Federal Court  Cour fédérale

Date: 20130502

Docket: T-434-11

Citation: 2013 FC 458

Ottawa, Ontario, May 2, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**CHIEF ROY FABIAN SUING
ON HIS OWN BEHALF AND ON BEHALF
OF ALL MEMBERS OF THE
KATLODEECHE FIRST NATION AND THE
KATLODEECHE FIRST NATION**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
AND PARAMOUNT RESOURCES LTD.**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 18.1 of the *Federal Courts Act* RSC 1985 c F-7 for judicial review of the decision of the Minister of Indian and Northern Affairs Canada (Minister) to issue a Type A Water Licence MV2010L1-0001 (Type A Water Licence) to Paramount Resources Limited (Paramount) pursuant to the *Mackenzie Valley Resource Management Act*, SC 1998, c 25, s

99 (Act) and associated regulations (Regulations). The Type A Water Licence allows Paramount to use water for oil and gas exploration and development as part of the Paramount Cameron Hills Project (Project).

BACKGROUND

KFN First Nation

[2] The Katlodeeche First Nation (KFN) is an Indian Band within the meaning of the *Indian Act*, RS 1985, c I-5, and its members are Aboriginal peoples within the meaning of subsection 35(1) of the *Constitution Act, 1982*. KFN has a membership of approximately 650 people, and is one of twelve groups who identify themselves as members of the Deh Cho First Nations. In 2010, KFN received approximately $70,000 in funding from the Minister to address issues relating to land and resources.

[3] KFN entered into Treaty 8 with Canada in or around 1900. Treaty 8 preserves KFN's right to rely on the lands, waters and resources of KFN's traditional territory to sustain its Members culturally, socially and economically through, *inter alia*, hunting, fishing and trapping (KFN's Treaty Rights). Canada and KFN disagreed on the interpretation of Treaty 8, and in 2001, Canada began negotiations with KFN for Treaty Land Entitlement (TLE). Since 1998, Canada and all the Deh Cho First Nations have been involved in talks to address outstanding matters under Treaties 8 and 11 (Deh Cho Process).

[4] In 2010, Canada began negotiations for a comprehensive land claim settlement agreement specific to KFN. These negotiations are still in progress. At all times material to this application, the Minister had knowledge of KFN's claim to aboriginal and treaty rights in the Project area, though

Canada has never recognized the claim of KFN for treaty rights or aboriginal title or rights over the lands in the Cameron Hills, referred to by KFN as the "Naghah Zhie" (Naghah Zhie).

[5] KFN's traditional territory is situated on the south shore of Great Slave Lake at the mouth of the Hay River in the Northwest Territories, including the Hay River watershed and the Naghah Zhie where the Project is located. There are other Aboriginal groups who also claim entitlement to the Naghah Zhie, and there is a lack of consensus between these groups as to the different claims.

[6] The Naghah Zhie provides water and wildlife to the Hay River watershed and is a calving area for caribou and moose. KFN says that its members engage in hunting, trapping and fishing in the Naghah Zhie area, although they more regularly do so in the Buffalo Lake region.

Paramount

[7] Paramount first established an interest in the Naghah Zhie area in 1979. A chronology of the consultation between Paramount and KFN since that time is canvassed in the Affidavit – Hughes – filed with Paramount's Record (Hughes Affidavit).

[8] In 2000 and 2001, Paramount conducted a Traditional Knowledge Study and Heritage Resource Impact Assessment covering Naghah Zhie area, which included collaboration with KFN and other First Nations. In 2007, Paramount met with KFN to discuss the possibility of lands being selected in the Naghah Zhie area as part of KFN's claimed additional LTE. In 2008, Paramount and KFN entered into discussions with respect to KFN purchasing a share in the Project.

The Statutory Background

[9] A Type A Water Licence, the type at issue in this application, allows oil and gas production, processing or refining. It is required for all deposits of waste if more than 300 cubic meters of water a day is used. The issuance of a Type A Water Licence in this case replaces all existing Type B Water Licences for the Project, which are much more narrow in scope.

[10] Under the Act, a developer must apply to the Mackenzie Valley Land and Water Board (Board) to obtain a Type A Water Licence. Based on whether there might be significant adverse impacts and public concern, the Board decides whether the application should be referred to the Mackenzie Valley Environmental Impact Review Board (Review Board) for an environmental assessment screening. If that does not happen, then the Board maintains control over the application, as well as the terms and conditions under which the licence will be issued, if at all.

[11] An application for a Type A Water Licence requires that a public hearing be held by the Board. As set out in section 81 of the Act, within 30 days of receiving the Type A Water Licence prepared by the Board, the Minister must make a final decision as to whether to authorize the Type A Water Licence and provide written reasons in the notification. The Minister may extend the period of 30 days by not more than 30 additional days.

The History of the Type A Water Licence

[12] The regulatory history of the Project is described in the Hughes Affidavit as part of Paramount's Record. Over the past two decades, the Project has been the subject of four environmental assessments (EAs), and has required numerous types of licences.

[13] In 2000, Paramount submitted its initial applications for land use permits and Type B Water Licences for the drilling stage of its operations. KFN participated in the approval process for these licences, and ultimately supported the Project proceeding. Although KFN did not participate in an environmental assessment that was undertaken in 2001, in 2002 KFN provided correspondence to all interested parties saying it was looking forward to working with Paramount.

[14] In April, 2003, Paramount applied to the Board to amend different Type B Water Licences. This application was very broad in scope and an EA was ordered (EA03-005). The scope of EA03-005 was defined as:

> …the cumulative effects of drilling, testing and tie-in of up to 50 additional wells over a period of 10 years, production of oil and gas over 15 to 20 years, and abandonment and reclamation of the entire development.

[15] The potential cumulative environmental impacts for the remaining life of the Project were considered, which included 92 wells and facilities. The use of a Type A Water Licence for 15 to 20 years of production for 92 wells was assessed within the scope of EA03-005, even though at that time Paramount had not yet applied for a Type A Water Licence. The public hearing for EA03-005 was held on February 18 and 19, 2004 in Hay River, and Chief Fabian provided comments on the impacts of the Project. KFN also provided a technical report on 2 March 2004, which raised concerns about impacts on water quality and the importance of protecting the watershed flowing off Naghah Zhie. Paramount responded on 11 March 2004, addressing these concerns.

[16] The 1 June 2004 report of EA03-005 concluded that the Project "will not likely have a significant environmental impact or be the cause for significant public concern and should proceed to the regulatory phase of approvals" (Hughes Affidavit, Exhibit 52).

[17] KFN participated in the public hearing for EA03-005 by providing oral and written submissions regarding its asserted rights and potential adverse impacts. Paramount responded in writing to KFN's concerns, and the Board expressly considered KFN's comments in its decision. KFN never challenged the adequacy of Crown consultation during this process, and the Federal Court held in *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 [*Ka'a'Gee Tu 2012*] that it was a good process.

[18] On 5 January 2010, Paramount submitted its application for the Type A Water Licence to the Board. The purpose of the application was to bring all of Paramount's Type B licences under one licence, and was for all water use associated with the Project for the remaining life of the Project, which was approximately 15 years. The water use contemplated by the Type A Water Licence did not change from that considered in EA03-005.

[19] On 18 March 2010, the Board sent out Paramount's application to KFN for review. Comments were due by 3 May 2010, but KFN did not submit any. Also on 18 March 2010, the Board sent out a draft work plan which included July 27-28, 2010 as the proposed dates for a public hearing. The deadline for comments on the draft work plan was 6 April 2010. KFN did not submit any comments on the draft work plan.

[20] On 29 April 2010, KFN submitted an application to Indian and Northern Affairs Canada (INAC), now Aboriginal Affairs and Northern Development Canada for $30,000 in "resource pressure funding." The purpose of this funding is to assist Aboriginal groups to participate in regulatory processes. KFN's application specifically mentioned the Project (Chief Fabian Cross Affidavit, Exhibit 6, Attorney General's Record). On 7 July 2010, KFN's request for pressure funding was approved.

[21] Updated versions of the work plans were distributed on May 6 and June 9, 2010. On 7 June 2010, the Board published the dates for the public hearing of the Project, which was to take place in Hay River on 27-28 July 2010. Hay River is adjacent to the KFN reserve.

[22] On June 22-23, 2010, technical sessions were held so that Paramount could explain the Type A Water Licence to interested parties. KFN did not attend these sessions, either in person or by phone.

[23] On 24 June 2010, the Board decided to change the location of the public hearing to Yellowknife. There had been no communication by KFN to the Board up to this point. Also on 24 June 2010, the Board decided the Type A Water Licence application would be exempt from a preliminary screening, since the activities that would be authorized under the Type A Water Licence had been the subject of an environmental assessment during EA03-005.

[24] On 5 July 2010, the dates for the public hearing were advertised in a newspaper indicating a change of venue from Hay River to Yellowknife. It is an 8-hour drive from Hay River to Yellowknife. On 6 July 2010, the Board notified KFN of the change of venue. A pre-hearing conference was held on 16 July 2010, which KFN did not participate in.

[25] KFN sent two letters to the Board on 16 July 2010 (Chief Fabian Affidavit, Exhibits G and H). In the first letter KFN registered as an intervenor, and in the second KFN requested permission to participate as a First Nation rather than as a member of the public (as a member of the public would only allow them one hour to make submissions). The second letter also requested: reasonable notice to allow KFN to prepare for the hearing; that the hearing be held in Hay River; and funding to assist KFN to participate in the hearing.

[26] On 26 July 2010, the Board informed KFN that the hearing would proceed as scheduled in Yellowknife (Chief Fabian Affidavit, Exhibit I). The Board also stated that it would not provide funding and that KFN should raise the issue of funding with the Minister. The letter also advised that KFN had missed the 19 July 2010 deadline to provide written submissions and the 23 July 2010 deadline to submit a presentation. The Board said that it was willing to hear argument from KFN, but it would reserve the right to rule inadmissible any new evidence that KFN submitted.

[27] By way of letter dated 26 July 2010 (Chief Fabian Affidavit, Exhibit J), KFN informed the Board that, due to the lack of reasonable notice and lack of certainty that its evidence would be accepted by the Board, KFN would not be able to participate in the hearing. The letter also said that KFN did not consider it appropriate to provide the evidence of elders and traditional knowledge by way of teleconference, and that it did not consider it fair that if KFN did provide evidence it could be considered inadmissible by the Board because of the time of which it was tendered. The letter urged to Board to hold a hearing on the KFN reserve in September, 2010. The Board did not respond to this letter.

