SCC Court File No: 36692

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS ORGANIZATION – CLYDE RIVER and JERRY NATANINE

Appellants (Applicants)

- and -

PETROLEUM GEO-SERVICES INC. (PGS), MULTI KLIENT INVEST AS (MKI), TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS) and THE ATTORNEY GENERAL OF CANADA

Respondents (Respondents)

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PART I - STATEMENT OF FACTS

A. OVERVIEW

1. The Appellants say that this case is about their traditional rights, the impact of the Proponents' proposed seismic survey on those rights, and the Crown's duty to consult. The Appellants also make numerous complaints about the Federal Court of Appeal.

2. This case is about the Appellants' rights and the potential impacts of the Proponents' activities on those rights. As a result of their rights, the potential effect of the Proponents' activities on those rights, and the need for federal authorizations from the National Energy Board "**NEB**", the Federal Crown's duty to consult was triggered.

3. The NEB subsequently embarked on a 3½ year long consultation process with numerous local communities, organizations and individuals. The NEB concluded its process by finding that the proposed activity would not have significant impacts on the Appellants' rights and authorized the proposed activities to proceed subject to numerous conditions.

4. The Appellants sought judicial review of the NEB's decision to the Federal Court of Appeal. The Court of Appeal reviewed the Appellants' complaints carefully and dismissed the judicial review application. The Court of Appeal concluded, as this Court has confirmed on numerous occasions, that it was open to the federal government to rely on the NEB's statutory process to satisfy its duty to consult. The Court of Appeal then carefully reviewed the nature of the Appellants' rights, the potential impacts of the proposed activity, the consultation process that had taken place, and the response to that process, and concluded that the Crown's duty had been satisfied.

5. The Appellants now appeal to this Court. The Appellants raise numerous complaints about the NEB and Crown's behaviour that were never raised during the consultation process. In some ways the Appellants have also recast their arguments from the Court of Appeal. However, fundamentally, the Appellants appear to rely on two propositions. First, they disagree with this Court's decisions that the Crown can rely solely on a statutory process to satisfy its duty to consult. Second, they say that the Crown needed to do more – much more.

6. With respect, this Court's decisions have made it clear that the Crown is allowed to rely on existing statutory processes to satisfy its duty. Therefore, the Proponents respectfully submit

that the only real question on this appeal is whether the NEB's process did so. The Proponents respectfully submit that it did.

B. BACKGROUND

7. Petroleum Geo-Services Inc. and TGS-NOPEC Geophysical Company ASA are international seismic companies. Multi-Klient Invest AS is a subsidiary of PGS. For convenience, PGS, TGS, MKI, and the other parties involved on their behalf in this matter are referred to as the "**Proponents**".

8. A core issue in this appeal is what was done during the NEB's process to satisfy the Crown's obligations. With respect, the Appellants' Statement of Facts does not provide a full review of these facts. Therefore, the Proponents have set out an overview of the Proponents' application and what was done to satisfy the Crown's duty to consult.

1. The GOA Application

9. In early 2010, the Proponents began the statutory process to try to get approval to undertake a marine seismic survey in Baffin Bay and Davis Strait in Northern Canada. The seismic survey was originally planned to take place during the open water season over a 5-year period from 2011 to 2016.

10. The initial steps in this process involved filing a Project Description describing the proposed activity, and filing an application for what is known as a Geophysical Operations Authorization ("**GOA**"). The GOA was required under section 5 of the *Canada Oil and Gas Operations Act* ("**COGOA**"). The Project Description was required because the GOA application triggered a requirement to undertake an environmental assessment under the then *Canadian Environmental Assessment Act* ("**CEAA 1992**"). The NEB, created under the *National Energy Board Act*, was responsible for both of these processes.

> Affidavit of Darlene Davis sworn on September 26, 2014 ("**Davis Affidavit**"), para 5-10, Appellants' Record ("**AR**"), Vol II, pp 209-210; *Canada Oil and Gas Operations Act,* R.S.C. 1985, c. O 7; *Canadian Environmental Assessment Act,* S.C. 1992, c. 37; *National Energy Board Act*, R.S.C. 1985, c. N-7.

11. The proposed activity is non-extractive. It involves a purpose-built vessel equipped with air guns. The air guns generate seismic waves which are directed towards the sea bed and into the earth below. The sound generated by the air guns dissipates rapidly. The seismic waves are reflected back from the subsurface and are detected by hydrophones towed behind the survey

vessel. Since seismic waves travel through different subsurface conditions at different speeds, the seismic data can be used to help understand geological features beneath the seafloor.

> Environmental Assessment Report ("**EA Report**"), AR Vol I, p 16; Environmental Impact Assessment dated April 28, 2011 ("**EIA**"), AR Vol II, pp 267-268.

12. There is a long history of seismic surveys in marine environments around the world. Seismic surveys have been conducted in Baffin Bay and Davis Strait since the 1970s, with fairly continuous activity since the 1990s.

> EIA, AR Vol II, pp 265, 272 and 413-415.

13. The equipment that the Proponents proposed to use is state of the art and has been developed to minimize environmental impacts. From the outset, the Proponents committed to following the Statement of Canadian Practice on the Mitigation of Seismic Noise in the Marine Environment developed by Fisheries and Oceans Canada.

> EIA, AR Vol II, p 362; Statement of Canadian Practice on the Mitigation of Seismic Noise in the Marine Environment, AR Vol II, pp 383-387; Fisheries and Oceans Canada, "Review of Scientific Information on Impacts of Seismic Sound on Fish, Invertebrates, Marine Turtles and Marine Mammals", Joint Respondents' Record ("**JRR**") Vol III, p 664.

14. In 2008, the last time that the Proponents obtained a GOA, it took just over four months. The time before, in 2007, it took just over three months.

> TGS NOPEC – Baffin Bay/Davis Strait/North Labrador Sea 2D Marine Seismic Survey 2007 Operation Identifier No. 8624-T175-001P; TGS-Nopec 2D Marine Seismic Survey Baffin Bay/Davis Strait/Labrador Sea Operation Identifier 5552841; (**Proponents Authorities, Tabs 14 and 15**).

2. Initial Consultations

15. In January 2011, the Proponents filed a revised Project Description to reflect a change in the area for the proposed seismic activity.

> Davis Affidavit, para 9, AR Vol II, p 210.

16. Under CEAA 1992, the NEB was required to issue a Federal Coordination Notice to a number of federal departments and agencies to obtain initial input into the environmental assessment. This included Indian and Northern Affairs Canada ("**INAC**"), the Qikiqtani Inuit Association ("**QIA**"), the representative of Inuit interests in the Qikiqtani region of Nunavut, and

the Nunavut Impact Review Board, the environmental assessment agency that assesses potential impacts of proposed developments in Nunavut. The proposed activity would actually take place outside Nunavut and seaward of Canada's 12 nautical mile Territorial Sea Limit.

> Letter dated January 26, 2011, AR VOL II, pp 247-250; Letter from QIA to NEB dated October 15, 2013, AR Vol IV, p 937.

17. In February 2011, the Proponents met with the local Hunters and Trappers Organizations ("**HTOs**") in each of the communities of Clyde River, Pond Inlet, Qikiqtarjuaq and Iqaluit on the east coast of Baffin Island. HTOs are established under Article 5.7 of the Nunavut Land Claims Agreement and are responsible for overseeing wildlife harvesting by Inuit, managing wildlife harvesting among its members, and other harvesting issues. The consistent message from these meetings was that concerns should be addressed through public meetings and that the Proponents should keep the local communities informed of the progress of the proposed activities.

> EIA, AR Vol II, pp 405-411; Nunavut Land Claims Agreement, AR Vol V, pp 1028-1029.

18. On April 28, 2011, the Proponents filed an Environmental Impact Assessment ("**EIA**") under CEAA 1992. An applicant's EIA is one of the inputs that the NEB uses to complete its environmental assessment of a proposed activity. The Proponents' EIA included: a detailed description of the proposed seismic activity; the biological, human and socioeconomic environment; and, an assessment of the impacts of the proposed activity, including the proposed mitigation measures. The EIA also discussed the Proponents' consultations to date.

