NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation*, 2019 NSCA 75

Date: 20190917
Docket: CA 484447
Registry: Halifax

Between:

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

Appellant

v.

Pictou Landing First Nation

Respondent

v.

Northern Pulp Nova Scotia Corporation

Intervenor

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: June 12-13, 2019, in Halifax, Nova Scotia

Subject: Aboriginal consultation – S. 35(1) of *Constitution Act, 1982*

Summary: For over fifty years, the Pulp Mill at Abercrombie Point has discharged fluid effluent and airborne emissions. Since 1967, the effluent has settled in the Boat Harbour Effluent Treatment Facility, owned by the Province and leased to the Mill's operator. The Intervenor Northern Pulp Nova Scotia Corporation is the current operator. Pictou Landing First Nation (PLFN), situated nearby, has long complained to the Provincial Government that the Mill's discharges were toxic. The *Boat Harbour Act*, S.N.S. 2015, c. 4, s. 3 enacted a partial accommodation by stating that, after January 30, 2020,

the use of the Boat Harbour Treatment Facility must cease. To operate, the Mill must have the Minister of Environment's Industrial Approval under part V of the *Environment Act*, S.N.S. 1994-95, c. 1. The Current Industrial Approval expires on January 30, 2020. Given the *Boat Harbour Act*, a new Industrial Approval will need a new effluent treatment facility (New ETF). A New ETF will require its own ministerial approval under Part IV of the *Environment Act*. Northern Pulp has applied for Part IV approval of its proposed New ETF. The application is under review by the Minister. As of yet, there is no application for Part V Industrial Approval.

Under s. 35(1) of the *Constitution Act, 1982*, before PLFN incurs a potential adverse impact to its credibly asserted rights that is caused by Crown conduct, PLFN is entitled to consultation with the Crown and, where appropriate, to accommodation. The Province has consulted with PLFN respecting the design and physical features of Northern Pulp's proposed New ETF and commits to consult respecting any application for a new Industrial Approval.

The Province has confidentially discussed with Northern Pulp whether the Province would provide funding for the New ETF. PLFN learned of these discussions and asked that consultations extend to the prospect of governmental funding. The Province refused. PLFN applied to the Supreme Court of Nova Scotia for a ruling that the consultations embrace the prospect of governmental funding.

The judge of the Supreme Court held that the Province has a duty to consult with PLFN respecting the prospective funding of a New ETF.

The Province appeals. In the Court of Appeal, Northern Pulp intervened and applied to add fresh evidence. PLFN applied to add fresh evidence in reply.

Issues: Should the Court admit the fresh evidence from Northern Pulp or PLFN? Must the Province consult with PLFN on the prospect that the Province would fund the New ETF?

Result: The Court of Appeal admitted the fresh evidence tendered by Northern Pulp and, in reply, by PLFN. The Court excluded

three exhibits that did not exist at the date of the hearing in the Supreme Court. The fresh evidence was admissible to remedy inadequate Crown disclosure before the hearing in the Supreme Court.

The Court of Appeal dismissed the appeal. The fresh evidence submitted by Northern Pulp included signed Agreements between Northern Pulp and the Province that set out terms of funding by the Province toward the design, engineering, environmental assessment, partial settlement of Northern Pulp's threatened lawsuit against the Province and, at the Province's option, capital cost of the New ETF. The Funding Agreements contributed to the potential adverse impact on PLFN. Under the tests to trigger consultation that have been established by the Supreme Court of Canada, the Province was required to consult with PLFN on the potential impact of the Province's Funding Agreements.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 53 pages.

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and

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and

Northern Pulp Nova Scotia Corporation

Intervenor

Judges: Bryson, Oland and Fichaud JJ.A.

Appeal Heard: June 12-13, 2019, in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of Fichaud J.A., Oland and Bryson JJ.A. concurring

Counsel: Sean Foreman, Q.C., for the Appellant
Brian J. Hebert and Tina Northrup, articling, for the Respondent
Harvey L. Morrison, Q.C. and Ryan Baxter, for the Intervenor

Reasons for judgment:

[1] For over half a century, the pulp mill at Abercrombie Point has discharged fluid effluent into Boat Harbour and emissions into the air. Pictou Landing First Nation is a Mi'kmaw community nearby. It has long complained to the Province that the discharges were toxic. The Provincial Government promised to act. But nothing was done.

[2] Then, in 2015, the Province came to a partial accommodation by enacting the *Boat Harbour Act*. The *Act* says the Mill's existing effluent treatment facility at Boat Harbour "must cease" operation by January 30, 2020.

[3] Under Part V of Nova Scotia's *Environment Act*, the Mill needs an Industrial Approval to operate. The Mill's current Industrial Approval expires on January 30, 2020. Without an effluent treatment facility, there will be no new Industrial Approval. Then the Mill's operation would end, as would the effluent and emissions. A new effluent treatment facility needs the Minister's Environmental Approval under Part IV of the *Environment Act*. Northern Pulp Nova Scotia Corporation, the Mill's current owner, has applied for Part IV approval of a new effluent treatment facility. The application remains under review.

[4] Under the *Constitution Act, 1982*, before Aboriginal peoples incur a potential adverse impact to their credibly asserted rights that is caused by Crown conduct, they are entitled to consultation with the Crown and, when appropriate, to accommodation. The Province treated Northern Pulp's Part IV application as triggering Crown consultation with Pictou Landing First Nation. So far, the consultation has been confined to the physical aspects of the design, construction and operation of Northern Pulp's proposed new effluent treatment facility.

[5] Meanwhile, the Province has confidentially discussed with Northern Pulp whether the Province would fund the new effluent treatment facility. Pictou Landing First Nation learned of these discussions and asked that consultation include the prospect of Crown funding. The Province refused. Pictou Landing First Nation applied for judicial review. A judge of the Supreme Court of Nova Scotia, after describing the record as "miniscule", held that the Province has a duty to consult before the Province becomes a "lender" to Northern Pulp.

[6] The Province appeals. Northern Pulp has intervened in this Court and seeks to admit fresh evidence. Pictou Landing First Nation offers fresh evidence in reply.

[7] There are two issues. Is either party's fresh evidence admissible? Must the Province consult with Pictou Landing First Nation on the prospect that the Province would fund the Mill's new effluent treatment facility?

Background

[8] The Respondent Pictou Landing First Nation (PLFN) is a Mi'kmaw community in Pictou County.

[9] Not far to the southwest of PLFN, at Abercrombie Point, is a bleached kraft pulp mill (Mill). The Mill has operated since September 1, 1967 under several owners. The Intervenor Northern Pulp Nova Scotia Corporation (Northern Pulp) acquired the Mill in 2008 and has operated it since.

[10] In August 2012, Stantec Consulting Ltd. prepared an Air Dispersion Modelling Study for Northern Pulp. The Stantec Study, page 3, gives an overview of the Mill's pulping process:

> The pulping process consists of digesting wood chips in white liquor, at elevated temperature and pressure, in a continuous digester to separate lignin from cellulose fibers. Once the cooking of the wood chips is complete, the stock is transferred to a blow tank and then to brown stock washers, where the pulp is separated from the cooking liquor by continuous washing of progressively cleaner water; airborne particles and contaminants are captured by vents which are routed to the recovery boiler for incineration. The separated pulp is further washed, bleached, pressed and dried into the finished product, with ventilation in place during the washing and the bleaching stages to remove airborne contaminants. The remainder of the process is designed to recover cooking liquor (for reuse) and heat.
>
> The spent cooking liquor and the pulp wash liquid are combined to form weak black liquor, which is sent through a series of evaporators to become concentrated (55% solids). This liquor is then further concentrated within a direct-contact evaporator to form strong black liquor (approximately 70% solids). The strong black liquor is burned in the recovery boiler to provide heat and power for the mill's processes. Gasses from storage tanks at each stage of the concentration process are vented into either the high-level roof vent (HLRV) or into the recovery boiler for direct incineration. The inorganic material that is collected following the burning of strong black liquor is called smelt. Smelt is combined with weak wash to form green liquor in the smelt dissolving tank. The green liquor is clarified then converted back to white liquor, to be re-used in the chip digestion process, in the slaker and causticizer system by adding calcium oxide

> (quicklime). The mud precipitate from the green liquor is sent to a lime kiln to re-generate the calcium oxide (quicklime).
>
> The mill also operates a power boiler which, for the most part, burns hog fuel, however bunker C fuel oil is used as needed.

[11] The Mill discharges fluid effluent into a treatment facility at Boat Harbour (Boat Harbour ETF), close to PLFN. The Boat Harbour ETF comprises two settling basins, an aerated stabilization basin and a pipeline that takes the effluent from the Mill to the settling basins. The Mill's toxic effluent has settled and stabilized in Boat Harbour since 1967.

[12] The Mill also discharges airborne contaminants that are blown by prevailing winds toward PLFN.

[13] For decades, the effect of the Mill's pollutants has been of concern to PLFN and a point of discussion between PLFN and the Province. Later I will cite the evidence [para. 46]. In 2015, the Legislature enacted the *Boat Harbour Act*, S.N.S. 2015, c. 4. The *Act* says:

> **Interpretation**
>
> 2 In this Act,
>
> …
>
> (b) "Facility" means the Boat Harbour Effluent Treatment Facility … .
>
> …
>
> **Prohibition**
>
> 3 On and after the earlier of January 31, 2020, and the date on which the Northern Pulp Nova Scotia Corporation ceases to use the Facility, the use of the Facility for the reception and treatment of effluent from the Mill must cease.
>
> **No action lies**
>
> 4 (1) No action lies against Her Majesty in right of the Province or a member of the Executive Council in respect of the cessation of the use of the Facility for the reception of treatment of effluent from the Mill as a result of this Act.
>
> (2) The enactment of this Act is deemed not to be a repudiation or anticipatory repudiation by Her Majesty in right of the Province of the lease agreement dated December 31, 1995, between Her Majesty in right of the Province and Scott Maritimes Limited, as extended by a lease extension agreement dated October 22, 2002, between Her Majesty in right of the Province and Kimberley-Clark Inc.

[14] The Province's factum characterizes the rationale for s. 3:

> 15. As part of its on-going relationship and commitment to the PLFN, the Province enacted the *Boat Harbour Act* in 2015, which requires Northern Pulp to close and replace the existing Boat Harbour Treatment Facility by January 30, 2020.

[15] The Province owns the Boat Harbour ETF and leases it to the Mill's operator. Section 4 of the *Boat Harbour Act* refers to the lease from the Province to the Mill's former owners, Northern Pulp's predecessors in title.

