IN THE MATTER OF the *Electrical Power Control Act, 1994*, SNL 1994, Chap E-5.1, As amended; and

IN TE MATTER OF an application by Nalcor Energy to establish the terms of a Water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited for The Churchill River, Labrador.

Legal Brief of Counsel
for the
Board of Commissioners of Public Utilities

Contents

I. Introduction

1. On November 10, 2009 Nalcor Energy (Nalcor) submitted an application to the Board of Commissioners of Public Utilities (the Board) under section 5.5(1) of the *Electrical Power Control Act, 1994*[1] (EPCA) for the establishment by the Board of a water management agreement (WMA) between Nalcor and Churchill Falls (Labrador) Corporation (CF(L)Co) with respect to the Churchill River in Labrador.

2. Nalcor states that CF(L)Co has rights to use the water in the upper portion of the Churchill River, which it utilizes to generate electric power at the Churchill Falls hydroelectric generating facility. Nalcor has rights to use the water in a portion of the Churchill River downstream from the Churchill Falls station for the generation of electric power at hydroelectric generating facilities proposed to be constructed at Gull Island and Muskrat Falls.

3. CF(L)Co is party to contracts for the supply to Hydro Quebec and to Twin Falls Power Corporation Limited (Twinco) of electric power produced at its Churchill Falls facility.

4. The Board has granted permission to intervene in the Nalcor application to the Conseil des Innus de Ekuanitshit (CIE); the Innu of Uashat mak Mani-Utenam, the Innu of Uashat mak Mani-Utenam Band Council and certain traditional families of the Uashat mak Mani-Utenam Innu (IUM); and Twinco.

5. There are issues of law and fact raised by both the Nalcor application and the positions taken by the Intervenors. The purpose of this brief is to comment on the law that in the opinion of Board counsel is applicable to the application and interventions and to present a description of the issues to be addressed by the Board.

[1] *Electrical Power Control Act, 1994*, SNL 1994 Chap. E-5.1

II. Legislation Applicable to the Nalcor Application

6. The EPCA was amended in 2007[2] to add sections 5.3 to 5.7 and section 32(b.1). Those provisions address the required content of a WMA, the process to be followed to approve or establish a WMA and the authority to make regulations.

7. In 2009 The *Water Management Regulations*[3] (the Regulations) were made by the Lieutenant Governor in Council under the authority of section 32 of the EPCA.

A. Statutory Criteria for Establishing the Content of the Water Management Agreement

8. The requirement for a WMA between two parties with rights to use the same body of water for the production of electric power is found in section 5.4(1) of the EPCA. The purpose of the WMA is to achieve the policy objective in section 3(b)(i) of the EPCA.

9. Section 3(b)(i) declares it to be the policy of the province that all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner that would result in the most efficient production, transmission and distribution of power. The relevant portion of section 3(b) is as follows:

> 3 It is declared to be the policy of the province that
>
> (b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner
>
> (i) that would result in the most efficient production, transmission and distribution of power,
>
> and, where necessary, all power, sources and facilities of the province are to be assessed and allocated and re-allocated in the manner that is necessary to give effect to this policy.

10. By section 5.3, the reference in section 3(b) to sources of production of power is deemed to include undeveloped sources.

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[2] *An Act to Amend the Electrical Power Control Act, 1994*, SNL 2007 Chap. 25
[3] *Water Management Regulations*, NLR 4/09

11. Section 4 of the EPCA obligates the Board is to implement the power policy declared in section 3(b)(i) and in doing so to "apply tests which are consistent with generally accepted sound public utility policy".

12. The objective of the WMA is further refined in section 3(1) of the Regulations as follows:

> 3. (1) The objective of a water management agreement shall be the coordination of the power generation and energy production in the aggregate for all production facilities on a body of water to satisfy the delivery schedules for all suppliers on the body of water, in a manner that provides for the maximization of the long term energy-generating potential of a body of water, while ensuring that the provisions of a contract for the supply of power governed by section 5.7 of the Act are not adversely affected.

13. Section 3(2) of the Regulations sets out a series of requirements to be addressed in a WMA in order to attain the objective described in section 3(1).

14. Section 5.7 of the EPCA states that a provision of a WMA is not to adversely affect a provision of a power supply contract made between a party to the WMA and a third party, where that third party contract was made before the WMA or renewed after it.

15. In summary, the EPCA and Regulations relating to the content of a WMA require:

a. that the terms and conditions of the WMA conform to the power policy of the province set out in section 3(b)(i) of the EPCA;

b. that the WMA must address the matters described in section 3(2) of the Regulations, which are for the purpose of attaining the objective in section 3(1) of the Regulations;

c. that the Board, when assessing whether a WMA complies with the power policy objective in section 3(b)(i) must also consider generally accepted sound public utility policy;

d. that the provisions of the WMA must not adversely affect the provisions of an existing power contract.

B. Procedure for Approving or Establishing a WMA

16. The scheme for approval or establishment of a WMA requires the parties holding rights to produce power from a body of water to first attempt to reach agreement among themselves. If they do, section 5.4(2) requires that the WMA be referred to the Board, and the Board, as set out in section 5.4(3), may

    a. approve,
    b. approve with changes, or
    c. refuse to approve the WMA.

17. In the case of an application for approval of a WMA, section 7 of the Regulations provides:

> 7. … the board shall approve … a water management agreement within 120 days of the referral to the board of a proposed water management agreement under section 5.4 of the Act …

18. Although a literal interpretation of section 7 would obligate the Board to *approve* any WMA referred to it under section 5.4 of the EPCA, clearly what is intended by this section is that the Board has 120 days from the date of referral to approve, approve with changes, or refuse to approve the WMA. To interpret it otherwise would be inconsistent with section 5.4(3) of the EPCA, the statute under which the Regulations were made.

19. If the parties do not reach agreement among themselves, then either party may apply under section 5.5 for the Board to establish the WMA for them. Section 5.5(1) makes it a prerequisite that the parties must have failed to enter into an agreement "within a reasonable time", and section 4 of the Regulations defines that reasonable time as 60 days. Section 5.5(2) says that the Board "shall establish the terms of an agreement".

20. In this case, section 7 of the Regulations provides:

> 7. … the board shall … establish a water management agreement within 120 days of … the filing of an application under subsection 5.5(1) of the Act.

21. When an application is made for the *establishment* of a WMA, section 5.5 does not expressly give the Board the option of refusing to establish the WMA. Section 5.5(2) says that the Board "shall" establish the WMA and section 7 of the Regulations says that the Board "shall" establish it within 30 days.

22. The interpretation of section 7, and whether the Board has a discretion to not establish a WMA within 120 days is addressed further below.

23. In addition to the powers given to the Board under sections 5.4 and 5.5, section 5.6(2) gives the Board the power to "require reporting commitments, and impose monitoring requirements, as it considers appropriate, to ensure that the persons to an agreement approved by the public utilities board under subsection 5.4(3) or established under subsection 5.5(2) comply with the terms and conditions of the agreement." This power is exercised at the time that the WMA is approved or established. The section does not say whether the reporting commitments and monitoring requirements are to be put in place through the order approving or establishing a WMA, or as terms of the WMA itself.

24. The only other procedural direction in the EPCA or the Regulations is section 6 of the Regulations which requires written submissions from "affected suppliers" addressing the matters described in that section within 30 days of the referral or application.

25. Otherwise, section 5 of the Regulations makes the *Board of Commissioners of Public Utilities Regulations, 1996*,[4] (the PUB Regulations) and the procedures set out in those regulations, applicable to applications made under sections 5.4 and 5.5 of the EPCA, subject to two qualifications:

    a. If the Regulations say something different than the PUB Regulations, then the Regulations take priority.

    b. The PUB Regulations do not apply if "the board believes the process under those regulations are not necessary or useful, or would unnecessarily delay, the establishment of a water management agreement".