> EIA, AR Vol II, pp 251-481.

19. In May 2011, the Proponents engaged in further consultations in Pond Inlet and Clyde River. During these meetings, community members expressed concerns about the potential impacts of the proposed activities on marine mammals and a desire to incorporate traditional Inuit knowledge, known as Inuit Quajimajatuqangit or "**IQ**", into the planning of the activities. A representative of the QIA also attended these meetings.

> Davis Affidavit, para 28-29, AR Vol II, pp 212-213.

20. In May and June 2011, various letters were sent to the NEB. These included a letter from the QIA expressing concerns about the consultation process, the available scientific information, and the incorporation of IQ into the seismic survey.

Davis Affidavit, para 30-31, AR Vol II, p 213; Letter dated June 13, 2011, AR Vol IV, pp 838-842.

21. Based on this initial response, the Proponents recognized that further consultation would be necessary. As a result, the Proponents postponed the planned start date for the seismic survey. The Proponents also engaged Nexus Coastal Resource Management Limited ("**Nexus**") to assist them with further community consultation and an IQ study.

Davis Affidavit, para 32-35, AR Vol II, pp 213-214; Letter dated July 12, 2011, JRR Vol 1, p 1.

22. Decisions on GOA applications are normally made by the NEB's Chief Conservation Officer. However, under section 15 of the *National Energy Board Act*, the NEB can authorize one of its members to report and make recommendations to the NEB on any question and for the purpose of taking evidence or acquiring the necessary information to make the report and recommendations. On July 13, 2011, the NEB withdrew the Chief Conservation Officer's delegation to consider the GOA application and authorized one of its members, David Hamilton, to report and make recommendations to the NEB on the Proponents' application.

Letter dated July 13, 2011, AR Vol III, p 486.

3. Consultation Process through Information Requests No. 1 to 3

23. One of the tools that the NEB has at its disposal is Information Requests or "**IRs**". IRs are written interrogatories that require a proponent to answer questions or supply additional information. On September 8, 2011, the NEB issued IR No. 1 to the Proponents. In IR No. 1, the NEB required the Proponents to provide a written response to each of the letters that had been sent to the NEB in May and June. IR No. 1 also required the Proponents to clarify the geographic scope of the proposed activity and the proposed mitigation measures and to provide an update on community consultations and a copy of certain management plans.

IR No. 1, JRR Vol I, p 2.

24. The Proponents responded to IR No. 1 on February 23, 2012. Their response included:

a) A discussion of research regarding the potential physical and behavioural effects of sound on fish, crustaceans, and pinnipeds (seals, sea lions, etc.);

b) A discussion of how the Proponents intended to continue to engage with the communities and to develop a community engagement strategy;

c) A further discussion of mitigation measures; and

d) The Proponents' plans to work with the Baffin Bay communities to learn about and incorporate IQ into the seismic survey.

Response to IR No. 1, JRR Vol I, p 7.

25. On April 4, 2012, the NEB issued IR No. 2. IR No. 2 requested an update on timing and requiring the Proponents to provide a consultation plan. The Proponents responded to IR No. 2 on May 3, 2012. In that response, the Proponents provided an overview of studies they had conducted to identify stakeholders and their needs/concerns. The response to IR No. 2 also discussed the Proponents' plan to undertake an IQ study and further community consultations.

IR No. 2, JRR Vol I, p 176; Response to IR No. 2, JRR Vol I, p 180.

26. On May 16, 2012, the QIA wrote to the NEB expressing concerns about the timing of consultations and potential impacts on marine mammals. The QIA recommended a multi-stage consultation process and the incorporation of IQ into the seismic survey. On May 30, 2012, the NEB issued IR No. 3 to the Proponents requiring the Proponents to respond to the QIA’s concerns. The Proponents responded to IR No. 3 on June 7, 2012.

IR No. 3, JRR Vol I, pp 184-185; Response to IR No. 3, JRR Vol I, p 186.

27. In July 2012, CEAA 1992 was replaced by the *Canadian Environmental Assessment Act*, *2012* ("**CEAA 2012**"). Under CEAA 2012, the GOA was no longer required to undergo an environmental assessment. It was also no longer subject to the public participation provisions of CEAA 1992. However, the NEB decided that it would continue the environmental assessment under its statutory powers under COGOA. The NEB also sought the Proponents’ consent to allow the NEB to continue to disclose the Proponents’ filings so the NEB could continue to make the Proponents’ materials available on its website and could conduct community meetings on the Proponents’ application. The Proponents consented to this in early August 2012.

Letter dated July 9, 2012, JRR Vol I 8, p 190; Letter dated August 8, 2012, JRR Vol I, p 195.

4. Further Consultations in 2012 and 2013

28. From June to October 2012, the Proponents held further consultation sessions with the HTOs and Hamlet Councils in each of the six Inuit communities on the east coast of Baffin Island: Pond Inlet, Pangnirtung, Iqaluit, Clyde River, Qikiqtarjuaq and Kimmirut. The Proponents

reported to the NEB on these sessions by preparing Community Engagement Reports describing what took place during these sessions.

> Affidavit of Christopher M. Milley sworn on September 26, 2014 ("**Milley Affidavit**"), para 24-26, AR Vol II, p 225; Davis Affidavit, para 49 and 51, AR Vol II, p 216; June Community Engagement Report, JRR Vol I, p 230; October Community Engagement Report, JRR Vol I, p 195.

29. As anticipated in the response to IR No. 3, the Proponents were not able to answer all of the questions that were asked at these sessions. To address this, the Proponents prepared a Supplementary Report addressing various topics that had been raised during the June and October sessions. The Proponents also prepared a Question and Answer document to facilitate further discussions. These documents were prepared in both English and Inuktituk.

> Response to IR No. 3, JRR Vol I, p 187; Milley Affidavit, para 34, AR Vol II, p 226; Supplementary Report, JRR Vol I, p 223; Questions and Responses from June and October Community Information Sessions, AR Vol III, pp 490-497.

30. In the October Community Engagement Report, the Proponents also advised that they had decided to use what is known as Passive Acoustic Monitoring as a further mitigation measure, as suggested in some of the consultations to date. Passive Acoustic Monitoring is a technology used to listen for marine mammal vocalizations prior to the commencement of seismic activities.

> October Community Engagement Report, JRR Vol I, p 195.

31. In November and December 2012, the Proponents held further meetings with the HTOs and Hamlet Councils in each of the six communities and further public meetings in each of Qikikiqtarjuaq, Iqaluit and Kimmirut. The Proponents prepared further Community Engagement Reports on these sessions. All of the Proponents' Community Engagement Reports were filed with the NEB and distributed to the six Hamlet Councils and HTOs.

> Milley Affidavit, para 40-45, AR Vol II, p 227; November-December Community Engagement Report, JRR Vol I, p 204; Addendum to November-December Community Engagement Report, JRR Vol I, p 221.

32. On March 22, 2013, the NEB decided that it would hold its own consultation sessions in Iqaluit, Qikiqtarjuaq, Pond Inlet and Clyde River. To facilitate further input, the NEB prepared and issued a Discussion Paper on the proposed activity. The NEB advised that it would accept written comments on the proposed activity and that the Discussion Paper was also intended to

guide the NEB's consultation sessions. Those sessions were held in late April and early May 2013. The NEB subsequently published the transcripts of those meetings on its website.

> Milley Affidavit, para 46-53, AR Vol II, p 228; Discussion Paper, AR Vol III, pp 500-514; Notice of public meetings dated March 22, 2013, AR Vol II, pp 515-516; Transcripts, AR Vol III p 517 – Vol IV p 772.

33. On April 4, 2013, the NEB issued IR No. 4. IR No. 4 requested further operational details such as how navigation would take place during periods of low visibility and when vessel speed and course would be altered. The Proponents responded to IR No. 4 on April 15, 2013.

> IR No. 4, JRR Vol I, p 245; Response to IR No. 4, JRR Vol I, p 247.