[16] The Mill is authorized to operate by Industrial Approval #2011-076657 issued by Nova Scotia Environment, effective January 30, 2015 with an expiry date of January 30, 2020 (Current Industrial Approval). The Current Industrial Approval was issued under Part V of the *Environment Act*, S.N.S. 1994-95, c. 1. Part V includes:

PART V

APPROVALS, NOTIFICATIONS, STANDARDS AND CERTIFICATIONS

Approvals

Prohibition

50 (1) No person shall knowingly commence or continue any activity designated by the regulations as requiring an approval unless that person holds the appropriate class of approval required for that activity.

(2) No person shall commence or continue any activity designated by the regulations as requiring approval, unless that person holds the appropriate class of approval required for that activity.

…

52 (1) Where the Minister [of Environment - s. 3(ag)] is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purpose of this Act, the Minister may, at any time, decide that no approval be issued in respect of the proposed activity if notice is given to the proponent, together with reasons.

(2) When deciding, pursuant to subsection (1), whether a proposed activity should proceed, the Minister shall take into consideration such matters as whether the proposed activity contravenes a policy of the Government or the Department, whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable.

Application for approval

53 (1) An application for an approval must be made in the manner prescribed by the regulations for the class of approval being sought by the applicant and must contain the information prescribed by the regulations.

…

Decision re application

54 (1) A decision on an application for an approval must be made within sixty days of the receipt of the completed application unless the Minister notifies the applicant otherwise in writing.

…

Powers of Minister

73 The Minister may

(a) classify releases for the purpose of this Part and exempt any release or any class of release from the application of this Part and attach terms and conditions to any such exemption;

(b) prescribe the concentration, amount, level and rate, including the maximum concentration, amount, level and rate of a substance that may be released into the environment;

(ba) establish procedures respecting the conducting of sampling, analysis, tests, measurements or monitoring of substances;

(c) determine the manner in which a report of a release of a substance is to be made and the contents of the report.

[17] The Current Industrial Approval, article 2, defines the "Scope of Approval" as applying to the "Facility". Articles 1(t), 1(v) and Appendix B, define "Facility" as the Boat Harbour ETF.

[18] As the Current Industrial Approval will expire on January 30, 2020, the Mill may not operate after that date without a renewed Industrial Approval under Part V. That renewal will require satisfactory treatment of effluent. Given s. 3 of the *Boat Harbour Act*, in order to operate after January 30, 2020, the Mill will need a new effluent treatment facility.

[19] A new effluent treatment facility requires its own Environmental Approval under Part IV of the *Environment Act*. Part IV includes:

PART IV

ENVIRONMENTAL-ASSESSMENT PROCESS

…

No work without approval

32 (1) Until the Minister [of Environment] has notified the proponent in writing that an undertaking is approved, no person shall commence work on the undertaking.

(2) The Minister may impose conditions upon the approval of an undertaking and the proponent shall comply with the conditions if the undertaking proceeds.

Registration of undertaking

33 Every proponent of an undertaking shall

(a) register the undertaking with the Minister in the time and manner prescribed by the regulations ….

Examination of information

34 (1) After an undertaking is registered pursuant to Section 33, the Minister shall examine or cause to be examined the information that is provided respecting an undertaking and shall determine that

(a) additional information is required;

(b) a focus report is required;

(c) an environmental-assessment report is required;

(d) all or part of the undertaking may be referred to alternate dispute resolution;

(e) a focus report or an environmental-assessment report is not required, and the undertaking may proceed; or

(f) the undertaking is rejected because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated.

(2) The Minister shall notify the proponent, in writing, of the decision pursuant to subsection (1), together with reasons for the decision, within the time period prescribed by the regulations.

…

[20] Northern Pulp has applied, under Part IV, for approval of the design, construction and operation of a new effluent treatment facility (New ETF). The Minister has not yet issued an approval.

[21] According to the judicial interpretation of s. 35(1) of the *Constitution Act, 1982*, before suffering a potential adverse impact to their credibly asserted rights caused by Crown conduct, Aboriginal peoples are entitled to consultation with the

Crown and, in appropriate circumstances, to accommodation. Later I will review the authorities on that matter [paras. 94-119]

[22] Northern Pulp's Part IV Application triggered the Crown's consultation with PLFN. The Province's factum states:

> 17. The Province is currently engaged in active consultation with the PLFN regarding the Pending ETF Application. The Province has confirmed at least $70,000.00 in capacity funding to support PLFN's meaningful participation in the process.

The Province's factum says (para. 18) the consultation "remains on-going and will continue throughout the Pending ETF Application".

[23] The current consultation focuses on the physical impact of the design, construction and operation of the proposed New ETF. PLFN has expressed concern about the discharge of effluent that is proposed for the New ETF.

[24] As the New ETF would handle fluid emissions in a marine environment, the current consultation does not encompass the Mill's airborne emissions. The Province acknowledges that its consideration of a new Part V Industrial Approval, once Northern Pulp applies for it, would trigger consultation with PLFN that includes airborne emissions. The Province's factum says:

> 22. There is no dispute that when Northern Pulp takes the required steps to seek a new or amended Industrial Approval to permit continued operation of the Abercrombie Mill beyond January 30, 2020, that further consultation between the PLFN and the Province that may be required as part of that future regulatory process can address any changes in Mill operations beyond that date, including regulatory controls regarding air emissions.

[25] Then there is the nub of this litigation. The Province has discussed with Northern Pulp the prospect of Crown funding that Northern Pulp may apply toward the design, engineering, environmental assessment and capital cost of the New ETF. During PLFN's consultations for the New ETF, PLFN learned of these discussions. However, PLFN had no access to the documents between the Province and Northern Pulp that reflected the discussions' progress.

[26] On January 11, 2018, PLFN's solicitor wrote to Nova Scotia's Office of Aboriginal Affairs. That Office coordinates the Province's approach to Aboriginal

issues. The letter asked that the consultation embrace "the decision to fund the effluent facility". The letter explained PLFN's reasons:

> However, the decision to provide funding to Northern Pulp to allow it to build a new treatment facility is also a decision that triggers consultation because of the potential impact that decision could have on Pictou Landing First Nation, impacts that are over and above the potential impacts of the new treatment facility itself. Specifically, by providing government funds to Northern Pulp as requested the government will be allowing Northern Pulp to extend the operation of the mill beyond January 30, 2020. After that date, the mill must cease operations if no alternative treatment facility is available. By providing funds to Northern Pulp for the purposes of building a new treatment facility, the Province would be prolonging the operating life of the mill.
>
> As noted in previous correspondence, the focus of Pictou Landing First Nation to date has been on the impact of the Boat Harbour treatment facility which is located in close proximity to the community. With the Boat Harbour treatment facility closed, odors and other nuisances emanating from that facility will be eliminated. However, there is reason to believe that some odors and contaminants, including Sulphur compounds and particulates, will be carried from the mill's stacks at Abercrombie Point to the reserve lands of the Pictou Landing First Nation and to other areas in and around Pictou County frequented by members of the Pictou Landing First Nation, including fishing areas within the Northumberland Strait.
>
> To the extent that the foregoing is true, extending the operational life of the mill beyond January 30, 2020 will result in continued contamination of the air to which Pictou Landing First Nation members are exposed beyond January 30, 2020. On the other hand, should the Province decide not to provide funding for the new effluent treatment facility, the mill will need to cease operations. For this reason, we take the position that the decision to provide funding to Northern Pulp triggers a separate duty to consult with Pictou Landing First Nation.
>
> This impacts the scope of the consultation. If we were to limit the consultation to the impacts of the new treatment facility only – the construction, the structure itself and the ongoing discharge of effluent, we would only focus on the marine environment and we would miss the adverse impacts from the air emissions from the mill itself.
>
> Accordingly, Pictou Landing First Nation seeks the acknowledgement of the Province that the scope of the consultation includes the decision to provide financial assistance to Northern Pulp and all adverse impacts related to the continued operation of the mill beyond January 30, 2020.

[27] By a letter of February 26, 2018, Beth Lewis, a Consultation Advisor with the Office of Aboriginal Affairs, replied to PLFN's solicitor. Her letter conveyed

to PLFN the Province's position on several matters. The letter also denied PLFN's request for consultation on funding:

> The current active consultation is focused on potential physical impacts to Aboriginal and Treaty rights associated with the design, construction, and operation of the proposed ETF. The intent of the ETF is to mitigate or eliminate harm to the environment by the industrial operation of the Mill.
>
> A decision by the Province in regard to any funding of the ETF does not create a new impact on Aboriginal or Treaty rights. The Province may provide information to PLFN in the event any decision regarding funding is made, in keeping with the spirit of maintaining transparent communication on the project.

[28] On April 4, 2018, PLFN filed a Notice for Judicial Review with the Supreme Court of Nova Scotia. The Notice cited s. 35(1) of the *Constitution Act, 1982* and challenged the Province's refusal "to consult with and, if necessary, accommodate [PLFN] regarding the [Province]'s pending decision to provide financial assistance to Northern Pulp … for the construction of a proposed effluent treatment facility".

[29] PLFN and the Province treated the court application as a judicial review of the ruling by Ms. Lewis on behalf of the Office of Aboriginal Affairs. On a judicial review, *Civil Procedure Rule* 7.09(1)(a) requires the decision-making authority to file with the Court "a complete copy of the record". The "Record of the Respondent (Nova Scotia Minister of Aboriginal Affairs)", filed by the Province, comprised only two items: the letter of January 11, 2018 from PLFN's counsel and Ms. Lewis' reply of February 26, 2018.

