IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office),* 2015 BCSC 1180

Date: 20150707
Docket: S146183
Registry: Vancouver

Between:

Chief Liz Logan in her own right on behalf of the Members of the Fort Nelson First Nation

Petitioners

And

Executive Director of the British Columbia Environmental Assessment Office, Canadian Silica Industries Inc. and Jeffrey Bond

Respondents

Before: The Honourable Mr. Justice Davies

On judicial review from: A decision of the British Columbia Environmental Assessment Office, dated August 8, 2013

Reasons for Judgment

Counsel for the Petitioner:	J. Tate N. Hume
Counsel for the Respondent, Executive Director of the British Columbia Environmental Assessment Office:	E. Christie A. Peacock
Counsel for the Respondent, Canadian Silica Industries Inc. and Jeffrey Bond:	K. G. O'Callaghan D. Bryant
Place and Date of Trial/Hearing:	Vancouver, B.C. January 21 - 23 and April 1, 2015
Place and Date of Judgment:	Vancouver, B.C. July 7, 2015

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INTRODUCTION

[1] This judgment concerns the threshold production capacity that will trigger an environmental assessment under Table 6 (Mine Projects) of the *Reviewable Projects Regulation*, B.C. Reg. 370/2002 (the *Regulation*) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the *Act*) for a new Sand and Gravel Pit. That new pit is proposed for development by the respondents, Canadian Silica Industries and Jeffrey Bond (collectively CSI). It is identified as the Komie North Mine.

[2] The Komie North Mine will be located on lands within the traditional territory of the petitioner, Fort Nelson First Nation (FNFN) in an area about 80 kilometers northeast of the City of Fort Nelson near Komie Creek.

[3] In addition to the Komie North Mine, CSI may eventually seek to develop up to five other new sand and gravel mines, all on lands within the FNFN's traditional territory.

[4] Three of those other potential mines would also be located in the area near Komie Creek and two would be located about 100 miles southeast of Fort Nelson, near Dazo Creek.

[5] CSI's development of the Komie North Mine and potentially the other five mines is intended for the extraction of "silica" or "frac" sand for use in the "hydraulic fracturing (or 'fracking') process" used in the extraction of natural gas.

[6] Many existing and potential deposits of natural gas are located in or near the FNFN traditional territory, making the frac sand sought to be extracted by CSI a particularly valuable commodity due to proximity to the needs of the developers of gas deposits.

[7] The FNFN is concerned about the potential environmental impact that the Komie North Mine may have upon its traditional territory and existing treaty rights. Those concerns are exacerbated by the magnitude of the potential environmental impact of five additional mines in the same territory.

[8] The FNFN has made those concerns known to the Environmental Assessment Office (EAO) as well as other governmental authorities from whom approval must be obtained by CSI for the development and operation of the Komie North Mine as well as the other potential mines identified by CSI.

[9] More specifically, as it relates to this petition, the FNFN has asserted in numerous communications with the EAO that the Komie North Mine should be designated as a reviewable project under the *Regulation*.

[10] However, on August 8, 2013, without consultation with the FNFN, the EAO determined (the Decision) that the Komie North Mine will not be a reviewable project.

[11] The EAO reached that conclusion by accepting that the annual production capacity for the Komie North Mine, as determined and represented by CSI, does not meet the threshold criteria of Table 6 of the *Regulation* that would make the project reviewable.

ISSUES

[12] The Decision and the circumstances that led to the EAO's making of it are each the subject of this petition for judicial review.

[13] The FNFN alleges that the EAO's failure to designate the Komie North Mine as a reviewable project under the *Regulation* resulted from an unreasonable interpretation and application of the threshold criteria in Table 6.

[14] The FNFN also alleges that in reaching the Decision the EAO and the respondent Province of British Columbia (the Province) breached the constitutional obligations of the Crown in Right of the Province (the Crown) to consult with the FNFN and, if necessary accommodate its interests when making the Decision which adversely affects its aboriginal treaty rights.

[15] In response, the EAO asserts that the Decision both correctly and reasonably interpreted the threshold criteria in Table 6 of the *Regulation* applied in determining that the Komie North Mine is not a reviewable project.

[16] In further response, although the Province does not dispute that the Province had a duty to consult with the FNFN with respect to the Komie North Mine generally, it says that additional consultation with the FNFN by the EAO specifically related to its interpretation and application of the threshold criteria in Table 6 of the *Regulation* to the Komie North Mine was and is not required.

[17] Determination of the issues raised by this petition engages consideration and interpretation of: the provisions of the *Act* and the *Regulation*; consideration of Treaty No. 8 (Treaty 8) as it relates to the Komie North Mine project; and, the applicable standard of judicial review to be applied by the court in respect of the Decision and in relation to the alleged breach of the Province's duty to consult.

[18] Further, while the Decision specifically under review relates only to CSI's proposed development of the Komie North Mine, CSI's potential development of additional frac sand extraction mining operations in the FNFN's traditional territory is also relevant.

[19] That is so because the interpretation and application of the threshold criteria by the EAO with respect to the Komie North Mine will obviously impact environmental assessment decision making in relation to the all of the sand and gravel operations in the FNFN's territory contemplated by CSI and especially the three located in the immediate vicinity of the Komie North Mine.

BACKGROUND

[20] The FNFN's traditional territory is located in the northeast corner of British Columbia. It stretches to both the Yukon Territory and Northwest Territory borders on the north and the Alberta border on the east. To the west it extends beyond the Kechika River.

[21] The FNFN is a band as defined by the *Indian Act*, R.S.C. 1985, c. I-5. It has approximately 800 members who are governed by an elected Chief (presently the petitioner Chief Liz Logan) and council.

[22] The ancestors of the FNFN adhered to Treaty 8 in 1910. Treaty 8 consists of both oral and written terms.

[23] Among other things, Treaty 8 provides:

> …And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading and other purposes.

[24] In addition to those specific terms in evidence on this petition is a report from the Treaty Commissioners (who negotiated Treaty 8) to the Government of Canada which stated among other things:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

[25] That report went on to say:

> We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service.

[26] Ms. Lana Lowe, the Director of the FNFN's Department of Lands and Resources (the "FNFN Lands Department") has deposed that:

> 11. The traditional FNFN mode of life is based on our lands and rivers. Our families have always tended and harvested resources from the areas around their villages, using patterns known as a "seasonal round".
>
> 12. These traditions and patterns are alive today. Among other things, FNFN members:
>
> (a) travel throughout the Territory, by foot, boat, and other means;
>
> (b) gather plants for food and medicine;
>
> (c) build and maintain cabins;
>
> (d) catch fish;
>
> (e) hunt animals such as moose, bear, rabbits, caribou; and
>
> (f) trap furbearing animals such as beaver and lynx.
>
> 13. Each FNFN family has a lake and river area for use in the season round. For example, a family from Náduhi Deezé (Snake River) would travel from that village to Deer River, then down the Nelson River, up to Two Island Lake, over to the Tsea Lakes and River, then to Komie Lake, down to Kotcbo Lake, and then back to Snake River.
>
> 14. Our ancestors used knowledge developed over centuries to make decisions about these activities and otherwise manage the natural resources in the Territory.
>
> 15. FNFN works hard to maintain, improve, and use this knowledge today because our members remain connected with and responsible for the lands, waters, plants, and animals that our ancestors tended for so long.

[27] The FNFN Lands Department has been set up to promote environmental stewardship in the FNFN's traditional territory. Its responsibilities include dealing with referrals from Crown agencies and proponents of projects in relation to activities proposed to take place in the FNFN's territory.

[28] In May of 2010, in order to undertake exploration and development of a frac sand quarry in the Komie North area the respondent, James Bond on his own behalf and on behalf of CSI submitted an application for a License of Occupation under s. 11 of the *Land Act*, R.S.B.C. 1996, c. 245 for a 210 hectare parcel of land adjacent to Komie Road.

[29] On August 30, 2010, the Province provided a copy of that application to the FNFN Lands Department.

[30] By letters dated October 13, 2010 and December 9, 2010, the FNFN Lands Department advised the Province's Integrated Lands Management Bureau of concerns with respect to potential adverse impact of the proposed Komie North Mine on the FNFN's rights and interests. Among other things the FNFN sought "an adequate and meaningful consultation process" and the provision of detailed documentation concerning CSI's proposal. Those letters also referenced concerns about the lack of an environmental assessment for the project.

[31] On March 24, 2011, a tenure offer for a five year term commencing March 21, 2011 for the area which comprises the site that is now the proposed location of the Komie North Mine was made to CSI by the Ministry of Forests, Lands and Natural Resources Operations (Ministry of FLNRO) for a License of Occupation comprised of an investigative phase and a production phase.

[32] On May 24, 2011, the Ministry of FLNRO advised the FNFN that a License of Occupation for 199.9 hectares comprising the Komie North Mine site had been approved for a term of five years for quarry purposes. The letter also stated that:

> …
>
> A referral letter was sent on August 30, 2010 requesting comments on how this application may impact your rights. A faxed letter was received on October 13, 2010 that did not specifically outline how the rights of Fort Nelson First Nation would be impacted by approving this application.
>
> In the absence of site specific comments we have been left to use existing knowledge of the area and previous consultation to mitigate the low potential impact to rights.

[33] No mention in that correspondence was made in respect of the December 9, 2010 letter from the FNFN that had also raised the concerns addressed by the FNFN in its October 13, 2010 letter.

[34] While processing of its application for a License of Occupation for the Komie North Mine was underway, CSI had also made applications for Licenses of Occupation relating to sand and gravel quarries for two other sites in the vicinity of the Komie North Mine as well as two in the Dazo Creek area.

[35] Those additional four applications were brought to the attention of the FNFN Lands Department before it was advised on May 24, 2011 of the approval by the Ministry of FLNRO of the License of Occupation of the Komie North Mine site.

[36] After approval of the License of Occupation of the Komie North Mine site was made known to the FNFN it was also notified in August of 2011 of an application for a License of Occupation for a fourth sand and gravel quarry in the Komie Creek area sought by CSI.

[37] The total land area for the six Licences of Occupation for sand and gravel quarrying sought by CSI is approximately 4,800 acres.

[38] In addition to the total of six Licenses of Occupation for sand and gravel quarries applied for by it CSI also applied (on July 11, 2011) to the Province for an investigative use permit over 216,368 hectares of land in the FNFN's traditional territory that also encompassed CSI's four applications in the vicinity of Komie Creek.

[39] CSI's investigative permit application was forwarded by the Province to the FNFN Lands Department on September 11, 2011 with the advice that the permit would be used to "identify potential sites for frac sand extraction".

[40] At that time and up until the hearing of this petition there were no frac sand quarries in the FNFN's traditional territory although other traditional sand and gravel pits did exist.

[41] On June 13, 2012, Chief Kathy Dickie, then Chief of the FNFN wrote to the Honourable Terry Lake, then the Minister of Environment for the Province (the Minister) "formally" requesting that the Minister designate the four sand and gravel quarries proposed near Komie Creek as well as the two Dazo Creek sites for which Licenses of Occupation had been sought by CSI as reviewable projects under s. 6 of the *Act.*

[42] Among other things, in that letter the Chief Dickie wrote concerning the four Komie North applications and proposed quarries:

> The Komie North Applications
>
> As you can see in the table attached as Schedule 1 to this letter, there are five applications for the Komie North area. Please see the attached map (Schedule 2 - Komie North) which sets out the location of these applications and demonstrates their geographic proximity to each other…All five of the Komie North applications are from a single proponent, Jeffrey Bond and Canadian Silica Industries Inc. ("Bond-C5Il"), for the same purpose - quarrying sand and gravel…the other applications are for licences of occupation and cover 1,000.6 ha. As you can see on the Schedule 2 map, applications 8015273, 8015425 and 8015352 are all contiguous. Application 8015443 is 1.9 km away from the site of those three applications. Applications 8015425 and 8015352 have estimated production limits of 240,000 tonnes per year. Application 8015443 has an estimated production limit of 249,000 tonnes per year. No production estimate is provided for 8015273, but it seems reasonable to assume that it would be similar to the other applications put forward by the Bond-C5Il proponent in Komie North and Dazo Creek which all have production estimates between 240,000-249,000 tonnes per year. Applications 8015425 and 8015443 indicate that gravel will also be quarried, but It is not clear whether the gravel is included in the production estimates, as it should be. This may increase the estimates. Notably, all of these estimates fall just short of the production capacity criteria set out in Table 6 (Mine Projects) of the EAA's Reviewable Project Regulation ("Regulation"). Under the Regulation, any sand and gravel pit project which produces ≥ 1,000,000 tonnes of sand or gravel or both over a period of ≤ 4 years is subject to an environmental assessment ("EA"). Also under the Regulation, any construction stone and industrial mineral quarry project which produces it 250,000 tonnes/year and is regulated as a mine under the *Mines Act* is subject to an EA. All four applications note that they will utilize the same processing facility that is to be situated on the land subject to application 8015352.

[43] Chief Dickie also wrote:

> Environmental, social, heritage and health effects
>
> It is likely the projects these applications represent will have significant adverse environmental effects and may have significant adverse social, heritage and health effects. It is difficult to set out many details in this regard because more information is required from the proponents, and assessments of the values [e.g. ecological and cultural) in these areas need to be undertaken, before effects can be determined. Without an EA, much of this information may not be provided and these assessments may not be undertaken. However, the information available points to the potential for significant adverse environmental effects. These applications affect very large areas: the four Komie North applications affect 1,000.6 ha (= 2,500 acres) and the three remaining Dazo Creek applications affect 7,560 ha (= 18,900 acres). The estimated rates of production for each of the applications taken

> alone is nearly sufficient to trigger an EA under the Regulation; any two taken together would trigger an EA. This raises questions as to the veracity of the estimates - were they purposefully under-estimated to avoid triggering an EA? This is particularly so as all of the applications have approximately the same production estimates, despite a tremendous variance in the size of the areas affected by the applications (from 50.7 to 4,124 ha.). Presumably the thresholds in the Regulation are set at levels at which there is concern that projects could result in adverse effects which should be assessed and mitigated through the EA process. Further, the Dazo Creek applications are adjacent to RRAs which have been temporarily set aside from development because they represent remnant core caribou habitat; extensive industrial development on these adjacent lands could significantly affect the value of this scarce habitat, particularly given the scale of these developments. Also, a proper cumulative effects assessment would require these applications be considered together in a single EA.
>
> The lands these applications affect are within FNFN's territory and are areas where members practice their treaty rights. As an example, the Dazo Creek proposals are set between two FNFN village sites - Fontas and Kantah, which is a strong indicator that the Dazo Creek area subject to these applications has seen intensive traditional use over thousands of years and to this day. Both the Komie North and Dazo Creek areas are used for hunting, fishing, trapping, habitation, gathering and travel. These areas contain important habitats supporting animals we are reliant on for the practice of our treaty rights.
>
> This information on potential effects is, by necessity, provisional only and very general as we do not have (nor do we believe the Province has) sufficient information from the proponents to properly evaluate these proposals at this time. Further, we have not undertaken any site and project specific assessments to determine what FNFN interests may be affected and to what extent they may be affected. We only provide this general information to assist you in your inquiries as to whether you should exercise your discretion under the EAA to designate these applications as a reviewable project. This information Is not provided in the context of a consultation on these applications as it is not yet clear how these projects will be assessed by the Province and how FNFN and the Province will consult on these applications (e.g., under what regulatory framework). Certainly, no proper consultation about impacts to our interests can be achieved when these projects are proposed in such a fragmented fashion.

[44] The total area of concern addressed by Chief Dickie with respect to the Dazo Creek applications (7,650 hectares) included three applications by proponents other than CSI.

[45] Chief Dickie also went on to express concerns with “project splitting” which she asserted should require designation of the projects as reviewable projects under

the *Act* and *Regulation.* Specifically with respect to the four Komie North vicinity applications she wrote:

> Project Splitting
>
> It would appear these applications have been designed and submitted in such a fashion as to avoid triggering an EA through project splitting, by ensuring that the estimated production capacity for each application "split off" from the whole (all applications taken together) falls just short of the EA threshold for projects of this type in the Regulation. It is our view that the four Komie North applications for licences of occupation are all a single reviewable project for the following reasons (summarized here but as set out in more detail above):
>
> - three applications are contiguous and a fourth is only 1.9 km. away;
> - all are proposed by the same proponent - Bond-CSII;
> - all are for the same industrial activity-quarrying sand and gravel; and
> - all of the product quarried will be processed at the same facility.
>
> Further, the proponent has explicitly stated in correspondence to us that their applications in Komie North "may all be considered effectively as one application" and their application materials note that each application complements the others (e.g. the 8015443 application notes "this application compliments [sic] our Komie North, Cabin-Komie North and Brandt-Komie North applications that were previously submitted...").

