NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66

Date: 20190809
Docket: CA 480920
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant

v.

The Nova Scotia Utilities and Review Board and Nova Scotia Power Inc.

Respondents

Kwilmu'kw Maw-klusuaqn Negotiation Office, Acadia First Nation, and Sipekne'katik First Nation

Intervenors

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: May 17, 2019, in Halifax, Nova Scotia

Subject: Administrative tribunal's authority to consider adequacy of the Crown's consultation with aboriginal groups under s. 35(1) of *Constitution Act, 1982*

Summary: Nova Scotia Power decided to refurbish its obsolete Tusket Main Dam. The project would adversely affect the archeological and fishing interests of nearby Mi'kmaq communities. Section 35 of the *Public Utilities Act* says "[n]o public utility shall proceed with any new construction, improvements or betterments", costing over $250,000, "without first securing the approval thereof by the [Nova Scotia Utility and Review] Board". After consulting with Mi'kmaq representatives, Nova Scotia Power applied, under s. 35, for the Board's approval.

According to s. 35(1) of the *Constitution Act, 1982*, as

interpreted by the courts, before Aboriginal peoples suffer an adverse effect to their potential rights caused by Crown conduct, they are entitled to consultation with the Crown and, when appropriate, to accommodation. The Supreme Court of Canada has directed when an administrative tribunal, before ruling on an application to approve a project, may determine whether prior consultations have been adequate. The Utility and Review Board determined that, in this case, prior consultations between the Crown and the Mi'kmaq had not been adequate.

The Board adjourned Nova Scotia Power's application for three months to allow an opportunity for further consultation. The Province appealed to the Court of Appeal.

Issues: Did the Board have the jurisdiction to consider whether the prior consultations between the Crown and Mi'kmaq representatives had been adequate under s. 35(1) of the *Constitution Act, 1982*?

Result: The Court of Appeal dismissed the appeal.

According to the Supreme Court of Canada's rulings, the test has three elements: (1) the Crown must have actual or constructive knowledge of a potential Aboriginal right or claim, and (2) there must be contemplated Crown conduct (3) that would adversely affect the Aboriginal right or claim.

In this case, the three elements exist. The Crown had actual or constructive knowledge. According to the Supreme Court's directives on the point, the Board's process was itself "Crown conduct". The Board's approval of Nova Scotia Power's application would cause an adverse effect. The Board had jurisdiction to consider the adequacy of prior Crown consultation with the Mi'kmaq representatives.

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Intervenors

Judges:	Farrar, Fichaud and Bryson, JJ.A.
Appeal Heard:	May 17, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud J.A., Farrar and Bryson JJ.A concurring
Counsel:	Sean Foreman, Q.C., and Myles Thompson, for the Appellant
	Bruce Outhouse, Q.C., for the Respondent the Nova Scotia Utility and Review Board
	Colin J. Clarke, Q.C. and Geoff Breen, for the Respondent Nova Scotia Power Inc.

Jason T. Cooke and Victor J. Ryan, for the Intervenors the Kwilmu'kw Maw-klusuaqn Negotiation Office and the Acadia First Nation

Raymond F. Larkin, Q.C. and Balraj Dosanjh, for the Intervenor the Sipekne'katik First Nation

Reasons for judgment:

[1] Nova Scotia Power Inc. is a privately-owned generator and distributor of electrical power. It supplies most of the electricity consumed in the Province and is a public utility under the *Public Utilities Act*. Section 35 of that *Act* says "[n]o public utility shall proceed with any new construction, improvements or betterments", costing over $250,000, "without first securing the approval thereof by the [Nova Scotia Utility and Review] Board".

[2] Nova Scotia Power decided to refurbish its obsolete Tusket Main Dam. The Dam generates electrical power from the Tusket waterway. The project could adversely affect the archeological and fishing interests of nearby Mi'kmaq communities. After consulting with Mi'kmaq representatives, Nova Scotia Power applied, under s. 35, for the Board's approval of its Tusket Dam project.

[3] According to s. 35(1) of the *Constitution Act, 1982*, as interpreted by the courts, before aboriginal peoples suffer an adverse effect to their known and credibly claimed rights caused by Crown conduct, they are entitled to consultation with the Crown and, in appropriate circumstances, to accommodation. At times, the project that would have an adverse effect is the subject of a private proponent's application for approval by an administrative tribunal. The Supreme Court of Canada has directed when such a tribunal must determine whether any prior consultations have satisfied the Crown's constitutional responsibility under s. 35(1).

[4] In this case, after inviting interventions and receiving submissions from the Province, Nova Scotia Power Inc. and Mi'kmaq groups, the Utility and Review Board determined that prior consultations with the Mi'kmaq had not satisfied the Crown's constitutional responsibility. The Board adjourned Nova Scotia Power's Tusket Dam application for three months to allow an opportunity for further consultation.

[5] The Province, supported by Nova Scotia Power, appeals. They submit that the Board had no jurisdiction to consider the adequacy of prior consultations between the Crown and the Mi'kmaq. The arguments address various elements of the test in the Supreme Court's decisions. Central to the submissions is whether the requirement that NSPI obtain other regulatory permits, in addition to the Board's approval under s. 35, affects the Board's jurisdiction to assess the adequacy of prior Crown consultation.

Background

[6] Nova Scotia Power Incorporated ("NSPI") is the Province's largest generator and distributor of electricity. It is wholly owned by Emera Inc., a publicly traded corporation. NSPI is a public utility under the *Public Utilities Act*, R.S.N.S. 1989, c. 380.

[7] NSPI owns and operates the hydro system along the Tusket River in Yarmouth County. The system generates about 12,000 megawatts of electric power annually. The Tusket facilities were built in 1928. In 2012, after a safety review, NSPI determined that its main dam at Tusket Falls failed the current safety requirements in the guidelines of the Canadian Dam Association.

[8] NSPI assessed its options and concluded that the most economical course was to refurbish the main dam. Decommissioning and reconstruction would be more expensive. The refurbishment would replace the four existing gates with eight vertical gates, raise the dam embankment and canal dykes and replace the existing Hurlburt Falls highway bridge with a longer bridge at a higher elevation to reduce the current bridge's overflow restriction ("Project").

[9] The area surrounding the Tusket hydro system has long been occupied by the Nova Scotia Mi'kmaq and has archeological significance to them. The Project may impact the Mi'kmaq's gaspereau fishery in the Tusket River.

[10] Consequently, NSPI's planning for the Project involved engagement with the Mi'kmaq. NSPI first identified the Project in its 2016 Annual Capital Expenditure Plan but deferred seeking capital cost approval at that time, pending further design work and discussions with the Mi'kmaq representatives.

[11] The Mi'kmaq parties to this litigation are:

- The Intervenor, Kwilmu'kw Maw-klusuaqn Negotiation Office ("KMKNO") is an incorporated society that, on behalf of eleven of the

twelve member bands of the Assembly of Nova Scotia Mi'kmaq Chiefs, leads negotiations with the Governments of Canada and Nova Scotia further to the Crown's constitutional duty to consult.

- The Intervenor Acadia First Nation is a Mi'kmaw First Nation whose lands include reserves in the vicinity of the Tusket Dam.

- The Intervenor Sipekne'katik First Nation is a Mi'kmaw First Nation whose lands include reserves and holdings in several locations.

[12] In 2015, NSPI opened consultations with the KMKNO and the Acadia First Nation about their concerns related to the Project. In February 2017, they established a working group.

[13] The Project requires that NSPI obtain several government approvals. Apart from the approval of the Nova Scotia Utility and Review Board, that I will come to shortly, these are:

- The Nova Scotia Department of Communities, Culture and Heritage issued a permit, under the *Special Places Protection Act*, R.S.N.S. 1989, c. 438, for NSPI's consultant to undertake an archeological impact assessment of the area surrounding the Tusket Dam.

- On May 15, 2017, the Nova Scotia Department of the Environment ("DOE") issued a permit, further to s. 5A(1)(c) of the *Activities Designation Regulations* under the *Environment Act*, S.N.S. 1994-95, c. 1, for alteration of the watercourse that is associated with the Project.

- On July 31, 2017, the federal Department of Fisheries and Oceans ("DFO") issued an authorization, under s. 35(2)(b) of the *Fisheries Act*, R.S.C. 1985, c. F-14, to allow the harming of fish involved with the construction of the new dam.

- The Tusket Project involves refurbishment to the Hurlburt Falls Bridge, located 120 feet downstream from the main dam. The Bridge is owned by the Province, meaning NSPI will need the assent of Nova Scotia's Department of Transportation and Infrastructure Renewal.

