**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111

**Date:** 20200324
**Docket:** Halifax, No. 487834
**Registry:** Halifax

**Between:**

Sipekne'katik

Appellant

and

Nova Scotia (Minister of Environment)
and

Alton Natural Gas Storage LP

Respondents

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**LIBRARY HEADING**

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| **Judge:** | The Honourable Justice Frank C. Edwards |
| **Heard:** | February 18 and 19, 2020, in Halifax, Nova Scotia |
| **Subject:** | *Constitution Act* - s. 35<br>*Nova Scotia Environment Act* – s. 138 |
| **Facts:** | The Appellant had appealed the April 8, 2019 Decision of the NS Minister of the Environment on the basis of inadequate Crown consultation with the Sipekne'katik Band regarding the Alton Natural Gas Storage Project. |
| **Issue:** | Whether the Minister made a palpable and overriding error when she concluded that the level of consultation was "appropriate to the circumstances and to the Aboriginal and |

treaty rights asserted."

**Result:** I allowed the appeal and reversed the Minister's decision. The Minister's decision was not supported by the evidence. While there had been extensive consultations regarding the potential environmental impacts of the Project, the core issue of Aboriginal title and treaty rights was never specifically engaged. The Minister therefore committed palpable and overriding error when she concluded that the level of consultation was appropriate. I also found that, but for her misapprehension of the evidence, the Minister would have concluded otherwise.

I directed the parties to resume consultations for a period of 120 days or for such time as the parties mutually agree. In the present circumstances, it is not possible to designate a start date for the resumption of consultation. That will have to await a declaration by the Province's Chief Medical Officer of Health that the COVID 19 crisis is over. The parties are free to agree on an alternative remote arrangement.

**Cases Noticed** ***Haida v. BC***, 2004 SCC 73

***Minster of Citizenship & Immigration v Vavilov***, 2019 SCC 65

***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235

***L.(H) v. Canada (Attorney General)*** 2005 SCC 25

***R. v. W. (R.),*** 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122

***Mi'kmaq of PEI*** **v.** ***Province of PEI***, 2019 PECA 26

***Coldwater Indian Band et al*** **v.** ***Canada (Attorney General),*** 2020 FCA 34

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

***R. v. Bernard***, 2005 SCC 43

***R v. Marshall***, [1999] 3 SCR 456

***Tsilhquot'in Nation v. British Columbia,***

***Halalt First Nation v. British Columbia***, 2012 BCCA 472

***Squamish Nation v. British Columbia***, 2019 BCCA 321

***Enge v. Mandeville et al***, 2013 NWTSC 33

***Adams Lake Indian Band v. British Columbia***, 2011 BCSC 266

***Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,*** 2017 SCC 40

***Tsleil-Waututh Nation v. Canada (Attorney General)***, 2018 FCA 153

***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*** 2005 SCC 69

***Lavaleé*** v ***Trevors***

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74

***Manitoba Metis Foundation Inc***. v ***Canada (Attorney General***

***Constitution Act in Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation***, 2019 NSCA 75

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

***Squamish First Nation v Canada (Fisheries and Oceans)***, 2019 FCA 216.

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| **Judge:** | The Honourable Justice Frank C. Edwards |
| **Heard:** | February 18 and 19, 2020, in Halifax, Nova Scotia |
| **Counsel:** | Ray Larkin, QC and Balraj K. Dosanjh, for the Appellant |
| | Sean Foreman, for the Respondent,<br>the Nova Scotia (Minister of Environment) |
| | Robert Grant, QC, for the Respondent,<br>Alton Natural Gas Storage LP |

## Table of Contents

**Overview**

[1] Sipekne'katik (the "Band") appeals the decision dated April 8, 2019 of the Honourable Margaret Miller, in her capacity as Minister of Environment (the "Minister's Decision").[1] The Band appealed the Minister's Decision on the basis of inadequate Crown consultation under section 35 of the Constitution Act. [2] While the Minister amended the Industrial Approval (IA), the Minister concluded that "consultations with Sipekne'katik have been sufficient in the circumstances of this matter." [3]

[2] The IA was one of the last authorizations the Proponent, Alton Gas, required from the Province of Nova Scotia (the "Province") for the Alton Natural Gas Storage L.P. Project (the Project). With the IA, Alton Gas may commence the solution mining process for the development of underground caverns to store natural gas.

[3] Through the solution mining process, water will be drawn from the Shubenacadie and Stewiacke Rivers to dissolve underground salt formations in order to develop the caverns. The diluted brine from the dissolved salt will be

[1] Minister's Decision, April 8, 2019, Appeal Record, Vol. 12, Tab 17
[2] *Constitution Act,* 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, Book of Authorities for Brief of the Appellant ("BOA of the Appellant"), Vol. 2, Tab 30.
[3] Minister's Decision, April 8, 2019, Appeal Record, Vol. 12, Tab 17, p. 791.

returned to the river. The Project and the solution mining process in particular has the potential to adversely impact the rights and title claim of the Mi'kmaq. As a result, the Crown was required to discharge its constitutional duty to consult with and accommodate the Band prior to the issuance of the IA.

[4] Since 2004, Alton Natural Gas Storage LP has been engaged in the development of an underground storage facility for natural gas in Colchester County, Nova Scotia. Developing a natural gas storage facility will allow Alton Gas to provide better price stability and security of natural gas supply to consumers in Nova Scotia. Litigation challenging construction of the Alton Gas project by the Appellant has been on-going since February 2016.

[5] This second statutory appeal pursuant to s.138 of the Nova Scotia *Environment Act*, SNS 1994-1995 c.1 ("the Act") appeals the Minister of Environment's written decision dated April 8, 2019, dismissing the Band's s.137 ministerial appeal of Industrial Approval IA-A03, originally dated January 20, 2016, as now amended by the Minister and dated April 8, 2019. The IA, now expiring January 20, 2026, permits Alton Gas to operate a brine storage and discharge facility on the Shubenacadie River.

**Chronology**

[6] I have reviewed the Record. To articulate a fairly detailed chronology, I have edited, and to some extent combined, the relevant portions of Counsels' source referenced briefs.

[7] Sipekne'katik is a "band" as defined in subsection 2(1) of the *Indian Act,* RSC 1985, c I-5. [4] It is one of the thirteen First Nations in Nova Scotia, and the second largest Mi'kmaw band in Nova Scotia. Sipekne'katik includes the communities of Indian Brook IR #14, New Ross IR#20, Pennal IR#19, Dodd's Lot (un-numbered), Wallace Gills IR#14A, and Grand Lake IR#13. Sipekne'katik has approximately 2,712 Band members.

[8] The Mi'kmaq are the first people of the area known as Atlantic Canada. The Mi'kmaq have long relied on the land and its various resources for all aspects of their livelihood, including sustenance, spiritual practices, and cultural knowledge. The Mi'kmaq have a long-existing, deeply entrenched relationship with the land and its resources for various purposes, including sustenance, medicinal, ceremonial, and conservation.[5]

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[4] Indian Act, RSC 1985, c 1-5, BOA of the Appellant, Vol. 2, Tab 31.
[5] Alton Natural Gas – Gas Lateral Project: Mi'kmaq Ecological Knowledge Study, March 2012 ("2012 MEKS"), Appeal Record, Vol. 5, Tab 93, p. 235.

[9] Sipekne'katik was formerly known as the Shubenacadie Band. In July of 2014, the Shubenacadie Band restored the traditional spelling and pronunciation of its name to Sipekne'katik.[6]

[10] Alton Gas has proposed development of an underground hydrocarbon storage facility in a series of engineered salt caverns near Alton, Nova Scotia.

[11] The Project is intended to help manage the supply and pricing of natural gas in Nova Scotia. Natural gas prices increase significantly during winter months when consumer demand is greatest. The price and volatility for customers can be reduced if more natural gas can be purchased and stored when prices are lower and then used during the heating season.

[12] The Project and its various components, which include development of the underground storage caverns, construction of related pipelines, and brine storage and discharge facilities, are subject to various layers of environmental and regulatory approval by the Province.

[13] The Project being developed by Alton Gas has three components; salt caves for the storage of natural gas which do not require an IA pursuant to the Act, but are subject to regulation by the Department of Energy and approved by the

[6] Affidavit of Chief Rufus Copage, Mar. 24, 2016, Appeal Record, Vol. 1, Tab 6, p. 148, para 11.

Utility & Review Board; pipelines which were subject to a separate and long-completed Environment Assessment approval; and the brining storage and discharge facility. The Project involves excavating salt caverns for the storage of natural gas, using river water, and returning diluted levels of brine to the Shubenacadie River, itself a tidal estuary.

[14] The amended IA being challenged here, and therefore this statutory appeal, relates solely to the "Operation of a Brine Storage Pond and associated works" (Industrial Approval IA-A03, Record, Vol.12, Tab 18).

[15] On July 6, 2007, Alton Gas registered the Project under Part IV (Environmental Assessment Process) of the Environment Act (Record, Vol. 5, Tab 106). Supporting documentation included an Environmental Assessment Report by Jacques Whitford dated June 14, 2007. The Jacques Whitford Report concluded that "significant effects due to the project on fish and fish habitat are unlikely to occur" (Record Vol. 3, Tab 22, p. 104). Also included was a required Mi'kmaq Ecological Knowledge Study dated December 2006 ("MEKS") undertaken by Membertou Geomatics Consultants (Record, Vol. 5, Tab 107).