[46] In requesting designation as a reviewable project Chief Dickie concluded by stating**:**

> Summary
>
> It is FNFN's request of you that the applications for Komie North and Dazo Creek be designated a single reviewable project under the EAA because of the interrelatedness of these applications. These applications represent projects which may have significant adverse environmental, social, heritage and health effects, given the scope of the industrial activity proposed. Designation of these applications as a reviewable project is in the public interest, as it will enable the engagement of the public in a proper assessment and it will uphold the public interest in environmental protection that the EA process represents. It is also in the public interest to ensure the EA process is properly triggered and that efforts to circumvent it do not succeed.
>
> Thank you for your time and attention to this matter. We look forward to hearing from you as to your decision on an EA of these applications. If you have any questions, please do not hesitate to contact us

[47] Chief Dickie's letter of request was responded to by Ms. Karen Christie, Executive Project Director of the EAO on February 8, 2013. In responding she wrote:

> On June 20, 2012, Fort Nelson First Nation wrote to the Honourable Terry Lake, Minister of Environment, to request that the Minister designate seven frac sand mine proposals near Dazo Creek and Komie Creek in northeast BC as a reviewable project (or projects) pursuant to section 6 of the *Environmental Assessment Act* (Act). The frac sand mine proposals are described in seven License of Occupation applications under the *Land Act*.
>
> I am writing to let you know that the Minister has decided not to designate the frac sand mine proposals as a reviewable project (or projects) under the Act. The Minister concluded that the proposals are preliminary, and not yet sufficiently defined to be considered proposed projects. As such, it is premature to assess their suitability for designation as a reviewable project (or projects) under section 6 of the Act.
>
> Environmental Assessment Office (EAO) is of the opinion that the six frac sand mine proposals described in the License of Occupation applications jointly submitted by Jeffrey Bond and Canadian Silica Industries Inc. may, when further advanced in terms of design, constitute a single project that requires an environmental assessment (EA). EAO has informed Jeffrey Bond and Canadian Silica Industries Inc. of the Minister's decision and EAO's opinion by letter, and has requested that they contact EAO prior to initiating the development stage of any of the six Licences of Occupation, should they be issued by Ministry of Forests, Lands and Natural Resource Operations (FLNRO), in order to determine whether an EA will be required
>
> [Emphasis added.]

[48] On December 1, 2012, three months before that response on February 8, 2013 to the FNFN's designation request of June 13, 2012, CSI had, unbeknownst to the FNFN, already submitted a Notice of Work application for the Komie North Mine to the Ministry of Energy and Mines (the Mines Ministry) for a permit under the *Mines Act,* R.S.B.C. 1996, c. 293.

[49] Among other things, the Komie North Mine Notice of Work application stated that the estimated annual extraction form the site was 240,000 tonnes per year.

[50] On May 2, 2013 the Ministry of FLNRO notified the FNFN that CSI had submitted a Sand and Gravel/Quarry Operation and Notice of Work application for the Komie North Mine and had also applied for an Occupant License to Cut.

[51] That notification enclosed documents relevant to the proposed development including the Notice of Work application that CSI had submitted to the Mines Ministry on December 1, 2012. Also included with the notification were copies of:

1) an "Updated Management Plan (Development Plan)" dated March 13, 2013; and

2) a "Borrow Pit and Reclamation Plan for Komie North Project" dated November 28, 2012 prepared by CSI's consultant AMEC Environment and Infrastructure.

[52] CSI has submitted (at para. 23 of its written submissions) that:

> 23. The Updated Management Plan differed from the Preliminary Management Plan, in that it included a detailed mine plan, a more detailed water management plan, a reclamation plan, and better defined estimate of the quantity of saleable material and included the results of further investigative work, including a non-invasive surface investigation, a sonic drill investigation and an AIA [Archeological Impact Assessment]. The description of the production capacity of the mine in the Updated Management Plan is:
>
> > Based upon current market conditions, 240,000 tonnes of product will be produced annually.
> >
> > ... Based on a production rate of 240,000 tonnes of product per year, the Phase I, 5 years of mining would produce 1,200,000 tonnes of product sand per year and 950.000 tonnes of waste gravel material to be backfilled into the pit. The remaining resource at the 4.3m extraction depth for Phase II, years 6-12 is estimated at 1,764,000 tonnes and 1,386,000 waste backfill.

[53] The Executive Summary of the Borrow Pit and Reclamation Plan stated, amongst other things, that:

> The Komie North Sand Project consists of approximately 206.5 hectares, which includes three separate pits, processing plant, light industrial area and a truck haul road between pits and the processing plant. The land is under Crown Lease Tenures. The property has been drilled by 28 drill holes and test pits and the sand and gravel resources extensively sampled and tested. The finished product after processing will be washed and dried sand used in the fracking industry. The boulders, grave, silt and clay material extracted as run-of-mine material and processed through the plant as waste material will be used as backfill after mining extraction is completed. The filler press material from de-watering process at the wash plant will also be deposited as backfill in the mine out areas.

> …
>
> The sand and gravel deposit to be exploited is up to 15 m thick; however only product down to the water table is currently planned to be extracted; additional extraction will require art assessment of site hydrogeology. Annual production will not exceed 240,000 tonnes.

[54] On June 3, 2013 the FNFN Lands Department responded to the Ministry of FLNRO's letter of May 2, 2013, and the documentation provided with it.

[55] In that response Ms. Lowe complained about what she asserted was an inadequate review period and also what she claimed were incomplete and inaccurate application materials provided by CSI. She also provided particulars of those assertions.

[56] Concerning the need for an environmental assessment that had first been requested in June of 2012 when Chief Dickie wrote to the Minister Ms. Lowe wrote:

> Referral to the EAO
>
> In the EAO's letter of February 8, 2013, on behalf of the Minister of Environment, the EAO stated its opinion that the frac sand proposals of the Proponent may, "when further advanced in terms of design", constitute a reviewable project subject to an environmental assessment ("EA"). In this letter, the EAO requested notification from the Proponent "prior to initiating the development stage of any of the six Licences of Occupation, should they be issued," to enable the EAO to determine whether an EA would be required. The EAO needs to be made aware that the Proponent has initiated the development stage of its only existing Licence of Occupation for the Komie North parcel, as the Proponent has applied for the Authorizations in order to allow it to proceed with construction of a frac sand processing facility on that parcel. Please confirm that the EAO has been made aware of this development application. The EAO must have the opportunity to assess these current applications of the Proponent's.
>
> As part of its application to proceed to development on the Komie North parcel, the Proponent has amended its Development Plan in order to provide more detail on its proposed development activities. The production estimates in the amended Development Plan considerably exceed the threshold necessary to classify the proposed project as reviewable under the *Reviewable Projects Regulation* (the "*Regulation*") under the EAA, and leave no doubt that the Proponent's proposal for the Komie North parcel must be subject to an EA, and receive approval under the EAA, before further provincial approvals are issued.
>
> Table 6 of the *Regulation* establishes that a sand and gravel pit is a reviewable project subject to an EA if the new pit facility:

> ... will have a production capacity of
>
> (a) ≥500 000 tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
>
> (b) over a period of ≤ 4 years of operation, ≥ 1000 000 tonnes of excavated sand or gravel or both sand and gravel,

The amended Development Plan states at page 3, that during the first five years of mining on the Komie North parcel, the Proponent will excavate an estimated 1,200,000 tonnes of sand and 950,000 tonnes of gravel. This works out to an estimated extraction of 430,000 tonnes of sand and gravel annually, or 1,720,000 tonnes of excavated sand and gravel over four years. It is abundantly clear that those numbers exceed the threshold in the *Regulation* of 1,000,000 tonnes of excavated sand and gravel over four years. Thus the Proponent's proposed project is a reviewable project under the *Regulation* which is subject to an EA.

The Proponent has apparently tried to circumvent the threshold in the *Regulation* by only counting sand in the project's production estimate and characterizing the gravel as "waste". This is inaccurate in both law and fact. The *Regulation* clearly sets the threshold number for a reviewable project based on the tonnage of excavated sand and gravel, counted together. What the proponent chooses to do with the sand or gravel once it is excavated does not affect the determination of a reviewable project under the *Regulation*. In any event, the Proponent clearly intends to put the gravel to use. The amended Development Plan states at page 4 that "gravel material from the processing of the sand will be used as road base and topping" and later states at page 9 that "the roads and areas surrounding all of the plant's facilities will be gravelled for safety".

It is clear that the estimated excavation of all sand and gravel from the Komie North parcel must be included in the determination of whether the Proponent's proposal constitutes a reviewable project according to the thresholds set out in the *Regulation*. It is equally evident that, according to its own estimates, the Proponent proposes to excavate an amount of sand and gravel that classifies its proposal as a reviewable project, which must be subject to an EA before any further provincial approvals for the development can be issued. It is critical that the EAO review this application and determine the applicability of the *EAA* to the proposed project before FLNRO proceeds to issue any Authorizations respecting the Proponent's applications, FNFN will be writing to the EAO requesting the EAO assess whether the Proponent's current applications for the Komie North parcel constitute a reviewable project under the EAA (and making the argument as set out above that they do) and that the EAO communicate to the respective provincial agencies that the Proponent's proposal is a reviewable project and, as such, section 9 of the *EAA* prevents the issuance of the Authorizations sought until an EA certificate has been issued.

In closing Ms. Lowe stated:

> FNFN looks forward to answers from the province as to the issues raised in this correspondence: Has the EAO been provided with notice of and full information concerning the Proponent's applications that are the subject of this referral? What is the province's rationale for determining that this project could be authorized as a "phased" tenure? What is the status of the province's internal consideration as to whether the Proponent's frac sand extraction proposals should be treated as a major project? We also look forward to receiving complete and corrected materials to support the applications in question.
>
> At an appropriate time, FNFN and the province will need to meet to determine what a mutually-agreeable process for consultation on the proposed Authorizations should be. However, before that occurs, these current applications of the Proponent must be forwarded to the EAO. Then, further to the EAO's letter of February 8, 2013 on this matter, a review must be undertaken by the EAO and a decision taken by the EAO with respect to the application of the EAA to this project. As noted earlier, FNFN will be engaging directly with the EAO and the Minister of Environment on the application of the *EAA* to the Proponent's Komie North project and the current applications. Until such time as that review has been completed, and the EAO has communicated the results of their review, the province (FLNRO) is not in a position to process this referral as to do otherwise could be contrary to the *EAA*, We look forward to your assurance that a hold will be put on FLNRO's processing of this referral until such time as the EAO's decision has been taken.

[57] In a letter dated June 18, 2013, Ms. Lowe also wrote to Ms. Christie of the EAO addressing many of the same concerns raised with the Ministry of FLNRO in her letter of June 3, 2013, concerning the development of the Komie North Mine and the need for an environmental assessment as a reviewable project.

[58] On June 19, 2103, Ms. Christie responded to Ms. Lowe by advising that:

> …EAO is aware of the proponent's application to move to the development stage of its License of Occupation for the Komie North parcel.
>
> Mike Peterson is the Project Assessment Manager working on this file, and is discussing the application with the project proponent, MEM and FNLR. Mike will respond to Fort Nelson First Nation once he has the required information.

[59] On July 19, 2013, CSI sent a letter to Mr. Peterson requesting "confirmation that the Komie North Project is not reviewable".

[60] In that letter CSI wrote:

> The purpose of this letter is to seek confirmation that, the Komie North Project (LOO 815115) is not a reviewable project under the *Reviewable Projects Regulation*. This letter also provides clarification on the production level and product use stated in the reclamation and development plan submitted to Forests, Lands and Natural Resource Operations (FLNRO) for LOO 815115.
>
> We have reviewed the proposed project against the *Reviewable Projects Regulation*. Our review concludes that the project falls below the thresholds.
>
> The threshold for a Sand and Gravel Pit under the *Reviewable Projects Regulation* is:
>
> > (1) A new pit facility that will have a production capacity of
> >
> > > (a) > 500 000 tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
> > >
> > > (b) over a period of < 4 years of operation, >1 000 000 tonnes of excavated sand or gravel or both sand and gravel.
>
> The production level for products sold and used (sand and gravel) from the operation will be ≤ 240 000 tonnes per year (or 960 000 tonnes over 4 years). The total area of disturbance in the first 12 years of operations as shown in the mine plan will be approximately 77.5 ha.
>
> As the production level for this proposed project will not exceed 1 000 000 tonnes of excavated sand or gravel (or both) over any 4 year operation period, the project does not trigger the *Reviewable Projects Regulation*.
>
> In Appendix E of the development and reclamation plan, under the processing plant section, we had stated we will use the waste gravels from the processing of the sand for road base and topping. The total amount of any sand and/or gravel from this project that is sold as product, or used in construction or maintenance material, will not exceed 240 000 tonnes/year.
>
> In the development and reclamation plan, we have stated in years 1-5 (5 years of operations) that the production from the facility will be 240 000 tonnes per year or 1 200 000 tonnes total for 5 years. In phase 2, years 6 - 12 (7 years of production), 240 000 tonnes per year will be produced or 1 680 000 tonnes total for the next 7 years. The document contains an error in the gross tonnage for phase 2 stating 1 764 000 tonnes of sand will be produced. Please accept the correction to 1 680 000 gross tonnes of product. We are sending a letter of amendment to fix this error in the development and reclamation plan to FLNRO which is dated July 19, 2013.
>
> As per the Feb 8th, 2013 letter from EAO, should we decide to initiate the production phase of additional five Licences of Occupation we submitted to FLNRO, we will contact EAO prior to submitting NoW application(s) to the Ministry of Energy and Mines.

[61] The FNFN was not provided with a copy of that letter when it was received by the EAO.

[62] On July 19, 2013, CSI also sent a letter to the Ministry of FLNRO seeking to amend its Borrow Pit and Reclamation Plan for the Komie North Project to accord with its communications of the same date to Mr. Peterson of the EAO.

[63] The FNFN was also not provided with a copy of that letter when it was received by the Ministry of FLNRO.

[64] On August 8, 2013, without any consultation with the FNFN, Mr. Peterson authored the Decision in which he advised CSI :

> I am writing in response to your letter of July 19, 2013, regarding the proposed Komie North Project (proposed Project). In your letter you request confirmation of whether the proposed Project constitutes a reviewable project for the purposes of the *Environmental Assessment Act* (Act).
>
> Project proponents are responsible for making their own determination as to whether or not their proposed project falls within the thresholds set out in the Reviewable Projects Regulation (the Regulation). While Environmental Assessment Office (EAO) is willing to provide its position in this regard, nothing in this letter should be construed as advice respecting the application of the Regulation to the proposed Project.
>
> The *Reviewable Projects Regulation* (Regulation) prescribes the criteria for when projects are reviewable under the Act. Under the Regulation, the proposed Project would be a sand and gravel pit, and the criteria for reviewability are provided in Part 3 of the Regulation. A new sand and gravel pit facility constitutes a reviewable project if the facility will have a production capacity of:
>
> > (a) ≥500,000 tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
> >
> > (b) over a period of ≤4 years of operation, ≥1,000,000 tonnes of excavated sand or gravel or both sand and gravel.
>
> According to the information provided in your letter of July 19, 2013, for the proposed Project, ≤240,000 tonnes per year (≤960,000 tonnes over 4 years) of sand and gravel products would be sold or used as construction or maintenance material for the operation. Based on this information, the proposed Project does not meet the criteria for a reviewable project under the Regulation.
>
> [Emphasis added.]

[65] The Decision was copied to the Mines Ministry as well as the Ministry of FLNRO but not to the FNFN.

[66] On September 13, 2013, after the Decision had, unbeknownst to the FNFN already been made on August 8, 2013, the FNFN wrote to the Ministry of FLNRO (with a copy to the EAO) advising that the FNFN had still not received a full response to its June 3, 2013 correspondence.

[67] In that communication the FNFN stated the Ministry of FLNRO should not "process further or approve the [Komie North Mine Project] until full responses to its outstanding correspondence had been given "by both the Ministry of FLNRO and the EAO (concerning the FNFN's June 18 letter)"; and "a full consultation with the FNFN has been conducted and concluded by the crown on this application".