[14] The Province treated NSPI's application for permission to alter the watercourse, filed with the DOE on November 29, 2016, as triggering the provincial Crown's duty to consult the Mi'kmaq under s. 35(1) of the *Constitution Act, 1982*. On December 22, 2016, the DOE wrote to the KMKNO and to the Sipekne'katik First Nation giving notice of NSPI's application, providing

information about the Project and initiating consultation. The DOE sent similar letters to Nova Scotia's Office of Aboriginal Affairs, the provincial Department of Transportation and Infrastructure Renewal and the DFO. The DOE's letter to the KMKNO said:

> I am writing to bring to your attention the proposed Tusket River Main Dam Refurbishment project and the application submitted by Nova Scotia Power Inc. to the Nova Scotia Department of Environment (NSE) for a watercourse alteration approval.
>
> The purpose of this letter is to initiate consultation on this matter with the Assembly of Nova Scotia Mi'kmaq Chiefs under the Mi'kmaq-Nova Scotia-Canada Consultation Process, and provide information about:
>
> 1.Description of the project;
>
> 2.Provincial approval requirements;
>
> 3.Consultation with the Mi'kmaq of Nova Scotia
>
> …
>
> NSE will lead aboriginal consultation at the provincial level and coordinate the process with any departments (provincial or federal) that will be involved. …
>
> … Should you be interested, we would like to hear from the Assembly about any concerns you may have, including the details of any asserted Aboriginal or Treaty rights that could be adversely impacted by this project. …

[15] As a regulated public utility, NSPI is subject to s. 35 of the *Public Utilities Act*:

> **Approval of improvement over $250,000**
>
> 35 No public utility shall proceed with any new construction, improvements or betterments in or extensions or additions to its property used or useful in furnishing, rendering or supplying any service which requires the expenditure of more than two hundred and fifty thousand dollars without first securing the approval thereof by the Board.

The Board is established under the *Utility and Review Board Act*, S.N.S. 1992, c. 11. Section 4(1)(a) of that *Act* confirms that the Board exercises the powers assigned by the *Public Utilities Act*.

[16] On July 5, 2017, under s. 35, NSPI applied to the Board for approval of a capital work order totaling $18,157,609 to carry out the Project ("NSPI Application"). The NSPI Application included information that explained NSPI's

preference for refurbishment over decommissioning and new construction, and the Project's methodology and costing. The NSPI Application discussed in detail and costed NSPI's attempts to accommodate the Mi'kmaq concerns about archeological preservation and the Mi'kmaw fishery. Later I will discuss this topic in more detail (paras. 77-84).

[17] The Board's panel for the NSPI Application comprised Steven M. Murphy, MBA, P.Eng., as chair, Roberta J. Clarke, Q.C., and Richard J. Melanson, LL.B.

[18] The Board invited interventions and retained Midgard Consulting Inc. as an independent expert to advise the Board. Several parties intervened. Following the Board's procedures, the Board and Midgard submitted information requests to NSPI requesting clarification of particulars in NSPI's Application. NSPI responded.

[19] On July 26, 2017, the Supreme Court of Canada issued decisions in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 S.C.R. 1069 ("*Clyde River*") and *Chippewas of the Thames First Nations v. Enbridge Pipelines Inc.*, [2017] 1 S.C.R. 1099 ("*Chippewas of the Thames*"). The rulings discussed the role of an administrative tribunal that assesses a project for which s. 35(1) of the *Constitution Act, 1982* requires consultation between the Crown and First Nations. I will summarize the Supreme Court's reasons later (paras. 50-60).

[20] On September 29, 2017, the Board advised the parties that, given the Supreme Court's rulings, the Board would consider the issue of the Crown's consultation with the Mi'kmaq respecting the Project. The Board's letters of September 29 invited the Province (through the Office of Aboriginal Affairs), the Acadia First Nation and the KMKNO to participate as intervenors. The letters said:

> As the Board understands these decisions, the Board must consider whether adequate Crown consultation with First Nations has occurred, if the concern is raised before it. …
>
> The record filed with the Board by NSPI, in the Tusket Dam Refurbishment project, describes the presence of significant Aboriginal archeological sites in the area surrounding where the work is to be undertaken, including sites which are currently submerged. NSPI describes certain mitigation measures relating to the protection of these sites. Other mitigation measures are set out in relation to fish ladders and the traditional gaspereau fishing season. …

[21] The Province and the KMKNO (on behalf of itself, the Assembly of Nova Scotia Mi'kmaq Chiefs and the Acadia First Nation) filed with the Board Notices

of Intention to Participate and documentary evidence. The Province's documents included its "Aboriginal Consultation Record", prepared by the provincial Office of Aboriginal Affairs.

[22] The Board notified the parties that it would deal with the issue of consultation by written submissions. The Board received final submissions on May 14, 2018. The Province submitted that the Board had no jurisdiction to consider the sufficiency of prior consultations and, in any case, sufficient consultations had occurred.

[23] The Board's Decision under appeal (2018 NSUARB 154), dated August 7, 2018, described the submissions, the process and the Board's conclusions:

> [18] The Acadia First Nation and the ANSMC [Assembly of Nova Scotia Mi'kmaq Chiefs] submitted that the Crown had not fulfilled its duty to consult in this case. The Province disagreed. No other party took a position on the issue.
>
> [19] As this is the first time the Board has directly addressed its jurisdiction in relation to duty to consult issues, and given the nature of the evidence and the parties' arguments, the Board has determined this important matter should be addressed in a Preliminary Decision.
>
> **II ISSUES**
>
> [20] The following issues will be addressed in this Preliminary Decision:
>
> 1. Does the Board have the jurisdiction to consider whether the Crown had a duty to consult First Nations in this matter; and,
>
> 2. Did the Crown discharge its duty to consult with the Mi'kmaq of Nova Scotia?
>
> [21] The Board finds it has the jurisdiction, and corresponding obligation, to address whether there was a Crown duty to consult First Nations in relation to the Project, and whether the duty has been fulfilled. The Board has determined that further Crown consultation is required. These findings will be explained in the reasons which follow.

[24] To summarize the Board's reasons:

- The Board noted the Project's potential adverse effect:

  > [30] The Tusket Hydro System is located in an area of known archeological significance in relation to the Mi'kmaq of Nova Scotia. As well, there is an existing First Nations gaspereau fishery on the Tusket River.

> [31] … construction activities, including, in particular, the proposed dewatering of Lake Vaughan, will have an impact on known and potential Mi'kmaw archeological sites, and the Aboriginal fishery … .

- The Province had acknowledged that NSPI's application for approval to alter the watercourse, filed with the DOE on November 29, 2016, engaged the Province's consultation process (above, para. 14). The Board said:

> [111] There is therefore no dispute that a duty to consult arose in relation to the Project. No party to the proceeding has asserted otherwise.

- The Board (para. 20) identified two issues, (1) whether the Board had jurisdiction to consider the Crown's duty to consult and, if so, (2) whether the Crown discharged its duty.

- As to jurisdiction, the Board (paras. 78, 84 and 102) noted that s. 22 of the *Utility and Review Board Act* empowered the Board to determine questions of law and no statute withdrew authority for the Board to consider constitutional issues. The Board held that the test in the Supreme Court's decisions was satisfied, meaning the Board had the jurisdiction, and obligation, to consider the adequacy of prior consultations.

- The Board assessed the evidence of the consultations and determined that consultation to date had been inadequate (paras. 112-165).

- The Board determined that the appropriate remedy was a three-month adjournment of NSPI's Application, to allow further consultation (paras. 166-176).

[25] The Board's Order of August 20, 2018 gave the parties three months to bring consultations to a head and report to the Board:

> **AND IT IS ORDERED** that this proceeding is adjourned pursuant to s. 20 of the *URB Act* to provide the parties with a further opportunity to complete consultations;
>
> **AND IT IS FURTHER ORDERED** that the Board retains jurisdiction in this matter and that the parties are directed to report back to the Board within three months of the date of its Decision, to advise of the status of the consultation;
>
> **AND IT IS FURTHER ORDERED** that the Application will be held in abeyance until the results of the consultation are known.

[26] On October 2, 2018, the Province filed a Notice of Appeal to this Court.

[27] The Province's factum, filed in January 2019, informed the Court:

> 54. … the parties have completed a process of further consultation subsequent to the filing and setting down of this appeal and have reported back to the Board by way of written reports filed November 16, 2018.
>
> 55. By letter dated November 22, 2018, the Board has accepted the consultation update reports, and has confirmed that it will proceed to finalize its decision on the merits of NSPI's capital cost application, based on the evidence filed on the Record to date.

Issue

[28] The Province appealed under s. 30(1) of the *Utility and Review Board Act*. Section 30(1) permits an appeal from the Board's order "upon any question as to its jurisdiction or upon any question of law".

[29] The Province's factum (paras. 50-52) said the Province would not pursue one ground of appeal and consolidated its remaining grounds into one question:

> Does the Board have the jurisdiction (and therefore a constitutional obligation) to consider and assess prior Crown consultation when making a capital cost approval decision pursuant to s. 35 of the *Public Utilities Act*?

Standard of Review

[30] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 ("*Carrier Sekani*"), McLachlin C.J.C. for the Court, discussed the standards of review for issues of consultation with First Nations:

> [64] Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation* [*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511], at para. 61:
>
> > 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…. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. **To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness.** …

[65] **It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness.** This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Khosa v. Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.). It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

…

[67] **The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness.** The relevant statutes, discussed earlier, do not displace that standard. …

…

[78] The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statues, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act*. **Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness"** as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

…

[85] What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held that there could be none. **The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.**

…

[92] … On this evidence, **it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect** the claims and rights of the CSTC First Nations.

