SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: Mi'kmaq of P.E.I. v. Province of P.E.I. et al. 2018 PESC 20

Date: June 25, 2018
Docket: S1-GS-27549
Registry: Charlottetown

Between:

**The MI'KMAQ OF PRINCE EDWARD ISLAND,
CHIEF MATILDA RAMJATTAN, on her own behalf and on behalf of
all of the members of the LENNOX ISLAND FIRST NATION, and
CHIEF BRIAN FRANCIS, on his own behalf and on behalf of
all of the members of the ABEGWEIT FIRST NATION**

Applicants

And:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
PRINCE EDWARD ISLAND, 9711864 CANADA INC.,
and DONALD J. MCDOUGALL**

Respondents

Before: The Honourable Justice Gordon L. Campbell

Appearances:

David M. Rosenberg, Q.C., John W. Hennessey, Q.C. and David W.P. Moriarty, counsel for the Applicants

M. Lynn Murray, Q.C. and Thomas Isaac, counsel for Her Majesty the Queen in Right of the Province of Prince Edward Island

David W. Hooley, Q.C., counsel for 9711864 Canada Inc. and Donald J. McDougall

Place and date of hearing	Charlottetown, Prince Edward Island January 16 to 19, 2018
Place and date of judgment	Charlottetown, Prince Edward Island June 25, 2018

Administrative law - Judicial review - Aboriginal law - Crown land - Assertion of title - Aboriginal rights - Aboriginal title - Duty to consult and accommodate - Honour of the Crown - When does duty arise - Content and extent of duty to consult - The *Haida* spectrum - Preliminary assessment of the strength of case and degree of impact of contemplated Crown action - Principles governing consultation process.

Provincial Crown lands had been leased to a private development company and used as a golf course and resort complex for approximately 34 years. The operation had been losing money for several years. The Province sought expressions of interest from the private sector for the lease, management, or purchase of the 325 acres of lands and complex. The Province gave notice of its intentions to the Mi'kmaq prior to issuing its initial request for expressions of interest. The Mi'kmaq asserted title to the lands in question, and asserted title to all of Prince Edward Island. The Province and the Mi'kmaq communicated on numerous occasions about various aspects of the proposed disposition of Crown lands. Over approximately 4 ½ years the Province dealt with various proponents, eventually reaching agreement to sell the lands and complex to a new developer. The Mi'kmaq filed a judicial review application seeking a declaration that the Province had failed to satisfy its duty to consult and accommodate Mi'kmaq interests prior to the transfer of lands. They sought a declaration that the Orders-in-Council approving the sale were invalid and that the conveyance of lands to the new developer was void.

Held: The application for judicial review was dismissed.

STATUTE CONSIDERED: ***Constitution Act, 1982***, Section 35

CASES CONSIDERED: ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44; ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73; ***Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)***, 2008 FCA 212; ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43; ***Canada (Public Works and Government Services) v. Musqueam First Nation,*** 2008 FCA 214; ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69; ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, 1997 CanLII 302 (SCC); ***R. v. Van der peet***, [1996] 2 S.C.R. 507; ***Canada (Attorney General) v. Long Plain First Nation***, 2015 FCA 177; ***Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)***, 2013 ABCA 443; ***Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources)***, 2013 BCCA 412; ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 BCCA 128; ***Hupacasath First Nation v. British Columbia (Minister of Forests)***, 2005 BCSC 1712; ***Katlodeeche First Nation v. Canada (Attorney General)***, 2013 FC 458; ***Little***

Salmon/Carmacks First Nation v. Yukon (Director, Agricultural Branch, Department of Energy, Mines & Resources) 2010 SCC 53 (also cited as ***Beckman v. Little Salmon, et al.***); ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*** 2017 SCC 54

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Introduction

[1] The Mill River Resort (the "Resort"), located in western Prince Edward Island, includes an 18 hole championship-style golf course, a hotel, a campground, and a fun park. The Resort, which sits on four parcels of land totalling approximately 325 acres (the "Lands"), has been operating since 1983. The Mill River Golf Course is one of four golf courses owned by the Province, each of which are associated with large tourist accommodations. Rodd Hotels and Resorts ("Rodds") have operated the Resort through a lease agreement with the Province for most of the past 34 years.

[2] In recent years, the Province has been losing money on its golf course operations. For that reason, in 2012, it decided to determine if anyone in the private sector had any interest in taking over its golf courses. In its Speech from the Throne on April 4, 2012, the Government signalled its intention to reassess and re-examine the manner in which it provided support to the tourism industry "to ensure [their] limited resources support the highest value return for the Province".

The Speech declared, “As well, my Government will introduce a public and transparent Request for Proposals to determine private interest in the four Provincial Golf Courses”.

[3] After issuing a Call for Expression of Interest in 2012, and after completing various discussions and negotiations, in January, 2017, the Government of Prince Edward Island announced it had reached an agreement to sell the Mill River Resort complex to a private developer. The Government issued two Orders-in-Council which granted permission for Donald J. McDougall (Order-in-Council EC 2017-6) and his company, 9711864 Canada Inc., (Order-in-Council EC 2017-12), to acquire the Lands from the Province.

Applicants seek judicial review

[4] The applicants applied for judicial review of Orders-in-Council EC 2017-6 and EC 2017-12. They seek the following relief:

> a) that the Orders-in-Council be declared invalid and be set aside;
>
> b) that any transfer of lands purported to have taken place pursuant to those Orders-in-Council is without effect; and
>
> c) a declaration that the respondent Province of Prince Edward Island failed to adequately consult and/or accommodate the Mi’kmaq of Prince Edward Island with respect to the decision to convey the Lands to the respondents, McDougall and his company.

[5] An additional application for an interim injunction prohibiting the further transfer of the Lands has been put in abeyance pursuant to a “standstill agreement” between the applicants and McDougall and his company. The standstill agreement expires after a fixed period of time following the issuance of this decision.

[6] The applicants are identified as the Mi’kmaq of Prince Edward Island, Chief Matilda Ramjattan, on her own behalf and on behalf of all members of the Lennox Island First Nation, and Chief Brian Francis, on his own behalf and on behalf of all of the members of the Abegweit First Nation. The Mi’kmaq Confederacy of Prince Edward Island (“Mi’kmaq Confederacy” or the “Confederacy” or “MCPEI”) is a nonprofit company which represents an alliance of the Lennox Island First Nation and the Abegweit First Nation, which are the two Indian bands which comprise the Mi’kmaq of PEI. I will generally refer to the applicants as the “Mi’kmaq Confederacy” or the “Confederacy” as that is the body which represents all of the applicants and through whom most of the contact or communications with the respondent Province flowed. I will refer to communications with the individual Chiefs when necessary to do so.

[7] I will refer to the respondent Her Majesty the Queen in Right of the Province of Prince Edward Island as the “Province”, or the “Government”.

[8] I will refer to the respondents Donald J. McDougall and his company, 9711864 Canada Inc., collectively as “McDougall” or “McDougall and his company”, unless the context requires specific reference to the company.

Consultation Agreement

[9] In 2012, the Mi’kmaq of Prince Edward Island, together with the Government of Prince Edward Island and the Government of Canada, signed a “Consultation Agreement”. To allow for an understanding of the nature of the agreement, I have set out the first several paragraphs:

> The Parties agree as follows:
>
> **PURPOSE**
>
> 1. **The consultation process under this Agreement is available whenever Canada or Prince Edward Island wishes to conduct consultation on the record and with prejudice with the Lennox Island First Nation and Abegweit First Nation respecting a decision or activity that may impact any established or asserted Mi’kmaq Aboriginal or treaty rights**.
>
> **MI’KMAQ OF PRINCE EDWARD ISLAND CONSULTATION UNIT**
>
> 2. The Mi’kmaq Consultation Unit is established, appointed by and reports to the two (2) Mi’kmaq First Nations in Prince Edward Island through the Mi’kmaq Confederacy of PEI Inc. (MCPEI).
>
> 3. The Mi’kmaq Consultation Unit has been mandated by the Mi’kmaq and the Chiefs and Councils of each of the two (2) Mi’kmaq Bands that subscribe to this Agreement to act as their agent in the consultation process as described in section 5.
>
> **CANADA AND PRINCE EDWARD ISLAND PARTICIPATION**
>
> 4. Canada or Prince Edward Island shall participate in consultations through the federal departments, provincial departments or other Crown agencies responsible for the decision or activity in respect of which consultation is sought.
>
> **CONSULTATION PROCESS**
>
> 5. The consultation process shall operate in good faith on the basis of the following:

a. **Where Canada or Prince Edward Island wishes to initiate consultation under this Agreement, they shall provide notification in writing to the Mi'kmaq Consultation Unit that consultation respecting a particular decision or activity is intended**;

b. **Canada or Prince Edward Island shall make good faith efforts to provide to the Mi'kmaq Consultation Unit all relevant information with respect to the proposed decision or activity and sufficient time to assess whether or not and the extent to which the decision or activity may impact on established or asserted Mi'kmaq Aboriginal or treaty rights**;

c. **The Mi'kmaq Consultation Unit shall, within a reasonable period of time, identify and communicate to Canada or Prince Edward Island any concern they may have respecting any potential adverse impact on established or asserted Mi'kmaq Aboriginal or treaty rights**;

d. Canada or Prince Edward Island shall consider the concerns identified pursuant to 5c, identifying potential accommodations, if any;

e. The Parties concerned may seek the engagement of industry proponents as part of any consultation conducted pursuant to this Agreement;

f. **Canada or Prince Edward Island shall notify the Mi'kmaq Consultation Unit of any decision reached, including responses to the issues or concerns raised, and notification of accommodations, if any, as a result of the consultation**; and,

g. The Parties concerned may terminate by written notice of seven (7) calendar days any consultation conducted pursuant to this Agreement.

LEGAL STATUS

6. **This Agreement does not require any Party to undertake consultation or to reach agreement in respect of any particular decision or activity**.

7. Nothing in this Agreement is intended to alter any statutory or regulatory requirements to which governments are subject.

8. **The consultation process under this Agreement is optional** and does not preclude the Parties from engaging in consultation independent of this process or from concluding additional or alternative consultation agreements.

9. This Agreement is not subject to settlement privilege and may be tendered as evidence in a court of law or other legal proceeding.

10. Consultation conducted pursuant to this Agreement is not subject to settlement privilege and evidence respecting consultation activities may be tendered as evidence in a court of law or other legal proceeding if the evidence is relevant to an issue of whether a duty to consult was or was not met.

11. **Nothing in this Agreement is intended to:**

    a. alter or define the duty to consult;

    b. create, alter or define any obligation on the Mi'kmaq respecting the duty to consult;

    c. prevent the Mi'kmaq from relying on any common law or statutory right they may have respecting the duty to consult; or

    d. represent the views of, or be interpreted as admissions by, any of the Parties with respect to the nature and scope of the duty to consult.

12. **Nothing in this Agreement is intended to recognize, deny, create, extinguish, abrogate, derogate from or define any Aboriginal or treaty rights that the Mi'kmaq may have.**

...

(Emphasis added throughout)

[10] The Consultation Agreement consists of non-binding declarations by each of the parties. The Province may give written notice to the Mi'kmaq that they intend to commence consultations with respect to a matter which may affect Aboriginal or treaty rights. Notwithstanding the use of the word "shall" from time to time in the agreement, the entire consultation process described in the agreement is "optional". It provides for notification of intention to consult, the use of best efforts to provide all relevant information, and the provision of a response by the Mi'kmaq within a reasonable time to any concerns arising. Neither party is required to undertake consultation or reach agreement, and no rights are intended to be created or extinguished or otherwise affected in any way.

[11] While the Consultation Agreement provided some basic process for consultation to occur, both the Province and the Mi'kmaq Confederacy acknowledged there is a legal obligation to "consult and, if appropriate, accommodate" with respect to asserted Aboriginal title and right, in situations or circumstances described in decisions of the Supreme Court of Canada.

Call for Expressions of Interest

[12] On July 10, 2012, prior to seeking public input, Her Majesty the Queen in Right of the Province of Prince Edward Island (the "Province"or the "Government") corresponded with Chief Brian Francis of the Abegweit First Nation and Chief Darlene Bernard of the Lennox Island First Nation. The Government advised them that the Department of Tourism and Culture was proposing to publish a Call for Expression of Interest to assist them in assessing the level of interest from the private sector in either purchasing, leasing, or engaging in the management of the provincial golf courses, and asked if further consultation was required.

[13] In the correspondence, which was copied to Don MacKenzie, Randy Angus, and Tammy MacDonald of the Mi'kmaq Confederacy, Helen Kristmanson of the Aboriginal Affairs Secretariat, and to Chris Jones, Director Tourism and Culture, the Province identified the golf courses and disclosed the Provincial Identification Numbers (PID#s) of the lands in question. Further materials were included in the information package, including location and ortho maps. The draft of the Call for Expression of Interest included in the information package referred to the potential for interested parties to purchase, lease, or manage the resort(s) and related properties. The correspondence of July 10, 2012, then stated:

> ...
>
> We kindly request your review of the information provided and advise us if further consultation with our Department regarding the information is required. We would appreciate if your response could be provided to the undersigned by *August 21, 2012.* If you are unable to meet that date, we kindly request your advising us of when you feel a response could be provided.
>
> ...

[14] The Confederacy responded to the Province on July 17, 2012, through its Executive Director, Senior Legal Advisor and Director of Intergovernmental Affairs, Don MacKenzie, stating:

> ...

> The First Nations expect to be consulted with respect to each and every decision that government may make in relation to this matter. However, there is no issue with putting out the expression of interest.

[15] That correspondence was the first exchange between the parties specifically in relation to the Province's wish to divest itself of its golf courses. The parties had numerous other exchanges of correspondence or consultations, between July, 2012 and January 10, 2017, when the Government passed the now-challenged Orders-in-Council.

[16] Following receipt of the response from the Confederacy, the Government published a Call for Expression of Interest in local and national newspapers on July 21, 2012. In addition, various invitations were sent to several North American golf course management companies.

[17] According to the Province, the Mill River Resort had, for several years, provided significant economic benefits to the West Prince County area of Prince Edward Island, and was an important draw for tourists to the whole of western PEI. However, by the mid-2000's, similar to the other three provincially owned golf courses, the Mill River Golf Course and the fun park, campground, and hotel resort were all suffering ongoing financial losses. Many major capital upgrades have been deferred resulting in the need, by 2012, for significant capital investment to improve, repair or replace a large portion of the infrastructure throughout the Resort. The Province estimated the combined payroll for the Resort operations to be in the range of $1.7 million per annum. In addition, 15,000 rounds of golf were played annually at the Mill River Golf Course, with additional hotel and campground accommodation nights being in the range of 6,500 and 2,500 respectively. The Province estimated that, in addition to the annual losses being incurred, the Resort required an investment of several million dollars.

