In the Matter of
Request for Review of the Lower Athabasca Regional Plan
Pursuant to s. 19.2 of the Alberta Land Stewardship Act
Submitted by the Mikisew Cree First Nation

Index of Reply Submissions of the Mikisew Creek Frist Nation

Province of Alberta

ALBERTA LAND STEWARDSHIP ACT

Statutes of Alberta, 2009
Chapter A-26.8

Current as of December 11, 2013

Office Consolidation

Alberta Queen's Printer
5th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

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Regulations

The following is a list of the regulations made under the *Alberta Land Stewardship Act* that are filed as Alberta Regulations under the Regulations Act

ALBERTA LAND STEWARDSHIP ACT

Chapter A-26.8

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Purposes of Act

1(1) In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.

(2) The purposes of this Act are

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;

(c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;

(d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

2009 cA-26.8 s1;2011 c9 s2

Definitions

2(1) In this Act,

(a) "activity" means

(i) anything that requires a statutory consent, and

(ii) anything that, under an enactment, must comply with a rule, code of practice, guideline, directive or instrument;

(a) respecting the transition of any matter in the expired or repealed regional plan;

(b) to remedy any confusion, difficulty, inconsistency, impossibility or other circumstance resulting from the expiry or repeal of the regional plan.

(5) A regulation may not be made under subsection (4) after the expiration of one year from the date the regional plan expires or is repealed.

Division 2
Contents of Regional Plans

State of the planning region statements

7 A regional plan may contain

(a) information relevant to the history of the planning region, its geography, its demographics and its economic, environmental and social characteristics;

(b) a description of the state of the planning region describing matters of particular importance in or to the planning region, and the trends and the opportunities and challenges for the planning region, including the economic, environmental and social opportunities and challenges.

Elements of a regional plan

8(1) A regional plan must

(a) describe a vision for the planning region, and

(b) state one or more objectives for the planning region.

(2) A regional plan may

(a) include policies designed to achieve or maintain the objectives for the planning region;

(b) set or provide for one or more thresholds for the purpose of achieving or maintaining an objective for the planning region;

(c) name, describe or specify indicators to determine or to assist in determining whether an objective or policy in the regional plan has been, is being or will be achieved or maintained and whether policies in the regional plan are working;

(d) describe or specify the monitoring required of thresholds, indicators and policies, who will do the monitoring and when, and to whom the monitoring will be reported;

(e) describe or specify the times and means by which, and by whom, an assessment or analysis will be conducted to determine if the objectives or policies for the planning region have been, are being or will be achieved or maintained;

(f) describe or specify the actions or measures or the nature of the actions or measures to be taken to achieve or maintain the objectives and policies in the regional plan, and by whom they are to be taken or co-ordinated, if

(i) an adverse trend or an adverse effect occurs;

(ii) an objective or policy is or might be in jeopardy or a threshold is or might be exceeded or jeopardized;

(iii) an objective or policy has not been achieved or maintained, is not being achieved or maintained, or might not be achieved or maintained;

(g) describe and convey to a person named in the regional plan authority to achieve or maintain an objective or policy, which may include delegating authority under any enactment or regulatory instrument to the person named;

(h) make different provision for

(i) different parts of a planning region, or for different objectives, policies, activities or effects in a planning region;

(ii) different classes of effect arising from an activity in a planning region;

(i) manage an activity, effect, cause of an effect or person outside a planning region until a regional plan comes into force with respect to the matter or person;

(j) specify that it applies for a stated or described period of time;

(k) provide for an exclusion from, exception to or exemption from its legal effect;

(l) specify whether, in whole or in part, it is specific or general in its application;

(m) delegate and authorize subdelegation of any authority under the regional plan, except authority

(i) to make a regional plan or amend a regional plan, or to make or adopt rules under a regional plan, or

(ii) to approve, adopt or incorporate a subregional plan or issue-specific plan as part of a regional plan, or to adopt or incorporate a plan, agreement or arrangement as part of a regional plan, or to amend any of them.

2009 cA-26.8 s8;2011 c9 s6

Implementing regional plans

9(1) A regional plan may contain provisions that the Lieutenant Governor in Council considers necessary or appropriate to advance or implement, or to both advance and implement, the purposes of this Act.

(2) Without limiting subsection (1), a regional plan may

(a) include or adopt statements of provincial policy for one, all or some planning regions to inform, guide or direct;

(b) adopt, as part of the regional plan, regulations made under Part 3 or 4 for the purpose of achieving or maintaining an objective or policy in the regional plan;

(c) whether or not another enactment deals with the same, similar or associated matters, make, as part of the regional plan, law on any matter within the legislative authority of the Legislature that is designed to advance or implement, or to both advance and implement, the purposes of this Act;

(d) make, as part of the regional plan, law that may be made as a regulation under this Act, or as a regulation under any other Act, and also make, amend or repeal regulations under any other Act whether

(i) the other Act is enacted before or after this Act comes into force, or

(ii) the authority to make regulations under the other Act is given to the Lieutenant Governor in Council, a Minister, a board or agency, or any combination of those persons;

(e) manage whatever is necessary to achieve or maintain an objective or policy, including managing all or part of the cause of an effect or those matters that affect or that might affect the economy, social objectives, the environment, human health or safety, a species or any element of any of them;

(f) repealed 2011 c9 s7;

(g) manage the surface or subsurface of land and any natural resource;

(h) authorize expropriation by the Crown under the *Expropriation Act*, including expropriation of mines and minerals;

(i) designate persons or existing entities, or establish a corporation or other entity, to perform any function under the regional plan;

(j) establish conflict resolution processes for any dispute, conflict or matter requiring resolution, including mediation, facilitation, conciliation, regulatory negotiation or arbitration under the *Arbitration Act*;

(k) authorize a Designated Minister to make an agreement or arrangement for the purpose of achieving or maintaining an objective or policy in the regional plan;

(l) provide for transitional or bridging arrangements;

(m) define, for the purposes of a regional plan, any term in this Act in a manner that is not inconsistent with this Act;

(n) specify or describe a means to determine which local government bodies and decision-making bodies, if any, must file a compliance declaration with the secretariat under Part 2, Division 3 after an amendment is made to a regional plan or after a subregional or issue-specific plan comes into effect or a plan, agreement or arrangement is adopted or incorporated as part of a regional plan;

(o) include any other matter that this Act or the regulations under this Act permit or authorize to be included in a regional plan.

(3) A regional plan may

(a) specify those provisions of a regional plan the contravention of or non-compliance with which constitutes an offence or makes the person who contravenes or does not comply liable to an order, directive or administrative or other penalty under another enactment;

(b) specify the fine, penalty or other enforcement mechanism in another enactment that applies to the contravention of or non-compliance with a regional plan;

(c) name or describe an official or other person having authority under another enactment to enforce a contravention of or non-compliance with a regional plan under that other enactment;

(d) provide that any appeal or review provisions under another enactment apply with respect to decisions made to enforce compliance with a regional plan.

2009 cA-26.8 s9;2011 c9 s7

Subregional plans, issue-specific plans and other arrangements

10(1) A regional plan may

(a) authorize the preparation of a subregional plan or an issue-specific plan and specify or describe how it is to be approved as part of the regional plan;

(b) make or authorize a Designated Minister to make, or authorize a Designated Minister to adopt by incorporation or reference, rules, a code of practice, guidelines, best practices or any other instrument on matters described in the regional plan for the purpose of advancing or implementing an objective or policy in the regional plan;

(c) approve, as part of the regional plan, a plan made under the *Public Lands Act*, whether the plan is made before or after this Act comes into force, with or without modifications, as a subregional plan or an issue-specific plan of the regional plan;

(d) adopt or incorporate, as part of the regional plan, a plan made under an enactment, or an agreement or arrangement, whether made before or after this Act comes into force, with or without modification to the plan, agreement or arrangement, as a subregional plan or an issue-specific plan of the regional plan.

(2) A subregional plan or an issue-specific plan approved by or in accordance with a regional plan, or a plan, agreement or arrangement adopted by or incorporated in a regional plan,

(a) may contain anything that a regional plan may contain;

(b) becomes effective in accordance with section 13(5).

(3) When a subregional plan or an issue-specific plan comes into effect, and when a Designated Minister makes or adopts rules, a code of practice, guidelines, best practices or any other instrument authorized by a regional plan, the subregional plan, issue-specific plan or rules, code of practice, guidelines, best practices or other

Province of Alberta

RESPONSIBLE ENERGY DEVELOPMENT ACT

ALBERTA ENERGY REGULATOR RULES OF PRACTICE

Alberta Regulation 99/2013

With amendments up to and including Alberta Regulation 45/2014

Office Consolidation

Alberta Queen's Printer
5th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
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(Consolidated up to 45/2014)

ALBERTA REGULATION 99/2013

Responsible Energy Development Act

ALBERTA ENERGY REGULATOR RULES OF PRACTICE

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Part 5
General Matters and Costs

Division 1
General Matters

Division 2
Costs

Part 6
Expiry and Coming into Force

Definitions

1 In these Rules,

(a) "Act" means the *Responsible Energy Development Act*;

(b) "applicant" means a person who files an application;

(c) "contact information" means, in respect of a person,

(i) the name, address in Alberta, telephone number, e-mail address or, if the person does not have an e-mail address, the fax number of the person, and

(ii) if the person is represented by a representative, the name, address in Alberta, telephone number, e-mail address or, if the person does not have an e-mail address, the fax number of the person;

(d) "document" includes any record or information in written, photographic, magnetic, electronic or other form;

(e) "electronic hearing" means a hearing conducted by conference telephone, video conference or other electronic means where each party is able to hear and respond to the comments of the other parties at the time the comments are made;

(f) "file" means file with the Regulator in the manner required by section 47;

(g) "information request" means a request for information described in section 12;

(h) repealed AR 203/2013 s2 ;

(i) "oral hearing" means a hearing at which the parties attend in person before the Regulator;

(i.1) "participant" means, except in Division 2 of Part 5, a person who is permitted by the Regulator under section 9 or 31.2 to participate in a hearing on an application or regulatory appeal, but does not include an applicant or a requester;

(j) "party" means

statement of concern with the Regulator in accordance with these Rules:

(a) where the Regulator proposes to make an amendment, addition or deletion to an approval under section 70 of the *Environmental Protection and Enhancement Act*;

(b) where a contaminated site is designated under section 125 of the *Environmental Protection and Enhancement Act*;

(c) where the Regulator proposes to make an amendment to an approval, licence or preliminary certificate under section 42, 54 or 70 of the *Water Act*;

(d) where the Regulator intends to suspend or cancel a disposition under section 26 or 27 of the *Public Lands Act*.

(2) A statement of concern in respect of a designation of a contaminated site referred to in subsection (1)(b) must be filed no later than 30 calendar days from the day the contaminated site is designated.

(3) A statement of concern in respect of

(a) an amendment, addition or deletion to an approval referred to in subsection (1)(a),

(b) an amendment to an approval, licence or preliminary certificate referred to in subsection (1)(c), or

(c) a suspension or cancellation of a disposition referred to in subsection (1)(d)

must be filed within the time period set out in the notice of the proposed or intended amendment, addition, deletion, suspension or cancellation, as the case may be.

AR 203/2013 s7

Non-consideration of statement of concern

6.2(1) The Regulator may disregard a statement of concern filed with the Regulator if in the Regulator's opinion any of the following apply:

(a) the person who filed the statement of concern has not demonstrated that the person may be directly and adversely affected by the application or a special circumstance set out in section 6.1, as the case may be;

(b) the statement of concern was not filed within the time specified by these Rules;

(c) a decision was made on an application by the Regulator prior to the statement of concern being filed;

(d) for any other reason the Regulator considers that the statement of concern is not properly before it.

(2) The Regulator may disregard a concern raised in a statement of concern filed with the Regulator if in the Regulator's opinion any of the following apply:

(a) the concern relates to a matter outside the Regulator's jurisdiction;

(b) the concern is unrelated to, or relates to a matter beyond the scope of the application;

(c) the concern has been adequately dealt with or addressed through a hearing or other proceeding under any other enactment or by a decision on another application;

(d) the concern relates to a policy decision of the Government;

(e) the concern is frivolous, vexatious, an abuse of process or without merit;

(f) the concern is so vague that the Regulator is not able to determine the nature of the concern.

AR 203/2013 s7

Decision regarding whether to hold a hearing

7 The Regulator may consider any of the following factors when deciding whether or not to conduct a hearing on an application:

(a) whether any of the circumstances described in section 6.2 apply;

(b) whether the objection raised in a statement of concern filed in respect of the application has been addressed to the satisfaction of the Regulator;

(c) whether the applicant and any persons who have filed statements of concern in respect of the application have made efforts to resolve the issues in dispute directly with each other through a dispute resolution meeting or otherwise;

(d) whether the application is one described in section 5.2(2);

(e) whether the matter to which the application relates has been adequately dealt with or addressed through a hearing

SUPREME COURT OF CANADA

CITATION: Grassy Narrows First Nation *v.* Ontario (Natural Resources), 2014 SCC 48

DATE: 20140711
DOCKET: 35379

BETWEEN:

Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of Grassy Narrows First Nation

Appellants

and

Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc.

Respondents

AND BETWEEN:

Leslie Cameron, on his own behalf and on behalf of all other members of Wabauskang First Nation

Appellant

and

Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc.

Respondents

- and -

Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Grand Council of Treaty # 3, Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation, Whitefish Lake First Nation # 128, Fort McKay First Nation, Te'mexw Treaty Association, Ochiichagwe'Babigo'Ining First Nation, Ojibways of Onigaming First Nation, Big Grassy First Nation and Naotkamegwanning First Nation, Métis Nation of Ontario, Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes, Lac Seul First Nation, Sandy Lake First Nation and Assembly of First Nations/National Indian Brotherhood

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 55)

McLachlin C.J. (LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ. concurring)

Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of Grassy Narrows First Nation *Appellants*

v.

Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc. *Respondents*

- and -

Leslie Cameron, on his own behalf and on behalf of all other members of Wabauskang First Nation *Appellant*

v.

Minister of Natural Resources, Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.), Attorney General of Canada and Goldcorp Inc. *Respondents*

and

Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Grand Council of Treaty # 3, Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation, Whitefish Lake First Nation # 128, Fort McKay First Nation, Te'mexw Treaty Association, Ochiichagwe'Babigo'Ining

First Nation, Ojibways of Onigaming First Nation, Big Grassy First Nation, Naotkamegwanning First Nation, Métis Nation of Ontario, Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes, Lac Seul First Nation, Sandy Lake First Nation and Assembly of First Nations/National Indian Brotherhood *Interveners*

Indexed as: Grassy Narrows First Nation *v.* Ontario (Natural Resources)

2014 SCC 48

File No.: 35379.

2014: May 15; 2014: July 11.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Aboriginal law — Treaty rights — Harvesting rights — Interpretation of taking-up clause — Certain lands subject to treaty annexed to Ontario after signature of treaty between Ojibway and Canada — Whether province has authority to take up tracts of that land so as to limit harvesting rights under treaty or whether it requires federal approval to do so — Constitution Act, 1867, ss. 91(24), 92(5), 92A, 109 — Constitution Act, 1982, s. 35 — Treaty No. 3.

In 1873, Treaty 3 was signed by treaty commissioners acting on behalf of the Dominion of Canada and Ojibway Chiefs from what is now Northwestern Ontario and Eastern Manitoba. The Ojibway yielded ownership of their territory, except for certain lands reserved to them. Among other things, they received in return the right to harvest the non-reserve lands surrendered by them until such time as they were "taken up" for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada. At the time that Treaty 3 was signed, a portion of land known as the Keewatin area was under the exclusive control of Canada. It was annexed to Ontario in 1912 and since that time, Ontario has issued licences for the development of those lands.

In 2005, the Grassy Narrows First Nation, descendents of the Ojibway signatories of Treaty 3, commenced an action challenging a forestry licence issued by Ontario to a large pulp and paper manufacturer and which authorized clear-cut forestry operations within the Keewatin area.

The trial judge held that Ontario could not take up lands within the Keewatin area so as to limit treaty harvesting rights without first obtaining Canada's approval. According to her, the taking-up clause in the treaty imposed a two-step process involving federal approval for the taking up of Treaty 3 lands added to Ontario in 1912.

The Ontario Court of Appeal allowed the appeals brought before it. That court held that s. 109 of the *Constitution Act, 1867* gives Ontario beneficial

ownership of Crown lands within Ontario. That provision, combined with provincial jurisdiction over the management and sale of provincial public lands and the exclusive provincial power to make laws in relation to natural resources gives Ontario exclusive legislative authority to manage and sell lands within the Keewatin area in accordance with Treaty 3 and s. 35 of the *Constitution Act, 1982*.

Held: The appeal should be dismissed.

The central question on this appeal is whether Ontario has the power to take up lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether this is subject to Canada's approval.

Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by constitutional provisions, the interpretation of the treaty, and legislation dealing with Treaty 3 lands.

First, although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown. Both levels of government are responsible for fulfilling the treaty promises when acting within the division of powers under the Constitution. Sections 109, 92(5) and 92A of the *Constitution Act, 1867* establish conclusively that Ontario holds the beneficial interest in the Keewatin lands and has exclusive power to manage and sell those lands as well as to make laws in relation to the resources on or under those lands. Together, these provisions give Ontario the power to take up lands in the Keewatin area under Treaty 3 for

provincially regulated purposes such as forestry. Further; s. 91(24) of that same Act does not give Canada the authority to take up provincial land for exclusively provincial purposes.

Second, nothing in the text or history of the negotiation of Treaty 3 suggests that a two-step process requiring federal supervision or approval was intended. The text of the taking-up clause supports the view that the right to take up land rests with the level of government that has jurisdiction under the Constitution. The reference in the treaty to Canada merely reflects the fact that the lands at the time were in Canada, not Ontario.

Lastly, legislation subsequent to the signature of the treaty and which dealt with Treaty 3 lands confirmed Ontario's right to take up that land by virtue of its control and beneficial ownership of the territory. It did not amend the terms of Treaty 3.

Ontario's power to take up lands under Treaty 3 is not unconditional. When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question. Here, Ontario must exercise its powers in conformity with the honour of the Crown, and the exercise of those powers is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. For Treaty 3 land to be taken up, the harvesting rights of the Ojibway over the land must be respected. Any taking up of land in the Keewatin area for forestry or other

purposes must meet the conditions set out by this Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69. If the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise.

Cases Cited

Referred to: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Horseman*, [1990] 1 S.C.R. 901; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637; *Smith v. The Queen*, [1983] 1 S.C.R. 554; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

Statutes and Regulations Cited

Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands (1891) (U.K.), 54 & 55 Vict., c. 5, Sch., s. 1.

Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands (1891) (Ont.), 54 Vict., c. 3, Sch., s. 1.

Constitution Act, 1867, ss. 91(24), 92A, 92(5), 109.

Constitution Act, 1982, s. 35.

Ontario Boundaries Extension Act, S.C. 1912, c. 40, s. 2.

Treaty No. 3 (1873).

APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Gillese and Juriansz JJ.A.), 2013 ONCA 158, 114 O.R. (3d) 401, 304 O.A.C. 250, [2013] 3 C.N.L.R. 281, [2013] O.J. No. 1138 (QL), 2013 CarswellOnt 2910, setting aside a decision of Sanderson J., 2011 ONSC 4801, [2012] 1 C.N.L.R. 13, [2011] O.J. No. 3907 (QL), 2011 CarswellOnt 8900. Appeal dismissed.

Robert J. M. Janes and *Elin R. Sigurdson*, for the appellants Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of the Grassy Narrows First Nation.

Bruce McIvor and *Kathryn Buttery*, for the appellant Leslie Cameron, on his own behalf and on behalf of all other members of the Wabauskang First Nation.

Michael R. Stephenson, *Mark Crow* and *Christine Perruzza*, for the respondent the Minister of Natural Resources.

Christopher J. Matthews, for the respondent Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.).

Mark R. Kindrachuk, *Q.C.*, and *Mitchell R. Taylor*, *Q.C.*, for the respondent the Attorney General of Canada.

Thomas F. Isaac, *William J. Burden*, *Linda I. Knol* and *Brian P. Dominique*, for the respondent Goldcorp Inc.

Heather Leonoff, Q.C., for the intervener the Attorney General of Manitoba.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

Richard James Fyfe and *Macrina Badger*, for the intervener the Attorney General for Saskatchewan.

Douglas B. Titosky, for the intervener the Attorney General of Alberta.

Zachary Davis, *Peter W. Hutchins* and *Jessica Labranche*, for the intervener the Grand Council of Treaty # 3.

Meaghan M. Conroy and *Abram B. Averbach*, for the interveners the Blood Tribe, the Beaver Lake Cree Nation, the Ermineskin Cree Nation, the Siksika Nation and the Whitefish Lake First Nation # 128.

Written submissions only by *Karin Buss* and *Kirk Lambrecht, Q.C.*, for the intervener the Fort McKay First Nation.

Karey Brooks, for the intervener the Te'mexw Treaty Association.

Donald R. Colborne, for the interveners the Ochiichagwe'Babigo'Ining First Nation, the Ojibways of Onigaming First Nation, the Big Grassy First Nation and the Naotkamegwanning First Nation.

Jason Madden and *Nuri G. Frame*, for the intervener the Métis Nation of Ontario.

David M. Robbins, *Dominique Nouvet* and *Heather Mahony*, for the intervener the Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes.

