the mandate of the Joint Review Panel and the scope of the environmental impact assessment it would conduct. A further Memorandum of Understanding, executed between the Minister of the Environment and the Inuvialuit, bestowed

upon the JRP the responsibility to address certain provisions of the *Inuvialuit Final Agreement* (IFA).

(b) *The Mandate*

[28] The JRP Agreement sets out what bodies are responsible for selecting the members of the JRP. The MVEIRB (composed of delegates from the Gwich'in, Sahtu, and the Deh Cho) would appoint three members; the Minister of the Environment, four members (two of whom would be nominated by the Inuvialuit Game Council). The selection of a Chairperson would be approved by the Minister of the Environment, the MVEIRB, and the Inuvialuit Game Council. These panelists were appointed on August 22, 2004 and were: Robert Hornal (Chair), Gina Dolphus, Barry Greenland, Percy Hardistry, Rowland Harrison, Tyson Pertschy, and Peter Usher – all named Respondents in this judicial review.

(4) Environmental Impact Terms of Reference

(a) *The Genesis*

[29] The scope of the JRP's environmental assessment and the informational requirements that the proponent (applicant, IORVL) needed to provide for its Environmental Impact Statement (EIS) were defined on August 22, 2004 in the *Environmental Impact Review Terms of Reference for Review of the Mackenzie Gas Project* ("Environmental Impact (EI) Terms of Reference"). The EI Terms of Reference were issued by the Minister of the Environment, the Chair of the MVEIRB, and the Chair of the Inuvialuit Game Council.

(b) *The Mandate*

[30] The EI Terms of Reference describe the MGP as including the Connecting Facilities for the purposes of the JRP process – that is, for the purposes of the environmental assessment. The Terms of Reference also required IORVL to file an Environmental Impact Statement with the JRP. This it did in August 2004. As it was deficient for failing to include the Connecting Facilities, the JRP requested IORVL resubmit. This it did in December 2004 by way of a Supplemental Environmental Impact Statement.

(5) The Joint Review Panel Proceedings

(a) *The Genesis*

[31] The Joint Review Panel was contemplated initially by the Cooperation Plan, agreed to be incorporated by the Regulators' Agreement, and implemented through the JRP Agreement. On July 18, 2005, the JRP concluded it had received sufficient information from the proponent (IORVL) to commence the public hearing process. These hearings began on February 14, 2006, are currently in process, and are scheduled to continue throughout the current calendar year and into the next.

(b) *The Mandate*

[32] The JRP is assigned the task of conducting the environmental assessment for the project. The project for the purposes of the JRP encompasses both the environmental impact of the MGP and the NGTL Connecting Facilities.

[33] It is important to realize that while the NEB would consider the pipeline regulatory process from the north through to the connection point 15 metres inside the Alberta border, the environmental review process takes into consideration the MGP and the Connecting Facilities to the existing NGTL facilities 65 kilometres long partially through territory in which the Dene Tha' had asserted treaty rights as well as Aboriginal rights.

[34] The term "environment" comports a broad meaning. It includes the "cumulative effect" of the MGP and the NGTL Connecting Facilities and any other facilities to be developed in the future. The JRP is specifically mandated to consider effects on "health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archeological, paleontological or architectural significance".

[35] The JRP has no mandate to conduct aboriginal consultation. It can only consider Aboriginal rights in the context of factual, not legal, determinations. Since the JRP cannot evaluate the legal legitimacy of an Aboriginal rights claim, it can only make determinations in respect of adverse impact to current Aboriginal usage of territory. It cannot make a determination regarding the potential further use of land since this would not be based on a claim of current usage but on a claim of future use grounded in a claim of an Aboriginal right.

[36] The JRP Report will inform the NEB decision with respect to whether or not to recommend the issuance of a Certificate of Public Convenience and Necessity. When the JRP issues its Report,

the NEB will stay its public hearings. These hearings will then continue after the NEB has reviewed the Report and will thus provide the public with an opportunity to respond to its contents.

(6) The National Energy Board Proceedings

(a) *The Genesis*

[37] IORVL made its application before the NEB in October of 2004. The NEB review arose as part of the development of a coordinated process for environmental assessment and regulatory review of the MGP defined in the Cooperation Plan.

(b) *The Mandate*

[38] The NEB is responsible for the decision of whether to recommend the issuance of a Certificate of Public Convenience and Necessity (CPCN) to the proponent of the pipeline project, IORVL. To determine this, the NEB has scheduled public hearings where this issue will be addressed. These hearings also began in early 2006 and are scheduled in a coordinated fashion with those of the JRP. The NEB's hearings will be continued after the JRP process has concluded. The ultimate decision of the NEB will be informed by the Report from the JRP. If the NEB decides that the granting of a CPCN is warranted, then the federal Cabinet still must approve the actual issuance of this Certificate.