[4] RNL 39/96

26. The applicability of specific provisions of the PUB Regulations is also subject to section 3(2) to 3(4) of those regulations which states:

> 3. (2) In any application or other proceeding, the board may dispense with, vary or supplement any provisions of these regulations on those terms as the board considers necessary.
>
> (3) Unless the board otherwise orders, a failure to comply with these regulations shall be treated as an irregularity and does not nullify a proceeding, a step taken, any document or an order made.
>
> (4) Before the disposition of an application or proceedings, the board may issue those directions as it considers necessary for the proper consideration and disposition of an issue.

27. In summary, there are a limited number of specific procedural directions contained in the EPCA and Regulations. Otherwise the procedures contained in the PUB Regulations are incorporated by reference, however the Board has a wide discretion to vary or deviate from the procedural requirements of the PUB Regulations.

28. The Board, in determining the procedure to be followed, must give due regard to the principles of fairness and natural justice, within any prescriptive limits imposed by the legislation.

C. Exercise by the Board of its Powers under the EPCA

29. The approach of the Board to the exercise of its powers under the EPCA was touched on in *Re Newfoundland (Board of Commissioners of Public Utilities)*[5]. The Board had referred a stated case to the Newfoundland and Labrador Court of Appeal for its opinion on questions of law affecting the jurisdiction of the Board when setting utility rates. Before addressing the specific questions posed to the Court, Green J.A. considered what he called "a theoretical frame of reference within the context of the general language of the existing legislation so as to determine the approach to be taken to its application in concrete situations." Beginning at paragraph 16 he stated:

[5] 1998 CarswellNfld 150 (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 164 Nfld. & P.E.I.R. 60, (sub nom. Reference re s. 101 of the Public Utilities Act (Nfld.)) 507 A.P.R. 60, 164 Nfld. & P.E.I.R. 60

> 16 It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice. This approach follows from s. 118 of the Act which provides:
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> > 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
> >
> > (2) The Board created has, in addition to the power specified in this Act, all additional implied and incidental powers which may be appropriate or necessary to carry out the powers specified in this Act.
> >
> > (3) A substantial compliance with the requirements of this Act is sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature.
>
> 17 In addition, the EPC Act, provides that the Board, in carrying out its duties and exercising its powers under the Public Utilities Act must implement the power policy of the province, as declared in s. 3 of the Act, and in so doing must "apply tests which are consistent with generally accepted sound public utility practice".
>
> 18 It follows from these provisions that a literal and technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation as well as the power policy of the province and be consistent with generally accepted sound public utility practice.
>
> 19 In answering the questions posed, therefore, it is necessary to identify generally accepted principles of sound public utility practice and to give to the legislation an interpretation which follows those principles and advances the stated legislative policy of the Province.

30. Although the questions posed in that reference concerned utility rate setting, and thus fell primarily under the *Public Utilities Act*[6], section 30(1) of the EPCA states that the Board may exercise all the powers given to it under the *Public Utilities Act* when carrying out its duties under the EPCA, so the following general principles selected from those summarized by Green J.A. may be helpful in assessing the role and powers of the Board on this application:

> 36 Having conducted this brief survey, I will now attempt to state some general principles to be used in the interpretation and application of the local legislation:

[6] RSNL 1990 Chap P-47

> 1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
>
> 2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;
>
> 3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power.

31. The EPCA was also considered by the Newfoundland and Labrador Court of Appeal in *Labrador (City) v. Newfoundland & Labrador Hydro Inc.*[7], a case where a municipality challenged a Board decision concerning utility rates. Cameron J.A. quoted from the earlier Court of Appeal decision and said:

> 19 In *Newfoundland (Board of Commissioners of Public Utilities), Re* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.) at para. 36 Green J. A., as he then was, stated some general principles respecting the *Public Utilities Act*:
>
> > 1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
> >
> > 2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy.
> > ...
>
> The purpose of the *Electrical Power Control Act, 1994* must also be considered. The *Public Utilities Act* and the *Electrical Power Control Act, 1994* provide a scheme for the regulation of electrical utilities which requires the Board to address policy issues and to balance interests.

D. Interpretation of Statutory Provisions

32. Achieving efficiency is a key component of the power policy, however the term "efficient" is not defined in the EPCA or the Regulations. How the Board interprets the word "efficient" will have an impact on the factors that the Board determines should be used to assess whether the policy objective has been met.

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[7] 2004 CarswellNfld 299, 2004 NLCA 61, 241 Nfld. & P.E.I.R. 81, 716 A.P.R. 81

33. Similarly, the term "sound public utility policy" used in section 4 of the EPCA is not defined in the Regulations, but the term "good utility practice", which may be similar, is defined in section 2(d) of the Regulations.

34. Assigning meaning to these terms is a matter of statutory interpretation.

35. There are a number of commonly applied rules of statutory interpretation. These include:

a. the ordinary meaning rule;
b. the original meaning rule;
c. the contextual analysis rule;
d. the purposive analysis rule;
e. the consequential analysis or absurdity rule;
f. the exclusionary rule;
g. the shared meaning rule; and
h. the plausible meaning rule.

36. These rules are succinctly described by Ruth Sullivan, in her text, *Statutory Interpretation*[8]. Not all rules can be used in every circumstance and it is not always possible to reconcile them with each other or to determine when one should take priority over another.[9] However the ordinary meaning rule is often used as a first step in the interpretation process and in many cases can resolve the interpretation issue without recourse to other rules. Sullivan says:

> Under the ordinary meaning rule, courts are obliged to determine the ordinary meaning of the words to be interpreted and to adopt this meaning in the absence of a reason to reject it in favour of some other interpretation. This rule tells courts and other interpreters that the first consideration to take into account in resolving statutory interpretation problems is the ordinary meaning of the legislative text.[10]

37. The author continues to explain what is meant by ordinary meaning in the following useful passage:

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[8] Ruth Sullivan, *Statutory Interpretation*, 1997, page 25
[9] Ibid, page 26
[10] Ibid, page 41

> Many interpreters confuse the ordinary meaning of words with their dictionary meaning. The ordinary meaning of a word or group of words in not the dictionary meaning, but the meaning that would be understood by a competent language user upon reading the words in their immediate context. Like any other text, a statute is read one sentence at a time. As each sentence is read, the reader forms an impression of its meaning based on the words and their arrangement within the sentence structure. This impression may be affected by the sentences coming immediately before or after. It may be affected as well by the reader's knowledge that he or she is reading a statute dealing with a particular subject and aimed at a particular purpose. These interactions between text, context and purpose generally occur instantaneously and intuitively, without self-conscious analysis. They draw on the reader's knowledge of language and on the large body of facts, assumptions, values and beliefs that together form the "shared wisdom" or "common sense" of a community.
>
> The ordinary meaning of a word or group of words in a legislative text is thus the product of a complex interpretative process. It is the meaning that competent readers would attribute to the words, drawing on their shared knowledge and expertise and taking into account as much of the surrounding text and situation as is needed to make sense of what is being said.[11]

38. The last part of that statement in effect incorporates much of the contextual analysis rule, which Sullivan describes as follows:

> To achieve a sound interpretation of a legislative text, the words to be interpreted must be read not only in their immediate context, so as to determine their ordinary meaning, but also in a larger context that may include the Act as a whole, other legislation, the legal system as a whole, and the social conditions in which the legislation operates. An interpretation that accords with features of this larger context is preferred over one that does not. Coherence with the context suggests that a proposed interpretation is appropriate, whereas inconsistency or disharmony suggests that it is wrong.[12]

39. A third rule that may usefully be applied is the purposive analysis rule. Sullivan explains it as:

> To achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of legislation. This includes the purpose of the provision to be interpreted as well as larger units – parts, divisions, and the Act as a whole. Once identified, the purpose is relied on to establish the meaning of the text. It is used as a standard against which proposed interpretations are

[11] Ibid, page 42
[12] Ibid, page 108

tested: an interpretation that promotes the purpose is preferred over one that does not.[13]

40. Words used in legislation may have technical meanings that differ from their ordinary usage. Expressions that are capable of only a technical meaning are easily assigned that technical meaning when used in legislation. Words that are capable of both ordinary and technical meaning present more difficulty. Two special rules that apply are, firstly, that the ordinary meaning is presumed, and secondly, that if the legislation is directed at a specialized audience the technical meaning that would be understood by that audience is preferred.[14]

41. Applying these approaches suggests that the terms "efficient" and "sound public utility policy" should not be interpreted in isolation, but should be read in the context of the subject matter being addressed by the EPCA generally and sections 3 and 4 of the EPCA in particular. The latter term may have a technical meaning in the context of public utility regulations that the Board, as a specialized tribunal, is familiar with.