[16] A MEKS is similar to an environmental impact assessment in its overall scope, as it also seeks to measure the present and lasting impact of human activity on the environment and its resources. A MEKS differs in that it seeks to identify the impact of developmental activities in accordance with Mi'kmaw land and resource practices. [7]

[17] If a MEKS identifies that a project may infringe upon Aboriginal rights, the MEKS then provides recommendations regarding necessary steps that a company and government must undertake to engage in formal consultation with Mi'kmaw leadership. The 2006 MEKS found that the Mi'kmaq "continue to undertake traditional activities throughout the study area, in a most significant manner".[8] Specifically, it was found that the Shubenacadie and Stewiacke Rivers play a key role for the Mi'kmaq as a source of the resources the Mi'kmaq harvest for food, social and ceremonial purposes. [9]

[18] The 2006 MEKS strongly recommended that Alton Gas and the Province meet with Mi'kmaw leadership to discuss the activities of the project in relation to the rivers, as it was found that "the likelihood of infringements on Mi'kmaq

[7] 2012 MEKS, Appeal Record, Vol. 5, Tab 93, p. 235
[8] 2006 MEKS, Appeal Record, Vol. 5, Tab 107, p. 341
[9] *Ibid*., p. 341.

use activities is highly possible."[10] This conclusion was based on the amount of Mi'kmaw traditional use activity that was found to occur in the study area, specifically on the Stewiacke and Shubenacadie Rivers, and based on the nature of the activities the company proposed to undertake.[11] Under "Historical Review Finding", the MEKS notes at pp. 7 and 8:

> Presently, there are (2) two established Mi'kmaq reserves that are located within 10 kilometers of specific points of the study area. These reserves are Mi'kmaq communities whose lands are defined as *federal lands that have been set aside for the use and benefit of Indians under the Federal legislation of the Indian Act.* One of the reserves is the Indian Brook First Nation (now the Appellant Band) and it is located (9) nine kilometers from the water withdrawal site located on the Shubenacadie River. Indian Brook is located southwest of the Alton study area, west of the town of Shubenacadie and the Shubenacadie River. The other community is Millbrook First Nation and it is located 13.7 kilometers from the proposed salt cavern storage site. It is located northeast of the Alton study area on the outlying area of the town of Truro. The Mi'kmaq people from both of these communities have a history of continuous occupation in this area which spans centuries and begins hundreds of years before European contact.
>
> Historically, the Mi'kmaq people lived within small winter villages located some distance from each other, but during the warmer season these small winter villages came together to form a larger summer village. This action was primarily due to the availability of resources, which during the warmer months became more available, thus could support a larger population. In the lands throughout and surrounding the study area, Mi'kmaq maintained various winter villages, and at least two or three larger summer villages. The larger villages were known as Cobequit, Mouscadobouet and Shubenacadie, and they were all located on key waterways found in the area; those being the Shubenacadie River, the Musquadoboit River and the Cobequid River. All of these rivers were significant to the Mi'kmaq as they allowed for easy travel by canoe from one area of Mi'kma'ki to another.

[10] *Ibid*., p. 357
[11] *Ibid*., p. 357

> The Shubenacadie area has historically been a key Mi'kmaq territory for the Mi'kmaq people. The Atlantic provinces are divided into 7 Mi'kmaq districts and Shubenacadie is located in the district of *Sipekne'katik*. This is also the Mi'kmaq word for Shubenacadie, which means "Ground Nut Place". Historically, the Shubenacadie Mi'kmaq community was a significant Mi'kmaq community from the time period of contact through to colonization. During the eighteenth century, and prior to such, all Mi'kmaq of the Atlantic Provinces utilized the Shubenacadie River as a primary travel route, and as well came to the Shubenacadie area for political, social and religious gatherings. The Mi'kmaq hunted and fished on the lands and waters of the Shubenacadie region as they traveled from one community to the next. It is during these travels when Mi'kmaq would establish small overnight hunting sites along the banks of the Shubenacadie and Stewiacke rivers, a practice that continued well into the 20th century.

[19] Between 2007 and 2014, consultation was between the Province and Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO). KMKNO is the technical and administrative office that coordinates and supports the work of negotiations and consultation for the Assembly of Nova Scotia Mi;kmaq Chiefs (the Assembly). The Band belonged to and was represented by KMKNO until March 5, 2013 when the Band voted to leave KMKNO and consult directly with the Province itself.

(1) On July 6, 2007, the Province provided KMKNO with notice of the Alton Gas Project and an opportunity to comment on the Project by July 19, 2007.[12]

(2) On July 17, 2007, through email correspondence, Twila Gaudet of KMKNO responded to the Province and wrote:

[12] Consultation Chronology – Alton Natural Gas Storage Facility and Pipeline, Appeal Record, Vol. 12, Tab 3, p. 57.

> "…**the Crown has a constitutional duty to consult with the Mi'kmaq of Nova Scotia when an activity may affect established or claimed Mi'kmaq Treaty Rights or Title. The Nova Scotia Mi'kmaq have a process in place which we expect to be followed.** Canada and the Province have agreed that the Terms of Reference of a Mi'kmaq-Nova Scotia-Canada Consultation Process will be implemented on a trial basis for approximately one year. **Our concern is that the time frame you have indicated in your letter is insufficient. …"**[13] [emphasis added]

(3) In a subsequent letter, dated July 25, 2007, Twila Gaudet reiterated the Province's constitutional obligation to consult, and specifically asserted that the proposed storage project "may infringe on Mi'kmaq Aboriginal Title and or Constitutionally protected Rights."[14]

(4) On July 31, 2007, the Minister of Environment & Labour issued a decision stating that the registration information was insufficient to allow him to make a decision. The Minister noted specific concerns, including the potential contravention of the Species at Risk Act, and concerns regarding the potential impact of the project on First Nations. The Minister asked Alton Gas for more information demonstrating "how First Nation concerns would be considered in the development and operating of the undertaking."[15]

(5) On September 19, 2007, the Province and the Department of Fisheries and Oceans Canada (the "**DFO**") participated in a working group with Alton Gas on September 19, 2007 to discuss the specific

[13] Email from Twila Gaudet to Candace Harding, July 17, 2007, Appeal Record, Vol. 5, Tab 105, p. 332.
[14] Letter from Twila Gaudet to Candace Harding, July 25, 2007, Appeal Record, Vol. 5, Tab 104, p. 329.
[15] Letter from Mark Parent to Scott McDonald, July 31, 2007, Appeal Record, Vol. 12, Tab 3, pp. 164-165.

issues that warranted supplemental information.[16] The Mi'kmaq were not invited to participate in this working group session despite the fact that the Province was aware via the 2006 MEKS that the Alton Gas Project has the potential to impact the Mi'kmaq. Since KMKNO was not part of those discussions, the Mi'kmaq lost the opportunity to have any input on the terms and conditions of the 2007 Environmental Assessment, which included input on the monitoring plan that took effect between 2007 to 2014.[17]

(6) In a letter dated September 26, 2007, KMKNO accepted the Province's invitation for consultation on the Alton Gas Project. [18] The Province acknowledged this letter on October 11, 2007.[19]

(7) In response to the discussions from the working group session in September 2007, Alton Gas submitted supplemental information on November 21, 2007. While KMKNO was provided with an opportunity to comment on the supplementary information on November 23, 2007, this was only in the context of a public consultation process.[20]

[16] Agenda – Alton Project Working Session, Sept. 19, 2007, Appeal Record, Vol. 12, Tab 3, pp. 166-171.
[17] Letter from Mark Parent to Scott McDonald, July 31, 2007, Appeal Record, Vol. 12, Tab 3, pp. 164-165.
[18] Letter from Twila Gaudet to Vanessa Margueratt, Sept. 26, 2007, Appeal Record, Vol. 5, Tab 103.
[19] Letter from Sandra Farwell to Chief Julian, Oct. 11, 2007, Appeal Record, Vol. 12, Tab 3, pp. 175-176.
[20] Advisory from Vanessa Margueratt, Nov. 23, 2007, Appeal Record, Vol. 5, Tab 99, p. 316.

[20] This led to a consultation between Provincial representatives, and Mi'kmaq representatives, on December 10, 2007; "The two issues raised by the Mi'kmaq related to the Alton project were fisheries and archaeology" (Record, Vol. 5, Tab 100). This same document details the Proponent's engagement with the Mi'kmaq at the time.

[21] Subsequently, on December 18, 2007, the Minister of Environment and Labour issued an "Environmental Assessment Approval". This approval contains a number of conditions, including conditions related to archaeology, and the following regarding fish and fish habitat:

> 2.0 Fish & Fish Habitat
>
> 2.1 The proponent, as part of the application for Part V Approval under the Environment Act must provide for review the following monitoring programs and plans developed in consultation with the Department of Fisheries & Oceans (DFO). Based on the results of the monitoring programs, the proponent must make necessary modifications to mitigation plans and/or operations to prevent continues unacceptable environmental effects to the satisfaction of NSEL and DFO.
>
> a) An Effects Monitoring Plan including parameters such as frequency and duration. The plan must evaluate potential impacts of sedimentation, salinity and flow alterations on aquatic organisms and include an impact prediction.
>
> b) A program to monitor discharge salinity levels into the estuary to ensure no negative impacts to fish species result.

> This program should be developed in consultation with Environment Canada (EC).
>
> c) A plan to gather baseline information on water temperature and the presence of Atlantic salmon, Striped bass and Atlantic sturgeon eggs and larvae during one spawning season prior to the commencement of solution mining.
>
> d) A long-term monitoring program for Atlantic salmon, Striped bass and Atlantic sturgeon eggs and larvae. This plain must identify operation responses to unexpected impacts to populations.
>
> e) an ongoing monitoring program of fish screens or passive water intakes to determine if impingement is occurring. (Record, Vol. 10, Tab 6, p.591)

[22] The Environmental Assessment Approval was not judicially reviewed, and its conditions resulted in an eight-year scientific study of the Shubenacadie River estuary by Alton Gas.

[23] The Aboriginal consultation described above proceeded pursuant to the "Mi'kmaq – Nova Scotia – Canada Consultation Terms of Reference" (Record, Vol. 1, Tab 11). Consultation under those Terms of Reference ("TOR") proceeds through the Mi'kmaq consultation agency, the KMKNO. As noted, the Band was a signatory to and bound by provisions of the Terms of Reference until March 5, 2013.

[24] On July 31, 2014 the Department of Environment (NSE) wrote to the Band to "continue consultation", prompted by notice from Alton Gas that it was now moving forward to plan and begin construction of the natural gas storage facility and would be seeking remaining regulatory approvals from the Province (Record, Vol. 5, Tab 78)[21].

[25] By letter dated August 13, 2014 signed by Chief Copage, the Band responded to "strongly express its opposition to the project" (Record, Vol. 5, Tab 75, p. 150), and stated, among other issues, "For the record, the Band has never been properly and adequately engaged in meaningful consultations with these matters, **nor has any consent, informed, or otherwise, as to the operation of these projects been given by the Band"** (p. 151). (Emphasis added)

[26] Between the summer of 2014 and January 20, 2016, two formal "on the record" consultation meetings were held on September 17, 2014 and October 24, 2014. In addition, there were seven so-called "technical" meetings which two representatives of the Band attended as "observers.".[22]

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[21] The letter mistakenly says that the consultation would be pursuant to the Terms of Reference. But at this date, the Band had withdrawn from the TOR.

[22] Letter from Chief Rufus Copage to Helen MacPhail, Oct. 31, 2014, Appeal Record, Vol. 5, Tab 64, pp. 61-63; Email from Beata Dera to Jennifer Copage, Sept. 23, 2014, Appeal Record, Vol. 5, Tab 70, p. 101; Email from

[27] On September 26, 2014, Alton Gas filed its formal application documents with Nova Scotia Environment for the Industrial Approval of the brine storage and discharge facility pursuant to Part V of the Act, the issuance of which on January 20, 2016 (as amended April 8, 2019) is the subject matter of this appeal.