(7) The Crown Consultation Unit

(a) *The Genesis*

[39] The Crown Consultation Unit (CCU) is not the product of a statutory, regulatory, or prerogative exercise. It is essentially an administrative body within the federal government created

unilaterally by the Government of Canada. Despite its name, one thing it had no authority to do was consult – at least not with any native group as to its rights, interests or other issues in respect of the very matters of concern to the Dene Tha'.

(b) *The Mandate*

[40] The mandate of the CCU is to coordinate and conduct "consultation" with First Nations groups who believe that their proven or asserted rights under section 35 of the *Constitution Act, 1982* may be affected by the MGP. It was intended to serve as a medium through which the concerns of First Nations regarding the MGP could be brought to the specific relevant government Ministers. Pursuant to this overall purpose, the CCU was mandated to set up meetings, prepare a formal record of meetings, and present a record of consultation to the NEB, to Ministers, and to other Government of Canada entities with regulatory decision-making authority.

[41] The CCU has no jurisdiction to deal with matters relating to the Cooperation Plan, the Regulators' Agreement, or the JRP Agreement. The mandate of the CCU, moreover, does not extend to the authority to determine the existence of an aboriginal right; rather, it only can address the impact on an established right. It was for all intents and purposes a "traffic cop" directing issues to other persons and bodies who had the authority, expertise or responsibility to deal with the specific matters.

C. Dene Tha's Involvement in these Processes

(1) Cooperation Plan

[42] The Government of Canada made no effort to consult the Dene Tha' in respect of the formulation of the Cooperation Plan. The Dene Tha' asserts and the evidence demonstrates that all the various proposed routings of the pipeline passed through territory in Alberta over which the Dene Tha' has recognized Treaty 8 rights. The federal government attempts to justify this exclusion on the basis that the Dene Tha' was not an agency with any regulatory or environmental assessment jurisdiction in relation to the pipeline projects -- no jurisdiction was provided by Treaty 8, by legislation, or by a Comprehensive Land Claim agreement. As such, the Crown argues that it was reasonable for the Dene Tha' to be excluded at this stage.

[43] The federal government further argues that the Dene Tha' had the opportunity to comment on the draft of the Cooperation Plan as the Government of Canada released a draft to the public on January 7, 2002. Details of the public release of the Cooperation Plan and other evidence the federal government adduces to support the argument that it has fully discharged its duty to consult will be discussed in a more in-depth fashion in a consideration of whether the Crown has fulfilled its duty to consult.

(2) Regulators' Agreement, JRP Agreement, and Terms of Reference

[44] The Dene Tha' was not consulted in respect of the Regulators' Agreement, the JRP Agreement, or the Environmental Impact Terms of Reference. On July 14, 2004, the federal government, through its instrument, the CCU, provided the Dene Tha' with copies of the draft EI Terms of Reference and draft JRP Agreement, instructing that the deadline for input on both was

the following day. The Dene Tha' asserts that this was the first time it obtained official knowledge of the contents of these drafts. The federal government further submits that on June 3, 2004 through select media releases and over the internet, it invited public consultation on drafts of the Environmental Impact Terms of Reference and JRP Agreement. This fact was also relied upon by the federal government to support its argument that, to the extent it had a duty to consult, it had carried out that duty.

(3) NEB Proceedings and JRP Proceedings

[45] The Dene Tha' has intervener status for both the NEB and JRP hearings. As interveners, the Dene Tha' can provide oral and written submissions and can submit questions to other interveners and the proponents. The Dene Tha' has filed a plan for participation in the public hearings of the JRP and has actively engaged in the preparation and delivery of Information Requests pursuant to the JRP Rules of Procedure.

(4) CCU

[46] In April of 2004, the Dene Tha' learned that the federal government intended to consult with the Dene Tha' about the MGP through the CCU. On July 14, 2004, the Dene Tha' met with representatives of the CCU. The Dene Tha' provided the CCU with information regarding its Aboriginal and Treaty Rights and made known its need of financial assistance to facilitate meaningful consultation efforts.

[47] The Dene Tha' alleges that this July meeting marks the first time it was made aware of the imminent establishment of the JRP by receipt of the draft Environmental Impact Terms of

Reference and draft JRP Agreement. The Dene Tha' claims the CCU representative informed it that it had until the following day (July 15, 2004) to provide comments on these documents. Not surprisingly, the Dene Tha' did not meet this deadline for public comment.

[48] The Dene Tha' was also informed at this meeting that the CCU was not yet fully staffed or operational and had yet to develop its terms of reference. Moreover, up to and including October 2004, the Dene Tha' was informed that the CCU could only begin consulting with respect to the MGP once the proponent had filed an application for the project with the NEB.

[49] The Dene Tha' consistently and continuously pestered the CCU regarding its claim for recognition of rights north of 60. This is a subject matter distinct from its treaty rights under Treaty 8 south of 60. On January 4, 2006, the Dene Tha' learned definitively that Canada's position was and always had been that these rights had been extinguished via Treaty 8. This position turned out to be intractable and was reiterated by CCU representatives in its further meetings with the Dene Tha' in 2006. The CCU stated Canada's position was that it would consider Dene Tha' "activities" in the NWT, but not rights.