[68] On September 26, 2013, still without knowing that the Decision had already been made, Ms. Lowe again wrote to the Ministry of FLNRO (with a copy to Ms. Christie at the EAO) stating:

> …
>
> We note at the outset that FNFN has not received any response from FLNRO to the numerous issues raised in our letter of June 3, 2013 respecting the Proponent's Applications. Nor have we received any response to our June 18, 2013 letter to the BC Environmental Assessment Office ("EAO") concerning the Applications (cc'd to FLNRO) although we did receive an email notification from the EAO that they were aware the Proponent was moving one of its seven applications in FNFN territory to the development stage, that they were reviewing it and would respond to FNFN in due course. These responses are outstanding and it is our view that FLNRO is not in a position to further process or approve the Applications until such time as substantive responses to these letters have been received, and the concerns and issues set out in them (including consultation with FNFN) have been meaningfully addressed with FNFN.
>
> FNFN has significant ongoing concerns regarding the Applications and all of the proposals the Proponent has for frac sand mine development in our traditional territory. These include the Proponent's attempts to split a large project into several separate proposals and applications in an apparent attempt to avoid environmental assessment (as addressed in our June 20,2012 letter to Minister Lake and in numerous letters to FLNRO); what appears to be a misrepresentation or misunderstanding respecting the thresholds for triggering EAs under the BC *Environmental Assessment Act* and Reviewable Projects Regulation (the "Regulation"); the need for meaningful consultation between the Crown and FNFN on these proposed developments; the significant impacts to our constitutionally-protected Treaty rights that have the potential to arise out of the development that is proposed; and, as noted above, fulsome responses to the issues raised in the above-noted correspondence.

> The Proponent's Amendment does not affect the application of the Regulation to the Applications; an EA is still triggered for the Applications due to the amounts of sand and gravel proposed to be extracted by the Proponent, even with the Amendment taken into account. It is not the amount of material that will be "sold as product" or "used as construction or maintenance material" that is relevant to the threshold which triggers an EA for a sand and gravel pit under the Regulation - it is; the amount of material excavated (as set out in some detail in our June 3 and June 16, 2013 letters to FLNRO and the EAO respectively).
>
> Table 6 of the Regulation establishes that a sand and gravel pit is a reviewable project subject to an environmental assessment if the new pit facility:
>
> > ... will have a production capacity of
> >
> > (a) ≥ 500 000 tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
> >
> > (b) over a period of ≤ 4 years of operation, ≥ 1 000 000 tonnes of excavated sand or gravel or both sand and gravel.
>
> On the basis of the numbers provided by the Proponent in its Development Plan for the Applications, including the Amendment, ≥1,720,000 tonnes of material will be excavated over a four-year period (1,720,000 tonnes on average over four years in Phase 1 and 1,752,000 tonnes on average over four years in Phase II) when both the sand and gravel to be excavated are taken into account, as is required by the Regulation. It is clear an EA is required for the development that is subject to the Applications due to the fact that over 1,000,000 tonnes of material will be excavated in a four-year period (leaving aside for the time being FNFN's view that all of the Proponent's frac sand mine proposals in our territory need to be considered as a single project due to their inter-relatedness, to enable proper assessment and consultation).
>
> As noted, FNFN looks forward to receiving responses from the provincial Crown (FLNRO and EAO) to our June, 2013 correspondence and to our further discussions on these Applications as they affect FNFN's rights and interests.
>
> [Emphasis added]

[69] On September 30, 2013 (in a letter incorrectly dated September 30, 2012) Mr. Peterson of the EAO for the first time after the Decision had been made almost two months earlier responded to the FNFN's outstanding correspondence and concerns.

[70] Most germane to the issues requiring determination on this petition for judicial review of the Decision are the following statements made by Mr. Peterson in that

letter concerning issues raised by the FNFN with the EAO and the other involved ministries more than three months earlier:

> I am writing in response to your June 18, 2013 correspondence to Environmental Assessment Office (EAO) regarding the application of Jeffrey Bond and Canadian Silica Industries Inc. (the Proponent) to move to the development stage of the License of Occupation (LOO) for land file number 8015273 (Komie North parcel). The Proponent proposes to construct and operate a sand and gravel pit that would produce ≤240,000 tonnes per year of sand and/or gravel for sale and use for approximately 12 years. The total area of disturbance, as described in the Proponent's Borrow Pit and Reclamation Plan (the Plan), would be approximately 78 hectares.
>
> Within your letter you posed several questions and interpretations to EAO that I would like to address and clarify:
>
> 1. *Fort Nelson First Nation (Fort Nelson) requests confirmation that EAO has been notified by the Proponent to move to development on the Komie North parcel.*
>
>   As requested by EAO, both the Proponent and representatives from the Ministry of Forests Lands and Natural Resource Operations (FLNR) notified EAO that the Proponent has applied to develop the Komie North parcel. FLNR provided EAO with the Plan for the proposed Project as well as the accompanying documentation, including an amendment to the Plan (dated July 19, 2013) which clarifies the production estimates.
>
> 2. *Fort Nelson expresses its strong view that the proposed Project constitutes a reviewable project subject to environmental assessment under the Reviewable Projects Regulation (the "Regulation") of the Environmental Assessment Act.*
>
>   Under the Regulation, a sand and gravel pit is a reviewable project if it is:
>
>   A new pit facility that will have a production capacity of:
>
>   (a) > 500 000 tonnes/year of excavated sand or gravel or both sand and gravel during at least one year of its operation, or
>
>   (b) over a period of < 4 years of operation, > 1 000 000 tonnes of excavated sand or gravel or both sand and gravel.
>
>   It is EAO's understanding that Fort Nelson is of the opinion that all material excavated at the site should be included in the calculation of production capacity.
>
>   EAO's view is that production capacity includes sand and gravel produced for sale or for use. Production capacity does

> not include that portion of the excavated material which would not be sold or used in the operation.
>
> The context of the *Environmental Assessment Act* favours thresholds that can be applied by proponents in advance without undue speculation. Estimates for product and non-product material are generally ascertained from low intensity sampling and testing. Non-product material can include overburden, silts, and clays and can be difficult to accurately measure.
>
> For the proposed Project, the Proponent has confirmed that both sand and gravel products (for sale and/or use within the proposed operation) would be included in the ≤240 000 tonnes per year production. After consideration of this information and the project description, it is EAO's position that the proposed Project does not meet the criteria for a reviewable project under the Regulation. While the EAO is willing to provide its position in this regard, nothing in this letter should be construed as legal advice, and the Proponent has been advised that it is responsible for making its own determination as to whether the proposed Project falls within the thresholds set out in the Regulation.
>
> 3. *Fort Nelson expressed concerns regarding licensing and permitting under FLNR and Ministry of Energy and Mines (MEM)*
>
> I understand that Greg Belyea at FLNR has responded or will be responding to your concerns regarding the use of a phased licence of occupation.
>
> EAO is aware of the 5 additional applications for LOO that were submitted by the Proponent to FLNR. FLNR will notify EAO if any of the additional LOO's are granted. The Proponent has also committed to contacting EAO prior to submitting Notice of Work application(s) to MEM for any of the submitted LOO.
>
> Should the Notice of Work for the proposed Komie North operation be granted by MEM, any subsequent Notices of Work submitted by the Proponent may potentially be considered a modification to the Komie North operation. The criteria to determine it a modification of a sand and gravel pit would be subject to an environmental assessment is defined in s. 8(2) of the Reviewable Projects Regulation.
>
> [Emphasis added.]

[71] Not surprisingly the FNFN took issue with the Decision and the EAO's interpretation and application of the threshold criteria in Table 6 of the *Regulation* in deciding that the Komie North Mine Project did not meet the threshold requirement for designation as a reviewable project.

[72] In a letter dated October 22, 2013, Ms. Lowe wrote to Ms. Christie of the EAO advising:

> …
>
> We disagree with the EAO's position that, under the Regulation production capacity of a Sand and Gravel Pit does not include the portion of the excavated sand and gravel that would not be "sold or used in the operation".
>
> The Regulation clearly sets the threshold for a reviewable project based on the volume of "excavated sand or gravel or both sand and gravel". Under the Regulation, what a proponent chooses to do with the sand or gravel once it is excavated is irrelevant. In any event, as we noted in our letter of June 18, the Proponent has indicated that it intends to put the excavated gravel or some of it to use. The Proponent intends to excavate a quantity of sand and gravel in excess of the threshold established in section 8 of the Regulations. As a result, the project is a reviewable project.
>
> In addition to being in accordance with the plain language of the Regulation, this interpretation is consistent with the scheme and object of the *Environmental Assessment Act* and the Regulation. The purpose of the Regulation is to provide that projects of a size and scope that are likely to cause significant adverse environmental effects are subject to an environmental assessment. The Regulation accomplishes this by establishing thresholds in relation to critical aspects of certain classes of project. The Regulation defines the threshold for Sand and Gravel Pits by reference to the amount of "excavated sand or gravel or both sand and gravel". This accords with the object of the Regulation. Put simply, the excavation sand and gravel causes adverse environmental effects. The greater the volume of sand and gravel excavated, the greater the effects. The fact that a proponent may have little use for excavated gravel has little or no impact on the environmental impact of the excavation and therefore does not affect the issue of whether the project is a reviewable project.
>
> The only rationale offered for the EAO's position does not withstand scrutiny. The EAO notes that it may be difficult to ascertain at the outset of a proposed sand and gravel pit project the quantity of extraneous material such as "overburden, silts, and clays". No one is suggesting that the proponent need measure these materials. The Regulations require and depend upon an estimate of the volume of sand and gravel to be excavated. There is no evidence that it would be difficult for the Proponent to ascertain the quantity of gravel in the Komie North parcel. On the contrary, the Proponent has done so.
>
> The EAO's interpretation of the Regulation as excluding the volume of excavated gravel is unreasonable. This interpretation is contrary to the express language of the Regulation and at odds with the scheme and object of the *Environmental Assessment Act* and the Regulation. The Regulation is clear that a Sand and Gravel Pit is a reviewable project if the volume of excavated sand and gravel exceeds the stated threshold. The Proponent proposes to excavate an amount of sand and gravel from the Komie North parcel that exceeds the threshold in the Regulation. Accordingly, this project

> is a reviewable project, which must be subject to an environmental assessment before any further provincial approvals can be issued.
>
> FNFN requests that the EAO communicate to the provincial permitting authorities that the Proponent's proposal for the Komie North parcel is a reviewable project and, as such, section 9 of the *Environmental Assessment Act* prevents the issuance of the Licence to Cut and Notice of Work permit until an environmental assessment certificate has been issued in respect of this project.

[73] On January 14, 2014, Mr. Peterson replied to Ms. Lowe's correspondence re-iterating the correctness of the Decision, and in so doing referred to the decision of the Court of Appeal in *Friends of Davie Bay v. Province of British Columbia*, 2012 BCCA 293 [*Friends of Davie Bay*] to which I will later refer in detail.

[74] In his letter of January 14, 2014 Mr. Peterson advised the FNFN as to why the EAO maintained that the Decision was correct and reasonable. In summary, the reasons given were:

1) The EAO's view is that extracted sand and gravel only counts for the purposes of the numeric thresholds [in Table 6 of the *Regulation*] if it is part of the Proponent (CSI)'s production capacity, that being, "the amount of sand and gravel that the Proponent will produce for sale or use" based on several factors stated to be:

> First, "production capacity" generally means the amount of "product" or "output" of something that has value added as compared to inputs. It would be contrary to the ordinary meaning of production capacity to measure it by including "waste material". Canadian Silica has confirmed, by their letter of July 19, 2013, that the amount of product sold and used, including both sand and gravel, will be less than the above thresholds.
>
> Second, interpreting item 3 of Table 6 in this manner is consistent with the scheme of the *Environmental Assessment Act* and an interpretation of the *Reviewable Projects Regulation* that avoids requiring proponents that have an intended production level below the numeric thresholds to engage in an extensive analysis of the amount of sand and gravel in waste materials, and avoids the Environmental Assessment Office (EAO) having to review such studies for the purposes of forming a view as to whether a project is a reviewable project.

In support of those positions and the following ones the EAO relied upon the Court of Appeal's decision in *Friends of Davie Bay.*

2) The EAO's view is that:

> …Consistent with the reasoning in *Friends of Davie Bay v. British Columbia*, our view is that in situations where the application of thresholds in Table 6 are ambiguous, it is generally preferable to apply an interpretation that is relatively easily applied by proponents based on intended production levels not estimates that are speculative or not easily identified.
>
> If the thresholds set by item 3 included waste gravel and waste sand the result in our view would be that proponents would be required to apply a threshold that is difficult to ascertain and is more speculative and would require oversight by EAO. Sand and gravel pits are developed for an intended production capacity of material that will be sold or used.

3) If that was not the case:

> Pit operators may estimate the amount of waste material that will need to be dug up in order to remove sand and gravel that meets their production specifications but this waste material is typically treated as an undifferentiated mix of materials that may potentially include boulders, clay, silt sand and gravel. It is theoretically possible to estimate the amount of sand and gravel that will be included in this waste material, by digging multiple bore holes, estimating the amount of different components in each bore hole, applying a statistical analysis to the bore holes situated in any area that will be mined in a single year or four year period, and then estimating the total amount of sand and gravel that will be dug up during any year or four year period. For the estimates to have any statistical significance, i.e. for them to be something other than speculative, pit proponents would need to dig more bore holes than are usually required for the purposes of assessing the suitability of a resource for mining. To form a position on whether a project is captured or not, EAO would need to review estimates to ensure that that core samples are representative and analysis properly carried out.
>
> Our view is that interpreting the Table 6 threshold for sand and gravel pits as being based on amounts of sand and gravel produced, i.e. excavated for sale or use, is consistent with the scheme of the Act because it is easily applied by proponents without additional analysis, it is less speculative and does not require EAO to review determinations made by proponents. It is consistent with the wording of item 6 which refers to "production capacity".
>
> [Emphasis added.]

4) Accordingly:

> … While the total of waste gravel, waste sand, produced gravel and produced sand may exceed the regulatory thresholds, for the reasons discussed above it is not appropriate to include either waste gravel or waste sand in production capacity. Thus, our view is that it is not

> necessary for the Proponent to differentiate between waste gravel, waste sand and other waste material because only product gravel and sand is included in production capacity. The amount of product sand and gravel proposed to be excavated is below the thresholds set out in the *Reviewable Projects Regulation*.

[75] Those assertions continue to be the primary bases upon which the EAO supports the correctness and reasonableness of the Decision.

[76] The EAO has also continued to take the position that no consultation with the FNFN in addition to that which had occurred before the Decision was made was necessary because its interpretation of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* concerns interpretation of criteria of general application in the Province and thus does not attract the specific duty to consult alleged by the FNFN.

[77] As far as I am aware, as of the dates of the hearing of this petition the Mines Ministry had not yet decided whether to approve CSI's Notice of Work application for the Komie North Mine.

[78] Also, Jeffrey Bond has deposed that although CSI has applied for the five Licenses of Occupation necessary for the potential development of the three other mines in the vicinity of Komie Creek and the two in the Dazo Creek region none of those licences have been approved.

[79] Mr. Bond has further deposed that CSI has "no present plans to develop multiple mines".

ANALYSIS AND DISCUSSION

[80] Aside from the issue of the alleged breach of the Province's duty to consult with the FNFN concerning the interpretation and application of the Table 6 threshold criteria of the *Regulation* to the Komie North Mine, the fundamental issue in dispute between the parties is whether EAO's decision to accept CSI's limitation of its production capacity to the sale of frac sand and the use of some of the extracted for site purposes is reasonable.

[81] I will accordingly first address the issues arising from the Decision concerning the interpretation of the threshold criteria for new Sand and Gravel Pits under Table 6 of the *Regulation* and the EAO's application of that interpretation to the proposed Komie North Mine and then address the duty to consult arguments made by the FNFN.

A. The EAO's Interpretation and Application of Table 6 of the *Regulation*

[82] Before proceeding to my determination of the substantive issues raised by the parties with respect to the EAO's interpretation of the threshold criteria for Sand and Gravel Pits under Table 6 of the *Regulation* and application of that interpretation to the proposed Komie North Mine Project, I will first discuss the standard of judicial review to be applied to the Decision.