[30] In support of the application, PLFN's Chief Andrea Paul filed an affidavit dated June 13, 2018. Her Affidavit included:

> 2. I am advised by Gary Porter, Executive Director, Corporate Initiatives at the Nova Scotia Department of Transportation and Infrastructure Renewal, and do verily believe, that the Province of Nova Scotia ("Nova Scotia") is negotiating with Northern Pulp Nova Scotia Corporation ("Northern Pulp") on the sharing of costs for a new effluent treatment facility (the "New Treatment Facility") and pipeline (the "New Pipeline") for Northern Pulp's existing pulp mill at Abercrombie, Nova Scotia (the "Mill"). It is my understanding based on various discussions with representatives of Northern Pulp and the Province that without Provincial funding, the New Treatment Facility and the New Pipeline will not be built.
>
> …

> 6. One concern that our community has always had has been the quality of the air that we breathe. We have suffered odors from the Boat Harbour Treatment Facility for 50 years. This has caused constant fear about the effect of this on our health, especially our elders' and children's health. …
>
> 7. With the closure of the Boat Harbour Treatment Facility, one source of these sulphur compounds will be removed – and our community is thankful for that. But as we look toward the future we must also be concerned about the long-term impact of the operation of the Mill on our community, including adverse impacts from the airborne contaminants coming from the Mill itself. We have never had an opportunity to study and understand these long term impacts as we have to date been so focused on the closure of the Boat Harbour Treatment Facility.
>
> 8. However, the Province is now in the process of determining whether to fund the New Treatment Facility and New Pipeline. If it does, the Mill will be operating for many years to come. In deciding whether to fund the New Treatment Facility and New Pipeline, we believe that the Province must take into account the potential impact of its decision on Pictou Landing First Nation. It is for this reason that we asked for a formal consultation with the Province in respect of this important decision.
>
> …

[31] Chief Paul's Affidavit attached as exhibits three studies that discussed the adverse health impacts that may be caused by toxic emissions from pulp and paper facilities such as the Mill. One was the Stantec Study [above, para. 10].

[32] The Province responded with an affidavit signed by its counsel, filed on July 6, 2018. The Affidavit attached the Mill's Current Industrial Approval, due to expire January 30, 2020 [above, paras. 16 and 17].

[33] On July 25, 2018, Supreme Court Justice Timothy Gabriel heard the matter.

[34] The Province provided no evidence on funding the New ETF. The judge's record on that topic was confined to the hearsay in Chief Paul's Affidavit, Ms. Lewis' conclusory letter and the assertions of counsel. The Province's brief, filed July 6, 2018, said:

> 7. The Province has disclosed it is also engaged in confidential discussions directly with Northern Pulp regarding potential crown funding that <u>may</u> be provided to support construction of the new ETF (the "Potential Crown Funding"). No such decision has yet been made. [underlining in Province's brief]

[35] On November 30, 2018, Justice Gabriel issued a decision (2018 NSSC 306) that granted PLFN's application. To summarize his reasoning:

- Justice Gabriel described the record as "miniscule". [para. 9]

- The judge and both parties treated the matter as a judicial review of the decision by the Province's Office of Aboriginal Affairs. The judge characterized the issue as whether the duty to consult was triggered and applied a correctness standard. [paras. 55-62]

- The judge [para. 48] cited the three elements of the test to trigger the Crown's duty to consult, stated in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 ["*Carrier Sekani*"], per McLachlin C.J.C. for the Court:

> [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.
> …

- The judge noted that the Province did not deny the existence of *Carrier Sekani*'s first element. [para. 63]

- He considered the second and third elements together and framed the issue as "whether the contemplated conduct (which is to say, the potential funding decision) might adversely affect an Aboriginal claim or right so as to trigger a duty to consult". [para. 63]

[36] Justice Gabriel said – Yes, for several reasons:

- He considered that Crown funding for a particular design of the New ETF was connected to any "meaningful" consultation on the New ETF that already was underway. [paras. 71-73]

- He said that Crown funding of the New ETF might impair at least the appearance of objectivity in the process by which the Minister would later consider whether to give an approval under the *Environment Act*. This would implicate the "Honour of the Crown" that governs consultations under s. 35(1) of the *Constitution Act, 1982*. [paras. 74-77]

- He said the Province's funding decision "will undoubtedly influence 'higher level' strategic decision making" that may lead to an adverse impact under *Carrier Sekani*'s test. [para. 78]

- He said "[i]f the Province is to become the lender, not only is it providing the means by which the ETF will be built, but it will have an

interest to insure that the mill will continue to remain in operation into the future so as to at least recover the taxpayers' investment". [para. 79]

- The judge said some environmental standards are discretionary, and provincial funding might affect whether the Minister applies minimum or maximum standards for the approvals under the *Environment Act*. [para. 80]

[37] Justice Gabriel concluded:

> [84] A consideration of the above factors, and others, makes it seem very implausible that a government decision to fund a new effluent treatment facility less than fourteen months before the statutorily mandated closure of the existing facility and the expiry of the mill's industrial approval, would not carry with it a <u>potential</u> for further adverse effect on PLFN's right to occupy lands already polluted by the Boat Harbour Treatment Facility. The new adverse impacts would include the increased likelihood of a new ETF being built (in the short term) and of the mill remaining open (in the longer term) prompted by (at least the appearance of) the interest of the Province to either recover its investment or profit from it. Provincial involvement in funding would set the stage for further decisions that have (at the very least) the potential to impact the "strategic, higher level decisions" of the Province in precisely the manner contemplated by [*Carrier Sekani*] (para. 47).
>
> [85] Finally, the bifurcation of issues ("design and construction" from the "actual funding" of the ETF) artificially compartmentalizes a process which, in my view, should be treated more holistically.
>
> [86] One (obvious) example, arises from the legitimate concern on the part of PLFN (presumably the Province as well – hence the consultation with respect to the design and construction) about the potential for deleterious effects upon the environs, which could potentially result from an inadequate design of the ETF. Separation of the potential funding issue would result in the loss of an opportunity for the two sides to discuss whether the financing (if it was to be provided by the Province) should or could be tied into a system of penalties and/or rewards for achieving and/or failing to achieve proposed emission or effluent discharge targets. This may (potentially) impact upon the likelihood that these targets would be attained.
>
> [87] Put differently, and unlike the situation in *River Dene* [*Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31], it seems clear to me that the parties have plenty to consult about with respect to the topic of the potential Provincial funding of the new ETF. …
>
> …
>
> [88] The application is granted. The consultations between the parties must necessarily include *inter alia* whether the Province should fund the construction

> and design of the ETF and pipeline, and, if so, what form that financing will take.

[38] The Supreme Court's Order dated January 16, 2019 said:

> 2. The Province has a duty to consult with the Applicant regarding potential funding for the construction and design of a proposed effluent treatment facility and pipeline for the kraft pulp mill at Abercrombie Point, Nova Scotia, owned by Northern Pulp Nova Scotia Corporation, including as to the form such funding might take.

[39] On January 22, 2019, the Province filed a Notice of Appeal to this Court. The Province's grounds of appeal say the judge "erred in law" by ruling that the Crown must consult respecting funding to Northern Pulp.

[40] The following day, Northern Pulp filed a motion to intervene in the Province's appeal. On February 20, 2019, Justice Bourgeois of this Court granted the motion. Her reasons (2019 NSCA 12) said:

> [13] I agree that Northern Pulp, as the potential recipient of Crown funds, has a direct interest in whether PLFN must be consulted in discussions of any financial arrangements.
>
> [14] I also agree with the submission of Northern Pulp that, as a potential recipient of government funding, it will likely bring a different perspective to the duty to consult than the Crown.
>
> [15] In its written submissions, Northern Pulp set out the two positions it seeks to advance as intervenor:
>
>> 1. The appeal should be allowed on the ground that the discussions between Northern Pulp and the Crown were settlement discussions in respect of which there is no duty of consultation owed to PLFN; and
>>
>> 2. The appeal should be allowed on the ground that, whether the discussions are characterized as settlement discussions or not, the continued operation of the Mill will not result in the infringement of aboriginal or treaty rights, and consequently no duty of consultation is owed to PLFN.

[41] Northern Pulp gave notice that it wished to adduce fresh evidence. Under *Civil Procedure Rule* 90.47(1), fresh evidence is for a panel, not a chambers judge. The issue of fresh evidence was deferred to this Court at the hearing of the appeal.

[42] On February 19, 2019, Northern Pulp filed its motion to adduce fresh evidence. That evidence comprised the Affidavit of Terri Fraser, Northern Pulp's

Technical Manager, sworn February 15, 2019 and her supplementary affidavit sworn April 5, 2019 that attached a document inadvertently omitted from her earlier Affidavit.

[43] PLFN countered with a motion to add a further Affidavit of Chief Paul, sworn March 4, 2019, as response fresh evidence.

Is the Fresh Evidence Admissible?

[44] Ms. Fraser's Affidavits say, or attach exhibits that say:

- The Province owns and, from 1967 to 1995, operated the Boat Harbour ETF.
- On December 1, 1995, the Province and Scott Maritimes Limited, then the owner of the Mill, signed a Memorandum of Understanding (MOU) to restructure their relationship. The MOU's recitals included a helpful chronology of events to that date. I quote:

> 1. As an inducement to encourage the development of the pulp industry in Pictou County, Nova Scotia and to encourage the introduction and expansion of other industries therein, Nova Scotia has agreed to develop and operate an effluent treatment facility at Boat Harbour, Pictou County, Nova Scotia;
>
> 2. Scott Paper Company, through a subsidiary, Scott Maritimes Pulp Limited (now Scott), constructed a kraft pulp mill at Abercrombie Point, Nova Scotia (the "Mill") which went into production on or about the 1st day of September, 1967;
>
> 3. Nova Scotia and Scott entered into an Agreement dated the 30th day of September, 1970 (the "1970 Agreement") which sets out the terms and conditions and respective obligations of the parties with respect to the operation and use of the Boat Harbour Effluent Treatment Facility and the supply of water to the Mill;
>
> 4. Pursuant to the 1970 Agreement, Nova Scotia is obliged to provide the Boat Harbour Effluent Treatment facility and supply water to the Mill for which Scott pays a set fee;
>
> 5. The 1970 Agreement is for a term of twenty-five (25) years commencing October 1, 1970, and is renewable at the instance of either party, subject to negotiation or arbitration of certain terms;
>
> 6. Scott gave notice of renewal of the 1970 Agreement to Nova Scotia on the 24th day of February, 1995 and such renewal was acknowledged by Nova Scotia by letter dated March 30, 1995;

> 7. Pursuant to Section 37(2) of the *Fisheries Act* (Canada) the Minister of Fisheries and Oceans has required Nova Scotia to submit a plan for the future operation of the Boat Harbour Effluent Treatment Facility and Nova Scotia desires to submit a plan which will result in the immediate closure of part of the Facility and a definitive termination date for the remainder of the Reconfigured Facility;

Article 1.01 of the MOU said that, under the 1970 Agreement with Scott Maritimes, "Nova Scotia constructed and is presently operating the [Boat Harbour Effluent Treatment] Facility".

The MOU referred to a "Reconfigured Facility", defined as the Effluent Treatment Facility after completion of upgrades prescribed in the MOU. The MOU, articles 4.01(k) and (l) said:

> (k) Nova Scotia agrees to obtain all required permits, consents, approvals and letters of authorization for the continued operation of the Reconfigured Facility … .
>
> (l) Nova Scotia agrees to use its best efforts to assist Scott [to] obtain all necessary permits, consents and approvals to permit the construction and operation of a replacement effluent treatment facility to replace the Facility at the expiration of the term of the Lease.