34. During the NEB's April and May sessions, some of the questions that were directed to the Proponents required more detailed responses than could be provided during the meetings. On May 31, 2013, the NEB advised the Proponents that it had determined that they considered the Proponents' application to be incomplete and that it was suspending its assessment of the application until the Proponents responded to the outstanding questions and provided other information. In particular, the NEB required the following:

a) Responses to the questions that were not answered at the April and May 2013 sessions and confirmation that this information had been provided to the communities and local fisheries organizations;

b) A detailed description of the information that had been obtained from local communities and organizations about the project design and how this information had affected the project design;

c) An estimated survey acquisition plan for each survey season; and

d) An approximate schedule for each survey season and a rationale for the schedule that referenced considerations of wildlife and other environmental factors.

> Letter dated May 31, 2013, AR Vol IV, pp 775-779.

35. On August 30, 2013, the Proponents responded to the NEB. The Proponents' response included a number of Supplementary Reports responding to the questions raised during the NEB's consultation sessions, an updated review of relevant scientific information, and a report

on interactions between various types of marine mammals and seismic noise. An Executive Summary of one of the Supplementary Reports and a study on air gun blasts in Baffin Bay and Davis Strait were translated into Inuktituk. Those translations and the full Supplementary Report were couriered to each of the Hamlet Council offices together with the Supplementary Report arising from consultations in the particular Hamlet. All of the Supplementary Reports were also made available to each of the HTOs and Hamlet Councils through a dedicated file transfer site. This site was set up to be accessible even with poor internet connectivity.

Letter dated August 30, 2013, JRR Vols II-XI, pp 255-4180; Milley Affidavit, para 58-65, AR Vol II, pp 229-230; Davis Affidavit, para 68-70, AR Vol II, p 219.

36. Given the extensive nature of the Proponents' response, on September 13, 2013, the NEB announced that the seismic survey would not commence in 2013, and invited further comments on the GOA application. The NEB subsequently extended the deadline for further comments in response to a request from the Arctic Fishery Alliance.

Davis Affidavit, para 74-77, AR Vol II, p 220.

37. The NEB received a number of letters and comments in response to its request for further input. Among other things, community members forwarded an article from a scientific journal regarding the impact of seismic testing on marine mammals. The QIA also made further submissions about the consultation process and the use of IQ in the seismic survey.

AR Vol IV, pp 929 – 936.

38. On November 8, 2013, the Proponents responded to the QIA's submissions to the NEB. The Proponents noted that scientific certainty was not possible, but that the Proponents had undertaken rigorous research on the scientific research and provided it to the communities as they requested. The Proponents also described how they had incorporated IQ into the proposed activity to date, and how they intended to do so going forward.

Letter dated November 8, 2013, JRR Vol XI, p 4181.

5. Request for a Strategic Environmental Assessment and Approval of Benefits Plan

39. On April 8, 2014, the QIA wrote to the Minister of INAC requesting that a Strategic Environmental Assessment ("**SEA**") for Baffin Island be completed before the NEB finished its assessment of the GOA application. This was the first time that any party had requested the Crown's direct participation in issues relating to the GOA application.

Letter dated April 8, 2014, AR Vol IV, pp 948-950.

40. On June 10, 2014, the Minister responded to the QIA's letter. The Minister indicated that he was aware of the GOA application and that the review had been under way since 2011. The Minister further indicated that he had confidence that the NEB would carefully weigh all the evidence and views in its decision-making process and that the scope of the NEB's mandate was sufficiently broad to deal with all of the matters before it; in particular, the issues that the QIA raised about the potential impacts on Inuit or on the marine environment and marine mammals within the Nunavut Settlement Area.

41. The Minister also noted, while he had considered the issue, he disagreed that a SEA was necessary prior to the NEB's determination but looked forward to continuing to work with the QIA on the plans for a SEA. Finally, the Minister noted that he had reviewed and approved the Canada Benefits Plan required under COGOA before the GOA could be approved.

Letter dated June 10 2014, AR Vol IV, pp 966-967.

6. The NEB's Decision

42. On June 26, 2014, the NEB published its Environmental Assessment Report on the proposed activity ("**EA Report**") and granted a GOA to the Proponents. Contrary to the Appellants' suggestions that the proposed activity poses significant risks of harm, the NEB concluded that, with the implementation of the Proponents' commitments, environmental protection procedures and mitigation measures, and compliance with the Board's regulatory requirements and the conditions included in the EA Report, the proposed activity was not likely to cause significant adverse environmental effects. The EA Report also addressed the Appellants' rights and the significance of those rights, referencing two major studies published by the Nunavut Wildlife Management Board, and contained a detailed section setting out the NEB's findings on the Aboriginal consultation conducted with respect to the GOA application.

AR Vol I, pp 1-45.

43. During the course of the GOA process, and as a result of consultation, the Proponents changed the proposed seismic survey area and modified the proposed survey lines so that the seismic survey would be conducted further offshore. The NEB summarized other changes to the seismic survey in its EA Report as follows:

The Board notes that MKI has implemented actions and made commitments as a result of its consultation with Aboriginal groups. For example, MKI has:

- contracted NEXUS Coastal Resource Management to assist in developing an Aboriginal consultation plan;
- committed to employing two Inuit Observers, one on the seismic vessel and the other on the support vessel;
- committed to the installation of Passive Acoustic Monitoring onboard the seismic vessel to listen for marine mammals;
- committed to conduct an Aboriginal Traditional Knowledge Study (IQ) study, and to work with Inuit communities on the design of the study;
- prepared a survey acquisition plan based on an interaction assessment of MKI's Activity and certain marine mammal species;
- committed to continuing consultation with Inuit communities throughout the duration of the Activity as well as after the conclusion of field operations;
- committed to hiring Community Liaison Officers in four of the communities (Pond Inlet, Clyde River, Qikiqtarjuaq and Iqaluit) to facilitate communication between MKI and the communities;
- committed to the sharing of a final observation report with Inuit communities; and
- committed to working with the BFC [Baffin Fisheries Coalition] and AFA [Arctic Fishery Alliance] to share the timing and location of the program in an effort to avoid interaction between the respective operations.

Milley Affidavit, para 39, AR Vol II, p 227; EA Report, AR Vol I, pp 24-25 (as MKI was designated as the operator, the NEB refers to MKI throughout the EA Report).

44. The NEB's approval of the GOA was subject to 15 conditions. These included requiring the Proponents to file an annual environmental commitments tracking table, a fishing gear compensation plan, a report describing how available IQ has been considered and incorporated into the project design 30 days prior to the commencement of the seismic survey each season, and an annual Marine Mammal Observer report. The Proponents are also required to conduct update meetings in interested communities following each operational season and to provide the NEB with meeting minutes from those meetings identifying the concerns raised and how the Proponents propose to address those concerns.

Terms and Conditions, AR Vol I, pp 3-4.

45. Part of the IQ study was to draw on knowledge from the local communities. Nexus commenced IQ study activities in the summer of 2013. The Appellants refused to participate in these efforts. In January 2014, the Appellants denied a further application by Nexus to conduct research on IQ.

Milley Affidavit, para 76-85, AR Vol II, pp 231-232.

7. The Federal Court of Appeal

46. On July 28, 2014, the Appellants applied for judicial review of the NEB's decision. None of the other Inuit groups or communities sought review of the GOA. The Minister's decisions not to undertake a SEA and to approve the Benefits Plan were not appealed or reviewed.

47. The Federal Court of Appeal unanimously dismissed the Appellants' application on August 17, 2015. After an extensive review of the law, the NEB's reasons and the record, the Court of Appeal concluded that the NEB has a mandate to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult; that the NEB's process in fact afforded meaningful consultation sufficient that the Crown could rely on it to fulfil its duty to consult; and that the NEB's EA Report and the GOA Terms and Conditions provided a reasonable degree of accommodation of the Appellants' concerns about the potential impact of the seismic survey on their section 35 rights.

Federal Court of Appeal Reasons ("**FCA Decision**"), para 31-112, AR Vol I, pp 69-97.