1. The applicable Standard of Judicial Review

[83] In *Friends of Davie Bay,* the Court of Appeal held that the standard of review of the EAO's interpretation and application of the thresholds in Table 6 of the *Regulation* (in that case the threshold criteria for "Construction Stone and Industrial Mineral Quarries") is that of reasonableness.

[84] In doing so Bennett J.A. stated for the Court at paras. 29 to 30:

> [29] The statutory interpretation question in issue bears upon whether the Quarry is deemed reviewable by the combined effect of the *Act* and the *Regulation*. It has no bearing on the source of the EAO's authority to interpret its home statute or otherwise apply the provisions of the *Act* and *Regulation* to the facts of this case.
>
> [30] The question in issue is one that involves the interpretation of an enactment closely connected to the EAO's function and so, in one sense, involves the determination of whether the EAO has authority or jurisdiction to determine whether the Quarry is reviewable. However, it is not one of the "narrow or exceptional" questions that concern true jurisdiction or *vires.* Accordingly, I conclude that the standard of review applicable to the EAO's determination in the case at bar is reasonableness.

[85] In reaching that conclusion, Bennett J.A. relied upon *Alberta (Information and Privacy Commissioners) v. Alberta Teachers' Association*, 2011 SCC 61, for the proposition that "for questions involving an administrative body's interpretation of its

home statute should presumptively be reasonableness, and the party propounding correctness should bear the burden of identifying a true question of jurisdiction raised by the decision in issue."

[86] As in *Friends of Davie Bay*, no question of the jurisdiction of the EAO to interpret or apply the threshold criteria of Table 6 of the *Regulation* arises in this case.

[87] The standard of judicial review of the Decision is accordingly that of reasonableness.

[88] Concerning the reasonableness standard of review of administrative decisions the Supreme Court of Canada said in *Dunsmuir v. New Brunswick*, 2008 SCC 9 ["*Dunsmuir*"], at para. 47:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[89] Following upon *Dunsmuir*, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 59, the Supreme Court of Canada also observed:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

2. Is the EAO's interpretation and application of the threshold criteria in Table 6 of the Regulation reasonable?

[90] Determination of this issue engages principles of statutory interpretation. It also requires examination of the threshold criteria in Table 6 of the *Regulation* in the context of other relevant legislative provisions.

[91] Table 6 of the *Regulation* is reproduced below:

Table 6

Mine Project

Column 1	**Column 2**	**Column 3**
Project Category	New Project	Modification of Existing Project
1 Coal mines - SIC code 063	**Criteria**: (1) A new mine facility that, during operation, will have a production capacity of ≥ 250 000 tonnes/year of clean coal or raw coal or a combination of both clean coal and raw coal.	**Criteria:** (1) Modification of an existing mine facility that meets Threshold E.
2 Mineral Mines	**Criteria:** (1) A new mine facility that, during operations, will have a production capacity of ≥ 75 000 tonnes/year of mineral ore.	**Criteria:** (1) Modification of an existing mine facility that meets Threshold E.
3 Sand and Gravel Pits __ SIC code 082	**Criteria:** (1) A new pit facility that will have a production capacity of (a) ≥ 500 000 tonnes/year of sand or gravel or both sand and gravel during at least one year of its operation or (b) over a period of ≤ 4 years of operations, ≥ 1 000 000 tonnes of excavated sand or gravel or both sand	**Criteria:** (1) Modification of an existing pit facility that meet Threshold F.

	and gravel.	
4 Placer Mineral Mines	**Criteria:** (1) A new mine facility that, during operations, will have a production capacity of ≥ 500 000 tonnes/year of pay-dirt.	**Criteria:** (1) Modification of an existing pit facility that meets Threshold F.
5 Construction Stone and Industrial Mineral Quarries	**Criteria:** (1) A new quarry facility or other operation that: (a) involved the removal construction stone or industrial minerals or both, (b) is regulated as a mine under the *Mines Act*, and (c) during operations, will have a production capacity of ≥ 250 000 tonnes/year of quarried product.	**Criteria:** (1) Modification of an existing mine facility that meets Threshold E.
6 Off-shore Mines	**Criteria:** (1) A new off-shore mine facility.	**Criteria:** (1) Modification of an existing facility that meets Threshold G.

[92] As noted many times in the correspondence amongst the parties which I have recorded, the applicable threshold criteria of Table 6 in issue is Item 3 of Column 1 of Table 6 for "Sand and Gravel Pits".

[93] More specifically, since the Komie North Mine is a "New Project" at issue are the criteria set out in Column 2.

[94] It is immediately apparent that given that CSI's proposed "production capacity" is 240,000 tonnes/year of frac sand per year over more than four years of operations, what is in controversy is Criteria 1(b) and more specifically, whether CSI's designated "production capacity" for frac sand alone modifies substantially

downward the more inclusive phrase "excavated sand and gravel or both" when almost all of the gravel is deemed by the proponent to be waste material.

[95] The primary focus of the arguments of the parties with respect to the Decision as it relates to the interpretation of the Sand and Gravel thresholds in Table 6 is upon principles of statutory interpretation in the context of the scheme and purpose of the *Act* and the *Regulation* as a whole, and the extent to which, if at all, other statutory provisions should inform that interpretation.

a) Applicable Principles of Statutory Interpretation

[96] Although the parties disagree with respect to the reasonableness of the EAO's interpretation of the threshold criteria for new Sand and Gravel Pits established by Table 6 they agree that the approach that should be taken in interpreting the *Act* and *Regulation* is the "modern approach to statutory interpretation" enunciated by the Supreme Court of Canada in *Re: Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo Shoes*].

[97] In *Rizzo Shoes,* at para. 21, Iacobucci, J (for the Court) wrote:

> … Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[98] While the parties all acknowledge that the formulation of the modern approach to statutory interpretation adopted by the Supreme Court of Canada in *Rizzo Shoes* governs my analysis in this case they also each rely upon other more recent authority to emphasize and support the positions they advance.

[99] In that regard I note at the outset that although the EAO and CSI each made separate submissions they were generally wholly supportive of the submissions advanced by the other.

[100] The FNFN relies on the Supreme Court of Canada's decision in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 in which, Binnie J. (for the majority) after discussing the modern approach to statutory interpretation of statutes adopted in *Rizzo Shoes* went on to say (at para. 38) with respect to the interpretation of regulations:

> 38 The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of the enabling statute:
>
> > It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.
>
> (Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247)
>
> This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision.

[101] The FNFN emphasizes that in *Friends of Davie Bay* (at para. 34) the Court of Appeal held that the object of the *Act* is environmental protection.

[102] The FNFN also relies upon *Pharmascience Inc. v. Binet*, 2006 SCC 48 and the majority's explaining "ordinary meaning" at para. 30 where LeBel J. wrote:

> 30 Although the weight to be given to the ordinary meaning of words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 59). In *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, Gonthier J. spoke of the "natural meaning which appears when the provision is simply read through".
>
> [Emphasis added.]

[103] In addition, the FNFN relies upon *Chieu v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 3 for the proposition that while the modern approach to interpretation may begin with the ordinary meaning of a provision that is not the end

of the necessary analysis because the provision must be read in its entire context. In that case Iacobucci J. stated at para. 34 that the contextual inquiry:

> … involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

[104] The FNFN submits that examination of the history of the prior wording of the threshold provisions for Sand and Gravel Pits are now found in Table 6 of the *Regulation* requires an interpretation that precludes the interpretation placed upon the present criteria in the Decision by the EAO.

[105] In support of its argument that its interpretation of the Sand and Gravel threshold in Table 6 of the *Regulation* is not only reasonable but correct the EAO relies upon the decision of the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (at para. 10) which held that the interpretation of legislative provisions requires a "textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole", and that:

> … where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[106] Relying upon that principle of interpretation the EAO submits that the Sand and Gravel threshold must be read harmoniously with not only the *Act* and *Regulation*, including all of the other criteria enumerated in Table 6 for other Mine Projects, but also with other statutory provisions related to the regulation of mining in British Columbia and most specifically the *Mines Act* and its treatment of "production capacity" by proponents such as CSI.

[107] While the principles of statutory interpretation enunciated by the Supreme Court of Canada to be considered when undertaking interpretation of a legislative provision upon which the parties rely are all entirely valid and potentially applicable, the authorities also establish that the significance of any one consideration or

combination of considerations relating to competing interpretations must also be assessed in the context of the factual circumstances under inquiry.

[108] To that end I will now examine the parties' positons in relation to the interpretation of the Sand and Gravel threshold criteria they advance by reference to the principles of interpretation they each rely upon.

b) "Grammatical and Ordinary Sense"

[109] The contest between the EAO and CSI on the one hand and the FNFN on the other centers upon the juxtaposition of the phrases "production capacity" and "excavated sand and gravel or both sand and gravel" in the wording of the Sand and Gravel threshold in Table 6.

[110] The FNFN asserts that "production capacity" is a generic term that is modified and given meaning by the phrase "excavated sand and gravel or both sand and gravel". On that interpretation the phrase that establishes the criteria for reviewability is "excavated sand and gravel or both" with the emphasis on "excavated" because what is at issue with a new pit facility is the volume and area of land disturbed by extracting the product mined.

[111] The FNFN thus asserts that on a plain and simple reading in its grammatical sense the Sand and Gravel threshold is concerned with the amount of material that is excavated or removed from the ground and is not concerned with the purpose for which it is removed.

[112] In support of the argument that the Sand and Gravel threshold should be read as it suggests the FNFN also relies upon the "first impression" interpretation placed upon the threshold by CSI when it first applied for a License of Occupation of the Komie North Mine in May of 2010.

[113] With that application CSI included a Development Plan which referenced an "Annual estimate of production" as follows:

> Based upon the current market conditions, 240,000 tonnes of resource will be mined yielding about a 46-year mine life. This translates into an annual

> amount of 134,000 tonnes of marketable proppant sand. This may be expanded on a yearly throughput as market conditions require. If expansion occurs beyond 250,000 tonnes for more than 4 years the proponents are prepared to enter the BCEAA review process.
>
> [Emphasis added.]

[114] The FNFN submits that that estimate of production of 240,000 tonnes of resource (comprised of both sand and gravel) per year of which only 134,000 tonnes is "marketable proponent sand" informs the ordinary and grammatical interpretation that should be placed upon the threshold production limit for new Sand and Gravel Pits in Table 6 of the *Regulation as* evidenced by the spontaneous understanding that emerged from CSI's "first impression" of its meaning. See: *Pharamascience* at para. 30 as quoted above.

[115] CSI and the EAO both submit that the FNFN's emphasis on the amount of sand and gravel or both excavated from a proposed new mine facility fails to recognize the import and meaning of the phrase "production capacity".

[116] CSI and the EAO point to dictionary meanings of "production" encompassing such concepts as the creation or generation of goods or commodities to be available for use.

[117] In its written argument (at paras. 107 to 109) CSI asserts:

> 107. The "production capacity" is determined in reference to the rest of the provision. The amount of "excavated sand or gravel or both sand and gravel". The provision provides an option in the amount to consider in determining the production capacity. This is due to the fact that many sand or gravel pits do not produce both sand and gravel for sale. According to this wording, a sand mine would only be required to include in its production capacity the sand that it produces for sale, instead of the total of both sand and gravel. The option directly contemplates the business of the proponent and the only rational interpretation of production capacity in relation to the option of sand or gravel or both would be for production capacity to mean the amount of product for sale or use, whether sand or gravel. An interpretation where both sand and gravel in the entire disturbed area is contrary to the option that the provision provides.
>
> 108. The term "excavate", defined in relation to the removal of something, is used in this provision to clarify that only the product that is removed for sale is to be included in the production capacity calculation. Any waste materials are not included in the term production capacity.

> 109. The provision is not concerned with the amount of disruption to land of a sand or gravel pit. This is obvious because the second part of the Sand and Gravel Threshold dealing with the threshold for modifications to sand and gravel pits, includes "modification will result in the disturbance of an area of land that was not previously permitted for disturbance", as well as the production capacity. It was open to the Lieutenant Governor in Council to have included disturbance to land in the new pit Sand and Gravel Threshold; however, that choice was not made.
>
> [Emphasis in original.]

[118] Similarly, the EAO asserts that the words used in establishing the threshold criteria for reviewability for new Sand and Gravel Pits did not isolate "production capacity" from "excavation of sand and gravel or both" without reference to a proponent's intended sale or use of that product that is extracted.

[119] The EAO submits that the intention of the Lieutenant Governor in Council was to assess the production capacity for the project, not the potential amount of materials to be excavated "regardless of whether or not they form part of the production facility".

[120] In support of that argument the EAO points to the modifying phrase "during operations" as being indicative that production from the actual operation should be considered, not the "maximum potential of the resource being excavated".

[121] The EAO also submits that the FNFN's reliance on CSI's May 2010 "first impression" reading of the threshold should be given little consideration because of later more detailed considerations and the Notice of Work evidenced by CSI's application for the Komie North Project under the *Mines Act.*

[122] The EAO also postulates that primary consideration should be given to the phrase "production capacity" because of its assertion at para. 116 of its written argument that:

> 116. Within the framework of the *EA Act*, the initial determination of whether a project is reviewable is to be made by the proponent, with reference to the applicable table in the *RPR*. There is no obligation for proponents to make an inquiry with EAO about the application of the *RPR* to their proposed project and no discretionary function is extended to the EAO under the statutory

scheme in determining whether a proposed project is reviewable under s. 5 of the *EA Act* and the *RPR*.

[123] Section 5 of the *Act* to which that submission refers provides:

> **Reviewable projects established by regulation**
>
> 5 (1) The Lieutenant Governor in Council may make regulations prescribing what constitutes a reviewable project for the purposes of this Act.
>
> (2) For the purpose of a regulation under subsection (1), the Lieutenant Governor in Council by regulation may
>
> (a) categorize projects according to size, production or storage capacity, timing, geographical location, potential for adverse effects, type of industry to which the projects are related, type of proponent or on any other basis that the Lieutenant Governor in Council considers appropriate, and
>
> (b) provide differently for the different categories of projects.

[124] In making that "proponent driven" and "no discretion" submission the EAO relies upon the trial level decision of Justice Voith in *Friends of Davie Bay,* 2011 BCSC 572, concerning his interpretation of Item 5 (Construction Stone and Industrial Mineral Quarries) of Table 6 of the *Regulation* that was upheld by the Court of Appeal.

[125] I will address those "proponent driven" submissions in more detail in these reasons when next addressing the interpretation of the Sand and Gravel threshold when read in their entire context and considering the scheme and object of the *Act.*

c) "In its entire Context"

[126] The FNFN submits that the Sand and Gravel threshold should be interpreted not only harmoniously within its place in the overall scheme and object of the *Act* and *Regulation* (as I will later discuss) but also having regard to its legislative history that also reflects the intention of the Legislature.

[127] When the first *Environmental Assessment Act*, R.S.B.C. 1996, c. 238 took effect in 1995 the Lt. Governor in Council promulgated a *Reviewable Projects Regulation* dated July 28, 1995 which established thresholds for many of the same

categories that are now the subject of Table 6 of the present *Regulation* that were enacted in 2002.

[128] In 1995 the threshold for the environmental reviewability of new "Sand and gravel operations" under s. 21(1) of the original *Regulation* provided :

> 21. (1) The construction of a new facility constitutes a reviewable project for the purposes of the Act if
>
> (a) the facility is within SIC code 082 - Sand and Gravel Pits, and
>
> (b) the facility has, or when the construction phase is completed will have, a production capacity of
>
> (i) 500 000 tonnes or more of sand or gravel or both sand and gravel per year, or
>
> (ii) 1 000 000 tonnes or more of sand or gravel or both sand and gravel over a period not exceeding 4 years.

[129] Absent from that formulation of the threshold criteria was the word "excavated" that was included in the 2002 iteration of the criteria and is now at the centre of the disputes amongst the parties.

[130] The FNFN submits that the interpretation of the present threshold must account for the inclusion of the word "excavated" as intending the inclusion of the entire amount of sand or gravel or both to be excavated from a proposed new mine, not only the amount of the particularized product the proponent CSI intends to sell or use.

[131] The FNFN thus submits that the EAO erred in failing to consider that significant substantive change in wording in the new threshold by giving the word "excavated" no meaning when relying upon CSI's self-declared "production capacity" based upon what it intend to use or sell. The FNFN say that is especially so when there is no inclusion of the concepts of either usage or sale within the prescribed threshold criteria.