[28] In September 2014, following a June 23, 2014 consultation meeting, the Crown delegated certain aspects of consultation to Alton Gas. The Crown is entitled to delegate under authority of the decision of the Supreme Court of Canada in *Haida v. BC* 2004 SCC 73, para. 53.

> "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; … The honour of the Crown cannot be delegated**." (Emphasis added)

[29] The delegating letter reads in part as follows:

> 1. Alton Natural Gas is required to submit to NS Environment (NSE) a more detailed and proactive Aboriginal communication plan. The current information provided with the *Industrial Approval Application – Alton Gas: Phase 3* is unsatisfactory.

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Beata Dera to Jennifer Copage, Nov. 3, 2014, Appeal Record, Vol. 5, Tab 63, p. 55; Letter from Chief Rufus Copage to Helen MacPhail, Oct. 23, 2014, Appeal Record, Vol. 5, Tab 66, pp. 71-79.

2. Alton Natural Gas should contact the Assembly of Nova Scotia Mi'kmaq Chiefs. In this case, the Benefits Committee of the Assembly should be contacted first, as requested by KMKNO representatives at the June 23, 2014 consultation meeting. The Benefits Officer is Jennifer MacGillivray and she can assist in coordinating the meeting.

3. Work together with the Mi'kmaq to develop mutually beneficial solutions and consider how the Mi'kmaq could make a contribution to the project.

4. A request may be made by the Mi'kmaq to present to the entire Assembly. Offer to meet to discuss the project and offer a site visit, when appropriate, so that Chief Prosper can view the project area and gain a first-hand understanding of the proposed project activities.

5. I understand that Alton Natural Gas has held a meeting to date with Sipekne'katik First Nation. I wish to stress the importance of engaging both the Assembly of Nova Scotia Mi'kmaq Chiefs as well as Sipekne'katik Fist Nation.

6. During discussions with the Mi'kmaq, please identify all concerns and identify how these concerns could be mitigated. Also provide project updates and share any available new reports, in particular the final Archaeological Resource Impact Assessment report.

7. NSE is in the process of scheduling a consultation meeting with Sipekne'katik First Nation and may invite Alton Natural Gas to attend and present project information.

8. Provide a summary report to NSE. The summary report should include:

    - Attempts to contact the Mi'kmaq and a summary of Mi'kmaq concerns;

    - Identification of how Mi'kmaq concerns were considered, and where appropriate, addressed by the proponent;

- Any outstanding issues the proponent was unable to address; and whether any other agreements were developed with the Mi'kmaq.

9. Provide copies of the engagement report to the KMKNO and NS Office of Aboriginal Affairs.

(Record, Vol. 5, Tab 73)

[30] Subsequent meetings in the fall of 2014 led to the Band's letters of October 23 and 31, 2014 (Record, Vol. 5, Tab 66, 64) raising a host of questions respecting the Project. Mistaken references in those letters brought to the attention of the Appellant were not addressed, such that on March 17, 2015 NSE wrote:

> "NSE has project information that we have wanted to provide to Sipekne'katik and continue the consultation, however, we have been waiting to receive the revised letters from Sipekne'katik since November 2014. Given the lack of response, it is unclear whether Sipekne'katik is interested in participating in the consultation process on the Alton Gas Project. Please forward the revised letters as soon as possible.
>
> The Province is committed to meaningful consultation. In the absence of a response from Sipekne'katik, I have decided to send the information now…"
> (Record, Vol. 4, Tab 52).

[31] The Band revised its letter on April 23, 2015 (Record, Vol. 4, Tab 48) reiterating various questions and concerns. The Department of Environment

provided a comprehensive reply dated June 29, 2015 (Record, Vol. 4, Tab 37, pages 122-300), including a 23 page "Issues Table" responding to every question and issue raised by the Appellant and provided all documents requested.

[32] In the meantime, Alton Gas delayed proceeding with the project. To address concerns raised respecting potential adverse impacts on the Appellants asserted Aboriginal and Treaty rights, particularly, the impact of the project on fish and fish habitat, the Province, the Assembly through the KMKNO, and the Band, discussed the terms of reference for an independent Third-Party Review of the environmental data relating to the river.

[33] In February 2015, the Band confirmed it "has decided not to participate in the independent third-party review process" (letter dated March 13, 2015, Record, Vol. 4, Tab 51). The other parties proceeded with the independent review, that was funded by the Province. The Band remained involved in the review, as an 'observer'. This was because the Band had believed that the Government had committed to an independent study and not a mere "peer review" study. (See Affidavit of Andrew Younger, then Minister of Environment Vol 11, Tab 5 p. 8, para 19)

[34] The Third-Party Review by "Conestoga–Rovers" is dated July 2015 (also known as the "CRA Report", Record, Vol. 7, p. 347). The CRA Report noted that the tidal nature of the Shubenacadie River and estuary regularly exposed the fish in the river to a change in salinity of 0 – 30 ppt "therefore many of the fish species in the river had to (sic) ability to adapt to changes in salinity and may be unaffected due to changes in salinity" (p. 7). The Report does not address Aboriginal or Treaty Rights and how they might be affected by the Project.

[35] Alton Gas responded to the CRA Report by accepting all five recommendations (Record, Vol. 4, Tab 33). Following this, a series of meetings in the fall of 2015 were in further response to concerns flowing from the CRA Report. There were approximately nine such meetings in the summer and fall of 2015, as part of the "consultation process". The Band considered only 2 of the 9 to be formal consultation meetings.

[36] The Band says that these "Technical" or "working group" meetings cannot be considered "consultation". The Band argues that the technical meetings

were not formal consultation meetings.[23] The Mi'kmaw participants in the meetings were not able or authorized to speak on behalf of the First Nations about the potential impact to the Mi'kmaq's rights and claim, or to make any decisions respecting impact to the Mi'kmaq's rights and claim without instructions from Mi'kmaw leadership. The Mi'kmaw participants were expected to convey the information they gathered from the technical meetings to their respective communities.

[37] All participants understood that the Assembly was to be briefed on December 17, 2015 on the information learned through the technical meetings.[24]

[38] On December 17, 2015, on behalf of the Assembly, Chief Prosper wrote to the Hon. Stephen MacNeil, stating, in part:

> **…the scope of these discussions was to develop further information to address the gaps and provide the (Assembly) with the necessary information so that an informed decision could be made.** The discussions did not include consensus building on any aspect of the proposed undertaking.
>
> On December 17, 2015, the KMKNO presented the results of these discussions to the ANSMC as identified in the attached, **the (Assembly) remains concerned**

[23] See e.g., email correspondence from Jay Brenton on October 21, 2014 noting "[t]his was a technical meeting and was not a formal aboriginal consultation meeting" (Appeal Book, Vol. 6, Tab 1, p. 127); and email correspondence from Bradley Skinner on October 20, 2014, in which he stated "[t]his was a technical meeting and was not a formal consultation" (Appeal Book, Vol. 6, Tab 1, p. 137).

[24] Jennifer Copage Affidavit 2016, Appeal Book Vol. 1, Tab 7, p. 301, para 85 and Exhibit M at pp. 449-451; and pp. 304-305, paras 104-105 and Exhibit N at pp. 453-459. See also email from Justin Huston, Dec. 9, 2015, Appeal Record, Vol. 3, Tab 18, p. 242.

**about the process used to assess this undertaking.** A resolution was passed by the ANSMC stating:

> 1. The Project Summary Response is approved;
> **2. Further consultation is required on the Industrial Approval;**
> **3. Further consultation is required on project splitting and conditional approvals;**
> 4. Alton Gas Natural Gas Storage and the Province of Nova Scotia need to conduct further direct community engagement with the Millbrook First Nation immediately;
> 5. Consultation has proceeded under the *Terms of Reference for a Mi'kmaq-Nova-Scotia Canada Consultation Process* (TOR) **however consultation has not been completed and the Mi'kmaq of Nova Scotia do not consent to this project moving forward.**

Specifically, **further consultation is required under the TOR for the pending Industrial Approval decision**. This is due to the following:

> 1. There were significant challenges in the coordination of the technical discussions and disclosures of information intended to address the gaps in information. On occasion, KMKNO was not provided with documents or copied on relevant emails. The incredibly short timeframe for review, analysis and response was a considerable challenge. While it was not KMKNO's role to coordinate these discussions, clearly this process requires significant improvements in the future.
>
> 2. The KMKNO has not been provided final versions of the information developed during the technical discussions. **While review of draft documents can be informative, there is additional consultation required on final documents.** The ANSMC fully expects final documents to be provided to the KMKNO for final comments and recommendations;
>
> 3. Discussion is required on the industrial approval process and opportunities within it to access the data collected through monitoring, review of activities, compliance with the conditions and other general communication requirements.

**It is the expectation of the Assembly that the approval of the industrial approval remains on hold. Further consultation and community engagement is required.**[25]

[emphasis added]

[25] Letter from Chief Prosper to Hon. Stephen MacNeil, Dec. 17, 2015, Appeal Record, Vol. 7, Tab 2, pp. 533-535.

[39] In order to respond to the points raised by the CRA Report, three other Reports were developed by the Proponent in discussion with the Technical group:

- Estuarial Environmental Monitoring and Toxicity Testing Plan, December 9, 2015
- Exposure Pathway Assessment Framework for Aquatic and Non-Aquatic species, dated December 9, 2015
- River Site Monitoring Plan, dated December 10, 2015 [Those documents are found under Justin Huston's email, Record, Vol. 3, Tab 17]

[40] At the same time, the Band's Chief Copage, raised many issues in a letter dated September 29, 2015 (Record, Vol. 4, Tab 30). This was responded to by letter dated December 3, 2015 (Record, Vol. 3, Tab 20).

[41] On January 6, 2016, the CEO of the Office of Aboriginal Affairs (OAA) wrote to the Band's Chief Copage, and noted that, "all of the substantive issues raised through these technical meetings have been addressed in the final draft of the Industrial Approval and the Proponent's Monitoring Plan". The CEO asked

if the Band had, "any new substantive comments" (Record, Vol. 3, Tab 16). The Band had until January 18, 2015 to respond.