[18] In response to its Call for Expression of Interest, the Province received numerous proposals with respect to some or all of the golf courses and related properties. According to the Province, it eventually focussed on the McDougall proposal for the Mill River Resort as a potential opportunity to revitalize tourism, upgrade or replace infrastructure, increase capital investment, and secure employment and other economic benefits for Western PEI.

[19] The Province was of the view that the Resort and related activities provide significant and much needed economic and socioeconomic benefits to the residents of western PEI. The Province stated that over the period of four and one-half years from the issuance of the Call for Expression of Interest to the time of making a decision, they considered various factors including:

a) the overall benefits to the taxpayers of Prince Edward Island;

b) issues and implications from a staffing, human resources and union perspective;
c) contractual arrangements and agreements with Rodd Resorts, as operator of the hotel situated at the Mill River Resort;
d) employment and tourism issues for the overall West Prince area; and
e) the need to engage in reasonable and adequate consultation with the Mi'kmaq Confederacy pertaining to the potential disposition of the provincially owned golf courses.

Communication between the parties

[20] The Province maintains that, with respect to the Mill River Lands, significant consultation did occur between it and the Mi'kmaq in the period from July 10, 2012 and January 11, 2017. They submit their consultations are reflected in, and highlighted primarily through, approximately 25 pieces of correspondence between the parties. They also refer to the fact there were three meetings between the parties specifically dealing with the Mill River Lands. Those meetings were held on November 3, 2016, December 5, 2016, and December 22, 2016. In addition, the Chiefs met with the Premier on one or more occasions. Further, on January 10, 2017, they met with the Provincial Cabinet which was the decision-maker whose decision is the subject of the application for judicial review. Neil Stewart, the Deputy Minister of Economic Development and Tourism at the time of the issuance of the Orders-in-Council, also testified that there were additional communications and un-minuted meetings of a general nature during which the issues relating to the Mill River Resort were discussed. The Province claims its consultation was adequate to satisfy its obligations to the Mi'kmaq of Prince Edward Island.

[21] The Mi'kmaq Confederacy maintains that the required consultation and accommodation did not occur. Throughout their correspondence they expressed that the Province required the "consent" of the Mi'kmaq of PEI before any conveyance of Crown lands could be completed, and such consent was not given.

[22] The parties addressed the numerous communications between the Province and Mi'kmaq of PEI. As the issue of the degree of consultation is central to the issue in dispute in this matter, there is value in reviewing those communications in detail. The highlighting, or bold print, appearing in the communications has been added by me, unless otherwise indicated.

2012
July 10, 2012

[23] This correspondence is referred to in para. 13 above. That the Province was conscious of its obligation to consult is clear from a reading of its initial

correspondence from Leo Creamer, Manager, Provincial Lands, to the Chiefs of the Abegweit and Lennox Island First Nations on July 10, 2012, in which he included a request to be advised of the desire for "**further consultation with our department**".

July 13, 2012

[24] The obligation to consult is even more pointedly referred to in follow-up contact from Kim Horrelt, Senior Director, Capital Planning, to Don Mackenzie, Executive Director of MCPEI. She emailed him on July 13, 2012, stating:

> Hi Don,
>
> I am assuming you received the **duty to consult notification letter** with respect to the "Expression of Interest" the Department of Tourism would like to put out on the provincial golf courses.
>
> The "Expression of Interest" is simply that, a way to gauge if there is any interest **for another party to buy, lease, or manage** any one, or all of the Provincial golf courses. ... **(Emphasis added)**

July 17, 2012

[25] This correspondence has already been referred to in para. 14 above. In it, the Executive Director responded to Ms. Horrelt by email on July 17, 2012, stating:

> ...
>
> **The First Nations expect to be consulted with respect to each and every decision that government may make in relation to this matter**. However, there is no issue with putting out the expression of interest.

August 29, 2012

[26] The next correspondence of significance came from MacKenzie of MCPEI, on August 29, 2012. It was an email to Leo Creamer, Manager of Provincial Lands, which was copied to MacDonald and Angus of MCPEI. In it, Mackenzie stated:

> ...
>
> I just wanted to touch base and advise that **our preliminary research** of the lands containing the four provincial golf courses has revealed a number of traditional Mi'kmaq activities potentially impacting on Aboriginal rights. **We will have further research to undertake before any kind of official consultation response can be provided. Until such time as we can explore the issues in more detail, the PEI**

> **Mi'kmaq would object to any Crown action or decision being taken with respect to those Crown lands - further consultation will be required**. Just wanted to give you a preliminary update.
>
> ...

2013
August 20, 2013

[27] Almost a year passed before the next recorded correspondence, which was again from Mackenzie by email to Ms. Horrelt on August 20, 2013, stating:

> ... **We haven't received any further consultation** respecting this matter from the Province, which I assume means nothing more has happened. But just thought I would check to see if there has been any activity since the expression of interest was put out last year. Anything?
>
> ...

[28] Following the email to Horrelt on August 20, 2013 a telephone conversation took place between Chris Jones of the Department of Tourism and Culture, and Mackenzie, on August 21, 2013.

September 30, 2013

[29] MacKenzie expressed the views of the Mi'kmaq Confederacy in correspondence of September 30, 2013, stating:

> ...
>
> Further to my email to Kim Horrelt of August 20th and the telephone conversation between you and me on August 21st, I am writing in relation to the possible Provincial Government (Crown) activity respecting one or more of the provincially owned golf courses (Mill River, Crowbush, Brudenell, Dundarave).
>
> In my email to Kim Horrelt in July of 2012, we advised that while the Mi'kmaq took no issue with the Crown publishing an "expression of interest" in the newspaper, there was the stated expectation that there must be Crown consultation with the Mi'kmaq with respect to each and every Crown decision relating to the subject properties. As we had heard nothing, we assumed that there was no activity respecting the properties, as set out in my August 20th email. However, after our phone conversation, I understand that there is some potential Crown activity in relation to one or more of the courses. As stated during our conversation, the Mi'kmaq have received no consultation respecting the potential activity, and such consultation is required before any Crown decisions are made.

> **As this matter involves large parcels of Crown land in areas where there is an abundance of traditional Mi'kmaq activities, Mi'kmaq Aboriginal and treaty rights may be negatively impacted by any Crown decision. Therefore, Crown consultation, and potentially accommodation, is mandatory**.
>
> **Until such time as proper and meaningful consultation with the Mi'kmaq has been undertaken, as well as appropriate accommodation, we will state for the record that we formally object to any Crown activities or decisions being made in relation to these properties**.
>
> ...

November 5, 2013

[30] William Dow, Q.C., ("Dow") responded to MacKenzie's letter by correspondence of November 5, 2013, stating:

> ...
>
> This letter is further to yours of September 30, 2013 addressed to Chris Jones of the Department of Tourism and Culture. Please be advised that we are legal counsel to the Department with respect to the "potential" sale of the Government owned golf courses.
>
> **For your information, no agreement has been reached, to date, with any of the proponents pertaining to the sale of these assets. If the Government of Prince Edward Island intends to reach such an agreement, it will ensure that its legal obligations with the Mi'kmaq of Prince Edward Island are fulfilled**.
>
> Should you have any questions, please do not hesitate to contact the undersigned.
>
> ...

2014
November 26, 2014

[31] The next substantive communication occurred a year after Dow's letter. The position of the PEI Mi'kmaq was set out by MacKenzie in correspondence to the Honourable Robert Henderson, Minister of Tourism and Culture, on November 26, 2014:

> ...

> I write to you on behalf of Chief Brian Francis of the Abegweit First Nation and Chief Matilda Ramjattan of the Lennox Island First Nation in relation to the potential conveyance of the Crown owned Mill River Golf Course and complex. We have noted that an article appeared in the November 22nd 2014, edition of the Charlottetown Guardian which indicates that **you have confirmed that the government is in discussions with a "perspective** [sic] **buyer". This is very surprising in light of the fact the PEI Mi'kmaq have not yet received any consultation notification**.
>
> As you are aware, **the Mi'kmaq Governments have asserted Aboriginal title to all lands and waters of Prince Edward Island, including adjacent areas and offshore islands**, and this certainly includes the Crown owned Mill River complex. Also, **the area in question is significant to the Mi'kmaq in terms of traditional and historical uses**, and therefore this is a matter that could have an adverse impact on Mi'kmaq Aboriginal and treaty rights.
>
> As such, **the Provincial Crown has a duty to meaningfully consult with the PEI Mi'kmaq before it makes any decision or takes any action** in relation to the Mill River property. Further, **as the property is subject to an assertion of Aboriginal title, the consent of the Mi'kmaq must be obtained prior to any conveyance being made. We formally advise that we object to any action being taken in relation to this property until such time as the Mi'kmaq have granted consent**.
>
> **We look forward to receiving a thorough consultation letter from the Provincial Crown at the earliest possible time,** should your government be considering taking any action respecting the subject property. Should you or your staff have any questions, please do not hesitate to contact me at any time.
>
> **I trust the foregoing to be satisfactory and that the position of the Mi'kmaq is clear.**
>
> ...

December 3, 2014

[32] On December 3, 2014, Jones from the Department of Tourism and Culture responded, with correspondence to Chief Francis and Chief Ramjattan:

> ...
>
> Please be advised that **the Department of Tourism and Culture,** in conjunction with the Department of Transportation and Infrastructure Renewal (TIR)**, intends to divest itself of the following properties**:

1. Provincial Parcel No. 39610 which contains **the Mill River Resort, the Mill River Golf Course and the Mill River Campground**; and

2. Provincial Parcel Nos. 559534 and 47217 to serve as **an access road** for the Mill River Resort, the Mill River Golf Course and the Mill River Campground.

Please find attached maps which provide locations and further property detail.

In keeping with the Provincial Policy on Consultation with the Mi'kmaq, **please consider this a formal consultation notice in relation to this proposed divestiture**. **Please provide any comments or information on how the proposed actions set out in this letter may affect your established and asserted Aboriginal and treaty rights**.

The Atlantic Canada Opportunities Agency (ACOA) has received an application for support for this proposed project. In keeping with the spirit of the 2012 Canada, Prince Edward Island and Mi'kmaq consultation agreement, ACOA will be participating in this process with the Government of Prince Edward Island.

Should you require further information, staff from the Department of Tourism and Culture, the Department of Transportation and Infrastructure Renewal and ACOA would be pleased to meet and discuss the proposed project.

The Department of Tourism and Culture on behalf of the Department of Transportation and Infrastructure Renewal **requests a response be provided to the undersigned by December 31, 2014 in order for your comments to be considered prior to a decision being made on this proposed divestiture**.

If you have any questions regarding the activities proposed herein or this notification package, please contact the undersigned.

...

[33] Three Geomatics maps were attached showing the subject parcels of land together with the surrounding parcels. The acreage and address of each parcel was also reflected in those maps.

December 19, 2014

[34] MacKenzie replied to Jones on December 19, 2014:

...

Firstly, I note that your letter has requested a response by December 31, 2014. As you are aware, **our protocol with the Provincial Government requires a minimum of 30 days from the date of notification to the date of requested response**. As the period is less than 30 days, and in light of the fact the Christmas holiday is in the middle of this period, the requested time frame is not in keeping with the spirit of meaningful and good faith consultation.

Secondly, before adopting a final position in this matter, or determining a reasonable time frame in which we could respond, **the PEI Mi'kmaq will require further details in relation to this proposed divestiture of Crown land. Please advise as to whom the Crown land is to be conveyed, and what the intended use is to be in relation to this significant acreage of Crown land post disposal**. If the Crown has already negotiated any kind of agreement prior to having sent the consultation notification, please provide us with full disclosure in relation to what was agreed.

Thirdly, our research has uncovered archaeological sites in Mill River and Cascumpec Bay areas. Our research has also revealed extensive historical Mi'kmaq use of the area, which includes campsites; hunting; and clay gathering for pottery. Traditional Mi'kmaq use includes group campsites, access for fishing and wild fruit gathering. Therefore, any conveyance of this Crown land will adversely impact on Mi'kmaq Aboriginal and treaty rights. If any disposal/conveyance were to take place, the Provincial Crown would have to accommodate the PEI Mi'kmaq as a result of the rights based infringement stemming from the disposal.

Fourthly, as the Provincial Crown is aware, the Mi'kmaq Governments have asserted Aboriginal title to all lands and waters of Prince Edward Island, including adjacent areas and offshore islands; and the assertion of Aboriginal title certainly includes those Crown lands that are the subject of this proposed disposal. As such, **and in addition to the consultation/accommodation required in relation to the rights based infringement, the Provincial Crown must secure the consent of the PEI Mi'kmaq before any disposal can be made**. This would be the case in relation to any Crown land, and certainly with such a large piece of Crown land that is historically and traditionally significant to the Mi'kmaq. If the Provincial Crown is intent on pursuing this disposal, **the two levels of government will have to engage in a meaningful and good faith negotiation process to determine if, and under what conditions, Mi'kmaq consent might be secured**. **To be clear, if no consent is secured, the Mi'kmaq formally object to, and strictly prohibit the disposal of this important Crown land**.

We look forward to receiving the requested details before embarking on the next phase of the consultation/accommodation process. Should you have any questions, please do not hesitate to contact me.

...

