IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prophet River First Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations),* 2016 BCSC 2007

Date: 20161031
Docket: 152987
Registry: Victoria

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Prophet River First Nation and West Moberly First Nations

Petitioners

And

Minister of Forests, Lands and Natural Resource Operations, Regional Manager, Northeast Region, Regional Water Manager, Northeast Region & Chief Inspector of Mines

Respondents

And

British Columbia Hydro and Power Authority

Respondent

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Petitioners:	J. Gailus M. Nefstead
Counsel for the first Respondents:	E. Christie A. Peacock
Counsel for the Respondent British Columbia Hydro:	M. Andrews, Q.C. C. Willms B. Gilbride
Place and Date of Hearing:	Victoria, B.C. November 17-19, 23 2016 February 2, 2016
Place and Date of Judgment:	Victoria, B.C. October 31, 2016

Table of Contents

I. INTRODUCTION

[1] The petitioners, Prophet River First Nation ("PRFN") and West Moberly First Nations ("WMFN"), are First Nations whose traditional territories are located in or near the Peace River Valley. They are signatories to Treaty No. 8 and are members of the Treaty 8 Tribal Association ("T8TA"). They seek judicial review of the 29 permits, three exemptions, and four notifications listed in Appendix A to the petition ("Permits"). The Permits were issued by representatives of the Province of British Columbia ("Province") to the respondent, British Columbia Hydro and Power Authority ("BC Hydro"), to allow it to commence construction of the Site C Dam on the Peace River ("Project"). The Project is located within the lands covered by Treaty No. 8.

[2] The Project will have a very significant impact on the petitioners and in particular on WMFN. The Project includes a hydroelectric dam located seven kilometres southwest of Fort St. John, a reservoir with a projected total surface area of 9,330 hectares, a generating station, transmission lines, and other related construction components. BC Hydro estimates the Project will cost in excess of eight billion dollars and will be operational by 2024.

[3] Before constructing the Project, BC Hydro was required to obtain an environmental assessment certificate ("EAC") from the Province pursuant to s. 17 of the *Environmental Assessment Act,* S.B.C. 2002, c. 43, as well as a decision statement granting approval of the federal cabinet pursuant to s. 52 of the *Canadian Environmental Assessment Act, 2012,* S.C. 2012, c. 19. Federal and provincial environmental assessments were conducted jointly in accordance with a process set out in an agreement between the two levels of government. An important part of that process was the creation of a joint review panel ("Joint Review Panel") to conduct hearings and prepare a report on the Project ("Panel Report"). Both of these approvals were granted on October 14, 2014.

[4] This is the second petition brought by the petitioners in this Court relating to the Project. In 2015 they sought an order quashing the EAC. In reasons released on

September 18, 2015, indexed as 2015 BCSC 1682 [*Prophet River No. 1*], I dismissed that petition.

[5] In those reasons, I described the petitioners and set out some of the history of the Project. I also described consultation with the petitioners with respect to the EAC, both directly with the Province and through BC Hydro. I will not repeat what I said in that judgment; however, as that petition was between substantially the same parties as those before me, I consider that the parties are bound by the findings contained in those reasons until they are reversed or varied on appeal (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63). These reasons should therefore be read in light of the findings in *Prophet River No. 1*.

[6] In *Prophet River No. 1*, I decided that the Province had met its obligation to consult with the petitioners with respect to the issuance of the EAC; however, to construct the Project, BC Hydro also requires numerous permits and authorizations for its various components. The Permits are the first of many required for the Project. They allow BC Hydro to proceed with the initial stages of construction and site preparation.

II. POSITIONS OF THE PARTIES

[7] It is common ground that the Province had a duty to consult with the petitioners with respect to the Permits. In June 2015, the Province prepared a First Nations Consultation Report ("Consultation Report") for submission to the statutory decision makers who issued the Permits. In that report the Province acknowledged that it was required to engage in substantial consultation with the petitioners and characterized the impact of the Permits as ranging from low to high. No party has challenged that characterization or the level of consultation described as appropriate in the Consultation Report.

A. Position of the Petitioners

[8] The petitioners' position is that both T8TA and the Province recognized that previously existing agreements applicable to consultation with T8TA First Nations

were not well suited to the complexities of consulting on the Project permits and approvals. They say that the Province agreed that a mutually agreeable custom agreement was required to establish how that consultation should be carried out, and that until such a custom agreement was reached, neither party would attempt to consult with respect to the Project permits.

[9] The petitioners submit that despite the Province's agreement to the contrary, it attempted to begin consultation on the Permits in August 2014. They say that in so doing, the Province breached its agreement, acted in bad faith, and did not conduct itself in accordance with the honour of the Crown and its constitutional obligations.

[10] The petitioners say that it was not until April 14, 2015 that an agreement was reached as to how consultation on the Permits should proceed. On that date, the Province and the petitioners, together with Saulteau First Nations, signed an agreement providing for consultation on most of the Permits ("Negotiation Agreement"), pending the completion of a custom consultation agreement for the remaining permits and authorizations required for the Project ("Consultation Agreement"). Their position is that it was only on that date that any meaningful consultation with respect to the Permits could commence. The petitioners submit that the Province concluded consultation on the Permits at the end of May 2015, before they had been given a meaningful opportunity to be consulted on them in accordance with the Negotiation Agreement. The petitioners say that consultation concluded before they had been given adequate time to conduct their own technical review for Permit consultation.

[11] The petitioners submit that although the Negotiation Agreement contemplated consultation beginning on most of the Permits, the Province breached its terms by seeking to consult on additional permits, although it had agreed that these would be consulted on in accordance with the Consultation Agreement.

[12] The petitioners also submit that the Province withheld the capacity funding provided for in the Negotiation Agreement and thereby deprived them of the capacity to engage in meaningful consultation.

B. Position of the Respondents

[13] The Province's position is that it did not agree that consultation on the Permits would be conducted solely under or postponed until a custom agreement had been concluded. The Province accepts that the parties agreed to try to conclude a custom agreement for all permitting on the Project. It submits, however, that the parties also agreed that until such a custom agreement was concluded, consultation would proceed generally in accordance with existing consultation agreements to which the Province and the petitioners were signatories and with the common law.

[14] The Province says it made good faith efforts to consult on the Permits as early as 2013, but that at the request of the petitioners it agreed to defer consultation on the Permits until after the Joint Review Panel had submitted the Panel Report.

[15] The respondents submit that although the Panel Report was released in May 2014, the petitioners frustrated all efforts to engage in meaningful consultation on the Permits until May 2015, and thereafter did not raise any specific concerns about the Permits for the Province to address in consultation.

[16] The respondents dispute the petitioners' construction of the Negotiation Agreement. They say that nothing in the Negotiation Agreement supports the proposition that the Province had agreed to postpone consultation on the Permits until a custom agreement was in place, nor does it provide that Project construction would be delayed until the petitioners had conducted their own technical review. They say that the Negotiation Agreement recognized the importance of the Project construction schedule and that the parties agreed to take that schedule into account in conducting consultation after its execution. The Province submits that it complied with the terms of the Negotiation Agreement and provided the capacity funding within a reasonable time.

[17] The respondents submit that the petitioners were given a meaningful opportunity to consult on the Permits, but refused to do so. They submit that the petitioners cannot seek to set aside the Permits when they have failed to engage in consultation on them despite being given a meaningful opportunity to do so.

[18] The respondents also submit that the process leading up to the issuance of the EAC must be taken into account in determining whether adequate consultation occurred. In particular, they submit that the conditions attached to the EAC were the result of a meaningful consultation process, that those conditions address the petitioners' concerns about the Project raised during the environmental assessment process, and that the petitioners have not raised any additional concerns to those already expressed prior to the issuance of the EAC.

III. DISPOSITION

[19] For the reasons that follow, I have decided that the petition must be dismissed.

IV. BACKGROUND

[20] The early history of the Project and the environmental assessment are described in *Prophet River No. 1*.

[21] In 2013, the Province designated the Ministry of Forests, Lands and Natural Resource Operations ("FLNRO") as the body with primary responsibility for consultations with First Nations with respect to permitting of the Project. T8TA represented the petitioners and other Treaty 8 First Nations in consultation on the Project. The Permits are the first group of what it is anticipated will be approximately 500 required authorizations to construct and operate the Project.

[22] After an exchange of correspondence and meetings with the Province, T8TA requested that consultation on permit applications be deferred so that its members' resources would not be divided between permit review and participation in the Joint Review Panel hearings. T8TA also requested the deferral so that permit consultation could be informed by the recommendations contained in the Panel Report.

[23] On December 11, 2013, the Minister for FLNRO wrote to T8TA agreeing to the petitioners' request to defer substantive consultation on the first batch of permit applications until after conclusion of the Joint Review Panel hearings. The Minister also agreed that the parties should work together to "develop a mutually agreeable

consultation process for the Site C Project." However, he also stated that "[a]ny customized consultation process for Site C needs to provide for consultation to begin far enough in advance of a decision to ensure that if the project is approved, decisions on construction permits can follow in a reasonable timeframe to meet the operational requirements of the project."

[24] The petitioners placed considerable weight on this letter in subsequent discussions with the Province, asserting that it evidenced an agreement to defer consultation until a custom agreement was in place. I therefore quote from it at length:

> The province recognizes the concerns you raised with respect to the complexity and workload that consultation on this project will create. The province believes there are opportunities to make the process more efficient to reduce overall workload, and also to manage the schedule of consultation to address some of the concerns you raised. At the meeting on November 20, 2013, Treaty 8 identified an interest in developing an alternative approach to consultation. The specific concerns you raised included the sheer volume of permits (potentially more than 2000) and the timing of consultation including potential overlap with public hearings.
>
> The province is interested in exploring modifications to the consultation process to address these concerns. The collaborative management agreements provide a framework for consultation, but also allow development of a custom process for special situations like this. If Treaty 8 is interested in developing a custom process, it would need to reflect the interests of Treaty 8, be based on an understanding of what is being proposed by BC Hydro, and address provincial requirements for a fair and timely decision making process.
>
> …
>
> I want to emphasize that it is BC Hydro's decision when to apply for authorizations. The permitting process may be adjusted over time as they gain more information and try to address operational requirements. Once BC Hydro submits authorizations, the province has a procedural duty to process the applications in a timely manner. Until a decision is made under the *Environmental Assessment Act*, no permitting decisions can be made; however, substantial work can be undertaken, including consultation. Any customized consultation process for Site C needs to provide for consultation to begin far enough in advance of a decision to ensure that if the project is approved, decisions on construction permits can follow in a reasonable timeframe to meet the operational requirements of the project.
>
> In conclusion, I would like to confirm that the province is committed to working with you to develop a mutually agreeable consultation process for the Site C Project. I would also like to confirm that consultations respecting the first batch of applications will not be initiated until the Joint Review Panel

> hearings conclude. Efforts have also been made to reduce the total number of permits, and the anticipated timing of those applications has been spread out over several years to moderate the workload involved. The province is willing to explore further adjustments to the consultation process before the first group of permits is received early next year. We believe there is significant flexibility in the process to address Treaty 8's concerns while still meeting provincial requirements for timely decisions and an efficient process.