PART II - STATEMENT OF ISSUES

48. The Appellants set out four questions in their Factum. The Proponents have restated these questions to more specifically identify the issues that the Proponents submit are raised by each of the Appellants' questions. The labelling below corresponds to the Appellants' labelling.

a) Is an administrative tribunal or other Crown decision-maker required to expressly acknowledge that an Aboriginal group or groups have constitutional rights, to conduct an explicit *Haida* analysis, and to expressly indicate that they are assessing Crown consultation in order for adequate consultation to have taken place? Did the Court of Appeal err in its approach to the review of the NEB's decision?

b) Was direct Crown participation in the NEB's process necessary to fulfill the Crown's duty to consult? Does deep consultation require that the Aboriginal group or groups have full participatory rights in the decision-making process and can participate in a full adversarial hearing?

c) Did the Court of Appeal otherwise err in consideration of the Appellants' rights under the Nunavut Land Claims Agreement? Did the NEB or Crown have to address the Appellants' international law issues before the duty to consult could be satisfied?

d) Did the Court of Appeal suggest that future consultation at the operational phase could cure any deficiencies in the duty to consult to date? Did the Court of Appeal otherwise err in referring to future consultation?

49. The Proponents have tried to set out their submissions to way that conforms as closely as possible to the Appellants' questions and the issues above.

PART III - STATEMENT OF ARGUMENT

50. The Proponents address each of the Appellants' primary arguments below. However, the Proponents submit there appear to be two themes which emerge when the Appellants' submissions are read as a whole.

51. The first appears to be an unwillingness to accept this Court's previous decisions that statutory processes can satisfy the duty to consult. This issue, and the Appellants efforts to argue against it, resonates in a number of places in the Appellants' submissions.

52. The second is the claim that more should have taken place during the consultation process. This itself isn't unusual. However, in many places, fundamentally, the Appellants' submissions appear to be inconsistent with the nature of this Court's approach to the duty to consult. The Appellants generally base the errors that they say took place in the consultation process on things that they say simply must be done during consultation, regardless of whether this was ever raised during the consultation process.

53. The Proponents submit that this is not consistent with this Court's approach. This Court has generally avoided imposing rules and creating hard lines. The Court has found that there is a requirement that all parties participate in consultation in good faith. The Court has also found

that the Crown must have the intention of substantially addressing Aboriginal concerns as they are raised. However, the Court has generally avoided other prescriptions. To the contrary, the Court has repeatedly emphasized that each case must be approached individually, and that there must be flexibility in how the duty is fulfilled. The Court has also emphasized the need for reasonableness and balance in the consultation process.

> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para 42-45 (**Appellants' Authorities, Tab 18**); *R. v. Sparrow*, [1990] 1 SCR 1075, pp 1101-1110 (**Proponents' Authorities, Tab 8**); *R. v. Nikal*, [1996] 1 SCR 1013, para 91-93 (**Proponents' Authorities, Tab 7**).

54. Consultation is about reconciliation. It's about respect and trying to work things out. It's ultimately about compromise and balance.

55. The Proponents respectfully submit that the Appellants' prescriptive approach doesn't serve these objects. If any of the parties to a consultation process think that the other should be doing more, with respect, that party should raise that issue during the process so it can be addressed at that time. There may not ultimately be agreement but the parties will have at least had the opportunity to discuss and debate it to see if it should be addressed further. The Proponents believe that is the path this Court has been encouraging.

A. DID THE COURT OF APPEAL ERR BY HOLDING THAT THE NEB HAD PROPERLY CONSIDERED THE ABORIGINAL RIGHTS OF THE INUIT AND THE DUTY TO CONSULT, DESPITE THE ABSENCE OF ANY REFERENCE TO ABORIGINAL RIGHTS OR THE DUTY TO CONSULT IN THE NEB'S REASONS?

56. The Appellants say that to produce a reasonable decision, the NEB was required to acknowledge the Inuit's constitutionally protected rights, to conduct an explicit *Haida* analysis, and to expressly indicate that they assessed the "Crown's" duty to consult when they assessed the adequacy of consultation, regardless of what else was done to satisfy the duty. The Appellants then say that the Court of Appeal failed because, no matter what analysis it did, the Court of Appeal could not find that the duty to consult was satisfied if the NEB did not expressly address these requirements. The Appellants then make a number of other arguments that the Court of Appeal erred.

> Appellants' Factum, para 39, 40 and 41.

57. The Appellants' submissions on these topics overlap. The Proponents have attempted to address the Appellants' submissions on the NEB's requirements first and then address the Appellants' submissions on the Court of Appeal.

1. Was the NEB Required to Expressly Acknowledge the Constitutional Nature of the Appellants' Rights, to Conduct an Explicit *Haida* Analysis, and to Expressly Indicate that they were Assessing Crown Consultation?

58. The Appellants' say the following at paragraph 65 of their Factum: "To produce a reasonable decision, the NEB in this case was required to undertake, and articulate, a *Haida* analysis – just as this Court did in *Carrier Sekani.* The NEB failed in this regard: it did not even reference, much less analyze, the Crown's duty to consult or the Inuit's s. 35 rights. That alone is fatal to the reasonableness of the decision under review."

59. Notwithstanding the fundamental nature of this proposition, the Appellants put forward little, if anything, to support it.

60. The Proponents respectfully submit that there is no support in this Court's jurisprudence for the proposition that, unless an administrative tribunal or other Crown decision-maker explicitly addresses the Appellants' requirements, regardless of what role they are playing in satisfying the duty to consult, their decision fails.

61. This Court first addressed the NEB's obligations in relation to Aboriginal rights in *AG Quebec v. Canada*. That decision took place before *Haida* was decided and therefore would not be expected to address the Appellants' requirement to undertake an express *Haida* analysis. Interestingly however, the Quebec Cree did argue that the NEB's decision in that case would have a negative impact on their Aboriginal rights. As a result, the Quebec Cree argued that the NEB was required to meet the test of justification set out in *Sparrow*. In other words, to use the Appellants' words, "To produce a reasonable decision, the NEB was required to undertake, and articulate, a *Sparrow* justification analysis – just as this Court did in *Sparrow.*"

> *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159, p 185 (**Appellants' Authorities, Tab 38**).

62. But that's not what happened. This Court did find, as indicated at paragraph 44 of the Appellants' Factum, that "[i]t is obvious that the [NEB] must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*". However,

the Appellants then rely on this statement without considering what the Court found when it applied this standard to the NEB's decision.

Appellants' Factum, para 44, 46 and 59.

63. When the Court did apply the requirement for the NEB to act constitutionally to the NEB's reasons, the Court found, for reasons expressed in its decision, that it was not able to evaluate the impact of the NEB's decision on the Quebec Cree's rights. However, the Court then went on to consider, assuming that there was a *prima facie* impact on the Cree's rights, whether the NEB's decision met the standard to act constitutionally. The Court found that it did. Contrary to the Appellants' proposition, the Court reached this conclusion even though a search of the NEB's reasons do not contain any mention of *Sparrow*, "constitution", "Crown", "justification" or "section 35"; and there is nothing in the NEB's reasons that resembles a *Sparrow* justification analysis.

AG Quebec v. Canada, pp 185-186; **(Appellants' Authorities, Tab 38**); *NEB* NEB, Reasons for Decision in the Matter of Hydro-Quebec, EH-3-89, August 1990.[1]

64. The Proponents submit that *Haida* is also inconsistent with the Appellants' theory. In *Haida*, this Court found that there is a duty to consult on asserted rights, not just proven rights; and established the foundational parameters of that duty. As discussed further below, the Court also found that it was open to governments to set up regulatory schemes to address aspects of the Crown's duty. However, with respect, there is nothing in *Haida* that says that administrative tribunals or other Crown decision-makers must explicitly articulate a *Haida* analysis, or the Appellants' other requirements, any time that they make a decision that has the potential to affect Aboriginal rights.