2015
January 30, 2015

[35] A detailed letter setting out the Province's activities to date, its future intentions for the Lands, and level of knowledge of Aboriginal activity in the area of the Mill River Resort was sent by Jones to MacKenzie on January 30, 2015:

> ...
>
> Thank you for your letter dated December 19, 2014 regarding the Province's potential plans for the Mill River Resort property. In your letter, you requested further information about this file.
>
> To date, this process has involved the Province, a private developer, West Prince Developments Inc. (a non-profit incorporated under Part II of the Companies Act) and the Atlantic Canada Opportunities Agency. **No agreement has been negotiated at this time.**
>
> At present, the Government of Prince Edward Island operates the golf course and provincial campground as contained on PID 39610 being +/- 282 acres. River Resorts Ltd. (doing business as Rodd's Mill River Resort) operates the hotel accommodation by way of a long term lease and aquaplex by way of a management agreement on this same property. Two other properties PID 559534 containing +/- 14 acres and PID 47217 containing +/- 4 acres are also included in this divestiture process.
>
> **The Province is in discussion with a private developer who is interested in purchasing the golf course, provincial campground, hotel, and adjacent lands (as referenced above)**. The private developer's intent is to maintain the existing use of the land, i.e. a golf course, campground and hotel. Any such change of use, either through development and/or subdivision would be subject to any and all relevant Provincial and/or federal statutes or regulations. It is intended that the not for profit corporation would assume title to the aquaplex.
>
> Upon successful completion of an agreement, the developer is proposing to carry out renovations of the hotel accommodations. The intent would be to commence renovations immediately upon closing of the sale with an expected 12 month completion period.
>
> **Timing is critical as it is anticipated that certain components require completion prior to the commencement of the busy 2015 tourism season beginning July 1, 2015.**
>
> In your letter you also make reference to the presence of archaeological sites and traditional Mi'kmaq use on the properties under discussion. **Our records show that a systematic archaeological survey of the Mill River system was completed by archaeologist Anna Sawicki in**

> **1984.** This survey was conducted mainly along the north shore of the Mill River, and included Fox Island, Hills River, Meggison's Creek, Long Creek, and Ashley Creek. **No archaeological sites were located in the surveyed areas and none are known within a five kilometre radius of the resort property**. Sawicki's interviews with local residents further identified traditional Mi'kmaq use in the 1930s at Carruthers Brook and at another unspecified location in the Mill River area. **We appreciate that your research has also produced knowledge of archaeological sites and traditional use in the Mill River and Cascumpec Bay areas. In order for us to give this proper consideration, please send detailed information to Dr. Helen Kristmanson, Director of Aboriginal Affairs and Archaeology**.
>
> On a related note, **in our letter of December 3, 2014, wherein we identified our intent to divest the subject properties, we requested comments or information on how the proposed actions may affect Aboriginal and treaty rights of the PEI Mi'kmaq. In your letter of December 19, 2014 you indicated that the property in question is "historically and traditionally significant to the Mi'kmaq." As the property in question is a developed site with a golf course and other recreational facilities and will continue to be used for this purpose, please specify how the transfer of the property adversely impacts an aboriginal or treaty right**.
>
> **Consistent with the spirit of meaningful and good faith consultation, we hereby request that this information be provided to the undersigned on or before February 13, 2015 in order for this information to be considered prior to a decision being made on this proposed divestiture**.
>
> Should you require further information, staff from the Department of Tourism and Culture would be pleased to meet and discuss the proposed project.
>
> ...

February 5, 2015

[36] MacKenzie responded to the Jones' January 30, 2015 correspondence with an email dated February 5, 2015, which was copied to Kristmanson, Chief Francis, Chief Ramjattan, and others at government and with MCPEI:

> Hi Chris, I am in receipt of your letter dated Friday, January 30, 2015, which was received on February 4th. **We will endavour** [sic] **to put together the requested information, but cannot guarantee that we can accumulate and communicate it by February 13, 2015.** Your requested time line requires comment on what is entailed in meaningful consultation. As pointed out in my letter of December 19th, for the Province to send a letter on December 3rd and request a response by year's end on a conveyance of this scale and magnitude, it would not be

> acceptable in any event. When the Christmas break is factored in, it becomes even less acceptable and flies in the face of the current protocol between the Provincial Government and MCPEI. **After the Provincial Crown was in possession of our initial response for six (6) weeks, we receive** [sic] **your most recent letter indicating that "timing is critical" and a response is requested within 9 days of us receiving the letter. This is not meaningful consultation**. The approach taken by the Crown to date has actually shown a level of disrespect towards the PEI Mi'kmaq and represents an unacceptable double standard. I must also mention that, in addition to any information we gather and provide respecting Aboriginal and treaty rights, **it is imperative that the Provincial Crown understands that this is a matter of Aboriginal title for which Mi'kmaq consent is required**. This was outlined in greater detail in my letter of December 19th. We will respond to your request in a reasonable time frame. In the meantime, **please advise how the Provincial Crown would like to initiate the process of negotiation that could potentially lead to the required consent being provided**.
>
> ...

February 9, 2015

[37] On February 9, 2015, Jones wrote a letter responding to MacKenzie's email of February 5, 2015:

> ...
>
> **Thank you for your February 5, 2015 email response to my letter which was dated and hand-delivered to the MCPEI Office on Friday, January 30, 2015.**
>
> I was looking forward to seeing your information by February 13. However, in light of your comments regarding your need for more response time, and owing to a spell of bad weather that has disrupted everyone's work schedule, an extension to February 23 is acceptable.
>
> **In your email you asked "how the Provincial Crown would like to initiate the process of negotiation that could potentially lead to the required consent being provided." As my focus is strictly the property transaction (PID#s 39610, 559534, 47217), the Aboriginal Affairs Secretariat will address this broader matter separately**.
>
> ...

February 9, 2015

[38] On the same date as Jones responded to MacKenzie's email of February 5, 2015, Kristmanson of the Aboriginal Affairs Secretariat wrote to MacKenzie, stating, in part:

> ...
>
> **In your email, you made reference to "how the Provincial Crown would like to initiate the process of negotiation that could potentially lead to the required consent being provided." We are giving this matter due consideration, however, as we undergo a transitional period with the resignation of our Minister, we won't be in a position to offer a considered response until internal matters have settled. Thanks for your patience**.
>
> **In the meantime**, **I know you are working with Chris Jones to bring forward any site-specific concerns regarding the proposed Mill River Resort property transaction and look forward to receiving that information**.
>
> ...

February 23, 2015

[39] MacKenzie emailed Jones indicating further time was required to respond:

> Hi Chris. Further to your letter of February 9, 2015, wherein you stated that "an extension to February 23 is acceptable" in relation to our next response; I am writing to advise that **we will not be able to provide that response today**. As I hope you can appreciate, this is a comprehensive matter involving many issues and a very large piece of Crown land. **We will respond in a reasonable time frame, and will endeavour to do so in the next week**. Please let me know if you have any questions.
>
> ...

March 12, 2015

[40] MacKenzie responded with references to archaeological sites, inquiring about the eventual decision-maker on the project and the opportunity for submissions, and stating their position on the duty to consult and the need for Mi'kmaq consent. On March 12, 2015, he wrote:

> ...
>
> Further to your letters of January 30th and February 9th, 2015, as well as our email correspondence, I am again writing in relation to the proposed land disposal of Mill River PID 39610; 559534; and 47217, which your Department is considering.

> **Our research has uncovered Mi'kmaq archaeological sites near the proposed land disposal areas, including three pre-Contact sites. Historical Mi'kmaq use of the area includes campsites; hunting; and clay gathering for pottery. Traditional, "Living Memory," Mi'kmaq uses within the designated areas include group campsites and wild fruit gathering. It must be remembered that the MCPEI database is, to date, a partial inventory of existing knowledge. As such, it does not mean that the subject area was not used (or used for additional purposes) or that there are not additional archaeological sites/findings, rather that evidence of these, if they exist, has not yet been collected**.
>
> On another note, **please advise whether there will be a statutory decision maker making a determination with respect to the proposed sale and transfer of the subject properties**. If so, will there be an opportunity for the Mi'kmaq to appear and make submissions?
>
> We have other matters to address in relation to this matter. In your letter of February 9, you indicated that your "focus is strictly on the property transaction ... the Aboriginal Affairs Secretariat will address this broader matter separately"; that was in response to our question about how the Crown would like to initiate the process of negotiation. By Letter of the same date, Dr. Helen Kristmanson of the Aboriginal Affairs Secretariat advised that they were undergoing a transitional period with the resignation of the responsible Minister, and would not be in a position to offer a considered response until internal matters have settled. **We take this opportunity to highlight that the Crown bears the onus of engaging in meaningful consultation, and the Crown has indicated that it is unable to undertake the negotiation process at this time**. **We would also highlight that it is the "property transaction" that has triggered the consultation and which will require the consent of the Mi'kmaq. We formally advise that the property transaction must not proceed without full and meaningful consultation and accommodation; and must not proceed without the consent of the Mi'kmaq, which is only possible after the Crown has initiated and undertaken a meaningful and respectful negotiation process**.
>
> ...

March 26, 2015

[41] Jones responded to MacKenzie on March 26, 2015, asking for further information on the pre-contact sites and uses to which MacKenzie referred, identifying the Government as the final decision-maker, and speaking of the process for further submissions to be made:

> ...

> **In your letter you refer to the existence of three pre-contact Mi'kmaq archaeological sites near the Mill River Resort property**. As I detailed in my letter of January 30, 2015 provincial records show that a professional archaeologist conducted a survey of the Mill River system in 1984 mainly along the north shore of the Mill River, and included Fox Island, Hills River, Meggison's Creek, Long Creek and Ashley Creek. No archaeological sites were located in the surveyed areas and none are known within a five kilometre radius of the resort property. **As soon as possible, please provide additional information as to the location and identification of the sites you referred to and indicate whether they are registered archaeological sites with Borden system assignations**.
>
> The 1984 archaeological survey also identified traditional Mi'kmaq use in the 1930s at Carruthers Brook and at another unspecified location in the Mill River area. **Please provide further information as to the location of the traditional uses cited in your letter such as campsites, hunting, clay gathering, and wild fruit gathering, and any current uses**.
>
> The Department's work on the proposed transaction of the Mill River Resort property (PID#s 39610, 559534, 47217) is on-going. **A final decision on the matter rests with Government. Please provide any further submissions you may have through this consultative process on or before April 24, 2015.**
>
> **As referred to in my letter of February 9, 2015**, the focus of this consultation process is the proposed property transaction. Issues outside the scope of the proposed transaction and **any related consultation should be brought to the attention of the Aboriginal Affairs Secretariat, and to whom this letter is copied, for their consideration**.
>
> ...

April 24, 2015

[42] In lengthy correspondence from MacKenzie to Jones on April 24, 2015, some traditional uses are identified. The position being taken by the PEI Mi'kmaq is forcefully reiterated as it relates to their view that the onus to identify negative impacts on Aboriginal rights is solely on the Province and that the Province is solely responsible for meaningful consultation, and that Mi'kmaq consent is a prerequisite to any transfer of the Lands:

> ...
>
> **With respect to the archaeological evidence, it is important to recognize that the MCPEI database is, to date, a partial inventory and there might very well be evidence that has not yet been**

discovered. Also, the entries in the database can be based on oral evidence, which can make it difficult to determine locations with exact specificity. We intend to set up a meeting with the Provincial Archaeologist and respond in more detail after that meeting has taken place.

With respect to traditional uses, the campsites are located directly on the subject parcels. Respecting the hunting, clay gathering and wild fruit gathering; the subject parcels would have been used by the Mi'kmaq as part of the travel routes directly related to these traditional activities.

In addition to matters you have referenced, there are matters that we would request you clarify. Firstly, as referenced in my March 12 letter, will there be any statutory decision maker making a determination with respect to the proposed sale and transfer of the subject properties? If so, will there be an opportunity for the Mi'kmaq to appear and make submissions?

Also could you please advise and detail as to what stage the Provincial Crown is at respecting the proposed transaction. As the case law has clearly set out that the Crown is under an obligation to inform itself of the impact its project will have on the rights of the Mi'kmaq, please advise as to what the Crown has done in this regard, and when it will be formally communicated to the Mi'kmaq.

In addition to the archaeological evidence and traditional activities you reference, it must be remembered that the Mi'kmaq have asserted Aboriginal title to all of PEI, including the subject parcels. Therefore, **the purported transfer would have a significant impact because of the transfer and control to a third party**. We trust the Crown is fully aware of this.

It should be recognized by the Crown that the Mi'kmaq will have numerous other submissions to make respecting this matter, but until further information is provided by the Crown, we will not be in a position to do so. To date, the Crown has failed to comply with all of its obligations related to its constitutional duty to consult and accommodate.

You reference that "the focus of this consultation process is the proposed property transaction". You suggest that issues outside the scope of the proposed transaction and any related consultation should be brought to the attention of the Aboriginal Affairs Secretariat. With respect, that approach is counterproductive and flies in the face of meaningful consultation. This matter relates to a proposed Crown activity - the transfer of the subject parcels. Therefore, **the Provincial Crown has an obligation to engage in meaningful consultation, to accommodate, and to obtain the consent of the Mi'kmaq before any transfer is made. The associated issues of consultation/accommodation and consent are inextricably linked to the proposed transfer, and cannot**

> **be carved off into separate Crown activities and responsibilities. Such an approach by the Provincial Crown is absolutely unacceptable. There is no obligation on the part of the Mi'kmaq to bring matters to the attention of the Aboriginal Affairs Secretariat. The obligation is solely on the Provincial Crown to meaningfully consult and to obtain consent prior to any transfer**.
>
> By virtue of this letter, and our previous correspondence, we have clearly made it known to the Provincial Crown what the position of the Mi'kmaq is and what needs to happen before any transfer can take place. **Should the Provincial Crown want to engage it's Aboriginal Affairs Secretariat as part of its obligations and duty to consult, so be it. But to be clear, before the Provincial Crown (through Tourism and Culture) can consider moving ahead with the proposed transfer, the Provincial Crown must meaningfully consult and obtain the consent of the Mi'kmaq. Failure to do so will result in injunctive relief being sought by the Mi'kmaq as a result of the failure of the Provincial Crown to live up to its legal and constitutional obligations**.
>
> As to the last paragraph of your letter, we require significantly more information from the Provincial Crown, as clearly outlined in this letter and our previous correspondence. **Included therein is a proposed time frame and structure for the required negotiation process. We shall await all of this information from the Provincial Crown.**
>
> **I trust the position of the Mi'kmaq has been made clear**. Should you have any questions, please do not hesitate to contact me.
>
> ...

July 2, 2015

[43] Chief Brian Francis and Chief Matilda Ramjattan wrote to Prince Edward Island Premier H. Wade MacLauchlan on July 2, 2015, about the import of the Supreme Court of Canada decision in ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44, for the Mi'kmaq of Prince Edward Island. They expressed their interpretation of that decision and that they believed the decision provided an opportunity for both parties to embark on a new path forward. The correspondence did not deal specifically with Mill River, but referred in general to Aboriginal title on PEI and their desire to move forward based on their understanding of the meaning of that case.