III. Issues Raised by the Nalcor Application

42. The issues raised by the Nalcor application and the governing legislation may be expressed as set out below. These encompass both matters of fact and law.

a. The terms of the WMA must satisfy the purpose of the policy objectives in EPCA section 3(b)(i) – which are to manage and operate sources and facilities for the production, transmission and distribution of power in a manner resulting in the most efficient production, transmission and distribution of power.

    i. What factors must be considered when determining what is most "efficient"?

    ii. Do the terms of the proposed WMA satisfy the purpose of the policy objectives in EPCA section 3(b)(i)?

[13] Ibid, page 135
[14] Ibid, page 76

iii. Are any amendments, additions or deletions necessary or desirable to achieve that purpose?

b. In carrying out its duties and exercising its powers under the EPCA the Board must implement the power policy in section 3 and in doing so apply tests which are consistent with generally accepted sound public utility practice, as stated in section 4.

i. What factors must be considered when applying generally accepted sound utility practice to the WMA?

ii. Do the terms of the proposed WMA accord with generally accepted sound public utility practice?

iii. Are any amendments, additions or deletions necessary or desirable to accord with generally accepted sound public utility practice?

c. Provisions of the WMA cannot adversely affect a provision of a prior contract between a party bound by the WMA and a third party for the supply of power, as set out in EPCA section 5.7.

i. Which contracts meet these criteria?

ii. Will the terms of the WMA proposed by the Applicant, or as modified by the Board, adversely affect any provision of those contracts?

IV. Position of the Intervenors

43. In its submission in support of its request for intervenor status filed on December 15, 2009 the CIE takes the position that the Government of Newfoundland and Labrador and Nalcor have a duty, arising from section 35 of the *Constitution Act, 1982*, to consult with and accommodate the CIE. Alternatively, the CIE says that a duty to consult is consistent with principles of good utility practice. The CIE ask that the Board dispose of the Nalcor application by "refusing to approve the agreement", or alternatively by "setting aside for future examination the duty to consult and accommodate the Innu of Ekuanishit".

44. In addition to that submission the CIE have, on February 12, 2010, filed a motion to suspend the proceedings before the Board. There are two grounds replied upon. The first is that section 68 of the *Environmental Protection Act*[15] prohibits the Board from establishing a WMA until the Lower Churchill hydroelectric project has been released from environmental review under that Act. The second is that suspension is necessary to allow the Board to meaningfully consider the question of the duty to consult and accommodate.

45. In its submission in support of its request for intervenor status filed December 21 2009 the IUM also take the position that the Government of Newfoundland and Labrador, Nalcor and CF(L)Co have a duty, arising from section 35 of the *Constitution Act, 1982*, to consult with and accommodate the IUM. The IUM asked the Board to dispose of the application by refusing to establish a WMA, or alternatively by staying these proceedings.

46. In its reply submission dated Jan 14, 2010, the IUM also argue that good utility practice requires consultation and accommodation.

47. In a revision to its December 21, 2009 submission that was filed February 16, 2010, the IUM now also ask that the Board order that the Crown and Nalcor engage in meaningful consultation and accommodation with the IUM regarding the WMA and the management of water thereunder, or alternatively that the Board establish a term of the WMA that requires the Crown and Nalcor to meaningfully consult and accommodate the IUM regarding the WMA and the management of water thereunder and to report to the Board regarding that consultation and accommodation.

[15] SNL 2002 Chap. E-14.2

V. Constitutional Duty to Consult

A. The Constitution Act, 1982

48. Section 35(1) of the *Constitution Act, 1982* reads:

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

49. This section is the basis for the constitutional duty of the Crown to consult with, and if necessary accommodate the interests of aboriginal people where the actions of the Crown will interfere with their aboriginal rights or title.

B. Supreme Court of Canada Decisions

50. The leading cases on the Crown's duty to consult and accommodate are the 2004 Supreme Court of Canada decisions in *Haida Nation v. British Columbia (Minister of Forests)*[16] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[17]. The Haida Nation asserted a land claim over a portion of the Queen Charlotte Islands in British Columbia. The province had issued a license to cut timber on those islands in 1961 and the license had been renewed several times since then. The land claim was outstanding and unresolved in 1999 when the Province approved a transfer of the license to Weyerhaeuser. The Haida challenged the transfer, which had been done without consultation with them, and argued that the continued harvesting of the forest, in particular old growth forest, diminished the value of their aboriginal rights claim.

51. Chief Justice McLachlin of the Supreme Court of Canada concluded that the province had a legal duty to consult with the Haida people about the harvest of timber from the disputed area, including about decisions to transfer or replace the license held by Weyerhaeuser. The consultation had to be carried out in good faith. It had to be meaningful, but there was no duty to reach agreement. The duty to consult rested

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[16] 2004 SCC 73, 2004 CarswellBC 2656, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511

[17] 2004 SCC 74, 2004 CarswellBC 2654, , [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550

on the provincial Crown. Weyerhaeuser, as a private company and not an agent of the Crown, owed no independent duty to the Haida to consult with or them or accommodate their concerns.

52. The Crown's duty to consult with aboriginal peoples and accommodate their interests is grounded in the "honour of the Crown". McLachlin, C.J. wrote:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with aboriginal peoples … It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

53. McLachlin, C.J. wrote further:

> 25 Put simply, Canada's aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiation of treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate aboriginal interests.

54. In answer to the question "when precisely does a duty to consult arise?", McLachlin, C.J. wrote:

> 35 … The foundation of the duty in the Crown's honour and the goal of reconciliation suggests that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it.

55. She continued:

> 37 … Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.

56. Regarding the content of the duty to consult and accommodate, McLachlin, C.J. wrote:

> 39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined

as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse affect upon the right or title claimed.

57. She introduced the idea of a spectrum to describe the scope of the duty to consult and accommodate:

> 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
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> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

58. Based on *Haida*, the Crown's duty to consult aboriginal people is triggered when:

a. there is asserted a credible claim of aboriginal rights or title, and
b. the Crown contemplates conduct that might adversely affect it.

59. If the duty to consult has been triggered, then the scope of the duty is proportionate to:

a. a preliminary assessment of the strength of the case supporting the existence of the aboriginal right or title, and
b. the seriousness of the potentially adverse affect of the action contemplated by the Crown.

60. In the *Taku River* case the scope of the duty was explored further. The reopening of a mine required construction of a road to the mine site through lands over which the Taku River Tlingit First Nation had an outstanding claim for aboriginal title. The First Nation participated in the environmental review process and objected to the road. The project was eventually approved by the provincial Minister despite the objection. The First Nation brought an application to court to quash the Minister's decision.