The Minister concluded the letter by asking T8TA to contact Mark Van Tassel of FLNRO to advance discussions for a customized process.

[25] The collaborative management agreements ("CMAs") referred to in the Minister's letter were entered into pursuant to an Amended Economic Benefits Agreement ("EBA") between the petitioners, Doig River First Nation, and the Province, dated December 17, 2009.

[26] Section 4.2 of the EBA sets out a consultation protocol to be followed in the absence of a specific consultation process contained in a CMA:

> In the absence of a consultation and accommodation process provided for in a Completed Agreement, consultation and accommodation will be conducted in accordance with the following process:
>
> (a) British Columbia will provide to a potentially affected Treaty 8 First Nation advance written notification of a proposed provincial Crown authorized activity that may adversely affect any of its rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982,* together with all relevant information about the proposed activity;
>
> (b) British Columbia will provide a reasonable period of time for the Treaty 8 First Nation to prepare its views on the proposed provincial Crown authorized activity;
>
> (c) British Columbia will provide a reasonable opportunity for a potentially affected Treaty 8 First Nation to present its views as to potential adverse impacts on the exercise of any of its rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982,* together with any suggestions as to how any such impact may be avoided, mitigated, minimized or otherwise accommodated (other than by compensation), and British Columbia will provide a reasonable opportunity to discuss the views and attempt to resolve any concerns;
>
> (d) British Columbia will undertake a full and fair consideration of any views presented by a potentially affected Treaty 8 First Nation;
>
> (e) In the absence of a presentation of views by a Treaty 8 First Nation within a reasonable period of time, British Columbia will undertake a

> full and fair consideration of all relevant information available to the provincial Crown authority respecting how to avoid, mitigate, minimize or otherwise accommodate (other than by compensation) any potential adverse impacts on the exercise of any of its rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982,* the provincial Crown authority having taken reasonable steps to inform, itself of any such adverse impacts on such rights; and
>
> (f) British Columbia will provide, in writing where appropriate, to a potentially affected Treaty 8 First Nation notification of the decision taken and how the views presented by the potentially affected Treaty 8 First Nation were taken into account.

[27] The CMAs relevant to this proceeding are as follows:

1. Crown Land Management Agreement, dated May 2010;
2. Forests and Range Resource Management Agreement, dated December 9, 2009;
3. Wildlife Collaborative Management Agreement, dated December 8, 2009; and
4. Heritage Conservation Memorandum of Understanding, dated May 20, 2010.

[28] On March 25, 2014, Chief Liz Logan wrote to FLNRO on behalf of T8TA and noted that in the absence of a customized consultation process the CMAs would continue to govern consultation obligations on the proposed Site C permits. Some of the Permits were subject to the consultation provisions of the CMAs and some were governed by the residual provisions of the EBA. Chief Logan went on to say that T8TA was interested in meeting with the Province to explore opportunities for a mutually agreeable consultation process.

[29] Minister Thomson responded to Chief Logan by letter on May 23, 2014 (erroneously dated May 23, 2013), confirming that the Province was willing to work with T8TA to develop a mutually agreeable consultation process for Project permit applications. The Minister again asked T8TA to coordinate discussions with FLNRO. He also repeated the Province's view that the EBA and CMAs were sufficiently

flexible to design an efficient and timely consultation process if no custom agreement could be reached.

[30] In 2014, BC Hydro prepared and submitted permit applications to the Province. These applications were in the order in which it was contemplated those authorizations would be required for construction activities. BC Hydro submitted the first bundle of applications ("Bundle 1") to the Province in April 2014. These were for authorizations required in the initiation of construction activities, then scheduled to begin in January 2015. Bundle 1 contained most of the Permits.

[31] There is some inconsistency in the terminology used in the correspondence to describe the grouping of permits for the Project. At times the groupings are described as Bundles and at times as Batches. In these reasons, I will use both terms and in particular will attempt to use the terminology contained in the specific correspondence to which I am referring; however, the important fact is that it was always contemplated that BC Hydro would submit permit applications in sequential groups, based on the phases of the Project. As I indicated at the outset of these reasons, when I use the word Permits, I am referring to the permits and authorizations challenged in the petition, most of which were included in Bundle 1.

[32] On March 31, 2014, FLNRO invited all Treaty 8 First Nations, including the petitioners, to attend an April 14, 2014 open house ("First Open House") for further information on the Project and the associated permits, authorizations, and environmental management and mitigation plans. The petitioners did not attend. After the First Open House, FLNRO provided PRFN and T8TA representatives with a copy of relevant materials and offered to meet to discuss permitting consultation, but the petitioners declined the invitation.

[33] The Panel Report was released to the public on May 8, 2014.

[34] I am satisfied that in the period after release of the Panel Report, T8TA focussed its efforts on attempting to persuade the ministers who were considering whether to issue the EAC not to approve the Project.

[35] On August 5, 2014, FLNRO renewed efforts to communicate directly with the Chiefs of the Treaty 8 First Nations, including the petitioners, who were parties to the EBA. One of the purposes of that attempted communication was to discuss a meeting between the Chiefs and Minister Thomson. FLNRO's efforts yielded no response from the petitioners.

[36] In August 2014, James Wellstead, Senior First Nations Relations Advisor for FLNRO, formatted BC Hydro's application package for the permits it then thought were necessary to proceed with site preparation work for the Project. Mr. Wellstead forwarded that package to the petitioners under cover of a letter dated August 15, 2014. The letter refers to these permits as the "Batch 1" permits. Mr. Wellstead acknowledged that as of that date, no environmental assessment certificate had been issued and that consultation with respect to the issuance of such a certificate was ongoing.

[37] The letter confirmed that BC Hydro was prepared to provide additional funding to address First Nations' capacity requirements. It also stated that the Province intended the consultation on the Batch 1 permits to be informed by the consultation that had already occurred to that date in relation to the environmental assessment process.

[38] The application package included a table setting out the permits and a Construction Environmental Management Plan of approximately 350 pages. On the same day, FLNRO provided the petitioners with access to a File Transfer Protocol site, giving them electronic access to information with respect to the permits. The letter also stated that the provision of the permit applications at that point was meant to offer the petitioners additional time to review the applications and prepare submissions on their impact on the petitioners' Treaty rights.

[39] I find that from March to August 2014, FLNRO representatives made attempts to discuss the development of a custom consultation process with the petitioners, but were unsuccessful in persuading the petitioners to begin such discussions.

[40] On September 12, 2014, T8TA Chiefs Willson (WMFN), Tsakoza (PRFN), and Davis (Doig River) wrote to Ministers Bennett and Thomson requesting a meeting to discuss custom consultation on the permitting process. The Chiefs took the position that consultation on Project permits was premature prior to the Project receiving environmental approval from the federal and provincial governments. The letter also stated that the First Nations had neither the human nor financial resources necessary to engage in meaningful consultation on the Project on the timeline proposed by BC Hydro. At that time, the timeline contemplated commencement of site preparation work in January 2015. Finally, the letter stated that a custom consultation process was required for the Project and that the Province had agreed to such a process in Minister Thomson's December 2013 letter.

[41] At or about the same time, the petitioners returned the referral package materials containing the Batch 1 permit applications. FLNRO received the returned referral packages on September 17, 2014.

[42] The Province did not accept the petitioners' position as set out in the September 12, 2014 letter and continued with its attempts to engage T8TA in consultation on the Batch 1 permits. The exchange of correspondence between the parties from this period forward in the record is principally found in the affidavits of Jeffrey Richert, Natural Resource Management Advisor for T8TA and Gary Reay, Executive Director, Strategic Projects, Regional Operations North Area of FLNRO. I have considered the whole of that correspondence, but will not refer to all of it in these reasons.

[43] On October 2, 2014, T8TA wrote to Mr. Van Tassel of FLNRO raising the issue of capacity funding for consultation and repeating its position that consultation on the permits was premature without federal and provincial approval of the Project. The concluding paragraph of that letter stated:

> Your ministry has recognized that these permits require substantial consultation. It is unfortunate that we have been unable to meet to jointly come up with a consultation plan for the review of these permits as is required under the CMA. Given the volume of referrals and the summer vacation we regret that we were unable to meet. However, the expiration of

> the 30 day period under the CMA does not mean that BC can simply move to a decision. Our position remains that consultation on these permits is premature until such time as the federal and provincial decisions have been made. The myriad of issues raised by the First Nations and the Joint Review Panel Report remain unaddressed. Consultation at this stage would simply be a process of our Nations "blowing off steam" and your Ministry proceeding to issue the permits regardless of our concerns.

[44] On October 7, 2014, Minister Bennett responded to the September 12, 2014 T8TA letter, reiterating the Province's intention to proceed with consultation on the Batch 1 permits to facilitate a construction start early in 2015. This meant that consultation had to be completed by the end of December 2014. The Minister also confirmed that no permits would be issued until the Project received environmental approval and agreed to a Chiefs to Ministers meeting to discuss the Project. In addition, he pointed out that T8TA had not engaged with FLNRO regional staff to take them up on their offer to develop a custom consultation process.