[93] **I conclude that the Commission took a correct view of the law on the duty to consult** and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. **It then examined the evidence on this question**. It looked at the

> organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. **It has not been established that the Commission acted unreasonably in arriving at these conclusions.**
>
> [emphasis added]

[31] In *Haida Nation*, before the passage quoted in *Carrier Sekani*, McLachlin C.J.C. for the Court said:

> 61 **On questions of law, a decision-maker must generally be correct**: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. **On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker**. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on the assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. **Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than a reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness.** To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, **where the two are inextricably entwined, the standard will likely be reasonableness**: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> [emphasis added]

To similar effect: *Mi'kmaq of P.E.I. v. Province of P.E.I.*, 2018 PESC 20, paras. 60-63; *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, para. 34.

[32] Based on the authorities, the consultation issues are governed by the following standards of review:

- The Province's Notice of Appeal defines each of its four grounds as whether "the Board erred in law". The Province's factum (para. 51) states that its consolidated single ground is "one fundamental legal issue". Its factum concludes the discussion of standard of review with the submission:

  > 70. It makes sense and is legally consistent, and the jurisprudence appears clear, that determination of when a duty to consult is triggered and

> the jurisdiction to consider consultation – whether on judicial review or statutory appeal – is a question of constitutional law subject to review on a standard of correctness.

The Province characterizes its submissions, on triggering and jurisdiction, as a pure or extractable question of constitutional law. As noted in *Carrier Sekani*, a legal question on a tribunal's jurisdiction to apply s. 35(1) of the *Constitution Act, 1982* is reviewed for correctness. See also *Beckman v. Little Salmon/Carmacks First Nation,* [2010] 3 S.C.R. 103, at para. 48, per Binnie J. for the majority. The correctness standard would apply whether the issue is termed "truly jurisdictional" or "constitutional" or of "central importance to the legal system" under *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, paras. 58-60.

- Elements of the test as to whether the Crown's duty to consult has been triggered may involve an issue of fact or of mixed fact and law with no extractable legal issue. An example is whether the Crown conduct would "adversely affect" the claimed aboriginal right. In *Carrier Sekani,* paras. 78, 85, 92-93, the Court reviewed that matter for reasonableness. See also *Dunsmuir*, para. 51.

- The court is to take account of legislative directions on the permitted grounds of appeal or review: *Carrier Sekani*, paras. 65, 72 and 78; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, paras. 18, 36, 41 and 51, per Binnie J. for the majority; *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, paras. 41-42. Under s. 30(1) of the *Utility and Review Board Act*, a pure issue of fact is not appealable to this Court. However, a finding of fact for which there is *no* evidence may be arbitrary and therefore appealable as an error of law: *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at paras. 41-47, and authorities there cited.

- The Decision under appeal included the Board's interpretation of provisions of the *Public Utilities Act*, one of the Board's home statutes. The Board's interpretation of its home legislation, undertaken discretely from the Board's interpretation of the constitutional principles, is reviewed for reasonableness. This topic was extensively reviewed in *Nova Scotia v. S&D Smith*, paras. 51-66, with authorities there cited.

- The Supreme Court has held that the adequacy of consultation attracts a reasonableness standard: *Haida Nation*, para. 62; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2

S.C.R. 386, paras. 9, 77, 82, 8, 15, per McLachlin C.J.C. and Rowe J. for the majority. The Province's remaining grounds of appeal do not address whether the Board erred in its view that, in this case, the Crown's prior consultation was insufficient. It is unnecessary to consider the application of a standard of review to that issue.

The Legal Principles

[33] The *Constitution Act, 1982* says:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[34] Section 35(1) affirms that, before suffering an adverse effect to their known and credibly claimed rights caused by Crown conduct, Aboriginal peoples are entitled to consultation with the Crown and, in appropriate circumstances, to accommodation. The conditions and scope of the entitlement are governed by principles developed in a series of rulings by the Supreme Court of Canada.

[35] ***Haida Nation* (2004):** In *Haida Nation*, *supra*, McLachlin C.J.C. explained the rationale for consultation and set out the test to trigger the Crown's duty.

[36] The duty to consult and, if appropriate, accommodate "is grounded in the honour of the Crown", a term which "is not a mere incantation, but rather a core precept that finds its application in concrete practices": (*Haida Nation*, para. 16). The Chief Justice summarized the rationale:

> 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 the process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.**
>
> [bolding added]

[37] This approach means the duty applies prospectively to potential Aboriginal rights before those rights have been finally determined:

> 26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? …
>
> 27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. **It must respect these potential, but yet unproven, interests.** The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. …
>
> …
>
> 32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. …
>
> [bolding added]

As the approach is prospective, the tribunal or reviewing court that assesses the adequacy of consultation does not determine the validity of the claimed aboriginal right. The merits of the underlying right await the appropriate trial process: *Ktunaxa Nation*, *supra*, paras. 84-85.

[38] In *Haida Nation*, the Chief Justice set out the test that triggers the duty to consult:

> 35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that **the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it** … .
>
> 36 … As I stated (dissenting) in *Marshall* [*R. v. Marshall*, [1999] 3 S.C.R. 456], at para. 11, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. …

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. **Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.** The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. …

[bolding added]

[39] The duty's content responds to the circumstances:

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

…

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw* [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010], at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. [citations omitted] Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 … At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. …

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. …

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. … The controlling

> question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. …

[40] The Crown's duty may include an accommodation that is based on balance and compromise:

> 46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. …
>
> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of the infringement, pending final resolution of the underlying claim. …
>
> …
>
> 50 … **Balance and compromise are inherent in the notion of reconciliation.** Where accommodation is required in making decisions that adversely affect as yet unproven Aboriginal rights and title claims, the Crown **must balance** Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.
>
> [bolding added]

[41] NSPI, a private corporation, has consulted with the KMKNO and the Acadia First Nation. How do consultations between the aboriginal group and a private party affect the Crown's duty? In *Haida Nation*, the Chief Justice said:

> 53 … the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. **The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.** The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments…. However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated. [bolding added]

[42] ***Carrier Sekani* (2010):** Six years later, in *Carrier Sekani*, *supra*, the Supreme Court refined *Haida Nation*'s directives.

[43] In the 1950s, without consultation, the Government of British Columbia authorized the construction of a dam and reservoir that affected First Nations' claims to their ancestral homeland and fishing rights. The sale of energy from the facilities was governed by Energy Purchase Agreements that were subject to approval by the British Columbia Utilities Commission. In 2007, the Government of British Columbia sought the Commission's approval of such an Agreement. At issue was the adequacy of the Crown's consultation with the Aboriginal groups. The Commission accepted that it had the jurisdiction to consider the adequacy of consultation. The Commission then found that the 2007 Energy Purchase Agreement did not adversely affect any Aboriginal interest. So the duty to consult was not triggered. The Commission approved the Agreement. The Commission's ruling was overturned by the British Columbia Court of Appeal but reinstated by the Supreme Court of Canada.

[44] McLachlin C.J.C., for the Court, explained why the duty to consult applies before the final determination of the Aboriginal right or claim:

> [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 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.
>
> [34] … Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. **Shutting down development by court injunction may serve the interest of no one.** The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.
>
> [35] ***Haida Nation*** sets the framework for **dialogue prior to the final resolution** of claims by requiring the Crown to take contested or established Aboriginal rights into account ***before*** **making a decision** that may have an adverse impact on them … . **The duty is *prospective,*** fastening on rights yet to be proven.
>
> [Supreme Court's italics, bolding added]

[45] The Chief Justice enumerated and explained *Haida Nation*'s test as to when the Crown's duty to consult arises:

> [31] **... This test can be broken down into 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 may adversely affect an aboriginal claim or right.** …
>
> [bolding added]

[46] As to the first element:

> [40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted [citation omitted]. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. …
>
> [41] The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed. [citations omitted].

[47] Then the second element, a key to this appeal:

> [42] Second, for a duty to consult to arise, **there must be Crown conduct or a Crown decision** that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.
>
> [43] This raises the question of what government action engages the duty to consult. It has been held that such action is **not confined to government exercise of statutory powers:** [citations omitted]. **This accords with the generous, purposive approach that must be brought to the duty to consult**.
>
> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. **A potential for adverse impact suffices**. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights … .
>
> [bolding added]

[48] Lastly, the third element:

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. **The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights**. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[46] Again, **a generous, purposive approach to this element is in order**, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. … The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[47] **Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right.** Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect the Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources" [citation omitted]. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources.

...

[49] The question is whether there is a claim or right that potentially may be impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. …

…

[53] … *Haida Nation* … grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

[Supreme Court's italics, bolding added]

[49] The Chief Justice then considered the role of an administrative tribunal – *i.e.* the British Columbia Utilities Commission – in the consultation process. A similar issue features in the appeal before this Court. McLachlin C.J.C. said:

B. *The Role of Tribunals in Consultation*

[55] The duty on a tribunal to consider consultation and the scope of the inquiry depends on the mandate conferred by the legislation that creates the tribunal. …

[56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. …

[57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. **Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand**.