61. In the Supreme Court of Canada MacLaughlin, C.J. found that the Crown's acceptance of the treaty claim for negotiation was enough to establish a *prima facie* case in support of aboriginal rights and title. There was expert evidence that the road would pass through areas critical to the First Nation's economy, so the impact was serious. Regarding the scope of the duty to consult, she said:

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

62. She then went on to find that the consultation undertaken by the Crown had been adequate:

> 44 ... Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.
>
> 45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

63. A third Supreme Court of Canada case was decided in 2005, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[18]. The Crown approved construction of a winter road through reserve lands. It had not consulted the band directly, and instead held open house sessions inviting public comment. The band did not participate in the public forum, but wrote to the Crown protesting the road proposal. The Supreme Court of Canada quashed the Minister's approval order and returned the matter to the Crown for further consultation. Unlike *Haida* and *Taku River*, this was a case where the Cree were asserting a claim to aboriginal title that had been established by treaty. Included within the treaty were terms allowing the Crown to take up lands for certain purposes. Regarding the scope and content of the duty to consult Binnie, J said:

> 64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the

[18] 2005 CarswellNat 3756, 2005 SCC 69, 259 D.L.R. (4th) 610, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6th) 205, 37 Admin. L.R. (4th) 223, [2005] 3 S.C.R. 388, 342 N.R. 82

> Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-160.

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

C. Other Duty to Consult Decisions

64. Lower courts have had to address the duty to consult issue in various situations since the three Supreme Court of Canada cases described above were decided.

65. In 2005 the British Columbia Court of Appeal decided *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*[19]. It concerned the transfer of land, over which the Musquem Band claimed aboriginal title, from the province to the University of British Columbia. The three judges who heard the appeal wrote separate judgements, although Lowery, J.A. agreed with the result of the reasons written by Hall, J.A. A portion of the summary of Hall J.A.'s reasons dealing with the scope and content of the duty to consult and accommodate reads:

> The government has a legal duty to consult prior to an aboriginal group's proving its claim. Where the aboriginal group has a weak title claim, the aboriginal right is limited, or the potential for infringement is minor, then the Crown need only to give the band notice of its plans, disclose information, and discuss issues raised in the notice. Where a strong prima facie case for the claim is established, then there may be required deep consultation aimed at finding a satisfactory interim solution. The consultation may include the opportunity to make submissions, to

[19] 2005 CarswellBC 472, 2005 BCCA 128, 28 R.P.R. (4th) 165, 37 B.C.L.R. (4th) 309

participate in the decision-making process, and to receive written reasons. In this case, the duty owed to the band was at the more expansive end of the spectrum. The Crown had conceded that the band had a prima facie case for title over the lands. Potential infringement was of significance to the band in light of its concerns about its land base. If the land was sold to a third party, it was likely that the band would not have another opportunity to prove its connection the land. The consultation process was flawed and came too late in the sale process.

The core of accommodation is the balancing of interests and the reaching of a compromise until claimed rights to property are finally resolved. The consultation process should be open, transparent, and timely. The remedy, in order to afford a proper opportunity for consultation with a view reaching some appropriate accommodation, was to suspend for two years the order-in-council authorizing the sale. After which, any party to the negotiations should be at liberty to bring appropriate proceedings in the Supreme Court of British Columbia to address any issues requiring decision by the court.

66. In 2007 the Newfoundland and Labrador Court of Appeal had its say on the Crown duty to consult in *Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation & Works)*[20]. Barry, J.A. described the issue in that case in this way:

> 1 The underlying issue in this case is whether individuals of aboriginal descent living in southern Labrador have a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them concerning wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway ("TLH").

67. Regarding the scope and content of the duty Barry, J.A. wrote:

> 30 There is a distinction between knowledge sufficient to trigger a duty to consult and the content or the scope of the duty to consult in a particular case. As the Court noted in *Haida*, at para. 37:
>
> > Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances.... A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims. ... Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

[20] 2007 CarswellNfld 376, 2007 NLCA 75, 33 C.E.L.R. (3d) 220, [2008] 1 C.N.L.R. 48, 830 A.P.R. 178, 272 Nfld. & P.E.I.R. 178, 288 D.L.R. (4th) 641

> 31 In order to determine what the scope of the Crown's duty to consult may be in any given case, the Court must consider 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 the title claimed. See *Haida*, at para. 39.

68. In that case the Labrador Métis claim to aboriginal rights had not been established, but was found to be credible. However the examination of the scope of the resulting duty to consult was limited because the Métis had asked only for disclosure of permit applications and related materials and then for an opportunity to provide comment. Barry, J.A. wrote:

> 52 … An obligation to consult at this relatively low level would be triggered by a claim of less prima facie strength than that of the respondents. While it would be helpful to provide more guidance to the parties as to the scope of future duties to consult, this is not possible without knowing the future evidence which may be presented regarding the strength of the respondents' claim and regarding the types of adverse effects on the potential aboriginal claim from future Crown activity. Any unsatisfactory consequences for the parties, from the Court's inability to provide greater guidance, may be alleviated by their implementing a process for reasonable ongoing dialogue.

69. In 2008 the British Columbia Supreme Court decided *Brown v. Sunshine Coast Forest District (District Manager)*[21], a case where the court intervened in the consultation process. The First Nation had opposed the province's approval of a Forest Stewardship Plan (FSP) for a logging area in which it claimed aboriginal title. Regarding the duty to consult and its scope the Court said:

> 17 As noted, the respondents do not contest that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the FSP submitted by Hayes. What is at issue is the scope of that duty in the particular circumstances of this case.

70. After reviewing *Haida* the Court defined what it had to do to answer the question before it:

> 26 To determine the extent of the Crown's constitutional duty to consult, then, I must first carry out a preliminary assessment of the strength of the case supporting the existence of the right or title asserted by Klahoose. I must also

[21] 2008 CarswellBC 2587, 2008 BCSC 1642

> assess the seriousness of the potentially adverse effect of the FSP on the right or title claimed by Klahoose. On the basis of these assessments, I must determine where on the spectrum of strength of case and adversity of effect this case lies, and come to a conclusion concerning to what depth of consultation Klahoose was entitled in relation to the decision to approve the FSP. In this regard I note that while the scope of the duty to consult will vary with the circumstances, it "always requires meaningful, good-faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (S.C.C.).

71. Regarding the preliminary assessment of the strength of the claim for aboriginal title, and the test used to assess the claims to aboriginal title or rights:

> 36 It is, of course, not for me in this proceeding to decide the validity of Klahoose's claim to aboriginal title and rights over its traditional territory. I must simply do my best on the evidence to assess, on a preliminary basis, the apparent strength of the case supporting the existence of Klahoose's asserted right or title.
>
> 37 In doing so, I bear in mind the test for the establishment of title set out in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), which requires claimants to prove exclusive pre-sovereignty occupation of the land by their forebears: *Marshall-Bernard*, *supra* at para. 55. As noted by the Chief Justice in *Marshall-Bernard*, *supra* at para. 58:
>
> > It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet, Nikal, Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, *the season over, they left, and the land could be traversed and used by anyone*. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights. [Emphasis added.]

72. The conclusion about the scope of the duty to consult was:

> 69 It follows from my findings concerning the strength of Klahoose's claim and the seriousness of the potential adverse effect of the FSP on Klahoose's aboriginal interests that the extent of the Crown's duty to consult and

> accommodate falls towards the higher end of the spectrum described by the Chief Justice of Canada in *Haida*.

73. The Court reviewed the consultation process that had taken place and found it inadequate. The remedy sought by the band was an order quashing the FSP approval. The Court said it was difficult to see how the approval of the permit could stand in light of the Crown's failure to meet its constitutional duties, but recognized the obligation stated in *Haida* for it to take a flexible approach. It ordered a stay of any actions under the FSP pending consultation conducted "in accordance with what I have found to be the Crown's duty of deep consultation, aimed at finding a satisfactory interim solution."