[45] On October 9, 2014, Minister Bennett met in Chetwynd with the Chief and Council of WMFN, and land managers from PRFN and Saulteau First Nations.

[46] On October 14, 2014, the responsible provincial ministers issued the EAC and the federal cabinet issued a Decision Statement approving the Project.

[47] On October 21, 2014, Mr. Wellstead emailed T8TA inviting its members to another open house scheduled for November 4, 2014 ("Second Open House") to provide information with respect to construction of the Project. Mr. Wellstead characterized the Second Open House as a means of facilitating ongoing consultation on the Site C permitting package forwarded in August of that year.

[48] The next day, on October 22, 2014, Chief Willson of WMFN notified FLNRO that consultation remained premature as the Province had not yet made its final investment decision on the Project. Two days later, Chief Tsakoza of PRFN wrote to Minister Polak setting out PRFN's opposition to the Project:

> We wholeheartedly disagree that the Site C Project and the associated significant adverse environmental effects are, or can be, justified. The loss of the Peace River Valley would be an infringement on the exercise of our Treaty rights and the continuation of our mode and way of life. The Province

> has relentlessly taken up land in Treaty 8 Territory and appears to be of the view that this practice can continue without limit. We are not prepared to let the Province continue in this direction without taking all legally available steps to preserve this important place for our community and for generations to come.
>
> We remain committed to our opposition to the Site C Project. We are in the process of obtaining legal advice and assessing all legal options to continue our opposition to Site C, to preserve the Peace River Valley for our community and generations to come. We urge the Province not to proceed with the Site C Project and we remain committed to working collaboratively with you on the exploration of alternative sources of energy, such as wind, solar and geothermal.

[49] On October 29, 2014, the petitioners and Doig River First Nation wrote to Mr. Wellstead informing him that they would not be attending the Second Open House in Fort St. John. In that letter the petitioners took the position that the Province had committed itself to a custom consultation process for the Project and made reference to the numerous mitigation plans that were made conditions of the EAC. The letter also asserted, in my view erroneously, that the Province had not taken any steps to facilitate the negotiation of a custom consultation process for the Project. In addition it made reference to a number of conditions in the federal Decision Statement requiring further consultation with First Nations.

[50] With respect to consultation on the Permits, the petitioners took the position that any custom consultation agreement or process should be discussed in a Chiefs to Ministers meeting. The Province, however, had consistently preferred to have T8TA and senior FLNRO staff develop such an agreement or process. FLNRO staff did make efforts to engage the petitioners in development discussions, but the petitioners did not respond to those efforts. Instead, the petitioners continued to press for Chiefs to Ministers meetings.

[51] I find that as of the end of October 2014, the petitioners continued to make it plain that they were not yet prepared to consult on the permit applications that had been provided to them in August. I also find that T8TA had not taken up the Province's offer to have FLNRO staff work with it on a custom consultation framework. In addition, the petitioners remained opposed to the Project and had

confirmed with the Province that no accommodation measures were acceptable to them, short of abandoning the Project.

[52] Throughout November 2014, FLNRO staff continued to press for consultation on various aspects of the Permits, but the petitioners resisted any such consultation pending a Chiefs to Ministers meeting.

[53] On December 4, 2014, there was a Chiefs to Ministers meeting at which it was agreed that the parties would attempt to negotiate a custom consultation agreement to deal with permit applications for the Project. On December 8, 2014 Gary Reay of FLNRO emailed the Chiefs who had attended the meeting. He informed them of the Province's negotiation team and requested a meeting in the week of December 15–19, 2014 to proceed with those negotiations. He also summarized the Province's understanding of what had been agreed:

> Thank you again for meeting on December 4th to discuss your concerns with the proposed Site C permitting with Ministers Bennett, Thomson and Rustad. I am pleased that we are moving forward on the negotiation of a custom consultation agreement to deal with upcoming and future applications related to the Site C project, should government choose to proceed with the project. We are still waiting for further direction from the Ministers with respect to the current applications that are in the consultation process.
>
> In follow up, the Ministry of Aboriginal Relations and Reconciliation (MARR) has identified Roger Graham, Stuart Gale and Alexandra Banford and the Ministry of Forests, Lands and Natural Resource Operations (FLNRO) has identified Mark Van Tassel and Gary Reay as the lead provincial representatives for negotiation of a custom consultation agreement. Our team is prepared to meet any day during the week of December 15 to 19, 2014 to begin these discussions; we are also available the first week of January, and as discussed with Ministers believe that this requires an early and concerted effort. Please identify your team and a date that works for your team to meet with us.
>
> At the meeting we also discussed capacity funding for the scoping phase of the consultation agreement. I am confirming again that BC Hydro is prepared to fund reasonable capacity for the scoping phase. Please provide myself with the budget that you are requesting for the scoping phase. As noted by the Ministers, we feel a consultation agreement should be able to be completed in January. Discussion of further capacity funding will be dependent on the structure of the consultation agreement.

[54] On December 16, 2014, the provincial cabinet made the final investment decision to proceed with the Project, but postponed the construction start date to the summer of 2015. This extended the timeline for consultation on the Permits, while still accommodating the construction schedule.

[55] On December 19, 2014, Jason Lee, on behalf of T8TA, informed Mr. Reay that the T8TA offices were closed for the Christmas break and would not reopen until on or about January 5, 2015. On January 8, 2015, Mr. Lee emailed Mr. Reay to set up a meeting at the T8TA offices on January 16, 2015.

[56] A without prejudice meeting was held on January 16, 2015 between representatives of T8TA, FLNRO, and the Ministry of Aboriginal Relations and Reconciliation ("MARR"). On January 29, 2015, Mr. Reay emailed T8TA to confirm that the delay in commencement of Project construction provided more time for consultation. In this email, Mr. Reay referred to the custom consultation process as an enhancement of the consultation process, but stated that any enhancement of the process relating to the Permits would have to be agreed to by February 15, 2015. Mr. Reay also provided a number of available dates to resume consultation process discussions.

[57] On February 3, 2015 Jeffrey Richert responded to Mr. Reay's email. Mr. Richert reiterated T8TA's position that the Province had agreed that consultation on all Project authorizations, including the Permits, would be conducted in accordance with a mutually agreeable consultation process. Mr. Richert also stated that it was unacceptable to T8TA to accelerate consultation on the Permits to meet the scheduled date for commencement of construction.

[58] In this email Mr. Richert stated:

> At no point in your email below have you referenced that this is a **mutually agreeable consultation process**, reaffirmed at the Chiefs to Ministers Meeting on December 4th and Minister Thomson's letter dated December 11th, 2013. This is an important point and we would like to remind you of this.
>
> With regards to "*enhancements to the consultation process for Batch #1, would need to be agreed to by February 15, 2015*", we are concerned that FLNRO is imposing a deadline in a unilateral manner. As you are aware,

> Doig River, Prophet River and West Moberly First Nations are parties to several collaborative management agreements, including the Crown Land Management Agreement. In the absence of a custom consultation process, the Crown Land Management Agreement would govern any consultations on permits. Importantly, there are no timelines in that agreement for consultation as the parties are to jointly come up with a consultation plan. While FLNRO has claimed engagement with these First Nations, it has not been in accordance with the agreement. Importantly, any changes to the agreement require the consent of both parties. That is in fact what we are trying to do with FLNRO. We remind you again that this is a **mutually agreeable consultation process** and any deadline, milestone or time constraint put on the process must be agreed upon by both parties.
>
> - Can you please advise us whether FLNRO Statutory Decision Makers (SDM's) plan on making decisions on Batch #1 permits on or after the 15th of February? We have yet to receive a rationale for the unilateral imposition of this date. We understand that BC Hydro aspires to begin construction on June 22nd but that artificial deadline, created by a proponent, cannot dictate meaningful consultation by the Crown. We query whether consultation will be conducted in good faith with the intention of addressing the First Nations' concerns when a unilateral timeline is being imposed. Is FLNRO's plan simply to issue the permits after *pro forma* consultation with the First Nations?
>
> We are extremely concerned that a **mutually agreeable consultation process** has now turned into an expedited "enhancement process" for Batch 1 permits. Never has the term "enhancement" been a part of the conversation until the letter recently received from Minister Thomson (undated; received January 14th).
>
> - We request clarification as to what "enhancement" is referring to within the context of this process? What is it that is being enhanced?
>
> Furthermore, I hope you understand that our team is currently subject to enormous workloads on a variety of files and projects both active and proposed; not to mention the daily responsibilities we are all tasked with. In addition, our Lands offices are overrun with requests, referrals, meeting requests, meetings etc. from the province, proponents and various stakeholders. This is at a time where budgets, staffing and resources are exceptionally constrained for everyone and we do our best to accommodate these requests as our schedules permit.
>
> [Emphasis and bold in original.]

[59] On February 13, 2015, Mr. Reay responded to Mr. Richert's email reiterating the Province's desire to proceed with consultation on the Permits simultaneously with negotiating a custom consultation agreement for future Project permits. Mr. Reay also confirmed that BC Hydro was prepared to provide capacity funding for that purpose.

[60] In the following weeks there were further without prejudice discussions about the favoured method of proceeding with consultation on Project construction. On February 23, 2015, Mr. Reay informed Chief Willson of WMFN and T8TA that the Province was prepared to postpone consultation on the initial batch of permits to March 15, 2015 to permit more time for the negotiation of a custom agreement governing all consultation. Mr. Reay also communicated that if no agreement was reached by that date, the Province intended to proceed with consultation under the existing agreements. Thereafter, the Province provided T8TA with further information about the Permits and without prejudice discussions continued.

[61] Representatives of T8TA, FLNRO, and MARR attended a meeting on March 9–10, 2015 at which T8TA representatives proposed that two working groups be set up. One group was to be charged with negotiating a custom consultation agreement while a second technical group would be charged with reviewing the Permit applications. It appears that the Province accepted this proposal.

[62] On March 19, 2015, Mr. Wellstead wrote to WMFN confirming the concurrent two-track process, and attaching Bundle 1 and Bundle 2 applications and proposed consultation streaming. Minister Thomson followed up with a March 20, 2015 letter in which he stated:

> It is my understanding that, while an agreement on a custom consultation process has not been reached, the current proposal does allow for technical discussions to proceed while the details of an agreement are finalized. I am therefore prepared to extend discussions on this matter to April 15, 2015. It is also the province's understanding that a final agreement will contain provisions to allow completion of consultation on Bundle 1 and 2 applications in order to facilitate a summer 2015 construction start date.