65. To the contrary, when the Court discussed the kinds of duties that may arise in different situations in *Haida*, the Court said that in cases of deep consultation, written reasons may be required in some circumstances. The Proponents understand that the Court's examples were not intended to be confined to watertight compartments and there likely are other circumstances when written reasons would be required. However, it appears from the Court's overall

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[1] An electronic version of the NEB's decision can be found at: **https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90466/94151/94159/94195/94253/1990-08-01_Reasons_for_Decision_EH-3-89.pdf?nodeid=94257&vernum=-2**

discussion that there was no expectation that written reasons would always need to be provided.

66. This appears to be inconsistent with the Appellants' interpretation. Under the Appellants' interpretation, written reasons would always need to be provided to address their explicit requirements; and it appears regardless of the level of consultation. The Proponents appreciate that the Appellants' submissions are primarily focused on deep levels of consultation. However, based on the underlying rationale for the Appellants' theory, there does not appear to be any justifiable reason that would allow reasons to be ignored at lower levels of consultation. The Crown's duty is still engaged regardless of the level of consultation and still must be satisfied.

> *Haida*, para, 43-45 (**Appellants' Authorities, Tab 18**).

67. In *Haida*, the Province did not consult with the Haida on the replacement of TFL 39. As a result, there is not the same ability to analyze the Court's decision as there is in *AG Quebec v. Canada*. However, there is in the Court's companion case in *Taku River.* In *Taku River*, the Project Committee considering the Tulsequah Chief application included a sentence in its Report and Recommendations that, "consultations were conducted to satisfy statutory requirements under the EA Act as well as common law and constitutional obligations on the Crown." However, in the Minister's subsequent decision, there was not a single mention of the Taku River Tlinget's rights or the Crown's duty to consult. Notwithstanding this, this Court still found that the process that had taken place satisfied the Crown's duty to consult and accommodate; and there was no mention in the Court's reasons of the sentence in the Project Committee's Report or any suggestion that there was any specific language that needed to be used to achieve this result. Instead, the Court focused on what was done during the consultation process, not what was said.

> Environmental Assessment Office, *Tulsequah Chief Project Committee Recommendations Report*, January 1998, s 4.8 (**Proponents' Authorities, Tab 13**); Minister of Environment, Lands and Parks, Reasons for Decision in the Matter of an Application by Redfern Resources Ltd. for a Project Approval Certificate to Re-open the Tulsequah Chief Mine Project in Northwestern British Columbia, March 1998, (**Proponents' Authorities, Tab 17**); *Taku River Tlinget First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, para 33-44 (**Appellants' Authorities, Tab 44**).

68. In *Rio Tinto/Carrier Sekani*,[2] this Court returned to the duty to consult and the role of administrative tribunals. The Appellants rely heavily on *Carrier Sekani*, including arguing that *Carrier Sekani* "implicitly" rejected *Standing Buffalo*, because the Court assessed the BC Utilities Commission's ("**BCUC**") *Haida* analysis in *Carrier Sekani*.

> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (**Appellants' Authorities, Tab 39**); Appellants' Factum, para. 57-58.

69. However, the Proponents' respectfully submit that there is a much simpler reason for this Court's review of the BCUC's *Haida* analysis than the one put forward by the Appellants. This Court assessed whether the BCUC had properly conducted a *Haida* analysis in *Carrier Sekani* because the BCUC had actually conducted the first portion of a *Haida* analysis to determine if the duty to consult was triggered in that case. As a result, the Court was simply reviewing the BCUC's reasons. At no point in *Carrier Sekani* did the Court say that an explicit *Haida* analysis always needed to be conducted, or that an administrative tribunal or other Crown decision-maker always needed to expressly address the Appellants' other requirements.

> *Carrier Sekani*, para 76-93 (**Appellants' Authorities, Tab 39**).

70. The Appellants' interpretation of *Carrier Sekani* also ignores the Court's subsequent decision in *Beckman.* If the Appellants' interpretation of *Carrier Sekani* is correct, the first thing that this Court would have done in *Beckman* would have been to examine the reasons in question to see if these contained the Appellants' requirements. If they did not, the decision would fail automatically.

71. Again, that is not what the Court did. In *Beckman*, this Court confirmed that in some circumstances participation in a statutory process that was created for another purpose may satisfy the duty to consult, "if in substance an appropriate level of consultation is provided". However, there is nothing in the Court's review of the minutes of the Yukon Land Application Review Committee ("**LARC**") that recommended approval of Mr. Paulsen's application, or the Court's discussion of the subsequent decision of the Director approving Mr. Paulsen's application, that suggests that either the LARC or the Director expressly acknowledged the constitutional nature of the Little Salmon/Carmacks treaty rights, set out an explicit *Haida*

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[2] For consistency with the Appellants' submissions, the Proponents will refer to this case as *Carrier Sekani* in the remainder of their submissions.

analysis, or expressly identified that they were assessing the adequacy of the Crown's duty to consult. To the contrary, the minutes appear to have simply indicated that the LARC considered the concerns voiced by Little Salmon/Carmacks, considered the impact of Mr. Paulsen's application, and put in place mitigation measures that they felt were appropriate. There is no indication that the Director's letter went any further, if that.

> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para 25, 27 and 83-87 (**Appellants' Authorities, Tab 3**).

72. The Appellants subsequently refer to a number of lower court decisions that they argue support their requirements.

> Appellants' Factum, para 62-64.

73. As identified in the Appellants' Factum, there is a series of BC Supreme Court decisions that say that the Crown had to make a preliminary assessment of the strength of the Aboriginal group's asserted claims in the circumstances of those cases. However, the Proponents' respectfully submit that these decisions do not support the Appellants' theory.

74. First, the decisions may not be right. For example, the Appellants refer to the lower court decision in *Halalt*. However, that decision was overturned on appeal. In fact, the BC Court of Appeal questioned the need to provide a preliminary assessment of the strength of claim as a proposition of law and then stated, "Clearly, it is desirable and sometimes may be necessary to prepare an assessment of the strength of case at the outset of consultation, but, in a case like this where the Crown concedes consultation should be deep, it is the quality of the consultation that must prevail. The lack of a formal assessment does not undermine the consultation provided it is indeed deep consultation."

> *Halalt First Nation v. British Columbia (Minister of Environment)*, 2012 BCCA 472, para 116-127 (**Proponents' Authorities, Tab 3**).

75. Further, as alluded to by the BC Court of Appeal in *Halalt*, each decision must be based on the facts and circumstances, including the specific statutory processes, at issue. As this Court needed to address in *Haida*, much of BC is subject to asserted Aboriginal rights, unlike the rest of Canada where most Aboriginal rights are treaty rights. Given this, it is not surprising that some courts in BC have found that a preliminary assessment of the strength of an Aboriginal group's asserted rights should be provided as part of some consultation processes. However, this does not mean that a preliminary assessment always needs to be provided. Nor

does it suggest that an administrative tribunal or other Crown decision maker must always provide reasons, including the explicit acknowledgements and analysis put forward by the Appellants.

76. In fact, on a closer analysis, none of the courts in the referenced decisions actually found that the failure to provide a preliminary strength of claim assessment was a fatal flaw to the consultation process, and each of them went on to review what actually took place during the consultation process. The BC Court of Appeal, who is mentioned in the Appellants' Factum as upholding the lower court decision in *Louis*, also made no mention of the need for an explicit *Haida* analysis or the Appellants' other requirements.

> *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, para. 169 and 170-249 (**Proponents' Authorities, Tab 10**); *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, para 121-138 (**Proponents' Authorities, Tab 2**); *Halalt First Nation v. British Columbia (Minister of Environment)*, 2011 BCSC 945, 630-711 (**Proponents' Authorities, Tab 4**); *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2013 BCCA 412 (**Proponents' Authorities, Tab 6**).

77. The decisions at paragraphs 63 and 64 of the Appellants' Factum also bear no relation to this case. In *Hupacaseth*, the court found that there had been no engagement by the Crown. In *Kwakiutl*, contrary to the Appellants' submissions, the BC Court of Appeal did not overturn the trial judge on the basis that he had not applied a *Haida* analysis. The Court of Appeal overturned the trial judge because they disagreed with how he had applied *Haida*.