[28] On 23 August 2010, KFN sent a letter to the Minister requesting a meeting to discuss how KFN might engage in meaningful consultation on the Project and proposed that the parties enter into a Consultation and Accommodation Protocol for the Project (Chief Fabian Affidavit, Exhibit K). The letter said that KFN was concerned about impacts on caribou calving grounds, hunting, fishing and fresh water in the Project area. The letter also explained the difficulties that KFN was encountering with the Board's process and that the Board had advised KFN to consult with the Minister. KFN also attached an "Agreement to Negotiate a Consultation and Accommodation Protocol in respect of the Paramount Project" (Chief Fabian Affidavit, Exhibit L). KFN did not

think that the Consultation and Accommodation Protocol would duplicate the Board's process because, in KFN's view, the Board did not consider itself to have any authority to conduct consultation.

[29] On 30 August 2010, the Board circulated a draft Type A Water Licence based on the July 27 and 28 hearing, in which KFN did not participate. KFN views the draft Type A Water Licence as only having covered 55 wells, but the Attorney General says that this is incorrect and that the draft Type A Water Licence included all "existing and planned wells," for a total of 92. These are the same wells that were included in the scope of EA03-005. The Board provided all parties with a deadline of 29 September 2010 to submit comment on the draft Type A Water Licence.

[30] On 8 September 2010, the Minister replied to the 23 August 2010 KFN letter and advised KFN to identify to the Board the impacts the Project would have on KFN's Aboriginal and Treaty rights (Chief Fabian Affidavit, Exhibit N). The letter said the Minister intended to rely on the Board's process to assist the Crown is discharging its duty to consult and urged KFN to participate in the Board's process. The letter concluded by stating the Minister would meet with KFN to discuss how to work together on Crown consultation, including any funding that might be available.

[31] On 22 September 2010, KFN filed a Motion for a Ruling with the Board and submitted comments on the terms and conditions of the draft Type A Water Licence (Chief Fabian Affidavit, Exhibit D). The Attorney General says that all of KFN's comments were about concerns addressed in EA03-005. In the Motion for a Ruling, KFN requested that the Board conduct a preliminary screening of the application, that the Board follow the Act's rules of procedure, and the AANDC (then INAC) and the Board consult KFN with respect to the impacts of the Project.

[32] In a letter dated 8 October 2010 (Chief Fabian Affidavit, Exhibit O), KFN again informed the Minister that it was having difficulty with the Board's consultation process and did not agree that the Board's process could be relied upon to discharge the Minister's duty to consult. KFN suggested a meeting with the Minister on October 18 or 19, 2010 to discuss how consultation could be carried out and whether any funding was available to assist KFN in participating in the consultation. This meeting did not take place, and the Attorney General says that between 20 October 2010 and the end of November, several unsuccessful attempts were made by the Minister to reschedule the meeting.

[33] The Minister responded on 26 November 2010 (Chief Fabian Affidavit, Exhibit P), stating that a meeting would be held but only after the Board's ruling on whether to hold another hearing to hear KFN's specific concerns. The Minister said that if the Board held another hearing, KFN would have an opportunity to make the Board aware of its specific concerns.

[34] On 10 December 2010, the Board issued its Reasons for Decision in response to KFN's Motion for a Ruling. The Board concluded that the process was fair and had been conducted in accordance with the Act, and that the Board had no authority to conduct consultation and was not responsible for judging the adequacy of consultation. The Board also passed a motion to approve the Type A Water Licence. This was communicated to KFN on 15 December 2010. KFN did not seek to judicially review this decision.

[35] On 13 December 2010, the Board recommended that the Minister approve the Type A Water Licence. The Board included a table with its recommendation showing how it had taken KFN's concerns into account. On 14 December 2010, KFN confirmed it was available to meet with the Minister to discuss the Reasons for Decision of the Board and to discuss KFN's concerns (Chief

Fabian Affidavit, Exhibit R). On 16 December 2010, the Minister replied that the Minister wished to meet immediately, as there was a 30-day time limit on whether to approve the Type A Water Licence once the recommendation was received from the Board (Chief Fabian Affidavit, Exhibit S).

[36] On 17 December 2010, KFN replied that it was unable to meet immediately due to the Christmas break from December 20, 2010 to January 4, 2011, but suggested a meeting on 11 January 2011 (Chief Fabian Affidavit, Exhibit T).

[37] On January 6-7, 2011, the Minister's office was in touch with Chief Fabian and Victoria St. Jean, who is the Lands and Resource Manager for KFN, to ask them to communicate their concerns in advance of the meeting. No concerns were communicated before the meeting. On 7 January 2011, the Minister requested a 30-day extension on approving the Type A Water Licence so that the meeting and further consultation with KFN could occur.

[38] On 11 January 2011, KFN met with staff from the Minister's office. During the meeting, the staff posed questions about new and novel concerns arising from the Type A Water Licence. KFN stated that it did not want to limit the discussion to novel impacts and wanted to discuss all potential impacts from the Type A Water Licence. KFN admitted it had no new concerns about the Type A Water Licence that were not already expressed, and insisted it would not engage in further consultation until INAC signed a consultation and accommodation protocol and provided $100,000 in funding. KFN said that, without this, it intended to start the judicial review process (Jenkins Affidavit, Exhibit T).

[39] Following the 11 January 2011 meeting, staff from the Minister's office concluded that consultation for the Type A Water Licence was adequate "based on the previous environmental

assessments, the Board process, as well as the Crown's interactions with the First Nation" (Jenkins Affidavit, paragraph 18).

[40] On 14 January 2011, KFN sent a follow-up letter (Exhibit V, Affidavit of Chief Fabian) to the Minister expressing concern that the Minister had only met with KFN after the Board recommended the approval of the Type A Water Licence, instead of meeting with KFN in August, as originally requested in its letter dated 23 August 2010. KFN stated it did not agree that meaningful consultation could result from a one-day meeting for a Type A Water Licence that covers 55 wells and lasts for 15 years. KFN proposed that meaningful consultation take place over the course of a couple months. The letter included a request for the amount of $100,000 to assist with consultation, and set out a budget of what KFN estimated would be required. The letter said that KFN was willing to work with the Minister and wished to negotiate a solution to the lack of consultation.

[41] The Minister did not reply to the 14 January 2011 letter.

[42] On approximately 19 January 2011, the Board informed KFN that the Minister had extended the timeline for consideration of the Type A Water Licence by an additional 30 days. Despite the extension, the Minister did not communicate with KFN.

[43] On 11 February 2011, the Minister made the decision to approve the Type A Water Licence and listed 60 oil and gas wells. The final Type A Water Licence added 5 more wells than were originally listed and commented on in the draft licence provided on 30 August 2010.

[44] KFN says that only during cross-examination for this judicial review, on 22 March 2012, was KFN informed by Paramount that the Type A Water Licence is for 92 wells, and not for 55 or 60 as listed in the draft and final Type A Water Licence. The Respondents say that this is incorrect, and that the Type A Water Licence always contemplated all 92 wells.

The Board's Decision on KFN's Motion for a Ruling

[45] The Board issued its Reasons for Decision in response to KFN's Motion for a Ruling on 10 December 2010. The Board noted that, by way of letter dated 26 July 2010, it had changed the venue for the hearings to Yellowknife because it had arranged for South Slavey translation and to connect some participants by teleconference. KFN responded, repeating its concerns, and had not participated in the hearing.

A) Was the process leading to the hearing fair?

[46] The problems raised by KFN in its Motion for a Ruling relate to the notice and location of the hearing. The Board found that KFN did have notice of the hearing, and that the Board had conducted the process in accordance with subsection 63(2) of the Act.

[47] The Board found that KFN's active participation did not commence until 16 July 2010, although the Board had been forwarding all materials since 18 March 2010. Up to this point, the parties actively participating were Paramount, the Minister, and a variety of other government departments. All these parties, except Paramount, were based in Yellowknife, so the Board decided to move the hearing there. The Act gives the Board discretion as to where to hold the public

hearing. The Board found that KFN had enough time (three weeks) to arrange to get to Yellowknife or participate by teleconference.

[48] The Board concluded that the change of location of the hearing was due to KFN's late arrival on the scene and, had KFN participated earlier, the hearing would have been held in Hay River. The Board made attempts to retain translators so that KFN could participate by teleconference, but KFN chose not to participate. Thus, the Board concluded that the decision to change the venue was not unfair.

B) Does the Board have a role in Aboriginal consultation and if so was that duty discharged in accordance with the law?

[49] The Board first pointed out that the final decision on the Type A Water Licence is made by the Minister. In the Board's opinion, it was the Minister who bore the responsibility to make the "final call" on Crown consultation. As the Board understood it, the Crown still had the time and the opportunity to do more consultation, if required.

[50] The Board stated that it did not have the authority or knowledge to determine whether consultation has been sufficient, and that it was not in a position to determine whether the Minister or Paramount properly consulted KFN. There is nothing in the Act that empowers the Board to actively engage in the consultation process.

[51] The Board also noted that KFN had filed no affidavits or other evidence to support its statements about the alleged impacts of the Project. In this position, the Board did not think it

possible to determine the potential impacts of the Project, and considered the evidence in support of most of the facts asserted to be very weak.

[52] In conclusion, the Board found that the process was fair, the exemption of the Type A Water Licence from a preliminary screening was justified, and that the Board had no authority to conduct consultation and was not responsible for judging the adequacy of Crown consultation.

ISSUES

[53] The Applicant raises the following issues in this application:

a) Did the Minister breach the duty to consult by not engaging in meaningful consultation before approving the Type A Water Licence?

b) Did the Board's process satisfy the Minister's duty to consult?

STANDARD OF REVIEW

[54] As stated by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], questions regarding the existence and content of the duty to consult and accommodate must be reviewed on the standard of correctness. Although reviewable on a correctness standard, this is a heavily factual determination, and as Justice Yves de Montigny said at paragraphs 90-92 of *Ka'a'Gee Tu 2012*:

> 90 Three caveats must be added to this apparently straightforward explanation of the applicable standard of review. First, the duty to consult and accommodate heavily depends on the particular circumstances of each case, and questions of law will therefore often be intertwined with questions of fact. As the Chief Justice stated in *Haida*, above at paras 61, 63:

> (...) 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...
>
> 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.