[63] On March 27, 2015, there was a technical team meeting of representatives of the petitioners, T8TA, BC Hydro, and FLNRO to discuss the Project construction applications, the EAC conditions and mitigation management plans, and a potential site visit. On April 7, 2015 there was a further meeting to discuss technical issues. At that meeting the parties agreed to schedule a follow-up meeting.

[64] On April 14, 2015, the Province and three of the T8TA First Nations (the petitioners and Saulteau First Nations) signed the Negotiation Agreement.

[65] In the Negotiation Agreement the parties agreed to use their best efforts to conclude negotiations for the Consultation Agreement by the next day, April 15, 2015. None of the parties provided any explanation as to why this date was chosen. Based on the other provisions in the Negotiation Agreement, I suspect that this date was inserted in error and should have been April 15, 2016.

[66] The Negotiation Agreement provided capacity funding of $550,000 to March 31, 2016. This included $350,000 of capacity funding to be provided "upon approval" of the Negotiation Agreement to support costs related to the negotiation of the Negotiation Agreement and Site C consultation.

[67] The Negotiation Agreement contained provisions addressing how the parties would consult on permits identified as "Bundles 1 and 2", which include most of the Permits. After setting out a number of principles and requirements for the consultation process, the Negotiation Agreement stated that meaningful consultation must occur on the permits in Bundle 1 and Bundle 2 and the relevant mitigation plans, before those permits were sent to statutory decision makers.

[68] The following provisions of the Negotiation Agreement deal specifically with consultation on the permits that were required to commence construction:

> 2. INTERIM PERMIT CONSULTATION
>
> 2.1. Consultation on the Permits may occur in parallel with consultation on the Environmental Assessment Certificate (EAC) mitigation plans.
>
> 2.2. The Parties acknowledge that the First Nations intend to carry out:
>
> 2.2.1. An independent technical review for the Permit consultation; and
>
> 2.2.2. Site visits, community meetings, technical work shops, meetings with Council.
>
> 2.3. The following principles will guide the Parties in the grouping and ungrouping of Permits for consultation:
>
> 2.3.1. The relevant mitigation plans and consultation;

2.3.2. Linkage to the construction schedule;

2.3.3. Seasonal windows and other scheduling constraints;

2.3.4. Grouping like with like (e.g. location, project component, value component, consultation activity);

2.3.5. Permit groups should be of a manageable size for required consultation activities; and

2.3.6. Personnel needed (e.g. BC Hydro, third party experts, First Nations community members, etc.)

2.4. The following principles will guide the Parties in discussing the scope of work and estimated timelines:

2.4.1. The first three principles identified in section 2.3;

2.4.2. The sequencing, including deferral, to an appropriate time, of consultation activities; and

2.4.3. Past experience with timing for similar consultation activities.

2.5. The Bundles 1 and 2 Permits may be sent to statutory decision makers after meaningful consultation has occurred on the Permits and the relevant mitigation plans required under the Environmental Assessment Certificate.

2.6. The statutory decision makers will seriously consider and as appropriate integrate proposals of the First Nations in relation to the Permits and provide First Nations with a written rationale for decisions taken with respect to Permit applications.

[69] Beginning on April 16, 2015 there were discussions about some re-grouping of the permit applications. According to Mr. Reay's affidavit, the re-grouping request originated in a meeting held on that day. This was followed up by an email that Mr. Hickling, a T8TA representative, sent on April 20, 2015, suggesting a re-grouping.

[70] On April 24, 2015, Mr. Wellstead emailed WMFN a referral letter, application materials, and initial impact statements for four additional permits from Bundle 3. In the email Mr. Wellstead reminded WMFN that it had agreed to provide a suitable date around the week of April 20, 2015 for a technical review meeting and indicated that the Province was available for such a meeting. The purpose of the review meeting was to review applications previously provided to WMFN.

[71] Also on April 24, 2015, Mr. Wellstead forwarded, by email, the same referrals to PRFN and asked it to provide a date for renewal of technical discussions. Mr. Wellstead also reminded PRFN that the Province and BC Hydro had arranged site visits for interested parties during the week of May 4–8, 2015, but that PRFN had indicated it would not attend site visits with the Province and BC Hydro. He clarified, however, that the invitation to attend was still open.

[72] Although the technical group met between mid-March and May 2015, there is little evidence about what was discussed at those meetings and no evidence that the petitioners used them to bring forward any specific concerns about the Permits.

[73] By May 2015, the Province was obviously becoming concerned that consultation on the Permits might continue beyond a date by which they should be submitted to statutory decision makers to accommodate starting construction in the summer of 2015.

[74] On May 19, 2015, FLNRO emailed to the petitioners consultation summary letters and issue tracking tables with respect to the Permits. The tracking tables set out various issues identified in the course of the environmental review and consultation to that point. They identified very few First Nations' comments or recommendations on those issues. Those that were identified related almost exclusively to the impact of the Project itself, as opposed to the incremental effects of the Permits.

[75] In a letter dated May 21, 2015, the petitioners objected strongly to the delivery of the summary and issue tracking document. They took the position that it was inappropriate for FLNRO to produce such a document at what they considered to be an early stage of the consultation process.

[76] On May 22, 2015, T8TA formally requested to be consulted on permitting and operational aspects of the Project and provided the Province with instructions as to how it wished to be provided with Project information.

[77] On May 28, 2015, FLNRO responded to T8TA's May 21, 2015 letter and reiterated the Province's position that consultation on the Permits was initiated in August 2014. FLNRO again emphasized that consultation on the Permits must conclude by the end of May 2015 to facilitate submitting the Permit applications to the statutory decision makers to permit construction to begin in June 2015.

[78] On the same day, representatives of T8TA and the Province held a meeting. They primarily discussed the grouping of the Permit applications. Following the meeting, T8TA emailed a number of letters to BC Hydro regarding the EAC mitigation plans and one letter to FLNRO requesting information about the various statutory decision makers who would be deciding whether to issue the Permits.

[79] After the May 28, 2015 meeting, the Province notified T8TA that it was concluding consultation on the Permits, including the four Bundle 3 permits, but that it would accept final submissions up to June 5, 2015.

[80] On June 3, 2015, T8TA wrote to the Province objecting to its decision to conclude consultation on the Permits.

[81] In this letter, T8TA summarized its objections to the termination of consultation on the Permits. An important assumption in the letter was that consultation on the Permits had only commenced upon the execution of the Negotiation Agreement in April 2015. The letter also interpreted the Negotiation Agreement as explicitly stating that consultation on the Permits could not be completed until the petitioners had completed their own technical review for permit consultation. It also acknowledged that the petitioners had only begun to commence their review of the Permit applications once the first tranche of capacity funding payable under the Negotiation Agreement had been received. The letter did not, however, identify any specific concerns about the effects of the Permits on the petitioners' Treaty rights, apart from those inherent in the Project.

[82] On June 5, 2015, T8TA delivered a 41-page letter to FLNRO addressing both the Permit applications and the environmental mitigation and management plans

prepared by BC Hydro. The first part of the letter reviewed some of the recommendations and findings of the Joint Review Panel. The letter went on to identify general concerns about the process the Province was using. T8TA also expressed concern about what it considered were gaps in the environmental assessment and set out proposals for structuring future consultation.

[83] In June 2015, FLNRO prepared the First Nations Consultation Report with respect to what it referred to as the Batch 1 permits and submitted it to the statutory decision makers for their consideration together with the Permit applications. In the Consultation Report, FLNRO concluded that consultation was adequate and sufficient for the Permit applications, including for the additional Bundle 3 applications.

[84] On June 16–18, 2015, the Province's technical staff made a presentation to the statutory decision makers to provide them with information in relation to the Permits. The statutory decision makers also received a number of reports, including a summary report and the Consultation Report.

[85] There were four decisions issued with respect to the Permits:

1. Rationale for Authorization Decisions under *Land Act, Forest Act*, and *Water Act* for Clearing and Early Site Preparation Work, dated July 6, 2015 and signed by Karrilyn Vince, Director of Authorizations and Regional Water Manager, Northeast Region of FLNRO;
2. Rationale for Authorization Decisions under *Wildlife Act* and *Forest and Range Practices Act* for Clearing and Early Site Preparation Work, dated July 6, 2015 and signed by Christopher Addison, Director, Resource Management, Northeast Region of FLNRO;
3. Letter dated July 14, 2015 from Steven Acheson of FLNRO to WMFN giving reasons for approving Permit Application 11200-30 and amending Permit 2104-0274, pursuant to the *Heritage Conservation Act*, with respect to mitigation of archeological sites;

4. Reasons for Decision with respect to permits pursuant to the *Mines Act* for two rock quarries and one aggregate pit to support the Project, dated July 24, 2015, signed by Victor Koyanagi, Senior Inspector of Mines of the Ministry of Energy and Mines.

   (together, "Rationales for Decision")

[86] Each of these documents concluded that the Province had met its obligation to consult with and attempt to accommodate the petitioners.

[87] In their Rationales for Decision, the statutory decision makers made reference to the Province's attempts to consult on the Permits prior to the execution of the Negotiation Agreement. They clearly relied on the Province's pre-Negotiation Agreement consultation efforts in reaching the conclusion that the Province had met its consultation obligations to the petitioners. Although they referred to the Negotiation Agreement, they did not interpret it in the manner suggested by the petitioners.

[88] On July 7, 2015, the Province notified the petitioners that it had approved 24 applications from Group 1, including three of the applications previously included in Bundle 3. The petitioners received most of these permits on July 13, 2015.

[89] On July 16, 2015, the Province notified the petitioners that it had issued an alteration permit and an amended heritage inspection permit under the *Heritage Conservation Act*.

[90] On July 28, 2015, the Province notified the petitioners that it had issued decisions on three authorizations under the *Mines Act*, one of which (the notice of work for the "Area A" quarry) was previously not included in Bundle 1 or Bundle 2.