[132] The FNFN further submits that the new wording that includes "excavation" emphasizes the physical impact of a proposed mine on the environment rather than the commercial intention of the proponent when that commercial intention is in

obvious conflict with environmental protection when so much useful gravel product is classified as "waste" notwithstanding the size of the pit needed to extract and produce the more desirable product.

[133] The EAO and CSI each submit that the FNFN's submissions concerning the evolution of the wording of the threshold fail to sufficiently account for the fact that other changes to the original thresholds in the *Regulation* concerning other types of mining operations included increases in thresholds and that in some cases the word "physical" was added to limit what they refer to as "direct disturbance" or "direct physical disturbance". They say that if the Lieutenant Governor in Council had intended to limit the physical impact of new sand and gravel operations in the way suggested by the FNFN it was open to explicitly do so.

d) Entire Context: The Scheme and Object of the Act

[134] The FNFN submits that the ordinary grammatical meaning of the threshold criteria and inclusion of the modifier "excavated" with the concept of "production capacity" is in harmony with the scheme and object of the *Act* as environmental protection legislation.

[135] It says further that to interpret the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* as allowing proponent declared "production capacity" limits based upon sale and use considerations to over-ride environmental considerations distorts the balancing of commercial interests and the protection of the environment contrary to the scheme and object of the *Act.*

[136] In making that submission the FNFN relies upon the Court of Appeal's decision in *Friends of Davie Bay* at paras. 34 and 35 in which Bennett J.A. stated:

> [34] Here, the object of the legislation is environmental protection. This important object must not be lost in the minutia. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71, La Forest J., for the majority, cited with approval the fundamental purposes of environmental impact assessment identified by R. Cotton and D.P. Emond in "Environmental Impact Assessment" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 245 at 247:

> (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

[35] I adopt, as a correct approach to the interpretation of environmental legislation, the following passages from *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50 (N.L.C.A.) at paras. 11-12, to which the chambers judge also referred at para. 72:

> [11] Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.
>
> [12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

[137] In short, the FNFN asserts that the EAO's approval of CSI's proponent driven setting of "production capacity" limits which preclude the Komie North Mine from being subject to environmental assessment abandons environmental considerations in favor of commercial agendas.

[138] In making that assertion the FNFN submits that if the Sand and Gravel threshold included only sand and gravel "intended for sale or use" proponents could excavate an unlimited amount of sand and gravel from a new mine without triggering

an environmental assessment, provided they planned to sell or use less than 250,000 tonnes of that excavated sand and gravel each year over a four year period.

[139] The FNFN further submits that under the EAO's approval of a proponent driven limit on production capacity that is based upon intended sale or use, the statutory threshold would no longer serve to identify sand and gravel mines for review based upon environmental impact.

[140] By way of example the FNFN posits two scenarios:

1) A proponent targeting a narrow market niche could excavate a million tons of sand and gravel per year to obtain 249,000 tonnes of a specific type of sand for sale without exceeding the statutory threshold as interpreted by the EAO.

2) On the other hand, a proponent that planned to excavate 250,000 tonnes of sand and gravel per year over a period of four years from that same deposit but intended to sell or use all of the excavated product would exceed the threshold and the project would be reviewable.

[141] The FNFN thus submits that the EAO's interpretation of the threshold creates a situation where the marketing intentions of the proponent are divorced from the physical and environmental impacts of the same mining project.

[142] The FNFN submits that, in result, the EAO's interpretation of the threshold will allow operators of frack sand mines to cause environmental harm without the oversight of an environmental assessment.

[143] Counsel for the FNFN characterizes such a result as creating a "loophole" through which proponents can avoid environmental assessment by stating an intention to use or sell less than 250,000 tonnes of specialized product each year over a four year period no matter how much sand and gravel would have to be excavated or how much harm the project might cause to the environment.

[144] The EAO and CSI submit that the Court of Appeal's assessment of the overall scheme of the legislation in *Friends of Davie Bay* as well as the conclusion reached in upholding the proponent driven determination of "production capacity" in respect of a "Construction Stone and Mineral Quarry" project under Item 5 of Table 6 of the *Regulation* is a complete answer to the FNFN's submissions on statutory interpretation.

[145] I agree that since what was at issue in *Friends of Davie Bay* was the reasonableness of the EAO's interpretation of threshold criteria for one type of project in Table 6 of the *Regulation* particular attention must be paid to that case. That is so not only because interpretation of another threshold in Table 6 is now at issue but also because of principles of *stare decisis* that are engaged.

[146] Before turning to my consideration of the extent to which the Court of Appeal's decision in *Friends of Davie Bay* may be dispositive of the statutory interpretation issues in this case, I must first address the issue of two expert reports filed by the FNFN in support of its submissions on both the statutory interpretation and duty to consult issues in this case.

[147] That discussion is necessary because the EAO submits that the two reports are not admissible on the judicial review of the Decision.

e) Admissibility of expert reports on the Judicial Review of the Decision

[148] The two reports in issue are those of Mr. Michael Hitch and Mr. John Clague.

[149] Mr. Hitch is an Associate Professor at the University of British Columbia in its Department of Mining Engineering, Faculty of Applied Science. He has a Ph. D. in Environmental and Resource Studies obtained from the University of Waterloo in 2006 and is licensed in British Columbia as a Professional Geoscientist and Geological Engineer.

[150] Mr. Clague is a Professor at Simon Fraser University in its Department of earth Sciences. He has a Ph. D. in geology from the University of British Columbia

obtained in 1973 and is a Professional Geoscientist with 40 years of experience in British Columbia and the Yukon Territory.

[151] Both Mr. Hicks and Mr. Clague appended their reports to affidavits filed in this proceeding concerning explanations given by the EAO in its letters of September 30, 2013 and January 15, 2014 as to why it had concluded that CSI's estimate of production capacity of 240,000 tonnes of fracking sand per annum from the Komie North Mine over a period of four years fell below the threshold which would trigger an environmental assessment.

[152] Both reports are highly technical and are critical of the Decision and the information provided by CSI in determining its estimated production capacity for fracking sand from the Komie North Mine.

[153] In his report Mr. Hicks concluded:

> Examination of the documentation provided informs the opinion of the author that there are several discontinuities that may lead to less prudent decisions by the regulatory authorities and the project proponent.
>
> Firstly, the most concerning finding is the lack of consideration about the aggregate resource in its entirety. The geology itself has been effectively described concerning its gravel and sand potential with an emphasis on the former. Material (i.e. sand and gravel) sampling has been carried out in a way that is expected and suitable. Aggregate quantity was calculated in a very simplistic and general manner. Volumes have been calculated in a very general sense and for most purposes such as overall inventory or regional evaluation that would be sufficient. In the case of a potential quarrying operation, it is expected that much more quantitative or semi quantitative work would have been completed. Considering the amount of production capital required for such an operation, risk management through proper engineering, by an appropriate Qualified Person (as defined by Nl 43-101) is expected. This appears not to have been done.
>
> Any technical data provided by the proponent is based on gravel first and foremost and the sand component is secondary. This is odd considering the proponent intends to produce a highly processed and high value-added frac sand. Any data on the sand is secondary and it is unclear how much raw material produces one unit of final frac sand product. This brings into question the reliability of production volume estimates.
>
> It borders on irresponsible to consider that other secondary saleable products produced during the process of washing, and classifying the primary frac sand as waste. Washed gravels and off-spec sand products are highly desirable and certainly would have a market in the local area. The proponent

> intends to waste this material and backfill the pit with it. Although the final product is high value, the consumption is limited and these other marketable products make the operation more sustainable and complete utilization of the resource is achieved.
>
> The project as conceived lacks consideration of the key elements that go into developing a mining operation. Setting production levels such that they fall below regulatory hurdles to the detriment of all involved is troubling.
>
> [Emphasis added.]

[154] In his report, Mr. Clague concluded that:

> The definitions of 'product' and 'waste', as used in the EAO letters, are unclear. The amount of marketable frac sand at the proposed North Komie Sand Quarry cannot be reliably determined based on data presented in AMEC File 11103 or the proponent's Development Plan. An unknown, but large amount of silt will be backfilled, but silt is not explicitly included in waste material. Based on the available data and other information, I do not understand how the proponent arrived at its precise estimates of product sand and non-product waste for its proposed North Komie Sand Quarry.
>
> [Emphasis added.]

[155] The EAO submits that both reports are inadmissible in relation to the FNFN's application for judicial review of the Decision.

[156] In making that submission counsel for the EAO wrote at para. 68 of its written submissions:

> 68. The general rule is that evidence going beyond the record is not admissible in judicial review proceedings. The court must examine the lawfulness of the decision under review based on the record that was before the decision-maker or tribunal, and not decide the matter anew. As noted by this Court in *Friends of Cypress Provincial Park Society* (2000):
>
> > ...the court is to determine whether the Minister followed a lawful process in coming to her decision rather than determining if she would have come to the same conclusion on either the evidence before her or such further evidence as may have been put before the court.

[157] After making that submission the EAO did acknowledge the existence of exceptions to that general rule, including that:

1) extrinsic evidence may be admitted if it is relevant to demonstrating an allegation of procedural fairness or jurisdictional error. See: *Ktunaxa*

Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2014 BSCS 568 [*Ktunaxa*] at para. 131; and

2) affidavit evidence be admitted in relation to a factual error in circumstances where there is no evidence to support a material finding made by the decision-maker but not to invite the court to re-evaluate or re-weigh the evidence heard by the decision maker. See: *Kinexus Bioinformatics Corporation v. Asad,* 2010 BSCS 33 [*Kinexus*] at paras. 17-20.

[158] The EAO submits that neither of those exceptions is available to the FNFN to allow the opinions of Mr. Hicks or Mr. Clague into evidence concerning the judicial review of the Decision.

[159] In making that submission the EAO also relies upon the decision of this Court in *Society of the Friends of Strathcona Park v. British Columbia (Environment),* 2013 BCSC 1105 at para. 105 in which Sigurdson J. wrote:

> Judicial review is not a rehearing of the application on its merits. It is an assessment of whether the decision on the record was reasonable. To the extent that the petitioners seek to add factual matters that were not before the committee for consideration or provide opinions on the merits of the decision or what the decision ought to have been, or provide argument, they go beyond background and are not admissible.

[160] I agree with the submissions of the EAO that it is only in rare cases and for limited purposes that extrinsic evidence is admissible in applications for the judicial review of decision makers.

[161] I am, however, also satisfied that the general prohibition against the admissibility of extrinsic evidence is most applicable to those situations in which an administrative tribunal has reached a decision in which the party seeking judicial review of that decision has had the opportunity to participate.

[162] In this case the FNFN did not directly participate in the decision making process engaged in by the EAO that resulted in the August 8, 2013 Decision that is now the subject of judicial review.

[163] The Decision was reached by the EAO after consideration of only the information provided by CSI in support of its application for the development of the Komie North Mine. The only involvement of the FNFN in the decision making process prior to August 8, 2013 was its continued attempts to have concerns it had addressed by the EAO and other government agencies commencing in June of 2012.

[164] It thus cannot be said that the FNFN had an opportunity to provide the EAO with the information contained in the evidence available form Mr. Hicks or Mr. Clague before the Decision was made by the EAO.

[165] I am satisfied that the Decision would have been better informed had the EAO had the opportunity to consider information, evidence and criticism available from Mr. Hicks and Mr. Clague.

[166] I am, however, not satisfied that the extrinsic evidence now sought to be admitted by the FNFN falls within the strictly construed exceptions identified by counsel for the EAO, and I have thus concluded that it is not admissible in respect of the judicial review of the Decision.

[167] The extrinsic evidence is, however, admissible on the issue of the alleged failure of the EAO to consult with the FNFN with respect to the making of the Decision.

f) Is Friends of Davie Bay Dispositive of the statutory interpretation issues concerning the threshold criteria for environmental assessment of Sand and Gravel Pits under Table 6 of the Regulations?

[168] Principles of judicial comity and *stare decisis* in British Columbia mandate that the Supreme Court of British Columbia is bound to follow the reasoned decisions of

the British Columbia Court of Appeal and the Supreme Court of Canada which have decided a question of law.

[169] Only if the underlying factual circumstances of the matter under consideration are sufficiently distinguishable from those upon which the question of law was decided is this Court not bound to decide the case before it in the same way.

[170] In *Friends of Davie Bay,* at para. 32 Bennett J.A. defined the issue on appeal to be:

> [32] The question to be answered here is whether the EAO, through the executive director's delegate, came to a reasonable conclusion in interpreting "production capacity" as that phrase appears in the *Regulation* to mean the actual rate of a project's production during operation, rather than the maximum production rate the infrastructure and equipment of a project could potentially sustain.

[171] Specifically at issue was a project on Texada Island intended by the proponent, Lehigh Hanson Materials Ltd (Lehigh), to quarry aggregate from two locations using drill and blast methods and subsequent shipping by barge to locations away from Texada Island. The intended infrastructure for the project included a haulage road allowing for two-way passage of 100 tonne trucks and a conveyor system capable of moving 2500 tonnes of material per hour.

[172] The Table 6 threshold criteria for new “Construction Stone and Mineral Quarries” are stated to be:

> (1) A new gravity facility or other operation that:
>
> (a) involves the removal of construction stone or industrial minerals or both;
>
> (b) is regulated as a mine under the M*ines Act*, and
>
> (c) during operations will have a productions capacity of ≥ 250 000 tonnes/year of quarried product.

[173] The EAO interpreted the term “production capacity” for Lehigh’s intended project as the proponent’s estimated and permitted annual extraction rate.

[174] The petitioner (a not for profit society formed for the purpose of conserving and protecting the environment of the Davie Bay area of Texada Island) argued that the EAO erred in interpreting "production capacity" to mean the proponent's estimate of annual throughput rather than the production potential of the project based upon an objective evaluation of all aspects of the project's environmental footprint.

[175] In Chambers in ruling against that argument (reported at 2011 BCSC 572) Voith J. stated at paras. 65 to 70:

> [65] Table 6 relies on three interwoven concepts: i) production capacity, ii) during operations, and iii) ≥ 250,000 tonnes / year. It is these three elements, in combination, that inform the meaning of the threshold or benchmark that is established in Table 6.
>
> [66] Both respondents argue that the words "during operations will" precede and, accordingly, inform the words "production capacity". They say that the proper question which emanates from the *Regulation* is "what will the annual production capacity of the operation be once it is operating?"
>
> [67] In my view, the meaning of the words "during operations will have a production capacity", without reference to additional considerations, remains ambiguous. The modifier "during operations" can just as easily be asking the question "once the quarry is operating what does it have the capacity to produce?"
>
> [68] The words "production capacity" are, however, further modified or book-ended by the figure of "≥ 250,000 tonnes". This latter consideration is important. It is a precise figure. If one were to adopt the petitioner's submission this would be the quarry's theoretical production capacity after taking into account its operation plan, equipment and infrastructure. How would this theoretical capacity be determined? Would it be based on the assumption that equipment would be used for one shift per day, or for two shifts, or for three shifts? If similar pieces of equipment had different capacities would those capacities be averaged? If the train of production equipment had a single linchpin with a low production capacity, would this set the ceiling for the production capacity of the quarry?
>
> [69] The exercise the petitioner advocates would engage a great many such considerations. No framework for any such assessment is established in the *Regulation* or otherwise and yet such a framework would be central to determining the production capacity of a project and to comparing that production capacity to the threshold established in Table 6.
>
> [70] On the other hand, comparing the Table 6 production capacity figure to the capacity of a quarry as established in its Notice of Work [under the *Act*] and in the permits it receives is straightforward. This yields an easily ascertained and objective factor which sets a ceiling on permitted production capacity. The structure of the various Table 6 criteria in combination strongly suggests that the intention of the words in question was to assess a

> proponent's intended production from a project, as limited by its plans and permits, rather than the theoretical or notional maximum production capacity of its infrastructure and equipment.