September 2015 to October 2016

[44] Between 2012 and 2014, Donald J. McDougall was involved in discussions and negotiations with the Province of Prince Edward Island, for the purchase of the Mill River Resort. Those discussions ended without any agreement. In September 2015, McDougall was contacted by the Province to see if he had an

interest in resuming negotiations for the possible acquisition of Mill River. That triggered a second round of negotiations which led to McDougall taking over the operation of the Mill River Resort for the 2016 season pursuant to a Management Services Agreement which was signed with the Province in April 2016. During the course of the 2016 season, and into the fall of 2016, McDougall continued negotiations with the Province.

2016
October 4, 2016

[45] Jones wrote to Chief Brian Francis and Chief Matilda Ramjattan on October 4, 2016, stating:

> ...
>
> **Please be advised that the Government of Prince Edward Island intends to convey the following properties**:
>
> 1) **PID 39610**, being 289 acres of land in Woodstock, PE in the possession of the Government of PEI and **being used as golf course, campground, roads, access and egress.**
>
> 2) **PID 559534**, being 14 acres of land in Woodstock, PE **containing access and egress to resort/golf property**
>
> 3) **PID 47217**, being 3.5 acres of land in Woodstock, PE (**corner property**)
>
> 4) **PID 605949**, being 29.06 acres of land in Woodstock, PE and **being used as a "fun park".**
>
> At this time **we would like to continue our consultations to provide further information and answer any questions you may have**. Please contact me at (902) 368-6342.
>
> ...

October 17, 2016

[46] Tammy MacDonald, Consultation/Negotiation Coordinator and Historical Researcher, for the Mi'kmaq Confederacy replied to Jones by email on October 17, 2016:

> ...

> **We received your consultation notification** of Woodstock, PID 39610 (289 acres); 559534 (14 acres); 47217 (3.5 acres); 605949 (29.06 acres), thank you. Before we can complete our review, however, the MCPEI Consultation Unit would like some information on the properties.
>
> **What is the intended usage of the properties? As well, have the properties been appraised recently, and, if so, what is their appraised values? If not, the Consultation Unit would like to wait our response to this consultation until an appraisal has taken place, and we have been informed as to the value of the properties**.
>
> If you have any questions about this, please do not hesitate to contact me.
>
> ...

October 19, 2016

[47] Jones replied in correspondence to MacDonald, with a copy to MacKenzie, on October 19, 2016:

> ...
>
> Further to your request for supplementary information dated October 17, 2016, I offer the following response.
>
> **Government intends to convey to a private sector company, properties located at Woodstock, PEI** and identified as PID numbers 39610, 559534, 47217 and 605949.
>
> **The Province owns certain assets commonly referred to as Rodd Mill River Golf Course, the Mill River Fun Park and the Mill River Campground and owns and leases the Rodd Mill River Hotel and Aquaplex to Rodd Management Limited** doing business as Rodd Hotels and Resorts.
>
> **The aforementioned private sector company intends to continue with the above noted uses**.
>
> **The agreed upon purchase price of the provincial assets is $500,000.**
>
> The private sector company continues to negotiate with Rodd Management Limited for acquisition of the resort complex.
>
> **As for an appraised value, the property/operations have lost money on an annual basis for the last several years; therefore the assets from a business perspective have minimal value**.

> Please be advised that the above noted information is confidential.
>
> ...

November 3, 2016

[48] The Government called a meeting for November 3, 2016, at the Premier's Office for the purpose of allowing McDougall to explain his proposal and future plans to MacKenzie. Those present at the meeting included Robert Vessey, Principal Secretary to the Premier, Paul Ledwell, Clerk of Executive Counsel, David Arsenault, Deputy Minister of Finance, Don MacKenzie, Executive Director and Senior Legal Counsel of the Mi'kmaq Confederacy of PEI, and Donald McDougall.

[49] The meeting lasted approximately one to one and one half hours during which McDougall briefed MacKenzie (and others present) on his intention to continue the current use of the Lands and on his future plans for refurbishment and redevelopment of the Lands. He testified that MacKenzie asked about what employment opportunities would be available for the Mi'kmaq of PEI at the Resort.

[50] MacKenzie's notes about the meeting indicate that it included a management update outlining what McDougall intended to do with the property. He also states that he advised the meeting that he was not a decision-maker and that he would have to take formal direction from First Nations leaders as to what their response would be. MacKenzie advised there were some community consultations scheduled and following that the leadership would formulate its position. MacKenzie states in his supplementary affidavit that he specifically referred to the Mi'kmaq claim to Aboriginal title, the importance of the land to the Mi'kmaq, and the ***Tsilhqot'in*** decision and stated that Mi'kmaq consent was required before any conveyance could take place. McDougall testified that he does not recall any comment from MacKenzie at the meeting regarding any intended legal intervention by the Mi'kmaq Confederacy of PEI.

November 18, 2016

[51] Following the meeting of November 3, 2016, MacKenzie wrote to Jones referencing previous correspondence on the issue:

> ..
>
> I write further to your letters of October 4 and October 19, 2016, in relation to the disposal of Woodstock, PID 39610; 559534; 47217; 605949 properties that the Government of Prince Edward Island is proposing. We would also like to thank you for providing us with the agreed purchase price of the properties.

> Consistent with our previous letters to the Provincial Crown, we are writing to formally advise that the Mi'kmaq firmly object to the disposal. In addition to the fact that the subject area is of significance to the Mi'kmaq in terms of matters related to Aboriginal and treaty rights, **the PEI Mi'kmaq have asserted Aboriginal title to all lands and waters of Prince Edward Island**, including adjacent areas and offshore islands - this obviously includes the subject parcel.
>
> **The law is clear that there can be no disposal of Crown land without the consent of the Mi'kmaq**. **We are hoping to develop a process with the Provincial Crown whereby the interests of the indigenous Mi'kmaq can be addressed and satisfied such that consent might be considered**. However, that process has not yet been successfully negotiated. As such, the PEI Mi'kmaq strenuously object to the proposed disposal.
>
> ...

December 5, 2016

[52] Another meeting was held on December 5, 2016 between Paul Ledwell, Clerk of Executive Counsel, acting on behalf of the Province, and MacKenzie. At the meeting, MacKenzie advised that the Mi'kmaq of PEI would not provide their consent to the proposed transfer. MacKenzie then put forth an alternative proposal from the Mi'kmaq that the Province convey the Lands to the Mi'kmaq of PEI who would immediately enter into a long-term lease (50-75 years) with McDougall or his company. Ledwell advised MacKenzie that would not be acceptable to McDougall and McDougall would walk away from the deal if he did not have clear title to the land. In his testimony, McDougall confirmed that in December 2016 he was asked if he would enter into a long-term lease such as was proposed by the Mi'kmaq instead of owning the property and he declined both for philosophical reasons and because he did not believe he would obtain the necessary long-term financing based on a bare leasehold interest.

December 22, 2016

[53] Ledwell and MacKenzie again met to discuss the proposed transfer. MacKenzie reiterated the Mi'kmaq proposal for it to acquire the lands and enter into a long-term lease with the private developer. Such a proposal had been approved by the Mi'kmaq Confederacy Board on December 15, 2016. Ledwell confirmed that McDougall was not interested in the project if it was based on a long-term lease.

2017
January 10, 2017

[54] The Board of the Mi'kmaq Confederacy met with the Provincial Cabinet (Executive Council) on January 10, 2017. According to MacKenzie, at the meeting the Executive Council affirmed its commitment or desire to maintain a meaningful relationship between the Government of Prince Edward Island and the Mi'kmaq of Prince Edward Island.

January 10, 2017

[55] As part of the business conducted at its meeting on January 10, 2017, Executive Counsel passed Orders-in-Council EC2017-6 and EC2017-12 granting permission for Donald McDougall, and 9711864 Canada Inc., respectively to acquire approximately 325.59 acres of land (the "Lands") from the Government of Prince Edward Island. Orders-in-Council EC2017-6 and EC2017-12 are the subject of this judicial review application.

January 11, 2017

[56] Jones wrote to Chief Francis and Chief Ramjattan advising them of the decision by the Province to dispose of the Lands:

> ...
>
> **Further to my letter of October 19, 2016, we have received and given consideration to all the information you have provided over the past four years regarding the province's proposed plan to convey to a private sector company, properties located at Woodstock**, PEI (PID 39610, 559534, 47217, and 605949).
>
> **Please be advised that we are proceeding with a decision to sell the property complex,** which houses the Rodd Mill River Golf Course, Mill River Fun Park, Mill River Campground, Rodd Mill River Hotel and Aquaplex. **Under its new ownership the property will continue to serve its existing function as a multi-purpose resort.**
>
> ...

[57] Following receipt of the correspondence of January 11, 2017, Chief Francis and Chief Ramjattan wrote to Premier MacLauchlan, on January 18, 2017, expressing their displeasure with the Province's decision and stating they intended to commence legal action against the Government.

[58] The within Notice of Application for Judicial Review was filed on February 8, 2017.

Issues

[59] The Mi'kmaq Confederacy submitted that the following issues are to be determined on this application for judicial review. The Province agreed:

1) Was the Province required to consult and/or accommodate the Mi'kmaq of PEI prior to the transfer of Lands to McDougall and his Company?

2) If so, did the Province adequately fulfil its duty with respect to that consultation and/or accommodation prior to the transfer of the Lands?

3) If not, what remedies are appropriate?

I have also addressed the issue of the extent or degree of consultation required.

Standard of Review

[60] McLachlin C.J., writing in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, at paras. 60-63, addressed the issue of the applicable standard of review as follows:

> 60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.
>
> 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 (CanLII). **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 (CanLII); *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 CanLII 385 (SCC), [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.

[61] Counsel for the Province also cited ***Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)***, 2008 FCA 212. That decision was a

reflection of the Federal Court of Appeal's interpretation of the Supreme Court of Canada's statements in ***Haida***. The court in ***Ahousaht*** concluded, at para. 34:

> 34 Thus, in my view, **the determination of the existence and extent of the duty to consult or accommodate is a question of law and, hence, reviewable on a standard of correctness. However, when the Crown has correctly determined that question, its decision will be set aside only if the process of consultation and accommodation is unreasonable**. In my view, the Supreme Court's recent decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.), does not change the standard of review applicable in this case.

[62] There are three points at which the standard of review is to be considered. They include when a tribunal is determining the existence of a duty to consult, deciding the extent of consultation required (as per the ***Haida*** spectrum), and assessing the extent of consultation that occurred. While McLachlin C.J. expressed that the existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty, she immediately went on to express, in para. 61 of ***Haida***, that a contextual assessment of the factual background may lead to deference being shown even with respect to deciding on the two questions of the existence and extent of the duty to consult. In other words, she allowed for reasonableness to be the standard of review to apply to the determination of those questions, depending upon the circumstances of each case.

[63] At the hearing of this matter, in line with the conclusion in ***Ahousaht***, all counsel submitted the applicable standard of review was correctness in respect of assessing both the existence and extent of the duty to consult and accommodate, and reasonableness with respect to assessing whether the Province met their duty to consult to the extent required. I will review the decisions upon the basis of these suggested standards of review.

Issue 1 - Duty to Consult

A) Was the Province required to consult and/or accommodate the Mi'kmaq of PEI prior to the transfer of Lands to McDougall and his Company?

[64] The Mi'kmaq Confederacy submitted that prior to making the decision to proceed with the sale of the Lands, the Province failed to fulfil its obligations to consult and accommodate the Mi'kmaq.

[65] The Province submitted that the Crown's duty to consult was not triggered by its decision to transfer the Lands. Alternatively, the Province submitted that if

there was a duty to consult and, potentially, accommodate, such duty was met and the application for judicial review should be dismissed.

[66] In the landmark decision of ***Haida Nation v. British Columbia***, the Supreme Court of Canada set out the framework of the Crown's duty to consult and, if appropriate, accommodate the interests of Aboriginal people who have asserted title to Crown lands.

[67] For more than 100 years the Haida people had claimed title to all of the lands of Haida Gwaii, formally known as the Queen Charlotte Islands, off the coast of British Columbia. The cedar forests on Haida Gwaii were central to the lives of the Haida people in that they used cedar to make their oceangoing canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forests played a central role in the economy and culture of the Haida people.

[68] For nearly all of the 20th century, the Province of British Columbia granted tree farming licenses to allow forestry companies to harvest trees in certain areas of Haida Gwaii. Some portions of the islands were covered with old-growth forest and others with second growth forest. In 1999, the Province approved a transfer of a license to a different forestry company. The Haida Nation objected to the transfer and objected to trees being harvested on blocks of land for which they were asserting Aboriginal title. They argued it was necessary for the government to consult with them regarding decisions affecting the forest and to accommodate their concerns, otherwise it was possible the forest could be harvested and destroyed before they had proven their title to the lands.

[69] The government argued it had the right and responsibility to manage the forest resource for the good of all British Columbians and until the Haida people formally proved their claim, they had no legal right to be consulted or have their needs and interests accommodated.

[70] The Supreme Court of Canada, on a preliminary assessment, found the Haida's claim to title to Haida Gwaii was strong, but expressed that it might take many years to prove. The Court concluded, at paras 10-11:

> 10 **I conclude that the government has a legal duty to consult with the Haida people** about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. **Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser**. Nor does Weyerhaeuser owe any independent duty to

> consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.
>
> 11 This case is the first of its kind to reach this Court. **Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate**.

[71] After expressing that the duty to consult and accommodate entailed "balancing of Aboriginal and other interests", the Court went on to identify the source of the duty to consult and accommodate, as being "grounded in the honour of the Crown". The court found as well that the Aboriginal interest in an asserted claim of title was "insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title." Section 35 of the ***Constitution Act, 1982***, recognizes and affirms existing Aboriginal rights, but does not define them.

(i) When does a duty to consult arise?

[72] At para. 35 of ***Haida***, the Court stated:

> 35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that **the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it**: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1997 CanLII 2719 (BC SC), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.
>
> **36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized**. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. **To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.** This is what happened here, where **the chambers judge made a preliminary evidence-based**

> **assessment of the strength of the Haida claims** to the lands and resources of Haida Gwaii, particularly Block 6.
>
> 37 **There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate**. The content of the duty, however, varies with the circumstances, as discussed more fully below. **A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties**. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. **Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty**. **(Emphasis added)**

[73] And in ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43, at para. 31, the Court wrote:

> [31] The Court in *Haida Nation* answered this question as follows: the duty to consult 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" (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 added)**

[74] Regarding the first two of the three components, the Mi'kmaq of PEI submit (i) the Crown had knowledge of the asserted aboriginal right or title and (ii) there was "contemplated Crown conduct", in the potential transfer of the Lands to McDougall. The Province does not dispute either contention. What the Province does dispute is the third component, namely, that the contemplated Crown conduct had the "potential of adversely affecting the asserted Aboriginal right or title".