[58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both **depending on what responsibilities the legislature has conferred on them**. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway* [*R. v. Conway*, [2010] 1 S.C.R. 765]. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

[59] … it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. …

[60] This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. … Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. …

[61] A tribunal that has the power to consider adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

…

[68] … As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

> [69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. **The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power** (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2002 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide **constitutional questions related to their statutory mandates**": *Conway*, at para. 6.
>
> [70] Beyond its general power to consider questions of law, **the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest".** The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? (para. 42)
>
> …
>
> [73] For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place. ...
>
> …
>
> [75] … If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.
>
> [76] The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. …
>
> [bolding added]

[50] ***Clyde River* (2017):** In *Clyde River*, *supra*, the National Energy Board was asked to authorize offshore seismic testing for oil and gas in Nunavut. The testing potentially could affect Inuit treaty rights. The Inuit in Clyde River alleged prior consultation with the Crown had been inadequate. The NEB determined prior consultation had sufficed and the testing was unlikely to cause a significant adverse effect. The NEB authorized the project. The Federal Court of Appeal dismissed the appeal. The Supreme Court of Canada allowed the further appeal and quashed the NEB's decision.

[51] Justices Karakatsanis and Brown, for the Court, (para. 25) reiterated the *Haida Nation*/*Carrier Sekani* test that the duty to consult is triggered when (1) the Crown has actual or constructive knowledge of a potential Aboriginal right, and there is (2) Crown conduct that (3) would adversely affect the Aboriginal right. Significant to the present appeal is their discussion of what constitutes "Crown conduct".

[52] The applicant to the NEB was a private party. The Government was not a formal party. At issue was whether the NEB was the "Crown". If so, the NEB's approval adversely affected a known potential Aboriginal right, which would satisfy the *Haida*/*Carrier Sekani* three-step test for consultation. Consequently, the NEB would have jurisdiction – and would be constitutionally obligated – to consider whether adequate consultations had occurred.

[53] Justices Karakatsanis and Brown held that the NEB was the "Crown" for the purposes of the test. They began with the Crown's responsibility to address the constitutional imperative:

> [22] In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. …
>
> [24] Above all, and irrespective of the process by which consultation is undertaken, **any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review.** That said, judicial review is no substitute for adequate consultation. … No one benefits – not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities – when projects are prematurely approved only to be subjected to litigation.
>
> [bolding added]

[54] To satisfy the Constitution's reconciliatory objective, Justices Karakatsanis and Brown interpreted "Crown conduct" broadly as including the NEB:

> [25] … Crown conduct which would trigger the duty is **not restricted** to the exercise by or on behalf of the Crown **of statutory powers or of the royal prerogative**, nor is it limited to decisions that have an immediate impact on lands and reserves. **The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible**. (*Carrier Sekani*, at paras. 45-46).

[26] … In short, the Federal Court of Appeal in both cases [*Clyde River* and *Chippewas*] was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. …

[27] Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

[28] It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority … .

[29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since – as the NEB operates independently of the Crown's ministers – no relationship of control exists between them [citation omitted]. **As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*** [*Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7], however, the NEB acts on behalf of the Crown when making a final decision on a project application. **Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away**. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the **final decision maker on a resource project** is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a **final decision** has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of the *COGOA* **to make final decisions respecting such testing** as was proposed here, clearly constitutes Crown action. [bolding added]

[55] Justices Karakatsanis and Brown then discussed what is expected of a tribunal that shoulders the authority to consider the adequacy of the Crown's consultation:

D. *What is the NEB's Role in Considering Crown Consultation Before Approval?*

…

> [36] **Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power"** (*Carrier Sekani*, at para. 69). **Regulatory agencies with the authority to decide questions of law have both the duty and the authority to apply the Constitution**, **unless the authority to decide the constitutional issue has been clearly withdrawn** (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). **It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982*** (*Carrier Sekani*, at para. 72).
>
> [37] The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.
>
> [bolding added]

[56] Justices Karakatsanis and Brown held that this conclusion follows notwithstanding that the Crown was not a party to the proceeding before the tribunal:

> [38] … Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.
>
> [39] The difficulty with this view, however, is that – as we have explained – action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). **If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate**. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, **because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval** (*Haida*, at para. 67).

> Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, **the NEB must withhold project approval.** And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, **since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question** (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78.).
>
> [Supreme Court's italics, bolding added]

[57] ***Chippewas of the Thames*** **(2017):** In *Chippewas of the Thames*, *supra*, the National Energy Board was asked to approve a modification of a pipeline that crossed a First Nation's traditional territory. The NEB considered whether there had been adequate consultation, held that the project's effect on Aboriginal interests would be minimal and approved the project with accommodating conditions.

[58] Justices Karakatsanis and Brown, for the Court, applied their ruling in *Clyde River* that a decision by a tribunal such as the NEB would be "Crown conduct" which triggers the Crown's duty to consult:

> [29] In the companion case to this appeal, *Clyde River*, we outline the principles which apply when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights. In these circumstances, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult (*Clyde River*, at para. 29). **A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision** [citing *Carrier Sekani*, para. 31 and *Clyde River*, para. 25].
>
> [bolding added]

[59] The Federal Court of Appeal had concluded that the absence of the Crown from the NEB's proceeding meant the NEB's decision would not be Crown conduct. Justices Karakatsanis and Brown rejected that view:

> [30] We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).
>
> …
>
> [35] … In *Standing Buffalo*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been

discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo* applied here. … In dissent, Rennie J.A. reasoned that *Standing Buffalo* had been overtaken by this Court's decision in *Carrier Sekani*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving Enbridge's application (para. 112). [Supreme Court's italics]

[36] We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. **If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate.** The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

[37] **As the final decision maker on certain projects**, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).

…

[48] As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, **this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them.** …

…

[59] In *Carrier Sekani*, this Court recognized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest" which surpasses economic concerns (para. 70). **A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met** (*Clyde River*, at para. 40; *Carrier Sekani*, at para. 70). …

[bolding added]

[60] Justices Karakatsanis and Brown reiterated that "balance and compromise" are at the heart of the process:

> [59] … Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida*, at para. 48). Rather, **proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights"** (*Haida*, at para. 50).
>
> [60] Here, the NEB recognized that the impact of the project on the rights and interests of the Chippewas of the Thames was likely to be minimal. Nonetheless, it imposed conditions on Enbridge to accommodate the interests of the Chippewas of the Thames and to ensure ongoing consultation between the proponent and Indigenous groups. The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. **Balance and compromise are inherent in that process** (*Haida*, at para. 50).
>
> [bolding added]

The Test

[61] *Carrier Sekani*, para. 31, says the test has three elements: (1) the Crown's actual or constructive knowledge of a potential Aboriginal right or claim, and (2) contemplated Crown conduct (3) that would adversely affect the Aboriginal right or claim.

First Element – Crown Knowledge

[62] There is no need to tarry with the first element. The Provincial DOE's letter of December 22, 2016 acknowledged that the NSPI's Tusket Project triggered the Crown's duty to consult (above, para. 14).

Second Element – Crown Conduct

[63] Was the Board's proceeding "Crown conduct"?

[64] In *Carrier Sekani*, paras. 55-58, the Chief Justice said the tribunal may have the authority to conduct consultations as a protagonist, or to determine whether prior consultations have been adequate, or no authority on the matter. In the first or second instances, the tribunal's proceeding qualifies as Crown conduct.

[65] Here, the legislation did not authorize the Utility and Review Board to conduct direct consultation with First Nations. Neither did the Board assert such authority (Board's Decision, paras. 75-76).

[66] This leaves the question – did the Board have the authority to determine whether prior consultations had satisfied the standard of the Crown's duty to consult? The analysis of that issue, according to the Supreme Court, should follow the following directions:

- the Board must have the authority to determine issues of law;
- the legislation must not show a "clear demonstration that the legislature intended to exclude" the Board's authority to determine the constitutional issue of Aboriginal consultation;
- the potential adverse effect to the Aboriginal interest must be "relevant to the decision at hand" by the Board;
- the Board must be a "final decision maker" on the matter to which the adverse effect is relevant;
- the Board's relief must agree with "the remedial powers expressly or impliedly conferred upon it by statute".

[67] I will take these points in turn.

[68] **Power to decide issues of law:** The starting point is *Carrier Sekani*:

> [57] Alternatively, the legislature may choose to confine the tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
>
> …
>
> [69] … The **power to decide questions of law** implies a power to decide constitutional issues that are properly before it, **absent a clear demonstration that the legislature intended to exclude** such jurisdiction from the tribunal's power. …
>
> [bolding added]

[69] The approach stated in para. 69 had been articulated in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, para. 39, and reiterated in *R. v. Conway*, [2010] 1 S.C.R. 765, para. 77.

[70] In *Clyde River*, Justices Karakatsanis and Brown cited *Carrier Sekani*'s para. 69, then elaborated:

> [36] … Regulatory agencies with the **authority to decide questions of law** have both the duty and authority to apply the Constitution, **unless the authority to decide the constitutional issue has been clearly withdrawn** (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* … .
>
> [bolding added]

[71] In *Chippewas of the Thames*, paras. 29-37, the Court confirmed its approach from *Clyde River*.