[91] This petition was filed on August 4, 2015.

V. ISSUES

[92] The positions taken by the parties require resolution of the following issues:

A. Did the Province agree to defer consultation on the Permits until a custom consultation process was in place?

B. Did the Negotiation Agreement stipulate the manner in which consultation on the Permits must be conducted?

C. Did the Province breach the Negotiation Agreement by:

i. concluding consultation and submitting the Permits to the statutory decision makers before the petitioners could complete their own technical review and before there was meaningful consultation on them?

ii. seeking to consult on and then seeking approval of permits not included in Bundle 1 or Bundle 2 prior to executing a Consultation Agreement?

iii. failing to provide capacity funding soon enough to permit the petitioners to utilize it for meaningful consultation before the Province concluded consultation?

D. Did the Province meet its constitutional obligation to consult with and accommodate the petitioners with respect to the Permits?

VI. DISCUSSION OF ISSUES

A. Did the Province agree to defer consultation on the Permits until a custom consultation process was in place?

[93] The petitioners say that the Province acted in bad faith by attempting to require consultation on the Batch 1 permits after agreeing that all Project permit consultation should take place pursuant to a mutually agreeable custom process.

[94] The petitioners have the onus of establishing that there was an agreement on the part of the Province to defer consultation on the Permits until a custom agreement was in place. In my view they have not discharged that onus.

[95] After reviewing the record, I see no basis on which I can conclude that the Province agreed to defer consultation on the Permits, that is, the permits necessary to commence construction, until after a custom consultation process was in place.

[96] The correspondence between the parties does establish that the Province agreed to attempt to negotiate a custom consultation process; however, the same correspondence makes it clear that the Province intended to consult on the permits required to commence construction in a time frame that would allow Project construction to commence as scheduled. The Batch 1 permits fall into this category.

[97] One of the documents relied on by the petitioners on this issue, Minister Thomson's letter of December 13, 2013, makes it clear that the Province intended to complete consultation on the permits necessary to commence work in time to meet the anticipated construction schedule. This is apparent from the same portion of the letter in which the Minister agreed to defer consultation until after completion of the Joint Review Panel hearings. In that part of his letter, the Minister reiterated that the Province was committed to adhering to the historical EBA and CMAs with respect to consultation until a custom agreement was in place.

[98] In addition, the petitioners' own correspondence does not support the existence of an agreement to defer consultation. At times, the petitioners took the position that there could be no consultation until a mutually agreeable consultation process was established. At other times, their correspondence merely expressed their desire that there be no permit consultation until a custom process was in place. At still other times, they acknowledged that the existing agreements would govern consultation until such an agreement was concluded. For example, in her letter to Minister Thomson dated March 25, 2014, Chief Liz Logan, tribal chief of T8TA, confirmed that in the absence of a customized consultation process, the existing CMAs would continue to govern consultation on the Project permits.

[99] Accordingly, I find that the Province did not agree, nor could the petitioners have reasonably concluded that it had agreed, to postpone consultation on the Batch 1 permits until a custom consultation agreement was reached. It therefore

follows that the Province's attempts to consult in 2014 did not constitute bad faith and are relevant to the question of whether the Province met its consultation obligations.

B. Did the Negotiation Agreement stipulate the manner in which consultation on the Permits must be conducted?

1. Principles of Contractual Interpretation

[100] Issues B and C require determination of the proper construction of the Negotiation Agreement, which is, of course, a contract. The principles applicable to the interpretation of contracts are well settled.

[101] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court stated that the modern approach to contractual interpretation requires a consideration of the context in which the agreement was executed:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[102] In *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381**,** [1971] 3 All E.R. 237 (H.L.), Lord Wilberforce described the surrounding circumstances as the factual matrix within which a contract was executed. The BC Court of Appeal described the factual

matrix in *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.*, 49 B.C.L.R. (3d) 317, [1997] B.C.J. No. 2946 (C.A.), as follows:

> [18] …The factual matrix is the background of relevant facts that the parties must clearly have been taken to have known and to have had in mind when they composed the written text of their agreement. It can throw light on what the parties must have meant by the words they chose to express their intention.

[103] The surrounding circumstances must, of course, never be allowed to overwhelm the words of an agreement. The interpretation of a provision in any contract must always be grounded in the text and read in light of the entire contract (*Sattva Capital Corp.* at para 57).

[104] The above decisions deal with commercial contracts. I agree with the petitioners that contracts between government and First Nations, especially those dealing with the government's constitutional obligations such as its duty to consult, must be interpreted in the context of those obligations. The basic principle that contracts must not be interpreted in a vacuum is consistent with the principle that the context of an agreement between government and First Nations includes the underlying obligations of the government to act honourably and in keeping with s. 35 of the *Constitution Act*, *1982.*

[105] The petitioners referred to *Canada v. Long Plain First Nation*, 2015 FCA 177, in support of their submission that the Negotiation Agreement must be interpreted in the manner they suggest. However, that decision is distinguishable from the facts of this case. In *Long Plain First Nation* the contracts under consideration were entered into for the express purpose of redressing past breaches of treaty by the federal government. The Federal Court of Appeal held that they must be interpreted in light of that purpose. In this case, the purpose of the Negotiation Agreement was to define how the parties should conduct consultation with respect to the ongoing Project.

2. Interpretation of Negotiation Agreement

[106] The petitioners submit that the Negotiation Agreement stipulated the terms governing consultation on the Permits. Their principal argument is that the Negotiation Agreement provided that consultation on the Permits could not be concluded until the First Nations had completed their own technical review of the Project permits and held internal meetings to discuss it. They say that the Province ignored ss. 2.2, 2.2.1, and 2.2.2 of the Negotiation Agreement by submitting the Permits without giving them any meaningful opportunity to conduct their own technical review. The petitioners also submit that the Province must be taken to have realized that it would take some months for the First Nations to complete that process and by necessary implication, the Province must be taken to have agreed not to submit the Permits to the statutory decision makers within that period.

[107] The petitioners further submit that by executing the Negotiation Agreement, the Province acknowledged that the petitioners had not previously been under any obligation to consult on the Permits. Therefore, they say that the Province's previous efforts to engage in consultation on the Permits are not relevant to the question of whether there has been meaningful consultation.

[108] Relying on ss. 2.3.1, 2.3.2, and 2.5 of the Negotiation Agreement, the respondents submit that the Negotiation Agreement expressly recognized the importance of the construction schedule and provided for an expeditious conclusion of consultation on the Permits to avoid undue delay in commencing construction of the Project.

[109] I do not construe the Negotiation Agreement as an acceptance of the petitioners' position that the Province acknowledged that there had been no previous consultation on the Permits. Such a construction would be inconsistent with the factual matrix within which the Negotiation Agreement was executed.

[110] I view the Negotiation Agreement as a compromise between the petitioners and the Province. In it, the Province agreed that consultation on Project permits would be conducted in accordance with a Consultation Agreement, which the parties

agreed to use their best efforts to negotiate. However, the Negotiation Agreement also expressly provided that the Permits would be consulted upon before the execution of the Consultation Agreement.

[111] I do not construe s. 2.2 as postponing the Province's right to submit the Permit applications to statutory decision makers until the petitioners had concluded their own technical reviews and internal consultation. Such an interpretation would have put the petitioners in the position of determining how long consultation could continue and when construction could commence. As such, it would be inconsistent with the compromise contained in the Negotiation Agreement.

[112] Section 2.5 is the only provision in the Negotiation Agreement that expressly addresses the question of when the Province could submit the Permits to the statutory decision makers. If the parties had intended that there would be no such submission until the petitioners had completed their own technical review, I would have thought they would have expressly so stated in s. 2.5. In addition, I note that s. 2.2 states that the parties acknowledge that the petitioners intend to carry out an independent technical review. It neither commits the petitioners to do so nor establishes any time within which such a review must be completed.

[113] I agree with the submission of BC Hydro that the term "meaningful consultation" in s. 2.5 reflects the parties' agreement that the Bundle 1 and Bundle 2 permits could be submitted to the statutory decision makers once there had been meaningful consultation in accordance with principles set out in the authorities dealing with the duty to consult and accommodate. I will address those principles later in these reasons.

[114] In summary, I find that the Negotiation Agreement did not specify how consultation must occur with respect to the permits necessary to commence construction. Although it set out general principles with respect to when the Province could submit those permits to the statutory decision makers, it did not prescribe the steps necessary to constitute meaningful consultation on them.

[115] However, I do find that the Negotiation Agreement relieved the parties from following the procedures set out in the CMAs with respect to consultation on the Permits. The Province was therefore not required to follow those procedures with respect to Bundle 1 and Bundle 2 permits, nor were the petitioners bound to the specific time limits for responses set out in the CMAs. The Province did, however, remain subject to its constitutional obligation to provide a meaningful opportunity to the petitioners to consult on the Permits.

C. Did the Government breach the Negotiation Agreement?

[116] The petitioners allege the Province breached the Negotiation Agreement in three respects. Firstly, they say that the Province terminated consultation on the Permits before they had an opportunity to carry out their own independent technical review and internal consultation, and therefore, before any meaningful consultation could occur. Secondly, they say that the Province included additional permits in the interim consultation process, which was applicable only to Bundle 1 and Bundle 2 permits. Thirdly, they say that the Province did not provide the capacity funding provided for in the Negotiation Agreement in a timely way, depriving them of the resources necessary to participate in meaningful consultation in the time allotted by the Province.

1. First Alleged Breach

[117] Given what I have found to be the correct interpretation of the Negotiation Agreement, I do not accept the first breach alleged by the petitioners.

[118] The petitioners submit that the Province must be taken to have known that an independent technical review would take between three months to one year to complete. However, the Negotiation Agreement did not make completion of such a review a precondition to the submission of the Permits to the statutory decision makers.

[119] I therefore find that the Province did not breach the Negotiation Agreement by reason only of submitting the Permit applications to the statutory decision makers

before the petitioners had completed their own technical review and internal considerations. In my view, the Province would have breached the Negotiation Agreement in this regard only if it submitted the Permit applications without fulfilling its obligation to meaningfully consult the petitioners on the Permits.