91 Second, perfection is not required when assessing the conduct of Crown officials. As is always the case when the standard of reasonableness is applied, the best outcome is not necessarily the benchmark; as long as it can be shown that reasonable efforts have been made to consult and accommodate and that the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, there will be no justification to intervene.

92 Finally, and closely related to the previous observation, the focus should not be on the outcome but rather on the process of consultation and accommodation.

STATUTORY PROVISONS

[55] The following provision of the Act is applicable in this proceeding:

Consultation	**Consultation**
3. Wherever in this Act reference is made, in relation to any matter, to a power or	**3.** Toute consultation effectuée sous le régime de la présente loi comprend l’envoi, à la partie à

duty to consult, that power or duty shall be exercised

(*a*) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare those views, and

(iii) an opportunity to present those views to the party having the power or duty to consult; and

(*b*) by considering, fully and impartially, any views so presented.

consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.

[…]

[…]

Aboriginal rights

5. (2) For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

Droits des autochtones

5. (2) Il est entendu que la présente loi ne porte pas atteinte à la protection des droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada découlant de leur reconnaissance et de leur confirmation au titre de l'article 35 de la *Loi constitutionnelle de 1982*.

[…]

[…]

Considerations

60.1 In exercising its powers, a board shall consider

Éléments à considérer

60.1 Dans l'exercice de ses pouvoirs, l'office tient compte,

(*a*) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and
(*b*) any traditional knowledge and scientific information that is made available to it.

d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

[…]

[…]

Notice of applications

63. (2) A board shall notify affected communities and first nations of an application made to the board for a licence, permit or authorization and allow a reasonable period of time for them to make representations to the board with respect to the application.

Avis à la collectivité et à la première nation

63. (2) Il avise la collectivité et la première nation concernées de toute demande de permis ou d'autorisation dont il est saisi et leur accorde un délai suffisant pour lui présenter des observations à cet égard.

Heritage resources

64. (1) A board shall seek and consider the advice of any affected first nation and, in the case of the Wekeezhii Land and Water Board, the Tlicho Government and any appropriate department or agency of the federal or territorial government respecting the presence of heritage resources that might be affected by a use of land or waters or a deposit of waste proposed in an application for a licence or permit.

Ressources patrimoniales

64. (1) L'office doit demander et étudier l'avis de toute première nation concernée, des ministères et organismes compétents des gouvernements fédéral et territorial et, s'agissant de l'Office des terres et des eaux du Wekeezhii, du gouvernement tlicho au sujet des ressources patrimoniales susceptibles d'être touchées par l'activité visée par la demande de permis dont il est saisi.

[…]

Purposes

114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and

[…]

(*c*) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.

Guiding principles

115. The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to

[…]

(*c*) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

[…]

Objet

114. La présente partie a pour objet d'instaurer un processus comprenant un examen préalable, une évaluation environnementale et une étude d'impact relativement aux projets de développement et, ce faisant :

[…]

c) de veiller à ce qu'il soit tenu compte, dans le cadre du processus, des préoccupations des autochtones et du public en général.

Principes directeurs

115. Le processus mis en place par la présente partie est suivi avec célérité, compte tenu des points suivants :

[…]

c) l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie.

ARGUMENTS

KFN

The Duty to Consult

[56] The source of the duty to consult is the honour of the Crown (*Haida*, above). As the Supreme Court of Canada said in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*] at paragraphs 32-33:

> 32 The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:
>
> > Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
>
> 33 The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a [page 670] final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in

> obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

[57] The test for the duty to consult consists of three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct might adversely affect an Aboriginal claim or right (*Rio Tinto* at paragraph 31). The third element of the test requires the claimant to show a causal relationship between the proposed decision and the potential for adverse impacts on pending Aboriginal rights (*Rio Tinto* at paragraph 45).

[58] The content of the duty to consult increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or Treaty right (*Haida* at paragraphs 43-45; *Rio Tinto* at paragraph 36; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku River*]).

[59] KFN submits that the first element of the test is met in this case; the Crown has real knowledge of KFN's claim, as a comprehensive claim is currently in negotiations. The second step is also met as the Crown conduct at issue is the decision by the Minister to approve the Type A Water Licence. The third step is also met, as KFN has raised concerns with the Board and the Minister about potential impacts of the Type A Water Licence in the Naghah Zhie area.

[60] KFN says that even if it had not been able to provide specific information on the potential adverse impacts to the Naghah Zhie area, this does not mean that the third element of the test has not been met, and does not preclude meaningful consultation. As with the situation in *Yellowknives Dene First Nation v Canada (Attorney General)*, 2010 FC 1139 [*Yellowknives*], the Board and the

Crown's denial of responsibility for consultation in the present case, and their refusal to engage with KFN, limited KFN's ability to fully articulate the potential adverse impacts of the Type A Water Licence on KFN's Aboriginal and treaty rights in the area.

[61] The duty to consult relates to current government conduct or decision, not past conduct (*Haida* at paragraph 78). KFN is concerned with the decision to approve the Type A Water Licence for wells that have not yet been drilled and water that has not yet been accessed. The fact that consultation may have occurred on past Type A Water Licence applications does not satisfy the duty to consult on the Type A Water Licence at issue in this application.

[62] Furthermore, the duty to consult goes beyond the Board's process. For example, in *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 [*Ka'a'Gee Tu 2007*], even though the review process in that case was satisfactory, the Minister's subsequent actions of modifying the recommendations breached the duty to consult.

[63] KFN points out that the source of the duty to consult means that the land claims process is not the appropriate forum to discharge that duty. KFN's participation in the land claims process, either through its own process or as part of the Deh Cho First Nations, does not satisfy the Crown's duty to consult on the Type A Water Licence because it will take a number of years to negotiate a land claim agreement. By then, the infringing activity will almost certainly be complete. There is also no guarantee a land claim agreement will be ratified and entered into. The duty to consult is designed to protect Aboriginal interests while land and resource claims are ongoing.

[64] KFN says it has a strong *prima facie* claim to the Project area, as evidenced by Treaty 8 and its long history of negotiating a land claim through the Dene Metis Land Claim, the Deh Cho Claim,

the KFN TLE, the KFN Claim and the evidence in the decision of *R. v Paulette*, [1977] 2 SCR 628 [*Paulette*].

[65] As regards the seriousness of the impact, KFN submits that it is difficult to assess what this would be in the absence of a proper consultation process. However, it was determined in the Cameron Hills Aquatic Report that "…there is potential for serious adverse environmental impacts to water due to the potential for spills and sedimentation of waterways from erosion as a result of Paramount's operations in Cameron Hills" (St. Jean Affidavit, Applicant's Record, paragraph 8). This report states that "the lakes and rivers that are fed by the Cameron River are the backbone of the way of life in this area. It is of the utmost importance that this watershed is maintained in a pollution free state to support the people and their way of life" (St. Jean Affidavit, paragraph 8). KFN points out that the Type A Water Licence is for 92 wells over a period of approximately 15 years, and it is fair to assume that the impacts will be serious.

[66] KFN has a strong *prima facie* claim and the seriousness of the potential adverse impacts of the Type A Water Licence warrant "something significantly deeper than mere consultation" (*Haida* at paragraph 79). Regardless, KFN submits that the Crown's conduct does not meet even the minimum standard of consultation.

[67] In *Yellowknives*, the decision only involved an exploration permit for five years, and yet "meaningful consultation" was the standard of consultation required. Also, an exploration permit like the one at issue in *Yellowknives* has less of an impact than a Type A Water Licence such as the one at issue in this application.

[68] KFN says that it occupies a similar position to the claimant in *Taku River*, above:

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

The Board's Process

[69] In *Yellowknives*, the Court held that the Crown's failure to consult was a failure to meet the requirements of Part 5 of the Act. Section 114 of the Act sets out the purpose of Part 5 which is, amongst other things, to "ensure that the concerns of Aboriginal people and the general public are taken into account in that process." In *Yellowknives* and both *Ka'a'Gee* decisions, it was found that the duty to consult applies to the process as a whole.

[70] In *Yellowknives*, Justice Michael Phelan had the following to say on point at paragraphs 83-85:

> 83 In the present case, the Board seemingly operates in compliance with both its enabling legislation and s. 35 as its decision depends on whether the Crown's duty to consult is being discharged. *Ka'a'Gee #2* indicates that this type of determination is legally necessary. There is no suggestion that the Board would dictate to the Crown that it was required to consult but it is evident that the Board might have decided differently or conducted its own process differently had it known the facts surrounding consultation.
>
> 84 In light of *Standing Buffalo* and the two *Ka'a'Gee* cases which suggest that questions of adequate consultation are for the courts to

> determine, the issues of the Board's alleged delegation to INAC or reasonable apprehension of bias are not germane to this case.
>
> 85 The Board was justified in inquiring of INAC whether consultation had taken place. The substantive issue is whether the Board relied on proper information as its decision was dependent on the response to that question of whether the duty had been discharged. The Board's failure to hear from the Applicants undermines the Board's information base as well as being procedurally infirmed.

[71] In the present case, the Board determined that it was not responsible for judging the adequacy of Crown consultation. Based on the above, KFN submits that this was plainly an error. The Board was required to consider the adequacy of Crown consultation before it made the recommendation to the Minister to approve the Type A Water Licence.

[72] The Board's Rules of Procedure allow it to develop its own procedures to ensure that consultation with affected Aboriginal people is met. Despite KFN's requests, the Board refused to alter its procedures to allow for adequate notice and an opportunity for KFN to meaningfully participate.

[73] Section 24 of the Act gives the Board the ability to "conduct any hearings that it considers to be desirable for the purpose of carrying out any of its functions." KFN objected to the Board's scheduling and notice of the hearing in the letter dated 16 July 2010. KFN also requested that the hearing take place on 20 September 2010, 60 days from the date of the notice, in accordance with Rule 81 of the Board's Rule of Procedure:

> 81. The Board will provide public notice of a hearing under Rule 80 at least 60 days before the hearing date.

[74] KFN requested time to canvass the concerns of its membership, including elders. The Board's jurisdiction to allow this request is further supported by sections 3 and 63(2) of the Act. KFN requested that the hearing be held in Hay River in accordance with section 91 of the Board's Rules of Procedure, which says that "the Board will consider which community is most convenient to the parties and close to the location of the project in question…" Further, section 92 of the Rules of Procedure says that:

> 92. The Board may decide to hold a public hearing in one community or in a number of communities in the Mackenzie Valley and may determine the issues to be address in each community.