[42] On Jan 12, 2016, Chief Copage wrote to Premier MacNeil;

> Dear Hon. McNeil:
>
> Recently a meeting was held on Friday, January 8, 2016 between the Councils of the Sipekne'katik and Millbrook First Nations, along with representatives of the Sipekne'katik District of the Mi'kmaq Grand Council to discuss the Alton Gas issue.
>
> **Prior to any final decision being made regarding this controversial matter, both first Nations and the Sipekne'katik District are united in demanding substantial, ongoing, and satisfactory communication with our memberships.** Additionally, there must be extensive engagement by Alton Gas and the appropriate regulatory bodies with our respective communities on this proposed project. Throughout this, the province must uphold the Honour of the Crown as it meets is Fiduciary Duty that is owed to the Mi'kmaq.
>
> **Once these real and meaningful processes have been completed, each Band will hold a referendum on whether Band members agree or disagree with the project proceeding. The province will be notified of the result of our community votes.** (Emphasis added)
>
> (Vol 3 Tab 15)

[43] Chief Copage then responded to the Province's January 6, 2016 letter on January 18, 2016, objecting to the termination of the consultation process, and flagging some of the Band's outstanding concerns. Specifically, Sipekne'katik noted:

- Consultations "cannot be truly viewed as meaningful as they began seven years after the project received approval. Consultations were viewed as notification.";
- The suggested mitigation measure was not accepted by the proponent due to cost and that was not acceptable;
- There had been no community engagement to date on the Alton Gas Project;
- The EA process for the project was flawed because Sipekne'katik was not engaged until July 31, 2014; and
- Alton Gas' river monitoring would not detect the presence of tomcod eggs and larvae near the Alton Gas Project site because they spawn in the winter months, and the water sampling was only completed in the spring and summer months.[26]

[44] Within two days, the Province responded in a letter dated January 20, 2016, stating that, "All of the potential environmental impacts which were identified as of concern to the Mi'kmaq" had been "identified, avoided, and/or mitigated through the proposed terms of the Industrial Approval and Alton Gas' Monitoring Plan."[27] In this letter, the Province also criticized Sipekne'katik for suggesting that the Province was expected to directly engage Sipekne'katik community members prior to concluding the consultation process.

[26] Letter from Chief Rufus Copage to Julie Towers, Jan. 18, 2016, Appeal Record, Vol. 3, Tab 14, pp. 115-116.
[27] Letter from Julie Towers to Chief Rufus Copage, Jan. 20, 2016, Appeal Record, Vol. 3, Tab 13, p. 113.

[45] Later, on January 22, 2016, the KMKNO released its "Alton Natural Gas Update" and message to the Mi'kmaq community from the Assembly, which expressed itself satisfied that after consultations and "important changes" to "how this project will operate", it "should not have significant impact to the environment". (Record Vol. 1, Tab 15, pages 538-540). This update stated, in part:

(a) "The Assembly, KMKNO and our community members are not only concerned about the environment, but also our Rights and Title. When we talk to Government and Proponents, we remain strong that our Rights to the resources should never be compromised." (p. 538).

(b) "Although there were a lot of challenges, this project has come a long way. We knew what needed to be done and we brought priorities to the table; because of this, important changes have been made on how this project will operate". (p. 538).

(c) "Our concerns were evaluated, further assessments were completed, and a plan to address most of the gaps was developed. Some of the gaps cannot be fully evaluated until the project is operational, so an expanded monitoring program was developed to collect this additional information in the early stages of operation."

(d) "The biggest concern for community members was the impact of the salt brine wastewater to all the River's species; this was discussed at length and carefully examined. Mitigation measures have since been

> implemented at the intake and discharge facilities, and it was agreed that operations will be shut down each year, during spawning seasons, to eliminate all risks of exposure to fish species." (p. 539)

[46] An IA was issued for the project on January 20, 2016 (Record, Vol. 1, Tab 1). It provided that the facility shall operate as outlined in the Application and "Reference Documents". The following documents are listed as Reference Documents:

- Application dated September 26, 2014 and attachments.
- Environmental Management Plan – Operation of Brine Storage Pond and Associated Facilities, Alton Natural Gas Storage LP., dated October 6, 2014, as prepared by WSP Canada Inc.
- Alton Natural Gas Storage Estuarial Environmental Monitoring & Toxicity Testing, dated December 9, 2015
- Letter dated August 1, 2014 from Mark McLean of Fisheries and Oceans Canada to David Birkett of Alton Natural Gas Storage LP, regarding their review of the Estuary Monitoring Plan.
- Alton Natural Gas Storage River Site Monitoring Plan During Cavern Development, dated December 10, 2015.
- Exposure Pathway Assessment Framework for Aquatic and Non-aquatic Species in Relation to the Alton Gas Natural Gas Storage Cavern Development at the River Site, dated December 9, 2015.
- Environment Assessment Approval – Alton Natural Gas Storage Project, as dated December 18, 2007.

- Email correspondence from Bob Rutherford to Brad Skinner regarding standard water analysis and total metals sampling parameters and attachments dated December 8, 2015.
- Email correspondence from Tim Church to Michael Cox and Jennifer Copage regarding a contingency plan for a brine pond breach and attachment dated December 2015.

**Procedural History Challenging the Industrial Approval**

[47] This current appeal is the second statutory appeal of the IA issued to Alton Gas. On February 18, 2016, the Band appealed to the Minister of Environment pursuant to s.137 of the Act alleging that consultation leading to issuance of the Industrial Approval on January 20, 2016 was inadequate. The appeal was, as is the usual course, the subject of an "in house" staff review by Glen Warner, who examined the appeal and reported ("Interim Decision Report") to the Minister (Record, Vol. 1, Tab 3).

[48] The Minister's first decision dated April 18, 2016, (Record, Vol. 1, Tab 4) rejected the appeal on the ground that there had been adequate consultation that had resulted in significant changes to the IA that recognized and accommodated the Aboriginal and Treaty rights advanced by the Band.

[49] The Band exercised its legal right to appeal the Minister's April 2016 decision to the Nova Scotia Supreme Court pursuant to s.138 of the Act (the "First s.138 Appeal").

[50] In this First s.138 Appeal proceeding, the Appellant argued there was a lack of procedural fairness in the s.137 Ministerial appeal process (in addition to its position that there has been inadequate Crown consultation in issuing the Industrial Approval).

[51] In 2017 NSSC 23 (January 27, 2017), Justice Hood allowed the s.138 appeal finding a lack of procedural fairness for failure to allow Sipekne'katik to respond to what is referred to as the "Warner Report" (**and did not decide the adequacy of consultation issue**). Justice Hood remitted the matter back to the Minister for reconsideration pursuant to s.137 of the Act, once Sipekne'katik had the opportunity to provide further submissions to the Minister.

[52] The Appellant subsequently provided further submissions to the Minister, including a detailed written submission, compendium of documents and legal authorities. (Vol. 12 Tabs 2, 3, 4)).

[53] Following several joint requests to delay making a decision to allow the Appellant and Alton Gas to attempt to negotiate a resolution between the parties

(Record, Vol. 12, Tabs 8 to 13), the Minister issued a second written appeal decision pursuant to s.137 of the Act on April 8, 2019.

[54] The Minister dismissed the appeal but exercised her statutory authority pursuant to s.137(4) of the Act to amend the Industrial Approval to include 2 additional terms and conditions, now the subject of this second statutory appeal.

[55] The Minister's decision of April 8, 2019, amended the IA pursuant to s.137(4) to add two new conditions: (1) to clarify compliance with regulatory requirements or authorizations required to operate the Project pursuant to other provincial, federal or municipal laws; and, (2) development of a further communications plan with participation by the Appellant to ensure sharing of information on environmental issues that may require future amendment to the approval (Record, Vol. 12, Tab 17).

[56] The Appellant commenced this current s.138 appeal involving a second challenge to the now Amended IA and the Minister's decision of April 8, 2019 (the "Second s.138 Appeal").

**Standard of Review**

[57] This proceeding is an appeal brought under Section 138 of the *Environment Act*, SNS 1994-1995 from the decision of the Minister of Environment pursuant to Section 137 of the Act dismissing the appeal of Sipekne'katik by an administrator in the Department of Environment who granted Industrial Approval No. 2008-061384 – A03 dated January 20, 2016

[58] Section 138 provides in part:

> 138(1) …a person aggrieved by… b) a decision of the Minister pursuant to Section 137…may, within 30 days of the decision or order, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court, and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.

[59] In ***Vavilov***, 2019 SCC 65 the Supreme Court of Canada decided that a statutory appeal requires the court to scrutinize the decision appealed from on an appellate basis. In paragraph 37 the court states:

> "It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal

> includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37."

[60] The approach in *Housen v. Nikolaisen* was discussed in *L.(H) v. Canada (Attorney General)* 2005 SCC 25. The Court discussed the phrase "palpable and overriding error" in paras. 55 and 56 where the court states as follows:

> 55. "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". **Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result**.
>
> 56**. In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence"**. In *R. v. W. (R.),* 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131-32) that
>
> > it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.
>
> The statutory framework in criminal matters is, of course, different in certain respects. But as a matter of principle, it seems to me that unreasonable findings of fact — relating to credibility, to primary or inferred "evidential" facts, or to facts in issue — are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, **that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence. And the**

> **reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result.** (emphasis added)

[61] Most germane to the circumstances of this case was the finding in ***Housen*** that a question of mixed fact and law can amount to a pure error of law subject to the correctness standard. In ***Housen***, The Supreme Court of Canada said at para 27:

> Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
>
> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.
>
> **Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.** (Emphasis added)

[62] ***Haida*** notes that

> "…the existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However it is typically premised on an assessment of the facts…To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness". (*Haida* para 61)

[63] In his submission on the appropriate standard of review, Counsel for the Province cited ***Mi'kmaq of PEI* v. *Province of PEI***, 2019 PECA 26. The case is of limited application here because it considered a judicial review and not a statutory appeal. It also preceded ***Vavilov***.

[64] The decision however does recognize that the content or scope of the duty to consult is a question of mixed fact and law, and thus subject to deference. As in ***Vavilov*** and ***Housen***, the PEICA recognizes that where there is an extricable error of law, the standard of correctness would apply. (See Paras. 40 and 41).

[65] Counsel also cited the post-***Vavilov*** decision of the Federal Court of Appeal in ***Coldwater Indian Band et al* v. *Canada (Attorney General),*** 2020 FCA 34. Again, the Court was dealing with a judicial review and not a statutory appeal. The case is interesting because the Court took the view that the existence and depth of the duty to consult was not in issue. It took that view because all parties agreed that the duty was one of deep consultation. Consequently, it concluded that since the Governor-in-Council's evaluation of the adequacy of the consultation was fact intensive, it called for deference. (Para 16).