[120] Therefore, the question of whether the Province breached the Negotiation Agreement requires a consideration of whether the Province discharged its constitutional and common law consultation duty on the Permits.

[121] For the reasons that I will set out when considering that issue later in these reasons, I conclude that the Province did meet its consultation obligations in this case. Accordingly, I find that the Province did not breach the Negotiation Agreement in that regard.

2. Second Alleged Breach

[122] The petitioners also submit that the Province breached the Negotiation Agreement by moving permits to Group 1 after it was executed. The permits at issue are as follows:

(a) one permit under the *Mines Act* (1641309-201501/201502) for quarrying activity;

(b) one permit under the *Water Act* (A703735) to install culverts on Septimus Road; and

(c) one permit under the *Wildlife Act* (FJ15-170904), authorizing the collection of fish for scientific purposes.

[123] The petitioners say that the re-grouping of permits into Group 1 was a breach of the Negotiation Agreement because consultation on permits not included in Bundle 1 or Bundle 2 was to be conducted pursuant to the Consultation Agreement, which has not been completed. The petitioners also submit that the Province did not satisfy the requirements of the CMAs with respect to these permits. Moreover, they say that they were not provided with the permits issued on July 28, 2015 under the *Mines Act* until the respondents served their affidavits.

[124] The respondents' position is that the Negotiation Agreement contemplates the re-grouping of permits. They point to the principles articulated in the Negotiation Agreement that are intended to guide grouping and re-grouping of permits for consultation, specifically linkage to the construction schedule and grouping like with like.

[125] The respondents say that the contested additional permits were listed as part of Group 1 on a spreadsheet shared with the petitioners' representatives on April 17, 2015, following a re-grouping meeting held the day before. On April 20, 2015, one of the petitioners' representatives provided revisions to the re-grouping, but made no comments at that time on the additional applications that had become part of Group 1. On April 24, 2015, the additional permit applications were delivered to the petitioners, noting they were part of Group 1, along with an initial assessment of potential impacts of these permits, a referral letter, and application materials. The petitioners did not object to the inclusion of these permits at that time.

[126] In response to the petitioners' claim that they did not have the permits issued under the *Mines Act* until the respondents served their affidavits, the respondents say that the permits were available on the Treaty 8 First Nations' File Transfer Protocol site as of August 4, 2015. Further, they say that the petitioners were notified of the upload and that the petitioners requested this method of communication for such information.

[127] I find that the Province neither acted in bad faith nor breached the Negotiation Agreement by re-grouping the permits. The Negotiation Agreement specifically contemplates re-grouping to facilitate initial site preparation work.

[128] I have also considered the additional permits themselves. I find that they authorize work that is logically connected to other permits in Group 1. For example, it is hard to see how installing culverts on Septimus Road is distinct from the construction of the road itself. Moreover, the installation of culverts is done to maintain hydrologic balance and to protect existing wetlands. Likewise, the permit

that allows the scientific monitoring of fish seems of benefit to all parties. It is difficult to see how either of these permits affected the petitioners' Treaty rights.

[129] In any event, the petitioners had two and a half months to consider the additional permits after they were re-grouped to Group 1. They have provided no substantive reason why this was not enough time to raise at least some preliminary, specific concerns about their inclusion. Had there been specific concerns about their inclusion or objection to the level of impact as assessed by the respondents, additional consultation might have been appropriate. Taking into account the permits at issue, I am not persuaded that the petitioners required more time to review these additional permits and raise concerns.

[130] In summary, I find that moving the permits to Group 1 was permissible. The permits at issue are logically connected to activities authorized by other permits that have been the subject of ongoing consultation attempts. In addition, the Negotiation Agreement contains provisions specifically related to the grouping and re-grouping of permits. The statutory decision makers were alive to the fact that these permits were originally in Bundle 3.

[131] The petitioners alternatively submit that the three additional permits were not issued in accordance with the CMAs. The respondents state that the EBA consultation process governed applications that were made under the *Water Act* and *Mines Act*. This would include two of the additional permits.

[132] I see no merit in the petitioners' argument in this regard. I have already found that the Negotiation Agreement clearly contemplated that consultation on the Bundle 1 and Bundle 2 permits need not be conducted pursuant to the CMAs.

[133] Assuming, however, that the CMAs applied, the petitioners have not established that the Province breached them in any way.

[134] The Wildlife Collaborative Management Agreement provided the consultation process for the additional permit application made pursuant to the *Wildlife Act.* This

permit authorizes scientific fish collection. This is the continuation of ongoing, annual fish indexing surveys that have taken place since 2001.

[135] The petitioners argue that the respondents breached the Wildlife Collaborative Management Agreement by not referring the application to the Wildlife Stewardship Board ("Board"), constituted under that agreement. However, on November 10, 2014, FLNRO contacted the Board and attempted to initiate discussions on the permit applications made under the *Wildlife Act*. The Board denied this request. The Province continued to provide the petitioners with information and, as previously described, notified the petitioners of changes to the permit grouping when they were available. Again, the petitioners have raised no specific concerns regarding this permit or how this re-grouping negatively impacts their Treaty rights. The fact that the Board chose not to review the applications under the *Wildlife Act* does not negate the respondents' attempts at consultation.

[136] I am therefore unable to find that the Province breached the Negotiation Agreement by including the additional permits in the interim consultation process.

3. Third Alleged Breach

[137] Finally, the petitioners submit that s. 3 of the Negotiation Agreement shows that the parties agreed that meaningful consultation could not occur until the petitioners were provided with adequate capacity funding.

[138] Pursuant to s. 3.1.1 of the Negotiation Agreement, $350,000 in capacity funding was made available to the petitioners; however, I can see nothing in it that suspended further consultation until the petitioners received this payment. The Negotiation Agreement specified that Bundle 1 and Bundle 2 permits be forwarded to the statutory decision makers once meaningful consultation had occurred. In the context of the pending construction schedule this strongly suggests that the parties agreed to continue to consult on the Permits pending payment of the capacity funding.

[139] In addition, the petitioners did not provide the Province with a written authorization to make payment of the $350,000 to T8TA until April 28, 2015. The funds were provided approximately two weeks later. In my view, this represented payment within a reasonable time.

[140] In any event, the petitioners have not put forward any specific evidence as to how any delay in receiving this funding had any material effect on their ability or willingness to consult before its receipt. Apart from a bare assertion, the petitioners did not lead any evidence to show how a lack of capacity funding prevented them from engaging in consultation prior to the end of May 2015. For example, there was no evidence that any particular consultant would not provide services without advance payment or indeed any evidence of what consultants the petitioners contemplated retaining.

[141] I repeat that in 2014 the Province had informed the petitioners that BC Hydro was prepared to provide capacity funding to assist in consultation on the Permits, but the petitioners provided no response to that offer.

[142] I am therefore unable to accept that lack of capacity funding prevented the petitioners from engaging in meaningful consultation on the Permits.

D. Did the Province meet its constitutional obligation to consult with and accommodate the petitioners?

1. Consultation Informed by Treaty No. 8

[143] Given my findings with respect to the Negotiation Agreement, my view is that the critical issue in this case is whether the Province provided the petitioners with a meaningful opportunity to be consulted with respect to the Permits.

[144] The Project is located on lands surrendered pursuant to Treaty No. 8. The Province's consultation obligation is therefore informed by the terms of Treaty No. 8, as interpreted in the jurisprudence.

[145] Consultation with respect to the Permits must focus on the effect of the Project on the petitioners' Treaty rights to utilize the lands for hunting, fishing, and

trapping acknowledged in Treaty No. 8. This was addressed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, and in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48. In *Mikisew Cree First Nation*, the Court set out the principles applicable to the exercise of Crown jurisdiction over treaty lands:

> 63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

[146] The Court made it clear that the objectives of consultation set out in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], also applied to the taking up of land subject to Treaty. The Crown is required to act honourably and reasonably to consult with affected First Nations regarding any Crown action that will adversely affect their rights. The duty to consult, however, does not extend to a duty to reach agreement. As such, First Nations do not have a right of veto over government actions, except in circumstances that do not apply in this case. In *Haida* the Court articulated this principle as follows:

> 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.
>
> 49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or

> different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

2. Positions of the Parties

[147] The parties agree that there was consultation during the environmental assessment process, but disagree on how that consultation should be treated in considering the adequacy of consultation on the Permits. The parties also disagree on the question of whether the Province's pre-Negotiation Agreement attempts to consult should be taken into account.

[148] The petitioners' view is that the consultation during the environmental assessment period was directed at the macro effects of the Project, but did not address the operational effects of the Permits on their rights.

[149] The petitioners submit that the Province's pre-Negotiation Agreement consultation efforts with respect to the Permits cannot properly be regarded as meaningful and should not be considered by this Court in assessing the adequacy of consultation. This position is articulated in their reply submissions:

> 30 In response to paragraph 2, BC Hydro misrepresents or misunderstands the position of the Petitioners as artificially constraining consultation on the Permits to include only the consultation that occurred following the execution of the Negotiation Agreement. In fact, the Petitioners acknowledge and accept that the consultation process carried out in relation to the Permits pursuant to the Negotiation Agreement must be informed by the processes and information exchanges that went before. In particular, the environmental assessment process included a great deal of discussion on the Project as a whole that remains relevant to the Permits. What the Petitioners have said, in fact, is that:
>
> a. consultation on the Permits must comply with the terms of the interim consultation process set out in the Negotiation Agreement;
>
> b. while that consultation will be informed by previous macro-scale consultation on the Project as a whole, the fact that such previous consultation has occurred cannot cure a failure by the Crown to comply with the Negotiation Agreement;

> c. consultation on the Permits, separately from consultation on the Project as a whole, was required in order to address operational-level decisions and mitigation measures that could affect the degree of impact of the Project on the Petitioners' Treaty rights, as well as to resolve issues and impacts that remained outstanding after the environmental assessment; and
>
> d. substantive consultation on the Permits themselves did not properly begin until the interim consultation process established by the Negotiation Agreement came into force and the Petitioners received the promised capacity funding from the Crown. Prior to this time, the Petitioners did not have the capacity to engage in consultation that, in their view, remained premature, particularly in light of the other demands on their resources from other ongoing Crown and BC Hydro consultation processes. This does not, however, mean that the results of the environmental assessment process ought not to be taken into account.