> *Hupacaseth First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, para 262 (**Appellants' Authorities, Tab 19**); *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2015 BCCA 345, para 64-85 (**Proponents' Authorities, Tab 5**).

78. Based on the above, the Proponents respectfully submit that there is no compelling argument that this Court's decisions, or any of the other decisions relied on by the Appellants, support the argument that an administrative tribunal or other Crown decision-maker must expressly acknowledge the constitutional nature of an Aboriginal group or groups' rights, must conduct an explicit *Haida* analysis, and must expressly indicate that they were assessing Crown consultation before they can successfully assess whether consultation was adequate. The Proponents further submit that there is nothing in this Court's previous decisions that would have indicated to the NEB that it needed to explicitly include these requirements in its reasons, regardless of what role it was playing. To the contrary, neither this Court, nor the others

discussed above, has ever put form over substance in determining whether the Crown has met its duty to consult. The question has always been what was done.

79. There also does not appear to be any compelling reason to impose these prescriptions. To the extent that an administrative tribunal or other decision-maker is not being asked to assess the adequacy of Crown consultation, this is simply inconsistent with that decision-maker's role. However, regardless of a decision-maker's role, the absence of strict prescriptions has not prevented administrative tribunals, including the NEB and other Crown decision-makers, from doing their jobs, including acting in accordance with the Constitution. The absence of such prescriptions has also not prevented reviewing courts from doing theirs. While explicit reasons might be necessary in some cases, such as *Carrier Sekani*, and even preferable in others, that does not mean that the absolute need for such analysis and acknowledgements should be imposed across the board and become a fatal flaw in the consultation process.

80. Ironically, even if an administrative tribunal or other Crown decision-maker were to include such explicit requirements in its reasons, that does not mean that the inquiry ends there. Undoubtedly, there will be occasions when one or more of the parties will disagree with such an analysis, no matter what words were used. In these cases, a reviewing court will still need to review the decision. Was the decision reasonable or, in reviewing what actually took place, does it appear that the decision-maker was simply trying to make sure that their reasons matched the right formula?

81. In the end, the Proponents submit that the imposition of the Appellants' requirements would simply create hard lines, fine parsing of decisions for their required elements, additional paths for legal challenges, and potential repercussions upstream into the consultation process; all for what appears to be very little in return. With respect, this does not appear to be a path towards reconciliation. True reconciliation is not achieved by what we say but what we do. As the Truth and Reconciliation Commission said:

> "Together, Canadians must do more than just *talk* about reconciliation; we must learn how to *practice* reconciliation in our everyday lives – within ourselves and our families, and in our communities, governments, places of worship, schools, and workplaces. To do so constructively, Canadians must remain committed to the ongoing work of establishing and maintaining respectful relationships." [emphasis in original]

The Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission*, 2015, p 21 (**Proponents Authorities, Tab 18**).[3]

82. With respect, the Proponents submit that there neither is nor should be a requirement that, regardless of their role, administrative tribunals and other Crown decision-makers need to expressly address the Appellants' proposed requirements in their reasons before the duty to consult can be satisfied.

2. Did the Court of Appeal Err in its Review of the NEB's Decision?

83. As indicated, the Appellants' primary position appears to be that the Court of Appeal failed because it could not conclude that the NEB's decision was reasonable unless the NEB included the explicit language in its decision that the Appellants say needed to be there. With respect, regardless of the role of the NEB in this consultation process, there is no requirement that should have caused the Court of Appeal to overturn the NEB's decision on that basis.

Appellants' Factum, para. 6.

84. However, the Appellants say that the Court of Appeal also erred in a number of different ways, including that the Court of Appeal did not adopt a correctness standard, wrongly adopted a "highly deferential" approach in relying on *Newfoundland Nurses*, and, even if they were allowed to rely on *Newfoundland Nurses*, erred in applying it. The Proponents will address each of these submissions in turn.[4]

Appellants' Factum, para. 50, 67, 71-75.

(a) Did the Court of Appeal err in not adopting a correctness standard?

85. The Proponents believe that some context is appropriate to understand the Court of Appeal's reasons before addressing this topic. In the Court of Appeal, the Appellants' argued that the Crown had failed to satisfy its duty to consult. The Appellants also argued, from an

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[3] The full report of the Truth and Reconciliation Commission can be found at **http://www.myrobust.com/websites/trcinstitution/File/Reports/Executive_Summary_English_Web.pdf**

[4] The Proponents recognize that the Appellants also argue that the Court of Appeal erred in not inserting a number of substantive requirements into the consultation process. This portion of the Proponents' submissions attempts to focus on the Appellants' arguments on how the Court of Appeal conducted its judicial review. The Appellants' arguments on issues (b), (c) and (d) are addressed later in these submissions.

administrative law perspective, that the NEB had breached its duty to give reasons and that the NEB had failed to address a number of items in its decision.

FCA Decision, para 8, 30, 101-112.

86. Based on these issues, from a duty to consult perspective, the Court of Appeal determined that what was at issue was the consultation process and the adequacy of consultation. Based on *Haida*, the Court of Appeal determined that the appropriate standard of review for these issues was reasonableness. The Court of Appeal then determined that the Appellants' submissions on the adequacy of the NEB's reasons should be addressed within the framework of the reasonableness analysis in *Newfoundland Nurses*.

FCA Decision, para 34-35.

87. The Appellants now submit that whether a duty to consult is owed and the scope and extent of the duty owed are questions of law based on *Haida*. They also submit that if the NEB misconceived the seriousness of the claim or impact of the infringement, the process would fall to being examined on a standard of correctness. Finally, the Appellants submit that the same rationale should apply when a tribunal or decision-maker has not conducted any analysis into the existence or scope of the consultation and the decision should be reviewed for correctness.

Appellants' Factum, para 72-74.

88. The Proponents will address the Appellants' overall submissions below. However, with respect, the Appellants' appear to misconstrue the Court of Appeal's decision on the NEB's role in the consultation process and the subsequent issues addressed by the Court of Appeal. Under the Court of Appeal's decision, the NEB was not directly assessing the adequacy of Crown consultation. The NEB was part of a statutory process that the Crown relied on to fulfill its duty. Based on that conclusion, and the Appellants' submissions in the Court of Appeal, the Court of Appeal subsequently assessed the adequacy of the statutory scheme to satisfy the duty to consult. As a result, the underlying premise of the Appellants' submissions does not apply to the NEB's reasons.

89. In any event, the Proponents also submit that the Appellants' submissions on the application of a correctness standard are not supported by *Haida*. Paragraphs 61 and 62 of *Haida* read as follows:

> On questions of law, a decision-maker must generally be correct: […] On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: […] Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: […]
>
> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": […] What is required is not perfection, but reasonableness. As stated in *Nikal,* […] "in … information and consultation the concept of reasonableness must come into play… . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty. [Citations omitted.]

Haida, para 61-62 (**Appellants' Authorities, Tab 18**); *Carrier Sekani*, para. 64 (**Appellants' Authorities, Tab 39**).

90. As indicated by the Appellants, *Haida* does say that, "[t]he existence or extent of the duty to consult and accommodate is a legal question in the sense that it defines a legal duty." However, as then set out in the paragraphs above, *Haida* goes on to say that the answer to this question is typically premised on an assessment of the facts, and that a degree of deference may be appropriate depending on the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal. Only to the extent that the issue is one of pure law, and can be isolated from the issues of fact, is the standard correctness.

Haida, para. 61 (**Appellants' Authorities, Tab 18**).

91. The Proponents respectfully submit that there is no pure question of law that can be isolated from the issues of fact on the scope and extent of the duty here. The scope of the duty is a product of the strength of the case supporting the Aboriginal right in issue (here a given based on the Appellants' treaty rights) and the seriousness of the potential adverse effect on the Aboriginal right. With respect, the only thing that might approach a pure question of law is the Appellants' rights, since these emanate from the Nunavut Lands Claims Agreement. However, even the understanding of the nature and significance of these has to be informed by what the

NEB was told and what it saw. Beyond this, an assessment of the potential impacts of the proposed activities and the potential impacts on the Appellants rights are not only questions of fact but fall squarely within the nature of questions that the NEB was established to address and its expertise. The Court of Appeal did not rely on the NEB for an assessment of the duty to consult. However, the Court of Appeal did rely on the NEB's findings, as it was entitled to. There is no evidence that the NEB misconceived the seriousness of the Appellants' rights or the impact of the infringement.