David G. Leitch, for the interveners the Lac Seul First Nation and the Sandy Lake First Nation.

Joseph J. Arvay, Q.C., and *Catherine J. Boies Parker*, for the intervener the Assembly of First Nations/National Indian Brotherhood.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

before it, i.e. take up lands. The fact that the words "taking up" were not used in the 1912 Legislation does not diminish the import of s. 2(*a*).

[48] Nor did transferring to Ontario the right to take up lands within the Keewatin area amend Treaty 3, as the appellants suggest. The treaty allowed for the taking up of land by the beneficial owner of the land — after 1912, this was Ontario. Changing the beneficial owner of the land and the emanation of the Crown responsible for dealing with the lands conveyed did not amend the treaty.

[49] The 1912 Legislation altered which level of government would have authority in terms of taking up the land. It did not modify the treaty or change its partners. As this Court stated with respect to Treaty 8 in *Horseman*, at pp. 935-36:

> The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement. . . . [Emphasis added.]

(4) Conclusion With Respect to the Power to Take Up Lands

[50] I conclude that as a result of ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, Ontario and only Ontario has the power to take up lands under Treaty 3. This is confirmed by the text of Treaty 3 and legislation dealing with Treaty 3 lands. However, this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must

exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the *Crown*. When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question.

[51] These duties mean that for land to be taken up under Treaty 3, the harvesting rights of the Ojibway over the land must be respected. Any taking up of the land for forestry or other purposes must meet the conditions set out by this Court in *Mikisew*. As explained by the Ontario Court of Appeal (at paras. 206-12), the Crown's right to take up lands under Treaty 3 is subject to its duty to consult and, if appropriate, accommodate First Nations' interests beforehand (*Mikisew*, at para. 56). This duty is grounded in the honour of the Crown and binds the Province of Ontario in the exercise of the Crown's powers.

[52] Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of substantially addressing their concerns (*Mikisew*, at para. 55; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168). The adverse impact of the Crown's project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation

at the outset. Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise (*Mikisew*, at para. 48).

B. *Does the Doctrine of Interjurisdictional Immunity Preclude Ontario From Justifying Infringement of Treaty 3 Rights?*

[53] I have concluded that Ontario has the power to take up lands in the Keewatin area under Treaty 3, without federal approval or supervision. Provided it does so in a manner that respects the requirements set out in *Mikisew*, doing this does not breach Treaty 3 harvesting rights. If Ontario's taking up of Keewatin lands amounts to an infringement of the treaty, the *Sparrow/Badger* analysis under s. 35 of the *Constitution Act, 1982* will determine whether the infringement is justified (*R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771). The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). While it is unnecessary to consider this issue, this Court's decision in *Tsilhqot'in Nation* is a full answer.

VII. Conclusion

[54] I would dismiss this appeal.

Indexed as:

Keewatin Tribal Council Inc. v. Thompson (City)

Between
Keewatin Tribal Council Inc., Applicant, and
The City of Thompson and the Provincial Municipal Assessor, Respondents

[1989] M.J. No. 295

[1989] 5 W.W.R. 202

61 Man.R. (2d) 241

[1989] 3 C.N.L.R. 121

[1989] 2 C.T.C. 206

16 A.C.W.S. (3d) 1

Suit No. 89-01-36031

Manitoba Court of Queen's Bench

Jewers J.

June 2, 1989

Assessments -- Indians -- Corporations -- Taxation -- Corporation without share capital whose members were Indian bands holding real property in trust for member bands and using most of it for student housing but renting one building at commercial rents -- Appeal from decision upholding property as assessable and liable to taxation allowed -- Act Providing for the organization of the Department of the Secretary of State of Canada and the management of Indian and Ordnance Lands, S.C. 1868, c. 42 -- Corporations Act, R.S.M. 1987, c. C225, Pt. XXII, ss. 268, 277(1) -- County Municipalities Act, S.M. 1875, c. 41, s. 52(b)(i) -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 149(1) -- Indian Act, S.C. 1951, c. 29, ss. 2(1)(o), 18(1) -- Indian Act, R.S.C. 1985, c. I-5, ss. 83(1), 87 -- Land Tax Act, S.M. 1873, c. 42, s. 1(c) -- Municipal Assessment Act, R.S.M. 1988, c. M226, s. 2(2)(b) -- Municipalities Act, S.M. 1875, c. 31, s. 20(3) -- Trustee Act, R.S.M. 1987, c. T160 -- Manitoba Queen's Bench Rules, Reg. 533/88, RR. 8.09-8.12.

This was an appeal from a decision of a board of revision sustaining an assessment for taxation. The appellant, a corporation without share capital whose members consisted of Indian bands, owned certain real property in trust for the members, most of which it used for student housing. One building was rented at commercial rates. The appellant argued that under s. 2(2)(b) of the Municipal Assessment Act it was exempt from taxation.

HELD: The appeal was allowed. The section cited by the appellant was not restricted to Indian reserve lands. According to the Supreme Court of Canada, treaties and statutes having to do with Indians should be liberally constructed so that the word 'trust' should be read to apply to non-reserve land that was held in trust for a tribe or group of Indians. The trust was valid. The corporation was a personality distinct from its members. It was not a sham absent any element of deceit or deception. An Indian band, which could possibly enforce the trust, was capable of being a trust beneficiary. A band was a creature of statute. The trust did not result in a contravention of s. 268 of the Corporations Act. An isolated asset transfer would not result in the corporation's carrying on business for the commercial advantage of members.

J.R. London, Q.C. and D. Martz, for the Applicant.
R.W. Morrison, for the City of Thompson.
D. Flood, for the Provincial Municipal Assessor.

JEWERS J.:-- The applicant appeals from a decision of the Board of Revision of the respondent City of Thompson dated January 24th, 1989 which dismissed the complaint of the applicant and sustained the assessment for the lands and premises known as 24 Westwood Drive, 336 Thompson Drive and 344 Thompson Drive in the City of Thompson in Manitoba. The applicant submits that the lands are exempt from taxation pursuant to s. 2(2)(b) of The Municipal Assessment Act, R.S.M. 1988 c. M226 in that they are lands held in trust for a tribe or body of Indians.

The parties were able to agree on the follcwing facts:

1. Keewatin Tribal Council Inc. (the "Corporation") was incorporated and registered under the Corporations Act of Manitoba on March 15, 1979.
2. The Articles of Incorporation have not been amended or changed since the date of registration.
3. Paragraph 7 of the Articles of Incorporation indicates the members of the Corporation to be the following Indian Bands: Northlands Band, Barren Lands Band, Churchill Band, Split Lake Band, York Factory Band, Fox Lake Band, Shamattawa Band, Nelson House Band, God's Narrows Band, Cross Lake Band, God's River Band, Norway House Band, Oxford House Band.
4. The members of those Bands and the War Lake Band are registered Indians and the Bands are constituted as tribes and bodies of Indians pursuant to the Indian Act (Canada).
5. The undertaking of the Corporation is restricted, by its Articles of Incorporation, to providing resorrce and human development among Indian people in Northern Manitoba.
6. By-Law No. 1 of the Corporation enactei on March 5, 1980, indicates that the members of the Corporation shall be composed of the elected chiefs from each of the following regions:

a) The Northeast Region which includes the following Bands: Northlands Band, Barren Lands Band, Churchill Band, Split Lake Band, York Factory Band, Fox Lake Band, Shamattawa

b) The North Re

on which region includes the following Bands: God's Narrows Band, God's River Band, Oxford House Band, War Lake Band, Cross Lake Band, Nelson House Band.

7. By-Law No. 1 of the Corporation re-enacted on July 5, 1988 (the "By-Law"), indicates the "Regular Members" of the Corporation to be the elected chiefs as representative of the following Indian Bands:

Northlands Band, Barren Lands Band, Churchill Band, Split Lake Band, York Factory Band, Fox Lake Band,

> relation to the reserve whose inhabit.&nts have elected it.
>
> "In summary, an Indian band council is an elected public authority, dependant on parliament for its existence, powers and responsibilities, whose essential function is to exercise municipal and government power delegated to it by parliament - in relation to the Indian reserve whose inhabitants have elected it ..."

Counsel for the applicant points out that in paragraphs 8 and 11 of Interpretation Bulletin IT-62, issued by Revenue Canada, an Indian band council has been likened to a "municipality" (municipal authorities are exempt from income tax under s. 149(1) of the Income Tax Act).

I do not believe that the gift can be interpreted as being in favour of the individual members of the bands, either for the present, or for the present and future. For one thing, the trust deed just did not say that. The gift was to the bands. Furthermore, the number of people involved is very large and it could hardly have been the intention of the settlor to give an interest in these properties to such a great number of individuals so that they could each hold respective shares as tenants in common. In my opinion, the gift must be viewed as one to be used for the purposes of the individual bands: In other words, a purpose trust. Normally, such a trust might be void as a perpetuity and also for want of a beneficiary or beneficiaries. However, in Manitoba the situation is unique in that our legislature has abolished the rule against perpetuities, and so that is no longer a problem here. The only question is whether there is in this case, a want of beneficiaries.

As to this last point, the case of Re Denley's Trust Deed 1968 3 A.E.R. 65 is instructive. There, land had been donated to trustees as a recreation ground for the employees of a certain company. This was a non charitable purpose trust, although the trust was limited to the perpetuity period so it was not void as a perpetuity. There was, however, a problem of enforceability. Goff, J. stated, at p. 69:

> "Counsel for the first defendant has argued that the trust in cl. 2(c) in the present case is either a trust for the benefit of individuals, in which case he argues that they are an unascertainable class and therefore the trust is void for uncertainty, or it is a purpose trust, that is a trust for providing recreation, which he submits is void on the beneficiary principle, or alternatively it is something of a hybrid having the vices of both kinds.
>
> "I think that there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity. Such cases can be considered if and when they arise. The present is not, in my judgment, of that character, and it will be seen that cl. 2(d) of the trust deed expressly states that, subject to any rules and regulations made by the trustees, the employees of the company shall be entitled to the use and enjoyment of the land."

The court went on to hold that the trust did not offend the beneficiary principle.

In the case at bar, the ultimate, albeit indirect, beneficiaries of the trust, are the individual members of the bands; indeed, there are potentially very real benefits in that the children are entitled to use the properties free of charge as accommodation while attending school in Thompson. Even if this were not enough to give individual band members locus standi, surely the trust could, and would be enforced by the band councils, or any one or more of them, or failing that, the chiefs, or any one or more of them. If the band councils have a status similar to that of municipalities, surely they have the necessary standing to enforce the trust. The real question is one of enforceability and nothing else. There is absolutely no problem with a charitable purpose trust, which will be enforced by the attorney-general, however impersonal its objects; similarly, there should be no problem with a non charitable purpose trust where there are any number of persons with standing to enforce it.

In the Court of Appeal of Alberta

Citation: Kelly v. Alberta (Energy Resources Conservation Board), 2011 ABCA 325

Date: 20111118
Docket: 1003-0171-AC
Registry: Edmonton

Between:

Susan Kelly and Lillian Duperron

Appellants

- and -

Alberta Energy Resources Conservation Board, West Energy Ltd. and Daylight Energy Ltd.

Respondents

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Decision by
Alberta Energy Resources Conservation Board
Dated the 1st day of June, 2010

[25] The reasoning of the Board therefore does not withstand scrutiny on the reasonableness standard. It is not transparent and intelligible, nor is it a method of analysis available on the facts and the law.

[26] The respondent Daylight is correct when it states that adverse effect is a matter of degree. At some point the Board must decide whether the magnitude of the risk is such that the applicant has become "directly and adversely affected". But the applicant need not demonstrate that the perceived risk is a certainty, or even likely. Nor need the applicant prove an adverse effect greater than that suffered by the general public, nor that any adverse effect would be life-threatening. Those in the tertiary evacuation area may not have an absolute right to standing in all cases, but they have a strong *prima facie* case for standing. The right to intervene in the *Act* is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource development (but no "right" that is engaged), and true "busybodies". As observed in ***Dene Tha'*** at para. 14, that balancing is the responsibility of the Board, provided that it is done on a proper legal foundation.

Conclusion

[27] The answer to the first question on which leave to appeal was granted is that a person who resides within the tertiary zone around an oil well is eligible for standing before the Board. Whether any particular applicant who resides in the tertiary zone would be granted standing depends on a finding by the Board that they are directly and adversely affected. The decision of the Board to deny these appellants standing was not made in the context of a reasonable meaning of "directly and adversely affected". It is not necessary to answer the second question.

[28] The appeal is allowed, and the matter remitted to the Board for reconsideration.

Appeal heard on October 5, 2011

Memorandum filed at Edmonton, Alberta
this 18th day of November, 2011

Slatter J.A.

Authorized to sign for: McDonald J.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Musqueam Indian Band Board of Review v. Musqueam Indian Band,* 2013 BCSC 1362

Date: 20130731
Docket: S124733
Registry: Vancouver

In the matter of a Stated Case under
Section 80 of the *Musqueam Indian Band Property Assessment Bylaw*

Between:

Musqueam Indian Band Board of Review

Appellant

And

Musqueam Indian Band, Assessor for the Musqueam Indian Band and Shaughnessy Golf and Country Club

Respondents

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for Musqueam Indian Band:	J.I. Reynolds, M. Morellato, Q.C. L. Pence
Counsel for Shaughnessy Golf and Country Club:	G.K. MacIntosh, Q.C. L.B. Herbst
Counsel for Assessor for the Musqueam Indian Band:	R.B.E. Hallsor G. Jacks
Written Submissions received March 13, 2012	All parties
Place and Date of Hearing:	Vancouver, B.C. February 25-28, 2013
Place and Date of Judgment:	Vancouver, B.C. July 31, 2013

could, for example, be used to develop waterfront condominiums consequently the court reasoned "the value would have to reflect the restriction on the property to some degree".

[123] In the case at bar, the Club is the occupier and the Band is the equivalent of the fee simple owner. The Federal Government on behalf of the Band imposed the restriction that the occupier Club may only use the property as a country club and golf course. That restriction is relevant to the value of the land. From this, it follows that the Board may consider the restriction in the Lease and whether there is a reasonable expectation that the Band would allow residential use of the Subject Property.

I. Interpretation of Provisions affecting Aboriginal Rights

[124] If there is any ambiguity in the correct interpretation of the *Bylaw*, it is argued by the Band, that ambiguity must be resolved in favour of the Band: see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85. In that case, Iacobucci J. sets out:

> [49] That s. 83(1)(a) [of the *Indian Act*] should be given a broad reading is clear from an application of the principle in [*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29], as explained by La Forest J. in [*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85], at p. 143:
>
> > ... it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them ... .
> >
> > At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.
> >
> > [Emphasis in Original]

[125] In the present case, there was no ambiguity as to whether the Lease may be considered *as* a restriction. Further, Mr. Justice Iacobucci is clear in his reasoning that this interpretive principle does not mean automatic acceptance of a given

construction is required of the Court because it is favourable to the aboriginal parties. I find this interpretive principle does not affect the Court's conclusions in the present case. I also note parenthetically that this principle may not have been contemplated by the Supreme Court of Canada for application to legislation drafted by an aboriginal band. However, that issue is not for this Court to determine.

J. Does the Assessor have discretion to consider relevant assessment factors?

[126] I now turn to the Assessor's discretion aspect of the question, both under the Band's *Bylaw* and under the provincial *Assessment Act*, which the Band *Bylaw* substantially follows.

[127] The Band argues the Assessor and the Club rely on the exercise of the assessor's discretion to reduce the actual value of the land from its highest and best *use* to an incorrect assessment based on a restriction in the Lease regarding the golf and country club use. The Band argues that it would be a wrong exercise of discretion to do so and to extend the wording of s. 26(3) of the Band's *Bylaw* to conduct an assessment in this manner. It is argued this would conflict with the paramount duty of the Assessor to assess the property on the basis of the market value of a fee simple interest. In this regard, the Band argues its *Bylaw* is materially different from the *Assessment Act*.

[128] The Assessor notes that under the provincial legislation, the Assessor has a duty to consider a restriction placed by the fee simple owner if the lands in question are owned by the Crown or another owner who is exempt from paying property taxes. This is not discretionary - the bylaw instructs this consideration at subsection 26(3) by stating to consider "any other circumstances affecting the value of the land". It follows, argues the Assessor, that it does not matter whether a given restriction is a restrictive covenant or a restriction on use. It is a restriction that can and should be considered.

Donald Martin *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

and between

Ruth A. Laseur *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

INDEXED AS: NOVA SCOTIA (WORKERS' COMPENSATION BOARD) *v.* MARTIN; NOVA SCOTIA (WORKERS' COMPENSATION BOARD) *v.* LASEUR

Donald Martin *Appelant*

c.

Workers' Compensation Board de la Nouvelle-Écosse et procureur général de la Nouvelle-Écosse *Intimés*

et

Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse, Ontario Network of Injured Workers Groups, Congrès du travail du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique et Workers' Compensation Board de l'Alberta *Intervenants*

et entre

Ruth A. Laseur *Appelante*

c.

Workers' Compensation Board de la Nouvelle-Écosse et procureur général de la Nouvelle-Écosse *Intimés*

et

Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse, Ontario Network of Injured Workers Groups, Congrès du travail du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique et Workers' Compensation Board de l'Alberta *Intervenants*

RÉPERTORIÉ : NOUVELLE-ÉCOSSE (WORKERS' COMPENSATION BOARD) *c.* MARTIN; NOUVELLE-ÉCOSSE (WORKERS' COMPENSATION BOARD) *c.* LASEUR

Neutral citation: 2003 SCC 54.

File Nos.: 28372, 28370.

2002: December 9; 2003: October 3.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Administrative law — Workers' Compensation Appeals Tribunal — Jurisdiction — Charter issues — Constitutional validity of provisions of Appeals Tribunal's enabling statute — Whether Appeals Tribunal has jurisdiction to apply Canadian Charter of Rights and Freedoms — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Constitutional law — Charter of Rights — Equality rights — Workers' compensation legislation excluding chronic pain from purview of regular workers' compensation system and providing in lieu of benefits normally available to injured workers four-week functional restoration program beyond which no further benefits are available — Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

The appellants, L and M, both suffer from the disability of chronic pain attributable to a work-related injury. M worked as a foreman and sustained a lumbar sprain. In the following months, he returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Workers' Compensation Board of Nova Scotia provided him with temporary disability benefits and rehabilitation

Référence neutre : 2003 CSC 54.

N^{os} du greffe : 28372, 28370.

2002 : 9 décembre; 2003 : 3 octobre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit administratif — Workers' Compensation Appeals Tribunal — Compétence — Questions relatives à la Charte — Constitutionnalité de certaines dispositions de la loi habilitante du tribunal d'appel — Le tribunal d'appel a-t-il compétence pour appliquer la Charte canadienne des droits et libertés? — Workers' Compensation Act, S.N.S. 1994-95, ch. 10, art. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Loi sur l'indemnisation des accidentés du travail excluant la douleur chronique du champ d'application du régime habituel d'indemnisation des accidentés du travail et remplaçant les prestations auxquelles ont normalement droit les accidentés du travail par un programme de rétablissement fonctionnel d'une durée de quatre semaines, après quoi aucun autre avantage n'est disponible — La loi viole-t-elle l'art. 15(1) de la Charte canadienne des droits et libertés? — Dans l'affirmative, la violation est-elle justifiable au regard de l'article premier de la Charte? — Workers' Compensation Act, S.N.S. 1994-95, ch. 10, art. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Droit administratif — Organismes et tribunaux administratifs — Compétence — Questions de droit constitutionnel — Pouvoirs des tribunaux administratifs de trancher des questions de droit constitutionnel — Critère applicable.

Les appelants, L et M, sont tous les deux atteints d'une incapacité due à la douleur chronique à la suite de la lésion liée au travail qu'ils ont subie chacun. M occupait un poste de contremaître et a subi une entorse lombaire. Au cours des mois suivants, il est retourné au travail à maintes reprises, mais il a dû cesser de travailler à cause d'une douleur récurrente. Il a suivi un programme de conditionnement au travail et de renforcement. Pendant cette période, la Workers'

services. When his temporary benefits were discontinued, M sought review of this decision, but his claim was denied by the Board. L was employed as a bus driver and injured her back and her right hand when she slipped and fell from the bumper of her bus. She received temporary disability benefits. Although L attempted to return to work on several occasions, she found that performing her duties aggravated her condition. She was denied a permanent partial disability award and vocational rehabilitation assistance. M and L appealed the Board's decisions to the Workers' Compensation Appeals Tribunal on the ground that the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations* and portions of s. 10B of the *Workers' Compensation Act* infringed s. 15(1) of the *Canadian Charter of Rights and Freedoms*. These provisions exclude chronic pain from the purview of the regular workers' compensation system and provide, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits are available. The Board challenged the Appeals Tribunal's jurisdiction to hear the *Charter* argument.