[72] Here, the *Utility and Review Board Act* assigns to the Board the exclusive jurisdiction over matters that are conferred on the Board, and the power "to determine all questions of law and of fact", to make binding findings of fact and to issue orders that are enforceable as court orders:

> **Jurisdiction**
>
> 22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and fact.
>
> …
>
> **Order**
>
> 24 In any matter before the Board, it shall grant an order, either as specified in the application or notice of appeal or as the Board decides.
>
> …
>
> **Effect of finding**
>
> 26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.
>
> …
>
> **Enforcement of order**
>
> 29 (1) An order made by the Board may be made a rule or order of the Supreme Court, and shall thereupon be enforced in like manner as a rule, order. decree or judgment of that Court.
>
> …
>
> (4) The Clerk shall forward the certified copy so endorsed to a prothonotary of the Supreme Court, who shall, upon receipt thereof, enter the

> same as of record, and it thereupon becomes and is an order of the Supreme Court and is enforceable as a rule, order, decree or judgment of the Court.

[73] **Clear demonstration of intent to exclude:** Does legislation clearly exclude the Board's authority to consider the constitutional issue of Aboriginal consultation?

[74] In *Carrier Sekani*, the Commission's enabling statute said: "the tribunal does not have jurisdiction over constitutional questions" (see para. 28 of the Court's reasons). The Supreme Court narrowly interpreted the restriction and concluded that the statute's words "do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult" (para. 72). The Court held the Commission was empowered to determine whether Crown consultation had been adequate.

[75] Here, there is no legislated restriction to be narrowly interpreted. Nothing in the *Utility and Review Board Act*, the *Public Utilities Act* or any other statute demonstrates an intention to exclude the Board's authority to determine a constitutional issue, such as compliance with s. 35(1) of the *Constitution Act, 1982*, that pertains to a matter before the Board.

[76] The Board's unrestricted power to decide issues of law satisfies the Supreme Court's first and second directions.

[77] **Relevance to the decision at hand:** Then there is the third direction. In *Carrier Sekani*, McLachlin C.J.C. said:

> [57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest **relevant to the decision at hand**.
>
> [bolding added]

[78] In this case, the potential adverse impact to Mi'kmaq interests clearly related to the issues before the Board.

[79] The NSPI Application costed and proposed to the Board methods to accommodate the potential adverse impacts to the Mi'kmaq archeology and fishery. The NSPI Application included:

- The Introduction (page 8) said that Section 6 of the Application discusses the steps NSPI will take to resolve First Nations concerns.

- The discussion of the Dam Safety Management Program (page 14) noted that NSPI had "prepared a site specific design to mitigate risk and First Nations impacts", and "[w]ith this information now available, NS Power is able to proceed with a fully costed and well-designed project plan".

- The Proposed Scope of the Project (page 19) said "[t]he construction footprint of the proposed scope also avoids disturbance of previously delineated archeological sites, keeping Mi'kmaq cultural resources intact and avoiding the need for archeological mitigation".

- The Breakdown of Spending as of April 30, 2017 (page 22), noted Archeology costs "to develop mitigation strategies acceptable to the Mi'kmaq of Nova Scotia and to the customer".

- The section on Variance to 2017 ACE Plan Submission (page 30) explained the increase in the Project's proposed capital cost from an initial $9,940,664 to the revised $18,157,609. One of the reasons was "the level of First Nations engagement required to appropriately address any First Nations concerns and successfully execute the Project became better understood".

- The section on First Nations and Archeology Considerations (page 34) said that one reason for refurbishment, instead of decommissioning and reconstruction, was that "costs associated with First Nations and archeology considerations are unknown and potentially costly if a decommissioning option is pursued". The Report said (page 35) "if a complete mitigation was required, excavation of the area within the boundaries of the site, removal of any artifacts using standard archeological methodology, and recording/mapping of the location of any uncovered artifacts would be required", meaning "[d]ecommissioning costs, should 'complete mitigation' be required, could be as high as $30,000,000", instead of $18,157,609.

- The Refurbishment proposal (pages 35-36) noted that the design considered the "constraints" of "registered pre-contact First Nations archeology sites surrounding the main dam structure". The Refurbishment proposal (page 37) also noted that one scenario had "the potential to alter the effectiveness of a nearby Acadia First Nation gaspereau fishing stand". The Report said NSPI took that factor, and others, into account in selecting the recommended scenario.

- The section on Risk Mitigation and Stakeholder Management (page 38) said that there were "four primary risks associated with project design and execution", three being "environmental issues", "known archeological sites" and "First Nations engagement". The environmental issues included possible adverse impact on the gaspereau fishery used by the Mi'kmaq (page 39). The archeological concern (pages 41-42) involved "over 70 archeological sites, features and areas of potential". Of these "seven archeological resources were deemed to be at high or potentially high risk of impact", which "include the submerged historic and First Nations sites to the north of the dam and the submerged known site AIDI-18". The Report (page 41) says "the scope of the project was altered to minimize the archeology risks".

- The section on First Nations Engagement (pages 43-44) noted the Mi'kmaq's expressed concerns that the water elevation of Lake Vaughan would be altered, exposing or affecting submerged artifacts, that the construction or operation of the main dam might affect the effectiveness of the fish ladder needed for the gasperau fishery. NSPI said it was "committed to balance the needs and concerns of Mi'kmaq of Nova Scotia in conjunction with regulatory and business requirements in order to execute successful capital work orders to the benefit of all customers".

- NSPI's Response to Information Requests 15 and 16, filed August 29, 2017, said any consideration of the decommissioning option could include assessment of the costs associated with archeological procedures, lowering Lake Vaughan to expose Mi'kmaq artifacts, preserving, documenting and cleaning the artifacts, as well as compensation to the Mi'kmaq for losses to their commercial gaspereau fishery from a change to the river flow.

[80] The Board's independent consultant, Midgard, and Intervenors filed with the Board submissions that NSPI's Application had overstated the requirements and costing for Mi'kmaq archeological preservation and maintenance of fish stock. NSPI replied with submissions on February 28, 2018 and again on May 14, 2018, that defended its approach.

[81] NSPI applied to the Board under s. 35 of the *Public Utilities Act*:

> **Approval of improvement over $250,000**
>
> 35 No public utility shall proceed with **any new construction, improvements or betterments in or extensions or additions** to its property used or useful in furnishing, rendering or supplying any service which requires the

> expenditure of more than two hundred and fifty thousand dollars without first securing the **approval thereof** by the Board.
>
> [emphasis added]

[82] NSPI asked the Board to approve the Project's scope – *i.e.* its construction, improvements, betterments, extensions or additions – and costing that included NSPI's proposed accommodation of Mi'kmaq concerns. The proposal represented NSPI's attempt, as the Application said (page 44), "to balance the needs and concerns of Mi'kmaq of Nova Scotia in conjunction with regulatory and business requirements in order to execute successful capital work orders to the benefit of all customers". A different scope, resulting from a different approach to accommodate and balance the Mi'kmaq's concerns, would reduce or heighten the potential adverse impact to Mi'kmaq interests by increasing or decreasing the capital costs that the Board was asked to approve.

[83] For example, if the Tusket Main Dam was decommissioned and rebuilt, instead of just refurbished as the NSPI Application proposed, then the Project's capital cost after a "complete mitigation" of the Mi'kmaq's concerns "could be as high as $30,000,000", to be recovered in rates, instead of the $18,157,609 in NSPI's Application (pages 34-35). The NSPI Application asked the Board to approve the less expensive balance without complete mitigation.

[84] In *Haida Nation*, para. 50 and *Chippewas of the Thames*, paras. 59 and 60, quoted earlier, the Court said "balance and compromise are inherent in [the] process" toward accommodation. The NSPI Application requested the Board's endorsement of NSPI's version of the balance and compromise. The potential adverse impacts to the Mi'kmaq's interests from the NSPI's Application were explicitly "relevant to the decision at hand" by the Board.

[85] **Final decision maker:** In *Clyde River*, Justices Karakatsanis and Brown said:

> [29] … The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of the *COGOA* to make **final decisions** respecting such testing as was proposed here, clearly constitutes Crown action.
>
> …
>
> [39] … because the NEB is the **final decision maker**, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). …
>
> [bolding added]

[86] Similarly, in *Chippewas of the Thames,* Karakatsanis and Brown JJ. said:

> [37] As the **final decision** maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). …
>
> …
>
> [48] As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a **final decision** that could impact them. …
>
> [bolding added]

[87] In *Chippewas of the Thames*, Justices Karakatsanis and Brown explained what they meant by saying the NEB was a "final decision maker":

> [9] **The NEB occupies an advisory role** with respect to the issuance of a certificate of public convenience and necessity. **Under ss. 52(1) and 52(2)** [of the *National Energy Board Act*, R.S.C. 1985, c. N-7], it can submit a report to the Minister of Natural Resources setting out: (i) **its recommendation** on whether a certificate should be issued based on its consideration of certain criteria; and (ii) the terms and conditions that it considers necessary or desirable in the public interest to be attached to the project should the certificate be issued. **The Governor in Council may then direct the NEB** either to issue the certificate or to dismiss the application (s. 54(1)).
>
> [10] **Under s. 58** of the *NEB Act*, however, **the NEB may make orders**, on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications from various requirements that would otherwise apply under Part III, including the requirement for the issuance of a certificate of public convenience and necessity. Consequently, as in this case, smaller projects and amendments to existing facilities are commonly sought under s. 58. **The NEB is the final decision maker on s. 58 exemptions.**
>
> [bolding added]

[88] A tribunal that makes an enforceable order, without needing confirmation by another authority, makes a final decision. A tribunal that acts merely in an advisory capacity, and makes a recommendation to another authority, is not a final decision maker.