92. From an overall perspective, the question of the standard of review here is no different than in each of *Taku River*, *Carrier Sekani* and *Beckman*. In each of those cases, this Court found that the standard of review of the overall statutory process, including any underlying decisions, was reasonableness. With respect, the Court of Appeal did not err in adopting the same approach.

> *Taku River* (**Appellants' Authorities, Tab 44**); *Carrier Sekani*, para 78 (**Appellants' Authorities, Tab 39**); *Beckman,* para 48 and 88 (**Appellants' Authorities, Tab 18**).

(b) Did the Court of Appeal err in adopting the approach in *Newfoundland Nurses?*

93. The Appellants argue that *Newfoundland Nurses* is a "highly deferential" approach and the Court of Appeal erred in applying it. At paragraph 50 of their Factum, the Appellants state, "At a more fundamental level, a highly deferential approach is not appropriate when dealing with the duty to consult, …".

> Appellant's Factum, para 41, 49, 50 and 54; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (**Appellants' Authorities, Tab 32**).

94. As discussed above, the Court of Appeal did not actually refer to *Newfoundland Nurses* in the context of the duty to consult. It simply referred to *Haida* and adopted a reasonableness standard based on the issue before it.

> FCA Decision, para 34-35.

95. However, to the extent that the Court's subsequent analysis relied on the principles in *Newfoundland Nurses*, or this Court's decision does, the Proponents submit that this is appropriate.

96. As the Court is aware, at the time of this Court's decisions in *Carrier Sekani* and *Beckman*, *Dunsmuir* was the leading authority on the test for reasonableness and the concept of deference. If a decision attracts a reasonableness standard, it's entitled to deference. There is not a higher and lower deferential standard in *Dunsmuir*.

> *Dunsmuir v. New Brunswick*, 2008 SCC 9 (**Appellants' Authorities, Tab 14**); *Carrier Sekani*, para. 78 (**Appellants' Authorities, Tab 39**); *Beckman,* para 48 and 88 (**Appellants' Authorities, Tab 18**).

97. *Newfoundland Nurses* was issued after the decisions in *Carrier Sekani* and *Beckman*. In *Newfoundland Nurses*, this Court provided further guidance on a review for reasonableness. Contrary to the Appellants' submissions, there is nothing in *Newfoundland Nurses* that suggests that it is a highly deferential approach or that it changes the approach in *Dunsmuir* such that it would be inappropriate to rely on it in conducting a review for reasonableness involving the duty to consult.

> *Newfoundland Nurses*, para 11-18 (**Appellants' Authorities, Tab 32**).

98. If the Court of Appeal did rely on the approach in *Newfoundland Nurses* in its decision on the duty to consult, that reliance was appropriate.

(c) Did the Court of Appeal err in applying *Newfoundland Nurses*?

99. The Appellants then say that, even under *Newfoundland Nurses*, the Court of Appeal erred in applying it. As indicated above, most of this argument appears to be directed at the Appellants' proposition that the NEB had to include an explicit discussion of the Appellants' requirements in its reasons. However, to the extent that the Appellants submit that the Court of Appeal otherwise erred in conducting its reasonableness assessment, this is addressed below.

> Appellants' Factum, para. 40, 49-50, 54-56.

100. As the Court is aware, the approach in *Dunsmuir* and *Newfoundland Nurses* requires a reviewing court to conduct a review of the justification, transparency and intelligibility of the decision-making process. It must also consider whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This is a single exercise.

> *Newfoundland Nurses*, para 11, 14-15 (**Appellants' Authorities, Tab 32**).

101. At paragraphs 42 and 43 of their Factum, the Appellants appear to try to limit the materials that the Court of Appeal could refer to in conducting its review to the NEB's EA Report.[5] Contrary to this submission, the Court of Appeal did not find that the EA Report was the NEB's sole reasons. The Court of Appeal found that the NEB's reasons consisted of both the EA Report and the Terms and Conditions of the GOA.

FCA Reasons, paras 101 and 102.

102. More fundamentally, as discussed in *Newfoundland Nurses*, this Court has recognized that a tribunal's reasons may not include all of the arguments, statutory provisions, jurisprudence or other details that the reviewing judge would have preferred. This is a core feature of the concept of deference as respect. Reasons come in all sorts of shapes and sizes and will be as unique as the wide range of statutory and other processes that they emanate from. In this case, the product of the NEB's statutory process(es) is an EA Report and, if granted, a GOA. *Dunsmuir* and *Newfoundland Nurses* make it clear that it is not a reviewing court's job to be critical of a tribunal because its reasons do not look like and contain all of the analysis that a court's reasons might. Perfection is not required. To the contrary, the concept of deference requires that a court must first seek to supplement the tribunal's reasons before subverting them and may look to the record for the purpose of assessing the reasonableness of the outcome.

Newfoundland Nurses, paras 12-13 and 15-16 (**Appellants' Authorities, Tab 32**).

103. The Appellants submit that the Court of Appeal found that it was enough that the EA Report showed that the NEB had generally turned its mind to Aboriginal interests. The Appellants also appear to suggest that the Court of Appeal substituted its own reasons for those of the NEB or "shored up" the NEB's reasons.

Appellants' Factum, paras 49, 54 and 56.

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[5] At paragraph 42, the Appellants also refer to a number of NEB reasons issued for applications under the *National Energy Board Act*. There is nothing in *Dunsmuir* or *Newfoundland Nurses* that suggests that a reviewing court should review other decisions of an administrative tribunal or other decision-maker, including under a different statute, in conducting their reasonableness assessment. The NEB has a wide range of statutory responsibilities and issues reasons for decisions in different formats depending on the statute and issue it is addressing.

104. The Proponents respectfully submit that these characterizations are unfair. The Court of Appeal did not simply find that the NEB had generally turned its mind to Aboriginal issues. The Court of Appeal expressly found that the NEB had engaged in a lengthy consideration of the Appellants' rights and knew that the Appellants had section 35 rights that needed to be taken into account.

FCA Decision, para 111-112.

105. The Appellants' arguments that the Court of Appeal substituted its own reasons for the NEB's reasons or shored these up also do not hold up to scrutiny. With respect, these arguments ignore what the Court of Appeal did, and what the Appellants asked it to do. As indicated above, the Court of Appeal did not find that the NEB was undertaking an assessment of the adequacy of consultation; the Court of Appeal found that the NEB was part of the statutory process that the Crown was relying on. Having found this, and in response to the Appellants' complaint, the Court of Appeal then assessed whether the duty to consult had been met. While the Court of Appeal relied in part on the NEB's reasons and the record to do so, this was the Court of Appeal's analysis.

FCA Decision, para 51-70.

106. The Proponents will not go through a detailed review of the Court of Appeal's Reasons. In *Haida*, this Court held that the satisfaction of the duty to consult is a function of three elements: the strength and significance of the Aboriginal right; the seriousness of the potential impact on that right; and the consultation and potential accommodation that takes place prior to the decision being made. The Court of Appeal assessed each of these elements. In the end the Court of Appeal's analysis is strikingly similar to this Court's analyses in *Taku River* and *Beckman* and numerous of the other decisions addressed above. The Proponents submit that there is no question that the Court of Appeal undertook its assessment in line with the approach in *Dunsmuir* and *Newfoundland Nurses*.

Haida, para 44; *Carrier Sekani,* para 35, (**Appellants' Authorities, Tab 39**); FCA Decision, para 30-100.

B. DID THE CROWN FAIL TO FULFILL THE DUTY TO CONSULT AND ACCOMMODATE?

107. In this part of its Factum, the Appellants argue that Crown failed to fulfill its duty to consult. They say that when deep consultation is involved, the Crown must be a direct

participant in the decision-making process. They then say that, even if the Crown does not need to be a direct participant in the decision-making process, the NEB's process could never satisfy their requirement for deep consultation because they were not given the opportunity to participate in the decision-making process or a full adversarial process.[6]

Appellant's Factum, paras 84-115 and 116-128.