[66] In the case before me, all parties took the position **at the hearing** that the duty was one of deep consultation. The requirement of "deep" consultation was

not acknowledged by the Minister in her decision. In any event, as I will explain later, deep consultation cannot occur where the Record disclosed that the core issues of asserted Aboriginal title and treaty rights were never engaged.

[67] This a case where the Minister **concluded** that the level of consultation on title and treaty rights was "appropriate." The Record is clear that no such discussion took place. Unlike ***Coldwater***, this is not a situation where the Court is being asked to assess the decision maker's evaluation of a set of facts. This is a situation where the Minister is making a conclusory finding that is unsupported by the evidence. Put another way, as I will demonstrate later, there is no evidence in the Record to support a finding that the level of consultation on title and treaty rights was appropriate.

**Issue**

[68] The issue in this Appeal is whether the Minister made a palpable and overriding error when she concluded that the level of consultation was "sufficient", or "satisfactory", or "appropriate to the circumstances and to the aboriginal and treaty rights asserted."

**Law and the Duty to Consult**

[69] In his brief at paragraphs 64 – 82, Appellant's Counsel sets out the law on:

(i) Duty to Consult and the Honour of the Crown;

(ii) The Trigger for the Deputy to Consult;

(iii) The Application of the Law to the Industrial Approval.

I adopt those paragraphs as an accurate and comprehensive statement of the applicable law.

**i. The Law and the Duty to Consult and the Honour of the Crown**

[70] The Crown has a legal obligation to consult with First Nations when it contemplates any decision that may adversely impact the First Nations' asserted or established rights. The duty to consult arises from subsection 35(1) of the Constitution Act, which recognizes and affirms "existing aboriginal and treaty rights of the aboriginal people in Canada." [28]

[71] The foundation of the duty to consult is the honour of the Crown and the goal of reconciliation of "the Crown's assertion of sovereignty in the face of prior Aboriginal occupation."[29] Indigenous peoples' constitutional rights embodied in subsection 35(1) require that "the Crown act honourably in

[28] Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982 c 11, BOA of the Appellant, Vol. 2, Tab 30; Haida, BOA of the Appellant, Vol. 1, Tab 10, para 32.
[29] Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74 ("Taku River"), BOA of the Appellant, Vol. 2, Tab 26, para 24.

defining the rights it guarantees and in reconciling them with other rights and interests." [30]

[72] Canada's colonial history has resulted in a "special relationship" between Indigenous peoples and the government. The underpinnings of this "special relationship" between Indigenous peoples and the Crown was examined by then Chief Justice McLachlin in ***Manitoba Metis Foundation Inc***. v ***Canada (Attorney General):***

> **The honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies.:** R. v. Van der Peet, at para. 248, per McLachlin J., dissenting. Aboriginal peoples were here first, and they were never conquered (Haida Nation, at para. 25); yet, they became subject to a legal system that they did not share. **Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language**: *R. v. Badger*, at para. 52; *Mitchell v. Peguis Indian Band*, at pp. 142-43, per La Forest J. **The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice**: Little Salmon, at para. 62. As explained by Brian Slattery:
>
> . . . when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples. [31]

[references omitted and emphasis added]

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[30] Haida, BOA of the Appellant, Vol. 1, Tab 10, para 20.
[31] Manitoba Metis Foundation Inc. v Canada (Attorney General), 2013 SCC 14, BOA of the Appellant, Vol. 1, Tab 12, para 67.

[73] Accordingly, the principle of the honour of the Crown, which must be understood generously, implies a duty to consult and accommodate, which "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".[32] If the Crown's duty to consult has been triggered, the duty "must be fulfilled prior to the action that could adversely affect the right in question." [33]

[74] The Nova Scotia Court of Appeal and the Federal Court of Appeal have both recently reviewed the legal principles from the jurisprudence on section 35 of the **Constitution Act in Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation**, 2019 NSCA 75, **Nova Scotia (Attorney General) v Nova Scotia (Utility and Review Board)**, 2019 NSCA 66, and **Squamish First Nation v Canada (Fisheries and Oceans)**, 2019 FCA 216.

[75] In these decisions, the appellate Courts highlighted the following principles:

[32] Haida, BOA of the Appellant, Vol. 1, Tab 10, para 35.
[33] Clyde River, BOA of the Appellant, Vol. 1, Tab 5, para 39.

• Indigenous peoples were already in Canada when Europeans made contact and were never conquered; section 35(1) of the Constitution Act protects the potential rights embedded in First Nations' claims. [34]

• The Crown is required to act honourably and participate in processes of negotiation while First Nations' rights are "determined, recognized and respected"; while this process of reconciliation continues, the honour of the Crown requires it to consult and accommodate Aboriginal interests where appropriate. [35]

• The content of the duty to consult and accommodate "responds to the circumstances", but in general terms, "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." [36]

• In the seminal Haida decision, the Supreme Court of Canada articulated a "spectrum", explaining that at "one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor" and at the "other end of the spectrum lie cases where a

[34] Nova Scotia (Attorney General) v Nova Scotia (Utility and Review Board), 2019 NSCA 66, BOA of the Appellant, Vol. 1, Tab 15, para 36.
[35] Ibid., paras 33 - 37.
[36] Ibid., para 39.

strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples and the risk of non-compensable damage is high." [37]

• Each case "must be approached individually" and the "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake." [38]

• Subsection 35(1) does not guarantee a "particular substantive outcome", but rather a process "of give and take"; what is required "is a commitment to a meaningful process of consultation." [39]

• The duty to meaningfully consult has a "substantive dimension" requiring "talking together for mutual understanding." [40]

• In cases where the Crown owes deep consultation, "a dialogue must ensue that leads to a demonstrably serious consideration of accommodation." [41]

• The Crown is permitted to "delegate the consultative process" but it "cannot escape the responsibility to consult". [42]

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[37] Haida, BOA of the Appellant, Vol. 1, Tab 10, paras 43-44.
[38] Squamish, BOA of the Appellant, Vol. 2, Tab 25, para 39.
[39] Ibid., para 37.
[40] Ibid., para 41.
[41] Ibid.

### ii. The Trigger for the Duty to Consult

[76] In **Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council ("Rio Tinto")**, the Supreme Court of Canada summarized the three-part test for determining when a duty to consult arises as follows:

> 1. The Crown has knowledge, actual or constructive, of an Aboriginal claim or right;
> 2. The Crown is contemplating conduct; and
> 3. The contemplated Crown conduct may adversely affect an Aboriginal claim or right. [43]

[77] Our Court of Appeal, in **Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation**, 2019 NSCA 75 ("Pictou Landing"), commented that "Crown conduct" and "adverse impacts" must be interpreted broadly in order to accomplish the "reconciliatory objective" of the Constitution Act.[44]

### iii. Application of the Law to the Industrial Approval

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[42] Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation, 2019 NSCA 75 ("Pictou Landing"), BOA of the Appellant, Vol. 1, Tab 14, para 102.
[43] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 ("Rio Tinto"), BOA of the Appellant, Vol. 1, Tab 20, para 31, more recently affirmed in Clyde River, BOA of the Appellant, Vol. 1, Tab 5, para 25, and cited by the Nova Scotia Court of Appeal in Pictou Landing, BOA of the Appellant, Vol. 1, Tab 14, para 114.
[44] Pictou Landing, BOA of the Appellant, Vol. 1, Tab 14, para 116.

### 1. The Crown has Knowledge of Sipekne'katik's Established Rights and Asserted Claims

[78] The Province has knowledge of Sipekne'katik's established Treaty and Aboriginal rights, and Sipekne'katik's claim of Aboriginal title to all of Nova Scotia and its offshore areas.

[79] In ***R v Marshall***, [1999] 3 SCR 456, pursuant to the Mi'kmaw Treaties of 1760-61, the Supreme Court of Canada confirmed "the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed 'necessaries'." [45] In ***R. v. Marshall; R. v. Bernard***, 2005 SCC 43, the Court wrote that the 1760-61 treaties were interpreted in ***R v Marshall***, [1999] 3 SCR 456 to confer on the Mi'kmaq "the right to catch and sell fish for a moderate livelihood".[46]

[45] R v Marshall, [1999] 3 SCR 456, BOA of the Appellant, Vol. 1, Tab 18, para 4.
[46] R. v. Marshall; R. v. Bernard, 2005 SCC 43, BOA of the Appellant, Vol. 1, Tab 19, para 13.

[80] In ***R v Marshall***, [1999] 3 SCR 456, the Supreme Court of Canada noted earlier Nova Scotia jurisprudence that recognized and affirmed the "Mi'kmaq aboriginal right to fish for food". [47]

### b. Province's Knowledge of the Mi'kmaq's Established Rights

[81] The Province has clear knowledge of the Mi'kmaq's established rights. First, as a Treaty party, the Crown is presumed to have knowledge of the contents of the Treaty.[48] If there had ever been any doubt as to the scope of the Mi'kmaq's rights pursuant to the Mi'kmaw Treaties of 1760-61, it was dispelled when the Supreme Court of Canada affirmed the Mi'kmaw Treaties in ***R v Marshall***, [1999] 3 SCR 456.

[82] Further, the Province's consultation policy, the "Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia" (**the "Consultation Policy**") acknowledges the Mi'kmaq's established Treaty rights. The Consultation Policy defines "Treaty Rights" as follows:

> Treaty Rights: Treaty rights refer to those rights outlined in treaties signed with the Crown. **There were several treaties signed with the Mi'kmaq in the Maritimes**, but the most relevant for the purposes of consultation are the **pre-Confederation Peace and Friendship Treaties of 1760-61. The Mi'kmaw treaty rights to hunt,**

[47] R v Marshall, [1999] 3 SCR 456, BOA of the Appellant, Vol. 1, Tab 18, para 4.
[48] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, BOA of the Appellant, Vol. 1, Tab 13, para 34.

> **fish, and gather to obtain a moderate livelihood were affirmed in the R v Donald Marshall decision in the 1999 and are protected under Section 35 of the Constitution Act, 1982**. It is important to note that in Nova Scotia, the treaties did not include extinguishment of rights or ceding of territory, as was the case in many of the treaties signed in other parts of Canada. [49]
>
> [emphasis added]

[83] Finally, the Province also represents to Sipekne'katik that it acknowledges the Mi'kmaq's Aboriginal and Treaty rights. For example, the Province provides Sipekne'katik with general consultation funding once a year. The general consultation funding is offered pursuant to a written agreement between the parties, which outlines how the funding will be used and requires Sipekne'katik to report to the Province "with respect to the expenditures of the Funding." [50]

[84] In Schedule "A" to the Agreement between the Province and Sipekne'katik dated March 1, 2016, it states:

> Goals and Objective
>
> The following goals and objectives will guide the work plan activities; including, but not limited to exploring consultation options for:
>
> • **Developing a consultation model that is reflective of Aboriginal and Treaty rights for the Mi'kmaq of Sipekne'katik**;

[49] Consultation Policy, Appeal Record, Vol. 1, Tab 5.5, p. 145.
[50] Funding Agreement between the Province of Nova Scotia and the Sipekne'katik Band, Appeal Record, Vol. 2, Tab 2, p. 11, para 5.