[176] In upholding the proponent driven interpretation placed upon the threshold criteria there in issue Voith J. also discussed the provisions of Table 6 more generally at paras. 80 to 85 in which he wrote:

> [80] The relevant context for Table 6, however, goes beyond the language in the Table that is specific to quarries. Of significant relevance is the fact that the initial question of whether a project is "reviewable" does not fall to the EAO. Neither the *Act* nor the *Regulation* contemplate that proponents apply to the EAO for a determination of whether or not the criteria in the *Regulation* are met and the project in question is "reviewable". There is then no process by which proponents of industrial or other projects make application to the EAO, regardless of how modest or ambitious that project may be, for a determination of whether the project falls within the ambit of the *Act*. Instead, the affidavit of Ms. Christie confirms at Exhibits "F" and "I", that Lehigh did not initially contact the EAO about the Project and was "not required to do so because the proposed quarry is below the RPR threshold".
>
> [81] Having said this, it is clear that a party may, as in this case, contact the EAO and ask it to consider whether a proposed project is reviewable.
>
> [82] The fact that it is a proponent who, in the first instance, determines whether a project is reviewable is relevant in several respects. First, it explains why the criteria in Table 6, for each of the various types of projects described, are expressed in clear and unambiguous terms. Overwhelmingly Table 6 stipulates or establishes particular numerical thresholds or confirms that projects "regardless of size" are reviewable. A new asbestos manufacturing facility would be an example of this latter category of project. Thus, project proponents are dealing with bright line figures that are easily understood and readily identified.
>
> [83] Second, because the initial determination falls to the project proponent, the criteria in Table 6 do not admit of any discretion. The determination made by a proponent does not require any judgment, nor for obvious reasons, could it be otherwise.
>
> [84] Once one recognizes this essential attribute of Table 6 it also becomes clear that Table 6 does not extend any discretionary function to the EAO. It cannot be that the application or interpretation of Table 6 would, absent some explicit authority, engage different judgments or processes for a proponent and the EAO respectively. Instead, both are required to consider the specific criteria that pertain to specific categories of project in Table 6.
>
> [85] The foregoing reality militates strongly against the petitioner who argues that the determination of "production capacity" must be made based on a full review and consideration of a project's land base, facilities and equipment. No such assessment arises from the plain language of Table 6. Certainly no such exercise could be entrusted to a proponent in its sole discretion. Still further, the interpretation advanced by the petitioner would necessarily have

> the EAO undertake such reviews for all projects regardless of their permitted and intended production levels. Such a detailed review would be necessary in order to ensure that the environmental footprint of a project was consonant with its stated and intended production levels - even if those stated production levels were modest.
>
> [Emphasis added.]

[177] On appeal the Court of Appeal also approved the proponent entered interpretation of the threshold criteria applied by the EAO but also adverted to "loophole" concerns raised by the Friends of Davie Bay that are also now raised by the FNFN.

[178] At paras. 36 to 38 Bennett J.A. wrote, followed by:

> [36] The *Act* contemplates that it is usually the proponent of a project who, by setting its intended "production capacity", dictates whether an environmental assessment is required. If the proponent of a project featuring a new quarry facility accepts a production capacity less than 250,000 tons of quarried product per year, then the provisions requiring an assessment are not triggered. An assessment can be otherwise ordered, as noted above.
>
> [37] This proponent-centred, self-monitoring approach to environmental regulatory compliance creates an apparent frailty or loophole in the legislation, as noted by Friends of Davie Bay and accepted by the chambers judge. A proponent can (and Lehigh did) overbuild its infrastructure and equipment which would allow for future increases to levels of production well beyond the initial declared production capacity. The proponent could, at some time in the future, "modify the existing project" and produce well in excess of 250,000 tonnes of quarried product per year, increasing the detrimental impact on the environment without subjecting the project to an environmental assessment performed under the *Act*. The gap is found in s. 8(1)(b) of the *Regulation*, which is cross-referenced to Table 6 above:
>
> > **Criteria for proposed modifications of mine projects**
> >
> > **8** (1) In this part, threshold E is met for a proposed modification of an existing facility if
> >
> > …
> >
> > (b) the modification will result in the disturbance of
> >
> > > (i) at least 750 hectares of land that was not previously permitted for disturbance, or
> > >
> > > (ii) an area of land that was not previously permitted for disturbance and it is at least 50% of the area of land that was previously permitted for disturbance at the existing facility.
>
> [38] As the chambers judge pointed out at para. 76, a project with an initial production capacity below the regulatory threshold for a new mining project

> could avoid a mandatory environmental assessment if the area of disturbed land at the outset subsequently proved large enough to accommodate future increases to production capacity the proponent might implement. The trial judge found there to be no suggestion that this is Lehigh's plan. Lehigh explained that its selection of equipment stemmed from the advantages using standardized equipment in all of its operations provided, including easier and more cost-effective repairs and transferability. It had a number of other reasons for its proposed specifications of the infrastructure, none of which was aimed at increased production.

[179] Those potential "loophole" and "overbuilding" concerns were then addressed at para. 39 in which Bennett J.A. stated:

> [39] An interpretation of legislation that creates a loophole through which the object of the legislation can be thwarted is rarely reasonable. However, I agree with the analysis of the chambers judge, which showed that when the *Act* and *Regulation* are viewed in their entirety, and in light of other legislation applicable to the Project, the loophole is sufficiently addressed and the overall scheme is practical.

[180] She then went on to observe (at para. 41) that there are:

> …a number of safeguards in place preventing environmentally damaging projects from slipping through an environmental assessment at all.

[181] Thereafter she considered the provisions of s. 6 of the *Act* and the potentially curative provisions available thereunder which could act as such a safeguard.

[182] Section 6 of the *Act* provides:

> **Minister's power to designate a project as reviewable**
>
> **6** (1) Even though a project does not constitute a reviewable project under the regulations, the minister by order may designate the project as a reviewable project if
>
> > (a) the minister is satisfied that the project may have a significant adverse environmental, economic, social, heritage or health effect, and that the designation is in the public interest, and
> >
> > (b) the minister believes on reasonable grounds that the project is not substantially started at the time of the designation.
>
> (2) A project designated as a reviewable project under subsection (1) is one for which an environmental assessment certificate is required.

[183] In *Friends of Davie Bay* the petitioner had first unsuccessfully applied to the Minister under s. 6 of the *Act* to have the proposed quarry project designated as

reviewable, prior to then bringing of a petition for review of the EAO's interpretation of the threshold criteria in Table 6.

[184] Although that application to the Minister was not successful, the "safeguard" role attributed by Bennett J.A. to s. 6 of the *Act* is borne out by the comprehensive analysis of the Texada project carried out by the EAO in addressing the environmental concerns raised by the opponents in its report to the Minister including the reasons for its recommendations that the Minister not designate the project as reviewable.

[185] Bennett J.A. also considered a second "safeguard" to over--building concerns at para. 44 in *Friends of Davie Bay* in which she said:

> [44] There are other safeguards as well. As pointed out by the Province, Lehigh cannot legally exceed the capacity in the Quarry Permit Approving Work System and Reclamation Program under the *Mines Act*, R.S.B.C. 1996, c. 293. The levels of production are monitored by the Ministry of Energy and Mines and Responsible for Housing to ensure that they do not exceed the stipulated production capacity. If Lehigh's annual production exceeded 240,000 tonnes of quarried product, it would be subjected to sanctions under the *Mines Act*.

[186] In upholding Voith J.'s decision the Court of Appeal concluded by saying at paras. 45 to 48:

> [45] In my respectful view, when the legislative scheme is considered as a whole, along with the other relevant legislation, the EAO's interpretation of "production capacity" as the phrase appears in the *Regulation* is not rendered unreasonable by legislative frailty or a loophole.
>
> [46] In addition, one cannot simply look at the words "production capacity in excess of 250,000 tonnes/year" as the appellant's interpretation would require. The provision in Table 6-5 reads "A new quarry facility or other operation that … during operations, will have a production capacity of ≥ 250 000 tonnes/year of quarried product". On a plain reading, the section sets out in what context and time frame (during operations) the production capacity is to be determined and how much (250,000 tonnes) it may produce in that time frame.
>
> [47] In my respectful view, to read into this legislation a requirement for an assessment of every project to determine the potential maximum production capacity the proposed infrastructure, equipment, and operation could facilitate is impractical and inconsistent with the means through which the legislation contemplates achieving its object. By designing a proponent-driven assessment at the front end of the environmental regulatory process, the

> Legislature balanced the need to conduct environmental assessments in warranted circumstances against the existence of other safeguards, the impracticality of assessing every project as a matter of course, and the interests of economic development in British Columbia.
>
> [48] In my view, the chambers judge committed no error. The EAO came to a reasonable conclusion in interpreting "production capacity" to mean a proponent's intended operational production capacity, rather than the theoretical maximum production capacity a project's proposed infrastructure, equipment, and operation could allow.

[187] The EAO and CSI submit that the Court of Appeal's conclusion that "by designing a proponent driven assessment at the front end of the environmental regulatory process, the Legislature balanced the need to conduct environmental assessments" precludes any determination in this case that the EAO's approval of the proponent-driven assessment of the production capacity intended by CSI for the Komie North Mine is unreasonable.

[188] I have concluded that the *ratio decidendi* of the Court of Appeal's decision in *Friends of Davie Bay* is that the EAO's interpretation of the threshold criteria for new Construction Stone and Industrial Mineral Quarries under Table 6 of the *Regulation* and the *Act* based upon the proponent's intended operational production rather than the potential maximum production capacity based upon a project's proposed infrastructure, equipment and operations could allow is not unreasonable. See: *Friends of Davie Bay* at paras. 46 to 48 quoted above.

[189] Important also to that decision is the Court of Appeal's conclusion that the EAO's interpretation of "production capacity" as that phrase appears in the threshold criteria for Construction Stone and Industrial Mineral Quarries in Table 6 was not unreasonable by reason of legislative frailty or a loophole arising from a "proponent driven" assessment of production capacity at the front end of the environmental regulatory process because of the existence of regulatory "safeguards". See: *Friends of Davie Bay* at para. 45 also quoted above.

[190] Of significance also are the two "safeguards" which the Court of Appeal concluded were effective to prevent a finding of unreasonableness due to legislative frailty or a loophole in relation to the EAO's interpretation of the threshold criteria for

Construction Stone and Industrial Mineral Quarries. In summary, those effective safeguards in that case were:

1) the remedial discretion of the Minister under s. 6 of the *Act* to designate a project as a reviewable project if satisfied that conditions in that section are met and that the project has not been substantially started at the time of the designation; and

2) the monitoring of production levels by the Mines Ministry to ensure they do not exceed the stipulated production capacity with potential sanctions under the *Mines Act* for so doing.

[191] In determining whether the decision of the Court of Appeal in *Friends of Davie Bay* is dispositive of the statutory interpretation issues in this case I will first asses the distinguishing factual and legal differences between the two cases.

[192] Those factual and legal differences between the two cases are that:

1) The Decision is concerned with the interpretation of the threshold criteria for a different category of mining project in Table 6 of the *Regulation* than was the subject of the quarry in *Friends of Davie Bay*.

2) The threshold criteria under the two categories are stated in materially different terms.

3) For Sand and Gravel Pits the criteria are:

3 Sand and Gravel Pits __ SIC code 082	**Criteria:** (1) A new pit facility that will have a production capacity of (a) ≥ 500 000 tonnes/year of sand or gravel or both sand and gravel during at least one year of its operation or (b) over a period of ≤ 4 years of operations,	**Criteria:** (1) Modification of an existing pit facility that meet Threshold F.

	≥ 1 000 000 tonnes of excavated sand or gravel or both sand and gravel.	

4) For Construction Stone and Mineral Quarries Sand and Gravel Pits the criteria are:

5 Construction Stone and Industrial Mineral Quarries	**Criteria:** (1) A new quarry facility or other operation that: (a) involved the removal construction stone or industrial minerals or both, (b) is regulated as a mine under the *Mines Act*, and (c) during operations, will have a production capacity of ≥ 250 000 tonnes/year of quarried product.	**Criteria:** (1) Modification of an existing mine facility that meets Threshold E.

5) Although the criteria for both include reference to production capacity, one in in terms of tonnage either per year "during operations" or "over a period of four years during operations" only the criteria for new Construction Stone and Industrial Mineral Quarries includes specific reference to regulation as a mine under the *Mines Act.*

6) Although the criteria for both categories include two types of potential product, those being "construction stone or industrial mineral or both" on the one hand,

and "sand or gravel or both" on the other, in the case of new Construction Stone and Mineral Quarries the criteria refers to the production capacity of undifferentiated "quarried product" as opposed to "excavated sand or gravel or both".

7) Accordingly, no issue arose in *Friends of Davie Bay* with respect to whether the proponent could have elected to sell or use only "construction stone" or "industrial mineral" and discard the other as "waste" to fall below the threshold criteria for annual production, which is the primary issue of statutory interpretation now raised by CSI's assessment of production capacity for the Komie North Mine. .

8) In *Friends of Davie Bay* the narrow factual issue determined by Voith J. and upheld by the Court of Appeal was whether "potential maximum production capacity" had to be assessed by considering criteria not included in Table 6 such as land base, facilities and equipment in respect of which Voith J. held at para. 84 (quoted above) that no such assessment arose from the wording of the statutory criteria.

9) In this case the FNFN does not seek to require the application of assessment criteria other than the estimated volume of tonnage of both sand and gravel to be excavated in each year of operations from the Komie North Mine as assessed by CSI and known to the EAO. The issue engaged is not the proponent's ability to measure potential maximum production capacity by reference to non-statutory criteria but rather whether production capacity from a known amount of excavated sand or gravel or both can be commercially limited by classifying excavated gravel as "waste" because the proponent has opted not to sell or use the known amount of excavated gravel that would otherwise trigger an environmental assessment.

10) The threshold criteria for the reviewability for Construction Stone and Industrial Mineral Quarries was not changed by the present *Regulation* from

those in existence in 1995 except by the addition of "is regulated as a mine under the *Mines Act.".*

11) No such criteria became part of the 2002 criteria for new Sand and Gravel Pits.

12) The criteria under the present *Regulation* for new Sand and Gravel Pits were, however, changed in 2002 to include the word "excavated" as I have previously discussed.

13) In *Friends of Davie Bay*, Voith J. found that there was no suggestion that the proponent's plan was to set production below the regulatory threshold for a new mining project to avoid a mandatory assessment if the area of disturbed land increased production capacity beyond its intended allowable annual tonnage in order to prevent environmental assessment.

14) Although CSI now asserts that it "has no present plans to develop multiple mines" that statement must be considered in light of all of the background facts that have led to this petition, including prior assertions of intention and CSI's applications for Five Licenses of Occupation in the FNFN's traditional territory, three of which are in the vicinity of the Komie North Mine. While this is in some respects an issue specifically related to allegations concerning the breach of the Province's duty to consult it is also of factual significance when assessing the extent to which the decision in *Friends of Davie Bay* was based upon the existence of adequate safeguards to prevent the need for environmental assessment where warranted.

15) In *Friends of Davie Bay* the petitioner had made a specific request of the Minister to designate the Texada quarry as a reviewable project under s. 6 of the *Act.* That request was refused and was not the subject of an application for judicial review. The Court of Appeal considered the substance of that review and concluded that although it had not resulted in the designation requested it had acted as an adequate safeguard to the potential loophole

afforded by "a proponent driven assessment at the front end of the environmental regulatory process."

16) In this case, although the FNFN also (on June 13, 2012) made a request under s. 6 of the *Act* (for the Minister to designate all of the Sand and Gravel mines, proposed by CSI in the FNFN's traditional territory) that request did not receive the same detailed analysis undertaken by the EAO that was the subject of the similar *Friends of Davie Bay* request. The response to the s. 6 request by the FNFN in this case, by the same EAO Executive Project Director who undertook the analysis of the *Friends of Davie Bay* request, was not delivered until February 18, 2013 and only stated that the Minister had concluded that the request was "premature" because the proposals were "preliminary and not yet sufficiently defined to be considered project proposals".

17) Significantly, as I noted in recording the background facts in this judgment, by the time that denial of the FNFN's s. 6 request for Ministerial designation was delivered, CSI had already, more than three months earlier, submitted a Notice of Work for the Komie North Mine project to the Mines Ministry. While again the denial of the FNFN's request for designation by the Minister may be of more import with respect to the duty to consult issues raised by the FNFN, the nature of the response given by the EAO does not give me the same confidence in the adequacy of s. 6 of the *Act* as a safeguard against avoidance of an environmental assessment of a project where warranted that Voith J. and the Court of Appeal found existed in *Friends of Davie Bay.*

18) The second available safeguard against exploitation of the "loophole" potentially created by a proponent driven assessment of production capacity at the front end of the environmental regulatory process to which the Court of Appeal referred in determining that the EAO's interpretation of the threshold criteria for Construction Stone and Industrial Mineral Quarries under Table 6 of the *Regulation*, is the regulatory role played by the Mines Ministry under

the *Mines Act* in monitoring the proponent's level of production with the power to apply sanctions for exceeding the limits in its Notice of Work.