[89] In *Clyde River*, the proponents applied, under s. 5(1)(b) of the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, for an authorization to conduct seismic testing. Section 5(1)(b) said:

> 5(1) The National Energy Board may, on application made in the form and containing the information fixed by the National Energy Board, and made in the prescribed manner, issue
>
> …
>
> (b) an authorization with respect to each work or activity proposed to be carried on.

[90] Justices Karakatsanis and Brown (para. 29) said the NEB's statutory power "to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action". The NEB decision was not just a recommendation to another authority, such as the Minister or Cabinet. It was final.

[91] Did the Board have the statutory power to make a final decision respecting NSPI's Application?

[92] Under the *Utility and Review Board Act*: (1) the Board's jurisdiction over the NSPI Application is "exclusive", (2) the Board's findings of fact are "binding and conclusive", (3) the Board "shall grant an order" and (4) its order is "made a rule or order of the Supreme Court, and shall thereupon be enforced in like manner as a rule, order, decree or judgment of that Court". [ss. 22(1), 24, 26 and 29(1), quoted above, para. 72]

[93] The Board's order, under s. 35 of the *Public Utilities Act*, is not advice or a recommendation to a provincial minister or to Cabinet. It is binding. The Board is a final decision maker on the NSPI Application.

[94] **The Board's remedial power:** The Board described its remedial options:

> [166] The Board generally would have two potential remedies in a situation where the Crown's duty to consult has not been completed:
>
> i) The Board could adjourn the proceedings until the duty to consult had been fulfilled;
>
> ii) The Board could approve a project and impose terms and conditions, within its jurisdiction, to alleviate First Nations' concerns which have not yet been addressed.

[95] The Board preferred the first option and adjourned for three months so the parties could conduct further consultations.

[96] In *Carrier Sekani*, the Chief Justice said:

> [61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the **remedial powers expressly or impliedly conferred upon it by statute.** The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*. [bolding added]

[97] The *Utility and Review Board Act* says:

> **Adjournment of hearing**
>
> 20 A hearing may be adjourned from time to time by the Board on reasonable grounds on its own motion or on the request of a party to the proceedings.

[98] An adjournment of the NSPI Application was within the Board's power under s. 20.

[99] **The Province's remaining submissions:** I have discussed the Supreme Court's directions on "Crown conduct". I will turn to the Province's remaining submissions. The Province says the Board's proceeding was not "Crown conduct" because:

- S. 35 of the *Public Utilities Act* does not authorize the Board to approve "the Project as a whole";
- the Board had no authority to consider the "public interest";
- the Board was not exercising an "executive function";
- the Board "judicially reviewed" the approvals of the DOE and DFO.

[100] **No authority to approve the "Project as a whole":** The Province submits that, under s. 35 of the *Public Utilities Act*, the Board merely approves the prudency of capital costs for NSPI's recovery in its rates to customers. The Province cites the DOE's permit to alter the watercourse and the DFO's permit to harm fish as other decisions that relate to NSPI's "Project as a whole". The Board has no authority over the watercourse or fish. From this, the Province submits:

- a Board approval under s. 35 "is not a 'final decision' on the Project as a whole" [factum, para. 71(b)], and
- "the Board is not making a 'final decision' on the entire Project itself" [factum, para. 133].

Consequently, says the Province, the Board's decision is not "final" under *Clyde River* and *Chippewas of the Thames* and the Board's proceeding is not "Crown conduct" under *Haida Nation* and *Carrier Sekani*.

[101] The Province assumes that "final", in the passages from *Clyde River* and *Chippewas of the Thames* (quoted above, paras. 85-87), means "all encompassing".

[102] The assumption is mistaken. In *Clyde River* and *Chippewas on the Thames*, the Supreme Court did not say that, to be a "final decision maker", the tribunal must have approval authority for the "project as a whole". Neither did the Court say that a statutory tribunal may consider the adequacy of prior consultations only when that tribunal's statutory mandate encompasses every conceivable approval on the chain of causation that leads to an adverse effect. Nor did the Court say that the existence of a second authority, with an approval power over a different aspect of the project, disqualifies both authorities from assessing the adequacy of prior consultations with aboriginal groups.

[103] A tribunal that makes a binding decision – *i.e.* does not just give advice or a recommendation – is a "final decision maker": *Chippewas of the Thames*, paras. 9 and 10. The Board's decision under s. 35 of the *Public Utilities Act* is binding (enforceable as a court order) and "final". It does not matter that "the Project as a whole" also generated earlier decisions by the DOE and DFO for the alteration of the watercourse and harming of fish.

[104] I respectfully disagree with the Province's submission.

[105] **No "public interest":** The Province's factum says:

> 106. The Board is not … acting with the necessary "public interest" as recognized by the Supreme Court of Canada in *Carrier Sekani* ….
>
> 110. As such, the Province submits that it is "ratepayer interest" that s. 35 of the PUA is designed to protect, not a broader societal or "public interest" that gains constitutional status pursuant to s. 35 of the *Constitution Act, 1982*.
>
> …
>
> 111. In *Carrier Sekani*, the Supreme Court held that beyond its general power to consider "questions of law", the factors that the B.C. Utilities Commission was required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, were broad enough to include the constitutional issue of Crown consultation, because the Commission was mandated to consider "any

> other factor that the Commission considers relevant to the public interest". [citing paras. 69-70 of *Carrier Sekani*]

[106] Unlike British Columbia's s. 71, no statute gives Nova Scotia's Board the express authority to consider the "public interest". The Province submits the omission is critical and the Board's mandate does not encompass issues of aboriginal consultation.

[107] For each of two reasons, I do not share the Province's view.

[108] First, the submission misinterprets the Supreme Court's reasons.

[109] In *Carrier Sekani*, the Chief Justice said:

> [69] … The power to decide questions of law implies a power to decide constitutional issues **that are properly before it**, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power. … "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions **related to their statutory mandates"**: *Conway*, at para. 6.
>
> [70] Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).
>
> [bolding added]

[110] In *Carrier Sekani*, "public interest" brought the constitutional issue "properly before" the Commission. The Chief Justice stated the test earlier in *Carrier Sekani*:

> [57] … the tribunal … is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest **relevant to the decision at hand**. [bolding added]

British Columbia's statutory criterion of "public interest" meant the consultation issue (with its constitutional "special public interest") was "relevant to the decision at hand" before the Utilities Commission.

[111] *Carrier Sekani* does not say that an express statutory mandate to consider the "public interest" is a *sine qua non* of any tribunal's jurisdiction to consider the adequacy of prior consultations. Rather, in each case, the question is whether the potential adverse impact is "relevant to the decision at hand" by the tribunal. Statutory authority to consider "public interest" is one avenue to relevance. It is not the only one.

[112] Here, the accommodation of potential adverse effects to the Mi'kmaq, balanced against cost to ratepayers, was spelt out in the NSPI Application to the Board. The matter was expressly "relevant to the decision at hand" (above, paras. 77-84). Relevance does not turn on whether the Board had explicit statutory authority to consider the "public interest".

[113] Second, the Board reasonably interpreted its mandate under the *Public Utilities Act* to encompass a significant component of public interest.

[114] The Board's Decision said:

> [88] The comprehensive role in utility regulation of the Board is expressed in the often quoted *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.*, 1976 CanLII 1234 (NS CA) [(1976), 75 D.L.R. (3d) 72, page 77]:
>
> > The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined – that all rates must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects – that a public utility give adequate service and charge only reasonable and just rates.
> >
> > The service requirement is expressed in s. 48, as follows:
> >
> > > 48. Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.
>
> [89] The service requirement is now set out in s. 52 of the *PUA*, and there are now performance standards enacted in relation to service as well.
>
> [90] There is no language in s. 35 of the *PUA* which specifically directs the Board to consider the public interest, as was the case in the legislative language discussed in *Carrier Sekani*. This said, the concepts of adequacy and safety of service, along with just and reasonable service requirements, expressed in s. 52 of the *PUA*, are examples of public interest considerations the Board can consider.

> [91] That factors other than a pure economic cost-benefit and prudency analysis are considered by the Board is shown in the extensive record in this matter.
>
> [92] Evidence and expert analysis have been provided to the Board on whether the project is needed for safety reasons in the first place, in order to meet Canadian Dam Safety Guidelines. A number of potential scenarios, completely different than those considered in the NSE and DFO permit applications, have been discussed and analysed in the evidence.
>
> [93] The Board has the jurisdiction to consider all aspects of the proposed Project, to determine whether NS Power's facilities are safe and adequate, and whether alternative scenarios are available.