[75] In ***Rio Tinto***, the Court held, starting at para. 45:

> [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.

[49] **The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question**. **Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right**. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to

> consult may be remedied in various ways, including the awarding of damages. **To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy**.

[76] The case of ***Canada (Public Works and Government Services) v. Musqueam First Nation,*** 2008 FCA 214, ("***Downtown Offices***"), offers some similarities to the matter currently before the court. The Musqueam asserted a claim to all of the City of Vancouver and surrounding areas as its traditional territory. The Federal Government was the owner of two office buildings in the downtown area, which they were intending to sell to a third party. The nature and use of the properties was not going to change after the sale.

[77] The Musqueam sought an injunction against the sale on the basis that Canada had a legal duty to consult with them, and relying on the fact "the properties could form a part of a land claim settlement between Musqueam and the Crown, and Musqueam's need and entitlement for more land for housing". They argued the Vancouver properties were among a limited inventory of lands remaining in the hands of the Government of Canada within the Applicant's claim area.

[78] In analysing the arguments on the injunction application, the Federal Court of Appeal stated, in ***Downtown Offices*** at para. 45, and onward:

> 45 The need for an "enhanced land base" does not, in and of itself, constitute a basis for a finding of irreparable harm.
>
> 46 **Musqueam led no evidence that the Properties are of special interest or of unique character to them. Rather, they simply argued that they need more land for housing**.
>
> 47 As indicated earlier, the Properties are fully developed, urban properties primarily suited for business. Musqueam has provided no indication of their anticipated plans for this property. It could hardly be said that two acres on which large office buildings are located would satisfy Musqueam's need for more land for housing.
>
> 48 It is obvious that Musqueam could receive monetary compensation equal to the value of the Properties and buy vacant land for housing far in excess of two acres. Therefore they could adequately be compensated in damages and there is no irreparable harm.
>
> ...
>
> 52 In this case, the loss of an opportunity for Musqueam to consult and be accommodated is insufficient to constitute irreparable harm. **I agree with the appellant that if an allegation of inadequate consultation**

***always* constituted irreparable harm, that could constitute a veto over the government transferring any title to property which is located in an area claimed as a traditional territory of an Aboriginal group. That would explicitly contradict the comments of the Supreme Court of Canada in *Haida Nation* at para. 48: "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." Rather, it is necessary to look deeper in each case and discern whether the failure to consult constitutes irreparable harm**.

53 **At this point it is helpful to step back and briefly review the law governing the duty to consult**. The duty to consult, based on the honour of the crown, 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*…." (*Haida Nation* at para. 35, emphasis added; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74 (S.C.C.) ("*Taku River*")). That is, the duty to consult arises in the context of the concern over Crown activity infringing on aboriginal rights before the rights can be proven. **The requirement for consultation assists in the prevention of land and resources from being changed and denuded during the process of proving rights: *Haida Nation* at para. 33. However, the facts at bar suggest that no pending right would be violated by a disposition of the Properties**.

54 In *Garden City* the Motions Judge in that case concluded that the loss of Musqueam's right to be consulted could not be compensated by damages. He elaborated at paragraphs 44, 46 & 48:

> **The nature of the harm which would be suffered if the Garden City property is transferred is the loss of the right to negotiate and be accommodated in respect of that land. Once the land is transferred, that right is effectively lost**.
>
> […]
>
> This situation is analogous to those where there is requirement for an environment study be done before a permit is issued or for proper notice to be given before a decision is made. The relevant considerations are public law principles and remedies. They are jurisdictional in nature, not monetary.
>
> […]
>
> If the Band's right is to have meaning, it cannot be allowed to be lost on the assumption that "sending a government cheque" would always suffice. It would be too tempting to allow government authorities to ignore these types of conditions to the exercise of power by merely permitting payment of some form of compensation as a substitute for the proper exercise of powers.

[Emphasis added.]

> [55] **If what was meant by the Judge in *Garden City* was that the mere assertion of the duty to consult itself is always sufficient to prove irreparable harm, then I disagree**. **Rather, I think the decision can be explained by the fact that in *Garden City* the lands comprised 136 acres and the Judge in that case had found that Musqueam not only claimed an interest in the land, but that the land had unique importance to Musqueam (*Garden City*, at paragraph 16).**
>
> [56] **In the case before this Court the Properties are office buildings in downtown, Vancouver, encompassing two acres. Their use upon disposition to Larco will not change. This is distinct from the *Garden City* case, where the use and character of the properties could change as a result of the transaction, and where Musqueam had submitted evidence of the land's unique importance beyond a proprietary interest**.
> **(Emphasis added)**

[79] The Mi'kmaq state they made historical and traditional uses of the Lands in the past. They advised they needed time to research and produce the necessary evidence to support their claim. Further, they argued the transfer of title in and of itself should be considered to have an "adverse impact" on their asserted title claim in that it alienates the Lands from Government's hands. They submitted the transfer itself constitutes an adverse impact sufficient to trigger the duty to consult.

[80] The Province submitted the transfer of Lands did not impact the Mi'kmaq's asserted Aboriginal rights or title. They argue the Lands were already in use as a golf course and resort area. They have been since 1983. The Lands have been operated by a private developer during the past several decades. The Lands are going to continue to be used in the same fashion by the new private developer. The Mi'kmaq have not asserted any unique significance or special characteristics with respect to these particular Lands. The Province submits there are no known archeological sites on the Lands and the evidence of title and use of those specific Lands is limited and speculative in nature. The Mi'kmaq themselves offered to lease the Lands to the developer for a period up to 75 years. The Lands in question constitute a very minute area, being less than 0.02%, or 2 one-hundredths of one percent, of the overall lands claimed, and being less than 0.33%, or one-third of one percent of all Crown lands available on Prince Edward Island. The act of transferring the Lands does not negate the Province's obligation to the Mi'kmaq if indeed the Mi'kmaq claim of title is eventually proven.

[81] ***Downtown Offices*** and ***Rio Tinto*** offer guidance on whether the legal action of conveying the land in 2017 affects the legal determination of whether Aboriginal rights crystallized at some point many years, decades, or even

centuries earlier. Does the conveyance of land necessarily have “irreversible effects” on whatever potential Aboriginal rights or title may be found to exist?

[82] Transferring lands is a legal action. A conveyance of land does not, in and of itself, cause any physical or structural change to that land. The lands are not denuded or destroyed or altered from their current form and use by the act of such a conveyance. Some impact may arise, as in other cases, primarily as a result of the future use by the recipient of the land or the holder of a license to pursue new activities, such as harvesting old growth forest, as in ***Haida Nation***.

(ii) Is the proposed conduct sufficient to trigger a duty to consult?

[83] The Mi’kmaq have not just claimed the Lands which are the subject of this hearing; they have asserted a claim to all of Prince Edward Island. Most of Prince Edward Island is held in fee simple. The Government has certain powers at its disposal to address any future finding of right or title. Transferring Crown lands, providing monetary compensation, or even expropriating lands held by third parties are all options.

[84] There may be occasions where such options are appropriate and effective if the need arises. There may be other occasions where some options would fail to preserve the lands in a way that respects the unproven claims or provide a measure of certainty that if such a claim is proven, the declaration of title does not become hollow owing to a drastic change in the nature of the land while the claim was being proven. (See ***Tsilhqot’in Nation***, para. 91). Each case must be assessed on its own merits, based on the information or evidence provided with respect to that claim.

[85] I return now to ***Rio Tinto,*** which, like ***Haida Nation***, is a decision of the Supreme Court of Canada. That decision came six years after ***Haida Nation,*** and somewhat modifies ***Haida.*** In effect, McLachlin, C.J., writing in ***Rio Tinto*** was doing what she said at para. 11 of ***Haida*** that future courts would do: “As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.”

[86] In ***Rio Tinto***, McLachlin, C.J. stated, at para. 45:

> **... 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**.

And at para. 46:

> **... there must [be] 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.

[87] In other words, is there a new and present adverse impact from the contemplated Crown conduct? Does the current contemplated conduct put the exercise of the potential right/claim in jeopardy in some way? That "conduct" in this case is the transfer of Lands to McDougall. The ***Rio Tinto*** analysis differs somewhat from ***Haida***, which at para. 37 implied the duty to consult arose more readily.

[88] The Mi'kmaq submission that transferring the Lands from Government hands would necessarily have an adverse effect on their claim to title is, in effect, equivalent to saying any and all future contemplated transfers of any amount of land would trigger the duty to consult given that they have asserted a claim to all of Prince Edward Island. I am not satisfied such a result would be consistent with current law. In my view, whether the act of transferring land is to be considered an adverse impact triggering the duty to consult is a determination to be made in the context of each case as part of the preliminary assessment of the strength of the case for Aboriginal title to the specific lands in question.

[89] Whether a duty to consult arose or not may be a moot point depending upon the extent and content of any consultation which may have taken place.

Issue 2 - Extent of the Duty to Consult

A) What factors are considered in determining the degree or extent of consultation required in this case? What, if any, consultation did occur?

[90] In ***Downtown Offices***, which dealt with an injunction rather than an application for judicial review, the court cited ***Haida Nation*** and noted the required consultation lies on a "spectrum", and each case, based on its own circumstances, will lie at a particular point on that spectrum. (See para. 57). In an instructive manner, the Court went on to compare the fact situation in ***Haida Nation*** with that in ***Downtown Offices*** and highlighted factors which would assist in determining the degree of consultation required in different circumstances. (See para. 58). The Court in ***Downtown Offices*** stated, at paras. 57-58:

> 57 **The content of the duty to consult lies on a spectrum, depending on the strength of the claim to title, the extent of the Aboriginal right claimed, and the potential for infringement**. As Chief Justice McLachlin stated in *Haida Nation*, at paragraphs 43-4:

> …I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. **At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding"**: T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> **At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required**. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

58 Without commenting on the content of Musqueam's right to be consulted and possibly accommodated (since the merits of that case are to be heard after the current issue concerning injunctive relief is concluded) **it is helpful, for illustrative purposes, to compare the facts in this case with the rights at stake in the leading cases on the duty to consult. In *Haida Nation* the decision to issue licences to cut trees on the Haida Gwaii could have deprived the Haida Nation of forests vital to their economy and their culture. As Chief Justice McLachlin stated at paragraph 7, "The stakes are huge. […] Forests take generations to mature… and old-growth forests can never be replaced."** In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (S.C.C.), the building of a road through a reserve impacted a significant number of trappers and hunters. In *Taku River*, the building of a road through Taku River Tlingit's First Nation territory passed through an area critical to their economy and could have had an impact on its continued ability to exercise its Aboriginal hunting, fishing, gathering, and other traditional land use activity rights. **In our case, there has been no allegation of an infringement of any aboriginal right that would or even may result from the disposition of the Properties. If there is no harm alleged in terms of an absolute rights analysis, how can the loss of a right to be consulted with respect to**

> **that right constitute irreparable harm? Moreover, if loss of the Properties can be adequately compensated in damages (see "*Irreparable Harm #1: Enhanced Land Base*" above), then surely the loss of the right to consult about disposing of the Properties can equally be compensated in damages in this case**.

[91] The degree of consultation required to fulfil the Crown's duty to consult, or where the matter falls on the spectrum identified in ***Haida Nation***, is dependent upon the context of each case.

[92] In ***Haida Nation***, the Court wrote:

> 39 **The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops**. In general terms, however, it may be asserted that **the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.**

[93] In ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, Binnie J., speaking for the Court, stated:

> 63 **The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context**. ... Another contextual factor will be **the seriousness of the impact** on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be **the strength of the aboriginal claim**. The history of dealings between the Crown and a particular First Nation may also be significant. ...

[94] That is reiterated in ***Rio Tinto*** in 2010***,*** at para. 36:

> [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 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

(i) Evidentiary burden rests on claimant

[95] The evidentiary burden falls on the claimant, the Mi'kmaq of PEI, to prove its claim. (See ***Tsilhqot'in Nation***, para. 50). While this case is not specifically about the Mi'kmaq *proving* their claim of title, it is about the fact they have *asserted a claim* and, depending on the circumstances, that assertion can trigger a

duty on the Crown to consult and, if appropriate, accommodate Aboriginal interests. To determine the extent of any consultation required, or where the duty falls on the ***Haida*** spectrum, it is necessary to undertake a preliminary assessment of the strength of the Aboriginal case, and an assessment of the seriousness of the impact of the contemplated conduct on the Aboriginal people or their right or title.

[96] In conducting a preliminary assessment it is necessary to consider the nature and extent of what might be required to establish such a claim. Of course, every case is different and the degree or depth of evidence available or needed may vary significantly.

[97] The Supreme Court of Canada decision in ***Tsilhqot'in Nation v. British Columbia***, was a landmark decision. After decades of land claim litigation, it marks the first time a declaration of Aboriginal title was granted. The Tsilhqot'in Nation is made up of a group of six bands who share common culture and history and have, for centuries, lived in a remote valley bounded by rivers and mountains in central British Columbia. The land was sparsely populated. The Tsilhqot'in people lived in villages, managed lands for the forging of roots and herbs, and hunted and trapped. They repelled invaders and set the terms for the European traders who came on to their land. (***Tsilhqot'in Nation***, paras. 3 and 6)

[98] The area claimed was confined to approximately 5% of what the Tsilhqot'in regard as their traditional territory. The trial in the British Columbia Supreme Court started in 2002 and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. In 2007, he found the Tsilhqot'in people were, in principle, entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. In 2012, the British Columbia Court of Appeal overturned that finding and held that the Tsilhqot'in claim to title had not been established. The Supreme Court of Canada reviewed the history of land claim cases in Canada and the evidence of use and occupation of the lands and concluded that the Tsilhqot'in Nation had proven their claim of title to that portion of the land. (***Tsilhqot'in Nation,*** paras. 6-9)

[99] In reaching that conclusion, the Supreme Court of Canada adopted and expanded upon the test for Aboriginal title set out by Lamer, C.J. in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, 1997 CanLII 302 (SCC). At paras. 25-26 of ***Tsilhqot'in Nation***, the Court wrote:

> [25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics.