- One aspect of the restructured relationship was a Lease, dated December 31, 1995, of the Boat Harbour ETF by the Province, as owner, to Scott Maritimes for a term of ten years ending December 31, 2005.
- On October 22, 2002, the Province and Kimberly-Clark Inc., the Mill's successor in title to Scott Maritimes, signed an extension of the Lease to December 31, 2030.
- Neenah Paper Company of Canada was the Mill's successor in title to Kimberly-Clark.
- In 2008, Northern Pulp acquired the Mill from Neenah.
- On May 12, 2008, the Province signed an Acknowledgement Agreement that the benefits of the 1995 MOU and Lease and the 2002 lease extension accrued to Northern Pulp and "shall continue to apply with respect to the ongoing operation of the Effluent Treatment System". The Acknowledgement Agreement specified that the terms identified on Schedule A "shall operate for the full benefit of Purchaser" (defined as Northern Pulp and its affiliates). Schedule A listed article 4.01(k) of the MOU, quoted above, that "Nova Scotia agrees to obtain all … approvals … for the continued operation of the Reconfigured Facility … ."

- Northern Pulp was not consulted in advance about the *Boat Harbour Act.* Rather "Northern Pulp was merely advised on or about April 15, 2015 that the bill would be introduced in the House of Assembly on April 16, 2015".

- Northern Pulp has notified the Province that Northern Pulp claims compensation for the early termination of the Lease (January 30, 2020 instead of December 31, 2030) as a result of the *Boat Harbour Act*. Ms. Fraser's Affidavit says: "Northern Pulp and the Province have been engaged in discussions on the amount and form of such compensation since 2016."

- Northern Pulp and the Province have signed an Agreement dated December 28, 2016, and an Amendment dated September 27, 2017, that provide reimbursement by the Province to Northern Pulp for engineering, design and environmental assessment expenses for the New ETF. The Minister of Transportation and Infrastructure Renewal signed for the Province. The Agreement and Amendment provide:

    - "The Province shall reimburse Eligible Expenses incurred by Northern Pulp … after December 1, 2016" provided the expenses include no markup, overhead, profit or management fee or salaries, and are not already reimbursable by another public authority. [art. 3.01]
    - Northern Pulp's reimbursable Eligible Expenses include Northern Pulp's reasonable costs for the design and engineering of the New ETF (up to $300,000.00), for the Environmental Assessment (up to $250,000.00), and "other costs approved by the Province in writing". [arts. 1.02, 2.01, and Amending Agreement, art. 2]
    - Northern Pulp's accounts for Eligible Expenses shall include "an approved project progress report". [art. 3.03]
    - Accounts are to be sent to the provincial Department of Transportation and Infrastructure Renewal for "approval and payment". [art. 3.04]
    - When "approved for payment", the Province is to pay within 30 days of the Province's receipt of the account. [art. 3.05]
    - Except as required by law, regulatory or judicial authority, Northern Pulp "shall keep private and confidential and not

> make public or divulge any information or material relative to this Agreement without having first obtained the written consent of the Province". [art. 6.01]

- On December 13, 2017, the Province, by the Minister of Transportation and Infrastructure Renewal, and Northern Pulp signed an Agreement providing that the Province would reimburse Northern Pulp's detailed design and engineering costs, up to $8 million, for the New ETF. The Agreement included the terms for approvals by the Province and confidentiality by Northern Pulp as set out above for the Agreement of December 28, 2016 as amended on September 27, 2017. The December 13, 2017 Agreement also said:

> 5.02 The parties agree that all or any part of **any contribution made by the Province** to Northern Pulp under the terms of this Agreement **will, at the option of the Province, be considered as a contribution to the capital cost** of a replacement facility for the Boat Harbour Effluent Treatment Facility, should the Province agree to contribute to such a replacement; **or be set-off against any future award Northern Pulp may be granted for damages** against the Province in any respect. In no event will Northern Pulp be required to repay any amount contributed by the Province under this Agreement, unless a contribution has been made to Northern Pulp contrary to the provisions of this Agreement. [bolding added]

[45] I will refer to the Agreement of December 28, 2016, the Amendment of September 27, 2017 and the Agreement of December 13, 2017 together as the "Funding Agreements".

[46] PLFN objects to Northern Pulp's fresh evidence but, if the evidence is admitted, submits a reply Affidavit of Chief Paul sworn March 4, 2019. Chief Paul gives PLFN's perspective on the Boat Harbour ETF's chronology that is set out in Ms. Fraser's Affidavit. It also states how PLFN learned of the Province's role in funding and design of the New ETF. The Affidavit includes:

- The Memorandum of Understanding dated December 1, 1995 between Her Majesty in right of the Province and Scott Maritimes Limited that is also attached to Ms. Fraser's Affidavit;

- A Report dated February 16, 1998, prepared for the Province, which Chief Paul cites as supporting her view that PLFN had Aboriginal title to the lands across on which the Boat Harbour ETF's pipeline was built.

- The Boat Harbour ETF has "created devastating environmental conditions in Boat Harbour, contrary to assurances given by the Province before it was built", after which PLFN "has been in various negotiations and discussions with the Province of Nova Scotia since 1967 in an effort to have the environmental problems associated with Boat Harbour addressed".

- A letter dated February 12, 1991, from the Hon. John G. Leefe, Provincial Minister of Environment, to the Federal Minister of Indian Affairs and Northern Development, copied to PLFN's lawyer, confirmed the Province's "commitments" to discontinue the Boat Harbour ETF and return Boat Harbour waters to their natural tidal regime by approximately November 1995.

- Correspondence confirming that, in September 1995, the Province and PLFN agreed that the Boat Harbour ETF could continue for a further ten years to December 2005, in return for the Province's agreement that the Boat Harbour ETF would be discontinued by December 31, 2005.

- In 2001, PLFN and Kimberly-Clark Inc., the Mill's new owner, agreed that, instead of closing the Boat Harbour ETF, Kimberly-Clark would, by December 31, 2005, build a new pipeline that would bypass Boat Harbour.

- Nonetheless, on October 22, 2002, the Province and Kimberly-Clark Inc. extended the Lease of the Boat Harbour ETF (with its existing pipeline) to December 31, 2030.

- The Boat Harbour bypass pipeline was not built.

- On January 2, 2006, PLFN and Neenah Paper Company (which had acquired the Mill from Kimberly-Clark) signed an Agreement to extend the deadline for building the bypass pipeline to December 31, 2008.

- In June 2008, Neenah Paper conveyed the Mill to Northern Pulp. Northern Pulp asked PLFN for a further extension of the date for the bypass pipeline.

- PLFN refused to grant a further extension, citing adverse environmental effects on its community.

- On December 2, 2008, PLFN's then Chief Francis-Muise met with the Province's: Minister of Justice and Aboriginal Affairs, the Hon. Michael Baker; Minister of Natural Resources, the Hon. David Morse; and Minister

of Transportation and Infrastructure Renewal, the Hon. Murray Scott. At the meeting, Chief Francis-Muise was told the Province would close the Boat Harbour ETF. This was confirmed by a letter dated December 4, 2008 from Minister Scott, copied to the others and to Northern Pulp. The letter included:

> As Minister Baker so graphically stated: "To say that the Band has been long suffering would be a masterful understatement of the obvious." It is our unwavering intention to end that suffering as quickly as possible. It should have been done long ago.
>
> Our first step will be to find another discharge location for mill effluent that does not involve Boat Harbour. We will then clean the harbour and return it to a tidal state.
>
> Achieving our mutual goal of relocating the Boat Harbour Effluent Treatment Facility will take time to complete as there is a massive amount of work involved. The band has been incredibly patient with time expended on attempts so far.
>
> …
>
> Let me make our government's position perfectly clear. We believe your community has suffered from the negative effects of the Boat Harbour Treatment Facility for far too long. We are fully committed to ending that suffering as quickly as it is practical to do so.

- In June 2009, after an election, there was a new Provincial Government.

- Chief Paul's Affidavit says "[f]ollowing that election Pictou Landing First Nation was advised that the new government was studying the matter and in 2010 was advised that the Province would not close the Boat Harbour Treatment Facility."

- In September 2010, PLFN sued the Province and Northern Pulp. The 57-page statement of claim is an exhibit to Chief Paul's Affidavit. The lawsuit claims interference with Aboriginal and Treaty rights to land, water and riparian rights, breach of contract, fraudulent and negligent misrepresentation, nuisance and escape of dangerous substance, trespass, failure to consult and accommodate and breach of accommodation, violation of Aboriginal title with the pipeline, negligence, breach of fiduciary duty and duty of good faith. The action seeks declarations of rights, injunctions and damages.

- After a breakage in the effluent pipeline in 2014, the Province and PLFN agreed the Province would legislate the closure date for the Boat Harbour ETF. Further negotiations led to the enactment of the *Boat Harbour Act*.

- In November 2016, PLFN learned the Province and Northern Pulp were jointly designing a New ETF. In March 2017, PLFN learned that the Province and Northern Pulp were discussing cost sharing of the New ETF.

- The PLFN then asked for consultation as set out in counsel's letter of January 11, 2018 [above, para. 26].

- The Province responded with Ms. Lewis' letter of February 26, 2018, declining consultation on the matter [above, para. 27].

[47] The Province objects to the admission of Exhibits I and J in Ms. Fraser's Affidavit and to Exhibit W in Chief Paul's reply Affidavit. I have not paraphrased those exhibits. The basis of the objections is that the documents are dated after the hearing of July 25, 2018 before Justice Gabriel.

[48] The Province accepts that the other fresh evidence offered by Northern Pulp and PLFN should be admitted. The Province's factum says:

> 81. In summary, the Province does not object to the fresh evidence that has been filed by these parties that was not otherwise included in the Record and that pre-dates the hearing date of July 25, 2019 [*sic* – 2018], as additional background information beyond the Record.
>
> …
>
> 83. The evidence is generally credible and in admissible form and **speaks to a "decisive or potentially decisive" issue** raised by the lower court in the JR [judicial review] Decision, by providing further background information and perspective as to the nature of the Potential Crown Funding (i.e. "funding" to be provided to Northern Pulp that can defray costs relating to the new ETF was not a loan or financing with the Province as a lender, and could be set-off against any future finding or agreement with the Province flowing from the effective termination of Northern Pulp's land lease as of January 30, 2020).
>
> [bolding added]

[49] Northern Pulp objects to Chief Paul's Affidavit as (1) irrelevant, because it addresses historical events rather than the impact of the New ETF, and (2) inadmissible on appeal as, with due diligence, the evidence could have been offered at the hearing before Justice Gabriel.