[115] The *Public Utilities Act* says: (1) "[t]he Board shall have the general supervision of all public utilities …" (s. 18), and (2) "[e]very public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable" (s. 52).

[116] NSPI is a "public" utility because its operations and service have a significant impact on the public. Most Nova Scotians obtain electrical power from NSPI. Clearly, as the Province and NSPI point out, the Board is tasked to safeguard financial prudence for the benefit of NSPI's ratepayers. But the Board's mandate extends beyond that factor to the others noted in the Board's reasons. Those factors share a common denominator of public interest.

[117] **No "executive function":** The Province's factum says:

> 86. The Board is not exercising "executive power" or the powers of the "Crown" when it considers a capital cost application under s. 35 of the *PUA*, as contemplated and explained most recently by the Supreme Court of Canada in *Clyde River*:
>
> > [29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown , since – as the NEB operates independently of the Crown's ministers – no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465).

[118] With respect, there is more to it. *Clyde River*'s passage continues:

> [29] … As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, **once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away**. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's

> interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. **As Rennie J.A. said** in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, **"[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers** under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown conduct.
>
> [bolding added]

[119] The Board had responsibility under s. 35 of the *Public Utilities Act* to make a final decision whether to approve the NSPI Application. Features of the Project described in the NSPI Application would potentially have an adverse effect on the Mi'kmaq's interests. According to *Clyde River*, para. 29, "it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures". The Board's approval, in furtherance of its statutory power, is executive action.

[120] The Province points out that "the Board acts primarily as a quasi-judicial economic regulatory tribunal" (factum, para. 87). With respect, that does not disqualify the Board's power of approval, under s. 35, from being "executive power as authorized by legislatures" (*Clyde River*, para. 29). In *Chippewas of the Thames*, Justices Karakatsanis and Brown spoke of the NEB's quasi-judicial authority:

> [48] As acknowledged in its reasons, the NEB, as a **quasi-judicial** decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, **this requires it** to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. [bolding added]

[121] NSPI's challenge comes from the other direction. NSPI cites *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, to support its submission that the Utility and Review Board does not exercise executive power. NSPI's factum, para. 99, emphasizes the following passages from paras. 40 and 41 of Karakatsanis J.'s reasons in *Mikisew*:

> 40 Applying a duty to consult to the development of legislation by ministers, as the Mikisew propose, also raises practical concerns. …
>
> 41 For these reasons, the duty to consult doctrine is ill-suited to be applied directly to the law-making process.

[122] With respect, *Mikisew* has no bearing on the Board's functions under s. 35 of the *Public Utilities Act*. In *Mikisew*, Karakatsanis J. said:

> [1] … The appellant Mikisew Cree First Nation argues that the Crown had a duty to consult them on the development of environmental legislation that had the potential to adversely affect their treaty rights to hunt, trap, and fish. This Court must therefore answer a vexing question it has left open in the past: Does the duty to consult apply to the **law-making process**?
>
> …
>
> [29] However, the question in this appeal is whether the honour of the Crown gives rise to a justiciable duty to consult when ministers **develop legislation** that could adversely affect the Mikisew's treaty rights. …
>
> …
>
> [32] For the reasons that follow, I conclude that **the law-making process** – that is, the **development, passage, and enactment of legislation** – does not trigger the duty to consult. …
>
> [bolding added]

[123] The Board's consideration of the NSPI Application, under s. 35 of the *Public Utilities Act*, did not involve the "law-making process" – *i.e.* the "development, passage, or enactment of legislation". Rather, the Board was a statutory decision-maker under existing legislation. In *Mikisew*, Karakatsanis J. said this about statutory decision-makers:

> [25] The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult [citations omitted]. This obligation has also been applied in the context of statutory decision-makers that – while not part of the executive – act on behalf of the Crown [citing *Clyde River*, para. 29]… .

[124] I am unpersuaded by the submissions of the Province and NSPI on this issue.

[125] **No power to "judicially review" prior approvals:** The Province's factum says:

> **The Board Cannot Judicially Review Prior Approvals**
>
> …
>
> 128. … the Board does not possess the "remedial powers" required at law to consider the adequacy of consultation and remedy any defects it may potentially

> identify relating to previously issued regulatory approvals over which it has no control.
>
> …
>
> 130. If a tribunal, such as the Board, does not have the necessary statutory authority or concomitant remedial powers to consider consultation and address the concerns raised by an Aboriginal group within the "relevant decision at hand", then the Aboriginal peoples that claim they are affected by inadequate prior consultation for the Project itself "must seek appropriate remedies in the Courts" [citing *Carrier Sekani*, para. 75, and *Haida Nation*, para. 51].

[126] The Province assumes that the Board conducted a roving judicial review of prior approvals by the DOE and DFO. To the contrary, the Board's Decision said:

> [157] The Board is not a reviewing court, but a tribunal which, in this case, will make a final determination as to whether or not the Tusket Main Dam Refurbishment Project should be approved.
>
> …
>
> [174] The Board does not have the jurisdiction to void any permits which have been issued by the Province, or DFO.

[127] The adequacy of consultations was relevant to the matter at hand before the Board – *i.e.* to features of the NSPI Application – as I have discussed. Under s. 35 of the *Public Utilities Act*, the Board was entitled to address the implications, including the constitutional ones, of the NSPI Application. The Board did not comment on the substantive merits of earlier approvals by the DOE (whether the watercourse may be altered) and DFO (whether fish may be harmed) under the provincial *Environment Act* and federal *Fisheries Act*.

[128] The Board merely adjourned the NSPI Application for three months so the parties could continue consultations. Section 20 of the *Utility and Review Board Act* authorizes the Board to adjourn "on reasonable grounds". Seeking compliance with s. 35(1) of the *Constitution Act, 1982* is a reasonable ground. The Board's relief was "in accordance with the remedial powers expressly or impliedly conferred upon it by statute" under *Carrier Sekani*, para. 61.

[129] I respectfully reject the Province's submission.

[130] **Summary:** The Board's findings of fact were supported by evidence. The Board reasonably interpreted its home statute. The Board correctly concluded that its consideration of the NSPI Application was Crown conduct under the Supreme Court's test.

Third Element – Causation of Adverse Effect

[131] NSPI says that the Board has no authority either to (1) "confirm" the DOE's (already issued) permit for the altered watercourse and the DFO's (already issued) permit to harm fish, or (2) give "substantive assurance" that the Project would maintain those permits through completion. Hence, according to NSPI, any adverse impact of a Board approval under s. 35 of the *Public Utilities Act* is "too remote" for the causation required by the third step in the *Haida Nation*/*Carrier Sekani* test.

[132] NSPI's factum puts it this way:

> 114. NSPI submits that, consistent with the case law cited above, any impact of a section 35 decision is too remote and indirect to trigger a duty to consult. While the Project itself might impact Aboriginal rights, a section 35 *PUA* decision does not confirm Crown permits or authorizations issued or to be issued in connection with the Project nor does it absolve the Crown of any continuing duty to ensure its conduct respects its duty to consult. A section 35 *PUA* decision is a disconnected preliminary approval process that provides no substantive assurance, right or momentum to a project moving forward from the perspective of government processes.

[133] This is a variation of the Province's proposition that, to exercise "Crown conduct", a tribunal must have the statutory authority to approve the "Project as a whole". NSPI adapts the point to whether there is causation of an adverse effect.

[134] In my view, the proposition has no merit.

[135] Most substantial projects have features that are subject to approval by more than one office at some level of government or statutory authority. At the appeal hearing, responding to a question from the Court, NSPI's counsel acknowledged that a municipal rezoning requirement may be "another approval" that, according to NSPI's proposition, would negate "causation of adverse effect" by the principal tribunal. Other examples come to mind. A proponent may need approval by a highway authority to move building materials, a permit to operate necessary machinery, an acknowledgement of compliance with occupational health and safety or workers' compensation standards, a building or occupancy permit for a new structure, a tax clearance or a business license.

[136] No statutory entity may "confirm" the approval of another whose authority derives from a different statute. No such entity may give "substantive assurance"

of what the other may do. It would be constitutionally impossible for a provincial tribunal, like the Board, to wade into DFO's federal jurisdiction over fisheries.

[137] If NSPI's proposition were correct, then whenever more than one approval is required for different aspects of a project – *i.e.* almost always – no single approving authority could cause an adverse effect. This would stultify the *Haida Nation*/*Carrier Sekani* test and counteract the "generous, purposive" rationale for the test that is meant to govern "adverse impacts, however made" (*Carrier Sekani*, paras. 43 and 46 and *Clyde River*, para. 25).

[138] The Province treated NSPI's application to the DOE as triggering the Crown's duty to consult (above, para. 14). This acknowledges that the DOE's consideration of whether to approve an altered watercourse may adversely affect a potential right under *Carrier Sekani*'s test. Yet the DOE's approval of an altered watercourse neither "confirmed" the other approvals required for the Project (DFO and Utility and Review Board) nor gave a "substantive assurance" that the DFO and the Board would issue and maintain their approvals.