[50] There were no other impediments to consultation with the Dene Tha' other than the failure or refusal of the federal government to engage in consultation. The Dene Tha' put up no barriers to such consultation, despite the suggestion by the Ministers that the Dene Tha' had imposed some form of pre-conditions.

D. Jurisdiction over Consultation

[51] It is necessary to consider the jurisdictions of the above institutional entities – the JRP, the NEB, and the CCU – over consultation with native groups and specifically the Dene Tha'.

[52] As this is a factual inquiry, several legally salient issues need not be considered for the moment. In particular, neither the necessity of express government delegation of its duty to consult nor the necessity of an intention to consult will be addressed. There is a significant gap in the mandates of JRP, NEB, and CCU – a gap consisting of the jurisdiction to engage in Aboriginal consultation with the Dene Tha'.

[53] The JRP has jurisdiction over the entire pipeline project, including both the MGP portion stemming from Inuvik to just south of the Alberta border and the Connecting Facilities that connect the southern terminus of the MGP with the existing NGTL pipeline facilities. The JRP has a broad mandate to consider a wide range of environmental effects, including adverse impact on First Nations activities and can make factual, but not legal determinations, regarding Aboriginal rights. The JRP has no mandate to engage in consultation. Furthermore, it cannot determine the existence of contested Aboriginal rights.

[54] The NEB only has jurisdiction over what has been applied for pursuant to the *National Energy Board Act*. IORVL submitted an application for the MGP in October of 2004. NGTL has yet to submit an application for the Connecting Facilities and, when it does, this will not go before the NEB, but before the Alberta equivalent, the Alberta Energy and Utility Board (AEUB). As such, the NEB does not have jurisdiction to consider Aboriginal concerns south of the southern terminus

of the MGP. In other words, it cannot consult meaningfully with the Dene Tha' regarding the area from the connecting point to the southern end of the Connecting Facilities. Furthermore, there is doubt that it can address concerns the Dene Tha' raises on this judicial review – with the creation of the process itself – as the NEB can be argued to have no jurisdiction pre-application date, that is, pre-October 2004. It is also questionable as to whether the NEB can or should deal with the creation of the process in which it was intimately involved.

[55] It was submitted that the NEB, as part of its mandate, is charged with the ability and responsibility to consider the adequacy of consultation in its determination of whether to recommend the issuance of a CPCN. It seems that inadequate Aboriginal consultation would be a factor that would militate against the public benefit of the MGP. Aside from the problems of allowing a private right to trump the benefits that the MGP might provide to the general public (given the "public interest" mandate of the NEB), the NEB, as discussed above, does not have temporal jurisdiction over consultation efforts (or lack thereof) pre-application, that is, pre-October 2004. As this is precisely the time frame that the Dene Tha' has issues with federal government behaviour, the NEB's inability to include such behaviour in its evaluation of the adequacy of consultation is extremely problematic.

[56] The federal government raised an argument regarding the exclusion of jurisdiction of the Federal Court by virtue of the jurisdiction of the NEB over aboriginal consultation. The government's argument is that the NEB has a mandate to assess the adequacy of aboriginal consultation as an issue it will consider in its ultimate decision of whether to issue a CPCN.

[57] The submission is that either the NEB's jurisdiction over issues relating to aboriginal consultation ousts the Federal Court's jurisdiction with respect to this judicial review or that it is more appropriate for this Court to defer to the NEB process given that board's expertise. However, that expertise is in the field of energy resources and undertakings, not native consultation or, more importantly, whether there is a duty to consult, when the duty arose and whether it had been met.

[58] It was further agreed that, pursuant to subsection 28(1)(f) of the *Federal Courts Act*, the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of the NEB. Subsection 22.(1) of the *National Energy Board Act* provides a right of appeal to the Federal Court of Appeal on questions of law and/or jurisdiction. Section 18.5 of the *Federal Courts Act* is thus engaged since if the Federal Court of Appeal has jurisdiction over the NEB, then the Federal Court, it was argued, should be deprived of its jurisdiction in reviewing whether the consultation procedure, in part orchestrated by the NEB, is in compliance with section 35 of the *Constitution Act, 1982* and/or the honor of the Crown.

[59] In sum, 18.5 does not apply to the case at hand. There has been no "*decision or order* of a federal board, commission, or other tribunal" as required for the exclusion envisioned by s. 18.5 to operate (*Forsyth v. Canada (Attorney General) (T.D.)*, [2003] 1 F.C. 96; *Industrial Gas Users Assn. v. Canada (National Energy Board)* (1990), 43 Admin. L.R. 102).

[60] Moreover, this argument is essentially a red herring as the scope of the project from the NEB perspective (that is, excluding the Connecting Facilities and pre-application behavior of the Crown) does not cover what the JRP does and what is of fundamental concern to the Dene Tha'.

While the NEB can deal with recognized aboriginal rights north of 60, it cannot address Dene Tha's Treaty 8 rights south of 60.