[75] KFN submits that the Board's scheduling and lack of notice breached the rules of procedural fairness and did not allow KFN to participate in the process that led to the approval of the Type A Water Licence.

[76] KFN did provide written comments on the draft Type A Water Licence but, because KFN did not participate in the hearing, information was not available to allow KFN to properly evaluate and protect its Aboriginal and Treaty rights. The written comments were provided without full knowledge of the Type A Water Licence and its impacts. For example, the fact that the Water Licence is for 92 wells (not 55), and the location of the wells, is information of which KFN was not aware.

[77] When the Board recommended the draft Type A Water Licence to the Minister, its terms and conditions were vague and incomplete. For example, at the time the Board recommended approval to the Minister, Paramount had not submitted a Site Wide Monitoring Report, so the Board gave Paramount until 30 June 2011 to do so. This was intended to "verify the accuracy of the predictions made in EA05-003 regarding the impacts of the Project on Water" (Chief Fabian

Affidavit, Exhibit V). KFN submits that the extension of time given to Paramount until 30 June 2011 indicates there was time and ability to involve the accommodation of KFN's concerns.

The Minister's Actions

[78] The Crown's duty to consult requires engagement in an honourable process of consultation to ensure that impacts are identified and addressed (*Haida* at paragraphs 35, 39, 63). KFN submits that the one meeting held with the Minister on 11 January 2011 did not satisfy this duty.

[79] At the 11 January 2011 meeting, staff from the Minister's office posed questions regarding novel impacts and wanted KFN to inform them of any new concerns regarding the Type A Water Licence. KFNs submits that it was incorrect for the Minister to approach the Type A Water Licence as though it was a part of the prior and continuing duty to consult on EA05-003. The wells had not yet been drilled, so it was not an issue of past infringement (*Rio Tinto* at paragraph 49). In any event, there were novel concerns regarding hydraulic facturing that KFN could not address because it did not have access to environmental technicians.

[80] KFNs was not prepared to attend the 11 January 2011 meeting for the purpose of giving evidence on novel impacts of the Type A Water Licence. For KFN to engage in meaningful consultation it required time and resources to hire a hydrologist or other environmental consultant in order to understand the Type A Water Licence's potential impacts. KFN also needed to provide this evidence to the community, and allow time for feedback. Furthermore, KFN was not provided with a copy of the final Type A Water Licence for review and comment before the meeting.

[81] KFN wanted to enter into a consultation protocol to properly understand the impacts of the Type A Water Licence, and how those impacts could be mitigated or accommodated. During the meeting on 11 January 2011 there was no response from the Crown as to whether the consultation protocol could be entered into (Jenkins Affidavit, Exhibit T).

[82] During the 11 January 2011 meeting, KFN requested an extension of the 30-day timeline to make the decision in order to allow the Minister to engage in consultation with KFN. At the time, the staff did not inform KFN that a 30-day extension had already been granted (St. Jean Affidavit, paragraph 35). KFN submits that this is evidence of dishonourable conduct by the Crown.

[83] The last letter from KFN dated 14 January 2011 indicated a willingness to continue the dialogue. The letter set out KFN's realistic and legitimate need for funds in order to engage in consultation. KFN did not intend the request for funds to be a demand and regretted that the Minister interpreted the request in that manner. Following this letter, there was no response from the Minister.

[84] Considering the potential for adverse impacts on KFN's Treaty and Aboriginal rights, KFN submits that one letter from the Minister and one meeting at the eleventh hour does not constitute meaningful consultation.

The Attorney General

Procedural Fairness

[85] In paragraphs 91-105 of KFN's submissions it is argued that the Board breached rules of procedural fairness. The AG submits that the doctrine of issue estoppel, the rule against collateral

attack and Rule 302 of the *Federal Court Rules*, SOR/98-106 preclude KFN from arguing that its rights of procedural fairness were breached.

[86] KFN did not seek to judicially review the Board's decision that there had been no breaches of procedural fairness. Issue estoppel prevents a party from raising an issue in a second proceeding that was already decided in an earlier proceeding (*Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44). All the elements of the test are met in the present case as the question is the same as previously decided, and the decision was both final and judicial. Further, the rule of collateral attack prevents KFN from now questioning the Board's decision when it declined to do so by way of the proper review procedure (*Canada (Attorney General) v Aéroport de Québec Inc*., 2011 FC 195). Lastly, KFN is implicitly asking this Court to review the Board's decision regarding procedural fairness, and Rule 302 of the *Federal Court Rules* says that an application for judicial review can relate to only one decision. The decision under review in this application is the Minister's, not the Board's. KFN is out of time to review the Board's decision.

[87] For the above reasons, the AG submits that the Court must take it as settled that the Board's process was fair. Further, and in the alternative, the AG submits that the Board's decision was fair for the Reasons for Decision dated 10 December 2010.

The Duty to Consult

The Content of the Duty

[88] The AG agrees that Canada owes KFN a duty to consult on the Minister's decision to approve the Type A Water Licence, and submits that, considering the strength of KFN's claim and

the potential impact of the licence on those rights, the scope of consultation owed is in the mid-range of the duty to consult spectrum.

[89] The AG submits that KFN has an arguable, but not a strong *prima facie* claim to Aboriginal and treaty rights in the Project area. KFN has not claimed it has Aboriginal title in the Project area. KFN claims existing Treaty 8 rights in the Project area, but the Project area is outside the boundaries of Treaty 8. In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*], the Supreme Court of Canada confirmed at paragraphs 42-43 that Treaty 8 rights exists within defined geographical limits. The most that can be said in this case is that KFN has asserted treaty rights in the Project area, but does not have existing, established treaty rights. In a strength of claim analysis, asserted treaty rights are generally given less weight than existing treaty rights (*Mikisew Cree*).

[90] KFN also asserts Aboriginal rights in the Project area, which the AG says are arguable but do not meet the threshold of a strong *prima facie* case. The KFN affiants gave evidence that the Project area itself is rarely used, and KFN members engage in traditional practices most often in the Buffalo Lake area. In the Deh Cho land use planning process, the Naghah Zhie has been mapped as an area of very low density traditional land use.

[91] The AG submits that KFN is attributing a meaning to its participation in the Deh Cho Process, the TLE process, and the KFN community claim which is not borne out by the evidence. There are several groups who claim the Naghah Zhie as part of their traditional territories, and the Ka'a'Gee'Tu First Nation has been recognized as having a reasonably arguable claim to the Project area (*Ka'a'Gee'Tu 2007*, above, at paragraphs 7, 107). KFN asserts a strong *prima facie* claim to

the Naghah Zhie by virtue of the *Paulette* decision, but that case does not discuss KFN's evidence or rights to the Project area at all.

[92] Any potential adverse impacts of the Type A Water Licence on KFN's asserted treaty and Aboriginal rights is moderate. EA03-055 determined that the Project will not likely have a significant environmental impact, and no substantive concerns were expressed by KFN that were not considered during EA03-005. Given the expansive definition of "impact on the environment" in section 111(1) of the Act, the Board's consideration of potential impacts to the environment was inherently broad and led to a good consultative process.

[93] KFN claims that it will have no further opportunity to comment on the effects of the Project for the 15-year term, but the AG points out that KFN will have the opportunity to comment prior to the approval of various operational plans. KFN can also review and comment on the annual environmental monitoring reports required over the 15-year term; if these reports identify adverse impacts, the Type A Water Licence may need to be amended, which would require further consultation. When Paramount decides to drill new wells (the "additional" wells scoped into the Type A Water Licence), the permits required will provide a further opportunity for KFN to discuss impacts of any new wells.

[94] In *Taku River*, above, the adverse effect was deemed relatively serious in part because the area of development at issue in that case was "critical to TRTFN's domestic economy." This is not the case here; KFN has used the Naghah Zhie for traditional activities to some extent, but the area is not critical.

The Crown has Discharged the Duty

[95] Pursuant to *Haida*, above, at paragraphs 43-45, the scope of consultation owed in the mid-range includes adequate notice of the matter to be decided, an opportunity to discuss with decision-makers the potential adverse impacts of the decision and how those impacts might be mitigated, and that the decision-maker take the expressed concerns into account in making the decision.

[96] The AG submits that these obligations have been fulfilled through the EA03-005 process and the Board's process. KFN had all the required information and notice to fully participate, and was afforded many opportunities to express any concerns. In addition, both Paramount and the Minister met with KFN independently of these regulatory processes. Finally, KFN's concerns were given serious consideration and were taken into account in the Board's recommendations and the final terms of the Type A Water Licence.

[97] The Crown is entitled to rely on regulatory processes in determining whether the duty to consult has been discharged (*Yellowknives, Taku River*). The scope of the activities studied in EA03-005 was the same as the scope of activities authorized by the Type A Water Licence, and this was noted by the Board. Both the Minister and KFN participated in EA03-005, which extensively considered the impacts of the Project. All the recommendations that resulted from EA03-005 were brought into the terms of the Type A Water Licence.

[98] The Board's process provided opportunities for KFN to participate at many different steps. Special accommodations were put in place so that KFN could participate by telephone and make use of interpreters. KFN had notice of all these steps but chose not to participate in any of them.

Further, the Board took the comments that were provided by KFN into account before it finalized the terms and conditions of the Type A Water Licence.

[99] The AG also points out that KFN was provided adequate funding to participate in the process. KFN received the full amount of resource pressure funding requested. When the application for the funding was made, KFN already had notice of the Type A Water Licence application, and referenced the Project specifically in its resource pressure funding request. In *Ka'a'Gee Tu 2007* a similar claim was made about lack of resources, and the Court rejected it.

[100] Between August and December 2010, the Minister's office made numerous attempts to set up a meeting with KFN to discuss the Type A Water Licence. At the meeting held on 11 January 2011, KFN said it did not know of any concerns that had not already been raised at some point in the process. KFN nevertheless requested the negotiation of a consultation and accommodation protocol to determine if there might be any as-yet unexpressed concerns and stated that, without such a protocol, consultation could not be deemed adequate.

[101] Sometimes a decision must be made even when an Aboriginal group asserts that consultation is not adequate, and to make a decision in these circumstances is not unreasonable (*Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2007 FC 567 [*Ahousaht*]). There is no duty to reach agreement, and no reason that a rapid conclusion to a consultation process will necessarily deprive an Aboriginal group of meaningful consultation when the preceding process itself has been lengthy and adequate (*Taku River*, above).