> • Developing a consultation model for the Community of Sipekne'katik that is reflective of the values and principles of the community and that the Community feels responsible for and is actively involved in. [51] …
>
> [emphasis added]

### c. Sipekne'katik's Claim of Aboriginal Title

[85] With respect to Sipekne'katik's Aboriginal title claim, Sipekne'katik is not seeking a determination of its claim of title by the Court in this matter, nor is it the role of this Court to resolve title claims in this type of proceeding.[52] In assessing consultation, the reviewing Court "does not determine the validity of the claimed Aboriginal right", as the "merits of the underlying right await the appropriate trial process."[53] All that is required in the context of Crown consultation is that Sipekne'katik "advances a factually credible claim to aboriginal rights",[54] as the initial threshold "informed by the need to maintain the honour of the Crown, is not high." [55]

[86] Sipekne'katik has a factually credible claim to Aboriginal title to the portion of the Shubenacadie River where the brining will occur, as well as title to the

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[51] Ibid., Schedule "A", p. 14.
[52] See, e.g. Gitxaala Nation v. Canada, 2016 FCA 187 ("Gitxaala"), in which the Federal Court of Appeal stated, "the duty to consult is not a duty to determine unresolved claims" (BOA of the Appellant, Vol. 1, Tab 9, para 289).
[53] Pictou Landing, BOA of the Appellant, Vol. 1, Tab 14, para 113.
[54] Hupacasath First Nation v. British Columbia (Minister of Forests) et al., 2005 BCSC 1712, BOA of the Appellant, Vol. 1, Tab 11, para 189.
[55] Ibid. See also Pictou Landing, BOA of the Appellant, Vol. 1, Tab 14, para 121.

Crown dyke, which was leased to Alton Gas for the Project. In order to establish Aboriginal title, the First Nation must demonstrate sufficient, continuous and exclusive occupation prior to assertion of European sovereignty.[56]

[87] With respect to the requirement to show sufficiency of occupation by historically nomadic or semi-nomadic Indigenous peoples, "'regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources' could suffice."[57] This was explained by then Chief Justice of the Supreme Court of Canada MacLachlin in **Tsilhqot'in Nation v British Columbia**:

> The Court in **Marshall**; Bernard confirmed that nomadic and **semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact**. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "**regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice** (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; **sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used**" (ibid.). [58]
>
> [emphasis added]

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[56] Tsilhqot'in Nation v British Columbia, 2014 SCC 44 ("Tsilhqot'in"), BOA of the Appellant, Vol. 2, Tab 27, paras 25 – 26.

[57] Ibid., para 44, citing R. v. Marshall; R. v. Bernard, 2005 SCC 43, BOA of the Appellant, Vol. 1, Tab 19, para 66, citing, in turn, Delgamuukw v. British Columbia, [1997] 3 SCR 1010, BOA of the Appellant, Vol. 1, Tab 6, para 149.

[58] Tsilhqot'in, BOA of the Appellant, Vol. 2, Tab 27, para 44.

[88] The 2006 MEKS supports Sipekne'katik's factually credible claim to Aboriginal title of the Alton Gas Project area. The 2006 MEKS provides evidence of the Mi'kmaq's historic and current occupation of the Alton Gas Project area.

**The Minister's Decision & the Aboriginal Title Claim**

[89] The April 8, 2019 decision by the Minister (Vol 12 Tab 17) makes several references to Aboriginal title claims:

> "Sipekne'katik submits that aboriginal title claims were not adequately addressed during consultation. The significance of Sipekne'katik proximity to the project area and history as a Mi'kmaq community was taken into consideration by the Province, as **the depth and length of the consultation process is reflective of the serious nature of both the aboriginal and treaty rights asserted, though not set out in detail by Sipekne'katik**." (Emphasis added)
>
> The Minister had stated earlier "…I have determined that the **consultations with Sipekne'katik have been sufficient in the circumstances of this matter**…(p. 1) (Emphasis added)
>
> And that "…a **necessary and satisfactory consultation** on the issues and concerns raised **was achieved**" (p. 1) (Emphasis added)
>
> On page 2, the Minister noted: "…I conclude that **the level of consultation was appropriate to the circumstances and to the aboriginal and treaty rights as asserted.**" (Emphasis added)
>
> At the bottom of page 2, the Minister said: "I conclude that **consultation on aboriginal and treaty rights was substantial** and was conducted separately from public consultation." (Emphasis added)

[90] The problem with the above is that the record discloses that the Province never specifically engaged in a discussion of the asserted Aboriginal title claim or treaty rights during the consultation process. The consultation process related exclusively to assessing, investigating, and mitigating, the potential environmental impacts of the Project.

[91] On page 3 of her decision, the Minister said;

> "The concerns and interests of Sipekne'katik and other aggrieved persons have been balanced with broader societal interests, including social and economic issues".

[92] The choice of words is telling. The Minister's balancing involved the "**concerns and interests**" of Sipekne'katik and other aggrieved persons…" Her balancing ought to have involved "asserted Aboriginal title and treaty rights" not mere "concerns and interests". The former are in a separate category from, and superior to, the concerns and interests of "other aggrieved persons" if that reference is to non-Aboriginal persons. The interests of other aggrieved persons should not be considered in conjunction with Sipekne'katik's asserted rights.

[93] In summary, the Minister's approach ought to have reflected the following: "The asserted Aboriginal title and treaty rights of Sipkne'katik have been balanced with broader societal interests…" This is not a matter of semantics.

Framing the issue as I have indicated would have been a recognition by the Minister of the importance of the rights issue and that it deserved special consideration in her deliberations.

**Asserted Title Claim**

[94] The Province was first expressly advised of the Mi'kmaq's claim of Aboriginal title in relation to the Alton Gas Project on July 25, 2007, when Twila Gaudet from KMKNO wrote to the Department of Environment and Labour. In her correspondence, Ms. Gaudet stated:

> As you may be aware, there is a constitutional duty to consult with the Mi'kmaq of Nova Scotia when any activity **may adversely affect Mi'kmaq Treaty Rights or Title.** The Nova Scotia Mi'kmaq have a consultation process in place that we expect to be followed and feel that the Proposed Storage Project **may infringe on Mi'kmaq Aboriginal Title and or Constitutionally protected rights.**[59] (emphasis added)

[95] The title issue does not appear in the Record again until 2014. In his August 13, 2014 letter to the Premier, Chief Copage notes that the Project will have

> "…an impact on Aboriginal Rights, including Title, but will also have an impact on the practice of our Constitutionally protected Treaty Rights. The impacts include, but are not limited to potential limitations placed upon the access to resources for the exercise of our Aboriginal and Treaty rights. " (Vol 5 Tab 75)

[59] Letter from Twila Gaudet to Candace Harding of NS Environment, July 25, 2007, Appeal Record, Vol. 5, Tab 104, p. 329.

[96] In listing the reasons for the Band's opposition to the Project, Chief Copage notes among other concerns: "Concerns for impact and/or infringement of rights and **title**" (Emphasis added).

[97] In his affidavit dated March 24, 2016, Chief Copage referenced a November 13, 2014 letter where KMKNO had advised:

> "…**the Mi'kmaq of Nova Scotia assert title to the Shubenacadie watershed included in District Sipekne'katik** where the Mi'kmaq continue to exercise traditional and Aboriginal rights through hunting, fishing and stewardship of the resources/environment. (Vol. 1 Tab 6 p. 151) (Emphasis added)

[98] During the first formal consultation meeting on September 17, 2014, Ms. Jennifer Copage, the Band's consultation coordinator, raised the issue of underlying title interests and potential impact to Aboriginal fishing rights. She also asked about the significance of the MEKS and how it fit into the Environmental Assessment process since it identified continued historic hunting and fishing practices (Affidavit of Jennifer Copage sworn on March 24, 2016, para 13). She did not receive a response to these specific questions and concerns.

[99] On November 6, 2014 the Assembly wrote to the federal Department of Fisheries and Oceans (DFO) and advised of the Mi'kmaq assertion of title to the Shubenacadie watershed. (Vol. 6 Tab 1 p. 41). This letter is part of the appeal record reviewed by the Minister prior to her 2019 decision.

[100] In a letter dated April 23, 2015, Chief Copage wrote to NSE and stated at page 4:

> "…The Band reaffirms that the Mi'kmaq have never sold, ceded signed away or traded away any rights and title and as such asserts that aboriginal and title, as well as Treaty rights are very much in existence for the area where the activity is contemplated." (Vol 6 Tab 48 p. 376)

[101] NSE replied as follows on June 29, 2015:

> "Consultation has continued since that time (2007), although the storage facility project construction was not continuous over the past 7 years and has been re-initiated by the proponent over the past year. The Province is committed to continuing meaningful consultation with the Mi'kmaq…" (Vol. 4 Tab 37 p. 144)

[102] Interestingly, on March 17, 2015, NSE wrote a letter to Chief Copage which opened: "The purpose of this letter is to continue consultation with Sipekne'katik First Nation on the Alton Natural Gas Storage Facility and Pipeline Project." Attached to the letter is an updated copy of the Mi'kmaq Issues Table on Alton Gas Storage Facility and Gas Pipeline. Item 16 (referencing a letter October 2, 2014) notes the **Issue**: "The compensation plan that is in place to accommodate the Mi'kmaq of Nova Scotia."

> **Response:** "The Province is continuing meaningful consultation with the Mi'kmaq of Nova Scotia to determine the potential impacts to treaty and/or Aboriginal rights. Discussions regarding a compensation plan may be required in the future if it is determined that potential impacts to treaty and/or Aboriginal rights cannot be avoided or mitigated." (Vol. 4 Tab 52 p. 408)

[103] The consultation never returned to the compensation question.