> 151 Such a solution would, one hopes, permit appropriate harvesting of timber resources while adequately protecting the economic, cultural, spiritual and social interests of Klahoose in the Toba River watershed.

74. The foregoing cases all involved administrative decisions by governments potentially adversely affecting aboriginal rights or title, either proven or claimed. *Haida* and *Brown* concerned provincial government grants of permission related to logging. *Taku River*, *Mikisew Cree* and *Labrador Métis* all involved provincial or federal government approval of road construction. *Musquem Band* was about the sale of land by the province. In all these examples a court was called upon to address the question of whether there was a duty to consult and accommodate and whether it had been discharged.

D. Regulatory Tribunal Decisions

75. We are aware of four court decisions that address the role of a public utilities regulator in assessing the duty to consult and accommodate.

76. Two cases, *Carrier Sekani Tribal Council v. British Columbia Utilities Commission*[22] and *Kwikwetlem First Nation v. British Columbia Transmission Corp.*[23] were decided by the British Columbia Court of Appeal in February, 2009.

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[22] 2009 CarswellBC 340, 2009 BCCA 67, [2009] B.C.W.L.D. 1574, [2009] B.C.W.L.D. 1749, 76 R.P.R. (4th) 159, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298

77. The background to the *Carrier Sekani* decision is that in the 1940s, Alcan built a smelter at Kitimat and a hydroelectric power station at Kemano. The province issued a water licence and permits for the redirection of water from the Nechako River to create a reservoir for the power station. In 2007, BC Hydro agreed to buy surplus electricity from Alcan. That Energy Purchase Agreement required approval from the British Columbia Utilities Commission. The Commission was obliged to consider whether the Energy Purchase Agreement was in the public interest.

78. The Carrier Sekani Tribal Council had outstanding claims for aboriginal title related to the Nechako River. The Tribal Council sought leave to be heard in the BCUC proceeding on the issue of whether the Crown had fulfilled its duty to consult before BC Hydro entered into the Energy Purchase Agreement with Alcan.

79. The Commission rejected the application on the grounds that the Energy Purchase Agreement would have no impact on the volume, timing or source of water flowing into the Nechako River and that since there were no new "physical impacts" created by the Energy Purchase Agreement, the duty to consult was not triggered. Based on that finding, the Commission determined that it did not need to decide whether BC Hydro had a duty to consult the Carrier Sekani First Nation.

80. The British Columbia Court of Appeal disagreed, finding that:

a. The BCUC, as a quasi judicial tribunal with the authority to decide questions of law, was competent to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled that duty.

b. Section 71 of the *Utilities Commission Act*, which obligated the Commission to consider approval of the Energy Purchase Agreement, required it to consider whether the Agreement was in the public interest. Whether the contract had been formed by a Crown agent in breach of a constitutional duty was a matter of public interest. The existence of a duty to consult and an allegation of a breach of that duty formed part of the public interest inquiry.

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[23] 2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273

The appropriate forum for enforcement a duty to consult in relation to the Energy Purchase Agreement was the tribunal with jurisdiction over the Agreement, the Commission.

c. Aboriginal law issues are not too complex or burdensome for a specialized administrative tribunal like the Public Utilities Board to have the capacity to decide the consultation issue.

d. Not only did the Commission have the competency and capacity to decide the consultation issue, as a body with powers delegated by the Crown, it had a duty to decide the issue and was the only appropriate forum to decide it in a timely way. In this respect, the Commission acts to discharge the honour of the Crown.

e. The Commission did not itself have a duty to consult.

81. The Court found that it was an error for the Commission to refuse to consider the Carrier Sekani Tribal Council's argument that the Crown had failed in its duty to consult. The Court did not conclude that the Commission was bound to find that there was a duty to consult. The Commission's obligation was to include that issue in the hearing process.

82. In *Kwikwetlem* the British Columbia Transmission Corporation applied to the BCUC for approval for the construction of a transmission line through territory subject to claims by several aboriginal groups. The aboriginal groups registered as interveners and applied for permission to lead evidence concerning the alleged failure of the Crown to fulfill its duty to consult with them. The Commission denied the request. Its view was that it could and should defer an assessment of the Crown's duty of consultation and accommodation to the provincial Minister who held the power to decide whether to issue an Environmental Assessment Certificate.

83. In this case, the parties agreed that the transmission line project had the potential to adversely affect the rights claimed by the aboriginal groups and they agreed that there was an obligation on the Crown to consult.

84. The proponent of the transmission line, a Crown Corporation, had been actively engaged in the consultation process with the First Nation applicants, which was a requirement of the environmental assessment process under separate legislation. It argued before the Commission that the environmental assessment process was the proper place for assessment of the adequacy of consultation and that the interests of the aboriginal groups would be fully protected within that process. The Commission accepted that position when it issued a "scoping decision" defining the issued to be addressed in the CPCN approval process.

85. The British Columbia Court of Appeal rejected that position finding that the CPCN decision was an important first decision in the process of constructing the power transmission line. It was at that stage that alternative means of providing power at the destination could be considered. The duty to consult applied to the Crown throughout the entire approval process, including at the CPCN stage. It wrote:

> 66 BC Hydro's duty to consult and, where necessary, accommodate First Nation's interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August, 2006. The duty continued while several alternative solutions were considered".

86. Regarding the content of consultation, the Court wrote:

> 68 Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action, based on information obtained through consultations. It may require accommodation.
>
> …
>
> 70 If consultation is to be meaningful, it must take place when the project is being defined and to continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTG's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

87. The decision of the British Columbia Court of Appeal was:

> 15 I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the affect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the Appellants had been met up to that decision point.

88. Three months later the Federal Court issued a decision in *Brokenhead Ojibway Nation v. Canada (Attorney General)*[24]. The Ojibway took court action to challenge the decisions of the Governor in Council to approve the issuance by the National Energy Board of certificates of public convenience and necessity for the construction of three pipeline projects in Southern Manitoba.

89. There had been evidence before the NEB of consultation by the private corporations proposing the projects with many of the aboriginal groups claiming rights or title in the areas to be affected by the pipeline construction. Aboriginal groups also participated in the NEB hearing process. The Board noted some measures that it had taken to facilitate that participation.[25]

90. Before the Federal Court the Treaty One First Nations acknowledged that the corporate proponents of the projects and the NEB had engaged in consultations and had accommodated some of their concerns, however they argued that the Crown had an independent duty to consult with them regarding the projects. It was the Governor in Council who made the final approval decisions for the projects.

91. The Court reviewed the law as stated in *Haida*, *Taku River* and *Mikisew*, and then went on to consider the effect of the consultation by the project proponents and the participation of the First Nations in the project approval process:

> 25 In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133 (B.C. S.C.) at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but

[24] 2009 CarswellNat 1339, 2009 FC 484, 44 C.E.L.R. (3d) 1, [2009] 3 C.N.L.R. 36
[25] Ibid, paragraph 5

> only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.
>
> 26 The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB (including, to some extent, the Treaty One First Nations) were well-received and largely resolved.
>
> 27 These regulatory processes appear not to be designed, however, to address the larger issue of unresolved land claims. As already noted in these reasons, the NEB and the corporate Respondents have acknowledged that obvious limitation.

92. The Court concluded:

> 45 The consultation duty owed by the Crown to the Treaty One First Nations has been met. This is not to say that the Treaty One First Nations do not have a credible land claim but only that the impact these Pipeline Projects have upon those claims is negligible. The Pipeline Projects have been built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in the future to be available for land claims settlement. The pipelines in question are also largely below ground and are reasonably unobtrusive. There is no evidence before me or, more importantly that was before the NEB or the GIC, to prove that the Pipeline Projects would be likely to interfere with traditional Aboriginal land use or would represent a meaningful interference with the future settlement of outstanding land claims in southern Manitoba. To the extent that any duty to consult was engaged, it was fulfilled by the notices that were provided to the Treaty One First Nations and to other Aboriginal communities in the context of the NEB proceedings and by the opportunities that were afforded there for consultation and accommodation.