The Appeals Tribunal affirmed its jurisdiction to apply the *Charter* and allowed M's appeal on the merits, holding that the Regulations and s. 10B(c) of the Act violated s. 15 of the *Charter* and that these violations were not justified under s. 1. M was awarded temporary benefits from August 6 to October 15, 1996. In L's appeal, the Appeals Tribunal concluded, based on the reasons given in M's appeal, that s. 10A and s. 10B(b) and (c) of the Act also violated s. 15(1) of the *Charter* and were not saved by s. 15(2) or s. 1; however, the Appeals Tribunal found that while L suffered from chronic pain attributable to her work injury, her permanent medical impairment rating under the applicable guidelines was 0 percent, thus barring her from obtaining permanent impairment or vocational rehabilitation. The Board appealed the Appeals Tribunal's *Charter* conclusions, M cross-appealed the cut-off of benefits as of October 15, 1996, and L cross-appealed the refusal to award benefits. The Court of Appeal allowed the Board's appeals and dismissed the cross-appeals. The court found that the Appeals Tribunal did not have jurisdiction to consider the constitutional validity of the Act and that, in any event, the chronic pain provisions did not demean the human dignity of

Compensation Board de la Nouvelle-Écosse (« commission ») lui a versé des prestations pour incapacité temporaire en plus de lui offrir des services de réadaptation. À la suite de la cessation du versement de ses prestations, M a demandé à la commission de réviser cette décision, ce qui lui a été refusé. L était chauffeur d'autobus et est tombée du pare-chocs de son autobus, se blessant alors au dos et à la main droite. Elle a touché des prestations pour incapacité temporaire. L a tenté de retourner au travail à maintes reprises, mais elle a constaté que l'exercice de ses fonctions avait pour effet d'aggraver son état. Elle s'est vu refuser une indemnité pour incapacité partielle permanente et une aide sous forme de réadaptation professionnelle. M et L ont interjeté appel contre les décisions de la commission devant le Workers' Compensation Appeals Tribunal, en faisant valoir que le *Functional Restoration (Multi-Faceted Pain Services) Program Regulations* et certaines parties de l'art. 10B de la *Workers' Compensation Act* violaient le par. 15(1) de la *Charte canadienne des droits et libertés*. Ces dispositions excluent la douleur chronique du champ d'application du régime habituel d'indemnisation des accidentés du travail, et remplacent les prestations auxquelles ont normalement droit les accidentés du travail par un programme de rétablissement fonctionnel de quatre semaines, après quoi aucun autre avantage n'est disponible. La commission a contesté la compétence du tribunal d'appel pour entendre l'argument fondé sur la *Charte*.

Le tribunal d'appel a confirmé qu'il avait compétence pour appliquer la *Charte* et il a accueilli l'appel de M au fond, décidant que le Règlement et l'al. 10Bc) de la Loi violaient l'art. 15 de la *Charte* et que ces violations n'étaient pas justifiées au regard de l'article premier. M s'est vu accorder des prestations temporaires pour la période du 6 août au 15 octobre 1996. Dans le dossier L, le tribunal d'appel a conclu, pour les mêmes motifs que dans le dossier M, que l'art. 10A et les al. 10Bb) et c) de la Loi violaient également le par. 15(1) de la *Charte* et n'étaient sauvegardés ni par le par. 15(2) ni par l'article premier; il a toutefois décidé que, en dépit du fait qu'elle souffrait de douleur chronique à la suite de l'accident du travail dont elle avait été victime, le taux d'incapacité médicale permanente de L était de 0 pour 100 selon les lignes directrices applicables, de sorte qu'elle n'avait droit ni à des prestations pour incapacité permanente ni à une aide sous forme de réadaptation professionnelle. La commission a interjeté appel contre les conclusions du tribunal d'appel relatives à la *Charte*, M a interjeté un appel incident contre la cessation du versement des prestations prévue pour le 15 octobre 1996, et L a interjeté un appel incident contre le refus de lui accorder des prestations. La Cour d'appel a accueilli les appels de la

the claimants and thus did not violate s. 15(1) of the *Charter*.

Held: The appeals should be allowed. Section 10B of the Act and the Regulations in their entirety infringe s. 15(1) of the *Charter* and the infringement is not justified under s. 1. The challenged provisions are of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*. The general declaration of invalidity is postponed for six months from the date of this judgment. In M's case, the decision rendered by the Appeals Tribunal is reinstated. L's case is returned to the Board.

The Constitution is the supreme law of Canada and, by virtue of s. 52(1) of the *Constitution Act, 1982*, the question of constitutional validity inheres in every legislative enactment. From this principle of constitutional supremacy flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. To allow an administrative tribunal to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada. Administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision-makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.

The Court of Appeal erred in concluding that the Appeals Tribunal did not have jurisdiction to consider the constitutionality of the challenged provisions of the Act and the Regulations. Administrative tribunals which have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. In applying this approach, there is no need to draw any distinction between "general" and "limited" questions of law. Explicit jurisdiction must be found in the terms of the statutory grant of authority.

commission et rejeté les appels incidents. Elle a conclu que le tribunal d'appel n'avait pas compétence pour examiner la constitutionnalité de la Loi et que, de toute façon, les dispositions relatives à la douleur chronique ne portaient pas atteinte à la dignité des demandeurs et ne violaient donc pas le par. 15(1) de la *Charte*.

Arrêt : Les pourvois sont accueillis. L'article 10B de la Loi et le Règlement dans son entier violent le par. 15(1) de la *Charte*, et cette violation n'est pas justifiée au regard de l'article premier. Les dispositions contestées sont inopérantes en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*. Il est ordonné que la déclaration générale d'invalidité ne prenne effet que dans six mois à compter de la date du présent jugement. La décision que le tribunal d'appel a rendue au sujet de M est rétablie. Le dossier de L est renvoyé à la commission.

La Constitution est la loi suprême du Canada et la question de la constitutionnalité est inhérente à tout texte législatif en raison du par. 52(1) de la *Loi constitutionnelle de 1982*. Il découle, en pratique, de ce principe de la suprématie de la Constitution que les Canadiens doivent pouvoir faire valoir les droits et libertés que leur garantit la Constitution devant le tribunal le plus accessible, sans devoir engager des procédures judiciaires parallèles. Permettre aux tribunaux administratifs de trancher des questions relatives à la *Charte* ne mine pas le rôle d'arbitre ultime que les cours de justice jouent en matière de constitutionnalité au Canada. Les décisions d'un tribunal administratif fondées sur la *Charte* sont assujetties au contrôle judiciaire suivant la norme de la décision correcte. En outre, les réparations constitutionnelles relevant des tribunaux administratifs sont limitées et n'incluent pas les déclarations générales d'invalidité. La décision d'un tribunal administratif qu'une disposition de sa loi habilitante est invalide au regard de la *Charte* ne lie pas les décideurs qui se prononceront ultérieurement dans le cadre ou en dehors du régime administratif de ce tribunal. Ce n'est qu'en obtenant d'une cour de justice une déclaration formelle d'invalidité qu'une partie peut établir, pour l'avenir, l'invalidité générale d'une disposition législative.

La Cour d'appel a eu tort de conclure que le tribunal d'appel n'avait pas compétence pour examiner la constitutionnalité du Règlement et des dispositions contestées de la Loi. Les tribunaux administratifs ayant compétence, expresse ou implicite, pour trancher les questions de droit découlant de l'application d'une disposition législative sont présumés avoir le pouvoir concomitant de statuer sur la constitutionnalité de cette disposition. Pour appliquer cette approche, il n'est pas nécessaire d'établir une distinction entre les questions de droit « générales » et les questions de droit « limitées ». La

Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by pointing to an explicit withdrawal of authority to consider the *Charter*; or by convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations. To the extent that *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, is inconsistent with this approach, it should no longer be relied upon.

The Appeals Tribunal could properly consider and decide the *Charter* issue raised in this case. The legislature expressly conferred on the Appeals Tribunal the authority to decide questions of law by providing, in s. 252(1) of the Act, that it "may confirm, vary or reverse the decision of a hearing officer" exercising the authority conferred upon the Board by s. 185(1) of the Act to "determine all questions of fact and law arising pursuant to this Part". Other provisions of the Act also confirm the legislature's intention that the Appeals Tribunal decide questions of law, including s. 256(1), which provides for a further appeal to the Court of Appeal "on any question of law". This suggests that the Appeals Tribunal may deal initially with such questions. The Appeals Tribunal thus has explicit jurisdiction to decide questions of law arising under the challenged provisions, a jurisdiction which is presumed to include the authority to consider their constitutional validity. This presumption is not rebutted in this case, as there is no clear implication arising from the Act that the legislature intended to exclude the *Charter* from the scope of the Appeals Tribunal's authority. Even if there had been no express provision endowing the Appeals Tribunal with authority to consider and decide questions of law arising under the Act, an examination of

compétence expresse est celle exprimée dans le libellé de la disposition habilitante. La compétence implicite ressort de l'examen de la loi dans son ensemble. Les facteurs pertinents sont notamment les suivants : la mission que la loi confie au tribunal administratif en cause et la question de savoir s'il est nécessaire de trancher des questions de droit pour accomplir efficacement cette mission; l'interaction entre ce tribunal et les autres composantes du régime administratif; la question de savoir si le tribunal est une instance juridictionnelle; des considérations pratiques telle la capacité du tribunal d'examiner des questions de droit. Les considérations pratiques ne sauraient toutefois l'emporter sur ce qui ressort clairement de la loi elle-même. La partie qui prétend que le tribunal n'a pas compétence pour appliquer la *Charte* peut réfuter la présomption en signalant que le pouvoir d'examiner la *Charte* a été retiré expressément, ou en convainquant la cour qu'un examen du régime établi par la loi mène clairement à la conclusion que le législateur a voulu exclure la *Charte* (ou une catégorie de questions incluant celles relatives à la *Charte*, telles les questions de droit constitutionnel en général) des questions de droit soumises à l'examen du tribunal administratif en question. En général, une telle inférence doit émaner de la loi elle-même et non de considérations externes. Dans la mesure où il est incompatible avec ce point de vue, il n'y a plus lieu de se fonder sur l'arrêt *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854.

Le tribunal d'appel était donc compétent pour examiner et trancher la question relative à la *Charte* soulevée en l'espèce. La législature a expressément investi le tribunal d'appel du pouvoir de trancher des questions de droit, en prévoyant, au par. 252(1) de la Loi, qu'il « peut confirmer, modifier ou infirmer la décision d'un agent enquêteur » rendue dans l'exercice du pouvoir — conféré à la commission par le par. 185(1) de la Loi — de « trancher [. . .] toute question de droit ou de fait découlant de l'application de la présente partie ». D'autres dispositions de la Loi confirment également l'intention du législateur d'investir le tribunal d'appel du pouvoir de trancher des questions de droit, notamment le par. 256(1), qui permet également d'interjeter appel « sur une question de droit » devant la Cour d'appel. Cela laisse entendre que le tribunal d'appel peut, au départ, examiner de telles questions. Le tribunal d'appel est donc expressément investi du pouvoir de trancher les questions de droit découlant de l'application des dispositions contestées, lequel pouvoir est présumé comprendre celui d'examiner la constitutionnalité de ces dispositions. Cette présomption n'est pas réfutée en l'espèce vu qu'il ne ressort pas clairement de la Loi que le législateur a voulu soustraire l'application de la *Charte* à la compétence du tribunal d'appel. Même s'il n'y avait eu aucune disposition autorisant expressément

the statutory scheme set out by the Act would lead to the conclusion that it has implied authority to do so.

The Court of Appeal also erred in concluding that the challenged provisions of the Act and the Regulations did not infringe s. 15(1) of the *Charter*. The appropriate comparator group for the s. 15(1) analysis in this case is the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries. By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. The view that since both the claimants and the comparator group suffer from physical disabilities, differential treatment of chronic pain within the workers' compensation scheme is not based on physical disability must be rejected. Differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated. Distinguishing injured workers with chronic pain from those without is still a disability-based distinction. Although, under the current guidelines, L would be found to have a 0 percent impairment rating and would thus be denied benefits anyway, deprivation of access to an institution available to others, even though the individual bringing the claim would not necessarily derive immediate benefits from such access, constitutes differential treatment. In the context of the Act, and given the nature of chronic pain, the differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession. A reasonable person in circumstances similar to those of L and M, fully apprised of all the relevant circumstances and taking into account the relevant contextual factors, would

le tribunal d'appel à examiner et à trancher les questions de droit découlant de l'application de la Loi, l'examen du régime établi par la Loi mènerait à la conclusion que le tribunal d'appel a implicitement le pouvoir de le faire.

La Cour d'appel a également eu tort de conclure que le Règlement et les dispositions contestées de la Loi ne violaient pas le par. 15(1) de la *Charte*. Pour les besoins de l'analyse fondée sur le par. 15(1), le groupe de comparaison approprié en l'espèce est celui constitué des travailleurs assujettis à la Loi qui ne souffrent pas de douleur chronique et qui sont admissibles à une indemnité pour une lésion professionnelle. Du fait qu'ils excluent totalement la douleur chronique du champ d'application des dispositions générales de la Loi relatives à l'indemnisation et qu'ils limitent à un programme de rétablissement fonctionnel de quatre semaines les avantages auxquels ont droit les travailleurs ayant subi une lésion après le 1er février 1996, il est évident que la Loi et le Règlement réservent aux accidentés du travail souffrant de douleur chronique un traitement différent fondé sur la nature de leur déficience physique qui est un motif énuméré au par. 15(1) de la *Charte*. Il y a lieu de rejeter le point de vue voulant que le traitement différent que le régime d'indemnisation des accidentés du travail réserve aux personnes souffrant de douleur chronique ne soit pas fondé sur la déficience physique, étant donné que les demandeurs et les membres du groupe de comparaison sont tous atteints d'une déficience physique. Une différence de traitement peut reposer sur un motif énuméré même lorsque les membres du groupe pertinent ne sont pas tous également maltraités. La distinction entre les accidentés du travail qui souffrent de douleur chronique et ceux qui ne souffrent pas de ce type de douleur demeure une distinction fondée sur une déficience. Indépendamment du fait que, suivant les lignes directrices actuelles, on jugerait que le taux d'incapacité de L serait de 0 pour 100 et que tout avantage lui serait de toute façon refusé, refuser à l'auteur d'une demande l'accès à une institution accessible à autrui, même dans le cas où il ne tirerait pas nécessairement immédiatement profit de cet accès, constitue une différence de traitement. Dans le contexte de la Loi et compte tenu de la nature de la douleur chronique, cette différence de traitement est discriminatoire. Elle l'est parce qu'elle ne répond pas à la situation et aux besoins véritables des accidentés du travail souffrant de douleur chronique, qui sont privés de toute évaluation individuelle de leurs besoins et de leur situation. Ces personnes ont plutôt droit à des avantages uniformes et limités qui sont fondés sur leurs caractéristiques présumées en tant que groupe. Le régime ne tient pas compte non plus des besoins des travailleurs qui, malgré les traitements, demeurent atteints d'une incapacité permanente due à la douleur chronique. Rien n'indique que le régime vise à améliorer la situation d'un groupe plus

conclude that the challenged provisions have the effect of demeaning the dignity of chronic pain sufferers.

The infringement of L's and M's equality rights cannot be justified under s. 1 of the *Charter*. The first objective of maintaining the financial viability of the Accident Fund is not pressing and substantial. Budgetary considerations in and of themselves cannot justify violating a *Charter* right, although they may be relevant in determining the appropriate degree of deference to governmental choices based on a non-financial objective. Likewise, the second objective of developing a consistent legislative response to chronic pain claims cannot stand on its own. Mere administrative expediency or conceptual elegance cannot be sufficiently pressing and substantial to override a *Charter* right. This objective only becomes meaningful when examined with the third objective of avoiding fraudulent claims based on chronic pain. Developing a consistent legislative response to the special issues raised by chronic pain claims — such as determining whether the pain is actually caused by the work-related accident and assessing the relevant degree of impairment — in order to avoid fraudulent claims is a pressing and substantial objective. The challenged provisions of the Act and the Regulations are rationally connected to this objective. It is obvious, however, that the blanket exclusion of chronic pain from the workers' compensation system does not minimally impair the rights of chronic pain sufferers. The challenged provisions make no attempt whatsoever to determine who is genuinely suffering and needs compensation, and who may be abusing the system. They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program. The fourth objective is to implement early medical intervention and return to work as the optimal treatment for chronic pain. Assuming that this objective is pressing and substantial and that the challenged provisions are rationally connected to it, they do not minimally impair the rights of chronic pain sufferers. No evidence indicates that an automatic cut-off of benefits regardless of individual needs is necessary to achieve that goal. This is particularly true with respect to ameliorative benefits which would actually facilitate return to work, such as vocational rehabilitation, medical aid and the rights

défavorisé, ni que les intérêts en cause sont purement économiques ou, par ailleurs, négligeables. Au contraire, nier que les travailleurs concernés souffrent réellement de douleur contribue à renforcer les nombreuses hypothèses négatives des employeurs, des agents d'indemnisation et de certains médecins. Une personne raisonnable placée dans une situation semblable à celle de L et de M et bien informée de toutes les circonstances pertinentes conclurait, à la lumière des facteurs contextuels pertinents, que les dispositions contestées portent atteinte à la dignité des personnes souffrant de douleur chronique.

La violation des droits à l'égalité de L et de M n'est pas justifiable au regard de l'article premier de la *Charte*. Le premier objectif, qui est d'assurer la viabilité du fonds d'indemnisation, n'est pas urgent et réel. Des considérations budgétaires ne sauraient à elles seules justifier la violation d'un droit garanti par la *Charte*, même si elles peuvent être utiles pour déterminer la mesure de déférence que commandent les choix du gouvernement fondés sur un objectif non financier. De même, le deuxième objectif — apporter une solution législative cohérente aux difficultés administratives que posent les demandes fondées sur la douleur chronique — ne saurait tenir à lui seul. La simple commodité administrative ou élégance conceptuelle ne peut être suffisamment urgente et réelle pour justifier la suppression d'un droit garanti par la *Charte*. Le deuxième objectif n'a de sens que s'il est examiné de pair avec le troisième objectif, qui est d'éviter les demandes frauduleuses fondées sur la douleur chronique. Donner une réponse législative cohérente aux difficultés particulières que posent les demandes fondées sur la douleur chronique — notamment lorsqu'il s'agit de déterminer si la douleur est vraiment due à un accident du travail et d'évaluer l'incapacité qui en résulte —, afin d'éviter les demandes frauduleuses, est un objectif urgent et réel. Il existe un lien rationnel entre cet objectif, d'une part, et le Règlement et les dispositions contestées de la Loi, d'autre part. Toutefois, il est évident que l'exclusion générale de la douleur chronique du champ d'application du régime d'indemnisation des accidentés du travail ne porte pas le moins possible atteinte aux droits des personnes souffrant de ce type de douleur. Dans les dispositions contestées, le législateur ne tente nullement de déterminer qui souffre vraiment et a besoin d'être indemnisé et qui abuse vraisemblablement du système. Ces dispositions ne tiennent pas compte des besoins bien réels des nombreux travailleurs qui sont effectivement atteints d'une incapacité due à la douleur chronique et pour qui le programme de rétablissement fonctionnel de quatre semaines n'est pas suffisant. La Loi a pour quatrième objectif d'assurer une intervention médicale prompte et un retour rapide au travail, en tant que meilleure façon de traiter la douleur chronique. À supposer que cet objectif soit urgent et réel

to re-employment and accommodation. Moreover, the legislation deprives workers whose chronic pain does not improve as a result of early medical intervention and who return to work from receiving any benefits beyond the four-week Functional Restoration Program. Others, like L, are not even admissible to this program because of the date of their injuries. The deleterious effects of the challenged provisions on these workers clearly outweigh their potential beneficial effects.

et qu'il ait un lien rationnel avec les dispositions contestées, ces dernières ne portent pas le moins possible atteinte aux droits des personnes souffrant de douleur chronique. Aucune preuve n'indique que la réalisation de cet objectif commande le retrait automatique des avantages sans égard aux besoins de la personne touchée. Cela est particulièrement vrai en ce qui concerne les avantages améliorateurs qui faciliteraient réellement le retour au travail, comme la réadaptation professionnelle, les soins médicaux, ainsi que le droit au réemploi et à des mesures d'adaptation. De plus, aux termes de la mesure législative en cause, les travailleurs souffrant de douleur chronique, dont l'état ne s'améliore pas à la suite d'une intervention médicale prompte et d'un retour rapide au travail, cessent d'avoir droit à des avantages après avoir participé au programme de rétablissement fonctionnel de quatre semaines. D'autres personnes, comme L, ne sont même pas admissibles à ce programme à cause de la date à laquelle elles ont subi leurs lésions. Les effets préjudiciables des dispositions contestées sur ces travailleurs l'emportent clairement sur leurs effets bénéfiques éventuels.

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Kenneth H. LeBlanc, *Anne S. Clark*, *Anne Derrick*, *Q.C.*, and *Patricia J. Wilson*, for the appellants.

Brian A. Crane, *Q.C.*, *David P. S. Farrar* and *Janet Curry*, for the respondent the Workers' Compensation Board of Nova Scotia.

Catherine J. Lunn, for the respondent the Attorney General of Nova Scotia.

John P. Merrick, *Q.C.*, and *Louanne Labelle*, for the intervener the Nova Scotia Workers' Compensation Appeals Tribunal.

Ena Chadha and *William Holder*, for the intervener the Ontario Network of Injured Workers Groups.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Robert Earl Charney, for the intervener the Attorney General of Ontario.

Kathryn L. Kickbush, for the intervener the Attorney General of British Columbia.

Written submissions only by *Curtis Craig*, for the intervener the Workers' Compensation Board of Alberta.

The judgment of the Court was delivered by

GONTHIER J. —

I. Introduction

Chronic pain syndrome and related medical conditions have emerged in recent years as one of the

Roman, Andrew J. « Case Comment : *Cooper v. Canada (Human Rights Commission)* » (1997), 43 Admin. L.R. (2d) 243.