[102] The Minister had a deadline of 13 February 2011 to decide whether to approve the Type A Water Licence, after extending the deadline by 30 days to provide sufficient time to consider the

adequacy of consultation. Staff completed a Crown Consultation Assessment and determined that KFN had had a fair opportunity to participate and there were no potential adverse impacts that had not already been discussed. Thus, the AG submits it was reasonable for the Minister to conclude that the duty to consult had been discharged.

[103] Even if "deep" consultation was required in this case, the AG submits that it has in fact engaged in deep consultation as defined in *Haida*. KFN had the opportunity to make written submissions, and the Board issued written reasons that showed how KFN's concerns were taken into account in the draft of the Type A Water Licence that was approved by the Minister.

KFN's Duty to Take Advantage of Consultation Opportunities

[104] While consultation is a duty of the Crown, there is also a corresponding duty on the part of Aboriginal groups to participate in good faith in reasonable consultation opportunities. There is a reciprocal obligation on Aboriginal groups to "carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution" (*Mikisew Cree*, above, paragraph 65).

[105] The AG submits that KFN has not "carried their end of the consultation." Despite reasonable notice and opportunity, KFN refused to participate in the Board's process, even when arrangements were made to facilitate participation in the public hearing by phone.

[106] Contrary to paragraph 96 of KFN's submissions, KFN did receive the original notice of the Type A Water Licence application. KFNs submits that it did not have enough time to prepare and file a written intervention after the hearing location was changed to Yellowknife, but if KFN was

prepared to participate if the hearing was held in Hay River there is no reason it should not have been similarly prepared to participate by phone in the Yellowknife hearing.

[107] KFN waited until 11 days before the hearing to assert a right to participate, and requested that another hearing be held in Hay River in September, 2010. When the Board did not agree, KFN refused to participate. KFN cannot unilaterally impose conditions on how the Board's consultative process should proceed (*Cook v British Columbia (Minister of Aboriginal Relations and Reconciliation)*, [2008] 1 CNLR 1). Further, at the 11 January 2011 meeting, KFN refused to engage in consultation until INAC agreed to negotiate a consultation and accommodation protocol and provide $100,000 in funding.

[108] The AG says that the facts in *Ahousaht*, above, were similar. The Court found that the Minister was not obliged to enter into a consultation protocol following a regulatory process where the First Nation refused to engage in reasonable opportunities for substantive discussions until such a protocol was in place. KFN claims it requires a hydrologist to fully understand the potential adverse impacts of the Project, but it should not need to duplicate the expertise provided in the previous regulatory processes.

[109] Further, any lack of knowledge is at least partially due to KFN's own choices. Chief Fabian admitted he had not read EA03-005, and KFN did not participate in the technical sessions or public hearing, which would have provided a basis for understanding the Type A Water Licence and the Project generally. There were also several documents on the public registry, and KFN could have asked questions at the 11 January 2011 meeting. KFN did not avail itself of these opportunities. It is disingenuous for KFN to now state that it cannot understand the potential adverse effects of the Type A Water Licence without entering into a consultation protocol.

[110] In summary, the AG submits that KFN has not fulfilled its obligation to take part in reasonable opportunities to express its concerns, and so cannot now complain that consultation was inadequate.

The Minister Did Not Violate Any Provisions of the Act

[111] KFN has not specifically explained how the Minister has violated any section of the Act, yet requests a declaration of such violation.

[112] The AG submits that the duty to consult has been satisfied, so section 5(2) of the Act is not breached. The Board considered conservation and traditional knowledge, and so section 60.1 of the Act is satisfied.

[113] Section 64(1) puts a duty on the Board to consult affected First Nations, but this is a duty of the Board and not the Minister, so no declaration can be made that the Minister violated section 64(1) of the Act. In any event, the AG submits that the Board did meet this obligation.

[114] The AG submits that KFN is asking this Court to impose obligations on the Minister that are clearly intended to be the Board's obligations. The Court cannot incorporate into legislation a term that was not intended by Parliament (*Ka'a'Gee Tu 2007*).

Paramount

[115] Paramount points out that it is the Minister's decision to approve the Type A Water Licence that is under review in this application and not the Board's decisions or processes. The only relevance of the Board's regulatory process is the extent to which the Minister should have relied on

it when determining that there had been adequate consultation with KFN in the circumstances. This is clearly distinguishable from the *Yellowknives* decision, where it was a decision of the Board that was under review and not the Minister.

Duty to Consult

[116] Paramount agrees with the AG that the duty to consult in this case falls somewhere in the mid-range of the spectrum. In *Ka'a'Gee Tu 2007*, the Ka'a'Gee Tu were found to have a "reasonably arguable case" to Aboriginal rights, including title to the Naghah Zhie. KFN cannot be said to have a stronger case to the Naghah Zhie than the Ka'a'Gee Tu. There are a multitude of competing claims to the area, and "overlapping claims…undoubtedly affects the strength – namely exclusivity – of [First Nation] asserted title interests and rights" (*Louis v British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070 [*Louis*] at paragraph 171).

[117] Not every issue requires the Crown to "develop special consultation measures" beyond a statutory procedure (*Taku*, above, at paragraphs 22 and 40). Furthermore, in *Upper Nicola Indian Band v British Columbia (Minister of Environment)*, 2011 BCSC 388 it was found that statutory environmental assessment processes can amount to "deep consultation." So long as the Minister independently assesses the adequacy of consultation, it is immaterial that aspects of the consultation process were delegated to others (*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53). Paramount submits that this is especially so considering the design and purpose of the Act itself, which specifically contemplates First Nation participation in the regulatory process. The Act cannot be compared to the public forum process at issue in the *Dene Tha'* decision cited by KFN on this point, where the process was not tailored to consider and prioritize Aboriginal concerns.

[118] Paramount submits that, given the regulatory regime in place, and the invitation to KFN to participate in the regulatory process, the characterization of "one meeting" being the extent of consultation is simply inaccurate and misleading. There is a long history of consultation between the parties behind the Type A Water Licence, and KFN was provided with a full, reasonable and fair opportunity to participate in the process at every step.

[119] In the particular circumstances of this case, it was appropriate for the Minister to consider past regulatory processes. EA03-005 specifically contemplated a Type A Water Licence such as the one at issue in this application. Chief Fabian acknowledged that all of KFN's concerns were addressed during this process. The concerns expressed by KFN in its 22 September 2010 submissions on a Motion for a Ruling were addressed by the Board when drafting the terms of the Type A Water Licence. The concern KFN has raised for the first time in these proceedings about the vagueness of the terms of the licence should have been raised during the technical sessions, public hearing or in submissions. This judicial review is not the proper venue for raising this new concern. In addition, any concerns about hydraulic fracturing were expressly contemplated in EA03-005.

[120] Chief Fabian stated in cross-examination that his only concern with the Type A Water Licence was its term, which he had understood to be longer than the scope of the Project considered in EA03-005. He admits that he did not know that the scope of EA03-005 covers a period of 20 years. He also admits to never having read the EA03-005 report, never having made an assessment with respect to the difference between the Type "A" and Type "B" water licences, and not knowing how water is used with respect to the Project.

[121] Paramount reiterates that the duty to consult is not a duty to agree; it is a duty for the Crown to seek input, inform itself and respond honourably (*Haida* at paragraph 42). Paramount has had a

large role as a source of information in the regulatory processes, but the Crown is responsible for discharging the duty to consult; the honour of the Crown cannot be delegated or discharged by an industry proponent (*Haida* at paragraph 10).

Duty of KFN to Participate in Good Faith

[122] Paramount reiterates the arguments put forward by the AG on this issue, and points to the decision in *Louis*, above, at paragraphs 223-224:

> 223 I also cite the following passages from *Woodward, supra*:
>
> > 5 s. 1900 Aboriginal groups must also engage in the consultation process in good faith. As a general rule, this means sharing relevant information and discussing the proposed decision or course of action with an open mind about the likely impact of the decision and the possible ways of accommodating their s.35 rights. If an Aboriginal group's only objective is to prevent a particular project from being approved, the courts will not normally consider this to be a good-faith effort, because the Supreme Court of Canada has emphasized that the consultation process generally does not give Aboriginal groups a veto over Crown decision-making. [Footnotes omitted. They refer to *Haida, supra*, at para. 48 and *Mikisew, supra*, at paras. 65-66.]
> >
> > ...
> >
> > 5 s. 1970 Aboriginal groups do not need to share their information with the Crown, but the extent to which they do so will be a large factor in determining the appropriate level of consultation. An Aboriginal group that seeks deep consultation and accommodation measures should clearly articulate which rights it considers to be at stake, its basis for asserting those rights, and how it believes that the proposed decision or activity might affect those rights. The more information an Aboriginal group can share, and the better it substantiates the existence of

> its claimed rights and the basis for its concerns about impacts on those rights, the greater the onus on the Crown to address those concerns in the decision-making process.
>
> 224 In short, while a First Nation band may (for whatever reason) decide to take a hard-bargaining position, categorically object to a project and not share all relevant information in the consultation process, it risks entering into a situation where concerns arising from that information will not be taken into account in Crown's decision-making.

[123] Paramount submits that KFN has not utilized the numerous opportunities in the licensing process to inform itself of the potential impacts of the Type A Water Licence. Had it participated, KFN would not be forced to "speculate" as to the potential impacts of the licence, as it has done in its submissions for this application.

ANALYSIS

[124] There is little dispute between the parties as to the legal principles applicable to this review. They are well-established in the jurisprudence and do not need extensive elaboration from me.

[125] The parties agree that the Minister owed KFN a duty to consult over the decision to issue the Type A Water License for the Project. The basic question for the Court is whether, on the facts, that duty was appropriately discharged.

Standard of Review

[126] The parties agree that the standard of review applicable in this case was articulated by the Supreme Court of Canada in *Haida*, above. The scope or extent of the duty should be reviewed on a standard of correctness. However, the adequacy of the process of consultation undertaken requires

an analysis of the factual context and should be reviewed on a standard of reasonableness. See *Haida* at paragraphs 60-63.

[127] This means that, in deciding whether the process of consultation and accommodation was reasonable on the particular circumstances of this case, I will address the "existence of justification, transparency and intelligibility within the decision-making process" and whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47.