93. *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[26] was decided by the Federal Court of Appeal in October, 2009. It concerned appeals, brought to the Federal Court under provisions of the *National Energy Board Act*, from the NEB decisions approving certificates of convenience and necessity granted to the private sector applicants for the three projects that were the subject of the *Brokenhead* decision above. The Appellants challenged the jurisdiction of the NEB to address the merits of the applications for the certificates without first determining whether there had been adequate consultation by the Crown.

[26] 2009 CarswellNat 3493, 2009 FCA 308

> 23 In the context of these appeals, the appellants assert that before the NEB could decide whether or not to grant the requested Project approvals, it was required to determine whether the Crown was subject to a *Haida* duty to consult the appellants in respect of the Projects. If such a duty was found to exist, the appellants assert that the NEB was then required to determine the scope of that duty and whether the Crown discharged it. Thus, the appellants assert that the NEB was required to undertake the full *Haida* analysis before it could make the Decisions.

94. The Federal Court of Appeal agreed that the NEB had the authority to consider constitutional questions of compliance with Section 35(1) of the *Constitution Act, 1982*, and therefore had the jurisdiction to consider the question of whether the Crown had discharged its obligations to consult and accommodate. However the Court resolved the jurisdictional issue as follows, and in doing so drew a distinction between this case and ones where the applicant was the Crown or a Crown agent.

> 32 In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.
>
> 33 I note as well that the applicant before the British Columbia Utilities Commission in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298 (B.C. C.A.), was accepted by the parties as being the Crown or its agent. Accordingly, I am of the view that this case provides no support for SFN/MFN's argument on this issue.

95. The Court also found that the NEB, even though it had adopted a process that required consultation with affected aboriginal groups by the project proponents and allowed for participation of aboriginal groups in the hearing process, was not subject to an independent duty to consult.

> 34 Finally, I would add that the NEB itself is not under a *Haida* duty and, indeed, the appellants made no argument that it was. The NEB is a quasi-judicial body (see *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), at page 184, and, in my view, when it functions as such, the NEB is not the Crown or its agent.

VI. Good Utility Practice Duty to Consult

96. The Intervenors also take the position that a duty to consult and accommodate arises from the application of good utility practice, independently of any constitutional obligation.

97. As set out in paragraph 11 above, the Board is to "apply tests which are consistent with generally accepted sound public utility policy" when assessing whether the proposed WMA complies with the power policy set out in section 3(b)(i) of the EPCA.

98. The interpretation of the expression "sound public utility policy" is also addressed above in paragraphs 40 and 41. As a technical expression used in public utility regulation, it is for the Board as a specialized tribunal to determine whether it is satisfied that sound public utility policy or good public utility practice, when applied to the circumstances of this application, supports a duty on the part of Nalcor and/or CF(L)Co to consult with and if necessary accommodate the interests of the Intervenors.

VII. Issues Related to the Duty to Consult

99. The issues arising from the Intervenors' positions regarding the duty of the Crown to consult aboriginal interests may be expressed as follows:

a. Must the Board assess whether the Crown has a constitutional duty to consult with the Intervenors concerning potentially adverse effects on aboriginal rights or title claimed by them?

    i. Does the Board have the jurisdiction to consider whether the Crown is under a duty to consult?

    ii. If the Board has jurisdiction, does it have an obligation to consider whether the Crown is under a duty to consult?

b. Does the Crown have a duty to consult with the Intervenors?

    i. Do the Intervenors have credible claims to aboriginal rights or title?

ii. Does the establishment of a WMA have the potential to adversely affect the aboriginal rights or title claimed by the Intervenors?

c. If the Crown has a duty to consult, then does it extend to Nalcor and/or CFLCo?

d. If Nalcor and/or CFLCo are bound by a duty to consult, then:

i. What consultation has taken place?

ii. Is the consultation that has taken place, if any, sufficient to discharge the duty?

1. What is the preliminary assessment of the strength of the Intervenors' claims to aboriginal rights or title?

2. How significant is the potential impact on such rights or title of the establishment of a WMA?

iii. To what extent should the Board take into account:

1. The relationship of the WMA to the hydroelectric development project as a whole?

2. The relationship of consultation in respect of the WMA to consultation in respect of the project as a whole?

e. Does a duty to consult an accommodate arise out of the application of principles of good utility practice?

f. If there is a duty to consult that has not been discharged sufficiently, then:

i. What powers, if any, does the Board have available to effect a remedy?

ii. How should the Board exercise any powers that are available to it?

100. Regarding issue (c) concerning whether the duty applies to Nalcor, section 3(5) of the *Energy Corporation Act*[27] provides that Nalcor is an agent of the Crown. Regarding CF(L)Co, it is described in contracts appended to the Nalcor application as

[27] SNL 2007 Chap E-11.01

a company incorporated under the laws of Canada. At page 7 of Exhibit 2 to the Nalcor application it is stated that CF(L)Co became a subsidiary of the Newfoundland and Labrador Hydro-electric Corporation "when the government of Newfoundland and Labrador purchased 65.8% of the issued share capital of CF(L)Co from Brinco in 1974. The remaining share capital is held by Hydro Quebec." Pursuant to section 3(4) of the *Hydro Corporation Act, 2007*[28], Newfoundland and Labrador Hydro-electric Corporation is an agent of the Crown.

101. Issue (f) concerning the powers of the Board is explored further below.

VIII. Disposition of the Nalcor Application

102. The powers expressly granted to the Board under the EPCA for disposition of the Nalcor application are:

a. to establish the WMA as set out in section 5.5(2), and

b. to require reporting commitments and impose monitoring requirements under section 5.6(2)

A. Can the Board Decide Not to Establish a WMA?

103. As discussed above, unlike the power given to the Board under section 5.4 when the Board is asked to approve a WMA agreed upon between the parties with rights to produce electric power from a body of water, section 5.5 does not expressly allow the Board to refuse to establish a WMA. This conclusion is based on interpreting the word "shall" in section 5.5(2) as mandatory rather than permissive.

104. There is little dispute that "shall" normally creates a mandatory requirement. Any uncertainty is put to rest by the *Interpretation Act*[29] which provides:

> 11.(2) The word "shall" shall be construed as imperative and the word "may" as permissive and empowering.

[28] SNL 2007 Chap H-17
[29] RSNL 1990 Chap I-19

105. The question more often addressed by courts is what are the consequences if the mandatory requirement is not complied with.

106. Sullivan addresses it this way:

> "Shall" is normally used in legislation to impose a duty on persons or to indicate the binding character of conditions or rules. "Shall" is always imperative in the sense that it always imposes binding duties or requirements. The interpretation question that arises in connection with "shall" is what are the consequences of breaching the binding duty or ignoring the binding requirement. Often the legislation itself stipulates what the consequences are, but where the legislation is silent, the courts or other interpreters must decide. If "shall" is judged to be mandatory, the result of the breach is total nullity. If "shall" is judged to be directory the result is an irregularity that can be cured.
>
> The leading authority on the distinction between mandatory and directory "shall" is a passage from the judgment of the Privy Council in *Montreal Street Railway Co. v. Normandin*:
>
> > The question whether provisions in a statute are directory or imperative [mandatory] has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at … When the provisions of a statute relate to a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.
>
> Generally, "shall" is presumed to be mandatory unless this interpretation would lead to unacceptable consequences or is otherwise inappropriate.[30]

107. If, as a result of such an analysis, the word "shall" in section 5.5(2) were found to be directory and not mandatory, the effect would not be to give the Board a discretion to treat it as permissive. The effect would be that a failure by the Board to comply with the mandatory requirement could be treated as an irregularity. The Board would not lose jurisdiction over the application, but would be subject to direction by a court to comply with the mandatory requirement to establish a WMA.