POURVOIS contre des arrêts de la Cour d'appel de la Nouvelle-Écosse (2000), 192 D.L.R. (4th) 611, 188 N.S.R. (2d) 330, 587 A.P.R. 330, 26 Admin L.R. (3d) 90, 84 C.R.R. (2d) 246, [2000] N.S.J. No. 353 (QL), 2000 NSCA 126, qui a accueilli les appels principaux et rejeté les appels incidents interjetés contre les décisions du Workers' Compensation Appeals Tribunal. Pourvois accueillis.

Kenneth H. LeBlanc, *Anne S. Clark*, *Anne Derrick*, *c.r.*, et *Patricia J. Wilson*, pour les appelants.

Brian A. Crane, *c.r.*, *David P. S. Farrar* et *Janet Curry*, pour l'intimée Workers' Compensation Board de la Nouvelle-Écosse.

Catherine J. Lunn, pour l'intimé le procureur général de la Nouvelle-Écosse.

John P. Merrick, *c.r.*, et *Louanne Labelle*, pour l'intervenant Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse.

Ena Chadha et *William Holder*, pour l'intervenant Ontario Network of Injured Workers Groups.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Robert Earl Charney, pour l'intervenant le procureur général de l'Ontario.

Kathryn L. Kickbush, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *Curtis Craig*, pour l'intervenante Workers' Compensation Board de l'Alberta.

Version française du jugement de la Cour rendu par

LE JUGE GONTHIER —

I. Introduction

Depuis quelques années, tant au Canada qu'à l'étranger, les régimes d'indemnisation des 1

whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts: see *Douglas College*, *supra*, at pp. 603-4. In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" (*Douglas College*, *supra*, at p. 597). This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings. As McLachlin J. (as she then was) stated in her dissent in *Cooper*, *supra*, at para. 70:

The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

Similar views had been expressed by the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

Second, *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often

a pas de question de droit plus fondamentale puisqu'elle permet de déterminer si, dans les faits, la disposition est valide et, par conséquent, si elle doit être interprétée et appliquée, ou s'il y a lieu de ne pas en tenir compte.

29 Il découle, en pratique, de ce principe de la suprématie de la Constitution que les Canadiens doivent pouvoir faire valoir les droits et libertés que leur garantit la Constitution devant le tribunal le plus accessible, sans devoir engager des procédures judiciaires parallèles : voir *Douglas College*, précité, p. 603-604. Pour reprendre les propos du juge La Forest, « il ne peut y avoir une Constitution pour les arbitres et une autre pour les tribunaux » (*Douglas College*, précité, p. 597). Ce souci d'accessibilité est d'autant plus pressant qu'au départ bon nombre de tribunaux administratifs ont compétence exclusive pour trancher les différends relatifs à leur loi habilitante, de sorte qu'obliger les parties à ces différends à saisir une cour de justice de toute question liée à la *Charte* leur imposerait un long et coûteux détour. Comme la juge McLachlin (maintenant Juge en chef) l'a affirmé dans ses motifs dissidents dans l'arrêt *Cooper*, précité, par. 70 :

La *Charte* n'est pas un texte sacré que seuls les initiés des cours supérieures peuvent aborder. C'est un document qui appartient aux citoyens, et les lois ayant des effets sur les citoyens ainsi que les législateurs qui les adoptent doivent s'y conformer. Les tribunaux administratifs et les commissions qui ont pour tâche de trancher des questions juridiques ne sont pas soustraits à cette règle. Ces organismes déterminent les droits de beaucoup plus de justiciables que les cours de justice. Pour que les citoyens ordinaires voient un sens à la *Charte*, il faut donc que les tribunaux administratifs en tiennent compte dans leurs décisions.

Dans l'arrêt *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, les juges majoritaires ont exprimé des points de vue semblables.

30 Deuxièmement, un différend relatif à la *Charte* ne survient pas en l'absence de tout contexte. Son règlement exige une connaissance approfondie des objectifs du régime législatif contesté, ainsi que des contraintes pratiques liées à son application et des conséquences de la réparation constitutionnelle

Attorney General of British Columbia and Ministry of Forests *Appellants*

v.

Thomas Paul *Respondent*

and

Forest Appeals Commission, Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta and First Nations Summit *Interveners*

INDEXED AS: PAUL *v.* BRITISH COLUMBIA (FOREST APPEALS COMMISSION)

Neutral citation: 2003 SCC 55.

File No.: 28974.

Hearing and judgment: June 11, 2003.

Reasons delivered: October 3, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Division of powers — Indians — Forestry — Whether province can constitutionally confer on administrative tribunal power to determine questions of aboriginal rights and title as they arise in course of tribunal's duties — Constitution Act, 1867, s. 91(24) — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, s. 96 — Constitution Act, 1982, s. 35.

Administrative law — Forest Appeals Commission — Jurisdiction — Aboriginal rights — Whether Forest Practices Code confers on Commission power to decide existence of aboriginal rights or title — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, s. 96.

Procureur général de la Colombie-Britannique et ministère des Forêts *Appelants*

c.

Thomas Paul *Intimé*

et

Forest Appeals Commission, procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général du Manitoba, procureur général de la Saskatchewan, procureur général de l'Alberta et First Nations Summit *Intervenants*

RÉPERTORIÉ : PAUL *c.* COLOMBIE-BRITANNIQUE (FOREST APPEALS COMMISSION)

Référence neutre : 2003 CSC 55.

N° du greffe : 28974.

Audition et jugement : 11 juin 2003.

Motifs déposés : 3 octobre 2003.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Partage des compétences — Indiens — Ressources forestières — Une province peut-elle investir un tribunal administratif du pouvoir de trancher des questions de titre aborigène et de droits ancestraux dans l'accomplissement de sa mission? — Loi constitutionnelle de 1867, art. 91(24) — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, ch. 159, art. 96 — Loi constitutionnelle de 1982, art. 35.

Droit administratif — Forest Appeals Commission — Compétence — Droits ancestraux — Le Forest Practices Code habilite-t-il la commission à se prononcer sur l'existence d'un titre aborigène ou de droits ancestraux? — Forest Practices Code of British Columbia Act, R.S.B.C. 1996, ch. 159, art. 96.

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

The B.C. Ministry of Forestry seized four logs in the possession of P, a registered Indian, who planned to use the wood to build a deck on his home. P asserted that he had an aboriginal right to cut timber for house modification and, accordingly, s. 96 of the *Forest Practices Code*, a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that P had contravened s. 96. P appealed to the Forest Appeals Commission, which decided, as a preliminary matter of jurisdiction, that it was able to hear and determine the aboriginal rights issues in the appeal. The B.C. Supreme Court concluded that the Legislature of B.C. had validly conferred on the Commission the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code. A majority of the Court of Appeal set aside the decision, holding that s. 91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive power to legislate in relation to Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context.

Held: The appeal should be allowed.

The province has legislative competence to endow an administrative tribunal with capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. The parties conceded that the Code is, in its entirety, valid provincial legislation in relation to development, conservation and management of forestry resources in the province, and there was no suggestion that, in operation, the law's effects on Indians are so significant as to reveal a pith and substance that is a matter under exclusive federal competence. As a law of general application, the Code applies *ex proprio vigore* to Indians, to the extent that it does not touch on the "core of Indianness" and is not unjustifiably inconsistent with s. 35 of the *Constitution Act, 1982*. Under the doctrine of incidental effects, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. While, through operation of the doctrine

Droit administratif — Organismes et tribunaux administratifs — Compétence — Questions de droit constitutionnel — Pouvoirs des tribunaux administratifs de trancher des questions de droit constitutionnel — Critère applicable.

Le ministère des Forêts de la Colombie-Britannique a saisi quatre troncs d'arbre que P, un Indien inscrit, avait en sa possession et qu'il comptait utiliser pour construire une terrasse chez lui. P a fait valoir qu'il avait le droit ancestral de couper des arbres pour apporter des améliorations à sa maison et que, par conséquent, l'art. 96 du *Forest Practices Code*, qui établit une interdiction générale de la coupe d'arbres situés sur les terres de la Couronne, ne s'appliquait pas à lui. Le chef de district et le comité de révision administrative ont tous les deux convenu que P avait enfreint l'art. 96. P a interjeté appel devant la Forest Appeals Commission qui a décidé, au sujet d'une question préliminaire de compétence, qu'elle pouvait entendre et trancher les questions relatives aux droits ancestraux soulevées dans l'appel. La Cour suprême de la Colombie-Britannique a conclu que la législature de la Colombie-Britannique avait validement conféré à la commission le pouvoir de trancher des questions touchant le titre aborigène et les droits ancestraux dans l'exercice de sa fonction juridictionnelle portant sur des infractions au Code. La Cour d'appel à la majorité a annulé cette décision en concluant que le par. 91(24) de la *Loi constitutionnelle de 1867*, qui confère au Parlement le pouvoir exclusif de légiférer relativement aux Indiens, empêchait la législature d'accorder à la commission la compétence pour trancher des questions de titre aborigène et de droits ancestraux dans le domaine des ressources forestières.

Arrêt : Le pourvoi est accueilli.

La province a compétence législative pour habiliter un tribunal administratif à examiner une question de droits ancestraux dans l'accomplissement de la mission valide qu'elle lui a confiée. Les parties ont reconnu que le Code dans son ensemble est une mesure législative provinciale valide relative à l'exploitation, à la conservation et à la gestion des ressources forestières de la province, et personne n'a laissé entendre que, dans son application, la loi en cause a sur les Indiens des effets importants au point d'en faire une mesure législative qui, de par son caractère véritable, touche à un chef de compétence fédérale exclusive. En tant que loi d'application générale, le Code s'applique *ex proprio vigore* aux Indiens dans la mesure où il ne touche pas à « l'essentiel de l'indianité » et n'est pas incompatible de manière injustifiable avec l'art. 35 de la *Loi constitutionnelle de 1982*. Selon la règle des effets accessoires, la Constitution permet qu'une loi

of interjurisdictional immunity, the "core" of Indianness is protected from provincial laws of general application, the Commission's enabling provisions do not attempt to supplement or amend the constitutional and federal rules respecting aboriginal rights. The effect of the Code is to prescribe that Indians charged under the Code will first raise an aboriginal rights defence before the Commission, as opposed to before a superior court judge. This effect has not been shown to have a substantial impact upon Indians *qua* Indians. The doctrine of interjurisdictional immunity relates to the exercise of legislative powers — that is, the power of a province to apply its valid legislation that affects matters under federal competence. The majority of the Court of Appeal erred in applying the doctrine in the context of an adjudicative, not legislative, function. The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which is also a creature of provincial legislation. Boards must take into account all applicable legal rules, both federal and provincial, in applying their enabling legislation.

A determination by an administrative tribunal, such as the Commission, is very different from both extinguishment of a right and legislation in relation to Indians or aboriginal rights. First, and most important, any adjudicator, whether a judge or a tribunal, does not create, amend, or extinguish aboriginal rights. Second, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law. They could not be declaratory of the validity of any law. Moreover, as for constitutional determinations respecting s. 91(24) or s. 35, the Commission's rulings would be reviewable, on a correctness basis, in a superior court on judicial review.

provinciale de portée générale, valablement édictée, touche des questions relevant de la compétence exclusive du Parlement. Bien qu'en vertu du principe de l'exclusivité des compétences, « l'essentiel » de l'indianité soit à l'abri des lois provinciales d'application générale, les dispositions habilitantes de la commission ne visent pas à compléter ou à modifier les règles constitutionnelles et fédérales relatives aux droits ancestraux. Le Code a pour effet d'obliger les Indiens accusés d'une infraction au Code à invoquer le moyen de défense fondé sur les droits ancestraux d'abord devant la commission plutôt que devant un juge d'une cour supérieure. Il n'a pas été démontré que cet effet a eu une incidence marquée sur les Indiens en tant qu'Indiens. Le principe de l'exclusivité des compétences concerne l'exercice des compétences législatives, c'est-à-dire le pouvoir d'une province d'appliquer ses mesures législatives valides touchant à des matières relevant de la compétence fédérale. Les juges majoritaires de la Cour d'appel ont commis une erreur en appliquant le principe de l'exclusivité des compétences dans le contexte d'une fonction juridictionnelle et non législative. La conclusion qu'un organisme administratif provincial peut trancher sur des questions relevant de la compétence législative fédérale cadre bien avec l'architecture constitutionnelle et judiciaire générale de notre pays. En tranchant, de manière accessoire, une question de droits ancestraux, un organisme administratif créé par une province se trouverait à appliquer des règles de droit constitutionnelles ou fédérales de la même manière qu'une cour provinciale qui est aussi une création de la loi provinciale. En appliquant leur loi habilitante, les organismes administratifs doivent tenir compte de toutes les règles de droit fédérales et provinciales applicables.

La décision d'un tribunal administratif comme la commission est très différente à la fois de l'extinction d'un droit et de l'exercice d'une fonction législative concernant les Indiens et les droits ancestraux. Premièrement, ce qui est le plus important, toute instance décisionnelle, que ce soit un juge ou un tribunal administratif, ne crée pas, ne modifie pas ou n'éteint pas des droits ancestraux. Deuxièmement, les décisions de la commission ne constituent pas de la jurisprudence, pas plus que leur importance collective contribue avec le temps à en faire un ensemble de règles de common law. Elles ne sauraient constituer une déclaration de validité de quelque règle de droit que ce soit. De plus, en tant que décisions sur des questions de droit constitutionnel relatives au par. 91(24) ou à l'art. 35, les décisions de la commission seraient sujettes au contrôle judiciaire d'une cour supérieure, selon le critère de la décision correcte.

To determine if a tribunal has the power to apply the Constitution, including s. 35 of the *Constitution Act, 1982*, the essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide the question at issue in light of s. 35 or any other relevant constitutional provision. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, and practical considerations will not suffice generally to rebut the presumption that arises from authority to decide questions of law. Here, the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters and to hear P's defence of his aboriginal right to harvest logs for renovation of his home. Section 131(8) of the Code permits a party to "make submissions as to facts, law and jurisdiction". The Commission thus has the power to determine questions of law and nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law. The nature of the appeal does not prohibit the Commission from hearing a s. 35 argument. Even if the Administrative Review Panel has no jurisdiction to determine a s. 35 question, the Commission is not restricted to the issues considered by that board. Lastly, any restriction on the Commission's remedial powers is not determinative of its jurisdiction to decide s. 35 issues, nor is the complexity of the questions.

Pour décider si un tribunal administratif peut appliquer la Constitution, y compris l'art. 35 de la *Loi constitutionnelle de 1982*, il s'agit essentiellement de savoir si la loi habilitante accorde implicitement ou expressément au tribunal administratif le pouvoir d'examiner ou de trancher toute question de droit. Dans l'affirmative, ce tribunal est présumé posséder le pouvoir concomitant d'examiner ou de trancher cette question à la lumière de l'art. 35 ou de toute disposition constitutionnelle pertinente. Il n'y a aucune raison sérieuse de distinguer le pouvoir de trancher des questions relatives à l'art. 35 de celui de se prononcer sur d'autres questions de droit constitutionnel, et en général, les considérations pratiques ne suffisent pas pour réfuter la présomption découlant du pouvoir de trancher des questions de droit. En l'espèce, la commission a le pouvoir de trancher des questions relatives aux droits ancestraux qui sont accessoires à celles qui se posent en matière de ressources forestières et d'entendre le moyen de défense de P voulant qu'il possède un droit ancestral de récolter des arbres pour rénover sa maison. Le paragraphe 131(8) du Code permet à une partie de « présenter des observations concernant les faits, le droit et la compétence ». La commission a donc le pouvoir de trancher des questions de droit et rien dans le Code ne permet clairement de réfuter la présomption que la commission peut trancher des questions de droit autochtone. Il n'est pas interdit à la commission d'entendre un argument fondé sur l'art. 35 en raison de la nature de l'appel interjeté. Bien que le comité de révision administrative n'ait pas compétence pour trancher une question relative à l'art. 35, la commission n'est pas obligée de s'en tenir uniquement aux questions examinées par ce comité. Enfin, une limitation des pouvoirs de la commission d'accorder une réparation n'est pas déterminante en ce qui concerne sa compétence pour trancher des questions relatives à l'art. 35, pas plus que ne l'est la complexité des questions.

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1 S.C.R. 206; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65; *Buhs v. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *R. v. Francis*, [1988] 1 S.C.R. 1025; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Ermineskin Cree Nation v. Canada* (2001), 297 A.R. 226, 2001 ABQB 760; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81; *R. v. Hynes*, [2001] 3 S.C.R. 623, 2001 SCC 82; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266; *McKenzie v. Mason* (1992), 72 B.C.L.R. (2d) 53, leave to appeal refused, [1993] 1 S.C.R. vii; *British Columbia Chicken Marketing Board v. British Columbia Marketing Board* (2002), 216 D.L.R. (4th) 587, 2002 BCCA 473.

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Timothy P. Leadem, *Q.C.*, and *Kathryn Kickbush*, for the appellants.

M. Hugh G. Braker, *Q.C.*, and *Robert C. Freedman*, for the respondent.

T. Murray Rankin, *Q.C.*, and *Mark G. Underhill*, for the intervener the Forest Appeals Commission.

Mitchell R. Taylor and *Peter Southey*, for the intervener the Attorney General of Canada.

Michel Y. Hélie, for the intervener the Attorney General of Ontario.

Written submissions only by *Pierre-Christian Labeau*, for the intervener the Attorney General of Quebec.

Written submissions only by *Gabriel Bourgeois*, *Q.C.*, for the intervener the Attorney General of New Brunswick.

Holly D. Penner, for the intervener the Attorney General of Manitoba.

Written submissions only by *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

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Timothy P. Leadem, *c.r.*, et *Kathryn Kickbush*, pour les appelants.

M. Hugh G. Braker, *c.r.*, et *Robert C. Freedman*, pour l'intimé.

T. Murray Rankin, *c.r.*, et *Mark G. Underhill*, pour l'intervenante Forest Appeals Commission.

Mitchell R. Taylor et *Peter Southey*, pour l'intervenant le procureur général du Canada.

Michel Y. Hélie, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *Pierre-Christian Labeau*, pour l'intervenant le procureur général du Québec.

Argumentation écrite seulement par *Gabriel Bourgeois*, *c.r.*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Holly D. Penner, pour l'intervenant le procureur général du Manitoba.

Argumentation écrite seulement par *P. Mitch McAdam*, pour l'intervenant le procureur général de la Saskatchewan.

Written submissions only by *Kurt J. W. Sandstrom*, for the intervener the Attorney General of Alberta.

Arthur C. Pape and *Jean Teillet*, for the intervener the First Nations Summit.

The judgment of the Court was delivered by

Bastarache J. —

I. Overview

These are the reasons following the decision of the Court on June 11, 2003 to allow the appeal. In August 1995, an official in the British Columbia Ministry of Forestry seized four logs in the possession of Thomas Paul, a registered Indian. Mr. Paul had cut three trees and found the fourth, and planned to use the wood to build a deck on his home. Mr. Paul asserted that he had an aboriginal right to cut timber for house modification, and accordingly that s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 ("Code"), a general prohibition against cutting Crown timber, did not apply to him. Both the District Manager and the Administrative Review Panel agreed that Mr. Paul had contravened s. 96. Mr. Paul then appealed to the Forest Appeals Commission ("Commission"). No one disputes these facts.

The issue in dispute is whether the Commission has jurisdiction to hear Mr. Paul's defence that he cut the trees and possessed the logs in the exercise of his aboriginal rights. To this point, Mr. Paul has asserted his right but never attempted to prove it. The issue is not whether provincial legislation can override an aboriginal right recognized and affirmed by s. 35 of the *Constitution Act, 1982*. As the submissions by the parties and the interveners show, the question is of great significance both to aboriginal persons and to provincial governments, which enable administrative tribunals to address a

Argumentation écrite seulement par *Kurt J. W. Sandstrom*, pour l'intervenant le procureur général de l'Alberta.

Arthur C. Pape and *Jean Teillet*, pour l'intervenant First Nations Summit.

Version française du jugement de la Cour rendu par

Le juge Bastarache —

I. Aperçu

Voici les motifs qui suivent la décision d'accueillir le pourvoi que la Cour a rendue le 11 juin 2003. En août 1995, un fonctionnaire du ministère des Forêts de la Colombie-Britannique a saisi quatre troncs d'arbre que Thomas Paul, un Indien inscrit, avait en sa possession. Monsieur Paul avait coupé trois arbres et en avait trouvé un quatrième, et il comptait les utiliser pour construire une terrasse chez lui. Monsieur Paul a fait valoir qu'il avait le droit ancestral de couper des arbres pour apporter des améliorations à sa maison et que, par conséquent, l'art. 96 de la *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, ch. 159 (« Code »), qui établit une interdiction générale de la coupe d'arbres situés sur les terres de la Couronne, ne s'appliquait pas à lui. Le chef de district et le comité de révision administrative ont tous les deux convenu que M. Paul avait enfreint l'art. 96. Ce dernier a alors interjeté appel devant la Forest Appeals Commission (« commission »). Personne ne conteste ces faits.