[61] Hence, neither the JRP nor the NEB is competent to conduct Aboriginal consultation with the Dene Tha' in respect of its territory in Alberta. Consequently, one might suppose that the CCU, the Crown *Consultation* Unit, the only entity left to consider, would naturally fulfill this role. However, the CCU expressly states it is not doing consultation. Its mandate does not include the ability to recognize claims to unproven aboriginal rights and, moreover, affidavit evidence reveals that the CCU has made up its mind on this point. The CCU had no jurisdiction to consult on matters relating to the Cooperation Plan, the Regulators' Agreement, the JRP Agreement, or the EI Terms of Reference.

[62] To summarize, the only unit out of the CCU, the NEB, and the JRP that could wholly address the territorial and temporal areas of concern of the Dene Tha' is the JRP. However, the JRP is engaged in environmental assessment, not aboriginal consultation. Although it will assess the effects the MGP and NGTL pipelines will have on aboriginal communities, it does so through the lens of environmental assessment, focusing on activities, not rights. Further, an aspect of the subject matter of which the Dene Tha' say their rights to consultation and accommodation were ignored is the process by which the JRP itself was created.

E. Comparison of Dene Tha' to other First Nations

[63] Against the background of the environmental and regulatory processes, it is necessary to consider the comparative treatment of the Dene Tha' by the federal government with that of other

First Nations groups: the Inuvialuit, the Sahtu, the Gwich'in, and, in particular, the Deh Cho. If the Crown is correct that differences between First Nations groups can justify differential treatment in accordance with those differences, then logic and fairness demands that substantial similarities between these groups would require similar treatment.

(1) The Inuvialuit, Gwich'in, and Sahtu

[64] In 1977, the Report of the Berger Commission was delivered. The Royal Commission, headed by Justice Thomas Berger, was appointed to assess proposed natural gas development in the Northwest and Yukon Territories. That Commission found that development in the North would likely lead to disruption of the traditional way of life of Aboriginal inhabitants of the area. As such, the Commission recommended any development of the area be preceded by land claims settlements with the local Aboriginal people.

[65] As a consequence of Justice Berger's recommendation, the Inuvialuit, the Gwich'in, and the Sahtu each negotiated and entered into respective final land claims settlements with the Government of Canada: (1) *The Inuvialuit Final Agreement*, entered into in 1984; (2) the *Gwich'in Comprehensive Land Claim Agreement*; and (3) the *Sahtu Dene and Metis Comprehensive Land Claim Agreement*. These agreements recognized the rights and responsibilities of the Inuvialuit, Gwich'in, and Sahtu respectively.

[66] In addition to recognizing rights, the agreements established means by which Aboriginal peoples could have an ongoing say in what was done to and on the lands stipulated by the agreements. In particular, various new regulatory agencies were created by the agreements. The

regulatory agencies of particular relevance in this matter are the Inuvialuit Game Council, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and the Mackenzie Valley Environmental Impact Review Board (MVEIRB).

[67] Of these relevant agencies, the MVEIRB plays a crucial role in the establishment of the JRP. The MVEIRB, through its enabling statute the *Mackenzie Valley Resource Management Act*, anticipates the creation of joint panels to conduct environmental assessments. Pursuant to its enabling legislation, at least half of the MVEIRB's members must be nominated by the Sahtu, the Gwich'in, and the Tlicho First Nation Governments.

(2) The Deh Cho

[68] The Deh Cho First Nation (Deh Cho) is the First Nation group whose territory lies directly north of the Dene Tha' in the NWT. The Deh Cho does not have a final land claim settlement with Canada; however, Canada and the Deh Cho are currently in negotiations to this end. Thus far, the Deh Cho has filed a comprehensive land claim agreement with Canada that Canada has accepted. Canada and the Deh Cho have entered into an Interim Measures Agreement and an Interim Resource Development Agreement that give the Deh Cho rights in respect of its claimed territory. Included in these rights is the right of the Deh Cho to nominate one member to the MVEIRB. As stated earlier, as result of its delegate to the MVEIRB, the Deh Cho was able to have observer status during the development of the Cooperation Plan.

[69] As a result of litigation initiated by the Deh Cho alleging that Canada had failed to consult with it adequately regarding the MGP, the Deh Cho received a generous settlement agreement.

Pursuant to this agreement, the Deh Cho obtained $5 million in settlement funds, $2 million for each fiscal year until 2008 to prepare for the environmental assessment and regulatory review of the MGP, $15 million in economic development funding for this same time period to facilitate the identification and implementation of economic development opportunities relating the MGP, and $3 million each fiscal year until 2008 for Deh Cho process funding.

F. Summary of First Nations Comparison

[70] Unlike the Inuvialuit, the Sahtu, and the Gwich'in, the Dene Tha' has no settled land claim agreement with Canada. A salient consequence of a settled land claim agreement was the creation of new regulatory agencies: the Inuvialuit Game Council, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and the MVEIRB. These Boards were assigned the task of managing the use of the land and resources within the respectively defined territories. In this case these boards play an even more significant role in that in part through them the members of the JRP were selected. Thus, through these Boards and their representatives, the First Nations of the Inuvialuit, Sahtu, and Gwich'in were able to consult meaningfully with Canada about the anticipated effects of the MGP. The Dene Tha' has no settled land claim agreement, no regulatory board, and no representation on any Board.