> It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.
>
> [26] The test was set out in *Delgamuukw, per* Lamer C.J., at para. 143:
>
> > In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (I) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[100] McLachlin, C.J. agreed those three concepts should be considered separately, but in context, and through culturally sensitive lenses. At para. 32 of ***Tsilhqot'in Nation***, she wrote:

> [32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. **Sufficiency, continuity and exclusivity** are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

[101] With respect to the type of evidence required to show "**sufficiency of occupation**", McLachlin C.J. stated, at para. 38:

> [38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. **There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group**. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[102] **Continuity of occupation** "...simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present

occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case." (***Tsilhqot'in Nation**, para.46)*

[103] Regarding **exclusivity of occupation**, the Court stated, at para. 47:

> [47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[104] The Court also confirmed, "The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common-law terms." (***Tsilhqot'in Nation***, para. 50; See also ***R. v. Van der peet***, [1996] 2 S.C.R. 507, at para. 132)

[105] The decision in ***Tsilhqot'in Nation*** is helpful in indicating the nature and extent of evidence to be presented in pursuit of a claim of Aboriginal title. I note the trial in ***Tsilhqot'in Nation*** lasted for 339 days over five years. Similarly, in ***Delgamuukw***, the trial lasted 374 days and the trial decision ran close to 400 pages with an additional 100 pages of schedules. Title was established in the ***Tsilhqot'in*** case, but that was not the result in ***Delgamuukw***. It is not a minor undertaking to establish Aboriginal title.

(ii) Principles governing consultation process

[106] The Court also reiterated its earlier statements about the degree of consultation and accommodation required, at para. 79:

> [79] The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, **the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right**. **"A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties"** (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[107] The courts have also described the character of the consultation process and the obligations of each party:

a) In ***Haida Nation***:

42 **At all stages, good faith on both sides is required**. **The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised** (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. **However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation**. **As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached**: ... Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

45 ... Pending settlement, **the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims**. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.

...

48 **This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take**.

49 ... A commitment to the process **does not require a duty to agree**. But it does require good faith efforts to understand each other's concerns and move to address them.

50 ... **the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests**.

b) In ***Mikisew***:

64 **The duty here has both informational and response components. ... This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests**. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. ...

...

66 ... As emphasized in *Haida Nation*, **consultation will not always lead to accommodation, and accommodation may or may not result in an agreement**. ...

c) In ***Canada (Attorney General) v. Long Plain First Nation***, 2015 FCA 177:

133 In doing this, **we must ensure that we are not applying too exacting a standard**. Situations such as the one in this case are complicated and dynamic, involving many parties and concerning issues that are legally and factually difficult. **Even in healthy relationships where there is mutual trust and ample communication over simple issues, there can be isolated innocent omissions, misunderstandings, accidents and mistakes**. ...

...

158 **Consultation is not a one-way street. All parties must actively engage in the process**:

> **There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions**: see *Ryan et al v. Fort St. James Forest District (District Manager*) (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

(*Halfway River*, above at paragraph 161; *Ahousaht*, above at paragraphs 50-53; see also *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, 345 F.T.R. 119 (F.C.) at paragraph 42.)

159 **Both parties must act to advance their respective rights in a prompt and conciliatory way:**

> **It is up to the parties, when…issues arise, to act diligently to advance their respective interests**. Good government requires that decisions be taken in a timely way.

(*Beckman*, above at paragraph 12.)

d) In ***Ahousaht Indian Band v. Canada***:

54 It follows from *Haida, supra*, that in determining whether the Minister has met his duty to consult, **perfect satisfaction is not required**. To the extent that the Minister makes **reasonable efforts to inform and consult the First Nations** which might be affected by the Minister's intended course of action, this **will normally suffice to discharge the duty**. ...

[108] The courts have defined and framed the consultation process. The case law articulates the following principles:

a) the degree of consultation required lies on a spectrum set out in ***Haida Nation***;
b) the Crown is bound by its honour to balance societal and Aboriginal interests;
c) at all stages, good faith on both sides is required;
d) there must be a meaningful process of consultation;
e) there is no duty to reach agreement;
f) consultation is not a one-way street;
g) both parties must actively engage in the process;
h) both parties must act to advance their respective rights in a prompt and conciliatory way;
I) the consultation process does not have to be perfect;
j) there must be a causal relationship between the contemplated conduct and the perceived adverse impact; past wrongs do not suffice;
k) there must be an appreciable adverse effect on Aboriginal rights;
l) mere speculative impacts will not suffice;
m) Aboriginal complainants must not frustrate the Crown's reasonable good faith attempts;
n) unreasonable positions must not be taken to thwart government decisions;
o) the process does not give Aboriginal groups a veto over what can be done with the land pending final proof of claim;
p) Aboriginal consent is only required in cases of proven title.

[109] Considering these and other statements from the courts, I will now assess the consultation process in this matter.

B) A preliminary assessment of the strength of the case for Aboriginal title to the Land

(i) What information did the parties have on the strength of the asserted Aboriginal claim for title and the seriousness of any adverse impact on Aboriginal rights claimed prior to the decision being made by Government?

[110] The preliminary assessment of the claimant's case, the seriousness of any impairment or infringement upon any right, and the level of risk of non-compensable damage occurring, requires an examination of the relevant information exchanged between the parties.

[111] Firstly, the parties were aware the Lands, owned by the Crown, have been used by a private developer as a golf course and resort complex since 1983.

[112] In 1997, then-Chief Jack Sark of the Lennox Island First Nation wrote to the then Premier of Prince Edward Island, the Honourable Pat Binns:

> ... The aboriginal people of this province never ceded title to this island and the Supreme Court of Canada has now set clear parameters to aid in the determination of our rights with respect to the land. We feel that the legal foundation for the assertion of a land claim by the First Nations of P.E.I. has been completed with the Supreme Court of Canada's decision in Delgamuukw. We intend to pursue such a claim. ...

[113] In 1999, then-Chief Charlie Sark sent a similar letter to Premier Binns:

> ...
>
> The Mi'kmaq of Prince Edward Island have never ceded any of the land in present day Prince Edward Island, through sale, bargain, treaty or any other means. The Mi'kmaq people of this province have an interest in all of present day Prince Edward Island. Our interest in the land is a continuing interest based on Aboriginal title.
>
> ...
>
> We continue to assert our title to the lands of present day Prince Edward Island. It is therefore important that your provincial government consider this fact when dealing with crown lands.
>
> ...

[114] That correspondence was acknowledged by the Premier of the day and reference was made to a Provincial Cabinet meeting occurring on Lennox Island around the same time as the correspondence.

(ii) What evidence did the Mi'kmaq present to support their assertion of title?

[115] By correspondence of July 17, 2012, the Mi'kmaq indicated they expected to be consulted with respect to each and every decision that Government may make in relation to the disposition of Government owned golf courses and related lands.

[116] On August 29, 2012 the Mi'kmaq advised their "preliminary research" of the lands containing the four provincial golf courses revealed "a number of traditional Mi'kmaq activities potentially impacting on Aboriginal rights. We will have further

research to undertake before any kind of official consultation response can be provided."

[117] On September 30, 2013, the Mi'kmaq advised, "As this matter involves large parcels of Crown land in areas where there is an abundance of traditional Mi'kmaq activities, Mi'kmaq Aboriginal and treaty rights may be negatively impacted by any Crown decision."

[118] On November 26, 2014, the Mi'kmaq advised:

> ...
>
> As you are aware, the Mi'kmaq Governments have asserted Aboriginal title to all lands and waters of Prince Edward Island, including adjacent areas and offshore islands, and this certainly includes the Crown owned Mill River complex. Also, the area in question is significant to the Mi'kmaq in terms of traditional and historical uses, and therefore this is a matter that could have an adverse impact on Mi'kmaq Aboriginal and treaty rights.
>
> ...

[119] On December 19, 2014, the Mi'kmaq advised:

> ...
>
> Thirdly, our research has uncovered archaeological sites in Mill River and Cascumpec Bay areas. Our research has also revealed extensive historical Mi'kmaq use of the area, which includes campsites; hunting; and clay gathering for pottery. Traditional Mi'kmaq use includes group campsites, access for fishing and wild fruit gathering. ...

[120] On March 12, 2015, the Mi'kmaq advised:

> ...
>
> Our research has uncovered Mi'kmaq archaeological sites near the proposed land disposal areas, including three pre-Contact sites. Historical Mi'kmaq use of the area includes campsites; hunting; and clay gathering for pottery. Traditional, "Living Memory," Mi'kmaq uses within the designated areas include group campsites and wild fruit gathering. It must be remembered that the MCPEI database is, to date, a partial inventory of existing knowledge. As such, it does not mean that the subject area was not used (or used for additional purposes) or that there are not additional archaeological sites/findings, rather that evidence of these, if they exist, has not yet been collected.
>
> ...

[121] On April 24, 2015, the Mi'kmaq advised:

> ...
>
> With respect to the archaeological evidence, it is important to recognize that the MCPEI database is, to date, a partial inventory and there might very well be evidence that has not yet been discovered. Also, the entries in the database can be based on oral evidence, which can make it difficult to determine locations with exact specificity. We intend to set up a meeting with the Provincial Archaeologist and respond in more detail after that meeting has taken place.
>
> With respect to traditional uses, the campsites are located directly on the subject parcels. Respecting the hunting, clay gathering and wild fruit gathering; the subject parcels would have been used by the Mi'kmaq as part of the travel routes directly related to these traditional activities.
>
> ...

[122] On July 2, 2015, the Mi'kmaq advised:

> ...
>
> There can be no question that the Mi'kmaq were the original – and the *only* – inhabitants of Prince Edward Island, long before contact with Europeans. The presence of the Mi'kmaq on this island can be traced back at least 10,000 years. Our Peoples exclusively controlled and systematically occupied these lands and waters in accordance with our ancestral way of life.
>
> ...

[123] The total of all information provided by the Mi'kmaq between July 10, 2012, and January 10, 2017, was set forth in the Mi'kmaq of PEI's assertions that the Mi'kmaq engaged in traditional activities such as camping, hunting, clay gathering and wild fruit gathering in the areas around the Lands, with the further assertion that camping took place directly on the subject parcels. They stated that they uncovered Mi'kmaq archaeological sites near the proposed disposal land area. They also asserted the Lands would have been used as part of the travel routes related to their traditional activities and as access to fishing areas, and that disposal of the lands could potentially have adverse impacts on their Aboriginal rights.

[124] While several assertions were made and repeated, no information or evidence supporting those claims was provided other than as set out above. It is not expected or required that the asserted claim of title is to be proven during the consultation period. Nor is it expected or required that the title be proven during

this judicial review process. However, as the court is now required to conduct a preliminary assessment of the strength of the case for title, it is compelled to examine the evidence provided in support of the assertions made. As for the Mill River area in general, and the Lands in particular, very little, other than assertions, was provided by the Mi'kmaq.

[125] Similarly, the Mi'kmaq did not advise of any adverse impact on its traditional uses of the land or its Aboriginal right or title as a result of the contemplated transfer of land other than by the act of conveyance itself. They expressed that such a conveyance would have an impact on the Crown's ability to address any future declaration of Aboriginal title, but did not disclose any impact on current traditional uses.

(iii) What information was known by the Province about the Mi'kmaq assertion of title prior to making its decision?

[126] The Province knew from the correspondences in 1997 and 1999 from past Chiefs that the Mi'kmaq were asserting title to Prince Edward Island. That assertion was reiterated in further correspondence from the Mi'kmaq from 2012, through 2017. The Province also knew in 2012 that the Mi'kmaq were undertaking further research prior to providing "any kind of official consultation response". From the same correspondence they knew that until such time as the Mi'kmaq could explore the issues in more detail, the Mi'kmaq were objecting to any action or decision being taken by the Crown with respect to those lands.

[127] In correspondence to the Mi'kmaq on January 30, 2015, the Province set out its knowledge of the status and current uses of the Lands. The Province addressed the Mi'kmaq reference to the presence of archaeological sites and traditional uses on the properties under discussion. The Province was aware of an archaeological survey in the general area of Mill River, but, to their knowledge, no archaeological sites were located within a 5 km radius of the resort property. They asked the Mi'kmaq to provide them with any other detailed archaeological information they might have which could assist them in evaluating the Lands in question. They also asked the Mi'kmaq to specify how the transfer of the property would adversely impact any Aboriginal or treaty right, given that the site had been developed and used as a golf course and other recreational facilities and would continue to be used for that purpose.

[128] Greater detail can be seen from the Province's correspondence of January 30, 2015:

> ... Our records show that a systematic archaeological survey of the Mill River system was completed by archaeologist Anna Sawicki in 1984. This survey was conducted mainly along the north shore of the Mill River, and

> included Fox Island, Hills River, Meggison's Creek, Long Creek, and Ashley Creek. No archaeological sites were located in the surveyed areas and none are known within a five kilometre radius of the resort property. Sawicki's interviews with local residents further identified traditional Mi'kmaq use in the 1930s at Carruthers Brook and at another unspecified location in the Mill River area. **We appreciate that your research has also produced knowledge of archaeological sites in traditional use in the Mill River and Cascumpec Bay areas. In order for us to give this proper consideration, please send detailed information to Dr. Helen Kristmanson, Director of Aboriginal Affairs and Archaeology.**
>
> On a related note, in our letter of December 3, 2014, wherein we identified our intent to divest the subject properties, **we requested comments or information on how the proposed actions may affect Aboriginal and treaty rights of the PEI Mi'kmaq**. In your letter of December 19, 2014 you indicated that the property in question is "historically and traditionally significant to the Mi'kmaq." **As the property in question is a developed site with a golf course and other recreational facilities and will continue to be used for this purpose, please specify how the transfer of the property adversely impacts an aboriginal or treaty right**.
>
> ...

[129] On February 5, 2015 the Mi'kmaq indicated they would endeavour to put together the requested information. On March 12, 2015, the Province received a response from the Mi'kmaq which made reference to three "pre-Contact sites". Two weeks later **the Province wrote again, reiterating the only knowledge it had was of the 1984 archaeological survey. They requested "additional information as to the location and identification of the sites you referred to", and, " further information as to the location of the traditional uses cited in your letter such as campsites, hunting, clay gathering, and wild fruit gathering, and any current uses."**

[130] Other than the information referred to in the correspondence of April 24, 2015 from the Mi'kmaq, the Province did not receive any additional information which would tend to support the claim for title.

[131] In summary, the Province had been advised of some past Aboriginal traditional activities in the general area, but the only archaeological or other information it had with respect to the specific 325 acres of land in question failed to disclose any significant past presence. That does not mean one can conclude there was no past activity, but it does affect an evidence-based preliminary assessment of the strength of the claim to title. No current traditional uses were identified. The Province knew the Lands had been used for a golf course and resort complex for the past 3 ½ decades. The Province also knew such use was

not going to change after the contemplated transfer. No other adverse impacts of its contemplated transfer were identified.