[50] In my view, the fresh evidence offered by both Northern Pulp and PLFN should be admitted, except for (1) Exhibits I and J in Ms. Fraser's Affidavit and Exhibit W in Chief Paul's Affidavit, as they post-dated the hearing before the reviewing judge, and (2) the identifying paragraphs for those three exhibits.

[51] My reasons are these.

[52] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence of "special grounds". This Court has approved two categories of special grounds. The first is relevant evidence that was omitted despite the parties' due diligence in the lower court. The second relates to critical matters of process and fairness in the court or tribunal below.

[53] ***Palmer* test:** The first category embodies the well-known *Palmer* test. The evidence may be admitted if the applicant exercised due diligence in an effort to adduce the evidence at the court or tribunal of first instance, and the evidence is relevant, credible, could reasonably have affected the result and is in admissible form: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, p. 775; *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal denied [2013] S.C.C.A. No. 446, para. 131.

[54] Here, Northern Pulp's fresh evidence is in admissible form and credible. As I will discuss, the evidence is relevant and reasonably could have affected the result.

[55] This leaves *Palmer*'s due diligence criterion.

[56] That criterion is poorly suited to the situation of an appellate intervenor. The intervenor was not a party and had no opportunity to adduce evidence in the court below. Northern Pulp addresses the point by saying PLFN "should" have named Northern Pulp as a party. This submission would shift the failure of diligence to PLFN. PLFN replies that, under s. 35(1) of the *Constitution Act, 1982*, consultation is a matter *inter se* between the Crown and the Aboriginal group, and PLFN was not legally required to name Northern Pulp.

[57] In my view, a debate about who "should" have been named in the Supreme Court is unhelpful.

- The "ultimate legal responsibility for consultation and accommodation rests with the Crown" and "[t]he honour of the Crown cannot be delegated": *Haida Nation v. British Columbia (Minister of*

Forests), [2004] 3 S.C.R. 511, para. 53, per McLachlin C.J.C. for the Court. The Chief Justice (paras. 52, 56 and 80) said the private party "cannot be held liable for failing to discharge the Crown's duty to consult and accommodate" and, on that basis, the Supreme Court allowed the private logging company's appeal against Haida Nation. Here, the true "parties" to the s. 35(1) consultation were the Province and PLFN. PLFN was not legally required to sue Northern Pulp as a respondent.

- The course for an interested party who is not sued is intervention. Had Northern Pulp moved to intervene in the court below, likely its motion would have been granted, as Justice Bourgeois ordered in the Court of Appeal. See, for instance, *Carrier Sekani*, where Rio Tinto Alcan actively participated as an intervenor. Northern Pulp learned of PLFN's Supreme Court application shortly after its filing yet made no motion to Justice Gabriel. If Northern Pulp felt it "should" have been a party, it should have moved to intervene.

[58] On the other hand, if *Palmer*'s due diligence criterion is simply dropped, then an appellate intervenor may adduce any credible and relevant evidence, in admissible form, that may reasonably be expected to affect the result. The appeal would become a *de novo* proceeding.

[59] That is not the law. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), [2005] 3 S.C.R. 388, Justice Binnie for the Court said:

> 40 … It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, **provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial** or raise an argument that is otherwise **unfair** to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not … .
>
> 41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice**.** [citations omitted, bolding added]

[60] Normally, the intervenor takes the evidence as it appears on the record but can advance a new argument that does not cause unfairness to an existing party.

[61] In my view, the *Palmer* test does not assist Northern Pulp's fresh evidence motion.

[62] ***Wolkins* test:** Northern Pulp's motion turns on the second type of "special ground" for admitting fresh evidence on appeal. In *R. v. Wolkins*, 2005 NSCA 2, Justice Cromwell said:

> [61] The other category of fresh evidence concerns evidence directed to the validity of the **trial process itself** or to obtaining an original remedy in the appellate court. In these sorts of cases, the *Palmer* test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a **failure of disclosure** by the Crown, the focus is on whether the new evidence shows that the failure may have **compromised trial fairness**: see *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307 at paras. 73-77 … . [bolding added]

To similar effect: *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, para. 79, leave to appeal refused [2012] S.C.C.A. No. 237.

[63] Under the *Wolkins* test, the evidence must still be credible and in admissible form. The Affidavits of Ms. Fraser and Chief Paul satisfy those criteria. Further, the evidence must be relevant to the cited concern of process and fairness. Here, the concern is whether the Province failed to disclose to PLFN, Ms. Lewis and Justice Gabriel, evidence in the Province's possession that was pivotal to determining the appropriate scope of consultation with PLFN.

[64] *Wolkins* mentioned "failure of disclosure by the Crown" as an example of a process concern that supported the admission of fresh evidence. Justice Cromwell cited *R. v. Taillefer*, which discussed inadequate Crown disclosure that would impair the accused's right to full answer and defence in a criminal case.

[65] In my view, similar considerations govern inadequate Crown disclosure respecting consultation under s. 35(1) of the *Constitution Act, 1982*.

[66] Extrinsic evidence may be admitted to assess the appropriate scope of Aboriginal consultation that is required by the honour of the Crown: *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2016 NSSC 260, paras. 21-24 and authorities there cited; *Tsuu T'ina Nation v. Alberta (Environment)*, 2008 ABQB 547, para. 28; Donald J.M. Brown, Q.C. and the Honourable John W. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2009), para. 6.5300, and authorities cited at note 425. Adequate disclosure inheres in the

honour of the Crown as liberally defined by the Chief Justice in *Haida Nation*, *supra*, paras. 16, 25 and 42, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, paras. 23-24 [below, paras. 98-103]. Adequate disclosure is necessary both for meaningful consultation and so a court may assess whether the Crown's duty to consult is triggered.

[67] Generally, on a judicial review, extrinsic evidence may be admitted to add the necessary background, remedy inadequate disclosure and address the absence of evidence on a central factual issue: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, para. 20. This is especially so in a judicial review that follows an atypically restricted production of relevant information: *e.g. Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, paras. 74-77 (leave to appeal granted by the Supreme Court of Canada).

[68] A Consultation Advisor in the Office of Aboriginal Affairs is not a typical administrative tribunal. The Office is part of a Provincial Department and coordinates the Province's approach to Aboriginal affairs. Ms. Lewis' letter of February 26, 2018 conveyed to PLFN the Province's position on several matters. After denying PLFN's request for consultation on funding, her letter continued:

> … The **Province may provide** information to PLFN in the event any decision regarding funding is made, in keeping with the spirit of maintaining transparent communication on the project.
>
> …
>
> The **Province recognizes** the need for capacity funding … . **The Province further recognizes** the desire for PLFN to engage subject matter experts … . [T]he Province commits to providing up to $70,000 in funding to PLFN ... . **[T]he Province remains open** to considering future funding requests.
>
> [bolding added]

We have no record of any instructions Ms. Lewis would have received on the matters for which she conveyed the Province's positions. A Consultation Advisor has no legal independence and is not statutorily authorized to make a binding adjudication on issues between PLFN and the Province. Ms. Lewis neither conducted a "hearing" nor received "evidence". She was the Province's spokesperson, not an arbiter of constitutional disputes.

[69] It is simply incongruous to treat the two letters to and from Ms. Lewis as a complete and impervious "judicial review record" on this complex and important issue.

[70] In summary, under the *Wolkins* approach, this Court may remedy inadequate Crown disclosure by admitting fresh evidence that is relevant to whether consultation is triggered under s. 35(1) of the *Constitution Act, 1982*.

[71] Was disclosure inadequate here? The circumstances were:

- The Province and Northern Pulp signed the Funding Agreements on December 28, 2016, September 27, 2017 and December 13, 2017.
- The Funding Agreements were not provided to PLFN.
- PLFN heard of the potential Provincial funding from a Provincial employee.
- Armed only with hearsay, PLFN's lawyer wrote to the Nova Scotia Office of Aboriginal Affairs on January 11, 2018.
- PLFN's request to Ms. Lewis and later application for judicial review did not afford the more rigorous pre-trial disclosure that governs a trial in the Supreme Court. PLFN had no access to the Funding Agreements.
- Ms. Lewis made the decision from which judicial review has been taken. She was not given the Funding Agreements. We know this because the Province's Judicial Review Record to Justice Gabriel did not include the Funding Agreements, despite Rule 7.09(1)(a)'s requirement that the reviewing court be provided with a "complete copy of the record" before the decision-maker.
- Justice Gabriel was not given the Funding Agreements in what he described as a "miniscule" record prepared by the Province.
- Justice Gabriel was left to draw inferences from the hearsay in Chief Paul's Affidavit and the unsworn statements in the argument of counsel. The Province's brief, filed July 6, 2018, said:

> 7. The Province has disclosed it is also engaged in confidential discussions directly with Northern Pulp regarding potential Crown funding that <u>may</u> be provided to support construction of the new ETF (the "Potential Crown Funding"). No such decision has yet been made. [underlining in Province's brief]

- From the signed Funding Agreements that reimbursed Northern Pulp's Eligible Expenses incurred after December 1, 2016, it is apparent that, by the time of the proceeding before Justice Gabriel, the Province and Northern Pulp had moved beyond mere "discussions".

- From his record, Justice Gabriel inferred the Province was considering whether to lend money to Northern Pulp. His reasons said:

> [63] The Province does not deny that the first element set forth in *Carrier Sekani* "knowledge of a potential Aboriginal claim or right" exists. Rather it maintains that the central issues concern the second and third elements. These latter, taken together, raise the question of whether the contemplated conduct (which is to say, the **potential funding decision**) might adversely affect an Aboriginal claim or right so as to trigger a duty to consult.
>
> …
>
> [79] … If the Province is to become **the lender**, not only is it providing the means by which the ETF will be built, but it will have an interest to insure that the Mill will continue to remain in operation into the future so as to at least recover the taxpayers' investment.
>
> [bolding added]

- The funding decision was no longer "potential", nor was the Province a "lender". Rather, the Province had already made non-recoverable payments for approved items of design, engineering and environmental assessment either toward settlement or reduction of damages in a potential lawsuit by Northern Pulp or, at the Province's option, toward the capital cost of the New ETF.

- The Province's factum to this Court chastises the reviewing judge for "speculation" about the potential adverse impact and for finding there would be a lending relationship without evidence.