The Duty to Consult

[128] As KFN points out, the duty to consult arises when the Crown has real or constructive knowledge of the potential existence of the Aboriginal or Treaty right and contemplates conduct that might adversely affect it. The test for the duty to consult consists of three elements: (1) The Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct might adversely affect an Aboriginal claim or right. See *Rio Tinto*, above.

[129] The source of the duty to consult is in the honor of the Crown. The duty to consult "is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their Treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation." See *Rio Tinto*, above, at paragraph 32.

[130] In the present case, the Crown agrees that it had a duty to consult KFN regarding the Minister's approval of the Type A Water License for the Project, so that the Court need only decide on the scope of the duty that arises on the present facts and whether that duty was discharged.

[131] The Supreme Court of Canada has held that, once triggered, the scope of the duty to consult exists across a spectrum. See *Haida*, *Mikisew Cree*, and *Rio Tinto*, all above.

[132] The consultation spectrum is a range of duties of increasing depth that may arise depending on (a) the strength of the claimed section 35 rights, and (b) the seriousness of any potential impact on those rights. See *Haida*, above, at paragraphs 43-45.

[133] Canada submits that, considering the strength of KFN's claim to rights in the Project area, and the seriousness of the potential impact on those rights, the appropriate point on the consultation spectrum for this case is in the mid-range.

[134] KNF, on the other hand, says that it has a strong *prima facie* claim to the Project area and the potential adverse impacts of the decision upon its rights is "very serious," so that this required "something significantly deeper than mere consultation." See *Taku*, above, at paragraph 32.

[135] KFN says that its strong *prima facie* claim on the Project area is "evidenced by Treaty 8, its evidence in the *Paulette Caveat* case, its long history of negotiating a land claim either through the Dene Metis Land claim, the Deh Cho Claim, the Katlodeeche TLE, and the Katlodeecho Claim." KFN's argument for a "strong" *prima facie* claim, however, is overstated and unconvincing.

[136] The Project area is outside of the boundaries of Treaty 8 and, as the Supreme Court of Canada confirms in *Mikisew Cree*, above, Treaty 8 rights only exists within the defined

geographical limits of the Treaty. See paragraphs 42 – 43 of *Mikisew Cree*. The Court at this stage has no means of determining whether KFN has treaty rights outside of the Treaty 8 area. At present, KFN has merely asserted such rights.

[137] Nor does the evidence suggest that KFN has strong Aboriginal rights in the Project area. KFN affiants say that the Project area is rarely used and, in the Deh Cho land use planning process, the Naghah Zhie is mapped as an area of very low density for traditional land use.

[138] As regards the Deh Cho Process, the TLE process, and the KFN community claim process, the evidence shows that KFN is one of 11 Aboriginal and Métis groups negotiating a Deh Cho Comprehensive Land Claim Agreement. In that process, a Framework Agreement was signed in May 2001, and an Interim Measures Agreement in October 2008. A final draft Land Use Plan was completed in May 2006. An Agreement in Principle has not yet been reached, nor a Final Agreement. The proposed Deh Cho region includes the Naghah Zhie. The Framework Agreement expressly states as follows:

> Nothing in this framework agreement is to be interpreted as creating, recognizing or denying rights or obligations … on the part of any of the Parties.

[139] KFN has also had discussions with Canada with respect to additional TLE. TLE is an obligation to set aside reserve lands based on population at the time Treaty 8 was entered into. KFN submitted a claim to Canada that some of its population was not accounted for when the Hay River reserve was created. KFN and Canada have agreed that the TLE shortfall will be remedied through a monetary payment. Contrary to the assertion of KFN, the TLE process does not in any way include a discussion of KFN rights to the Naghah Zhie. The TLE process is based solely on historic population size, not the location or area of asserted traditional territory.

[140] Finally, KFN is involved in discussions with Canada about withdrawing from the Deh Cho Process and entering into a negotiations process for a community-based Comprehensive Land Claim Agreement. These discussions have not yet resulted in a signed Framework Agreement, and may never reach that point. KFN has submitted a map of its asserted traditional territory to Canada for the purpose of discussion. Canada has not explicitly or implicitly accepted KFN's asserted rights in the Naghah Zhie by virtue of these exploratory discussions.

[141] The evidence also reveals that there are several Aboriginal groups who claim the Naghah Zhie area as part of their traditional territory, and I see nothing in the *Paulette Caveat* case that provides any evidence that KFN has rights in the Project area.

[142] All in all on this point, I have to agree with Canada that KFN has nothing more than reasonably arguable treaty and Aboriginal rights in the Project area.

[143] I also agree with Canada that the seriousness of any potential adverse impact of the Type A Water Licence on the KFN's asserted treaty and Aboriginal rights can be no higher than moderate. The only convincing evidence on point comes from the MVEIRB Report for EA03-005 to the effect that "with the implementation of the measures recommended … and the commitments made by Paramount … the proposed development will not likely have a significant environmental impact or be cause for significant public concern." There will also be future opportunities for KFN to address effects of the Project during the term of the Type A Water Licence, and the evidence suggests that the Project area is not of serious importance for KFN's domestic economy.

[144] All in all, then, I cannot place the duty to consult in this case any higher than the mid-range of the spectrum. More than mere notice and information sharing were required, but the case is not one that requires deep consultation and serious accommodation.

[145] This means that, in accordance with *Haida*, above, at paragraphs 43-45, adequate consultation in this case requires:

a. Adequate notice of the matter to be decided;

b. The opportunity for KFN to discuss the potential impacts of the decision and how those impacts might be mitigated;

c. That the Minister take KFN's concerns into account in making the decision.

[146] As the British Columbia Court of Appeal put it in *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, above, at paragraph 160:

> [T]he Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

The Decision

[147] In making the decision to issue the Type A Water Licence in this case, the Minister relied upon the following to discharge Canada's duty of adequate consultation and accommodation:

a. The EA03-005 process;

b. The Board process; and

c. Direct correspondence and meetings between Canada and KFN and Paramount, and KFN independently of the regulatory processes.

[148] AANDC staff examined the whole record and produced a Crown Consultation Assessment in order to brief the Minister before the decision was made. AANDC concluded that the EA and Board processes had provided a fair opportunity for KFN to express its concerns about the Type A Water Licence. AANDC staff also concluded that, where appropriate, KFN's expressed concerns had been considered and accommodated in the terms and conditions of the Type A Water Licence. Based upon this assessment and the totality of the information examined, the Minister concluded that the duty to consult with KFN had been discharged and he approved the Type A Water Licence.

KFN's Position

[149] KFN says that the duty to consult was not discharged in this case for a variety of reasons. KFN's position, as stated in its written submissions, was amended and modified by its oral submissions at the hearing before me. The Court's understanding of KFN's current objections to the Type A Water Licence can be summarized as follows:

a. The duty to consult was breached throughout the entire regulatory process on the Type A Water Licence as neither the Board or the Minister honorably responded to KFN's genuine and repeated attempts to engage in meaningful consultation;

b. The Board's denial of responsibility for consultation, and thus refusal to engage in consultation with KFN, limited KFN's ability to fully articulate the potential adverse impacts of the Type A Water Licence on KFN's Aboriginal and treaty rights in the Project area;

c. Consultation on past water licence applications or past decisions in environmental assessment processes, such as the process in EA03-005, may have been adequate consultation in the past, but past consultation does not satisfy the duty to consult on the current Type A Water Licence. This is because the duty to consult relates to current government conduct or a decision, and not past conduct;

d. The duty to consult did not end with EA03-005 because KFN is concerned with the breach of the duty to consult on the decision to approve the Type A Water Licence for wells that have not yet been drilled and water that has not yet been accessed;

e. The Board was required to consider the adequacy of Crown consultation before it made the decision to recommend to the Minister the approval of the Type A Water Licence, and the Board refused to use any of its available processes to allow KFN to participate in a reasonable manner so that KFN's concerns could be well understood and meaningfully discussed;

f. For various reasons, the meeting of 11 January 2011 between KFN representatives and the Crown did not satisfy the Crown's duty to engage in a level of meaningful consultations. The Minister could have entered into meaningful consultation with KFN, but chose not to;

g. There are existing Treaty and Aboriginal rights that are adversely impacted by the Type A Water Licence and the extent of those impacts are unknown;

h. This case is "remarkably similar" to *Yellowknives*, above, where the Court said that "no one took responsibility for ensuring meaningful consultation." KNF was not necessarily entitled to all that it would like but it was entitled to some substantial consultation;

i. The Minister could and should have consulted directly with KFN, instead of relying upon the processes of the Board. The Board did not consult with KFN and ruled that it had no authority to consult with KFN. This means that the only purported consultation between the Minister and KFN occurred at the 11 January 2011 meeting, and this was totally inadequate to fulfill the duty to consult;

j. KFN has fulfilled its reciprocal duty to take advantage of consulting opportunities. Failure to attend the Board's public hearing is irrelevant because the Board was not engaged in consultation and, even if the Board's process could be relied on, KFN's submissions and concerns were not addressed by the Board. Canada's own representative acknowledged that some of KFN's concerns may not have been addressed, yet the Minister continued to rely upon the Board's process;

k. KFN had no obligation to participate in the Board's process because that process was not consultation. KFN's duty is to engage in consultation; it has no duty to engage in any and all regulatory processes.

Reliance on Regulatory Processes

[150] In the present case, the Minister placed significant reliance upon prior regulatory processes in order to satisfy the acknowledged duty of consultation with KFN. The jurisprudence is clear that the Crown is entitled to do this, as long as the regulatory process concerned:

a. Provided KFN with all necessary information in a timely way;

b. Gave KFN an opportunity to express its interests and concerns;

c. Gave KFN's representations serious consideration; and

d. Wherever possible, demonstrably integrated KFN's concerns into the proposed a plan of action.

See *Halfway River*, above, paragraph 160.

[151] The Crown is not required to "develop special consultation measures" if an established statutory procedure will suffice and satisfy the above-noted conditions. See *Taku River*, above at paragraphs 20 and 40. The Supreme Court of Canada in *Beckman*, above, recently confirmed that participation in a forum created for other purposes can satisfy the duty to consult if an appropriate level of consultation is provided. See *Beckman*, above, at paragraph 39.

[152] In principle, then, there was nothing to prevent Canada in the present case from relying upon the previous regulatory processes already undertaken in discharging the duty to consult, provided that Canada independently assessed the adequacy of that prior consultation. The independent assessment in the present case was provided by the Crown Consultation Assessment.