19) While I do not disagree that the potential for application of sanctions may be a disincentive to over-mining or over-production I am not satisfied that the potential for after the fact sanctions directly addresses whether an environmental assessment may be required in first instance. I say that because if the object of the *Act* is, as the Court of Appeal stated (at para. 34 of *Friends of Davie Bay)*, environmental protection including "early identification and evaluation of all potential environmental consequences of a proposed undertaking" reliance on the availability after the fact consequence can defeat those objects.

20) I am accordingly satisfied that while the Court of Appeal referenced such sanctions as a potential safeguard that reference must be read in the context of para. 34 and does not form part of the ratio in *Friends of Davie Bay.*

[193] The foregoing points of distinction between *Friends of Davie Bay* and this case convince me that I am not strictly bound by *stare decisis* to reach the conclusion that the EAO's interpretation of the threshold criteria for Sand and Gravel Pits in Table 6 embodied in the Decision concerning the Komie North Mine is reasonable.

[194] I am, however, also satisfied that I must accept the Court of Appeal's conclusions, expressed at para. 47 in *Friends of Davie Bay*, that the scheme of the *Act* and *Regulation* as designed by the Legislature provides for a proponent-driven assessment at the front end of the environmental process, which balances the need to conduct environmental assessments in warranted circumstances against the impracticality of assessing every project as a matter of course, and the interests of economic development in British Columbia.

[195] I do not, however, take that conclusion to mean that every proponent driven assessment will achieve that required balancing or that it will be reasonable in any

given case for the EAO to accept a proponent's assessment that falls below the threshold criteria and leave it to other potential available safeguards to provide environmental oversight.

[196] I say that because the EAO has an obligation to critically evaluate a proponent driven assessment as was done with the quarry that was the subject of the *Friends of Davie Bay* decisions to ensure compliance with the statutory threshold criteria in Table 6 of the *Regulation*.

g) Conclusion

[197] I have concluded that the EAO's interpretation and application of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* as set out in the Decision is unreasonable.

[198] I have reached that conclusion for the following reasons:

1) CSI's own initial interpretation of the threshold criteria in its Development Plan for the Komie North Mine project included with its application for a License of Occupation (quoted in paragraph 113 of this judgment) is compelling evidence that on first reading or impression the meaning that spontaneously emerges is that in its ordinary and grammatical sense the threshold criteria includes all excavated sand and gravel from the proposed pit - not the differentiated reading allowing classification of some of the gravel as "waste" now asserted by CSI and accepted by the EAO in the Decision.

2) The words "production capacity" in the threshold criteria for new Sand and Gravel Pits does not include the words "that the Proponent will produce for sale or use" relied upon by the EAO in the Decision.

3) Similarly, there is no support found within the threshold criteria for the EAO's exclusory conclusion in the Decision that in assessing production capacity for excavated sand or gravel or both such capacity "does not

include that part portion of the excavated material that would not be sold or used in the operation".

4) I accordingly reject the position of CSI accepted by the EAO in making the Decision that the threshold criteria for new Sand and Gravel Pits should be read as providing a proponent with an option to include only the sand component of the total amount of sand or gravel excavated from the new pit to obtain that sand component to accord with the business intentions of the proponent. The phraseology "excavated sand or gravel or both" precludes the interpretation asserted by CSI and accepted by the EAO.

5) I am also of the opinion that interpretation of the new Sand and Gravel threshold criteria must recognize and give meaning to the historical evolution of those statutory criteria which formerly did not but now does include the word "excavated" when identifying a production capacity of "sand or gravel or both". In the Decision not only does the EAO not give "excavated" any meaning in accepting CSI's differentiated production capacity as comprising only sand for sale or use but by doing so relegates the gravel component of the stipulated excavated material to waste.

6) I agree with the submission of the FNFN that the interpretation placed upon the threshold criteria for new Sand and Gravel Pits is unreasonable to the extent it is divorced from the potential physical impact of the project on the environment. As posited by the FNFN a proponent who intends to sell or use only a niche product of the sand or gravel from a new mine that uses only a fraction of the total excavated sand or gravel or both would not be subject to environmental review while a proponent who intends to sell or use all of the usable excavated sand and gravel would be subject to review notwithstanding the same physical impact of the new pit on the environment.

[199] In result, I find that whether expressed in the positive or the negative the limiting or modification of the ordinary meaning of the threshold criteria for new Sand

and Gravel Pits in Table 6 of the *Regulation* to include only that portion of all excavated sand or gravel or both that the proponent "intends to sell or use" so undercuts the environmental protection objects of the *Act* in favor of purely commercial interests that it distorts the balancing sought to be achieved by the Legislature as identified by the Court of Appeal in *Friends of Davie Bay*.

[200] I accordingly find that to the extent the Decision accepts that the production capacity of the proposed Komie North Mine is limited to that excavated sand or gravel or both that CSI intends to sell or use in its operation is not defensible in respect of the facts and law and is thus unreasonable within the meaning of *Dunsmuir* and must be set aside.

[201] I must also note that I have reached that conclusion after also considering the evidence adduced by the EAO about other determinations made by it with respect to the reviewability of other sand and gravel pit projects and the submissions of the parties with respect to those projects which I requested at the end of the initial hearing of the petition.

[202] I will address the appropriate remedies that arise from my conclusions after I have addressed the submissions of the FNFN that in making the Decision the Province breached its constitutional duty to consult.

B. Did the Province breach the constitutional duty to consult with the FNFN in making the Decision?

[203] Given the findings I have and conclusions I have reached concerning the unreasonableness of the Decision it may not be strictly necessary to determine the FNFN's breach of duty to consult allegations.

[204] I have, however, concluded that I should do so for two reasons:

1) The question of whether a duty to consult arose with respect to the making of the Decision is a matter of general importance with respect to the interpretation and application of the threshold criteria under Table 6 of the *Regulation* by the EAO that was fully argued by the parties; and

2) If I am wrong in my conclusion that the Decision must be set aside because it is unreasonable, determination of the FNFN's alternative breach of duty to consult argument will be of significant substantive importance to the disputes amongst the parties.

[205] The FNFN alleges that in reaching the Decision the EAO and the Province breached the constitutional obligations of the Crown to consult with the FNFN and, if necessary accommodate its interests when making a decision that could adversely affect the FNFN's treaty rights.

[206] In response, while the Province does not dispute that the Province had a duty to consult with the FNFN with respect to the Komie North Mine generally concerning the potential impact of the project on the FNFN's rights under Treaty 8 it also submits that additional consultation by the EAO specifically with respect to its interpretation of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* and the application of that interpretation to the Komie North Mine was not required.

[207] In the alternative the Province submits that any duty to consult that may exist was satisfied by the EAO.

[208] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 [*Mikisew*] at paras. 33 and 34 Binnie J. wrote:

> 33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:
>
> > The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship".

> . . .
>
> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
>
> 34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

[209] Also, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*], McLachlin, C.J at para. 31 answered the question "When does the Duty to Consult Arise" by writing:

> [31] The Court in *Haida Nation* answered this question as follows: the duty to consult arises "<u>when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it</u>" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.
>
> [Emphasis in original.]

[210] In *Rio Tinto* at paras. 36 and 37 the Chief Justice also affirmed that the content of the necessary consultation and potential remedies for a breach of that duty are both situational. She wrote:

> [36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC74, [2004] 3 S.C.R. 550, at para. 32.
>
> [37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to

> damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

[211] The Province's general response to the FNFN's breach of a duty to consult allegations is stated as follows in its written submission at para. 148:

> 148. There is no dispute that the Province has knowledge of FNFN's treaty rights and that the Project is located within the traditional territory of the FNFN. Furthermore the Province acknowledges it has a duty to consult with the FNFN concerning the potential impacts of the Project upon their Treaty 8 rights. Consultation between FLNRO and the FNFN is presently ongoing in respect of the CSI Respondents' application for a permit under the *Mines Act* and under the *Forest Act* for the Project. However, the Provincial Respondent submits that EAO's interpretation of the *RPR* is not in itself Crown conduct that triggers the duty to consult, as the EAO's determination have any potential adverse effect on the Petitioners' treaty rights.

[212] More specifically at paras. 149 and 150 the Province has submitted that:

> 149. The Provincial Respondent submits that the EAO had no duty to consult with FNFN in the application of the thresholds for determining reviewable projects under the *RPR*. The interpretation and application of legislation is not Crown conduct triggering the duty to consult as there is no discretionary decision-making by the EAO in relation to the thresholds prescribed by the Lieutenant Governor in Council. To the extent that the determination of whether an environmental assessment will be required for a project or not, turns on interpretation of its "home" statute and the associated regulations, the EAO is best placed to determine how the goals of the legislation can be most effectively achieved.
>
> 150. The determination of whether a quantified threshold for review is met is not a process that can properly be the subject of First Nations' consultation. The proponent drives the process of whether an environmental assessment is required to the extent that they determine the intended production for the project. This is an appropriate approach to achieve the goals of the *EA Act* given the additional safeguards within the legislative scheme including the discretion provided to the Minister under s. 6, as well as monitoring, compliance and enforcement.

[213] In support of those submissions the Province relies upon the decisions of this Court and the Court of Appeal in *Friends of Davie Bay.*

[214] The Province further asserts that goals of statutory interpretation promoting predictability are "antithetical" to the Crown's duty to consult which, as stated in *Taku*

River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74 [*Taku River*] at para. 29:

> …always requires meaningful good faith willingness on the part of the Crown to make changes bases on information that emerges during the process.

[215] In addition, the Province relies upon the proposition that since the EAO's interpretation of the criteria in Table 6 of the *Regulation* to determine whether a project is reviewable is not discretionary, there is no need for consultation. It says also that any duty of consultation only arises in respect of ministerial discretion arises under s. 6 of the *Act* that allows the Minster to designate an otherwise unreviewable project as reviewable an issue which is not before the court.

[216] In the alternative, the Province submits that any duty to consult which may be found to exist is at the "low end of the consultation spectrum" and was satisfied by the EAO.

1. Standard of Judicial Review

[217] Determination of the question of what standard of judicial review will exist in any case concerning an alleged breach of the Crown's duty to consult can be a complex inquiry.

[218] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] Chief Justice McLachlin wrote (at paras. 61 to 63):

> 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. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
>
> [Emphasis added.]

[219] Thus in any given case the standard of review may range from correctness to reasonableness depending upon whether what is at issue is the decision as to whether a duty to consult exists and if so its extent (primarily legal questions attracting the correctness standard) or, whether the decision concerns the process engaged in by the government in fulfilling its duty which will likely attract a reasonableness standard. See: *Ahoushat Indian Band v. Canada (Minister of Fisheries and Oceans),* 2008 FCA 212 at para. 34.

[220] In this case, notwithstanding the Province's assertion that since the EAO was interpreting its "home" statute a reasonableness standard should be applied in assessing whether a duty consult with the FNFN concerning the Decision existed should be assessed on a deferential reasonableness standard, I am satisfied that the standard to be applied to the EAO's determination that no consultation was necessary is that of correctness.

2. Did the EAO have a duty to consult regarding the Decision?

[221] In *Rio Tinto* after determining how a duty to consult arises when the Crown has knowledge of a potential claim or right Chief Justice McLachlin stated at para. 41:

> [41] The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

[222] She then went on to say at paras. 42 to 44:

> [42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.
>
> [43]This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*,2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.
>
> [Emphasis added.]

a) Crown conduct: Is the Decision a "strategic high level decision" that triggered a duty to consult?

[223] The Province submits that the EAO had no duty to consult with the FNFN concerning the making of the Decision other than by way of those processes engaged in before it was made because the Decision involved only interpretation of Table 6 of the *Regulation* as a matter of general application in the Province and was thus not a "strategic high level decision" triggering a duty to consult with the FNFN.

[224] In my view that assertion conflates issues of general statutory interpretation with issues that are more fundamental to the process engaged in by CSI through the action or inaction of the Province in "taking up" of lands over which the FNFN has, (by virtue of Treaty 8) rights to hunt, fish or trap, without any consultation concerning the environmental impact that taking up for the purpose of mining could have on those treaty rights.

[225] In making the Decision the EAO did more than merely interpret the provisions of the Sand and Gravel criteria in a way that accepted a proponent driven assessment of production capacity excluding excavated gravel that was not intended for sale or use. The EAO also accepted without apparent critical evaluation the calculations of CSI upon which that limited production capacity falling slightly below the threshold for environmental review was based.

[226] The evidence of the two Professional Geoscientists adduced on this petition calls into question the legitimacy of the data used by CSI and accepted by the EAO in determining that even the production capacity asserted by CSI is warranted. Had there been meaningful, good faith consultation and critical examination concerning the methodology and data used by CSI, the EAO may have reached a different conclusion than it did with respect to the site specific "taking up" of lands from the FNFN's traditional territory without requiring an environmental assessment of the impact on its Treaty 8 rights.

[227] Further, by making the Decision that the Komie North Mine project could proceed without environmental assessment because a proponent can exclude

excavated gravel as "waste" the EAO set the stage for the development of more frac sand mines in the FNFN's traditional territory that could also proceed on the same proponent driven analysis that would not require environmental assessment.

[228] The fact that further development in the Komie North area might attract environmental assessment as a "modification" or by way of designation by the Minister under s. 6 of the *Act* does not address the fact that before any such environmental assessment might become required the development of the Komie North Mine without environmental assessment would have already proceeded without consultation with the FNFN.

[229] Also, the possibility of eventually requiring environmental assessment of the Komie North Mine after it is in operation, or of other mining projects because of modification or subsequent designation are not matters in respect of which the EAO or the Minister have assured the FNFN there would be consultation.

[230] Accordingly, the Decision not only potentially directly adversely affects the FNFN's Treaty 8 rights to the use of its traditional land in the area comprising the Komie North Mine project but also indirectly affects all other areas of its traditional lands over which frac sand mining development may be sought.

[231] The fact that such concerns are not speculative is, in my view, more than adequately evidenced by the five other Licenses of Occupation applied for by CSI notwithstanding its present assertion that it has no present plans to develop mines on those additional sites.

[232] For all of those reasons I am satisfied that the Decision must be treated as being more akin to a strategic high level decision triggering the Province's duty to consult with the FNFN in relation to the potential adverse impact of the Komie North Mine on its treaty rights as opposed to either a decision requiring no consultation or, alternatively, one made at the "low end of the consultation spectrum" as postulated by the EAO.

[233] In my opinion, that duty to consult is not abrogated by the fact that the interpretation of the Table 6 criteria accepted by the EAO may be of general application for other new Sand and Gravel Pits in the Province which are not subject to treaty rights.

b) The potential for Adverse Effects arising from the Decision

[234] In *Rio Tinto*, after discussing what Crown conduct that will give rise to a duty to consult the Chief Justice next addressed the need to show the possibility that the impugned Crown conduct (in this case the Decision) will adversely affect the Aboriginal claim or right asserted.

[235] In doing so, Chief Justice McLachlin said at paras. 45 to 48:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in

> development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.
>
> [48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

[236] The Province has submitted that the EAO's interpretation of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulations* is not in and of itself Crown action which has an adverse impact on the FNFN's Treaty 8 rights. It submits that the fact that the Komie North Mine project is not reviewable under the *Regulation* does not affect the Crown's obligation to adequately consult with the FNFN on decisions and activities which may infringe on those treaty rights.

[237] The Province argues that environmental assessments are a process by which the environmental impacts of a project are examined and recommendations made to the Minister and as such do not diminish treaty rights.

[238] While the Province acknowledges that when an environmental assessment is required it will include First Nation's consultation within the course of the process; it also says that such consultation is not the purpose of the *Act* and is specifically not required when determining reviewability at first instance which is only a matter of statutory interpretation and application of the requisite threshold criteria.

[239] That argument is premised upon the proposition that whether an environmental assessment is required or not the project under consideration will be the same because the nature of the proposed activity will not change. That results in the conclusion that there can thus be no impact on treaty rights arising from any failure of the EAO to require an environmental assessment of the Komie North Mine.

[240] In response the FNFN submits that the Decision has potential adverse effects upon its treaty rights in two specific respects.

[241] Firstly the FNFN submits that there is the very real potential for the Komie North Mine project, without any consultation with the FNFN with respect to requirement for an environmental assessment, being approved for operation exposing those lands in its traditional territory to negative impacts upon protected treaty rights.