- The Province's factum was filed after Northern Pulp filed its motion to adduce the fresh evidence, which included the Funding Agreements as exhibits. The Province (factum, para. 83) now acknowledges that Northern Pulp's evidence, including the Funding Agreements, "speaks to a 'decisive or potentially decisive' issue" and should be admitted.

[72] This matter proceeded through the reviewing court without the Funding Agreements. The Funding Agreements would have affected the analysis of the central issue. Later I will explain how.

[73] I would admit Ms. Fraser's two Affidavits under the *Wolkins* test. I would exclude Exhibits I and J of the Affidavit and the identifying paras. 15-16. Those exhibits were dated after the hearing before the reviewing judge and could not have been tendered on the judicial review.

[74] **PLFN's fresh evidence:** Chief Paul's Affidavit is offered in reply to Northern Pulp's fresh evidence. As Binnie J. said in *Mikisew*, *supra*, an intervention should not prejudice or unfairly affect an existing party.

[75] Ms. Fraser's Affidavit recites the chronology of the Boat Harbour ETF and attaches exhibits citing events back to the 1960s. That is the historical evidence that is relevant from Northern Pulp's perspective. It is fair that PLFN be permitted to do the same, from its perspective.

[76] Northern Pulp's fresh evidence is tendered in support of Northern Pulp's submissions on the merits of the appeal. Its submissions extend beyond those of the Province, even to challenge a concession made by the Province on one of *Carrier Sekani*'s elements. It is fair that PLFN be permitted to adduce reply evidence of its choosing to support its responding submissions.

[77] I would admit Chief Paul's Affidavit, except for Exhibit W and its identifying para. 42. That is because Exhibit W was dated after the judicial review hearing before Justice Gabriel.

Issue on the Appeal

[78] Did the judge err in law by ruling that the Crown was obliged to consult with PLFN respecting the prospect that the Province may provide funds to Northern Pulp for the New ETF? Given the admission of the fresh evidence, the issue focuses on the impact of the Funding Agreements.

Standard of Review

[79] In *Carrier Sekani*, McLachlin C.J.C. for the Court discussed the standards of review for issues of consultation with Aboriginal groups:

> [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*, 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, when the two are inextricably entwined, the standard will likely be reasonableness.** …

…

[78] … **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 (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190.

…

[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.**

[bolding added]

[80] 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.
>
> [bolding 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; *Nova Scotia (Attorney General) v. Nova Scotia (Utility and Review Board)*, 2019 NSCA 66, paras. 30-32.

[81] The passages from *Haida Nation* and *Carrier Sekani* discussed the judicial review of an administrative decision, meaning the choice was correctness or reasonableness under *Dunsmuir*.

[82] PLFN initiated this litigation with a Notice for Judicial Review. To the reviewing judge, both PLFN and the Province proposed the judicial review approach. Justice Gabriel accepted that characterization:

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

[83] In the Court of Appeal, the Province, PLFN and Northern Pulp all confirm the judicial review approach. No party suggested this was a direct claim by PLFN against the Province, or that the Court of Appeal should apply the appellate standard for a direct claim – *i.e.* correctness for legal issues or palpable and overriding error to issues of fact or mixed issues with no extractable legal error – to the decision of Justice Gabriel.

[84] I will apply the judicial review approach. This involves an appellate standard to Justice Gabriel's ruling and a reviewing standard to Ms. Lewis's letter.

[85] In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, LeBel J. for the Court defined the appellate standard:

> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2002 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as " 'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the *administrative* decision"
>
> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it correctly?
>
> [Deschamps J.'s italics]

[86] Was the appropriate reviewing standard to Ms. Lewis' letter correctness or reasonableness?

[87] The Province's brief to the applications judge said correctness:

> **The Standard of Review is Correctness**
>
> …
>
> 45. [H]ere, the sole issue is whether a duty to consult is triggered at all. This is a legal determination that was made by an administrative decision-maker (not the Minister himself, or an adjudicative tribunal) on a threshold question of law that relies on minimal key facts that are not seriously in dispute.

[88] The judge agreed. Justice Gabriel's decision said:

> [59] … here the court is not being asked to review a completed process of consultation replete with an extensive activity record. If it were, this would ordinarily trigger the application of a more deferential or relaxed standard (one of reasonableness).
>
> [60] Rather, in circumstances such as this, the extant case law frames the applicable standard of review as one of correctness. Either the duty to consult exists or it does not.

[89] In this Court, all the parties cite correctness:

- The Province's factum:

> **Standard of Review is Correctness**
>
> 64. The Province argued in the lower court, and agrees with the JR Decision, that the applicable standard of review to determine the existence of a duty to consult under s. 35 of the *Constitution Act* is correctness.
>
> 65. This does not appear to be in dispute. As argued, either the duty to consult exists, or it does not.

> 66. The impugned decision challenged by PLFN was a legal determination that was made by an administrative decision-maker (not the Minister himself, or an adjudicative tribunal) on a threshold question of law that relies on minimal key facts that are not seriously in dispute.

- PLFN's factum:

> 35. The parties all agree that whether the duty to consult exists is a question of law and therefore the appropriate standard of review by the Court below was correctness.

- Northern Pulp's factum:

> 29. … The Judge held that the appropriate standard of review was one of correctness: …. Consequently, this Court must determine whether the Judge was correct in holding that a duty of consultation exists.

[90] The Province's Notice of Appeal defines its grounds as whether the applications judge "erred in law". The List of Issues in the Province's factum repeats that phrase for each issue. The Province's factum says:

> 59. The grounds of appeal are all elements of the **one central legal issue** to be determined when applying the test outlined by the Supreme Court of Canada as to when contemplated Crown conduct may adversely affect an Aboriginal claim or right and trigger a duty to consult pursuant to s. 35 of the *Constitution Act*.
>
> …
>
> 70. In this appeal, the Province agrees the appropriate standard of review was chosen by the lower court, but that it was applied incorrectly resulting in an error of law that must be reversed on appeal.
>
> [bolding added]

[91] The Province characterizes its grounds of appeal as embodying a pure question of constitutional law that invokes correctness.

[92] As stated in *Haida Nation* and *Carrier Sekani*, a pure legal question on whether consultation is triggered under 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, para. 48, per Binnie J. for the majority. Accordingly, I will apply correctness. That standard would govern whether the issue is termed truly jurisdictional or constitutional or of central importance to the legal system in the terminology of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras. 58-60.

[93] Whether there is causation of an adverse impact may involve an issue of fact that would attract a reasonableness standard: *Carrier Sekani*, paras. 78, 85, 92-93. Here, a deferential standard applied to either Ms. Lewis's letter or Justice Gabriel's ruling would be virtually unworkable. Neither was given Funding Agreements which are now before this Court as critical fresh evidence. Ms. Lewis made no findings and simply imparted the Province's position. Justice Gabriel was left to draw inferences, as best he could, from a feeble foundation.

The Legal Principles on Consultation

[94] I will start by outlining the general legal principles, as they have evolved, then analyze the submissions that the judge erred.

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

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

[96] Section 35(1) affirms that before suffering a potential adverse impact, caused by Crown conduct, to their credibly claimed rights, 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.

[97] ***Haida Nation* (2004):** In *Haida Nation*, *supra*, the Province of British Columbia issued a Tree Farm Licence in 1961 to MacMillan Bloedel Limited. The license permitted the harvesting of trees on lands claimed by the Haida people. In 1981, 1995 and 2000, the Province replaced the previous license with replacement licenses to Weyerhaeuser Company Limited. The Haida Nation challenged the replacement licenses as having been issued without consultation. The Supreme Court held that the provincial Crown had breached its duty of consultation with the Haida.

[98] McLachlin C.J.C. explained the basis for consultation and accommodation and set out the test to trigger the Crown's duty. 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 this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.**
>
> [bolding added]

[99] The rationale means the duty may apply 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]

[100] 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. 112, 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.** 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]

[101] The process of consultation must be "meaningful":

> 42 At all stages, good faith is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised [citation omitted], through a process of meaningful 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.

[102] The Crown may delegate the consultative process but cannot escape the responsibility to consult. 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; that 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]

[103] ***Taku River* (2004):** In *Taku River Tlingit First Nation*, *supra*, a companion case to *Haida Nation*, the Chief Justice for the Court elaborated on the Honour of the Crown:

> 23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The province submits that it owes the TRTFN no duty outside of those specific situations.
>
> 24 The province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida*, *supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. **In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).**
>
> [bolding added]

[104] ***Mikisew* (2005):** In *Mikisew*, *supra*, Binnie J. for the Court expanded on the Chief Justice's comments in *Haida Nation*, respecting the degree of "adverse effect" needed to trigger consultation:

> 34 … The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. **The flexibility lies not in the trigger ("might adversely affect it")** but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to notice" (*Haida Nation*, at para. 43). …
>
> [bolding added]

[105] ***Carrier Sekani* (2010):** Several years later, in *Carrier Sekani*, *supra*, the Supreme Court refined the principles.

[106] 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 with Rio Tinto Alcan. At issue was the adequacy of the Crown's consultation with the Aboriginal groups. The Commission accepted 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. It approved the Agreement. Its ruling was overturned by the British Columbia Court of Appeal but reinstated by the Supreme Court of Canada.

[107] 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]

[108] 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; (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.** …

[bolding added]

[109] 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].

[bolding added]

[110] Then the second element:

[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** [citation omitted]. Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation)*; ….
>
> [bolding added]

[111] 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 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 Nations 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 those 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. …
>
> …
>
> [52] The respondent's submissions are based on **a broader view** of the duty to consult. **It argues that even if the 2007 EPA will have no impact** on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The government action or decision, **however inconsequential,**

> becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.
>
> [53] **I cannot accept this view of the duty to consult.** *Haida Nation* negates such a broad approach. It 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.
>
> [54] … An order compelling consultation is only appropriate where **the proposed Crown conduct, immediate or prospective, may adversely impact** on established or claimed rights. Absent this, other remedies may be more appropriate.
>
> [Supreme Court's italics, bolding added]

[112] The Commission found that the Energy Purchase Agreement would not adversely affect the Aboriginal interests. In upholding that finding, the Chief Justice said:

> [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]

[113] ***Ktunaxa Nation*** **(2017):** As the approach is prospective, the tribunal or reviewing court that assesses issues 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 v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 S.C.R. 386, paras. 84-85.

[114] ***Clyde River*** **(2017):** In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 S.C.R. 1069, para. 25, Justices Karakatsanis and Brown for the Court 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) might adversely affect the Aboriginal right.