La question est de savoir si la commission est compétente pour entendre le moyen de défense de M. Paul selon lequel il a coupé les arbres et avait les troncs d'arbre en sa possession dans l'exercice de ses droits ancestraux. Jusqu'à maintenant, M. Paul a invoqué son droit sans toutefois jamais tenter d'en faire la preuve. Il ne s'agit pas ici de savoir si une mesure législative provinciale peut supprimer un droit ancestral reconnu et confirmé par l'art. 35 de la *Loi constitutionnelle de 1982*. Comme en témoignent l'argumentation des parties et des intervenants, la question revêt une grande

implies, *a contrario*, that a provincially constituted administrative tribunal cannot do so. First, while I need not decide this point, it is arguable that La Forest J.'s reference to "courts of inferior jurisdiction" naturally includes an adjudicative tribunal such as the Commission. Such a conclusion follows perhaps even more readily from the French version, "*tribunaux d'instance inférieure*" (*Pembina*, *supra*, at p. 225). Second, even if the statement in *Pembina* does not embrace the Commission, La Forest J. was speaking of the jurisdiction of a small claims court, and I do not think he can be taken to have been pronouncing, by implication, on broader questions. Third, the constitutional protection of judicial review of administrative tribunals, derived from s. 96 of the *Constitution Act, 1867*, integrates administrative tribunals into the unitary system of justice: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. By performing judicial review of the decisions of administrative tribunals, superior courts play an important role in assuring respect for the rule of law (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21). While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice.

23 The conclusion sought by the respondent would pose intractable difficulties for administrative tribunals in the execution of their tasks. A provincially constituted board cannot respect the division of powers under the *Constitution Act, 1867* if it is unable to take into account the boundary between provincial and federal powers. For example, in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65, the Law Society could only stay within the limits of its jurisdiction to review a

fédéral, signifie par contre qu'un tribunal administratif provincial ne peut pas le faire. Premièrement, bien que je n'aie pas à me prononcer sur ce point, il se peut que les propos du juge La Forest, et plus particulièrement l'expression « tribunaux d'instance inférieure » qu'il utilise dans ses motifs (*Pembina*, précité, p. 225), visent forcément un tribunal administratif, comme la commission, qui exerce une fonction juridictionnelle. Deuxièmement, même si l'affirmation contenue dans l'arrêt *Pembina* ne vise pas la commission, le juge La Forest parlait de la compétence d'une cour des petites créances, et je ne crois pas qu'il faille considérer qu'il s'est prononcé implicitement sur des questions plus générales. Troisièmement, la protection constitutionnelle du contrôle judiciaire des tribunaux administratifs, qui émane de l'art. 96 de la *Loi constitutionnelle de 1867*, intègre les tribunaux administratifs dans le système judiciaire unitaire : *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220. En contrôlant les décisions de tribunaux administratifs, les cours supérieures contribuent de façon importante à assurer le respect de la primauté du droit (*Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 21). Malgré leurs différences, les tribunaux administratifs et les cours de justice font tous partie du système judiciaire. Il est dont juste de considérer que le système judiciaire englobe les tribunaux de droit commun, les cours fédérales, les cours créées par une loi provinciale et les tribunaux administratifs. Pour décider quelles matières relèvent de leur compétence, il est donc illogique de distinguer les tribunaux administratifs des cours provinciales pour le motif que seules les cours provinciales font partie du système judiciaire unitaire.

La conclusion sollicitée par l'intimé mettrait les tribunaux administratifs aux prises avec des difficultés insurmontables dans l'accomplissement de leur mission. Un organisme administratif provincial ne peut pas respecter le partage des compétences établi par la *Loi constitutionnelle de 1867* s'il est incapable de tenir compte de la ligne de démarcation entre les compétences provinciales et fédérales. Par exemple, dans l'affaire *Krieger c. Law Society of Alberta*, [2002] 3 R.C.S. 372, 2002 CSC

prosecutor's ethical breach if it considered federal law relating to prosecutorial discretion. Indeed, a multitude of administrative tribunals, both provincial and federal, routinely make determinations respecting matters within the competence of the other legislator. Provincial boards may have an express statutory mandate to pronounce upon federal legislation: *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 92.1; *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 48; *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (enabling legislation of provincial boards directing them to interpret and apply federal income tax, pension and employment insurance legislation). Alternatively, the necessity to consider a question of constitutional or federal law may simply arise in the course of a primary determination: *Buhs v. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41, at para. 31 (municipal tax Board of Revision could hear assessment appeal on ground that property subject to aboriginal title). In short, in applying their enabling legislation, boards must take into account all applicable legal rules, both federal and provincial. I therefore decline to accept the respondent's argument and its logical extension that the practices just described are constitutionally impermissible.

Further reasons persuade me to reject the respondent's general position that questions relating to aboriginal rights are untouchable by a provincially created tribunal by virtue of their falling within federal legislative competence. It is necessary to examine side by side two provisions in the Constitution. The one on which the respondent relies heavily is s. 91(24), which empowers Parliament to legislate in relation to "Indians, and Land reserved for the Indians". The other is s. 35 of the *Constitution Act, 1982*. Unless

65, le barreau ne pouvait agir que dans les limites de sa compétence pour examiner un manquement à la déontologie d'un procureur, s'il examinait le droit fédéral concernant le pouvoir discrétionnaire en matière de poursuites. En fait, une multitude de tribunaux administratifs, tant provinciaux que fédéraux, rendent couramment des décisions concernant des matières relevant de la compétence de l'autre législateur. Les organismes administratifs provinciaux peuvent se voir confier explicitement, par la loi, une mission qui les autorise à se prononcer sur des mesures législatives fédérales : *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A, art. 92.1; *Workers' Compensation Act*, S.N.S. 1994-95, ch. 10, art. 48; *Workers Compensation Act*, R.S.B.C. 1996, ch. 492 (lois habilitant des organismes administratifs provinciaux à interpréter et à appliquer les lois fédérales en matière d'impôt, de régime de pensions et d'assurance-emploi). Subsidiairement, la nécessité d'examiner une question de droit constitutionnel ou de droit fédéral peut simplement découler d'une première décision : *Buhs c. Board of Education of Humboldt Rural School Division No. 47* (2002), 217 Sask. R. 222, 2002 SKCA 41, par. 31 (la commission de révision de l'impôt municipal pouvait entendre l'appel qui avait été interjeté contre l'évaluation pour le motif que l'immeuble était assujetti à un titre aborigène). Bref, en appliquant leur loi habilitante, les organismes administratifs doivent tenir compte de toutes les règles de droit fédérales et provinciales applicables. Je ne retiens donc pas l'argument de l'intimé ni sa suite logique voulant que les pratiques que je viens d'exposer soient inacceptables sur le plan constitutionnel.

24 D'autres raisons m'incitent à rejeter le point de vue général de l'intimé voulant qu'un tribunal administratif provincial ne puisse pas toucher aux questions relatives aux droits ancestraux du fait qu'elles relèvent de la compétence législative fédérale. Il est nécessaire de mettre en parallèle deux dispositions de la Constitution. La première, que l'intimé invoque abondamment, est le par. 91(24) de la *Loi constitutionnelle de 1867* qui habilite le Parlement à légiférer concernant « [l]es Indiens et les terres réservées pour les Indiens ». L'autre

para. 23; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. To avoid judicial review, the Commission would have to identify, interpret, and apply correctly the relevant constitutional and federal rules and judicial precedents. As a result of the contrast between the general application of a provincial law by a court and the specific, non-binding effect of a board's particular decision, there is a substantial difference.

(6) The Present Role of the Commission and the Core of Indianness

The preceding point brings me to consider the role of the Commission in this case. Recall that the general prohibition against cutting Crown timber appears in s. 96(1) of the Code, and is not attacked in this appeal. The question, then, is not whether that prohibition unjustifiably infringes an aboriginal right. The question is whether provisions that would enable the Commission to hear a defence of aboriginal right are unconstitutional. I have already noted that the determinations of the Commission respecting aboriginal rights would be reviewable on a correctness standard. Provincial officials cannot initiate any inquiry into aboriginal rights before the Commission. Instead, a question of aboriginal law will arise only when a respondent raises an aboriginal right before the Commission in seeking relief from a general prohibition or other regulatory provision in the Code. I do not see how, by raising a defence of aboriginal right, a respondent should be able to alter the primary jurisdiction of the Commission or halt its proceedings. The nature of a particular defence should be seen as secondary to the Commission's primary jurisdiction. A person accused of violating the Code should not be able to oust the Commission's jurisdiction relating to forestry simply by raising a particular defence and thereby highlighting a constitutional dimension of the main issue. In any event, constitutional law doctrines aside, I think it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within

l'énergie), [1998] 1 R.C.S. 322, par. 40; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 23; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570. Pour éviter un contrôle judiciaire, la commission devrait dégager, interpréter et appliquer correctement les règles de droit constitutionnel et de droit fédéral, ainsi que la jurisprudence applicables. Vu le contraste entre l'application générale d'une règle de droit provinciale par une cour de justice et l'effet particulier non contraignant de la décision d'un organisme administratif, il existe une différence marquée.

(6) Le rôle actuel de la commission et l'essentiel de l'indianité

L'observation qui précède m'amène à examiner le rôle de la commission en l'espèce. Rappelons que l'interdiction générale de la coupe d'arbres situés sur les terres de la Couronne est énoncée au par. 96(1) du Code et n'est pas contestée dans le présent pourvoi. La question n'est donc pas de savoir si cette interdiction porte une atteinte injustifiable à un droit ancestral. Il s'agit plutôt de savoir si des dispositions qui habiliteraient la commission à entendre un moyen de défense fondé sur un droit ancestral seraient inconstitutionnelles. J'ai déjà fait observer que les décisions de la commission touchant les droits ancestraux pourraient faire l'objet d'un contrôle selon la norme de la décision correcte. Les fonctionnaires provinciaux ne peuvent pas déclencher un examen des droits ancestraux devant la commission. Au contraire, une question de droit autochtone ne se posera que si un intimé revendique un droit ancestral devant la commission afin d'échapper à l'application d'une interdiction générale ou d'une autre disposition réglementaire du Code. Je ne vois pas comment, en invoquant un moyen de défense fondé sur un droit ancestral, un intimé devrait pouvoir modifier la compétence principale de la commission ou interrompre les procédures qui se déroulent devant elle. Il faut considérer que la nature d'un moyen de défense a une importance secondaire comparativement à la compétence fondamentale de la commission. La personne accusée de violation du Code ne doit pas être en mesure d'écarter la compétence de la commission en matière de ressources forestières en invoquant

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the mechanisms of the administrative and judicial apparatus.

33 The respondent has failed to grasp the distinction between adjudication by a provincially created tribunal, on the one hand, and limits on regulation by a province of a matter under federal competence, on the other. Taking this distinction into account, I cannot see how the ability to hear a defence based on s. 35 would constitute an indirect intrusion on the defining elements of "Indianness". The "core" of Indianness has not been exhaustively defined. It encompasses the whole range of aboriginal rights that are protected by s. 35(1): *Delgamuukw*, *supra*, at para. 178. For present purposes, it is perhaps more easily defined negatively than positively. The core has been held not to include labour relations (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031) and highway traffic regulation on reserves (*R. v. Francis*, [1988] 1 S.C.R. 1025). On the evidence adduced in *Kitkatla Band*, *supra*, at para. 70, the status or capacity of Indians was found not to be impaired by the impugned *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. Given that these substantive matters were held not to go to the core of Indianness, I cannot see how the procedural question in this appeal can. The respondent has failed to demonstrate that the procedural right to raise at first instance a defence of aboriginal rights in a superior court, as opposed to before a provincially constituted tribunal, such as the Commission, goes to the core of Indianness.

34 I conclude, therefore, primarily on the basis that adjudication is distinct from legislation, that the Legislature of British Columbia has the constitutional power to enable the Commission to determine questions relative to aboriginal rights as

simplement un moyen de défense particulier et en faisant, de ce fait, ressortir un aspect constitutionnel de la question principale. De toute façon, abstraction faite des principes de droit constitutionnel, je pense que les autochtones auraient tout avantage à invoquer le plus tôt possible, devant les tribunaux administratifs et judiciaires, la protection offerte par les droits que leur garantit la Constitution.

L'intimé n'a pas compris la distinction entre la décision d'un tribunal administratif provincial, d'une part, et les limites de la réglementation provinciale d'une matière relevant de la compétence fédérale, d'autre part. Compte tenu de cette distinction, je ne vois pas comment le pouvoir d'entendre un moyen de défense fondé sur l'art. 35 constituerait un empiétement indirect sur les éléments qui délimitent l'« indianité ». L'« essentiel » de l'indianité n'a pas été défini de manière exhaustive. Il englobe l'ensemble des droits ancestraux protégés par le par. 35(1) : *Delgamuukw*, précité, par. 178. Pour les besoins de la présente affaire, il peut être plus facile de le définir en précisant ce qu'il n'englobe pas plutôt que ce qu'il englobe. On a statué que l'essentiel ne comprenait ni les relations du travail (*Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031), ni la réglementation de la circulation à l'intérieur des réserves (*R. c. Francis*, [1988] 1 R.C.S. 1025). Dans l'arrêt *Bande Kitkatla*, précité, par. 70, la Cour a jugé que, compte tenu de la preuve déposée, la loi attaquée, à savoir la *Heritage Conservation Act*, R.S.B.C. 1996, ch. 187, ne portait atteinte ni au statut ni aux droits des Indiens. Du fait qu'il a été jugé que ces questions de fond ne touchent pas à l'essentiel de l'indianité, je ne vois pas comment la question procédurale pourrait le faire en l'espèce. L'intimé n'a pas démontré que le droit procédural d'invoquer, en premier ressort, un moyen de défense fondé sur des droits ancestraux devant une cour supérieure, plutôt que devant un tribunal administratif provincial telle la commission, touche à l'essentiel de l'indianité.

En conséquence, compte tenu essentiellement de la distinction qui existe entre la fonction juridictionnelle et la fonction législative, je conclus que la Constitution permet à la législature de la Colombie-Britannique d'habiliter la commission

they arise in the execution of its valid provincial mandate respecting forestry. I turn now to the question of whether the provisions of the Code in force at the time of this appeal's events actually gave such a power to the Commission.

(7) The Disguised Claim of Bias

There was much discussion in the written and oral submissions concerning the unsuitability of any organ created by the Province of British Columbia hearing an argument relating to s. 35 rights. The concern, evidently, is that the significant number of aboriginal land claims in the Province assure that the interests of the Province are adverse to those of aboriginal persons. As I understand it, this argument is not one of constitutional law. It finds no place within the doctrine that has accreted around the division of powers. It strikes me more as an administrative law argument respecting the Commission's impartiality. The constitutional determination made here says nothing either way about the impartiality of the Commission, and does not preclude a fact-specific argument being raised in the future in the context of a particular constituted board and its practice: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at paras. 44 and 197; *Matsqui*, *supra*, at pp. 67-72. In short, the potential bias argument is irrelevant to the constitutional division of powers issue.

B. *Statutory Interpretation: Does the Code Empower the Commission to Hear and Decide Section 35 Questions?*

(1) Are Section 35 Questions Distinct From Other Constitutional Matters?

As a preliminary issue, I note that there is no basis for requiring an express empowerment that

à trancher des questions relatives aux droits ancestraux dans l'accomplissement de la mission valide qu'elle lui a confiée en matière de ressources forestières. Je vais maintenant examiner si les dispositions du Code en vigueur au moment où sont survenus les faits à l'origine du présent pourvoi conféraient réellement un tel pouvoir à la commission.

(7) L'argument déguisé de la partialité

Les plaidoiries et les observations écrites traitent abondamment de l'inopportunité qu'un organisme créé par la province de la Colombie-Britannique entende un argument relatif aux droits garantis par l'art. 35. Il est clair que l'on s'inquiète du fait que les nombreuses revendications territoriales des autochtones dans cette province font en sorte que la province et les autochtones ont des intérêts opposés. Si je comprends bien, cet argument n'a pas trait au droit constitutionnel. Il n'a rien à voir avec les théories qui se sont développées au sujet du partage des compétences. Il m'apparaît tenir davantage d'un argument de droit administratif concernant l'impartialité de la commission. La décision constitutionnelle rendue en l'espèce ne précise rien dans un sens ou dans l'autre en ce qui concerne l'impartialité de la commission et elle n'empêche pas qu'un argument fondé sur des faits particuliers soit avancé, à l'avenir, dans le contexte d'un organisme administratif particulier et de sa procédure : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29, par. 44 et 197; *Matsqui*, précité, p. 67-72. Bref, l'argument du risque de partialité n'est pas pertinent en ce qui concerne la question du partage des compétences dans la Constitution.

B. *Interprétation de la loi : Le Code habilite-t-il la commission à entendre et à trancher des questions concernant l'art. 35?*

(1) Les questions concernant l'art. 35 diffèrent-elles des autres questions de droit constitutionnel?

À titre préliminaire, je souligne que rien ne justifie d'exiger une attribution expresse de

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an administrative tribunal be able to apply s. 35 of the *Constitution Act, 1982*. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, such as the division of powers under the *Constitution Act, 1867* or a right under the *Charter*. Section 35 is not, any more than the *Charter*, "some holy grail which only judicial initiates of the superior courts may touch" (*Cooper*, *supra*, at para. 70, *per* McLachlin J. (as she then was), dissenting). This Court has rejected the theory that Indian reserves are federal "enclaves" from which provincial laws are excluded: Hogg, *supra*, at p. 27-10, discussing *Francis*, *supra*; *Four B*, *supra*. Similarly, aboriginal rights do not constitute an enclave that excludes a provincially created administrative tribunal from ruling, at first instance, on the border between those aboriginal rights and a provincial law of general application. The arguments that s. 35 rights are qualitatively different — that they are more complex, and require greater expertise in relation to the evidence adduced — have little merit. As Moen J. noted in *Ermineskin Cree Nation v. Canada* (2001), 297 A.R. 226, 2001 ABQB 760, at para. 51, in determining that a Human Rights Tribunal had jurisdiction to consider a s. 35 argument:

> [T]here is no principled basis for distinguishing *Charter* questions from s. 35 questions in the context of the Tribunal's jurisdiction to consider constitutional questions. In either case, the decision-maker is simply applying the tests set out in the case law to determine if the particular right claimed is protected by the *Constitution*. In either case, if the applicant is successful, the result is a declaration of invalidity or a refusal to apply only the particular statute or provision before the decision-maker.

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an

compétence pour qu'un tribunal administratif soit capable d'appliquer l'art. 35 de la *Loi constitutionnelle de 1982*. Il n'y a aucune raison sérieuse de distinguer le pouvoir de trancher des questions relatives à l'art. 35 de celui de se prononcer sur d'autres questions de droit constitutionnel — comme le partage des compétences établi par la *Loi constitutionnelle de 1867* — ou sur un droit garanti par la *Charte*. L'article 35 n'est pas plus que la *Charte* « un texte sacré que seuls les initiés des cours supérieures peuvent aborder » (*Cooper*, précité, par. 70, la juge McLachlin (maintenant Juge en chef), dissidente). Notre Cour a rejeté la théorie voulant que les réserves indiennes soient des « enclaves » fédérales où ne s'appliquent pas les lois provinciales : Hogg, *op. cit.*, p. 27-10, analysant les arrêts *Francis* et *Four B*, précités. De même, les droits ancestraux ne constituent pas une enclave où les tribunaux administratifs provinciaux ne peuvent pas se prononcer, en premier ressort, sur la ligne qui sépare ces droits ancestraux d'une loi provinciale d'application générale. Les arguments voulant que les droits garantis par l'art. 35 soient qualitativement différents — qu'ils soient plus complexes et exigent une plus grande expertise relativement à la preuve produite — sont peu fondés. Comme le fait observer le juge Moen dans la décision *Ermineskin Cree Nation c. Canada* (2001), 297 A.R. 226, 2001 ABQB 760, par. 51, en décidant qu'un tribunal des droits de la personne était compétent pour examiner un argument fondé sur l'art. 35 :

> [TRADUCTION] [I]l n'y a aucune raison fondée sur des principes de distinguer les questions relatives à la *Charte* et de celles relatives à l'art. 35, dans le contexte du pouvoir du tribunal d'examiner des questions de droit constitutionnel. Dans les deux cas, l'instance décisionnelle ne fait qu'appliquer les critères énoncés dans la jurisprudence pour déterminer si un droit revendiqué est protégé par la *Constitution*. Dans les deux cas, si le demandeur a gain de cause, il s'ensuit une déclaration d'invalidité ou un refus d'appliquer seulement la loi ou la disposition en cause devant l'instance décisionnelle.

Dans la mesure où les droits ancestraux sont des droits non écrits, collectifs ou susceptibles d'extinction, et où un examen des faits est donc requis, il convient de noter que, à l'instar des cours de justice, les tribunaux administratifs remplissent des

and satisfactorily, in the best interests of all concerned.

38 I conclude, therefore, that there is no principled basis for distinguishing s. 35 rights from other constitutional questions.