[242] In support of that submission the FNFN relies on the decision of this Court in *Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, 2014 BCSC 1278 in which Macintosh J. considered the effect of the failure of the Crown to consult with the claimant before determining that the project in question had been "substantially started".

[243] If, as determined by the EAO in that case, the project had been substantially started by application of s. 18(5) of the *Act* an environmental certificate issued five years earlier under s. 18 would continue for the life of the project. However, if the project had not been "substantially started" the certificate would have expired.

[244] In finding that a duty to consult arose with respect to the determination of whether the project had been substantially started Macintosh J. held that the failure to consult had the adverse effect upon First Nation rights because the decision of the EAO had allowed the project to proceed when it otherwise could not have done so.

[245] The FNFN submits that the finding of adverse effect in that case is similar to what has occurred in this case in the EAO's determination without consultation that the Komie North Mine project is not a reviewable project under the *Regulation* because it clears the way for the approval of the project by other Crown ministries including the issuance of permits under the *Mines Act* that will result in the existence of the mine in the FNFN's traditional territory without consultation.

[246] The second adverse effect of the Decision upon its treaty rights asserted by the FNFN is that it allows other large Sand and Gravel Pit mining operations to be approved without environmental assessment or oversight so long as in assessing "production capacity" the proponents postulate limits less than 250,000 tonnes per year over more than four years of operations by including only that portion of all of the excavated sand and gravel from a new pit that which the proponent intends to sell or use thereby allowing new mines in the FNFN's traditional territory affecting its treaty rights to hunt, fish and trap.

[247] In that regard I note the observations of the Chief Justice in *Rio Tinto* in para. 47 (quoted in full above) that:

> …as discussed in connection with what constitutes Crown conduct, high level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have "no immediate impact on the lands and resources"… This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources.

[248] In my opinion the EAO's adoption of and strict adherence to the proponent-driven approach to the environmental regulatory process in this case as evidenced by the Decision as well as the EAO's September 30, 2013 and January 14, 2014 assertions of its correctness is equivalent to a high level management decision concerning resource management that can have both immediate as well as future direct adverse impacts upon the FNFN's treaty rights.

[249] After considering the evidence adduced on this petition and the submissions of all counsel, I have concluded that the FNFN has established the potential for adverse effects arising from the conduct of the EAO in the making of the Decision.

[250] In doing so I accept the FNFN's submission about potential adverse effects arising from both the direct (the Komie North Mine project) and indirect (prospective future new Sand and Gravel pit projects in its traditional territory) arising as consequences of the EAO's failure to consult with the FNFN about the threshold criteria to be applied for the Komie North Mine.

[251] I also reach those conclusions with respect to the EAO's acceptance of a proponent-driven approach to environmental assessment in the face of known treaty rights and the potential for adverse effects of that process upon those rights.

[252] I say that because that uncritical acceptance of a proponent-driven assessment at the front end of the environmental regulatory process has the very real potential to defeat existing treaty rights by allowing projects to proceed without environmental assessment with any relief to the FNFN being left to sanctions which may be of no or little benefit once those rights have been abrogated.

[253] While the protection against the "loopholes" that can arise in a proponent-driven approach as identified in *Friends of Davie Bay* may be sufficient to meet the goals of the *Act* in cases not involving aboriginal treaty rights, in my opinion they are insufficient to do so when the project has the potential to both immediately and in future directly and indirectly adversely affect treaty rights.

[254] It is, in my opinion, also no answer to the duty of the Crown to consult when treaty rights may be adversely affected to say that if the proponent-driven assessment is flawed that flaw can be addressed by the possibility that ministerial discretion may be engaged to correct the flaw or that sanctions may be applicable.

[255] As stated by Chief Justice McLachlin in *Rio Tinto* at para. 48:

> The duty to consult is designed to prevent damage to Aboriginal claims and title while claim negotiations are underway.

[256] While that observation was made in the context of as yet to be determined Aboriginal claims, I am satisfied that it is equally applicable to a situation such as this where the Decision is a fundamental part of the process that may lead to the taking up of land which is subject to treaty rights for purposes which have the obvious potential to infringe those rights.

[257] In result I find that the Province had a duty to consult with the FNFN before making the Decision on August 8, 2013.

3. Has the EAO satisfied the duty to consult?

[258] In the alternative to its argument that the EAO had no duty to consult with the FNFN in the making of the Decision and without acknowledging any legal duty to consult on the interpretation and application of the thresholds in Table 6 of the *Regulation*, the Province submits that any such consultation would be at the "low end of the consultation spectrum" (per *Haida* at para. 43) because the Decision only establishes a process for environmental assessment review, any adverse impact would be minimal.

[259] The Province accordingly submits that because of that minimal potential adverse impact on the FNFN's Treaty 8 rights occasioned by the EAO's interpretation of the *Regulation* that makes the Komie North Mine unreviewable, to maintain the honour of the Crown the only duty of the Crown would be to engage with the FNFN by giving notice, disclosing information and discussing any issues raised in response to the notice, as suggested by the Supreme Court of Canada in *Haida*, when low end consultation is required.

[260] The Province submits that the evidence establishes that the EAO did appropriately engage with the FNFN to at least the low level extent required by *Haida* concerning the interpretation of the Sand and Gravel threshold in the *Regulation.*

[261] In making that submission the Province references:

1) The June 18, 2013 letter from the FNFN to the EAO requesting that the Komie North Mine project be considered reviewable under the *Regulation* and setting out the FNFN's own views on interpretation of the Sand and Gravel threshold;

2) The EAO's response the following day advising the FNFN that it would consider whether the *Regulation* applied;

3) The EAO's advice to the FNFN on September 30, 2013 providing its views regarding the interpretation of the Sand and Gravel threshold;

4) The FNFN's letter of October 22, 2013, in which the FNFN made further submissions to the EAO in support of its interpretation of the threshold; and

5) The EAO's response dated January 15, 2014 with its further explanations of the rationale for its interpretation of the *Regulation.*

[262] In its written submissions the Province asserts that the referenced correspondence "demonstrates that the FNFN made submissions to the EAO and that their submissions were substantively considered by the EAO and a response and rationale provided". The Province thus submits that if there was a duty to consult with the FNFN, the EAO "adequately discharged any duty of consultation on the facts before this Court".

[263] The Province further submits that based upon the Court of Appeal's decision in *Friends of Davie Bay*, the EAO did not in any event, have a duty to respond to the FNFN's inquiries about the application of the *Regulation* to proposed projects because the function undertaken by the EAO does not involve an exercise of discretion.

[264] In addition, the Province asserts that both the Decision and the September 30, 2013 explanation of it to the FNFN only provided the "views" of the EAO on the interpretation of the *Regulation* and that "under the statutory scheme, responsibility for determining whether a project is a reviewable project rests with the proponent".

[265] Finally, the Province asserts in its written submissions that the FNFN's submissions concerning the EAO's failure to provide the FNFN with an opportunity to present their view in advance of the making of the August 8, 2013 Decision was "not pled and they have made no attempt to amend their Petition in this regard".

[266] Before turning to the determination of the substantive issue of whether the Province adequately consulted with the FNFN concerning the making of the Decision, I will first address that pleading issue raised by the Province in its written submissions.

[267] In the petition first filed on August 11, 2014 the FNFN sought, in addition to other specified relief:

> 2) A declaration that the Crown in right of the Province of British Columbia (the Crown) owes a duty to consult and accommodate the Fort Nelson First Nation with respect to the subject matter of the Decision, prior to making the Decision.
>
> [Emphasis added.]

[268] To the extent that the Province seeks to rely upon a lack of a more specific pleading of the failure of the EAO to allow the FNFN to present their views in advance of the making the Decision, I am satisfied that any such lack of specificity of the FNFN's allegations of the EAO's failure to consult before the making of the Decision was more than remedied by the voluminous affidavit evidence filed.

[269] The issue was also fully canvassed in argument by all counsel with the alleged failure of the EAO to provide the FNFN with a meaningful opportunity to make submissions before the Decision was made being a central focus of the duty to consult arguments.

[270] In all of the circumstances I am satisfied that if there was any failure of the FNFN's pleadings to sufficiently particularize its complaints about the making of the Decision, any such lack of specificity did not cause surprise and did not in any way prejudice the Province in the hearing of the petition.

[271] As to the merits of the Province's submissions in support of its substantive arguments that there was a sufficiently adequate exchange of information and consideration of the FNFN's point of view to satisfy the duty of the Crown to consult in the circumstances of this case I make the following observations and have reached the following conclusions :

1) I do not agree that the duty to consult in this case is at the "low end of the consultation spectrum". I have found in determining that there was a duty to consult in the making of the Decision which is more akin to a "strategic high level decision".

2) I have also determined that the potential adverse effects of the Decision not only with respect to the Komie North Mine project but also other potential new Sand and Gravel Pits in the FNFN's traditional territory is not "minimal".

3) For those reasons alone I do not accept the Province's suggestion that any duty to consult has been satisfied by "giving notice, disclosing information and discussing any issues raised in response to the notice".

4) More specifically, however, I do not agree that the exchange of correspondence between the EAO and the FNFN is capable of supporting the proposition advanced by the Province that the correspondence to which it refers demonstrates that the submissions made by the FNFN to the EAO "adequately discharged any duty of consultation on the facts before this Court".

5) To the contrary, the correspondence relied upon by the Province and other communications that are not referenced satisfies me that there was no meaningful consultation with the FNFN at all with respect to the subject matter of the Decision.

6) I conclude that what in reality transpired was that the FNFN sought to engage in meaningful consultation and the EAO either failed to respond in a timely way or deflected the FNFN's concerns and then made the Decision without any input from the FNFN. The EAO then asserted and continues to assert that the process did not require consultation because it took the positions that the EAO's interpretation of the Sand and Gravel is proponent-driven and that application of the threshold is not discretionary.

7) In making that observation I specifically note that:

   a. The correspondence relied upon by the Province does not include reference to the June 13, 2012 correspondence from the FNFN to the Minister requesting designation of all of CSI's proposed Sand and Gravel Pits in the FNFN's traditional territory as reviewable projects. In that letter concerns with "Project splitting" to avoid environmental assessment by setting production limits for each separate but related project was specifically raised by the FNFN.

   b. The letter of June 13, 2012, was not responded to by the EAO until February 13, 2013, when the Executive Director of the EAO advised that the Minister had decided not to designate the Komie North Mine project or the other projects as reviewable projects "because the projects are preliminary, and as yet not sufficiently defined to be considered proposed projects".

   c. That response letter also stated that in the opinion of the EAO the CSI projects "may when further advanced in terms of design constitute a single project that requires environmental assessment" but ended by saying that the EAO had requested that CSI contact the EAO prior to initiating the development stage of any of the six Licenses of Occupation "in order to determine whether an EA will be required".

   d. However, more than two months before that letter was sent to the FNFN, CSI had already submitted a Notice of Work application to the Mines Ministry for a permit under the *Mines Act* for the development of the Komie North Mine.

   e. The FNFN was not informed of that application until May 2, 2013, five months after the application was made.

   f. When the FNFN was finally informed, it complained to the Ministry of FLNRO on June 3, 2013, about an inadequate review period as well as

incomplete, inadequate and inaccurate materials provided by CSI. In that same letter the FNFN again raised environmental assessment concerns and more specifically about what it suggested was an apparent attempt by CSI to "circumvent the threshold" by counting only sand in the production estimate and characterizing the gravel as waste.

g. Similar concerns were raised in the FNFN's letter of June 18, 2013, to the EAO which also enclosed a copy of its June 3, 2013 letter to the Ministry of FLNRO.

h. In the EAO's response to the June 18, 2013 letter the following day which the Province says advised the FNFN "that it would consider whether the *Regulations* applied", the actual wording of the response was that:

> EAO is aware of the proponent's application to move to the development stage of its License of Occupation for the Komie North parcel.
>
> Mike Peterson is the Project Assessment Manager working on this file, and is discussing the application with the project proponent, MEM and FNLR. Mike will respond to Fort Nelson First Nation once he has the required information.
>
> [Emphasis added]

i. Notwithstanding that advice to the FNFN, when CSI sent a letter to Mr. Peterson on July 19, 2013 requesting "confirmation that the Komie North Project is not reviewable" when the letter was received by the EAO no copy or information about it was provided to the FNFN.

j. The EAO then made the Decision on August 8, without notification and without seeking any input from the FNFN.

k. The Decision was copied to the Mines Ministry as well as the Ministry of FLNRO, but was not made known to the FNFN until September 30, 2013. Even then it was only made known after:

i. the FNFN had sent an email to the Ministry of FLNRO (with a copy to the EAO) advising that it had not received a full response to its letter of June 19, 2013 in which it had stated that the Ministry of FLNRO should not "process further or approve the [Komie North Mine Project] until full responses to its outstanding correspondence had been given "by both the Ministry of FLNRO and the EAO (concerning the FNFN's June 18 letter)"; and "a full consultation with the FNFN has been conducted and concluded by the crown on this application"; and

ii. the FNFN had also sent a letter to the EAO on September 26, 2013 (quoted at full in para. 68 of this judgment) advising that it had still not received a response to its June 2013 correspondence and in which it stated it looked forward to receiving responses to that correspondence and to "our further discussions of these Applications as they effect the FNFN's rights and interests".

l. The EAO's letter of September 30, 2013 and subsequent letter of January 14, 2014, cannot fairly be read as being part of a consultation process. Those letters seek only to justify the Decision. They do not substantively respond to the FNFN's repeated concerns of which the EAO had been aware since June of 2012 that had not been addressed with the FNFN before the EAO made the Decision,

m. As stated by Binnie J. in *Mikisew* at para. 54:

> … Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along…

8) I also do not accept the Province's assertion that based upon the Court of Appeal's decision in *Friends of Davie Bay*, the EAO had no duty to respond to the FNFN's inquiries about the application of the *Regulation* to the Komie North Mine project or other proposed projects because the

function undertaken by the EAO does not include an exercise of discretion. For reasons I have already given, I am not persuaded that to the extent the decision in *Friends of Davie Bay* approves a proponent-driven approach to the interpretation and application of the thresholds in Table 6 of the *Regulation,* it also applies when a proponent-driven assessment at the front end of the environmental regulatory process has the very real potential to defeat existing treaty rights by allowing projects to proceed without environmental assessment with any relief being left to sanctions which may be of little or no benefit to a First Nation whose rights have been abrogated.

9) It follows that I do not accept the Province's further assertion that the Decision and the September 30, 2013 explanation of it to the FNFN only provided the "views" of the EAO on the interpretation of the *Regulation* and that "under the statutory scheme, responsibility for determining whether a project is a reviewable project rests with the proponent".

10) In my opinion, that assertion is, at best surprising, given the important environmental protection and oversight role afforded to the EAO by the Legislature in its attempt to balance environmental protection with other legitimate societal concerns. At worst it is an attempt to avoid responsibility.

[272] After considering all of the submissions of counsel and the totality of the evidence I find that the EAO did not engage in the required consultation with the FNFN with respect to the subject matter of the Decision in a meaningful way sufficient to satisfy the Province's constitutional obligations.

SUMMARY

[273] I have concluded that:

1) The EAO's interpretation and application of the threshold criteria for new Sand and Gravel Pits in Table 6 of the *Regulation* as set out in the Decision is unreasonable.

2) The Province had a duty to consult with the FNFN with respect to the Decision.

3) The Province failed to meaningfully consult with FNFN in good faith and seek to accommodate the FNFN's aboriginal rights under Treaty 8 with respect to the subject matter of the Decision in a way sufficient to satisfy the Province's constitutional obligations.

REMEDIES

[274] As a consequence of those conclusions and the findings I have made in reaching them the FNFN is entitled to the following remedies:

1) An order setting aside the Decision.

2) An order remitting the determination of whether the Komie North Mine project meets the thresholds set out for new Sand and Gravel Pits in Table 6 of the *Regulation* to the EAO for reconsideration pursuant to s. 5 of the *Judicial Review Procedure Act* having regard to the findings I have made and the conclusions I have reached.

3) A Declaration that the Crown in the right of the Province of British Columbia owed a legal duty to meaningfully consult with the FNFN in good faith and seek to accommodate the FNFN's aboriginal rights under Treaty 8 with respect to the subject matter of the Decision prior to making the Decision.

4) A Declaration that the Crown in the right of the Province of British Columbia failed to fulfil its duty to meaningfully consult with the FNFN in good faith and seek to accommodate the FNFN's aboriginal rights under Treaty 8 with respect to the subject matter or the Decision.

"Davies J"