[115] Justices Karakatsanis and Brown affirmed the Crown's responsibility to address the constitutional imperative:

> [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. …

[116] To satisfy the Constitution's reconciliatory objective, Justices Karakatsanis and Brown interpreted "Crown conduct" and "adverse effects" broadly:

> [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 resources. 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). [bolding added]

[117] ***Chippewas of the Thames* (2017):** In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] 1 S.C.R. 1099, the National Energy Board was asked to approve a modification of a pipeline that crossed the First Nation's traditional territory. The Board considered whether there had been adequate consultation, held the project's effect on Aboriginal interests would be minimal, and approved the project with accommodating conditions.

[118] Justices Karakatsanis and Brown held that the duty to consult is triggered by adverse impacts from the specific proposal currently at issue and not by merely historic impacts. However, the historical context and cumulative effects of an ongoing project may inform the analysis of the impact to be expected from the current proposal:

> [41] The duty to consult is **not triggered by historical impacts.** It is not a vehicle to address historical grievances. In *Carrier Sekani*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue – not [on] 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**" (*Carrier Sekani*, at para. 53 [emphasis in *Carrier Sekani*]). *Carrier Sekani* also clarified that "[a]n order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights" (para. 54).
>
> [42] That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context [citation omitted]. **Cumulative effects of an ongoing project, and historical context,**

> **may therefore inform the scope of the duty to consult** [citation omitted]. This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project [citation omitted].
>
> [bolding added]

[119] ***Mikisew* (2018):** In *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765, paras. 32, 102 and 148, the majority held that the law-making process does not trigger the duty to consult. Justice Karakatsanis succinctly tracked the consultative duty's derivation from first principles:

> [21] The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. …
>
> [22] The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests [citation omitted]. One way that it does so is by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes [citation omitted]. This endeavour of reconciliation is a first principle of Aboriginal law.
>
> …
>
> [24] As this Court has stated in *Haida Nation*, the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances" (paras. 16 and 18). … Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances [citations omitted].
>
> [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]. … These cases demonstrate that, in certain circumstances, Crown conduct may not constitute an "infringement" of established s. 35 rights; however, acting unilaterally in a way that **may adversely affect** such rights does not reflect well on the honour of the Crown and may thus warrant intervention on judicial review.
>
> [26] … The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims [citations omitted].

> [27] … Crown conduct need **not have an immediate impact** on lands and resources to trigger the duty to consult. This Court has recognized that **"high-level management decisions or structural changes to [a] resource's management" may also trigger a consultative duty** [citation omitted]. …
>
> [bolding added]

Analysis – The Test

[120] 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 potentially would adversely impact the Aboriginal right or claim: *Haida Nation*, para. 35; *Carrier Sekani*, para. 31.

First Element – Crown Knowledge

[121] The Crown's knowledge of "a credible but unproven claim suffices". "[T]he threshold, informed by the need to maintain the honour of the Crown, is not high". The Crown's "actual knowledge arises when a claim has been filed". *Haida Nation*, para. 37. *Carrier Sekani*, para. 40. The Court that assesses whether the duty to consult is triggered does not determine the merits of the underlying claim: *Ktunaxa Nation*, paras. 84-85.

[122] In 2010, PLFN filed a Notice of Action (Hfx No. 335700) that sets out detailed claims against the Province, Northern Pulp and the predecessor owners of the Mill, alleging actionable interference with PLFN's lands and resources caused by the Mill's discharges. Chief Paul's fresh evidence Affidavit attaches the Notice of Action and Statement of Claim.

[123] The Province accepts it had the required knowledge. Its factum says:

> 90. The Province does not dispute that it has knowledge of the Aboriginal claims or rights asserted by PLFN to the lands and resources that have been impacted by the operations of the Abercrombie Mill since 1967.

[124] Northern Pulp disagrees. Its factum cites the letter of January 11, 2018 from PLFN's counsel to the Office of Aboriginal Affairs, then submits:

> 100. … no Aboriginal or treaty right is identified and, accordingly there is no evidence provided of an Aboriginal right to be free of "contamination of the air". In the absence of a showing that an Aboriginal treaty right might be infringed, no duty of consultation arises … .

[125] The submission has no merit. PLFN's 2010 Statement of Claim includes credible claims respecting airborne pollution: *e.g.* paras. 54-57, 106, 112 and 133. The Crown knew of these claims. PLFN was not obliged to prove its claim with evidence before requesting consultation.

[126] *Carrier Sekani*'s first element is satisfied.

Second and Third Elements –
Crown Conduct that Causes a Potential Adverse Impact

[127] The submissions have, for the most part, treated the second and third elements of the test in tandem, as did Justice Gabriel's reasons. I will do the same.

[128] The point of departure is the Chief Justice's reasoning in *Carrier Sekani* which, for convenience, I requote:

> [44] … 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 [citation omitted]. Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*). …
>
> …
>
> [47] … **high-level management decisions or structural changes** to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources" [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. …
>
> [90] … In cases where adverse impact giving rise to a duty to consult has been found as a consequence of **organizational or power-structure changes**, it has generally been on the basis that **the operational decision at stake may affect the Crown's future ability** to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have **reduced its power to control** logging of trees, some of them old growth forest, and hence its ability to exercise decision making power over the forest consistent with the honour of the Crown. … [Chief Justice's italics, bolding added]

[129] As an example of such a strategic or organizational decision, the Chief Justice cited the transfer of tree licenses in *Haida Nation*.

[130] In *Haida Nation*, the Province granted a tree farm license. The license did not authorize the harvesting of timber, for which a further permit would be required. The adverse impact would be the harvesting. The Supreme Court held that the tree farm license was "strategic planning for utilization of the resource" that might lead to an adverse impact on Aboriginal claims to the resource, should a permit later be issued. This triggered the duty to consult. The Chief Justice said:

> 75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm License, or only at the stage of granting cutting permits? **The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits.** T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" [citation omitted].
>
> 76 **I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision relates to strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title**.
>
> [bolding added]

[131] The Funding Agreements (1) reduce the likelihood of the Mill's closure, and (2) increase the likelihood of ministerial approvals for the Mill's continued operation. Together, those factors generate sufficient potential for adverse impact to satisfy the test. I will explain.

[132] **Avoidance of Mill closure:** The only evidence of Northern Pulp's commitment to build a New ETF is the Funding Agreements which prescribe cost sharing by the Province. Nowhere does Northern Pulp's fresh evidence suggest it would build the New ETF without the Province's funding. According to Ms. Fraser, the Province and Northern Pulp have negotiated the matter since 2016. If after these negotiations the Province held the view that, absent Provincial funding, Northern Pulp would build a New ETF anyway, then it is difficult to understand why the Province would commit to cost sharing.

[133] There is a distinct potential that, without the Province's contribution, Northern Pulp would decline to pay the full amount required for the New ETF and would be content to sue the Province for the alleged breach of the Lease. Then the Mill would not obtain a new Industrial Approval after January 30, 2020, and would close, ending the discharge of contaminants that adversely impacts PLFN.

Consequently, the Province's funding could contribute to maintaining the Mill's toxic discharges after January 30, 2020.

[134] **Impact on Minister's approvals:** The Funding Agreements for the New ETF are meaningful only if followed by the Minister's approvals under Parts IV and V of the *Environment Act*. Without those approvals, the New ETF would not operate, the Mill would close and its toxic discharges would end on January 30, 2020. With the approvals, the discharges could continue to adversely impact PLFN after that date.

[135] Would the Funding Agreements potentially influence the Minister's exercise of discretion to issue the approvals?

[136] The Funding Agreements make it clear the Province would not be a "lender", as Justice Gabriel had assumed. However, the Funding Agreements inject their own incentives into the process of ministerial approval.

[137] Those incentives include the following:

- Provincial funds already have been paid, with more to come, toward the design, engineering, environmental assessment or capital cost of the New ETF. Without the ministerial approvals, the Province's payments would be wasted. The New ETF would not operate. Ministerial approvals are needed for the Province's investment to be productive.

- The Funding Agreements say the Province "approves" the items of design, engineering and environmental assessment before paying Northern Pulp. Once the Province approves under the Funding Agreements, would there be an about-face that denies approval under the *Environment Act*? Likely, the contractual approval would facilitate the statutory approvals. In the past, the Province has contracted to give approvals for a new ETF. The 1995 MOU, articles 4.01(k) and (l), said the Province would "obtain all required … approvals ... for the continued operation of the Reconfigured Facility". In 2008, the Province signed an acknowledgement that this provision would continue to benefit Northern Pulp. [above, para. 44].

- The Funding Agreements embody partial terms of settlement of a threatened lawsuit by Northern Pulp against the Province for early termination of the Lease. A settlement is meaningful only with ministerial approvals under the *Environment Act*. The approvals would allow the Mill to operate toward the expiry date of the terminated Lease, reducing Northern

> Pulp's claimed damages. Denial of approval could leave Northern Pulp's alleged losses mostly intact, subject to issues of mitigation, for pursuit in litigation against the Province. The Minister might consider an avoided lawsuit to be beneficial for the Province.

[138] The Funding Agreements are pivotal to these factors. If the Minister considers such a factor as favoring the exercise of his discretion to approve under Parts IV or V of the *Act*, then the Funding Agreements would contribute to the Mill's operation after January 30, 2020 and to the discharge of contaminants that would adversely affect PLFN after that date.

[139] The Province submits that any consideration by a court whether ministerial approval may be affected by a potential benefit to the Province (what the submissions termed a "political" factor): (1) is legally forbidden reasoning under *Imperial Oil Limited v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, and (2) factually, is "speculation" and "conjecture".

[140] I will discuss these two points.

[141] **Forbidden reasoning:** The Province, endorsed by Northern Pulp, submits it is legally impermissible to consider the possibility that the Minister's exercise of discretion for approvals under Parts IV or V of the *Environment Act* may be affected by a political factor, such as a potential benefit to the Province. They rely on *Imperial Oil Ltd. v. Quebec, supra*.

[142] An appreciation of the Supreme Court's reasoning in *Imperial Oil* is critical to assessing these submissions.