[104] On December 9, 2015 Justin Huston, Executive Director of OAA, sent an email to (among others) James Michael (Counsel for the Band) and Jennifer Copage. He indicated that by December 14, 2015 he would provide them with the final draft of the Industrial Approval (IA) and final draft of the monitoring plan:

> "This will provide KMKNO and Sipekne'katik staff with the information that they have requested to brief their leadership on how potential adverse impacts to Aboriginal and Treaty rights have been identified through the consultation process, and how they have been addressed through the design and proposed monitoring, management and regulation of the brining facility…"

[105] Huston went on to say that he would use the information to brief the Minister on the IA and consultation "…so that he may make an informed decision." (Vol. 3 Tab 18)

[106] This was followed by KMKNO's letter (Chief Prosper) dated December 17, 20155 to the Premier. (referenced earlier). This letter states in part:"… To be clear, the process used in 2007 to approve this project (apparent reference to 2007 Environmental Approval)…fails to meet adequate consultation with the Mi'kmaq…" Chief Prosper concludes: "Further consultation and community engagement is required." (Vol 7 Tab 2 pp. 533-535).

[107] It is somewhat puzzling that by January 22, 2016, Chief Prosper was apparently satisfied (as referenced earlier) with the consultation which had taken

place. His January, 2016 update appears to be inconsistent with his December 17, 2015 letter stating "Further consultation and community engagement is required." No consultation took place between December 17, 2015 and the issuance of the IA on January 20, 2016.

[108] Whatever his reasons, it is important to remember that Chief Prosper did not speak for the Band after 2013. Chief Copage spoke for the Band and he clearly wanted and expected consultation to continue. The Band's consultation coordinator, Jennifer Copage, also expected further consultation. (Affidavit Vol. 1 Tab 7, paras. 109-111.

[109] Instead, the Province (OAA), by letter dated January 6, 2016 advised that the time had come for the Minister to make a decision on the IA. The Province gave the Band twelve days (Jan 18/15) to respond with "any new substantive comments."

[110] Chief Copage wrote to the Premier on January 12, 2016 and demanded further consultation that included community engagement. "Once these real and meaningful processes have been completed, each Band will hold a referendum…"

[111] On January 18, 2016, Chief Copage responded to the January 6 letter from the OAA. Chief Copage took the position that consultations did not begin until

seven years after the Project was approved. (2007 Environmental Approval). Strictly speaking, that is incorrect as consultation began with the KMKNO (to which the Band was a party) in 2007. However, it is clear that the bulk of the consultation occurred between 2014 and 2016, after the Proponent had applied for the IA of the storage facility.

[112] Chief Copage also referenced his January 12, 2016 letter to the Premier where, as noted above, he sought more consultation and community engagement. He noted his duty "…to our membership to protect their rights and **title**" (Emphasis added) (Vol. 3 Tab 14)

[113] By letter dated January 20, 2016, OAA advised:

> "the Province intends to make its decision."
>
> "All of the potential outstanding environmental impacts which were identified as of concern to the Mi'kmaq through the robust consultation process have been identified, avoided and/or mitigated through the proposed terms of the Industrial Approval and the company's Monitoring Plan. Given that there are no more substantive matters to be addressed, the Province intends to make its decision."

[114] The January 20 letter reinforces the point that the Province was concerned strictly with the potential environmental impacts of the Project. At no time did the Province specifically address the impact of the Project on the rights issue, the asserted Aboriginal title claim.

[115] The IA was issued on January 20, 2016. It was only after the decision had been made, that, on February 23, 2016 the Province (OAA)directly addressed the Aboriginal title issue.

> The Province is aware that the SIPEKNE'KATIK First Nation asserts title to lands which extend beyond its reserve lands. The factual and legal history in Nova Scotia differs from that set out in the recent Supreme Court of Canada decision of *Tsilhquot'in Nation v. British Columbia*, in which the Tsilhqot'in First Nation successfully established title to the land.
>
> In situations where there are unresolved claims to Aboriginal rights and title, the key case for guidance on consultation is *Haida First Nation v. British Columbia*. **The Province is committed to meaningful consultations with Sipekne'katik First Nation**, in good faith, and with the desired outcome of seeking accommodations which minimize or avoid identified impacts to Mi'kmaq and Treaty rights. The duty as set out in the *Haida* decision does not extend to include consent-based decision making. In these circumstances, Sipekne'katik First Nation has not obtained a right of consent concerning a government decision that was made in accordance with a consultation process undertaken in good faith by all parties.
>
> However, we are deeply committed to working with Sipekne'katik First Nation to look for solutions that allow for the exercise of Aboriginal and Treaty rights within a context of responsible economic development within Nova Scotia. (Vol 3 Tab 6)

[116] The message in the February 23, 2016 letter is ambiguous. The Band would already have known that it was not in the same position as the **Tsilhqot'in Nation** which had established title. The Band was asserting yet to be proven Aboriginal title and treaty rights.

[117] As noted, the letter says in part that the Province is committed to "… meaningful consultations …". That phrase is referenced in **Haida** where the Court said:

> In all cases, the honour of the Crown requires that the Crown act in good faith to provide **meaningful consultation appropriate to the circumstances.** (para 41)
>
> (Emphasis added)

[118] "Meaningful consultations" is therefore a moving target unless there is some measure of what is "appropriate to the circumstances." That measure has to be a preliminary assessment by the Province of the strength of the case supporting the existence of the right or title.

[119] The Province did not do a preliminary assessment of the strength of the Band's case or, at least, never disclosed that it had. Counsel for the Province took the position that a preliminary assessment was not necessary. He argued that since the Province had acknowledged at the hearing that "deep" consultation was required, there was no need for an assessment of the Band's asserted title claim.

[120] Counsel provided two cases from the BC Court of Appeal to support his argument. In **Halalt First Nation v. British Columbia**, 2012 BCCA 472, the Court wrote at para 118:

> Clearly, it is desirable and sometimes may be necessary to prepare an assessment of the strength of claim at the outset of consultation, but, in a case like this where the Crown concedes consultation should be deep, it is the quality of the consultation that must prevail. **The lack of a formal assessment does not undermine the consultation provided it is indeed deep consultation**.
>
> (Emphasis added)

[121] That reasoning was reaffirmed by the Court in **Squamish Nation v. British Columbia**, 2019 BCCA 321 at para. 87.

[122] With respect, those cases do not assist the Respondent Province because what occurred in this case was not "deep" consultation. Putting the "deep" label on the consultation does not make it so. Consultation cannot be "deep" if it does not address the proverbial elephant in the room. That elephant, of course, is the core issue, the asserted title claim. From the Band's viewpoint, it insists that it be recognized as the potential owner of the land. The Province avoided any engagement on that issue until after the Minister had made her decision.

[123] In order to ascertain the content of its duty to consult, the Province must do a preliminary assessment of the strength of the Band's title claim. At para 39, the Court in **Haida** stated:

> The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. **In general terms, however, it may**

> **be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed**.
>
> (Emphasis added)

The Province should then provide the Band with an opportunity to comment on its preliminary assessments, i.e. both on the strength of the title claim and on the potential impact of the proposed decision on the asserted rights. In this regard, I agree with the reasoning in the decisions in **Enge** and **Adams Lake**, to which I will briefly refer.

[124] In **Enge v. Mandeville et al**, 2013 NWTSC 33, the Court stated at paras. 145 – 147:

> 145 Where the duty to consult has been triggered, the Crown is required, at the outset of the process to:
>
> > make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights. **The Crown's obligations also extend to providing the affected Aboriginal group with an opportunity to comment on these preliminary assessments**.
>
> *Adams Lake Indian Band, supra* at para. 131.
>
> 146 The Crown is required to complete a preliminary assessment because "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." *Haida Nation, supra* at para. 36.
>
> 147 **The preliminary assessment informs the content of the duty to consult**. Adams Lake, supra at para. 132; *Wii'litswx, supra* at para. 245. Once the Crown

> has completed a preliminary assessment, the Crown must then design a process for consultation that meets the needs of the duty to consult. *Huu-Ay-Aht First Nation*, *supra* at para. 113.
>
> (Emphasis added)

[125] Similarly, in **Adams Lake Indian Band v. British Columbia**, 2011 BCSC 266, (cited in **Enge**), the Court stated at para. 131:

> On my review of the authorities, it is well established that where the Crown has notice of a claim asserted by an aboriginal group and the duty to consult has been triggered, the Crown is obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights. **The Crown's obligations also extend to providing the affected aboriginal group with an opportunity to comment on these preliminary assessments. This is necessarily a key step in the consultation process because the scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed**.": *Haida* at para. 39.
>
> (Emphasis added)

[126] The Province should not be shy about engaging in a dialogue on the strength of the title claim. As the Court noted in **Enge**:

> A preliminary assessment is not intended to be a conclusive determination of the status of the right but is intended to determine whether there is a *prima facie* basis for the claim. As stated in *Haida Nation*, *supra* at para. 66, "Consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits." (Para. 178)

[127] It is possible that the failure to have a dialogue on the claim strength led the Province to believe that the issue could be managed on the basis of environmental impacts alone. The Minister's decision recognizes that the Band lived "in proximity to the project area." That is a long way from acknowledging that the Band is the potential owner of the area.

[128] At this stage, the Province must be clear about its commitment (expressed during the hearing) to "deep" consultation. My impression was that the Province was merely saying that 'deep' consultation had occurred without taking any position on the strength of the Band's claim. If the Province's position is that the Band's claim is not strong, then it should say so and articulate the reasons for its position. In any event, the Province must share its evaluation of how strong the Band's claim is. The chances of meaningful consultation are remote unless the parties have this discussion.

[129] The point is that the discussion has to focus on the Band's asserted title and treaty rights and not environmental impacts *per se*.

[130] In **Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,** 2017 SCC 40, the Court was dealing with **established** Inuit treaty rights. I am satisfied that the Court's reasoning in **Clyde River** is applicable to cases like this one where

the rights are asserted but not yet established. Consultation is all about the duty of the Crown to adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants. (**Haida**, paras. 26 – 27)

[131] In **Clyde River**, the Court stated that "… the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right …" (para 45).

[132] The Court went on to note that

> "… consultation in its least technical definition is talking together for mutual understanding. … **No mutual understanding on the core issues** – the possible impact on treaty rights, and possible accommodations – **could possibly have emerged from what occurred here**." (para 49)
>
> (Emphasis added)

[133] **Clyde River** was quoted with approval by the Federal Court of Appeal, in **Tsleil-Waututh Nation v. Canada (Attorney General)**, 2018 FCA 153. At para 504, the Court states:

> Consultation must focus on rights. In *Clyde River*, the Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "**consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right**" (emphasis in original) (*Clyde River*, paragraph 45**). Mitigation measures must provide a reasonable assurance that constitutionally protected rights were considered as rights in themselves-not just as an afterthought to the assessment of environmental concerns** (Clyde River, paragraph 51). (Emphasis added in last sentence)

[134] The foregoing speaks directly to the problem in the present case. No mutual understanding could possibly have emerged from what occurred here. The parties never engaged in a discussion of the core issue. The "afterthought" observation in the quote from **Tsleil** is strikingly resonant where, as discussed, the Province did not address the title issue until after the Minister had made her decision.