[71] The Deh Cho, like the Dene Tha', also has no settled land claim agreement. Unlike the Dene Tha', however, the Crown is in the process of negotiating such a final agreement. In the spirit of negotiation, Canada included the Deh Cho in the process for setting up the environmental and regulatory review process for the MGP by permitting them to nominate one member to the

MVEIRB. Thus, through its representation on the MVEIRB, the Deh Cho may be in a position to be able to consult meaningfully with Canada.

[72] The Dene Tha' has no such representation. Its status is purely that of intervener. Through its lack of representation on any boards or panels engaged in conducting the environmental and regulatory review processes themselves, it will always be an outsider to the process.

[73] The Crown justifies this differential treatment on the basis that different First Nations will have different rights and thus it is reasonable to treat each differently in accordance with their differences. The primary differences between the Dene Tha' and the other First Nations here are: (1) the Dene Tha' has no settled land claim agreement and are not in the process of negotiating one, and (2) the Dene Tha's uncontested territory lies south of the NWT – Alberta border.

[74] Neither difference is legally relevant as to the existence of the duty to consult the Dene Tha' or the time at which the duty arose. It may be relevant to how the consultations are carried out. That the Dene Tha' has no settled land claim agreement is not sufficient to exclude the duty to consult as it has, as a minimum, a constitutionally equivalent agreement with Canada about its rights as manifest in Treaty 8. The location of the Dene Tha's affected territory (south of 60) also is irrelevant to justification for exclusion because the scope of the JRP includes the Connecting Facilities as part of its consideration of the whole MGP.

[75] The conduct of the federal government in involving and consulting every aboriginal group affected by the MGP but the Dene Tha' undermines the Ministers' argument that it was premature to consult with the Dene Tha' when the regulatory/environmental processes were being created.

III. DUTY TO CONSULT – TIMING AND CONTENT

A. Introduction

[76] The concept and recognition of the fiduciary duty owed by the Crown toward Aboriginal peoples was first recognized in *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321. The duty to consult, originally, was held by the Courts to arise from this fiduciary duty (see *R. v. Sparrow*, [1990] 1 S.C.R. 1075).

[77] The Supreme Court of Canada in three recent cases – *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), [2005] S.C.J. No. 71, 2005 SCC 69 – has described a more general duty arising out of the honor of the Crown. This duty includes the duty to consult.

[78] In *Guerin*, the Supreme Court of Canada held that a fiduciary obligation on behalf of the Crown arose when the Crown exercises its discretion in dealing with land on a First Nation's behalf. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, the Court expanded this duty to encompass protection of Aboriginal and treaty rights. Even with this expansion, however, the fiduciary duty did not fit many circumstances. For example, the duty did not make sense in the

context of negotiations between the Crown and First Nations with respect to land claim agreements, as the Crown cannot be seen as acting as a fiduciary and the band a beneficiary in a relationship that is essentially contractual. The duty also encountered problems in conjunction with the Crown's obligations to the public as a whole. It is hard to justify the Crown acting only in the best interests of one group especially when this might conflict with its overarching duty to the public at large.

[79] In *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1, 2002 SCC 79, Justice Binnie of the SCC noted that the fiduciary duty does not exist in every case but rather is limited to situations where a specific First Nation's interest arises. As Binnie explained at paragraph 81 of that judgment:

> But there are limits [to the fiduciary duty of the Crown]. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

[80] In light of the decision in *Wewaykum*, in order for the purpose of reconciliation which underpins s. 35 of the *Constitution Act, 1982* to have meaning, there must be a broader duty on the Crown with respect to Aboriginal relations than that imposed by a fiduciary relationship. Hence, in *Haida Nation*, the Court first identified the honor of the Crown as the source of the Crown's duty to consult in good faith with First Nations, and where reasonable and necessary, make the required accommodation. As such, the Crown must consult where its honor is engaged and its honor does not require a specific Aboriginal interest to trigger a fiduciary relationship for it to be so engaged. Another way of formulating this difference is that a specific infringement of an Aboriginal right is no longer necessary for the Government's duty to consult to be engaged.

[81] The major difference between the fiduciary duty and the honor of the Crown is that the latter can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group's best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honor of the Crown fills in to insure the Crown fulfills the section 35 goal of reconciliation of "the pre-existence of aboriginal societies with the sovereignty of the Crown."

[82] In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation – which is reconciliation – must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. The goal of consultation does not also indicate any specific result in any particular case. It does not mean that the Crown must accept any particular position put forward by a First Nations people.

B. <u>The Trigger for Consultation</u>

[83] The trigger for the Crown's duty to consult is articulated clearly by Chief Justice McLachlin in *Haida Nation* at paragraph 35:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway*

> *River First Nation v. British Columbia (Minister of Forest*s), [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, *per* Dorgan J.