[150] The respondents submit that all consultation and attempts to consult on the Permits are relevant to the question of whether the Province has complied with its consultation obligations.

3. Scope of Consultation on the Permits

[151] In my view, it is artificial to attempt to draw distinctions between the various steps in the Project approval process. The Project requires a series of approvals from the federal and provincial governments to be constructed and become operational. The environmental approvals obtained in 2014 were the first in that series. The Permits are part of the second set of approvals that will facilitate physical construction of the Project.

[152] I agree with the comments of Justice Strickland of the Federal Court of Canada in *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981, that consultation is a cumulative process:

> 140 The phases of the consultation process, and the consultation undertaken in each phase, are connected. The prior consultation therefore serves, to a degree, to inform the consultation and accommodation undertaken in Phase 5. The consultation process cannot be considered to be complete until the end of Phase 5. Thus, the totality of the consultation between Canada and the NCC in each phase of the EA must be considered in order to understand and assess the extent of the consultation and accommodation in respect of the Authorization. To the extent that the NCC questions the content or adequacy of the consultation with respect to the

> issuance of the Authorization, it is entitled to look at the prior consultation for that purpose, but not as an attempt to impugn the validity of those prior decisions.

[153] I regard all consultation efforts as sequential steps in a single consultation process. The fundamental question before this Court, therefore, is whether at this stage of the Project the Province has met its obligation to provide a meaningful opportunity for the petitioners to consult on the Permits. I emphasize that the sole issue in this petition is whether the Province has met its obligation to consult on the specific Permits issued to permit construction to commence. It is not whether there has been adequate consultation on all of the permits necessary to complete the Project.

[154] In *Prophet River No. 1*, I decided that the Province had met its constitutional obligation to consult with respect to the issuance of the EAC. If I am correct in that decision, there has already been meaningful consultation with respect to the overall impact of the Project itself on the petitioners' Treaty rights.

[155] What then is the scope of consultation on the Permits?

[156] It seems to me that the subject matter of consultation on the Permits encompasses any incremental effects on the petitioners' Treaty rights not addressed in the environmental assessment. Such incremental effects would arise from the manner and timing of how the work authorized by the Permits is carried out.

[157] This does not mean that the Permits do not affect the petitioners' Treaty rights and that consultation on those potential effects was unnecessary. What it does mean is that consultation with respect to the effects of the work authorized by the Permits had already occurred in the course of the environmental assessment process. What remained to be consulted upon were the effects of the manner in which the work was to be carried out and the timing of that work, as well as any residual effects not addressed in the environmental assessment process.

[158] The Province has an ongoing constitutional obligation to engage in meaningful consultation with the petitioners on the impacts of the Project on their

Treaty rights. This does not mean, however, that further consultation is required at each stage of the Project on matters that were already the subject of meaningful consultation at an earlier stage.

[159] On somewhat different facts, the Supreme Court of Canada considered the interrelationship of an environmental assessment and the government's duty to consult in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku River*], a decision released at the same time as *Haida*. In *Taku River*, the Court held that consultation in the course of an environmental assessment may be sufficient to fulfill the government's duty to consult:

> 22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

[160] One object of the environmental assessment process was to address the impacts of the Project on Aboriginal peoples. Sections 2.2 and 2.3 of the Terms of Reference of the Joint Review Panel address this purpose:

> 2.2 The Joint Review Panel must include in its assessment of the Project, consideration of the following factors:
>
> - the purpose of the Project;
> - the need for the Project;
> - alternatives to the Project;
> - alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
> - the environmental, economic, social, health and heritage effects of the Project, including the cumulative effects that are likely to result

from the Project in combination with other projects or activities that have been or will be carried out;

…

- any change that the Project may cause in the environment on the current use of lands and resources for traditional purposes by aboriginal persons;

…

- comments from the public and Aboriginal persons and groups that are received during the assessment; and
- community knowledge and Aboriginal traditional knowledge.

2.3 The Joint Review Panel will receive:

- information regarding the manner in which the Project may adversely affect asserted or established Aboriginal rights and treaty rights;
- information provided by Aboriginal persons or groups regarding the location, extent and exercise of asserted or established Aboriginal rights and treaty rights that may be affected by the Project; and
- Information regarding any measures to avoid or mitigate potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights.

2.4 The Joint Review Panel will use the information collected pursuant to section 2.3 of this Terms of Reference and its assessment made in accordance with 2.2 to:

(a) make recommendations which, if implemented, would avoid or minimize potential adverse effects of the Project on asserted or established Aboriginal rights and treaty rights; and

(b) inform its assessment of the potential environmental, economic, social, health or heritage effects of the Project.

[161] The Terms of Reference led to a significant portion of the Panel Report addressing and making recommendations with respect to mitigating the impact of the Project on First Nations' interests as well as a number of conditions to the EAC addressing that objective.

[162] I therefore conclude that the ongoing duty to consult and accommodate the petitioners was with respect to any novel or incremental impacts that the prosecution of the work authorized by the Permits could have had on the petitioners' Treaty rights. Such impacts might arise from the alignment of roads, the manner in which

BC Hydro proposed to minimize impacts on archeological sites, or the timing of undertaking various steps such as clearing land to be flooded by the reservoir. These are, of course, merely examples of possible impacts. Consultation on the Permits must build on and take into account the consultation that took place during the environmental assessment process, but need not duplicate it.

4. Meaningful Opportunities for Consultation

[163] I agree with the petitioners that there was minimal consultation on what I have characterized as the incremental effects of the Permits on their Treaty rights; however, the critical question is why that was the case. Consultation cannot occur in a vacuum. By definition it requires the participation of all parties to an issue.

[164] The Province submits that the honour of the Crown requires that the government provide a meaningful opportunity for consultation and accommodation with respect to government actions that may adversely affect Treaty rights or claims. It submits that it did provide such an opportunity, but the petitioners refused to take advantage of it.

[165] The petitioners respond by saying that the Province wrongfully compressed the amount of time available for consultation by requiring the consultation on the Permits to be completed in time to meet BC Hydro's construction schedule. They argue that the Province should not have allowed the construction schedule to trump meaningful consultation on the Permits.

[166] As *Haida* makes clear, the obligation on the part of government is to make reasonable efforts to inform and consult. The question of what is reasonable is contextual. The context in this case includes the consultation that occurred in the course of the environmental assessment process, the nature of any adverse impacts of the Permits on the petitioners, the length of time during which the petitioners could have consulted on the Permits had they chosen to, and the public interest in the efficient prosecution of work on the Project.

[167] In *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, Justice Finch, as he then was, confirmed the reciprocal nature of the duty to consult:

> [160] 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: see *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.); *R. v. Noel*, [1995] 4 C.N.L.R. 78 (Y.T.T.C.) at 94-95; *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 at 222-223 (C.A.); *Eastmain Band v. Robinson* (1992), 99 D.L.R. (4th) 16 at 27 (F.C.A.); and *R. v. Nikal*, *supra*.
>
> [161] There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

[168] I am satisfied that the Province did meet its consultation obligations as described by Finch J.A. in *Halfway River First Nation.* I find that the combination of the information provided in the course of the environmental assessment process and the referral package provided in August 2014, together with the other opportunities given to the petitioners to obtain information and engage in consultation, met the Province's obligation to provide the petitioners with all necessary information about the Permits in a timely way. I also find that the petitioners were provided with a reasonable opportunity to express their interests and concerns, but that they did not express any concerns that could reasonably have been accommodated in the Permits approval process. In particular, I find that the petitioners failed to take advantage of the numerous consultation opportunities available to them with respect to the Permits.

[169] The petitioners put forward a number of explanations as to why they did not take up the opportunities for consultation offered to them. Immediately following the release of the Panel Report, the petitioners concentrated their efforts on trying to persuade the Province not to approve the Project. After the EAC was issued, they

declined to consult because there was no final investment decision from cabinet. They declined the opportunity to engage in consultation on technical matters because they wished to have a custom agreement in place to govern such consultation. After the Negotiation Agreement, they took the position that consultation could not be completed until they had completed their own review of the Project and considered the matter internally.

[170] In these reasons I have considered and rejected each of these reasons for declining to engage in consultation. I also do not accept the petitioners' position that the construction schedule was irrelevant to the question of the timeliness of consultation. I do agree that meeting a construction schedule could not have justified a failure on the part of the Province to meet its consultation obligations. That is quite different, however, from saying that the construction schedule was irrelevant either to the question of whether the parties acted reasonably or to the interpretation of the Negotiation Agreement.

[171] Examples of the petitioners' refusal to participate in consultation opportunities with the Province or to take reasonable steps to facilitate consultation include:

1. In April 2014, the Province learned that BC Hydro was preparing its first group of permit applications. FLNRO inquired of the petitioners about a convenient date for an open house to explain the BC Hydro referral package, but WMFN stated that it would not be available for over two months.
2. The Province did agree to defer consultation on technical issues relating to the Permits until after the Panel Report was released, which occurred on May 8, 2014.
3. In May 2014, both before and after the release of the Panel Report, the petitioners took the position that they had no obligation to engage in consultation on technical issues prior to environmental approval of the Project, but did state they were willing to discuss a custom consultation process.

4. On August 15, 2014, the Province sent a referral letter to T8TA enclosing the Batch 1 permit applications from BC Hydro and requested a meeting to discuss the applications and a custom consultation process by September 22, 2014. The petitioners returned the hard copies of the referral package, indicating that they had no obligation to engage in consultation on technical issues before the Project received environmental approval.

5. The EAC and federal Decision Statement approving the Project were issued on October 14, 2014. One week later, FLNRO invited the EBA signatory First Nations, including the petitioners, to the Second Open House addressing their substantive concerns, to be held on November 4, 2014. The agenda included a review of the application materials contained in the August 2014 referral package and discussion regarding Bundle 2 applications to be referred in the future.

6. On October 22, 2014, Chief Willson replied to this correspondence with a one-sentence email stating there had not been a final investment decision as of yet, so it was still premature to discuss any Project permits.