(2) The Appropriate Test: the Power to Determine Questions of Law

39 The facts and arguments in this appeal and those in *Martin*, *supra*, have presented this Court with an opportunity to review its jurisprudence on the power of administrative tribunals to determine questions of constitutional law. As Gonthier J. notes in *Martin*, at para. 34, the principle of constitutional supremacy in s. 52 of the *Constitution Act, 1982* leads to a presumption that all legal decisions will take into account the supreme law of the land. "In other words", as he writes, "the power to decide a question of law is the power to decide by applying only valid laws" (para. 36). One could modify that statement for the present appeal by saying that the power of an administrative board to apply valid laws is the power to apply valid laws only to those factual situations to which they are constitutionally applicable, or to the extent that they do not run afoul of s. 35 rights. This Court's decision in *Cooper*, *supra*, has too easily been taken as suggesting that practical considerations relating to a tribunal may readily overcome this presumption. I am of the view that the approach set out in *Martin*, in the context of determining a tribunal's power to apply the *Charter*, is also the approach to be taken in determining a tribunal's power to apply s. 35 of the *Constitution Act, 1982*. The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the

en faire le critère applicable en justice. Le procureur général de la Colombie-Britannique n'a présenté aucun moyen réaliste de soustraire les questions de droit autochtone compliquées à l'examen des tribunaux administratifs, pour ne leur laisser que les questions de droit autochtone plus simples qu'ils pourraient régler de façon rapide et satisfaisante, dans le meilleur intérêt de toutes les parties intéressées.

Je conclus donc qu'il n'y a aucune raison fondée sur des principes de distinguer les droits visés à l'art. 35 des autres questions de droit constitutionnel.

(2) Le critère applicable : le pouvoir de trancher des questions de droit

Les faits et les arguments du présent pourvoi et ceux de l'arrêt *Martin*, précité, ont permis à notre Cour de revoir sa jurisprudence relative au pouvoir des tribunaux administratifs de trancher des questions de droit constitutionnel. Comme le fait observer le juge Gonthier dans l'arrêt *Martin*, par. 34, le principe de la suprématie de la Constitution, à l'art. 52 de la *Loi constitutionnelle de 1982*, amène à présumer que toute décision portant sur une question de droit tient compte de la loi suprême du pays. « En d'autres termes », écrit-il, « le pouvoir de trancher une question de droit s'entend du pouvoir de la trancher en n'appliquant que des règles de droit valides » (par. 36). Pour les besoins du présent pourvoi, on pourrait modifier cet énoncé en disant que le pouvoir d'un organisme administratif d'appliquer des règles de droit valides est le pouvoir d'appliquer ces règles uniquement aux situations de fait auxquelles elles sont constitutionnellement applicables, ou encore dans la mesure où elles ne portent pas atteinte aux droits garantis par l'art. 35. L'arrêt *Cooper*, précité, de notre Cour a trop aisément été interprété comme indiquant que cette présomption peut facilement être réfutée au moyen de considérations pratiques relatives au tribunal administratif en cause. Je suis d'avis que l'approche adoptée dans l'arrêt *Martin* pour décider si un tribunal administratif peut appliquer la *Charte* est également celle qui doit être adoptée pour décider si un tribunal

concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.

The parties spent some time discussing the relationship between a tribunal's remedial powers and its jurisdiction to hear particular categories of legal questions. The appellants referred the Court to *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*"), and *R. v. Hynes*, [2001] 3 S.C.R. 623, 2001 SCC 82. In those cases, this Court articulated a functional and structural approach for determining whether an inferior court is a "court of competent jurisdiction" for the purposes of granting a remedy under s. 24(1) of the *Charter*. It was suggested in the hearing that the test in *Dunedin* gives credit to the view that remedial powers are a central feature to determine jurisdiction, that *Dunedin* and *Hynes* can be read broadly as indicating that there are distinctions between particular subject matters of constitutional law, and that implied jurisdiction to consider general questions of law may include only certain questions concerning the constitutional validity of the tribunal's enabling statute. I cannot accept these points. First, this Court has already recognized that the power to find a statutory provision of no effect, by virtue of s. 52(1) of the *Constitution Act, 1982*, is distinct from the remedial power to invoke s. 24(1) of the *Charter*: *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 31. In other words, an inferior court's remedial

administratif peut appliquer l'art. 35 de la *Loi constitutionnelle de 1982*. Il s'agit essentiellement de savoir si la loi habilitante accorde implicitement ou expressément au tribunal administratif le pouvoir d'examiner ou de trancher toute question de droit. Dans l'affirmative, ce tribunal est présumé posséder le pouvoir concomitant d'examiner ou de trancher cette question à la lumière de l'art. 35 ou de toute disposition constitutionnelle pertinente. En général, les considérations pratiques ne suffisent pas pour réfuter la présomption découlant du pouvoir de trancher des questions de droit. Toutefois, cela ne signifie pas qu'il n'est pas possible de tenir compte de considérations pratiques pour déterminer quelle solution convient le mieux pour régler un différend lorsqu'il existe plusieurs possibilités.

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Les parties ont consacré un certain temps à l'analyse du lien entre les pouvoirs de réparation d'un tribunal administratif et sa compétence pour entendre des catégories particulières de questions de droit. Les appelants ont mentionné les arrêts *R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81 (« *Dunedin* »), et *R. c. Hynes*, [2001] 3 R.C.S. 623, 2001 CSC 82, où notre Cour a adopté une approche fonctionnelle et structurelle pour décider si une cour d'instance inférieure est un « tribunal compétent » pour accorder une réparation en vertu du par. 24(1) de la *Charte*. On a laissé entendre, à l'audience, que le critère de l'arrêt *Dunedin* étaye le point de vue selon lequel les pouvoirs de réparation revêtent une importance cruciale lorsqu'il s'agit de déterminer l'existence de compétence, qu'il est possible de donner aux arrêts *Dunedin* et *Hynes* une interprétation large en considérant qu'ils indiquent l'existence de distinctions entre certaines matières relevant du droit constitutionnel et que la compétence implicite pour examiner des questions de droit générales ne peut viser que certaines questions relatives à la constitutionnalité de la loi habilitante du tribunal administratif en cause. Je ne puis souscrire à ces observations. Premièrement, notre Cour a déjà reconnu que le pouvoir de déclarer une disposition législative inopérante en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* est distinct du pouvoir d'accorder une réparation procédant

The Grand Council of the Crees (of Quebec) and the Cree Regional Authority *Appellants*

v.

The Attorney General of Canada, the Attorney General of Quebec, Hydro-Québec and the National Energy Board *Respondents*

and

Sierra Legal Defence Fund, Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and Sierra Club of Canada *Interveners*

INDEXED AS: QUEBEC (ATTORNEY GENERAL) *v.* CANADA (NATIONAL ENERGY BOARD)

File No.: 22705.

1993: October 13; 1994: February 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Public utilities — Electricity — Licences — National Energy Board granting licences for export of electrical power to U.S. — Licences granted subject to environmental assessments of future generating facilities — Whether Board erred in granting licences — National Energy Board Act, R.S.C., 1985, c. N-7 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Following lengthy public hearings at which the appellants made numerous submissions, the National Energy Board granted Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. At the time the licence applications were filed, the Board was required to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements and that the price to be charged by the power authority was just and reasonable in relation to the public interest. After the

Le Grand conseil des Cris (du Québec) et l'Administration régionale crie *Appelants*

c.

Le procureur général du Canada, le procureur général du Québec, Hydro-Québec et l'Office national de l'énergie *Intimés*

et

Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, Survie culturelle (Canada), les Ami(e)s de la Terre et Sierra Club of Canada *Intervenants*

RÉPERTORIÉ: QUÉBEC (PROCUREUR GÉNÉRAL) *c.* CANADA (OFFICE NATIONAL DE L'ÉNERGIE)

N° du greffe: 22705.

1993: 13 octobre; 1994: 24 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Services publics — Électricité — Licences — Délivrance par l'Office national de l'énergie de licences d'exportation d'électricité à destination des États-Unis — Licences assujetties aux évaluations environnementales des futures installations de production — L'Office a-t-il commis une erreur en délivrant les licences? — Loi sur l'Office national de l'énergie, L.R.C. (1985), ch. N-7 — Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement, DORS/84-467.

Après de longues audiences publiques au cours desquelles les appelants ont présenté de nombreux arguments, l'Office national de l'énergie a délivré à Hydro-Québec des licences d'exportation d'électricité à destination des États de New York et du Vermont. Au moment du dépôt des demandes de licences, l'Office devait s'assurer que l'électricité à exporter n'était pas requise pour satisfaire aux besoins normalement prévisibles du Canada à l'époque en cause et que le prix à demander par la société d'électricité était juste et raison-

hearings but prior to the Board's ruling, these two explicit criteria were removed from the *National Energy Board Act*, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. In evaluating the environmental impact of the applications, the Board considered itself bound by both its own Act as amended and the *Environmental Assessment and Review Process Guidelines Order*. The licences were granted subject to two conditions relating to the successful completion of environmental assessments of future generating facilities. The Federal Court of Appeal rejected the appellants' argument that the Board erred in several respects in granting the licences, but allowed the appeal by Hydro-Québec and the Attorney General of Quebec, concluding that the Board had exceeded its jurisdiction in imposing the environmental assessment conditions. It severed these two conditions and allowed the licences to stand. This appeal is to determine (1) whether the Board properly conducted the required social cost-benefit review; (2) whether the Board's failure to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness; (3) whether the Board owed the appellants a fiduciary duty in the exercise of its decision-making power, and, if so, whether the requirements of this duty were fulfilled; (4) whether the Board's decision affects the appellants' aboriginal rights; and (5) whether the Board failed to follow the requirements of its own Act and of the Guidelines Order in conducting its environmental impact assessment.

Held: The appeal should be allowed and the order of the Board restored.

Hydro-Québec provided evidence on which the Board could reasonably conclude that the consideration of cost recoverability was satisfied. The Board did not err in considering relevant to this issue the fact that the export contracts had received the approval of the province. Also, as this was only one of the factors considered, the Board did not improperly delegate its decision-making responsibility. It has not been shown that the Board's discretion to determine what evidence is relevant to its decision was improperly exercised in this case so as to result in inadequate disclosure to the appellants. The Board had sufficient evidence before it to make a valid finding that all costs would be recovered, and the appellants were given access to all the material before the Board. While there is a fiduciary relationship between

nable par rapport à l'intérêt public. Après les audiences, mais avant la décision de l'Office, ces deux critères explicites ont été retranchés de la *Loi sur l'Office national de l'énergie*; l'Office doit maintenant tenir compte seulement des facteurs qu'il estime pertinents. Dans le cadre de l'évaluation des incidences environnementales des demandes, l'Office s'est estimé lié par sa propre loi habilitante modifiée et par le *Décret sur les lignes directrices visant le processus d'évaluation et d'examen en matière d'environnement*. Les licences ont été délivrées sous réserve de deux conditions, qui portaient sur le résultat favorable des évaluations environnementales des futures installations de production. La Cour d'appel fédérale a rejeté l'argument des appelants que l'Office avait commis plusieurs erreurs en délivrant les licences, mais a accueilli celui d'Hydro-Québec et du procureur général du Québec, concluant que l'Office avait excédé sa compétence en imposant les conditions relatives aux évaluations environnementales. Elle a retranché ces deux conditions et a maintenu les licences délivrées. Le présent pourvoi vise à déterminer (1) si l'Office a correctement procédé à l'analyse de rentabilité sociale nécessaire; (2) si, en n'exigeant pas qu'Hydro-Québec divulgue en totalité les hypothèses et la méthodologie à la base de l'analyse de rentabilité, l'Office a contrevenu aux exigences en matière d'équité procédurale; (3) si l'Office a une obligation fiduciaire, envers les appelants, dans l'exercice de son pouvoir décisionnel et, dans l'affirmative, s'il y a satisfait; (4) si la décision de l'Office touche les droits ancestraux des appelants, et (5) si l'Office a omis de respecter les exigences de sa loi habilitante et du Décret lorsqu'il a procédé à l'évaluation environnementale.

Arrêt: Le pourvoi est accueilli et l'ordonnance de l'Office est rétablie.

Hydro-Québec a fourni des éléments de preuve permettant à l'Office de raisonnablement conclure que le facteur de la récupération des coûts avait été respecté. L'Office n'a pas commis d'erreur en considérant comme pertinent, relativement à cette question, le fait que la province avait autorisé les contrats d'exportation. En outre, comme il ne s'agissait que de l'un des facteurs considérés, l'Office n'a pas délégué de façon illégitime son pouvoir décisionnel. On n'a pas démontré que le pouvoir discrétionnaire de l'Office de déterminer la preuve qui est pertinente relativement à sa décision a été exercé illégitimement de façon à entraîner une divulgation insuffisante aux appelants. L'Office disposait d'une preuve suffisante pour conclure validement qu'il y aurait récupération de tous les coûts, et les appelants ont eu

the federal Crown and the aboriginal peoples of Canada, the function of the Board in deciding whether to grant an export licence is quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it. The fiduciary relationship between the Crown and the appellants thus does not impose a duty on the Board to make its decisions in the appellants' best interests, or to change its hearing process so as to impose superadded requirements of disclosure. Moreover, even assuming that the Board should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, the Board's actions in this case would have met the requirements of such a duty. The appellants had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by Hydro-Québec. On the issue of whether the Board's decision will have a negative impact on the appellants' aboriginal rights, it is not possible to evaluate realistically the impact of the Board's decision on the appellants' rights without reference to the James Bay Agreement, on which the appellants disavowed reliance. Moreover, even assuming that the Board's decision is one that has, *prima facie*, an impact on the appellants' aboriginal rights, and that for the Board to justify its interference it must at the very least conduct a rigorous, thorough, and proper cost-benefit review, the review carried out in this case was not wanting in this respect.

The Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. Even though the Board found that the new facilities contemplated would have to be built in any event to supply increasing domestic needs, if the construction of new facilities is required to serve the demands of the export contract, among other needs, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power. In defining the

accès à tous les documents déposés devant l'Office. Bien qu'il existe des rapports fiduciaires entre l'État fédéral et les peuples autochtones du Canada, l'Office, lorsqu'il décide de délivrer une licence d'exportation, remplit une fonction quasi judiciaire, qui est en soi incompatible avec l'exigence voulant qu'il existe des rapports d'une extrême bonne foi entre l'Office et une partie qui comparaît devant lui. Les rapports fiduciaires entre l'État et les appelants n'imposent pas à l'Office une obligation de prendre des décisions dans l'intérêt des appelants, ou encore de modifier son processus d'audience de façon à imposer des exigences additionnelles de divulgation. En outre, même si l'on suppose que l'Office aurait dû tenir compte de l'existence de rapports fiduciaires entre l'État et les appelants, les mesures qu'il a prises auraient permis de satisfaire aux exigences d'une telle obligation. Les appelants ont eu accès à tous les éléments de preuve déposés devant l'Office, ils ont pu présenter des arguments et une réplique et ils ont également eu le droit de contre-interroger les témoins assignés par Hydro-Québec. Quant à savoir si la décision de l'Office aura une incidence négative sur les droits ancestraux des appelants, on ne peut établir d'une façon réaliste l'incidence de la décision de l'Office sur les droits des appelants sans examiner la Convention de la Baie James, dont les appelants n'ont pas voulu se servir. En outre, même en supposant que la décision de l'Office a, à première vue, une incidence sur les droits ancestraux des appelants, et que ceux-ci ont raison de soutenir que, pour justifier son intervention, l'Office doit, à tout le moins, procéder à une analyse de rentabilité rigoureuse, approfondie et appropriée, l'analyse effectuée en l'espèce n'était pas déficiente sur ce point.

L'Office n'a pas excédé sa compétence en vertu de la *Loi sur l'Office national de l'énergie* en tenant compte des effets sur l'environnement de la construction des futures installations de production dans la mesure où ils se rapportent aux exportations proposées, domaine de compétence fédérale. La Cour d'appel a commis une erreur en limitant l'examen de l'Office sur les incidences environnementales aux effets sur l'environnement du transport d'électricité par une ligne de fil métallique au-delà de la frontière. Bien que l'Office ait conclu qu'il faudrait de toute façon procéder à la construction des nouvelles installations pour répondre à l'accroissement de la demande intérieure, les effets sur l'environnement de la construction de ces installations ont un lien avec l'exportation si la construction de nouvelles installations est nécessaire, entre autres, pour répondre à la demande créée par un contrat d'exportation. Dans ces circonstances, il devient alors approprié pour l'Office de

jurisdictional limits of the Board, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern, but the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. The Board met its obligations under the Guidelines Order in attaching to the licence the two impugned conditions. Having concluded that the environmental effects of the construction and operation of the planned facilities were unknown, the Board was required by s. 12(*d*) of the Order to see either that the proposal was subjected to further study and subsequent rescreening, or that it was submitted to a public review. The conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the Guidelines Order, but rather are an attempt to avoid the duplication warned against in the Order, while continuing the Board's jurisdiction over this matter.

tenir compte de la source de l'énergie électrique à exporter et des coûts environnementaux associés à la production de cette énergie. En définissant les limites de la compétence de l'Office, notre Cour doit s'assurer que l'exercice des pouvoirs de l'Office se limite vraiment aux questions d'intérêt fédéral. Cependant, il ne faut pas circonscrire l'étendue de l'examen à effectuer à un tel point que la fonction de l'Office devienne dénuée de sens ou privée d'efficacité. L'Office a respecté ses obligations en vertu du Décret en assortissant la licence des deux conditions contestées. Lorsqu'elle a conclu que les effets sur l'environnement de la construction et du fonctionnement des installations prévues étaient inconnus, l'Office était tenu, en vertu de l'al. 12*d*) du Décret de veiller à ce que la proposition soit soumise à d'autres études suivies d'un autre examen ou qu'elle fasse l'objet d'un examen public. L'Office a, pour l'essentiel, satisfait à cette obligation en imposant les conditions. Celles-ci ne constituent pas une délégation erronée de la responsabilité de l'Office en vertu du Décret, mais tentent plutôt d'éviter le double emploi dont le Décret fait mention, tout en préservant la compétence de l'Office sur cette question.

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Arrêts mentionnés: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *In re le Conseil de la Radio-Télévision canadienne et in re la London Cable TV Ltd.*, [1976] 2 C.F. 621; *Parke, Davis & Co. c. Fine Chemicals of Canada Ltd.*, [1959] R.C.S. 219; *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Lakeside Colony of Hutterian Brethren c. Hofer*, [1992] 3 R.C.S. 165; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; *Gitludahl c. Minister of Forests*, C.S.C.-B., Vancouver A922935, 13 août 1992; *Dick c. La Reine*, C.F. 1re inst., T-951-89, 3 juin 1992; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement)* (1989), 4 C.E.L.R. (N.S.) 201 (C.F. 1re inst.), conf. par [1991] 1 C.F. 641 (C.A.); *Friends of the Island Inc. c. Canada (Ministre des Travaux publics)*, [1993] 2 C.F. 229.

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Constitution Act, 1982, s. 35(1).
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Hydro-Québec Act, R.S.Q., c. H-5, s. 24.
James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32.
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Loi sur l'Office national de l'énergie, L.R.C. (1985), ch. N-7 [mod. 1990, ch. 7], art. 2, 22(1), 24, 118, 119.02, 119.03, 119.06(2), 119.07, 119.08, 119.09, 119.093.
Loi sur le règlement des revendications des autochtones de la Baie James et du Nord québécois, S.C. 1976-77, ch. 32.
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APPEAL from a judgment of the Federal Court of Appeal, [1991] 3 F.C. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, severing conditions from licences granted by the National Energy Board, [1991] 2 C.N.L.R. 70, and allowing the licences to stand. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1991] 3 C.F. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, qui a retranché certaines conditions des licences délivrées par l'Office national de l'énergie, [1991] 2 C.N.L.R. 70, et déclaré les licences par ailleurs valides. Pourvoi accueilli.

Robert Mainville, *Peter W. Hutchins* and *Johanne Mainville*, for the appellants.

Robert Mainville, *Peter W. Hutchins* et *Johanne Mainville*, pour les appelants.

Jean-Marc Aubry, *Q.C.*, and *René LeBlanc*, for the respondent the Attorney General of Canada.

Jean-Marc Aubry, *c.r.*, et *René LeBlanc*, pour l'intimé le procureur général du Canada.

Pierre Lachance and *Jean Robitaille*, for the respondent the Attorney General of Quebec.

Pierre Lachance et *Jean Robitaille*, pour l'intimé le procureur général du Québec.

Pierre Bienvenu, *Jean G. Bertrand* and *Bernard Roy*, for the respondent Hydro-Québec.

Pierre Bienvenu, *Jean G. Bertrand* et *Bernard Roy*, pour l'intimée Hydro-Québec.

Judith B. Hanebury, for the respondent the National Energy Board.

Gregory J. McDade and *Stewart A. G. Elgie*, for the interveners.

The judgment of the Court was delivered by

IACOBUCCI J. — This appeal arises from the decision of the respondent National Energy Board ("the Board") to grant to the respondent Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. This decision followed lengthy public hearings at which the Grand Council of the Crees (of Quebec) and the Cree Regional Authority ("the appellants"), along with other concerned groups, made numerous submissions.

The Attorneys General of Quebec and of Canada appeared as respondents to this appeal, as did the Board. The Court also heard the joint submissions of the Sierra Legal Defence Fund, the Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and the Sierra Club of Canada ("the interveners").

The appellants argued before the Federal Court of Appeal that the Board erred in several respects in granting the licences. The respondents Hydro-Québec and the Attorney General of Quebec claimed that the Board erred in making the granting of the licences conditional on the successful completion of environmental assessments of the power generation facilities contemplated by Hydro-Québec for future construction. The Federal Court of Appeal rejected the argument of the appellants, and concluded that the Board had erred in imposing the conditions impugned by the respondents. The Court of Appeal severed these conditions, and allowed the licences to stand. The appellants now appeal to this Court.

Judith B. Hanebury, pour l'intimé l'Office national de l'énergie.