[84] There are two key aspects to this triggering test. First, there must be either an existing or potentially existing Aboriginal right or title that might be affected adversely by Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and contemplate conduct might adversely affect it. There is nothing in the Supreme Court decisions which suggest that the triggers for the duty are different in British Columbia than in other areas of Canada where treaty rights may be engaged.

[85] Thus, the question at issue here is *when* did the Crown have or can be imputed as having knowledge that its conduct might adversely affect the potential existence of the Dene Tha' aboriginal right or title? In other words, did the setting up of the regulatory and environmental processes for the MGP constitute contemplation of conduct that could adversely affect a potential aboriginal right of the Dene Tha'? Given the scope of the MGP and its impact throughout the area in which it will function, it is hardly surprising that the parties are in agreement that the construction of the MGP itself triggers the Crown's duty to consult. Indeed the Crown engaged in that duty with every other aboriginal group.

C. Content of the Duty to Consult and Accommodate

[86] Whenever the duty of consultation is found to have begun, whether the duty was breached depends on the scope and content of this duty. Again Chief Justice McLachlin's comments in *Haida Nation* are applicable:

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

Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

[87] Four paragraphs later, at 43-45, McLachlin C.J.C. invokes the image of a spectrum to illustrate the variable content of the duty to consult:

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
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> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they

> had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[88] To summarize, at the lowest end of the spectrum, the duty to consult requires the Crown to give notice, disclose information, and discuss any issues raised in response to said notice. On the highest end of the spectrum, the duty to consult requires the opportunity to make submissions for consideration, formal participation in the decision-making process, and the provision of written reasons that reveal that Aboriginal concerns were considered and affected the decision.

D. Standard of Review

[89] The Ministers identified as the theme of its submissions the overall reasonableness of the Crown's behavior, asserting that this was the appropriate standard of review for the Court to adopt on this judicial review.

[90] The Ministers further used the language of deference, imposing the pragmatic and functional approach from *Dr. Q v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R.

226 that dominates administrative law onto the case at hand. This approach is not particularly helpful in this case where the core issue is whether there was a duty to consult and when did it arise.

[91] The pragmatic and functional approach and the language of deference are tools most often used by courts to establish jurisdictional respect *vis-à-vis* statutorily created boards and tribunals. The law of aboriginal consultation thus far has no statutory source other than the constitutional one of s. 35. Therefore, to talk of deference and/or impose a test, the goal of which is to determine the level of deference, is inappropriate in this context.

[92] In respect of the Ministers' "theme" of reasonableness, comments by the Chief Justice in *Haida* are illuminating. At paragraph 60-63 of her judgment in *Haida Nation*, McLachlin C.J.C. concisely addresses the issue of administrative review of government decisions *vis-à-vis* first nations:

> Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.
>
> On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts

> were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[93] It thus follows that as the question as to the existence of a duty to consult and or accommodate is one of law, then the appropriate standard of review is correctness. Often, however, the duty to consult or accommodate is premised on factual findings. When these factual findings can not be extricated from the legal question of consultation, more deference is warranted and the standard should be reasonableness.

[94] These two standards of review dovetail onto the questions of whether there is a duty to consult and if so, what is its scope. The further question of whether the duty to consult has been met attracts a different analysis. From McLachlin C.J.C.'s reasons, it is clear that the standard of review for this latter question is reasonableness. To put that matter in slightly different terms, the government's burden is to demonstrate that the process it adopted concerning consultation with First Nations was reasonable. In other words, the process does not have to be perfect.

[95] In this case, all parties agree that there is a duty to consult and accommodate the Dene Tha'. The disagreement centers on when this duty arose and whether the government's failure to consult the Dene Tha' on issues of design of the consultation process constituted a breach. The federal government's efforts made after the determination as to the scope and existence of the duty to consult may be reviewed on the reasonableness standard. The issue of when the duty to consult arose is, however, one that goes to the definition of the scope of this duty, as such, as it is considered a question of law, it would attract the correctness standard of review.

[96] In my view, the question posed by the Dene Tha' is whether the duty to consult arose at the stage of process design – that is, from late 2000 to early 2002. The questions of fact involved in this issue – what the precise Aboriginal interests of the Dene Tha' are and what are the adverse effects of this failure to consult – are better contemplated in determining the *content* of the duty to consult, not its bare existence. As the question posed by Dene Tha' is a question of law focused on whether the duty to consult extends to a time period prior to any decision-making as to land use, the appropriate standard of review for this inquiry is correctness.

[97] Whether or not the government's actions/efforts after the duty to consult arose complied with this duty, however, would be judged on a reasonableness standard, assuming that it actually engaged in consultation. The issue would be whether it had engaged in reasonable consultation or made reasonable efforts to do so.

E. Application of the Law to the Dene Tha'

(1) When did the Duty Crystallize?

[98] The issue is: at what time did the Crown possess actual or constructive knowledge of an aboriginal or treaty right that might be adversely affected by its contemplated conduct? (No claim to Aboriginal title has been brought before this Court).