7. The petitioners did not attend the Second Open House; however, the Province did send them the presentation from the event, as well as the summary comments of other First Nations in attendance.

8. When the Province attempted to bring *Wildlife Act* permit applications to the Board in November 2014, the Board refused to consider the applications.

9. After the December 4, 2014 Chiefs to Ministers meeting referred to in para. 53 above, the petitioners did not respond to Mr. Reay's December 8, 2014 email trying to set up a meeting to pursue discussions on a custom consultation agreement until December 19, 2014. In that response, T8TA announced that its offices were closed for the Christmas break.

10. In an email dated February 3, 2015, T8TA stated that it was only prepared to consult pursuant to a mutually agreeable consultation process that would not be constrained by any Project construction schedules.

11. On April 24, 2015, after the execution of the Negotiation Agreement, Mr. Wellstead attempted to engage the petitioners. He recognized that WMFN and PRFN had previously expressed a desire not to visit the site, but notified them of opportunities for future site visits. As an alternative, he provided the petitioners with the necessary data should they wish to conduct their own site visit.

12. Over three days in early May 2015, representatives from FLNRO, BC Hydro, Transport Canada Navigation Protection Program, and McLeod Lake Indian Band participated in site visits to see the locations of the Bundle 1, Bundle 2, and Bundle 3 applications. The petitioners did not attend these site visits, nor did they visit the site on their own.

13. There is no evidence that the petitioners provided any substantive comments on the Permits at any time prior to June 1, 2015.

14. Throughout the Project approval process, the plaintiffs have repeatedly made it clear that there are no mitigation or accommodation measures acceptable to them, short of cancelling the Project.

[172] The petitioners' opposition to the Project does not disentitle them from their right to be meaningfully consulted with respect to the Permits. It is, however, relevant to the question of whether the Province provided a meaningful opportunity for such consultation. The petitioners were in the best position to bring forward their concerns about the Permits and the work that they authorized. It is difficult to see how the Province could have addressed any issues relating to the Permits if the petitioners did not bring such issues forward for discussion.

[173] Government is not held to a standard of perfection in carrying out its obligation to consult with First Nations. In this case, I am satisfied that the Province

did act in good faith, and did make reasonable and meaningful efforts to engage the petitioners on the Permits.

[174] In *R. v. Douglas et al*, 2007 BCCA 265, leave to appeal ref'd [2007] S.C.C.A. No. 352, Chief Justice Finch, writing for the court, recognized that First Nations who allege a failure to consult have a duty to make reasonable efforts to respond to consultation approaches by government:

> [45] Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. …As the trial judge held, "the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed" (at para. 73).

[175] Similarly in *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, Justice Barnes stated:

> [42] I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: see *Ahousaht v. Canada*, 2008 FCA 212, [2008] F.C.J. No. 946 at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.

[176] In *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, leave to appeal ref'd [2013] S.C.C.A. No. 471, the Court of Appeal considered a case in which a First Nation refused to engage in consultation on permits to modernize a mine, unless such consultation addressed

the continued operation of the mine and the historical decision that had permitted the mine to be opened in the 1960s.

[177] In *Louis,* the petitioner took the position that the permits should not have been issued until it had conducted its own comprehensive study of the impacts of the work authorized by the permits. However, the main reason that the petitioner refused to consult was that the government refused to consult on the adverse impact of the opening of the mine in 1965. At para. 63, the court agreed with the findings of the chambers judge that the petitioner had not provided information as to how the issuance of the permits might affect its interests.

[178] In *Louis*, the chambers judge found that the government had complied with its obligation to provide a meaningful opportunity for consultation, relying in part on the refusal of the petitioner to consult except on its own terms. The BC Court of Appeal agreed with that analysis:

> [88] The appellant's second ground of appeal, to the effect that the chambers judge erred in finding that the Crown needed to engage in only minimal consultation in this case, appears to me to mischaracterize the judge's findings.
>
> [89] The judge did express some doubt as to the strength of the Stellat'en claim to Aboriginal title. I need not, for the purposes of this judgment, express any conclusions with respect to that finding. I do not read the judge's reasons as suggesting that his doubts as to the strength of the title claim led him to the view that only limited consultation was required.
>
> [90] There were, in this case, numerous attempts by the MEMPR to engage the Stellat'en in consultation. I would not characterize those efforts as "minimal consultation".
>
> [91] The honour of the Crown imposes upon it a duty to consult with, and where appropriate, accommodate a First Nation. The First Nation is not under any duty to participate or cooperate in the process. Nonetheless, the process discussed by the Supreme Court of Canada in *Haida* operates most effectively where there is a high degree of cooperation between the Crown and the First Nation or Nations involved. Where that cooperation is lacking, the process is, unfortunately, easily derailed.
>
> [92] As I have already indicated, the consultation process in this case was a failure. This was not because of an absence of effort on the part of the MEMPR, but rather a result of the parties' disparate views as to the nature of the required consultation. Because it misconstrued the nature of the consultation required, the Stellat'en refused to participate in the process. In

> those circumstances, it seems to me that the consultation undertaken by the MEMPR was as deep as it could be.

[179] The ratio to be drawn from the above authorities was summarized by Justice Willcock in *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345:

> [75] The judge, citing *Brokenhead Ojibway First Nation v. Canada (Attorney General),* 2009 FC 484, found that the KFN "cannot complain if it failed to avail itself of reasonable assistance offered by the Provincial Crown".
>
> [76] As the judge rightly observed, the constitutional duty of the Crown is to offer to engage in meaningful consultation in good faith in an attempt to understand Aboriginal concerns, and to address those concerns with a view toward reconciliation of the Crown's sovereignty with the Aboriginal rights enshrined in s. 35 of the *Constitution Act*. Where, as in *Ahousaht First Nation v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, and *R. v. Douglas*, 2007 BCCA 265, the Crown has demonstrated an intention to substantially address Aboriginal concerns through a meaningful process of consultation but consultation has been frustrated, the Crown is not precluded from acting. In such circumstances, the Crown may honourably engage in resource management pending claims resolution. It may not do so, however, if it has offered inappropriately limited consultation, as in this case.
>
> [77] In my view, the judge erred in finding the Provincial Crown's duty had been met, despite finding that the offer of consultation made to the KFN was inadequate. The judge found that the Crown's offer was based on a flawed understanding of the rights and claims the KFN might assert, but reasoned that the KFN might nevertheless have identified its interests and made its claim in the process that was offered to them. There must be more than an available process; the process must be meaningful. In this regard, I agree with the views of Neilson J. in *Wii'litswx #1* at para. 178:*"*The Crown's obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information". That obligation was described by Finch J.A. (as he then was) in *Halfway River* at para. 160 as "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".

[180] I am satisfied that the Province understood the nature of its obligation as outlined above. The Province endeavoured to engage the petitioners in consultation on the Permits over a prolonged period of time. The Province attempted to provide the petitioners with the information they required to assess the impact of the Permits on their Treaty rights at an early stage in the Permit approval process. Ministers of

the Province met with the petitioners' representative three times between December 2013 and January 2015. The Province attempted to commence discussions about a custom consultation process in the summer of 2014, but the petitioners did not respond to those attempts. As a result of the environmental assessment process the Province did have an understanding of the concerns of the petitioners. In summary, the Province did provide T8TA with all necessary information about the Permits in a timely way and was prepared to consider any concerns that the petitioners brought forward, short of cancelling the Project entirely.

[181] I am satisfied that the process of consultation was frustrated by the positions taken by the petitioners and, in particular, by their refusal to engage in consultation within a reasonable timeframe. I am satisfied that the Province was prepared to engage in meaningful consultation and that both the Province and BC Hydro were prepared to provide funding to assist the petitioners in such consultation.

[182] I am also satisfied that the Province did not impose unreasonable time constraints on consultation on the Permits. The petitioners should have realized that it was highly likely that the Project would proceed once the EAC and federal Decision Statement were issued on October 14, 2014. Over seven months elapsed between that date and the time when the Province concluded consultation on the Permits. In my view, that seven months was a reasonable and adequate time within which meaningful consultation could have taken place.

[183] For the above reasons, I conclude that to the extent there was any deficiency in the consultation process in this case, it is attributable to the petitioners' own actions.

VII. STATUTORY DECISION MAKERS' REASONS

[184] The relief sought in this petition is the setting aside of the Permits. This would ordinarily require a review of the reasons of the statutory decision makers on the appropriate standard of review.

[185] This raises the question of the standard of review applicable to those decisions. In *Haida,* Chief Justice McLachlin addressed the standard of review:

> 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness.

[186] However, in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, Justice Binnie, speaking for the majority that included McLachlin C.J.C., held that a decision maker's conclusion that there had been adequate consultation was reviewable on a correctness standard.

[187] In this case, counsel spent very little time either orally or in their written submissions addressing the decision makers' reasons. The focus of the submissions before me was on the underlying question of whether there had been adequate

consultation by the Province before it submitted the Permits to the statutory decision makers.

[188] I have reached the conclusion that the statutory decision makers correctly decided that the Province had met its obligation to consult in this case. I therefore consider it unnecessary to address the question of standard of review.

VIII. CONCLUSION

[189] I find that the petitioners have not established any basis for judicial review of the statutory decision makers' decisions to issue the Permits.

[190] I would be remiss if I did not state that I agree that a custom consultation process would be of great assistance to the parties in dealing with the many issues that will arise during the 10-year construction phase of the Project. As of the date of the hearings in this petition, the parties had not been able to conclude a Consultation Agreement. I also understand that the Province has terminated the Negotiation Agreement.

[191] I urge the parties to renew their efforts to reach agreement on a custom consultation process for consultation on the Project. Until such an agreement is concluded, the parties must of course act in accordance with their existing agreements and the jurisprudence explaining the duty to consult.

[192] In this regard, I note that the parties agreed to use their best efforts to conclude a Consultation Agreement. That required good faith efforts on both sides to conclude such an agreement. The question of whether such efforts have been made may well be relevant to the question of whether there is meaningful consultation on future permits. However, that issue is not before me on this petition.

[193] The petition is dismissed without costs to any party.

"The Honourable Mr. Justice Sewell"