Gregory J. McDade et *Stewart A. G. Elgie*, pour les intervenants.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi contre la décision de l'intimé l'Office national de l'énergie («l'Office») de délivrer à l'intimée Hydro-Québec des licences d'exportation d'électricité à destination des États de New York et du Vermont. Cette décision a été prise après de longues audiences publiques au cours desquelles le Grand conseil des Cris, l'Administration régionale crie («les appelants») ainsi que d'autres groupes intéressés ont présenté de nombreux arguments.

Le procureur général du Québec, celui du Canada et l'Office ont comparu comme intimés dans le cadre du présent pourvoi. Notre Cour a également entendu le Sierra Legal Defence Fund, l'Association canadienne du droit de l'environnement, Survie culturelle (Canada), les Ami(e)s de la Terre et le Sierra Club of Canada («les intervenants»).

Les appelants ont soutenu devant la Cour d'appel fédérale que l'Office avait commis plusieurs erreurs en délivrant les licences. Les intimés Hydro-Québec et le procureur général du Québec ont affirmé que l'Office avait commis une erreur en assujettissant la délivrance des licences au résultat favorable des évaluations environnementales des futures installations de production d'électricité envisagées par Hydro-Québec. La Cour d'appel fédérale a rejeté l'argument des appelants et a conclu que l'Office avait commis une erreur en imposant les conditions contestées par les intimés. La Cour d'appel a retranché ces conditions et déclaré que les licences étaient par ailleurs valides. Les appelants se pourvoient maintenant devant notre Cour.

export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

The respondents expressed concern that giving such a scope to the inquiry of the Board might then bring into its contemplation areas which are more properly the subject of provincial regulation and control. I hasten to add that no constitutional question was raised in this appeal, and I expressly refrain from making any determinations relating to the interpretation of the provisions of the *Constitution Act, 1867*. However, it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these concerns. Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the *Constitution Act, 1867*, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. In this regard, I find helpful the reasons of this Court in *Friends of the*

crée une situation où la construction d'une centrale électrique pourrait être envisagée seulement en réponse à la demande résultant d'un certain nombre de contrats d'exportation, mais que, parce que l'on ne peut dire qu'un contrat d'exportation particulier est la cause de la construction de la centrale, on n'aura jamais à tenir compte de ses effets sur l'environnement.

Il vaut mieux se demander simplement si la construction de nouvelles installations est nécessaire, entre autres, pour répondre à la demande créée par un contrat d'exportation. Dans l'affirmative, les effets sur l'environnement de la construction de ces installations ont un lien avec l'exportation. Dans ces circonstances, il devient alors approprié pour l'Office de tenir compte de la source de l'énergie électrique à exporter et des coûts environnementaux associés à la production de cette énergie.

Les intimés craignent que l'on amène ainsi l'Office à examiner des domaines qui relèvent davantage de la réglementation et du contrôle des provinces. Je m'empresse d'ajouter que le présent pourvoi ne soulève aucune question constitutionnelle, et je m'abstiens explicitement de me prononcer sur l'interprétation des dispositions de la *Loi constitutionnelle de 1867*. Cependant, dans la détermination des limites de la compétence de l'Office, il importe néanmoins de tenir compte des craintes exprimées. De toute évidence, bien que les questions d'exportation relèvent clairement de la compétence fédérale en matière de réglementation des échanges et du commerce, conformément au par. 91(2) de la *Loi constitutionnelle de 1867*, on ne saurait nier qu'un projet d'exportation peut avoir des ramifications sur le fonctionnement des entreprises provinciales ou sur d'autres questions de compétence provinciale.

En définissant les limites de la compétence de l'Office, notre Cour doit s'assurer que l'exercice des pouvoirs de l'Office se limite vraiment aux questions d'intérêt fédéral. Cependant, il ne faut pas non plus circonscrire l'étendue de l'examen à effectuer à un tel point que la fonction de l'Office devienne dénuée de sens ou privée d'efficacité. À cet égard, je trouve utiles les motifs de notre Cour

Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, a decision released after the Federal Court of Appeal had rendered judgment in this case.

In *Oldman River* this Court considered, among other issues, the constitutional validity of the *EARP Guidelines Order*. La Forest J., for the majority, concluded, in words I find apposite to this appeal (at p. 64):

> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

Therefore (at p. 65):

> . . . the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.

As noted earlier, the *vires* of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.

dans l'arrêt *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, rendu après le jugement de la Cour d'appel fédérale en l'espèce.

Dans l'arrêt *Oldman River*, notre Cour a notamment examiné la constitutionnalité du *Décret sur le PEEE*. Le juge La Forest, s'exprimant au nom de la majorité, a conclu en des termes que j'estime fort pertinents pour les fins du présent pourvoi à la p. 64:

> Il faut reconnaître que l'environnement n'est pas un domaine distinct de compétence législative en vertu de la *Loi constitutionnelle de 1867* et que c'est, au sens constitutionnel, une matière obscure qui ne peut être facilement classée dans le partage actuel des compétences, sans un grand chevauchement et une grande incertitude.

En conséquence (à la p. 65):

> . . . on peut plus facilement trouver la solution applicable à l'espèce en examinant tout d'abord l'énumération des pouvoirs dans la *Loi constitutionnelle de 1867* et en analysant comment ils peuvent être utilisés pour répondre aux problèmes environnementaux ou pour les éviter. On pourra alors se rendre compte que, dans l'exercice de leurs pouvoirs respectifs, les deux paliers de gouvernement peuvent toucher l'environnement, tant par leur action que leur inaction.

Comme je l'ai déjà fait remarquer, la validité de la *Loi sur l'Office national de l'énergie* n'est pas contestée dans le présent pourvoi. En appliquant la Loi, l'Office peut tenir compte des effets sur l'environnement à l'intérieur d'une province s'il les considère pertinents aux fins de sa décision de délivrer une licence d'exportation, matière de compétence fédérale. La province peut, quant à elle, examiner les effets sur l'environnement des aspects d'un projet donné qui relèvent de la réglementation provinciale. Cette coexistence de responsabilité n'est ni inhabituelle ni impossible. Il y a, bien entendu, lieu de minimiser le double emploi de directives et les contradictions entre ces dernières, et c'est précisément le problème que le *Décret sur le PEEE*, tout particulièrement ses art. 5 et 6, cherche à éviter, et que l'Office a tenté de réduire en imposant les conditions 10 et 11 de la licence.

COUR DU QUÉBEC

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE ROBERVAL
Localité de Roberval
« Chambre civile »

N°: 155-80-000005-128

DATE : 11 juin 2013

SOUS LA PRÉSIDENCE DE : L'HONORABLE DORIS THIBAULT, J.C.Q.

SOCIÉTÉ D'HISTOIRE ET D'ARCHÉOLOGIE DE MASHTEUIATSH,

DEMANDERESSE;

c.

LE SOUS-MINISTRE DU REVENU DU QUÉBEC, DIRECTION DU CONTENTIEUX FISCAL ET CIVIL, REVENU QUÉBEC,

DÉFENDEUR;

JUGEMENT

JT-1425

Le droit et l'analyse

[25] Le bulletin d'interprétation **RAMQ-34-5/R1** élargit la portée de l'exemption accordée par l'article 87 de la Loi sur les indiens en prévoyant qu'aucune cotisation prévue à la Loi sur la RAMQ n'est exigible sur un salaire attribuable aux activités non commerciales d'une organisation indienne. Cette pratique administrative est entrée en vigueur en octobre 1999.

[26] La lecture du bulletin d'interprétation révèle que pour bénéficier de l'exemption, l'organisation doit rencontrer tous les critères suivants:

a) exercer des activités non commerciales;

b) être une organisation indienne;

c) résider dans une réserve;

d) les activités de l'organisation doivent viser le mieux-être d'indiens ou de personnes de descendance indienne; et

e) relever soit d'une bande ou d'un conseil de bande;

[27] Seule la dernière condition ne serait pas rencontrée par la S.H.A.M. selon les prétentions du Sous-ministre du Revenu.

[28] À la lumière des faits, la S.H.A.M. rencontre-t-elle cette dernière condition.

[29] La S.H.A.M. soumet que le Tribunal doit interpréter les conditions d'application de l'exemption de façon large et généreuse. Elle réfère le Tribunal aux propos du juge Dickson dans l'affaire *Nowegijick* c. *R.*[(1)]:

> "*les traités et les lois visant les Indiens doivent recevoir une interprétation libérale et toute ambiguïté doit profiter aux Indiens.*"

[30] Le Sous-ministre du Revenu oppose que le Tribunal n'a pas à interpréter le sens du mot "relève" car l'article 12 du bulletin d'interprétation le définit.

[31] Les articles 5 et 12 au bulletin d'interprétation qui sont nécessaires à la compréhension de la position du Sous-ministre du revenu, se lisent ainsi:

---

(1) 1983 1 R.C.S. 29;

"…

5. Pour bénéficier de la pratique administrative énoncée au paragraphe 4 de ce bulletin, l'organisation indienne devra se consacrer, entre autres, au développement social, culturel, éducationnel ou économique d'Indiens ou de personnes d'ascendance indienne qui vivent dans une réserve, et relever:

a) soit d'une ou de plusieurs bandes;

b) soit d'un ou de plusieurs conseils de bande représentant une ou plusieurs bandes.

(…)

12. Aux fins du paragraphe 5 de ce bulletin, une organisation indienne relèvera soit d'une ou de plusieurs bandes, soit d'un ou de plusieurs conseils de la bande représentant une ou plusieurs bandes lorsque, à la fois:

** la bande ou le conseil de la bande ou les membres particuliers de la bande ou du conseil de la bande nomment ou élisent la majorité des membres de l'organe directeur de l'organisation indienne (ex: les administrateurs);*

** l'organisation indienne doit, en vertu d'une loi, de règlements administratifs ou d'un accord d'exploitation, soumettre son budget de fonctionnement et, s'il y a lieu, son budget d'immobilisations à l'examen et à l'approbation de la bande ou du conseil de la bande.*

…" [notre soulignement]

[32] L'article 12 du bulletin impose donc deux conditions cumulatives pour conclure qu'une organisation indienne relève d'une ou de plusieurs bandes

A. Concernant la première condition, soit que *la bande ou le conseil de bande ou* ***les membres particuliers de la bande ou du conseil de bande nomment ou élisent*** *les administrateurs de l'organisation indienne*.

[33] La preuve est claire, aucun administrateur n'est nommé par le conseil de bande et il n'est pas de l'intention du conseil de bande de le faire. Le témoignage de madame Robertson ne laisse place à aucune interprétation; le conseil de bande souhaite

respecter l'autonomie administrative de la S.H.A.M. et ne veut pas assumer des possibles pertes financières.

[34] Lorsque le conseil de bande a souhaité avoir un représentant sur le conseil d'administration, elle l'a désigné de façon spécifique et a limité son mandat à la période du remboursement d'un prêt qu'il a cautionné.

[35] Cependant, seul un membre régulier peut voter et être élu au sein du conseil d'administration et pour être membre régulier il faut avoir le statut d'indien membre de la bande. Donc les membres du conseil d'administration de la S.H.A.M. sont élus par des membres de la bande.

[36] Le Tribunal conclut que les administrateurs de la S.H.A.M. sont élus par des membres de la bande. En conséquence la S.H.A.M. rencontre la première des conditions exigées par l'article 12.

B. Concernant la deuxième condition, soit *que l'organisation indienne doit soumettre son budget de fonctionnement* ***à l'examen et à l'approbation*** *de la bande ou du conseil de bande*.

[37] Le Tribunal retient de la preuve que la S.H.A.M. travaille étroitement avec le conseil de bande. Les grandes orientations de la S.H.A.M. sont déterminées en collaboration avec le conseil de bande qui établit le cadre dans lequel doit s'effectuer leur mise en application.

[38] Cependant, la lecture de la preuve documentaire et plus particulièrement des règlements généraux démontre que le budget de la S.H.A.M. n'a pas à être approuvé par le conseil de bande ou par la bande. Le budget doit être approuvé par le conseil d'administration.

[39] Le mot "approbation" suppose un accord, une acceptation et la preuve ne permet pas de conclure que le conseil de bande ou la bande doit approuver le budget de la S.H.A.M.

[40] Les règlements généraux font état que le conseil d'administration de la S.H.A.M. possède l'ensemble des pouvoirs décisionnels quant à la gestion et à l'administration de la corporation.

[41] Le financement fourni par le conseil de bande n'est pas important par rapport à l'ensemble du budget dont dispose la S.H.A.M.

[42] La lecture de la lettre du 16 octobre 2007 adressée par une représentante du Conseil des Montagnais à la S.H.A.M. (P-13) indique que le conseil de bande demande

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247

Date: 20110525
Docket: CA038048

Between:

Chief Roland Willson on his own behalf and on behalf of the members of the West Moberly First Nations and the West Moberly First Nations

Respondents
(Petitioners)

And

Her Majesty the Queen in Right of The Province of British Columbia as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines, and Dale Morgan, District Manager, Peace Forest District

Appellants
(Respondents)

And

First Coal Corporation

Respondent
(Respondent)

And

**Treaty 8 First Nations of Alberta,
Grand Council of Treaty #3, and
Attorney General of Alberta**

Intervenors

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, March 19, 2010,
(*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, Victoria Docket No. 09-4823)

Counsel for the Appellant, Province of British Columbia:	K.J. Phillips, E.K. Christie
Counsel for the Respondent, First Coal Corporation:	K.E. Clark, R. Robertson
Counsel for the Respondent, West Moberly First Nations:	C.G. Devlin, T.H. Thielmann
Counsel for the Intervenor, Treaty 8 First Nations of Alberta:	R.M. Kyle
Counsel for the Intervenor, Grand Council of Treaty #3:	K.M. Brooks
For the Intervenor, Attorney General of Alberta:	Written Submissions Only
Place and Dates of Hearing:	Vancouver, British Columbia January 4, 5 and 6, 2011
Place and Date of Judgment:	Vancouver, British Columbia May 25, 2011

Written Reasons by:
The Honourable Chief Justice Finch

Concurring Reasons by:
The Honourable Mr. Justice Hinkson (page 46 para. 169)

Dissenting Reasons by:
The Honourable Madam Justice Garson (page 52, para. 186)

inconsequential effects, the duty to consult was nevertheless triggered. The Court rejected this argument. It said in part:

> [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.
>
> ...
>
> [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. ...
>
> ...
>
> [53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.
>
> ...
>
> [83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult.
>
> [Italic emphasis in original; underline emphasis added.]

[117] I do not understand *Rio Tinto* to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.

[118] The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at

[Rule 3.8]

COURT FILE NUMBER	1203-01106
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANT(S)	ATHABASCA CHIPEWYAN FIRST NATION, DENE THA' FIRST NATION, DRIFTPILE FIRST NATION, DUNCAN'S FIRST NATION, FORT MCKAY FIRST NATION, FROG LAKE FIRST NATION, HORSE LAKE FIRST NATION, LOON RIVER FIRST NATION, MIKISEW CREE FIRST NATION AND SWAN RIVER FIRST NATION
RESPONDENT(S)	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, AS REPRESENTED BY THE MINISTER OF SUSTAINABLE RESOURCE DEVELOPMENT AND THE LIEUTENANT GOVERNOR IN COUNCIL
DOCUMENT	**AMENDED ORIGINATING APPLICATION**

AMENDED THIS 23 DAY OF March A.D. 20 12
PURSUANT TO RULE 3.62 UNDER ORDER/CONSENT DATED
DAY OF A.D. 20
CLERK OF COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Rosanne M. Kyle
Janes Freedman Kyle Law Corporation
340 - 1122 Mainland Street
Vancouver, BC V6B 5L1
Tel: 604-687-0549
Fax: 604-687-2696

Address for Service: MacPherson Leslie & Tyerman LLP
Suite 2200
10235 101st Street
Edmonton AB T5J 3G1
Tel: 780-969-3500
Fax: 780-969-3549

NOTICE TO THE RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:	June 19, 2012
Time:	10:00 am
Where:	Court of Queen's Bench, Edmonton, 1A Sir Winston Churchill Square, Edmonton, AB T5J 0R2
Before:	Justice

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

The Parties

1. Each of the Applicants, Athabasca Chipewyan First Nation, Dene Tha' First Nation, Driftpile First Nation, Duncan's First Nation, Fort McKay First Nation, Frog Lake First Nation, Horse Lake First Nation, Loon River First Nation, Mikisew Cree First Nation and Swan River First Nation, is a First Nation, a "band" of Indians within the meaning of the *Indian Act*, RSC c I-5, and an "aboriginal people" within the meaning of s.35 of the *Constitution Act*, 1982 (UK) 1982 c11 (the "*Constitution Act*").

2. The Applicants, Athabasca Chipewyan First Nation, Dene Tha' First Nation, Driftpile First Nation, Duncan's First Nation, Horse Lake First Nation, Fort McKay First Nation, Loon River First Nation, Mikisew Cree First Nation and Swan River First Nation are successors to an Aboriginal group that signed or adhered to Treaty No. 8. The Applicant, Frog Lake First Nation is a successor to an Aboriginal group that signed or adhered to Treaty No. 6. The Applicants and their members continue to hold the rights constitutionally guaranteed under Treaty No. 8 and Treaty No. 6 respectively.

3. The Respondent Minister of Sustainable Resources Development is the Minister responsible for managing Alberta's public lands. In particular, the Respondent Minister of Sustainable Resources Development is responsible for developing the *Public Lands Administration Regulation*, Alta Reg 187/2011. The Minister is also responsible for discharging Crown consultation obligations with First Nations in relation to the *Public Lands Act*, RSA 2000 c. p – 40, and the *Public Lands Administration Regulation.*

4. The Respondent Lieutenant Governor in Council is the body empowered by the *Public Lands Act* to make regulations permitting, prohibiting and regulating activities on vacant public lands, including the *Public Lands Administration*

Regulation. Public lands are lands owned by the Crown in right of Alberta and are also referred to herein as Crown lands.

The Applicants' Treaty Rights

5. Since time immemorial and continuously to the present day, the ancestors and present members of the Applicants have lived and sustained themselves, their families and their communities by using the lands and resources in their respective traditional territories ("Traditional Territories").

6. Treaties No. 6 and 8 are treaties between the Crown and a number of groups of Aboriginal people, including the Applicants. Treaties No. 6 and 8 share a variety of common features and, at a minimum, each of Treaties No. 6 and 8 guarantees the beneficiaries of such treaties:

    a. the right to harvest resources for various uses, including harvesting resources for livelihood purposes;

    b. the right to hunt, trap and fish;

    c. ancillary and incidental rights thereto, including, but not limited to:

        i. the right to access lands, including by using modern means, for the purpose of hunting, fishing and trapping;

        ii. the right to camp and to build shelters, other structures and trails for the purpose of facilitating hunting, fishing and trapping;

        iii. the right to cut down trees, build fires, and gather resources for the purpose of facilitating hunting, fishing and trapping;

        iv. the right to choose the means and timing for engaging in hunting, fishing and trapping activities; and

        v. the right to hold gatherings and ceremonies related to hunting, fishing and trapping activities.

7. The Crown's promises regarding the continuity and preservation of the Aboriginal signatories' way of life, including the guarantee of the continuance of their patterns of economic activity and vocations such as harvesting wildlife and fish, are essential elements of Treaties No. 6 and 8 respectively.

8. The Natural Resources Transfer Agreement (*Constitution Act*, 1930, 20-21 George V, c. 26 (U.K.), Schedule 2) (the "NRTA") transferred Crown lands from Canada to Alberta. The NRTA also restricted the ability of Alberta to regulate the exercise of Treaty rights on Crown lands to that which is necessary for the conservation of game. In addition, the NRTA protected the right of holders of

Treaty rights to access Crown lands, and lands to which they have a right of access, for the purposes of hunting, fishing and trapping in Alberta.

9. The Applicants' Treaty rights under Treaties No. 6 and 8 respectively are protected under s. 35(1) of the *Constitution Act*, 1982. In this Originating Application, a reference to Treaty rights includes Treaty rights as protected by the NRTA.

10. The Applicants and their members have maintained their distinctive identities and cultures as Aboriginal peoples by maintaining their cultural, social and spiritual connections to their Traditional Territories across generations. This connection is maintained, in part, by exercising Treaty rights in accordance with the customs and traditions of the Applicants, such as hunting, fishing, trapping and establishing cabins, trails and camps on the land which act as bases from which they can set out to hunt, fish and trap.

The Public Lands Administration Regulation

11. The Crown has developed a legal and policy regime to manage the use of public lands in Alberta. A cornerstone of the Crown's regulation of public lands in Alberta is the *Public Lands Act*, which governs most of the approximately 60 per cent of Alberta lands that are public lands. The *Public Lands Act* supports development activities on public lands by authorizing the Crown to issue approvals for various developments, such as agricultural and oil and gas activities.

12. The *Public Lands Act* prescribes what is legally allowed or prohibited on public lands. Section 20(f) of the *Public Lands Act* sets out a general prohibition on entering or using public lands for any purpose unless the person entering or using the land is authorized under the *Public Lands Act* or under subsidiary regulations. Sections 56(1)(d) and 56(1)(k) of the *Public Lands Act,* respectively, make it an offence to occupy public lands without an authorization issued under the *Public Lands Act* or under subsidiary regulations.

13. The *Public Lands Act* also assigns statutory authority to a variety of Crown actors to establish rules for accessing and using public lands under the *Public Lands Act*. Sections 8 and 9 of the *Public Lands Act* give the Lieutenant Governor in Council statutory authority to make regulations permitting, prohibiting or regulating the use of, and activities on, vacant public lands.