[139] It is unnecessary that the Board confirm all the other approvals or assure that NSPI will maintain the conditions of other approvals that have been granted.

[140] Causation is a factual issue with a "but for" test and a civil standard of proof on a balance of probabilities. It suffices that, (1) without the Board's approval, the Project described in the NSPI Application probably would not proceed, meaning the adverse effect probably would not occur, and (2) with the Board's approval, the Project probably would proceed to cause the adverse effect.

[141] Without the Board's approval, would the Project proceed?

[142] Section 35 expresses a prohibition: "No public utility shall proceed with any new construction, improvements or betterments … to its property … without first securing the approval thereof by the Board".

[143] The Province submits that s. 35 should not be taken literally. The Province reads s. 35 as merely prohibiting NSPI from abusing its monopoly power by passing on to ratepayers the improvident capital cost of an unapproved project. According to that proposition, after a Board refusal under s. 35, NSPI could still refurbish the Tusket Main Dam at its own – *i.e.* its shareholders' – expense and refrain from including the amortized capital cost in its rates to its customers. Whether NSPI chooses to do so, says the Province, "is a practical

commercial/business decision" for NSPI [factum, para. 118, note 50], and not the Board's concern.

[144] The Board gave short shrift to that proposition, legally and factually:

> [87] While it is true that the Board's role in assessing an application pursuant to s. 35 of the *PUA* is primarily one of an economic regulator, reviewing a cost-benefit analysis, and assessing the economic prudency of a particular project, the Board does not only approve the capital expenditure, but also approves the project itself.
>
> …
>
> [97] A literal reading of s. 35 of the *PUA* indicates NS Power cannot proceed without Board approval. This is the position advanced by the ANSMC and Acadia First Nation. The situation may be slightly more nuanced, in that one of the potential remedies the Board has utilized, on limited occasions in the past, is to exclude expenditures for unapproved projects from the rate base.
>
> [98] However, a Board refusal of this Application, for a project of this magnitude, with ongoing financial obligations for operational safety and maintenance requirements, for an asset designed to directly produce electricity for distribution to the public, would almost certainly result in the project not proceeding.
>
> [99] Therefore, prior Crown approvals aside, the Board is effectively the final decision maker for the Project in the circumstances of this case.

[145] The Board interpreted s. 35 of the *Public Utilities Act*, the Board's home legislation. In my view, the Board's interpretation is reasonable. The Tusket Dam is integral to NSPI's hydro generation facilities. Electrical generation is a core utility function. The construction, commissioning and operation of the refurbished Main Dam described in the NSPI Application, after a Board refusal, would offend s. 35's prohibition, s. 18's statement that "[t]he Board shall have the general supervision of all public utilities" and this Court's ruling in *Board of Commissioners v. Nova Scotia Power Corp.*, *supra*, page 77:

> The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operations in providing a controlled service.

[146] The Board's para. 98 is a finding of fact. In *Carrier Sekani*, para. 85 (also para. 92), the Chief Justice said that, on the judicial review of a tribunal's conclusion respecting causation of adverse effect, "[t]he question is whether this conclusion was reasonable based on the evidence".

[147] Here, there is no evidence that, if the Board refused approval under s. 35, NSPI would proceed with the rejected refurbishment anyway, spending millions of dollars at its shareholders' expense, without cost recovery in its rates. To the contrary, NSPI firmly asserted that the Project's future capital costs would be recoverable in rates from its customers:

- The NSPI Application said:

> While the cost of this Project is significant, it is more cost-effective for **customers** than decommissioning the Tusket Main Dam. [page 8]
>
> NS Power acknowledges that all spend **prior to UARB approval is at NS Power's shareholder risk** if the Board requires changes to the project or declines to approve the project in whole or in part. **All capital spend** is also subject to rules regarding its **treatment in rate base** pursuant to the Board approved Summary CEJC and Accounting Policy 1520 – Rate Base, with which this project complies. [page 23]
>
> This analysis indicates that the proposed scope of rebuilding the Tusket Main Dam to address dam safety risks is the least costly alternative for **customers**. [page 34]
>
> Based on this assessment, the EAM confirmed that the best option for **customers** is to rebuild the dam to meet CDA dam safety guidelines … . The present value of revenue requirements associated with the selected alternative is an increase, but is the best solution for **customers** given the analysis on decommissioning [page 37]
>
> [bolding added]

- NSPI was given an Information Request that asked "What is the basis for flowing these costs [archeological costs and artifact salvage] through to customers" following a decommissioning. On December 6, 2017, NSPI replied:

> As noted above, NS Power views the archeological costs associated with decommissioning a necessary and prudent component of the asset retirement costs associated with this hydro system and as such, **NS Power should have the ability to recover these costs from customers** if incurred. [bolding added]

- Asked by another Information Request "would NS Power's ratepayers be exposed to the cost impacts" resulting from the Project's risks, on December 6, 2017 NSPI replied:

> All of the costs discussed in part (d) that are the responsibility of NS Power would be considered costs necessary and prudently incurred to put

> the project in service, thereby **recoverable from customers** as the benefit of the project accrues to customers. … [bolding added]

- NSPI's Reply to the comments of Midgard, the Board's independent consultant, and Intervenors, filed with the Board on February 28, 2018, repeats the submission:

> CONCLUSION
>
> As set out in NS Power's Application, refurbishing the Main Dam is the best cost option for **customers**.
>
> …
>
> … The cost alternatives, renewable generation considerations, and additional legal and environmental risks associated with decommissioning all suggest that refurbishing the Main Dam is the best option for **customers**.
>
> [bolding added]

- NSPI's closing submission to the Board, signed by its Regulatory Counsel, dated May 7, 2018, concludes with:

> The replacement of the Tusket Main Dam is in the best interest of **customers**. NS Power respectfully requests the Board to approve CI 29807 in the amount of $18,157,609. [bolding added]

[148] The Province endorsed the position that the capital costs would be recoverable from ratepayers. The Province's Intervenor Submission to the Board, dated February 14, 2018, said:

> 27. The Province makes no submission with respect to the estimated amounts, requirements, project alternatives, or other issues to be determined before the Board, other than to confirm the following:
>
> …
>
> C. As with any proponent, if NSPI is approved to undertake work on a Project that may require such costs as completing detailed archeological study and protection of Mi'kmaq artifacts, **such costs are properly a ratepayer cost** (relating to and flowing from that specific Project), and not a general "societal cost" to be paid by taxpayers at large. [bolding added]

[149] The Board reasonably found that, but for the Board's approval, the Project described in the NSPI Application would not proceed.

[150] After the Board's approval, would the Project proceed?

[151] Clearly NSPI wanted to do so. The NSPI Application (page 6) states:

> .. the investment is required to ensure the Tusket Main Dam structure is compliant with current Canadian Dam Association (CDA) dam safety guidelines and Nova Scotia Environment requirements. Additionally, the existing gates within the main dam structure have reached the end of their expected useful life and must be replaced. This structure is important to NS Power customers. It is a significant component of the Tusket Hydro System and without it all generation at the Tusket Powerhouse would be lost.

[152] Would there be any barrier to the Project? There is no evidence that the permits issued by the DOE and DFO were at risk of withdrawal. The NSPI Application (page 21), under the heading "Project Milestones", identified five milestones. The only one that related to authorizations was "Receive all Environmental Permits". The "Description" beside that milestone comprised:

> Nova Scotia Environment (NSE) Watercourse Alteration permit is issued for the planned duration of construction activities. Department of Fisheries and Oceans (DFO) Fisheries Act Authorization is granted.

[153] If the Project proceeds, would there be an adverse effect? The Board found:

> [101] In this matter, the footprint of the existing dam is being altered, with an impact on the water flows, and the potential exposure, or disturbance, by virtue of dewatering and construction activities, of pre-contact Mi'kmaw archeological artifacts and a continuing Aboriginal fishery. Therefore, Board approval does have the potential to impact asserted Aboriginal or treaty rights.

[154] This finding of fact is supported by evidence. The NSPI Application acknowledges throughout that the Project could adversely affect Mi'kmaq interests (above, paras. 78-84). The provincial Department of the Environment's letter of December 22, 2016 to KMKNO treated the NSPI Application as triggering consultation respecting adverse effects (above, para. 14).

[155] The evidence of causation here contrasts with the record in *Carrier Sekani*, where the Commission found that the Energy Purchase Agreement would not cause an adverse effect. In upholding that finding as reasonable, the Chief Justice noted:

> 92 … The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA was approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it … . [Supreme Court's italics]

[156] Here there is direct and probable causation from the Board's decision under s. 35 of the *Public Utilities Act* to the potential adverse effect on the Mi'kmaq interests.

[157] The Board correctly applied the constitutional principles. It reasonably interpreted its home statute and made findings of fact supported by evidence.

Conclusion

[158] I would dismiss the appeal. No party requested costs. The disposition will be without costs.

Fichaud J.A.

Concurred:

Farrar J.A.

Bryson J.A.