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[30] Ibid, page 86

B. Is the Board Bound to Establish the WMA Within 120 Days?

108. Like section 5.5(2) of the EPCA, section 7 of the Regulations uses the mandatory word "shall" to require that the WMA be established within 120 days of the application.

109. Apart from any other considerations, the same analysis should apply to section 7 as is described above for section 5.5(2). The Board is required to comply with the regulation. If it fails to do so it should not lose jurisdiction but would be subject to judicial direction to cure the irregularity as near as can possibly be done.

110. The intervenors have submitted that the Board is obliged to or has the authority to suspend the Nalcor application, meaning that a WMA would not be imposed within 120 days as required by section 7, and that it should do so.

C. Effect of Section 68 of the Environmental Protection Act

111. The CIE submit that section 68 of the *Environmental Protection Act*[31] (EPA) prohibits the Board from establishing the WMA until the project is released from environmental review.

112. Section 68 of the EPA is as follows:

> 68. (1) A licence, permit, approval or other document of authorization issued under another Act pertaining to an undertaking shall not be issued until the undertaking has been exempted or released under this Part.
>
> (2) This Part does not exempt a proponent of an undertaking from the requirements imposed upon an undertaking by
>
> (a) another Act or regulation of the province or of Canada; or
>
> (b) a municipal regulation, by-law or requirement.

113. This section has not been judicially considered, nor does there appear to have been any judicial consideration of any aspect of the environmental assessment process under the *Environmental Protection Act*.

114. The evidence appears to indicate that the Lower Churchill hydroelectric project is undergoing an environmental assessment process by a joint panel pursuant to

[31] SNL 2002 Chap E-14.2

agreement between the province and Canada, as authorized by section 72 and 73 of the EPA. The Project has not been exempted or released from review. Section 68 therefore appears to be applicable.

115. Section 68 prohibits the issue of a "licence, permit, approval or other document of authorization issued under another Act pertaining to an undertaking." "Undertaking" is a defined term, which appears to include the project. The WMA is "issued under another Act' and does appear to "pertain to an undertaking".

116. The WMA is not described in the EPCA as a "licence, permit or approval". However, section 5.4 of the EPCA makes it mandatory for a party that proposes to develop hydro-electric power on a body of water where another party holds similar rights to enter into a WMA. The Board should consider not just the description of the WMA in the EPCA, but also whether in substance it is "a licence, permit, approval or other document of authorization" when decided whether section 68 is applicable.

117. If the Board interprets section 68 of the EPA to apply to a WMA established under section 5.5 of the EPCA, then, assuming that the project will not be released from environmental review prior to the expiry of the 120 days mandated by section 7 of the Regulations, the mandatory requirements of section 68 of the EPA and section 7 of the Regulations will be in conflict.

118. In a case of apparent conflict between two statutory provisions a court will first attempt to interpret the provisions in a manner which avoids conflict. In *Human Rights Commission v. Workplace Health, Safety & Compensation Commission*[32] Judge Cameron of the Newfoundland and Labrador Court of Appeal said:

> 13 There is a presumption that both within a particular statute and within the whole of the body of legislation there is consistency. This has been expressed as a presumption that the legislature did not intend to make or empower the making of contradictory enactments. See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at 38, *per* La Forest J. As a result, where possible, potentially conflicting legislation is interpreted so that inconsistency or conflict is avoided.

[32] 2005 CarswellNfld 262, 2005 NLCA 61, 250 Nfld. & P.E.I.R. 124, 746 A.P.R. 124, 259 D.L.R. (4th) 654, 133 C.R.R. (2d) 333, 54 C.H.R.R. D/201

119. In *Diamond Estate v. Robbins*[33], Judge Mercer of the Court of Appeal said:

> 49 … In statutory interpretation there is a presumptive rule of coherence, i.e., that the legislature did not intend to enact inconsistent provisions in statutes dealing with the same subject matter. "As a result, where possible, potentially conflicting legislation is interpreted so that inconsistency or conflict is avoided". *Newfoundland (Human Rights Commission) v. Newfoundland (Workplace, Health, Safety & Compensation Commission)*, 2005 NLCA 61 (N.L. C.A.) at para. 13; and *Pointe-Claire (Ville) c. S.E.P.B., Local 57*, [1997] 1 S.C.R. 1015 (S.C.C.) per Lamer C.J.C.:
>
> > ... There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones....
>
> 50 It follows that where provisions in separate statutes can apply without conflict both will apply - *Sullivan & Driedger* at 263-4.

120. In attempting to reconcile the two statutory provisions reference should be made to any other sections of each statute that are directed to resolving statutory conflict. EPA section 4 is as follows:

> 4. (1) Where there is a conflict between this Act and another Act, this Act prevails.
>
> (2) A licence, permit, approval or other authorization issued under another enactment does not constitute an approval under this Act, unless otherwise stated in the regulations.
>
> (3) A provision of another Act or of a regulation or by-law of a municipality is not in conflict with this Act by reason only that it imposes a restriction or requires a condition for the protection of the environment in excess of that required by this Act.

121. The EPCA contains the following provision:

> 34. (1) An Act or contract, whether enacted before or after the commencement of this Act relating to a producer or retailer shall be read and construed subject in all respects to this Act, which in a case of conflict shall, notwithstanding a provision to the contrary contained in another Act or contract, prevail over a general or special Act enacted or a contract entered into prior to the commencement of this Act.
>
> (2) A contract referred to in subsection (1) includes a contract authorized by or entered into under an Act.

[33] 2006 CarswellNfld 3, 2006 NLCA 1, 22 C.P.C. (6th) 1, 253 Nfld. & P.E.I.R. 16, 759 A.P.R. 16

122. "Producer" and "retailer" are defined in the EPCA in a manner that appears to include Nalcor and CF(L)Co.

123. Unfortunately, EPA section 4 and EPCA section 34 do not present an obviously coherent scheme for resolving conflicts between the two statutes and must themselves be reconciled before their effect on section 68 and section 7 can be understood.

124. Looking first at EPA section 4, subsection (1) appears to be applicable. It says that in the case of a conflict the EPA trumps any other Act. Subsections (2) and (3) do not appear to be applicable and need not be considered.

125. Section 34 of the EPCA might be broken out grammatically into two phrases:

a. An Act or contract, whether enacted before or after the commencement of this Act relating to a producer or retailer shall be read and construed subject in all respects to this Act

b. In a case of conflict [this Act] shall, notwithstanding a provision to the contrary contained in another Act or contract, prevail over a general or special Act enacted or a contract entered into prior to the commencement of this Act.

126. Looking at the first phrase alone, the first thing to note is that the EPCA trumps any other Act "relating to a producer or retailer". Is the EPA such an Act? Nalcor and CFLCo, which meet the EPCA definition of producer and/or retailer, should be subject to the EPA, but perhaps only because of their intention to develop a project that may affect the environment, rather than because of their status as producers or retailers. It is thus open to argue that the EPA is not directed towards regulating the activities of power producers *per se* and is therefore not an Act "relating to a producer or retailer". If that interpretation applies, then the first phrase does not give the EPCA priority over the EPA. That would be consistent with section 4(1) of the EPA. The effect would be that the EPA requirement in section 68 would overrule section 7 of

the Regulations and the WMA could not be established until the project is released from environmental review.

127. The second phrase has been broken out separately from the first, but it can be argued that is not correct. The second phrase could be interpreted as only a refinement of the statement made in the first. In that case it would also apply only where the other Act is an Act "relating to a producer or retailer". If interpreted that way the result remains the same and the EPA takes priority.