14. The Lieutenant Governor in Council made the decision to approve the *Public Lands Administration Regulation* on August 25, 2011 in Order in Council 381/2011.

15. The *Public Lands Administration Regulation* purports to manage all uses of, and access to, vacant public lands in Alberta by establishing rules for authorizing,

restricting and prohibiting access to vacant public lands, as well as establishing enforcement mechanisms for those rules.

16. A key component of the *Public Lands Administration Regulation* is increased regulation of access to, and use of, vacant public lands.

17. Another key component of the *Public Lands Administration Regulation* is the streamlining of applications for particular activities on public lands, such as agricultural and oil and gas activities. The *Public Lands Administration Regulation*:

    a. Authorizes decision-makers to require and issue dispositions, authorizations or approvals for the use of public land for grazing, the extraction of resources, pipelines and the construction and use of ancillary facilities and other uses;

    b. Imposes restrictions and prohibitions on uses of vacant public lands, such as activities conducted for "recreational purposes" and establishes requirements for Crown authorizations and permits to access vacant public land for various activities;

    c. Recognizes Public Land Use Zones (PLUZs), Public Land Recreation Areas (PLRAs) and Public Recreation Trails, and creates rules for access to, and use of these areas; and

    d. Establishes discretionary authority for decision-makers to create disturbance standards regarding activities on public lands and to impose conditions on authorizations and dispositions on public lands.

18. The *Public Lands Administration Regulation* does not distinguish Treaty rights from other types of land uses when regulating access to and use of Crown lands. Treaty rights are treated as "recreational purposes" and are subjected to numerous temporal, geographic and discretionary restrictions in the Regulation, including:

    a. Access permits are required to enter and use vacant public lands to exercise Treaty rights, such as hunting, trapping or fishing, if the land use or activity could reasonably be expected to occur for a period longer than 14 days;

    b. Access permits are required to enter and use vacant public lands for the exercise of Treaty rights if the Crown has closed the vacant public lands for any purpose under any enactment;

c. Access permits are required to enter and use vacant public lands for the exercise of Treaty rights if the activity may cause loss or damage to vacant public lands;

d. Authorization is required to exercise Treaty rights by using wheeled or tracked conveyances along the shores of any waterways;

e. Formal dispositions are required for the construction and use of ancillary facilities such as cabins, even where the ancillary facility is reasonably incidental to the exercise of Treaty rights, if the Crown identifies cabins as ancillary facilities in disturbance standards;

f. Access for the purpose of exercising Treaty rights to vacant public lands that have been secured or closed by decision-makers is prohibited;

g. Crown officers can evict anyone from vacant public lands if the officer has a reasonable belief that the person might access public vacant lands to exercise Treaty rights for more than 14 days without a permit;

h. Access permits for the exercise of Treaty rights are limited to a period of up to 14 days, with the 14 day period beginning from the day the permit is issued, not the day the permit is received; and

i. Permits are required in some cases to access vacant public lands to exercise ancillary Treaty rights, such as holding Treaty-related events or for exercising spiritual or cultural practices related to the exercise of Treaty rights.

19. The *Public Lands Administration Regulation* also

a. Allows the Crown to reject any application described above if any debts are owing to the Crown or to a municipality;

b. Requires applicants to deliver security for facilities approved under the Regulation and allows the Crown decision-maker to require security for other authorizations;

c. Allows the Crown decision-maker to take up to 90 days to make a decision with respect to the issuance of access permits for the exercise of Treaty rights; and

d. Gives the Crown decision-maker unfettered discretion to include any terms and conditions in access permits for the exercise of Treaty rights that the decision-maker deems appropriate.

20. The *Public Lands Administration Regulation* places stringent restrictions, complete prohibitions and discretionary limitations on camping, use of firearms, fires, use of vehicles, dressing game, trapping, removal of firewood and the exercise of other Treaty rights and incidental Treaty rights in all areas designated under the *Public Lands Administration Regulation* as PLUZs, PLRAs or Public Recreation Trails.

Development of the *Public Lands Administration Regulation*

21. In the summer of 2010, the Crown proposed a *Public Lands Administration Regulation* under the *Public Lands Act*.

22. The Applicants sought consultation with the Crown in respect of the *Public Lands Administration Regulation* because:

    a. Access to, and the use of, Crown lands is necessary for the exercise of Treaty rights and the *Public Lands Administration Regulation* regulates access to and use of Crown lands for the exercise of Treaty rights;

    b. The *Public Lands Administration Regulation* fails to recognize or accommodate the Applicants' Treaty rights and treats Treaty rights as if they were merely "recreational uses" rather than constitutionally-protected rights; and

    c. The *Public Lands Administration Regulation* impacts and infringes the Applicants' Treaty rights by restricting access to Crown lands and restricting the location, means and timing of the exercise of Treaty rights on Crown lands.

23. As a part of the Applicants' attempt to engage the Crown in consultation, the Applicants provided the Crown with:

    a. Information relating to their rights and interests that are likely to be impacted by the *Public Lands Administration Regulation*;

    b. Information about their concerns in respect of the *Public Lands Administration Regulation*;

    c. Information with respect to their expectations of the consultation process;

    d. Proposals with respect to how to continue consultation; and

    e. Proposals for addressing impacts to their rights from the *Public Lands Administration Regulation* and potential accommodations for those impacts.

24. During the months of August and September 2010, the Crown gave the Applicants approximately 6 weeks to review the 273 page proposed *Public Lands Administration Regulation* and provide their comments to the Crown.

25. ~~On or about August 20, 2010~~ Beginning on or about August 11, 2010, and on numerous subsequent occasions, the Applicants asked for an engagement process in relation to the *Public Lands Administration Regulation* that would result in meaningful consultation. The Applicants raised serious concerns with respect to the proposed *Public Lands Administration* Regulation and its potential impacts on the Applicants' Treaty rights.

26. The Crown did not consult with the Applicants about the consultation process that would be undertaken in relation to the *Public Lands Administration Regulation*, despite requests by the Applicants.

27. On or about September 13, 2010, the Crown held a meeting to present the *Public Lands Administration Regulation* to the Applicant Fort McKay First Nation. On or about September 17, 2010, the Crown held a 2-hour meeting to present the *Public Lands Administration Regulation* to the Applicant Dene Tha First Nation. Also on or about September 17, 2010, the Crown held a joint meeting to present the *Public Lands Administration Regulation* to the Applicants Horse Lake First Nation and Duncan's First Nation. On or about September 20, 2010, the Crown held a 3-hour joint meeting to present the *Public Lands Administration Regulation* to the Applicants Athabasca Chipewyan First Nation and Mikisew Cree First Nation. The Crown also held one meeting with Swan River First Nation to present the *Public Lands Administration Regulation*.

28. The Crown did not attend these meetings with an open mind or with an intention to try to address or accommodate the Applicants' concerns. The Crown unilaterally decided before the meetings were held that the consultation process with the Applicants would be over by September 24, 2010, regardless of what concerns were raised by the Applicants.

29. At the meetings, the Applicants expressed concerns about adverse impacts to their Treaty rights from the *Public Lands Administration Regulation*. The Applicants also indicated that they needed additional information regarding the proposed regulation to understand potential impacts, an opportunity to provide additional information to the Crown and an engagement process between the Crown and their respective communities so that potential impacts could be explored and better understood.

30. On a number of occasions in the months that followed the meetings, the Applicants again requested information and further engagement from the Crown and again raised concerns about impacts and infringements of Treaty rights from the proposed regulation.

31. Much of the information requested by the Applicants was not provided by the Crown and the Crown did not engage with the Applicants regarding the concerns they raised prior to and following the meetings. Rather, the Crown consistently and repeatedly took the position that consultation ended following the first meeting with the Applicants.

32. On a number of occasions, including during the meetings with the Crown, the Applicants requested that the exercise of Treaty rights be exempted from the *Public Lands Administration Regulation*. The Crown refused this request.

33. On or about August 25, 2011, the Respondents Lieutenant Governor in Council and the Minister of Sustainable Resources Development jointly adopted the *Public Lands Administration Regulation* through Order in Council 381/2011 and Ministerial Order 05/2011 respectively. These decisions are the subject of this Application.

34. On or about September 12, 2011, the *Public Lands Administration Regulation* was implemented by the Crown and became enforceable. The Applicants were given notice of the decision to approve the *Public Lands Administration Regulation* on the same day.

35. On or about September 12, 2011, the Crown provided the Applicants with the *Public Lands Administration Regulation* Standard Operating Procedure ("Standard Operating Procedure"), which purports to provide guidance to Crown officers in relation to the enforcement of the *Public Lands Administration Regulation*.

36. The Crown did not consult with the Applicants on the Standard Operating Procedure, despite the Applicants' requests and despite the fact that the Standard Operating Procedure appears to have been in draft form since at least February 27, 2011.

37. After receiving notice of the approval of the *Public Lands Administration Regulation*, the Applicants Athabasca Chipewyan First Nation and Mikisew Cree First Nation again requested consultation on the *Public Lands Administration Regulation* and the Standard Operating Procedure. The Crown refused these requests.

The First Decision at Issue – Order in Council 381/2011

38. On or about August 25, 2011, the Lieutenant Governor in Council made its decision to approve the *Public Lands Administration Regulation* by approving Order in Council 381/2011.

39. Order in Council 381/2011 was made pursuant to statutory authority created by ss. 8, 9, 9.1, 71.1, 108 and 119 of the *Public Lands Act* and vested in the Lieutenant Governor in Council by that Act.

40. Order in Council 381/2011 was not within the scope of the authority delegated to the Lieutenant Governor in Council under the *Public Lands Act* to the extent it approved the sections of the *Public Lands Administration Regulation* that derogate from and unjustifiably infringe Treaty rights.

41. Order in Council 381/2011 was also not within the scope of the authority delegated to the Lieutenant Governor in Council under the *Public Lands Act* to the extent it approved the sections of the *Public Lands Administration Regulation* that breach the NRTA and are outside the jurisdiction of Alberta to apply to the exercise of Treaty rights.

A) Infringement of Treaty Rights

42. As set out in paragraphs 17, 18, 19 and 20 above, the *Public Lands Administration Regulation* derogates from and interferes with the ability of the Applicants to exercise their Treaty rights by, among other things:

    a. Restricting or prohibiting the practice of Treaty rights;

    b. Restricting the duration of time over which Treaty rights can be exercised;

    c. Restricting the locations where Treaty rights can be exercised;

    d. Restricting the means by which Treaty rights can be exercised;

    e. Restricting or prohibiting practices that constitute ancillary or incidental Treaty rights; and

    f. Subjecting the exercise of Treaty rights to unfettered administrative discretion.

43. The interferences, restrictions and prohibitions in the *Public Lands Administration Regulation* are unreasonable because:

    a. They were imposed without adequate or meaningful consultation with the Applicants;

    b. The Crown provided no evidence that the exercise of Treaty rights is causing safety or conservation concerns on vacant public lands that would require the provisions in the *Public Lands Administration Regulation* to be applied to Treaty rights - to the contrary, the Crown has described Treaty rights as “low impact activities”;

    c. The Crown did not provide priority to the exercise of Treaty rights in the *Public Lands Administration Regulation*;

d. The Crown did not exempt Treaty rights from the permitting or other requirements in the *Public Lands Administration Regulation*, but did provide exemptions to other groups using vacant public lands;

e. The *Public Lands Administration Regulation* subjects the Applicants to the exercise of prosecutorial discretion and restraint for the protection of their Treaty rights; and

f. The Standard Operating Procedure provides no meaningful or effective accommodation or protection of the Applicants' Treaty rights and is not a legally enforceable document.

44. The interferences, restrictions and prohibitions in the *Public Lands Administration Regulation* are more than a mere inconvenience and impose undue hardship on the Applicants because:

a. The *Public Lands Administration Regulation* allows for lengthy delays in issuing access permits;

b. The *Public Lands Administration Regulation* unduly limits the duration of access permits to 14 days, with the 14 day period beginning from the day the permit is issued, not the day the permit is received;

c. The *Public Lands Administration Regulation* requires access permits to be renewed every 14 days if the exercise of Treaty rights continues beyond 14 days;

d. The *Public Lands Administration Regulation* gives unfettered discretion to the Crown regarding placement of conditions on access permits;

e. The *Public Lands Administration Regulation* erodes an important aspect of the Applicants' Treaty rights by restricting the exercise of Treaty rights near and along water bodies and the means of accessing and using harvesting areas, thereby impacting the Applicants' ability to access preferred harvesting locations and restricting the Applicants' preferred access routes to harvesting locations; and

f. The many restrictions imposed on activities in PLUZs and PLRAs make it effectively impossible to exercise Treaty rights in those areas.

45. The *Public Lands Administration Regulation* denies the Applicants the preferred means of exercising their Treaty rights because it:

a. Restricts the use of areas in and around water bodies, which are preferred locations and means for exercising Treaty rights and ancillary and incidental Treaty rights such as travelling and camping;

b. Restricts the use of wheeled and tracked conveyances, which are a preferred means of accessing harvesting areas to exercise Treaty rights and constitute ancillary and incidental Treaty rights;

c. Restricts gatherings and cultural activities which constitute ancillary and incidental Treaty rights;

d. Restricts the use of cabins which constitutes ancillary and incidental Treaty rights; and

e. Restricts the duration of exercising Treaty rights.

46. The Crown has not justified the application of the *Public Lands Administration Regulation* to the exercise of Treaty rights. In particular,

a. The Crown has not demonstrated that it has a compelling objective for applying the *Public Lands Administration Regulation* to the exercise of Treaty rights;

b. The Crown has not demonstrated that the *Public Lands Administration Regulation* needs to be applied to Indians and the exercise of Treaty rights for the purposes of conservation of game or safety;

c. The Crown has failed to effectively minimize the restrictions and hardships caused by the application of the *Public Lands Administration Regulation* to the exercise of Treaty rights;

d. The Crown failed to include an exemption for the exercise of Treaty rights in the *Public Lands Administration Regulation*, despite including exemptions for various categories of recreational users in the *Public Lands Administration Regulation*;

e. The Crown failed to give priority to the exercise of Treaty rights in the *Public Lands Administration Regulation*; and

f. The Crown failed to meaningfully consult the Applicants or provide accommodation, despite having knowledge of the Applicants' Treaty rights and despite the potential for the *Public Lands Administration Regulation* to adversely affect Treaty rights.

B) Lack of Jurisdiction

47. The NRTA is a constitutional agreement that transferred authority over public lands to Alberta. The authority over public lands that was transferred to Alberta under the NRTA is limited by Treaty harvesting rights.

48. The NRTA does not give the Crown the authority to erode or infringe Treaty rights. Under the NRTA, the Crown has an obligation to secure to the members of the Applicants, and other First Nations, the continuance of access to Crown lands for the exercise of Treaty rights and to only limit the exercise of Treaty rights for the purposes of conservation of game.

49. The decision of the Lieutenant Governor in Council to approve the *Public Lands Administration Regulation* breaches the constitutional limits on Alberta's authority to regulate the exercise of Treaty rights under the NRTA because, as set out in paragraphs 17, 18, 19 and 20 above, the *Public Lands Administration Regulation* purports to restrict access to lands where Treaty rights can be exercised, the areas where Treaty rights can be exercised, and the ways in which those rights can be conducted.

50. The restrictions on Treaty rights in the *Public Lands Administration Regulation* do not relate to the conservation of game and are not necessary for safety purposes.

51. Accordingly, the Order in Council 381/2011 is *ultra vires* the Crown, or of no force or effect, to the extent that it interferes with Treaty rights.

The Second Decision Being Challenged – Ministerial Order 05/2011

52. On or about August 25, 2011, the Minister of Sustainable Resources made Ministerial Order 05/2011 to approve the *Public Lands Administration Regulation* despite the lack of meaningful consultation and accommodation regarding the *Public Lands Administration Regulation*.

53. Ministerial Order 05/2011, and any recommendation by the Minister to the Lieutenant Governor in Council regarding the approval of the *Public Lands Administration Regulation,* was the culmination of the Crown's conduct, undertaken by the Minister, to develop the *Public Lands Administration Regulation*.

54. The Crown's development of the scheme for the *Public Lands Administration Regulation* triggered a duty to consult with the Applicants because:

    a. The Crown had knowledge of the Applicants' Treaty rights;

    b. The development of the *Public Lands Administration Regulation* was Crown conduct, culminating in Ministerial Order 05/2011 and

any recommendation by the Minister to the Lieutenant Governor in Council, regarding the *Public Lands Administration Regulation*;

c. The Crown had knowledge that the *Public Lands Administration Regulation* had the potential to adversely impact and infringe the Applicants' Treaty rights.

55. The duty to consult was breached because:

a. The Crown did not properly approach the assessment of the level of consultation required in relation to the *Public Lands Administration Regulation*, because the Crown unilaterally determined an improper level of consultation before assessing the potential impacts of the *Public Lands Administration Regulation* on the exercise of rights and before receiving information about potential impacts from the Applicants;

b. The Crown did not provide the Applicants with its preliminary assessment of its understanding of the rights of the Applicants or the potential adverse impacts to those rights, nor did the Crown provide the Applicants with an opportunity to comment on that assessment;

c. The Crown provided the Applicants with insufficient time for consultation;

d. The Crown provided the Applicants with insufficient information regarding the *Public Lands Administration Regulation*;

e. The Crown decided consultation would end after one meeting with each of the Applicants and without addressing the concerns of the Applicants;

f. The Crown did not meaningfully engage with the Applicants and was not responsive to their concerns or requests;

g. The Crown breached its own consultation guidelines;

h. There was no consultation on the Standard Operating Procedure; and

i. The Standard Operating Procedure is not accommodation because it was prepared without consultation, is not responsive to the Applicants' concerns, and is not legally enforceable.

56. The totality of the consultation record shows that the Crown had no intention of genuinely listening to, or addressing, the concerns raised by the Applicants.

Remedies sought:

57. A Declaration that ss 5, 8, 9, 11, 12, 32, 33, 34, 35, 37, 38, 39, 43, 44, 45, 46, 47, 48, 178, 179, 180, 182, 184, 185, 186, 187, 188, 189, 190, 192, 193, 195, 198, 200, 201, 202, 204 and 206 and Schedule 4 of the *Public Lands Administration Regulation*, individually or together, constitute prima facie infringements of the Treaty rights of the Applicants;

58. A Declaration that the infringements of the Applicants' Treaty rights are not justified;

59. A Declaration that ss 5, 8, 9, 11, 12, 32, 33, 34, 35, 37, 38, 39, 43, 44, 45, 46, 47, 48, 178, 179, 180, 182, 184, 185, 186, 187, 188, 189, 190, 192, 193, 195, 198, 200, 201, 202, 204 and 206 and Schedule 4 of the *Public Lands Administration Regulation*, individually or together, breach the NRTA to the extent the Crown is purporting to apply them to the exercise of Treaty rights;

60. A Declaration that ss 5, 8, 9, 11, 12, 32, 33, 34, 35, 37, 38, 39, 43, 44, 45, 46, 47, 48, 178, 179, 180, 182, 184, 185, 186, 187, 188, 189, 190, 192, 193, 195, 198, 200, 201, 202, 204 and 206 and Schedule 4 of the *Public Lands Administration Regulation*, individually or together, are *ultra vires* the Province to the extent the Crown is purporting to apply them to the exercise of Treaty rights;

61. A Declaration that ss 5, 8, 9, 11, 12, 32, 33, 34, 35, 37, 38, 39, 43, 44, 45, 46, 47, 48, 178, 179, 180, 182, 184, 185, 186, 187, 188, 189, 190, 192, 193, 195, 198, 200, 201, 202, 204 and 206 and Schedule 4 of the *Public Lands Administration Regulation*, individually or together, are invalid and of no force or effect to the extent the Crown is purporting to apply them to the exercise of Treaty rights;

62. A Declaration that the Crown in right of the Province of Alberta had a duty to consult with the Applicants and attempt to accommodate the impacts to the Applicants' Treaty rights in relation to the *Public Lands Administration Regulation*;

63. A Declaration that the Crown in right of the Province of Alberta breached its duty to consult with the Applicants and accommodate the impacts to the Applicants' Treaty rights in relation to the *Public Lands Administration Regulation*;

64. An order for the costs of and incidental to this application;

65. Any other declaration that this Honourable Court may deem just.

Affidavit or other evidence to be used in support of this application:

66. Such Affidavits as may be filed with the court.

Applicable Acts and Regulations:

67. *Alberta Rules of Court*, Alta Reg 124/2010, R 1.4(1), R 3.15; R 3.14; R 3.24(1);

68. *Judicature Act*, RSA 2000 c J-2, s 11;

69. *Proceedings Against the Crown Act*, RSA 2000 CP-25, s 16;

70. *Public Lands Act*, RSA 2000 CP-40, ss 8, 9, 9.1, 20, 28(2), 43(2), 62.1(2), 71.1, 104(4), 108, 109;

71. *Public Lands Administration Regulation*, Alta Reg 187/2011, ss 5, 8, 9, 11, 12, 32, 33, 34, 35, 37, 38, 39, 43, 44, 45, 46, 47, 48, 178, 179, 180, 182, 184, 185, 186, 187, 188, 189, 190, 192, 193, 195, 198, 200, 201, 202, 204 and 206 and Schedule 4.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).