[99] There are three components to this question: (1) did the Crown have actual or constructive knowledge of an aboriginal or treaty right? (2) did it have actual or constructive knowledge that that right might be affected adversely by its contemplated conduct? and (3) what is the conduct contemplated?

[100] Dealing with the third question first, the 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.

[101] Turning now to the first question, the right in question is the Dene Tha' Treaty 8 right. As it is a signatory to the treaty agreements, the federal government has imputed knowledge of the existence of treaty rights (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388). There is no dispute that the Dene Tha' has Treaty 8 rights in the territory in which the MGP and Connecting Facilities will run, and the federal government has knowledge of these rights. At the time of the Cooperation Plan, all versions of the proposed routing of the pipeline envisioned it going through Dene Tha' Treaty 8 territory in Alberta.

[102] The *Mikisew* decision referred to above is particularly applicable and is virtually on "all fours" with this judicial review. The decision involved affected rights under Treaty 8 in respect of the Mikisew Cree First Nation. The subject matter was a new road to be built through the Mikisew's territory (but not through a reserve) and the failure of the government to consult despite a public comment process.

[103] The Court held that any consultation must be undertaken with the genuine intention to address First Nation concerns. In the present case there was no intention to address the concerns before the environment and regulatory processes were in place.

[104] The Court also held that a public forum process is not a substitute for formal consultation. That right to consultation takes priority over the rights of other users. Therefore the public comment process in January 2002 in respect of the Cooperation Plan and that of July 2004 in respect of the Regulators' Agreement, JRP Agreement and Terms of Reference is not a substitute for consultation.

[105] Furthermore, there is no dispute that the federal government contemplated that the construction of the MGP had the potential of adversely affecting Aboriginal rights. It admitted on numerous occasions that it recognized it owed a duty of consultation to the Dene Tha' upon construction of the 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 60º 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.

[109] There can be no question that the Crown had, at the very least, constructive knowledge of the fact that the setting up of a Cooperation Plan to coordinate the environmental and regulatory processes was an integral step in the MGP, a project that the Crown admits has the potential to affect adversely the rights of the Dene Tha'.

[110] The duty to consult arose at the earliest some time during the contemplation of the Cooperation Plan – that is, before its finalization in 2002. At the latest before the JRP Agreement was executed. For purposes of this case, nothing turns on the fixing of a more precise date as no consultation occurred during the creation of the Cooperation Plan or indeed the other regulatory processes through to July 15, 2004.

(2) What is the Content of the Duty?

[111] The Ministers submitted that the content of the duty in this case fell at the high end of the spectrum. The question here is whether the Crown in its behavior toward the Dene Tha' fulfilled the duty.

[112] The Crown also asserted that the combination of the JRP, NEB, and CCU worked to discharge it of its duty to consult. As canvassed earlier, none of these entities possessed either separately or together the jurisdiction to engage in consultation.

[113] The first time the Crown admits that what it was doing was consultation was the July 14, 2004 meeting between CCU and the Dene Tha', 24 hours before the JRP Agreement draft was finalized. Although there is evidence that the Dene Tha' had knowledge of the contents of the JRP draft Agreement prior to this meeting, this is not particularly significant. The first time that the Crown reached out to the Dene Tha' was at this meeting. Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*. Consultation must represent the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation. Thus it is relevant that at the time of this meeting the CCU asserted it was not engaged in aboriginal consultation as no application for the MGP had been filed. The Ministers cannot now argue that the CCU was engaged in consultation.

[114] By depriving the Dene Tha' of the opportunity to be a participant at the outset, concerns specific to the Dene Tha' were not incorporated into the environmental and regulatory process.

Among the concerns cited by the Dene Tha', two stand out: its concern over the enforceability of the federal review process' conclusions *vis-à-vis* the Alberta portion of the pipeline (the "Connecting Facilities" to be operated and owned by Nova Gas Transmission Limited) and the absence of funding to be able to engage in meaningful consultation.

[115] At the hearing, the Ministers and IORVL agreed that the construction of the MGP would demand the highest level of consultation from government. It is clear that during the period when the duty to consult first arose – at the stage of the Cooperation Plan – not even the most minimal threshold of consultation was met. To take one patent example, the Dene Tha' was not specifically notified of the creation of the Cooperation Plan. Public consultation processes cannot be sufficient proxies for Aboriginal Consultation responsibilities. As such, the Crown has clearly not fulfilled the content of its duty to consult.

[116] Even if one were to take the view that the duty to consult arose when the JRP process was being created and finalized, the duty was not met. The duty to consult cannot be fulfilled by giving the Dene Tha' 24 hours to respond to a process created over a period of months (indeed years) which involved input from virtually every affected group except the Dene Tha'. It certainly cannot be met by giving a general internet notice to the public inviting comments.

[117] This conduct would not even meet the obligation to give notice and opportunity to be heard which underlies the administrative law principle of fairness much less the more onerous constitutional and Crown duty to consult First Nations.