[153] KFN argues that such prior assessment was not consultation at all — at least as regards the Board process — but also says that, even if it was consultation, it was not adequate. My review of the prior EA and Board processes, together with the direct consultation undertaken by the Crown, leads me to the conclusion that KFN's arguments on this point are not sustainable and that the evidentiary record reveals that appropriate and adequate consultation on KFN's submissions and concerns did take place.

Adequate and Appropriate Consultation

[154] The record in this case is both dense and voluminous. My conclusions are based upon the following principal findings, taking into account the record which the parties have placed before me in this application.

Prior Environmental Assessments

[155] The decision of the Minister to approve the Type A Water Licence is merely one step in a Project that has been on-going for many years. The Project and its impacts have been extensively studied. For example, four environmental assessments have been conducted and there have been many land use permits and Type B Water Licences issued, even though this is the first Type A Water Licence.

[156] Throughout the life of the Project, KFN has been supplied with extensive information and has been kept updated on new developments. KFN has had many opportunities to express its concerns about the Project, including its concerns about the Type A Water Licence. In fact, KFN fully participated in the important EA03-005, and to some extent also participated in the Board process and engaged in direct consultation with the Crown over the Type A Water Licence.

[157] In relation to the Board's process, KFN brought a Motion for Ruling and the Board ruled that the process leading to the public hearing for the Type A Water Licence was fair. As part of its decision, the Board found, *inter alia*, that KFN had "received notice of every step in the process, beginning as early as March 18, 2010 as well as the fact that all relevant materials were circulated to KFN and all participants in the proceeding." The Board also found that "the activity proposed by

Paramount is an unmodified part of the development addressed in EA03-005. Because the development has not been modified, the consultation efforts made during and after that process also apply to this Type A Water Licence application." The Board's decision on KFN's Motion for Ruling has not been challenged.

[158] When the Board found that the activity proposed by Paramount under the Type A Water Licence was an unmodified part of the development addressed in EA03-005, it meant that the Board had considered the potential cumulative environmental impacts for the remaining life of the Project. This means a total of 92 wells and associated facilities. The total of 92 wells included 42 wells that already existed or were proposed by Paramount at the material time, as well as some 50 additional wells that were reasonably foreseeable as part of the Project in the future. In other words, the use of a Type A Water Licence for the 15 to 20 years of production for 92 wells was already assessed as part of EA03-005. As part of its unchallenged decision in KFN's Motion for Ruling, the Board found that "EA03-005 clearly anticipated that protection would occur on the Paramount SDL [Significant Discovery Licence], if the EA Report were approved", and "it was clear that during the Cameron Hills Project that more wells would be drilled on the SDL and that they would be production tested and if viable tied into the gathering system," and "the development subjected to EA clearly included the production of oil and gas that would take place on Paramount's SDL in the Cameron Hills."

[159] These unchallenged findings of the Board are important because the evidence shows that KFN participated fully in the public hearing for EA03-005 and provided both oral and written submissions regarding its asserted rights and concerns about potential adverse impacts of the Project. The Board expressly considered KFN's comments and KFN did not challenge the Board's

recommendations or the adequacy of Crown consultation during EA03-005. In fact, this Court has already held in *Ka'a' Gee Tu 2007*, above, that the EA process was a good one. See paragraph 119.

[160] At the oral hearing of this application, KFN conceded that EA03-005 can be relied upon, but not for the new matters and modifications that have arisen since. However, given the Board's unchallenged findings that the "development subjected to EA clearly included the production of oil and gas" in the Project area, and it was clear that more wells would be drilled and would become part of the gathering system, and that "KFN counsel had submitted no relevant evidence indicating that the development described and approved in EA03-005 has been modified," the Court cannot accept KFN's position that its concerns have not been addressed.

[161] In essence, there are no new matters or modifications that needed to be addressed. In fact, in its letter of 22 September 2010 to the Board in which KFN provided comments on the draft Type A Water Licence — which authorizes water use for "the existing and planned wells (as detailed in Schedule 1), and the future 36 well defined by EA03-005" — KFN expressed concerns about wildlife, trapping, fishing, gathering, burial grounds and camping, and the Aboriginal right to water. All of these concerns had been raised in EA03-005. Chief Fabian was cross-examined on this point and he conceded that he was not aware of any KFN concerns that were not set out in this 22 September 2010 correspondence. Once again, therefore, the Court cannot accept KFN's assertion that its concerns have not been raised and addressed as part of the extended process that took place as the Project evolved.

[162] In order to avoid this obvious conclusion, KFN has raised three concerns in particular, over which it says that consultation did not take place: Aquatic Effects Monitoring; the term of the Water Licence; and fracking.

[163] As regards the term of the licence (which in cross-examination Chief Fabian said was his only concern), the Type A Water Licence and its term are contemplated by EA03-005, which covers a period of 20 years of oil and gas production and cleanup. Chief Fabian appears to have been under the impression that the term was longer than the scope of the Project considered in EA03-005. Chief Fabian in cross-examination acknowledged that all of KFN's concerns were properly addressed during the EA03-005 process, which contemplated this kind of Type A Water Licence for the Project. The term is not, then, a new concern that has not been addressed.

[164] The "fracking" concern has never been raised by KFN in the past and has been raised for the first time before me as a part of this application. It can hardly be said that the Crown has failed to consult with KFN on an issue that KFN has not indicated as a concern until now. As Paramount points out, fracking was expressly contemplated as a completion technique within the scope of EA03-005, and was addressed in the context of the environmental assessment. Chief Fabian conceded in cross-examination that he was aware that the cumulative effects of the Project were considered under EA03-005. Yet he is raising fracking before the Court for the first time. KFN has also been repeatedly asked to state its concerns about the Project, but has not mentioned fracking.

[165] As regards the Aquatic Effects Monitoring, I believe KFN is well aware of the weakness of its case in this regard, and has attempted to bolster its position by raising additional concerns for the first time in this application. The proper venue for raising new concerns is not this application. There is no evidence before me that KFN will not be able to raise and have considered any new concerns with the Crown as the Project evolves, or indeed that concerns such as "fracking" have not already been addressed as part of the EA process. This approach by KFN of raising new concerns before me that were not brought forward during the many opportunities KFN has had to raise them,

and when they could have been properly considered and addressed by qualified personnel prior to the issuance of the Type A Water Licence, cannot undermine the reasonableness of the Minister's decision to approve the Type A Water Licence on the basis of the whole record before him.

The Board Process

[166] Consideration of the Type A Water Licence before the Board involved an assessment of the potential cumulative impacts for the remaining life of the Project of the total 92 wells and associated facilities. Paramount was seeking a single Type A Water Licence that "incorporated the entire scope of EA03-005" in order to advance the Project and pursue its long-term oil and gas production for up to 92 wells. The record shows that, throughout the entire Board process for the Type A Water Licence, KFN received notice of all steps taken by the Board to review Paramount's application and was given extensive and ample opportunity to raise any concerns. KFN also had access to all relevant documents, which were posted on the Board's public registry. KFN failed to avail itself of many of the opportunities which this process allowed it, and little by way of explanation has been offered to the Court for this failure. On 22 September 2010 KFN did, however, write to the Board and expressed comments on the terms and conditions of the draft Type A Water Licence. These concerns related to wildlife, trapping, fishing, gathering, burial grounds, camping, and the right to water, all of which had been raised and addressed as part of the EA03-005 process. At the same time, KFN filed its Motion for Ruling with the Board and followed up with further submissions on 15 October 2010 and 22 November 2010. The Board ruled, *inter alia*, that the Board process had been procedurally fair, and KFN has not sought to have that decision reviewed. In any event, my review of the evidence and the process leads me to conclude that KFN was given every opportunity to state its concerns and that, where so stated, those concerns were fully addressed.

[167] As part of this application, KFN has attempted to insinuate that it was hampered by a lack of funding from responding adequately to the Board process. This allegation is entirely unconvincing. The record before me shows that KFN applied for and received Interim Resource Management Assistance (IRMA) resource pressure funding ($30,000), as well as IRMA base funding. When KFN applied for IRMA resource pressure funding it was well aware of Paramount's Type A Water Licence application and specifically mentioned the Project to justify the need for additional funding. KFN's resource pressure funding was approved in addition to $40,135.00 in base funding for fiscal year 2010-2011 and KFN signed the base funding agreement on 9 June 2010. Hence, it is clear that KFN received all of the IRMA funds requested for 2010-2011 and that this funding took into account KFN's needs for the Board process. Noticeably, KFN did not refer to these funding issues in oral argument before me on this application as a cause of KFN's failure to participate fully in the Type A Water Licence process before the Board.

[168] What KFN argued before me at the oral hearing for this application was that the Type A Water Licence process of the Board was not consultation at all because the Board itself in its decision on KFN's Motion for Ruling said that "In this case, the Board has no authority to conduct consultation and is not responsible for judging the adequacy of Crown consultation." A reading of the Board's Motion for Ruling decision as a whole, as well as a review of the Board's process over the course of the Type A Water Licence application, reveals that KFN is reading these words out of context. The Board was asked what its jurisdiction was "with respect to the duty to consult [KFN]," and "if the Board has a duty to consult, did the Board consult." The Board's answer to, and rulings on these questions, is an attempt to make it clear that, in this case, the duty to consult rests with the Crown. The Board does not say that, in fulfilling this duty, the Crown cannot rely upon the Type A Water Licence process before the Board. The Board makes this clear in the body of its ruling:

> In this case the final decision-maker is the Minister of DIAND. In the Board's opinion, it is the Minister who has the responsibility to determine whether consultation is adequate or not. The MVLWB recognizes that its process can contribute to the discharging of the Crown's obligation, but it would be premature for the Board to purport to judge the adequacy of consultation before the licensing process is complete. In this case, the Board holds that it is not responsible for judging the adequacy of consultation.

[169] In my view, this is a complete answer to KFN's late allegation that what took place before the Board cannot contribute to the Crown's obligation to consult with KFN. This late argument has an air of desperation about it because it is clear that, unless it is accepted, KFN had every opportunity to make its concerns known before the Board and that those concerns were addressed and fully taken into account before the Board passed its motion on 10 December 2010, issuing the Type A Water Licence, subject to Ministerial approval. The Board's conclusion that "its process can contribute to the discharging of the Crown's obligation," but the final decision on whether the duty to consult had been discharged in this case was for the Minister to make, was not challenged by KFN, except by way of collateral attack in this application. Having concluded that KFN's argument on this point is not supported by the Board's decision and the reality of what occurred before the Board, much of what KFN has to say about inadequate consultation and the breach of the duty to consult by the Crown simply falls away.