Exchanges regarding the consultation process itself

[132] The Province started the process with its correspondence of July 10, 2012. They advised of their intention to seek expressions of interest, and inquired as to whether further "consultation" was required. The Province enclosed parcel identification information and maps identifying the location of the subject lands. Shortly thereafter, the Mi'kmaq were contacted again to confirm that they had received the "**duty to consult notification letter**".

[133] In emails on July 17, and August 29, 2012, the Mi'kmaq confirmed they expected to be consulted and that further consultation was required.

[134] On August 20, 2013 the Mi'kmaq noted, "We haven't received any further consultation ... which I assume means nothing more has happened..." with respect to the proposed sale of golf course lands. That email generated a phone call from the Province the next day which confirmed there were some continuing discussions with some of the proponents. The Mi'kmaq responded on September 30, 2013, expressing that proper and meaningful **"consultation, and potentially accommodation, is mandatory**".

[135] In early November, 2013, the Province advised that no agreement had been reached to date with any of the proponents and that if matters progressed, **the Province would ensure its legal obligations to the Mi'kmaq were fulfilled**.

[136] In November 2014, responding to a newspaper article referring to provincial discussions with a prospective buyer, the Mi'kmaq expressed surprise given they had not yet received any "consultation notification". They then stated, "... as the property is subject to an assertion of Aboriginal title, **the consent of the Mi'kmaq must be obtained prior to any conveyance being made**."

[137] In early December 2014, the Province sent "**a formal consultation notice**" in relation to the proposed divestiture of the Mill River Lands. Maps and other property information was again provided. A response was requested.

[138] Later in December 2014, **the Mi'kmaq responded indicating they would require further details in relation to the proposed divestiture of Crown land**, and they asked to whom the land was to be conveyed, and what the intended use was to be. They again expressed that as they had asserted title to those lands, "... in addition to the consultation/accommodation required ... **the Provincial Crown must secure the consent of the PEI Mi'kmaq before any disposal can be made**".

[139] On January 30, 2015 the Province advised that no agreement had been negotiated at that time, but that it was in discussions with a private developer who was interested in purchasing the Lands, with the intention of continuing their current use. **The Province asked for any additional archaeological information the Mi'kmaq might have and for an explanation of how the transfer of property would impact Aboriginal rights**. They asked for a response within two weeks since they were contemplating reaching an agreement to be effective in time for the summer tourist season.

[140] The Mi'kmaq responded on February 5, 2015, indicating they would endeavour to respond within that time, but that they did not consider that to be sufficient time to constitute meaningful consultation. Once again they stated, "... **it is imperative that the Provincial Crown understands that this is a matter of Aboriginal title for which Mi'kmaq consent is required"**. They then asked "... **how the Provincial Crown would like to initiate the process of negotiation that could potentially lead to the required consent being provided**."

[141] The Province suggested a ten day extension to the requested response time from the Mi'kmaq. The Province responded about the consultation process itself in two ways on February 9, 2015**. Jones stated his focus was strictly on the proposed disposition of the Lands, and that the Aboriginal Affairs Secretariat would address the broader issues, referring to the issues of negotiation and consent**. The Secretariat stated they were giving the matter due consideration but asked for patience, indicating they could not respond immediately because their Minister had resigned (for unrelated reasons).

[142] On February 23, 2015 the Mi'kmaq advised they could not respond by that day, but did provide their response on March 12, 2015. **They inquired as to whether there would be a statutory decision maker making a determination with respect to the proposed sale and transfer, and if so, would there be an opportunity for the Mi'kmaq to appear and make submissions**. The Mi'kmaq also expressed that they wished to highlight **(i) the Crown bears the onus of engaging in meaningful consultation** and **(ii) the property transaction must not proceed without the consent of the Mi'kmaq, which is only possible after the Crown has initiated and undertaken a meaningful and respectful negotiation process**.

[143] On March 26, 2015, the Province replied to the questions posed regarding a statutory decision maker and the opportunity to make submissions. Jones, for the Province advised, "**A final decision on the matter rests with Government. Please provide any further submissions you may have through this consultative process on or before April 24, 2015**." He then referred to his

February 9th correspondence **and reiterated that consultations beyond those dealing simply with the property transaction should be addressed to the Aboriginal Affairs Secretariat**.

[144] The Mi'kmaq did respond, at length, on April 24, 2015. They asked about the current status of the proposed transaction. **The Mi'kmaq stated, "...the Crown is under an obligation to inform itself of the impact its project will have on the rights of the Mi'kmaq, please advise as to what the Crown has done in this regard, and when it will be formally communicated to the Mi'kmaq"**. They also stated the Mi'kmaq would have "numerous other submissions to make" respecting the matter, but until further information was provided by the Crown they would not be in a position to do so. They reiterated their position that Crown was required to obtain the consent of the Mi'kmaq before any transfer was made. They went on to state:

> **There is no obligation on the part of the Mi'kmaq to bring matters to the attention of the Aboriginal Affairs Secretariat. The obligation is solely on the Provincial Crown to meaningfully consult and to obtain consent prior to any transfer**.

[145] The next correspondence was from Chief Francis and Chief Ramjattan focussing on their understanding of the meaning of ***Tsilhqot'in*** decision and expressing the desire to start a process of true and lasting reconciliation.

[146] Another "Duty to Consult - Notification" was sent by the Province to the Chiefs on October 4, 2016, advising of the intention to convey the Lands and inviting contact to continue consultations.

[147] Two weeks later **the Mi'kmaq asked what the intended use of the properties would be, and indicated they wished to be informed of the value of the properties before responding to the consultation request**.

[148] Two days later, on October 19, 2016, **the Province advised the current use of the land would be continued and the purchase price of the property was $500,000.** They stated the property/operations had lost money annually for several years and the assets had minimal value.

[149] As indicated earlier, the consultation process continued with a meeting on November 3, 2016. Following that, on November 18, 2016, the Mi'kmaq again reiterated:

> **The law is clear there can be no disposal of Crown land without the consent of the Mi'kmaq. We are hoping to develop a process with the Provincial Crown whereby the interests of the indigenous**

Mi'kmaq can be addressed and satisfied such that consent might be considered.

[150] As already noted, a further meeting was held on December 5, 2016, at which **the Mi'kmaq offered to lease the Lands to McDougall for a period of 50-75 years**. The Province advised McDougall would not proceed with the project based on a leasehold interest. That proposal was made again in a further meeting on December 22, 2016, and **the Province confirmed McDougall was not interested in the project based on a long-term lease**. Don McDougall, who is now 80 years of age, explained in his testimony that he was on the "back nine" of his business career, and he was "sensitive to time", and he did not view a leasehold interest as being the best way to move the project forward.

[151] The Board of the Mi'kmaq Confederacy met with the Executive Council on January 10, 2017. On that same day, Executive Council passed the Orders approving the transaction.

[152] The Mi'kmaq allege the Crown failed to provide the Traditional Uses Data Sheet to them, and failed to provide other information relating to the transfer in a timely manner. They also advise that correspondence was sent to the Premier, but they did not receive a direct response from him. The Province expressed that the Traditional Uses Data Sheet was simply a compilation of information prepared from two other source documents, both of which were known to or provided to the Mi'kmaq during the consultation process.

[153] The Province requested and did not receive the additional archaeological information apparently uncovered by the Mi'kmaq. Nor did the Province receive any further information or explanation of any adverse impact arising from the proposed transfer. That was despite a specific request for some assistance in understanding the Mi'kmaq's basis for objecting to the transfer. The bulk of the information contained in the affidavit of Tammy MacDonald, provided during the judicial review process, was not provided to the Crown during the consultation process.

Determining the degree of consultation required

[154] At some point in the consultation process, the decision-maker will conclude enough consultation has occurred, and that a decision can be made. The court's assessment of the degree of consultation required is always a retrospective exercise undertaken after the decision-making body has made its decision.

[155] Breaking down the ***Haida*** spectrum, we can list certain factors that place the obligation for consultation on the **low end** of the scale, including:

a) the claim to title is weak,
b) the Aboriginal right is limited, and
c) the potential for infringement is minor,

whereas factors indicating consultation should be on the **high end** of the spectrum include:

a) cases where a strong *prima facie* case for the claim is established,
b) the right and potential infringement is of high significance to the First Nation, and
c) the risk of non-compensable damage is high.

[156] The Mi'kmaq have claimed title to all of Prince Edward Island. The decision under review is in the context of the transfer of the Mill River Lands. To establish any claim, a claimant must present evidence to show they had "sufficiency of occupation", "continuity of occupation", and "exclusivity of occupation" of the Lands in question. The onus is on the claimant to prove its title.

[157] The Province did not have, and was not presented with, evidence which would reasonably lead it to conclude the claim to these Lands was one beyond minimal strength. That is not to say the claim will always be viewed as a weak claim, but only that the evidence supporting any claim is, to this point, very limited. Such limited evidence of some use or some presence may lead to usufructuary rights, but may not be sufficient to found title. A usufructuary right is essentially the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered. Even for nomadic or semi-nomadic peoples, a claim of title requires supporting evidence of sufficiency of occupation, as that term would be applied to the particular circumstances of the claimants and viewed through the appropriate culturally sensitive lens. Given the nature and extent of information provided as the basis for a declaration of Aboriginal title to approximately 5% of the Tsilhqot'in people's traditional territory, the information currently available in this case is minimally past the assertion stage.

[158] The Court in ***Tsilhqot'in Nation*** repeatedly spoke of the need for "evidence" or "proof" to establish the sufficiency, continuity, and exclusivity of occupation. It requires consideration of both the common law doctrine of adverse possession and the perspective of the Aboriginal group as to how it occupies or possesses the land. However, even while balancing the two concepts and being culturally sensitive to the Aboriginal way of life, and dealing with less site-specific, more territorial-based claims, there must be "proof" of regular and exclusive use of the lands in question. Assertions, without supporting evidence are just that: assertions. In ***Tsilhqot'in Nation***, McLachlin, C.J. stated:

> [41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.
>
> [42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.
>
> [43] The Province argues that this Court in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII), [2005] 2 S.C.R. 220, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there "appears to have rejected the territorial approach of the Court of Appeal" (*"Aboriginal Title and the Supreme Court: What's Happening?*" (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). **In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw***.
>
> [44] **The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact**. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

[159] Potential for infringement is minor. There was no information provided regarding current use of the Lands by the Mi'kmaq. The Lands have been operated by a private developer and used as a golf course and resort area for the past 35 years. No supporting information was identified or presented which might tend to show the Lands were unique and of special significance to the Mi'kmaq. The Lands will continue to be used as they have been for the past 35 years. The

Mi'kmaq themselves offered to perpetuate that use for an additional 75 years. It appears clear from a review of the circumstances there would be little to no adverse impact on the right claimed as a result of a transfer of those Lands.

[160] A similar case relating to extending or continuing current use of lands was addressed in ***Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)***, 2013 ABCA 443, where at para. 31, the court stated:

> 31 ... **In our view the impact of the campground expansion will have an adverse effect on both the right to fish and the other traditional uses. But that effect is tempered by an important consideration. The Recreational Area is not on bare unoccupied Crown land. The existing campground has been there for over 50 years. The Doyle Land was privately held since 1930, and since the transfer of those lands to the Crown in 1970 there have been several dispositions of those lands**. ...

[161] I have discussed earlier the legal nature of a conveyance and the presence of other options to address any potential future declaration of title. The transfer of Lands does not negate any obligation for which the Crown may eventually be found liable. Given the absence of information or evidence showing any new or present adverse impact on current uses of the Lands, and given the absence of evidence of any unique or special characteristics or significance of the Lands, the risk of non-compensable damage is low.

[162] Considering the foregoing, I find the degree of consultation required to be at the **low end** of the ***Haida*** spectrum.

Issue 3 - Did the Province meet its obligation to consult and, if appropriate, accommodate?

[163] In terms of the overall consultation process, the Province started by giving notice of their intended activity, which was to seek expressions of interest in purchasing any of its golf courses. Some interest was generated and they began discussions with those proponents. Nothing of significance materialized during 2012 and 2013, although they were continuing to have some discussions.

[164] By the end of 2014, they had issued a formal consultation notice regarding the proposed divestiture of the Mill River Lands. In subsequent months, they asked for additional archaeological information which the Mi'kmaq indicated their research had uncovered.

[165] The Province advised that Government was the decision-maker and submissions should be made through the consultative process which was underway. Matters once again quieted down as the Province had entered into an

operating agreement for the Mill River Resort with one of the proponents for the 2016 tourist season. A final Duty to Consult Notification sent in October 2016 again specified their intention to divest themselves of the Lands. Shortly thereafter they provided additional information regarding the purchase price of the lands and reiterated the intended future use of the property. They had not received any additional archaeological or traditional use information from the Mi'kmaq since their earlier request, and had not uncovered any additional information themselves.

[166] For their part, the Mi'kmaq confirmed they expected to be consulted on any decisions affecting Aboriginal right or title. They expressed that proper and meaningful consultation and, potentially, accommodation was mandatory. The Mi'kmaq asserted their claims to title based on traditional use and occupation of the Lands. They repeatedly insisted that consent of the Mi'kmaq was required before any conveyance could take place. They perceived that the consultation process should be in the form of a negotiation which could potentially lead to the required consent of the Mi'kmaq being provided. They stated that the Crown bore the sole onus of engaging in meaningful consultation. In response to a request for further information or evidence to support the claim of traditional use and occupation, the Mi'kmaq expressed there was no obligation on their part to bring matters to the attention of the Province or its representatives. They stated the Crown had a duty to inform itself of the impact its project would have on the rights of the Mi'kmaq, and then to advise the Mi'kmaq of their findings. Until that was done, they stated they would not be providing any further submissions through the consultative process initiated by the Crown.

[167] As indicated earlier, the Mi'kmaq Confederacy repeatedly and forcefully declared in much of their correspondence during the consultation period that their **consent** was required before any conveyance of Crown lands could take place. Such statements have their basis in a misinterpretation and overstatement of what the Supreme Court of Canada said in ***Tsilhqot'in Nation***. The obligation to have Aboriginal consent to Crown conduct in respect of subject lands only arises **after** Aboriginal title has been proven and conferred. The Court in ***Tsilhqot'in*** stated, at paras. 89-91:

> [89] **Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups.** The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. ...
>
> [90] **After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the**

> **title-holding Aboriginal group to developments on the land**. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.
>
> [91] **The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests**. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. **Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982***.