128. On the other hand, the reference to "another Act" instead of "the other Act" in the second phrase suggests that it is intended to be applied independently of the first phrase. "Another Act" can be any other Act, not just an Act "relating to a producer or retailer". If that interpretation is adopted, then the language of EPCA section 34(1) and EPA section 4(1) conflict with each other and do not assist in resolving a conflict between section 68 of the EPA and section 7 of the Regulations.

129. If statutory provisions are irreconcilable, Judge Cameron in *Human Rights Commission* wrote:

> 14 Where conflict exists, there are recognized approaches to its resolution. Two of those are reflected in the maxims *leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary laws) and *generalia specialibus non derogant* (a general provision does not derogate from a special one). The first of these is subject to the second. *Generalia specialibus non derogant* is sometimes described as the provisions of the special statute being construed as providing an exception to the general, thereby bringing the two into harmony. *Leges posteriores priores contrarias abrogant*, on the other hand, is often described as implied repeal of the earlier by the later[FN4] . Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pages 262-280, (Sullivan and Driedger).

130. Judge Mercer in *Diamond Estate v. Robbins* similarly wrote:

> 51 Where there is conflict, such that the provisions in separate statutes cannot both apply, other interpretative rules assist in the resolution thereof. One of these is reflected in the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one), also known as the rule of implied exception:

> ... *Generalia specialibus non derogant* is sometimes described as the provisions of the special statute being construed as providing an exception to the general, thereby bringing the two into harmony. ...
>
> Human Rights Commission at para. 14

52 As explained in Sullivan & Driedger:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.
>
> p. 273

131. The first principle described in the extract from *Human Rights Commission* above says that the newer legislative provision overrules the older. The Regulations, filed January 16, 2009 are more recent than section 68 of the EPA which was enacted in 2002. This would support the 120 day requirement.

132. The second principle is that a specific enactment overrules a general one. It also suggests that the 120 day limit would stand. Section 7 of the Regulations is directed specifically at the establishment of a water management agreement. EPA section 68 refers to a more generally described set of permits, approvals, etc. and is not as specifically directed to the facts of the application before the Board.

133. Sullivan, in *Statutory Interpretation,* describes an additional principle which is important here and may resolve the uncertainty created by the foregoing analysis. It is that statutes are generally considered paramount over delegated legislation. She writes:

> … the paramountcy of statutes over delegated legislation operates as a presumption. In the event of a conflict, the statute is presume to prevail, but this presumption is rebuttable by clear evidence of a contrary intent.[34]

134. The relation between this rule and the other paramountcy rules is complex and depends on the circumstances. For example, although statutes generally are paramount over regulations, a federal regulation would prevail over a provincial

[34] Ibid, page 227

statute and a regulation made under a human rights code might prevail over an ordinary Act.

135. The Regulations were made by the Lieutenant Governor in Council. There appears to be nothing in the Regulations themselves or in EPCA section 32, which authorizes the making of the Regulations, that displaces the presumption that a conflicting provision in a statute would be paramount. Applying this rule would give priority to EPA section 68 with the effect of overriding the 120 day time limit in favour of the requirement that the project be released from environmental assessment before a WMA can be established. This conclusion, of course, depends on first having found that the WMA fits within the definition of the approvals that are suspended by section 68.

D. Can the Board Suspend the Nalcor Application under section 27(1)(b) of the EPCA?

136. Section 27(1)(b) of the EPCA is:

> 27.(1) The public utilities board may
>
> (b) set aside for future examination an issue that in its opinion requires a more prolonged examination;

137. Leaving aside for the moment the effect of section 7 of the *Regulations*, section 27(1)(b) appears to allow the Board to defer the question of whether there is a Crown obligation to consult and whether consultation has been adequate for more prolonged examination. If it is not possible to establish the water management agreement until that issue has been examined, then apart from the effect of section 7 of the *Regulations*, there would not seem to be any legal impediment to deferring the establishment of the agreement also.

138. But if the power granted by section 27(1)(b) of the Act is exercised in that way it will conflict with the limitation on the time for establishment of the water management agreement in section 7 of the Regulations. Unlike the possible conflict between section 68 of the EPA and section 7 of the Regulations, in this case the conflict is between a statute and a regulation made under the authority of that same statute. How should that conflict be resolved?

139. The general rule is that if there is a conflict between a provision of a statute and a regulation made under the same statute, the regulation must be read as subject to the statute. If the regulation cannot be construed to bring it into harmony with the authorizing statute, it cannot be regarded as having been made within the authority conferred by the statute. The statute cannot be amended under the guise of regulations.

140. This principle was adopted by the Supreme Court of Canada in *R. v. Belanger*[35] in 1916 where the headnote reads:

> If there is a conflict between one of the regulations passed under a section of an Act and the provisions of the Act itself, the regulation is treated as subordinate to the Act and the Act supplies the governing consideration. The regulation should be read as subject to an implied proviso that nothing in it shall sanction a departure from the Act itself.

141. Holland and McGowan, in *Delegated Legislation in Canada*[36], rely on that case as authority for the statement that:

> … the question is resolved as if there were two conflicting sections in the Act itself. At first, an attempt is made to read the two provisions so as not to conflict. Where tat fails, and one provision must prevail, the regulation falls as being subordinate.[37]

142. If that principle is applied, the Board may begin by asking whether the power to defer the consultation issue can be applied in a way that is consistent with establishing the water management agreement within 120 days. If there is a way to reconcile the two provisions, then that interpretation should be adopted. If the positions cannot be reconciled, then the EPCA would take priority over the Regulations and the power to defer the issue would take priority over the obligation to establish the agreement within 120 days.

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[35] 1916 CarswellNat 50; 54 S.C.R. 265, 20 C.R.C. 343, 34 D.L.R. 221
[36] Denys Holland and John McGowan, Delegated Legislation in Canada, 1989
[37] Ibid, page 182

E. Should the Board Suspend the Nalcor Application

143. If section 27(1)(b) of the EPCA gives the Board the authority to suspend the Nalcor application as requested by the Intervenors the Board must decide whether it should exercise its discretion to do so.

144. In exercising that discretion the Board should take into account its findings concerning whether or not Nalcor and CF(L)Co, on behalf of the Crown, have duties to consult with the Intervenors, and if so whether the consultation has been satisfactory.

145. The Board also has a general obligation to conduct its proceedings in a manner that is fair to the participants. The Board may therefore consider aspects of procedural fairness for all participants when considering the Intervenors' requests for suspension of the Nalcor application.

F. Can the Board Order Consultation and Accommodation?

146. The IUM have asked that the Board order Nalcor and CF(L)Co to engage in consultation and if necessary to accommodate its interests. This request is presented alternatively as a disposition to be embodied in the order of the Board, or as a term of the WMA.

147. While the EPCA does not specifically grant powers for the disposition of an application under section 5.5 other than as set out above, section 30 provides that "in carrying out its duties under this Act, the public utilities board has and may exercise all the powers given to it under the Public Utilities Act."

148. Section 118(2) of the *Public Utilities Act* is as follows:

> 118. (2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

149. This would appear to give the Board the authority to include directions in its order under section 5.5(2) of the EPCA that are incidental to the establishment of a WMA.

150. Regarding the terms of a WMA, section 5.5(2) of the EPCA gives the Board the authority to establish terms of a WMA "for the purpose of achieving the policy objective set out in subparagraph 3(b)(i)" which may limit its authority to imposing terms related to that policy objective.

151. Section 5.6(2) allows the Board to require reporting commitments and impose monitoring requirements without specifying whether that is to be done by order or by including terms to that effect in the WMA.

Respectfully submitted this 19th day of February, 2010.

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Daniel W. Simmons
Ottenheimer Baker
Counsel to the Board