[118] The Court's conclusion is that there was a duty to consult with respect to the MGP; that the duty arose between late 2000 and early 2002; that the duty was not met at this time because there was no consultation whatsoever; that the meetings in July 2004 cannot be considered reasonable consultation.

[119] In the face of the Court's conclusion that the duty to consult had been breached, it is necessary to consider the remedy which should flow. The remedies must address the rights of the offended party, and be practical and effective and fair to all concerned including those who played no role in the Crown's breach of its duty.

IV. REMEDY

[120] The first remedy is a declaration that the Respondents Minister of Environment, Minister of Fisheries and Oceans, Minister of Indian and Northern Affairs Canada, and the Minister of Transport are under a duty to consult with the Dene Tha' in respect of the MGP, including the Connecting Facilities. The Court further declares that the Ministers have breached their duty to consult.

[121] The Dene Tha' requested that there be a "stick", an incentive, to goad the Crown into meaningful consultation. Specifically, the Applicant requested that the JRP hearing process be stayed pending further order of this Court, except insofar as the JRP may deliberate on matters unrelated to the Connecting Facilities or the territory within which the Dene Tha' have asserted Aboriginal or treaty rights. Moreover, the Applicant proposed that 120 days lapse following this

order before a Party could apply to the Court without the consent of the other party for a lifting of this stay.

[122] The Applicant further requested that the Court provide detailed direction to the Ministers about what constitutes consultation. Specifically, the Applicant requested that the Court order the Ministers consult with the Dene Tha' about the MGP, including the design of the environmental assessment process, the Terms of Reference for the environmental assessment, the treatment of the Connecting Facilities, and the provision of financial and/or technical support to assist the Dene Tha' in participating in the process.

[123] In addition, the Applicant suggested the Court play an ongoing supervisory role in the consultation process to follow as evidenced by its suggestion that a party be able to apply to the Court on ten days notice to request further directions.

[124] The remedy requested by the Dene Tha' is somewhat novel. As such, it is beneficial to search for some first principles regarding remedy in the context of Aboriginal law.

[125] In *Haida* in the context of whether the Haida Nation were limited in respect of remedy to an interlocutory injunction of the government, McLachlin C.J.C. provided a glimpse at some general principles that might underlie the determination of an appropriate remedy in the event of a governmental breach of its duty to consult.

[126] The Court tied the issue of remedy into the ultimate goal of Aboriginal-Crown relations, namely, reconciliation, finding that "the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations." (paragraph 14). The Court also noted that negotiation was preferable to litigation in respect of achieving this reconciliatory goal.

[127] A striking feature of this present case is that while many government departments, agencies, entities and boards were involved, no one seemed to be in charge or at least responsible for consultation with First Nations. Clearly that was the case with Dene Tha'.

[128] As a part of any remedy, it is necessary to fix some Minister or person with responsibility, whose actions are subject to accountability in meeting the duty to consult which has been breached.

[129] The parties were at some disadvantage in making their arguments on remedies in that they did not know if and on what basis any liability or breach would be found. To that end, their submissions on remedy should be considered preliminary in nature.

[130] The difficulty posed by this case is that to some extent "the ship has left the dock". How does one consult with respect to a process which is already operating? The prospect of starting afresh is daunting and could be ordered if necessary. The necessity of doing so in order to fashion a just remedy is not immediately obvious. However, it is also not immediately obvious how consultation could lead to a meaningful result.

[131] The first priority has been to identify the problem (if any); the next priority is to fix the problem to the extent possible in a real, practical, effective and fair way. The parties should be given an opportunity to address some of the ways in which this can be achieved in a final order.

[132] Therefore the Court will issue final orders of declaration and an order to consult upon terms and conditions to be stipulated following a remedies hearing.

[133] To preserve the current situation until a final remedy order is issued, the members of the JRP shall be enjoined from considering any aspect of the MGP which affects either the treaty lands of the Dene Tha' or the aboriginal rights claimed by the Dene Tha'. They shall be further enjoined from issuing any report of its proceedings to the National Energy Board.

[134] The Court will hold a remedies hearing, after hearing from the parties as to the issues which should be addressed at that hearing. Those issues shall include but not be limited to:

- whether the Crown should be required to appoint a Chief Consulting Officer (similar to a Chief Negotiator in land claims) to consult with the Dene Tha';
- the mandate for any such consultation;
- the provision of technical assistance and funding to the Dene Tha' to carry out the consultation;
- the role, if any, that the Court should play in the supervision of the consultation; and
- the role that any entities including the JRP and NEB should have in any such consultation process.

[135] Therefore, the application for judicial review will be granted with costs. A formal order will issue.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-867-05
STYLE OF CAUSE:	DENE THA' FIRST NATION and MINISTER OF ENVIRONMENT ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 19 to 23, 2006
REASONS FOR JUDGMENT:	Phelan J.
DATED:	November 10, 2006

APPEARANCES:

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Mr. Andrew Hudson	FOR THE RESPONDENT, NATIONAL ENERGY BOARD
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