[168] The evidentiary burden lies on the Mi'kmaq to demonstrate the strength of their claim. The Mi'kmaq claimed it was the Province's duty to do research to uncover past traditional uses by the Mi'kmaq. The court in ***Cold Lake***, placed the onus for such research and disclosure on the shoulders of the Aboriginal claimants. It stated, at para. 29:

> 29 The First Nations contend that the record is silent as to the location and frequency of the traditional activities and the extent to which traditional activities could potentially be adversely impacted by the proposed campground expansion. **The First Nations submit that the Crown had a duty to acquire the information about Aboriginal practices and did not. This argument was raised for the first time on appeal. In our view this did not form part of the Crown's obligation.** Both parties have reciprocal duties to facilitate an assessment of the asserted rights and to outline concerns with clarity: *Haida* at para 36. We do not view this as a gap in the record for which the Crown is responsible. The First Nations argue that the Crown had a duty to provide full information about historic Aboriginal uses of the land in question. They rely on a passage in *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C.S.C.) at paras 1293-94, available on line, which seems to suggest such a duty. However, the facts in that case are very different and the issue was not discussed on appeal: 2012 BCCA 285, 324 BCAC 214 (B.C.C.A.).There is no suggestion here that the Crown had or withheld such information. In our opinion, **the Crown should not ordinarily be required to conduct such research in lieu of the First Nations, as the First Nations should be in a much better position to ascertain their own historical practices**.

[169] Unfortunately, the unfounded declaration by the Mi'kmaq Confederacy that they were entitled to grant or withhold their consent to the proposed transfer tainted the consultation process and lead to their participation in a less than fulsome manner. The Mi'kmaq further frustrated the process of consultation in declaring they had no obligation to assist the Province in learning of or better understanding any adverse impact of the proposed transfer. Their engagement in the consultation process was undermined by their misapprehension that, in effect, they had a veto based on the fact they had *asserted* title to the Lands. The Court's statements in ***Tsilhqot'in Nation*** are clearly to the contrary.

[170] There are similarities between what occurred in this case and what occurred in ***Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources)***, 2013 BCCA 412 ("***Louis***").

[171] In that case, the Stellat'en First Nation was insistent that consultations include reference to the adverse impacts of an existing mining operation, rather than being restricted to the new adverse impacts which might arise as a result of the expansion of the mine or the extension of its life span. The First Nation's position on that issue coloured their involvement in the overall consultation process. Groberman, J.A., writing for the Court of Appeal, stated, starting at para. 65:

> 65 **The consultation efforts faltered at a nascent stage. The Crown was not prepared to engage in discussions concerning compensation or other accommodations for past disturbance caused by the existing mine. Consultation was, for the Stellat'en, a non-starter unless the consultation included, as a major component, the past disturbance**.
>
> ...
>
> 68 **One of the difficulties with this case is that the position of the Stellat'en in its discussions with the Ministry was, emphatically, that consultation had to be directed at past infringements as well as new ones that would result from the expansion project**. The chambers judge put it this way, at paragraph 156:
>
> > **Consultation did not readily 'get off the ground' because Stellat'en insisted on discussing alleged past infringements of their asserted Aboriginal title and rights with respect to the opening of the original mine back in 1965 and its continuing operation since then**. ...
>
> 69 By the time the matter was heard on judicial review, the Supreme Court of Canada had released its judgment in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) rejecting the position that the Crown had a duty to

> consult over past and continuing effects on claimed Aboriginal rights whenever it made a decision connected with an existing operation. ...
>
> ...
>
> 92 **As I have already indicated, the consultation process in this case was a failure. This was not because of an absence of effort on the part of the MEMPR, [**Minister of Energy, Mines, and Petroleum Resources**] but rather a result of the parties' disparate views as to the nature of the required consultation. Because it misconstrued the nature of the consultation required, the Stellat'en refused to participate in the process. In those circumstances, it seems to me that the consultation undertaken by the MEMPR was as deep as it could be.**

Improperly insisting on certain terms of the consultation process resulted in a more limited degree of consultation than might have occurred otherwise, leaving the Court of Appeal to conclude "that the consultation undertaken was as deep as it could be".

[172] The Mi'kmaq cited ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 BCCA 128, as a case in which the court ordered a two-year suspension of the Order-in-Council authorizing the sale of lands so the parties would have time to consult and reach agreement with respect to its uses. The Musqueam claimed the golf course property was within their First Nation's traditional territory and represented one of the few remaining parcels of land held by the province within that territory.

[173] In that case, however, the Crown conceded that the Musqueam had shown a *prima facie* case for title. As a result of that, and as there was a shortage of reserve land, the court suspended the sale for an interim period.

[174] In ***Hupacasath First Nation v. British Columbia (Minister of Forests)***, 2005 BCSC 1712 ("***Hupacasath***"), the court upheld judicial review applications. At para. 271, the court held that:

> 271 ... despite the previous history of consultation with the HFN about the management of TFL 44, **the Crown did not attempt consultation at all**. The Crown did not meet what Finch J.A. described as its "positive obligation".

[175] Similarly, in ***Long Plain***, the Federal Court of Appeal granted an application for judicial review, concluding at para. 135, that Canada completely failed in its duty to consult:

> 135 Summarizing the 2006-2007 period, the Federal Court held as follows (at paragraph 79):

> The matter is more egregious in the 2006 to 2007 period. **Canada simply ignored correspondence written by and on behalf of the [four respondents]. It ignored a request for a meeting. It did not provide any information such as the appraisal or basis of the selling arrangements negotiated with Canada Lands Company. The [four respondents] were simply ignored**. After the fact, the [four respondents] were told to take their concerns to the Canada Lands Company. **I find the treatment of the concerns raised by the [four respondents] and other [A]boriginal bands to be far short of the scope of even the minimum duty to consult.**

[176] The matter currently before the court is readily distinguishable from both ***Hupacasath*** and ***Long Plain*** in the level of consultation undertaken by the Province.

[177] The parties did not reach an agreement through the consultation process, but it is not a requirement that an agreement must be reached. The Province did not convert the consultation process into a “negotiation”, as requested by the Mi’kmaq, but they were not required to do so. As the court stated in ***Cold Lake***, at para. 39:

> 39 In our view, the duty to consult is described in very general terms and there is significant flexibility in how the duty is met. **The Crown has discretion as to how it structures the consultation process**. ...

[178] Over the course of four and one- half years, the Province engaged in the following consultation activities:

> a) it provided notice of its intended action;
> b) it provided specific information, including maps, parcel identification numbers, and archaeological information regarding the Lands in question;
> c) it requested specific information on potential impacts on traditional uses of its contemplated action;
> d) it requested the additional archaeological information the Mi’kmaq stated their research had uncovered;
> e) it responded with information regarding who the final decision-maker would be;
> f) it gave direction regarding to whom any further submissions from the Mi’kmaq ought to be addressed; and
> g) when negotiations with the potential purchaser did progress to an intended disposition of the lands, it again advised the Mi’kmaq of the status of negotiations and responded to inquiries relating to price and value.

[179] When I examine the Province's consultation efforts as a whole, (See: ***Katlodeeche First Nation v. Canada (Attorney General)***, 2013 FC 458 at para. 183), I am satisfied that they met, and exceeded, their duty to engage in meaningful consultations and to act in good faith toward the Aboriginal people and interests which might be impacted by their contemplated land transfer. The Government made reasonable efforts to inform and consult. Given the absence of evidence of any new adverse impacts, they far exceeded the minimum degree of consultation required. Notwithstanding their duty to consult in this case would at most be at the low end of the ***Haida*** spectrum, I find the Province's consultation efforts were sufficient to satisfy the requirements associated with a duty in the midrange of that spectrum.

[180] Considering the consultation process as a whole, it is the substance of the efforts by the Province to engage in meaningful consultation that is important. The substance is more important than precise compliance with any "formalities" of identifying consultation as being pursuant to a Consultation Notice under the non-binding Consultation Agreement between the parties. In the same way as the duty to consult does not arise from the Consultation Agreement, meaningful consultation is not restricted to any formulaic process, but is dependent upon the context of each situation.

[181] The consultations were not perfect. The Province could have been more proactive in reaching out to the Mi'kmaq Confederacy at times when the negotiations with the proponent went quiet. Being informed of the fact that nothing new is happening on the matter is far better than being left to speculate and make further inquiries.

[182] The Provincial Cabinet met with the Board of the Mi'kmaq Confederacy on January 10, 2017. On that same day, Cabinet passed the Executive Council Orders approving the transfer of the Lands. On January 18, 2017, Chiefs Francis and Ramjattan wrote a strongly worded letter to the Premier expressing their disappointment and sense of betrayal at not being informed on January 10, 2017, that the Province simultaneously intended to approve the land transfer.

[183] While being notified that the Province had made a decision to move forward with the transfer is not strictly part of the consultation process, it clearly would have been more a respectful gesture and less offensive to the Mi'kmaq leadership if they had been informed of the impending decision on January 10, 2017. They were indeed clearly informed the Government intended to proceed with the sale in correspondence addressed to them on October 4, 2016, which stated, in part, "Please be advised that the Government of Prince Edward Island intends to convey the following properties:..." Subsequent correspondence filled in further details of the intent to transfer. However, providing an indication during their

face-to-face meeting on January 10, 2017, that the decision was imminent would have reduced some of the negative feelings resulting from that decision. The reconciliation process is best served by courteous and thoughtful interactions at all times.

[184] There was a clear and ample process of communication between the Province and the Mi'kmaq Confederacy. The Province did not ignore any information provided by the Mi'kmaq. Neither party responded to the other in a manner which fully satisfied the other party. However, each party requested and provided information, and was given the opportunity to request or provide further information. Each party's position was evident to the other. The consultations proceeded to the point where there was no new information coming forward. As was stated in ***Little Salmon/Carmacks First Nation v. Yukon (Director, Agricultural Branch, Department of Energy, Mines & Resources)*** 2010 SCC 53 (Also cited as ***Beckman v. Little Salmon, et al.***), at para. 84, "*Somebody* has to bring consultation to an end and to weigh up the respective interests... . The purpose of the consultation was to ensure that the Director's decision was properly informed."

[185] As was confirmed in the recent Supreme Court of Canada decision in ***Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*** 2017 SCC 54, the Government's decision to end the consultation process and issue the Orders-in-Council is entitled to deference:

> [77] The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.

Whether a duty to consult was triggered is a moot point

[186] Since I have concluded the Province made reasonable efforts to inform and consult, and conducted consultations consistent with or in excess of the legal requirements of ***Haida***, the question of whether a duty to consult was triggered in this case is moot.

Issues relating to respondents McDougall and 9711864 Canada Inc.

[187] Given my finding that the Province adequately consulted with the Mi'kmaq Confederacy it is not, strictly speaking, necessary to deal with the question of what the appropriate remedy would be if the Province had failed to adequately consult.

However, McDougall has asked in his submissions that the Court make a finding regarding any potential remedies in the event there is an appeal from this decision.

[188] In McDougall's evidence, he recounted his involvement with the Province over the past five years leading to the completion of the agreement of purchase and sale of the Lands. He reviewed the direct and indirect economic benefits flowing from the Mill River Complex to the western part of Prince Edward Island, and to the entire Island. He provided some examples of negative financial impacts on his efforts arising from the uncertainty surrounding the project, in light of the litigation, and expressed concern for further financial and economic impacts.

[189] In reviewing his involvement with the Province, he confirmed that he did, at some point, become aware of the assertion of title being advanced by the Mi'kmaq. He stated in his affidavit that he had been provided with little or no specific, objective or empirical evidence as to the nature and scope of any traditional uses and concluded by stating, "In short, there is no cogent evidence that the Lands hold any "special" significance to the Applicants which might be irreparably harmed by the Respondents' acquisition and continued tourism use of the Lands."

[190] He made those statements in support of his position that if there were to be any remedies granted, the Lands themselves were not of such significance as to warrant their transfer to the Mi'kmaq, but instead the court ought to order "fair compensation" from the Province, as Lamer C.J. held in ***Delgamuukw,*** at para. 169:

> 169 ... In keeping with the duty of honour and good faith on the Crown, **fair compensation will ordinarily be required when aboriginal title is infringed.** The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. ...

[191] McDougall also relies on the findings at paras. 9-10 of the ***Haida*** decision. In that case, Weyerhaeuser Company Limited was the transferee of a license to harvest trees in a certain portion of Haida Gwaii. The Supreme Court of Canada addressed the question of what duty falls to an independent third-party in terms of consultation and accommodation. The Court stated:

> 9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280 (CanLII). **The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida**

people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147 (CanLII), with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (CanLII).

> 10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. **The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations.** It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

[192] Any duty to consult or accommodate Aboriginal interests rests solely with the Crown. McDougall has no obligation to consult or accommodate. As for "becoming liable for assumed obligations", both the Memorandum of Agreement whereby McDougall's company agreed to purchase the Lands, and the actual Agreement of Purchase and Sale, contain clauses which ensure that any obligations which may arise, are the sole responsibility of the Province.

[193] The Memorandum of Agreement is conditional upon "the Province fulfilling its legal obligations and duties in dealing with Aboriginal land claim issues that arise as a consequence of the divestiture of Crown lands". The Agreement of Purchase and Sale warrants that the Province is not in default of, or in violation of, any obligation pursuant to any law, and that the Province "has all right, title and interest to the Property, and the right to sell ... and transfer the same to the Purchaser". The Province agrees to "indemnify and save harmless" McDougall's company "in respect of any and all costs, losses and damages incurred by [the Purchaser] as a result of any inaccuracy or misrepresentation, or in breach of any representation, warranty, covenant or agreement made in this Agreement by the Vendor".

[194] Finally, the deed of conveyance from the Government to the company grants title to the Lands "in fee simple and free from all encumbrances".

Disposition

[195] The applicants sought a declaration that the respondent Province of Prince Edward Island failed to adequately consult and/or accommodate the Mi'kmaq of Prince Edward Island with respect to the decision to convey the Lands to the

respondents, McDougall and his company. They also sought declarations that Orders-in-Council EC 2017-6 and EC 2017-12 are invalid and are to be set aside and that any transfer of lands purported to have taken place pursuant to those Orders-in-Council is without effect. The Mi'kmaq Confederacy also asked for their costs if they were successful.

[196] I hereby dismiss the applicant's judicial review application. The question of costs was not canvassed to any extent during the hearing. If the parties are unable to reach agreement on costs, they may contact the Court and the matter can be addressed.

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Campbell, J.

June 25, 2018