[143] In *Imperial Oil*, Quebec's Minister of the Environment issued a "characterization order" that Imperial Oil perform a study to include decontamination measures. Imperial Oil asked the Administrative Tribunal of Quebec to quash the order. The Minister had been involved in earlier decontamination work and was being sued by the landowners for the contamination. Imperial Oil argued the Minster was biased which violated procedural fairness. The Tribunal declined to quash the Minister's order. The matter was appealed through to the Supreme Court of Canada. Justice LeBel for the Court held that the Minister's order should not be quashed. LeBel J. reasoned as follows:

17 **The sole issue now at stake in this appeal is the question of procedural fairness or natural justice in relation to the Minster's decision.** It remains, though, an important issue. The appellant submits that there was bias, or at least an appearance of bias, that completely vitiated the decision to issue a characterization order. **That argument is based on the premise that the Minister was bound by a duty of impartiality** that he could not fulfil because of the existence of a conflict of interest. … If the argument that the Minster must be impartial, as framed by the appellant, is found to be without merit, the legal basis for the entire challenge to the decisions of the Tribunal and the Minster will fall apart. …

…

18 … the question relates to an environmental protection problem in Quebec. It cannot be resolved without first examining the statutory framework that governs this field in Quebec. …

…

20 The centrepiece of Quebec's environmental legislation is the *Environment Quality Act*, which was originally enacted in 1972. …

21 The Minister of the Environment plays a key role in the administration of the Act and the regulations under it, and the implementation of the general policy on which they are based. **The legislature has delegated substantial and diverse functions and powers to the Minister for such purposes**. …

…

27 … At the outset of the analysis, a preferred approach would have been to attempt to determine the applicability of the concept of impartiality relied upon by the appellant, in its full potential reach. In this perspective, the scope of the duty of impartiality upon an administrative decision-maker such as the Minister in the exercise of **an essentially discretionary and political power**, and the manner in which that duty is discharged, would then have had to be examined.

C. *The Duty of Impartiality in Administrative Law and Variations of That Duty*

28 The duty of impartiality ranks among the fundamental obligations of the courts. …

…

31 **The appellant's reasoning thus treats the Minster**, for all intents and purposes, like a member of the judiciary, whose **personal interest in a case would make him apparently biased** in the eyes of an objective and properly informed third party. This line of argument **overlooks the contextual nature** of the content of the duty of impartiality which, like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions ….

…

38 … The Minister was **not performing an adjudicative function** in which he was acting as a sort of judge. On the contrary, **he was performing his functions of management and application of environmental protection legislation**. **The Minister was performing a mainly political role** which involved his authority, and his duty, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation.

39 Having regard to the context, which includes the Minster's functions viewed in their entirety, as well as to the framework within which his power to issue orders is exercised, **the concept of impartiality governing the work of the courts did not apply to his decision.** … **In exercising his discretion, the Minster could properly consider a solution that might save some public money**. …

[bolding added]

[144] From *Imperial Oil*, the Province's factum submits:

141. While the underlying scenarios are somewhat different, the same principles apply to the present case. There is no basis, in fact or law, to question or pre-judge the required and independent regulatory approval process applicable to Northern Pulp that will be governed independently by the Minster of Environment.

[145] After citing the factors that the Minister may weigh under the *Environment Act*, Northern Pulp's factum says:

120. In these, and other matters, the Minister is not performing adjudicative functions:

[quoting paras. 38-39 from *Imperial Oil*]

121. These words apply to equal force to the exercise of the power conferred by the Legislature in the Minister of Environment. The Judge erred when he held that the Minster of Environment's decision-making with respect to the future operation of the new ETF and the Mill might be tainted by a conflict of interest. As the *Imperial Oil* case clearly shows that the concept of impartiality as deployed by the Judge in his judgment are [*sic*] not applicable to the Minister of Environment. Accordingly, it should not have been used to impose a duty of consultation on the Province.

[146] In *Imperial Oil*, Justice LeBel said the Minister of the Environment "was not performing an adjudicative function" and the "concept of impartiality governing the work of the courts did not apply to his decision". The Province and Northern Pulp correctly point out that, in our case, the Minister's decision on approval

would not be challengeable based on principles of legal impartiality or conflict of interest.

[147] However, there is no challenge to a ministerial decision. So far, there is no ministerial decision.

[148] More to the point, LeBel J. also said that the Minister exercised "an essentially discretionary and political power" and "a mainly political role" meaning, for instance, "the Minister could properly consider a solution that might save some public money". That was why judicial impartiality played no role.

[149] The Province interprets *Imperial Oil* as precluding this Court from considering whether the Minister, when assessing whether to give approval, might heed a "political" factor such as a potential benefit to the Province. *Imperial Oil* said no such thing. To the contrary, LeBel J. said the Minister *may heed* such a political factor.

[150] **Speculation and conjecture:** The Province says it is "speculative" and "unfounded conjecture" to suggest that a ministerial approval may be influenced by a benefit to the Province. The submission turns a blind eye to history. For decades, the Provincial Government has vacillated this way and that, weighing economic stimulus against environmental concerns from the Mill's discharged contaminants. The chronology is set out in Chief Paul's fresh evidence [above, para. 46]. The Province has offered no evidence on the matter.

[151] The Minister's powers under Part IV and V are broad and discretionary, as were the Quebec Minister's "political" authority in *Imperial Oil*. Nova Scotia's s. 52, dealing with Industrial Approvals, cites criteria of "public interest", contravention of "a policy of the Government" and "unacceptable" adverse effects. Section 73 gives the Minister unrestricted discretion to grant exemptions or to attach terms and conditions for exemptions or for releases into the environment. Given the ruling in *Imperial Oil*, the Minister's legal power to consider a political factor – *i.e.* a benefit to the Province – is unconstrained by principles of judicial impartiality.

[152] **Other submissions by the Province and Northern Pulp:** The Province and Northern Pulp make the following additional submissions on the second and third elements of *Carrier Sekani*'s test:

- The Province says its funding decision is not a "strategic, higher level" decision under *Carrier Sekani*, paras. 44, 47 and 90 and *Haida Nation*, paras. 75-76.
- The Province submits that to require consultation on the funding would implement the "alternative" or "broader view" of consultation that the Chief Justice rejected in *Carrier Sekani*, paras. 52-54.
- The Province says governments commonly fund projects and to treat funding *per se* as a trigger for Aboriginal consultation would open floodgates of unmanageable consequences.
- Northern Pulp submits that emissions or discharges after January 30, 2020 would be just a "continuing breach" and would not generate a "novel adverse impact" from the current proposal, as discussed in *Carrier Sekani*, para. 49 and *Chippewas of the Thames*, paras. 41-42.

[153] I will take these points in turn.

[154] **Strategic and higher-level decision:** In *Carrier Sekani*, para. 44, the Chief Justice said: "A potential for adverse impact suffices" and the duty to consult "extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights".

[155] The Funding Agreements are such a strategic initiative. They were signed by the Minister of Transportation and Infrastructure Renewal and emanate from no lower a "level" than did *Haida Nation*'s tree farm licenses that satisfied the test. Since the 1960s, when considering the Mill's future, the Province has weighed environmental concerns against economic benefits. The balancing exercise has occupied the highest levels of government, as set out in Chief Paul's second Affidavit [above, para. 46].

[156] **"Broader view" of consultation:** The Province next submits that to require consultation on the funding would implement the "alternative" or "broader view" of consultation that the Chief Justice rejected in *Carrier Sekani*, paras. 52-54.

[157] The Chief Justice said the rejected "broader theory" would trigger consultation when there is "no impact" or with impact "however inconsequential" from "the specific Crown proposal at issue". Here, the specific Crown conduct is the Province's Funding Agreements. I have identified their potential impacts. The impacts are more than inconsequential. This is not the rejected "broader theory".

[158] **Funding and floodgates:** The Province says this. Governments often offer financial assistance to promote economic initiatives. It is unrealistic to expect governments to track every subsidy for potential effects on Aboriginal interests and then initiate consultations. Application of such a standard would be unmanageable. The trigger must include more than mere funding.

[159] These reasons do not treat funding as a freestanding basis for consultation. That issue is for another day.

[160] The Province agrees that design of the New ETF and any upcoming application for Industrial Approval should be subject to consultation [above, paras. 22 and 24]. The Funding Agreements connect the design and engineering to the Provincial funding, to the Provincial approvals, and to the dynamics of settlement of Northern Pulp's threatened lawsuit against the Province. These factors are interdependent because the Province's Funding Agreements made them so. Under s. 35(1) of the *Constitution Act, 1982*, "the commitment is to a meaningful process of consultation": *Haida Nation*, para. 42. The funding is not a stand-alone topic for consultation. Rather, the potential impact of the Funding Agreements, including their provisions on funding, contributes incrementally to the impact that generated the existing consultation. Meaningful consultation with PLFN may not occur in a silo that obscures the interdependence of these factors.

[161] **Continuing breach or novel impact:** Northern Pulp submits that the chronology back to the 1960s, set out in Chief Paul's second Affidavit, is "historical impact" that is not to be addressed by current consultation. Northern Pulp says effluent or emissions after January 30, 2020 would be merely a "continuing breach" without a "novel adverse impact" from the current proposal, as discussed in *Carrier Sekani*, para. 49 and *Chippewas of the Thames*, paras. 41-42.

[162] I respectfully disagree. The 2015 *Boat Harbour Act* means that, as of January 30, 2020, the effluent and emissions "must cease" unless there is a New ETF and a new Industrial Approval. That was the new legal baseline as of 2015. It was a partial accommodation by the Crown to PLFN. As discussed, the Funding Agreements of 2016 and 2017 constitute Crown conduct that potentially impacts whether there will be a New ETF and new Industrial Approval for the period after January 30, 2020. The adverse impact would be caused by the contaminants discharged after January 30, 2020. Given the new legal baseline of a partial accommodation, this is a novel impact.

[163] The evidence of events since the 1960s is context that helps the Court understand the impact and informs the scope of the consultative duty as contemplated by the passage from *Chippewas of the Thames*, para. 42. For instance, the Province says the notion that a political factor, involving a benefit to the Province, may influence the Minister's decision whether to approve under the *Environment Act* is "speculation" and "conjecture". Yet the evidence shows that such factors have been standard fare in governmental decision-making for the Boat Harbour ETF and the Mill. [above, paras. 44 and 46].

[164] **Summary:** The Funding Agreements: (1) reduce the likelihood that Northern Pulp would allow the Mill to close after January 30, 2020, to avoid paying the full cost of a New ETF; and (2) heighten the likelihood of ministerial approvals that are necessary for the Mill to operate after January 30, 2020. The Funding Agreements, along with the Province's funding that they prescribe, constitute Crown conduct with "a potential for adverse impact" on PLFN by increasing the likelihood the Mill will discharge contaminants after January 30, 2020.

Conclusion

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

Fichaud J.A.

Concurred: Oland J.A.
Bryson J.A.