[170] Consultation by way of the Board process was particularly apt and complete in this case because the Act is unique legislation that is designed to ensure First Nation participation in the regulatory process. Justice Blanchard made this point in *Chicot*, above:

> The consultation process provided for under the Act is comprehensive and provides the opportunity for significant consultation between the developer and the affected Aboriginal groups …. In essence, the product of the consultation process is reflected in the Review Board's Environmental Assessment Reports.

> These Reports … do reflect the collective input of all of the parties involved….

[171] As Paramount points out, the Act was enacted in 1998 to establish a legislative scheme for an integrated system of management of land and water on public and private lands in the Northwest Territories. The Act establishes land and water boards and environmental review boards whose purpose is "to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians." Input from the community and consultation is the cornerstone of this legislation and guides the processes carried out by the boards created under the Act.

[172] Under the Act, communications sent between industry proponents, the Board and all interested parties are forwarded to all other interested parties, such as local First Nation groups, including KFN, who are provided with an opportunity to comment and make submissions with respect to any proposed permits and licenses.

[173] Part 5 of the Act provides the legislative framework for the review process and environmental assessment process mandated by the Act. One of the purposes of this part of the Act is to "ensure that the concerns of aboriginal people and the general public are taken into account," with the process providing due consideration to the protection of the environment, the protection of the social, cultural, and economic well-being of residents and communities in the Mackenzie Valley and the "importance of conservation to the well-being and way of life of the aboriginal people…who use an area of the Mackenzie Valley."

[174] KFN compares the present situation to the public forum process at issue in *Dene Tha' First Nation*, above. However, in that case, the process under scrutiny was not structured to prioritize and

assess Aboriginal concerns, while the process under the Act is. The record in the present case demonstrates a long history of consultation with KFN by both Paramount and Canada that extends throughout the whole history of the Project. The regulatory process under the Act was part of that history of consultation and, to use the words of Justice Blanchard in *Ka'a' Gee Tu 2007*, at paragraph 119, it provided KFN with an opportunity to express its interests and concerns and ensured that those concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

Direct Consultation Between the Minister and KFN

[175] In addition to the *de facto* consultation that took place as a consequence of the EA process, the whole history of the Project development, and the process before the Board for the Type A Water Licence, the Minister communicated directly with KFN with a view to ascertaining whether there were any additional concerns that had not been otherwise addressed. KFN is now attempting to characterize these direct discussions as the only consultation undertaken by the Minister on matters of concern to KFN. This is not the case.

[176] The record shows that AANDC staff engaged with KFN independently of the regulatory process between August and December 2010, and that a consultation meeting eventually took place on 11 January 2011. At this meeting, KFN was specifically asked about its concerns with the Type A Water Licence, and KFN made it clear that it did not know of any concerns that had not already been raised during the EA and Board processes.

[177] At the same meeting, KFN said that it wanted to negotiate a consultation and accommodation protocol with Canada as a means of determining whether there might be, as yet,

unidentified concerns. KFN took the position that, without such a protocol, consultation would not be adequate. However, there is nothing to support this position. The fact that KFN wishes to negotiate a Consultation and Accommodation Protocol with Canada does not bear upon the principal issue before me, which is whether the duty to consult was discharged on the facts of this case with regard to the approval by the Minister of the Type A Water Licence. Bearing in mind, the significant amount of indirect consultation that had occurred as part of the EA and Board processes, it was reasonable for the Minister to seek to understand and address new concerns about adverse impacts that may not have been identified earlier. Apparently, KFN had no such new concerns.

[178] At the oral hearing before me for this application, KFN referred the Court to the Meeting Notes for the 11 January 2011 consultation meeting and the following words of Yvonne MacNeill of the Department of Justice, speaking for Canada:

> Yvonne said: I've been told not to go into the past but I will need to a little to explain our position. First of all this project is not a new project. North Arrow was a new project. As Chief Fabian mentioned Paramount has been around for years, the Paramount development has gone through numerous regulatory processes including 3 EAs, the development was approved years ago and we are now at the stage of issuing the licence for the approved project. KFN's counsel had submitted KFN concerns via the request for ruling submissions and others had raised some of the same concerns. Maybe not all KFN concerns were addressed but some concerns have been taken into account via licence conditions. I also want to let you know that the licence was issued by the Board on Dec. 13th with a correction on Dec. 15th and that the legislation requires the Minister to make a decision within 30 days, with the option of extending that for another 30 days. The Minister has no legal authority to extend past the 60 days to issue or reject the license. [Emphasis added]

[179] KFN says that the words "Maybe not all KFN concerns were addressed but some concerns have been taken into account the licence conditions" is an admission by Canada that not all of

KFN's concerns have been taken into account, so that consultation has not been adequate. This is a very narrow basis upon which to mount an argument for inadequate consultation.

[180] To begin with, these are meeting notes and it is not at all clear what Ms. McNeill has in mind. The full context of the meeting and the notes suggest a meaning to me that is entirely different from the one suggested by KFN.

[181] The full notes of the meeting reveal that KFN wanted the Minister not to approve the Type A Water Licence because the whole process leading up to it was flawed. However, rather than articulate what impact concerns had not been adequately dealt with as part of that process, KFN wanted to begin consultation all over again by way of a consultation protocol. Canada made it clear that it felt it could rely upon the extensive EA and the Board processes, but Chief Fabian is reported as refusing to countenance this approach and as saying "If we do not get a protocol, see ya in court."

[182] Obviously, from the context of the whole meeting, Canada did not think that the whole consultation process needed to be repeated by way of a consultation protocol. Ms. McNeill's comments are made in response to submissions that have been made in the past by KFN. If Ms. McNeill is admitting that not all of KFN's concerns have been addressed, then KFN would have no trouble demonstrating to me what those concerns are and explaining how and why they have not been addressed as part of the EA and Board processes. KFN has not been able to do this. It is much more likely that Ms. McNeill is simply acknowledging that "maybe" KFN's concerns have not all been addressed as KFN would like them to have been addressed, but clearly "some concerns" have been addressed because they "have been taken into account via license conditions."

[183] Canada does not have to accept and accommodate every concern raised by KFN, and Canada's failure to take every concern into account via licence conditions does not mean that the consultation surrounding the Type A Water Licence was inadequate. When I examine the whole record, I find that adequate consultation has, in fact, occurred, but this does not mean that the Crown has accepted that every concern raised by KFN is justified and requires specific licencing provisions to deal with it.

[184] The record before me is clear that, over the course of the Project and, in particular, with reference to the Type A Water Licence, KFN has been provided with all necessary information in a timely manner to allow it to understand the proposed plan of action and its potential impact upon KFN's Treaty and Aboriginal rights. In addition, KFN has been given fair and ample opportunity to express its interests and impact concerns prior to the approval of the Type A Water Licence. The next question is whether KFN's concerns have been seriously considered and, wherever possible, whether those concerns have been demonstrably integrated into the proposed plan of action – in this case, the approval of the Type A Water Licence.

Consideration of KFN's Interests and Concerns

[185] The duty to consult does not mean that the Crown had to agree with KFN in this case and adopt whatever KFN said was necessary. See *Ahousaht*, above, at paragraph 69.

[186] Before the Minister approved the Type A Water Licence on 11 February 2011, AANDC staff examined the whole record and produced a Crown Consultation Agreement in order to brief the Minister. AANDC staff concluded that the EA and the Board processes that took place provided a fair an adequate opportunity for KFN to understand and express its interests and impact concerns

with the Type A Water Licence. They also concluded that the relevant impact concerns were considered and, where appropriate, were accommodated within the terms and conditions of the Type A Water Licence. In my view, KFN has not seriously challenged this conclusion in this application. The Court understands that KFN would like its concerns to be addressed as part of a Consultation Protocol between KFN and the Crown, but KFN has not demonstrated that its Treaty and Aboriginal rights have not been demonstrably addressed by the Type A Water Licence and the process that led to it. As already discussed, the Type A Water Licence application was expressly contemplated by EA03-005. Given the evidence provided by Chief Fabian in cross-examination, it is difficult for the Court to understand how KFN can now say that its interest and concerns were not addressed and, where possible, accommodated. In cross-examination, Chief Fabian recognized that all of KFN's concerns were properly raised and addressed during the EA03-005 process. The evidence before me from R. Jenkins, who is the Manager of Communications for the Board, says that the KFN concerns over the Type A Water Licence, as expressed in KFN's letter of 22 September 2010 to the Board were taken into account by the Board when drafting the terms of the final licence. KFN has produced nothing to refute this position. Indeed, in cross-examination, Chief Fabian said that his only concern with the Type A Water Licence was its term. But, as already discussed, the Type A Water Licence was contemplated by EA03-005 and consideration of its impact was part of that assessment, and Chief Fabian conceded in cross-examination that EA03-005 properly addressed KFN's concerns and dealt with the cumulative effects of the Project. Hence, it is difficult to see what continuing concerns KFN had that had not been appropriately addressed by the Type A Water Licence and the process that led up to it.

Conclusions

[187] My general conclusion is that the honor of the Crown has been upheld in this case and that the duty to consult has been reasonably discharged. In accordance with *Haida*, above, KFN was provided with all necessary information in a timely way to allow it to understand how its Treaty and Aboriginal rights could potentially be impacted by the Type A Water Licence. KFN was also given fair and adequate opportunity to express its interests and impact concerns, even though KFN — at times in breach of its own duty to take advantage of consultation opportunities – did not always avail itself of those opportunities. Also, KFN's interests and impact concerns were seriously considered as part of the EA and Board process and by the Minister and, wherever possible and relevant, were demonstrably integrated into the terms of the Type A Water Licence. Even though KFN did not always avail itself on the consultation opportunities made available to it, my review of the record suggests that all of KFN's known concerns were, in any event, reasonably considered and reasonably accommodated by the Crown.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The parties are at liberty to address the Court on the issue of costs. This should be done, initially at least, in writing.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-434-11
STYLE OF CAUSE:	**CHIEF ROY FABIAN SUING ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE KATLODEECHE FIRST NATION AND THE KATLODEECHE FIRST NATION** - and - **THE ATTORNEY GENERAL OF CANADA AND PARAMOUNT RESOURCES LTD.**
PLACE OF HEARING:	Yellowknife, NWT
DATE OF HEARING:	March 19, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	May 2, 2013

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