[135] The Province's own Consultation manual (Vol I Tab 5.5) recognizes that the level of consultation is proportionate to a preliminary assessment of the potential of the assertion and the potential adverse impact of the contemplated activity (manual p. 19).

[136] The options for accommodation in turn depend upon the level of consultation. Accommodation measures should be proportionate to the level of impact a particular government authorized activity will have on the asserted rights.

[137] The section on Accommodation begins with the quote; "Consultation that excludes from the outset any form of accommodation is meaningless" (***Mikisew*** v ***Canada***, 2005 SCC 69 para 54). The manual states that for consultation to be

meaningful, it must consider accommodation from the outset. (Manual pp. 24-25). It depicts a "Spectrum of Accommodation" ranging from avoidance, to mitigation, to compensation.

[138] Compensation is considered where avoidance or mitigation is not possible. Compensation can be financial and/or non-financial. Some examples of compensation listed include habitat restoration, profit and/or resource sharing, direct payment, and benefit agreement. (Manual p. 26)

[139] Because the consultation never focused on rights **per se**, the full range of accommodations was never discussed. Arguably, the focus on the environmental impacts rather than asserted rights effectively excluded certain forms of accommodation from the outset. The issue of compensation, for example, was raised but never discussed. (see para 102 above)

[140] I am not saying that compensation necessarily has to flow from any continued consultation. What I am saying is that everything has to be on the table.

[141] The consultation was prematurely and abruptly ended by the Province. By December 9, 2015, the Province had sent out the draft IA. From its perspective, all of the environmental impacts had been addressed and therefore the

consultation was finished. The January 6, 2016 letter from Ms. Towers of OAA again focuses on environmental impacts;

> …the Province was not aware of "any potential environmental impacts that have not been identified, avoided, and/or mitigated … **Nor are we aware of outstanding impacts to aboriginal and treaty rights that have been inadequately addressed."**
>
> (Emphasis added)

[142] Despite the foregoing highlighted sentence regarding "rights", the Province is still viewing the consultation solely through an environmental lens. Understandably, the Province became concerned about Chief Copage's insistence on community engagement and the possibility of a referendum. The Province would also have taken exception to Chief Copage's characterization of the consultation to date as mere "notification". (his letters of January 12 and 18, 2016 discussed earlier)

[143] It is unfortunate that Chief Copage did not clearly state that it was title and treaty rights which now had to be discussed in further consultations. It probably would have made no difference. The Province had decided that there had been enough consultation and that it wanted to make a decision. The February 23, 2016 letter demonstrates that the Province knew the title issue was out there. As far as the Province was concerned, that was a discussion for

another day. As I have indicated earlier, the Province was mistaken. The consultation should have continued and the fundamental rights question addressed.

[144] This decision should not be read to mean that the Province did everything wrong. The Province did make commendable efforts to address the Band's environmental concerns and make appropriate accommodations. The consultations were fine as far as they went. They unfortunately stopped short of engaging the critical rights issue. The Province is obliged to investigate, study, and mitigate environmental impacts in every case. The presence of asserted Aboriginal rights in a given case adds another dimension to the Province's responsibility. The Province must specifically address that issue.

[145] On the Band's side, there is room for improvement. It is legitimate for Chief Copage to express his opposition to the Project. That opposition must not interfere with good faith participation in the consultations. Consultations involve good faith and "give and take" on both sides.

[146] One party cannot, for example, unilaterally change the terms of engagement. That is what Chief Copage did when he stated that "on the record" consultations would only take place in situations where it was previously agreed to in writing.

(Chief Copage's letter of September 24, 2013). That is the opposite of what occurs under the Terms of Reference where everything is on the record unless the parties agree otherwise. It must be underlined that the Terms of Refence is the product of an agreement between the Mi'kmaq of Nova Scotia and the Provincial and Federal governments.

[147] Secondly, some of Chief Copage's positions (e.g. holding a referendum) imply that the Band has a veto power over the Project. That is clearly not so. But consultation resulting from a discussion about where the Band's claim lies on the **Haida** spectrum may strengthen the Band's position.

[148] The parties have to sit down and negotiate how they proceed from here. I would suggest that the Terms of Reference formula is the preferred option. Otherwise, a great deal of useful and appropriate consultation could take place but count for nothing because one side deems it "off the record". The parties must keep the goal of reaching a mutual understanding at the forefront. On the record discussions should foster the trust necessary to reach a mutual understanding.

[149] The Band should reconsider its insistence that there should be community engagement by the Province. The Province is obliged to consult with the

legitimate representatives of the Band. It is the responsibility of the Band to decide who those representatives will be. It is also the responsibility of the Band to communicate with its membership on the content and results of the consultations. Community engagement between the Band members and their representatives is critical. It is important that the Band's representatives ensure that their membership understands the consultation process together with the reasons for the concessions and gains (the "give and take") of the negotiations.

**Conclusion**

[150] I am satisfied that the Minister did make a palpable and overriding error in her Decision.

[151] In his supplementary brief on the post -***Vavilov*** standard of review, Counsel for the Province cited the PEI Court of Appeal in ***Lavaleé*** v ***Trevors.*** At para. 12 the Court stated:

> "The palpable and overriding error test is met where the findings can be properly characterized as "unreasonable" or "unsupported by the evidence" and the reviewing court "must be persuaded that the impugned factual finding is likely to have affected the result" [***H.L.***v ***Canada (AG),*** 2005 SCC 25 paras. 55-56].

[152] As I have demonstrated, the Minister's finding that the level of consultation was "appropriate" to the asserted aboriginal title and treaty is not supported by

the evidence. The Record discloses no instance where the Province engaged the Band on the title/treaty issue prior to the Minister's decision. There are assertions by the Province that it was committed to "continuing meaningful consultation". Regrettably, that consultation never proceeded to a discussion of the core issue of Aboriginal title.

[153] As previously noted, prior to making her decision, the Minister received an additional submission dated July 17, 2017 from Mr. Larkin on behalf of the Band. Paragraph 36 of that submission reminds the Minister that the Province never addressed the Band's treaty and title rights. That paragraph reads:

> "Sipenkne'katik appreciates that the number of consultation letters has the appearance of substantial consultation. However, as will be developed further below, while the Province certainly provided information about the Alton Gas Storage project and answered questions relating to the scientific and technical aspects the project, **the Province never addressed the specific issue of the potential impact to Sipekne'katik's assertion of Aboriginal, treaty and title rights.** (Emphasis added)

[154] The Minister appears to have fallen into error by misapprehending consultation references in the Record on the rights issue. For example, as noted above, (see para 102) item 16 in the Mi'kmaq Issues Table quotes the Province "continuing meaningful consultation…to determine the potential impacts to treaty and/or Aboriginal rights…"

[155] Another example is NSE's reply dated June 29, 2015 to Chief Copage's letter of April 23, 2015 (above paras. 100 and 101). In his letter, Chief Copage had raised the title issue. The Province's reply is a vague "…(T)he Province is committed to continuing meaningful consultation…"

[156] In both instances, although purporting to respond to a title issue, the consultation proceeded to consider environmental issues only. The Minister is therefore mistaken to consider such references as consultation on the rights issue.

[157] "Deep" consultation obliged the Minister to look beyond the environmental issues and to assess the level of consultation that had occurred on the rights issue. Had she done so, she would have recognized the rights issue itself was never specifically discussed. She therefore would not have come to the conclusion that the consultation had been satisfactory, or sufficient, or appropriate. Her misapprehension of the evidence therefore affected the result.

[158] "Deep" consultation is not defined in the caselaw. ***Haida*** says deep consultation must be aimed at finding a satisfactory interim solution. The precise requirements of deep consultation will vary with the circumstances. (***Haida*** para 44). This is why it is vital that the parties engage on the strength of

the asserted title claim. The content of the consultation must be tailored to the needs of the individual case. Those needs are informed by the strength of the asserted claim. As a general proposition, the Court stated in ***Haida***:

> …The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary. (***Haida*** para 45).

[159] The Band still does not know what the Province thinks of the strength of its title claim. To restart the consultation the Province must remedy that deficiency. Its assessment at this stage can no longer be deemed "preliminary". A more accurate designation would now be "a tentative assessment". As discussed, the Province should then give the Band the opportunity to comment on its tentative assessment.

[160] To this point, I have not commented on the fact that the preliminary or tentative assessment is two-fold: in addition to an assessment of the strength of the title claim, the assessment should also evaluate the seriousness of the potentially adverse effect of the Project on the title claim (***Haida*** para 39).

[161] The Project is a significant industrial intrusion on an area the Band is claiming as its own. Massive volumes of salty brine will be pumped into the Shubenacadie River. The studies and research to date indicate that the environmental consequences may be minimal. There is no certainty and that is why the parties have devised a detailed monitoring plan and mitigation strategies. As Chief Prosper noted in his update, the full effects of the Project will not be known until the Project is operational.

[162] The Province should therefore provide a tentative assessment of the potential adverse effects of the Project on the title claim. A necessary aspect of that impact assessment should be a discussion of the possible, if unlikely, worst case scenarios. Such a discussion will better inform the content of the consultation and, in particular, what further accommodations (if any) may be required.

[163] At the hearing, Counsel for the Appellant asked that I limit the renewed consultation to sixty (60) days. That is probably overly optimistic. I am going to limit the continued consultation to one hundred and twenty (120) days. The parties are free to shorten or lengthen that time period by mutual consent. Because of the continuing COVID 19 situation, there is no way at this point to designate a start date for the resumption of consultation. That will have to wait for the declaration by the Province's Chief Medical Officer of Health that the

COVID 19 crisis is over. The parties are free to agree upon an alternative remote arrangement.

[164] I am allowing the Appeal and reversing the Minister's April 8, 2019 decision. I am directing the parties to resume consultations for a period of 120 days or for such period as the parties mutually agree.

[165] As the successful litigant, the Band shall have its costs against the Respondent Province only. The Respondent Alton Natural Gas Storage is not responsible for what I have found to be inadequate consultation by the Province. The assessment of costs will have to await resolution of the COVID 19 crisis.

Order Accordingly,

Edwards, J.