108. The Proponents respectfully submit that neither of these propositions is supported by this Court's decisions. The Proponents further submit that neither of these propositions is supported by what actually occurred.

1. Was Direct Crown Participation in the NEB's Process Necessary to Satisfy the Duty to Consult?

109. What is necessary to satisfy the duty to consult depends on the circumstances. While direct Crown participation may be necessary to satisfy the duty to consult in some circumstances, direct Crown participation is not necessary to satisfy the duty to consult in all circumstances, and was not necessary here. This flows from the Court's decisions in *Haida*, *Carrier Sekani*, and *Beckman*.

110. In *Haida*, the Court confirmed that it was open to the Crown to put in place and rely on statutory processes to satisfy the duty to consult. This is not a delegation of the Crown's duty; it is a legitimate means by which the Crown can be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated. In the companion case of *Taku River*, the Court found that the Crown had done so and that the statutory process in issue had satisfied the duty to consult.

Haida, para. 53 (**Appellants' Authorities, Tab 18**); *Taku River*, para 33-44 (**Appellants' Authorities, Tab 44**).

111. In *Carrier Sekani*, the Court confirmed *Haida* and expanded on the role that administrative tribunals might play in the duty to consult. In that case, the Court found that the BC Utilities Commission had satisfied the duty. Part of the duty is to assess whether the duty is triggered; the Court found that the BCUC had done so.

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[6] The Appellants' also make submissions at paragraphs 71 to 76 on the standard of review. Those submissions have been addressed above.

Carrier Sekani, para 76-93 (**Appellants' Authorities, Tab 39**).

112. Interestingly, in *Carrier Sekani*, the Crown was also absent throughout the process. BC Hydro, an agent of the Crown was present; however, it was simply the applicant. The actual fulfillment of the duty to consult rested on the shoulders of the BCUC. It was the BCUC who created a process to determine whether the Crown's duty had been triggered and who ultimately addressed that aspect of the duty. There was no one from the Crown who formally assessed the ability of the BC *Utilities Commission Act* to meet the duty to consult, nobody from the Crown who watched over the BCUC's shoulder and nobody from the Crown who reviewed the BCUC's decision to see whether they agreed that the duty had been satisfied.

113. In *Beckman*, after finding that the duty to consult could still be triggered in the context of a modern treaty, the Court found that even statutory processes that are in place for other purposes can satisfy the duty. The question, as stated in *Haida*, is whether the regulatory scheme, viewed as a whole, accommodates the Aboriginal right in question.

Haida, para. 42, 48 and 62 (**Appellants' Authorities, Tab 18**); *Beckman*, para 84-88 (**Appellants' Authorities, Tab 3**).

114. The Proponents will not repeat their comments on *Beckman* above. The important aspect of *Beckman* in this context is that Mr. Paulsen's application was submitted under the Yukon's Agriculture Policy. After Mr. Paulsen submitted his application, it went through a number of reviews for completeness and compliance with the Policy. It was then sent to the Agricultural Land Application Review Committee for more in-depth technical analysis, and ultimately forwarded to the LARC. The LARC subsequently requested and received comments from the Little Salmon/Carmacks First Nation and addressed those comments. Following the recommendation of the LARC, the Director, Agriculture Branch, Yukon Department of Energy, Mines and Resources, approved Mr. Paulsen's application.

Beckman, para 22-27 (**Appellants' Authorities, Tab 3**).

115. Throughout this process, not a single person from the Yukon government outside of the Yukon Agriculture Policy process consulted with Little Salmon/Carmacks in any way, made any form of assessment that the Yukon Agriculture Policy could satisfy the duty to consult, or assessed whether it had done so in this case. In other words, anyone who would fall within the

Appellants' definition of the Crown was absent throughout the process.[7] Notwithstanding this, this Court found that the Yukon Agriculture Policy process satisfied the duty to consult.

116. The Appellants may say that *Beckman* is distinguishable because the officials in *Beckman* were acting under a policy and not a statute and therefore were, in fact, the Crown. With respect, this distinction does not appear to be material. The Court has already said in *Haida* that it's not going to create a bright line between statutory and policy efforts in this area.

Haida, para 51 (**Appellants' Authorities, Tab 18**).

117. The Appellants may also attempt to argue, as they appear to, that the NEB is somehow different still. With respect, this is also inconsistent with the underlying basis for the Court's approach.

118. This Court has recognized that the duty to consult does not exist in a vacuum; it must take into account and be integrated into existing Canadian, provincial and territorial governance structures. It has long been recognized that administrative tribunals and other statutory processes form a fundamental and necessary part of Canadian society. The integration of the duty to consult into these structures, where possible, is part of the balance that goes along with the duty. This has been recognized by this Court since *Haida* and reiterated and reinforced ever since.

119. Under this understanding of this Court's framework, the Proponents submit that there is no basis for distinguishing the NEB's process and the process that approved Mr. Paulsen's application. As stated in *Haida*, the question is whether the process, viewed as a whole, accommodates the Aboriginal right in question, not the legal character of the individuals or institutions involved.

Haida, para 62 (**Appellants' Authorities, Tab 18**).

120. In this case, the federal government established the statutory process to obtain a GOA.[8] Like the 1991 Yukon Agriculture Policy, parts of the COGOA and CEAA 1992 process preceded

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[7] The Appellants do not put forward a formal definition of who they refer to as the Crown in their Factum. However, it's clear that this does not include anyone who is a formal part of the statutory process.

[8] It should be noted that there is no Constitutional challenge in this appeal to this statutory process on the basis that it is incapable of meeting the Crown's constitutional obligations.

the Nunavut Land Claims Agreement which gives rise to the Appellants' rights. However, based on *Beckman*, that is not significant.

121. The NEB process then unfolded. As set out in the Facts and in the Court of Appeal's decision, the NEB was alive to the significance of their potential decision on the Appellants' rights throughout the process. The record shows that they were proactive, responsive, flexible, adaptive, thorough, creative, and, above all, respectful.

122. While it does not appear that this matters, contrary to the Appellants' submissions, "the Crown" was not absent throughout the NEB process. On April 8, 2014, the QIA wrote to the Minister of INAC requesting that a SEA be completed before the NEB finished its assessment. This is the first time that any party had requested the Crown's involvement in the GOA application. The Minister declined this request, with reasons. No challenge was made to that decision. The QIA also complained to the Minister about aspects of the NEB's process. The Minister reviewed these complaints and advised that, based on his review, he was confident that the process could meet the Crown's obligations. The standard is not perfection.

123. The Appellants attempt to rely on numerous authorities to say that a regulatory process alone cannot satisfy the duty to consult. With respect, these cases either do not support this proposition or simply reflect the facts in the particular circumstance.

124. The Proponents submit that the proper role of "the Crown" under this Court's framework is reflected above. The Crown is free to establish statutory processes to satisfy the duty to consult. The Crown is then free to rely on those processes to satisfy the duty. If an issue arises that is beyond the ability of the statutory process to address, such as the request for a SIA, an Aboriginal group may request another entity from the Crown, who is responsible for that issue, to become involved. Beyond that, there is no requirement for the Crown to be involved throughout the statutory process, or to undertake a review of the outcome of the process.

125. The Proponents submit that there was no need for the Crown to be involved throughout the NEB process or to undertake an independent review of that process. As indicated in *Carrier Sekani*, if an Aboriginal group ultimately believes that a process is not adequate to address the duty to consult, they can seek a remedy in the courts. That is what happened here.

Carrier Sekani, para. 63 (**Appellants' Authorities, Tab 3**).

2. Does Deep Consultation Have to Include Full Participation and a Full Adversarial Process?

126. At paragraphs 116 to 128, the Appellants argue that even if this Court finds that a regulatory process without Crown engagement can satisfy the duty to consult, the NEB's process could not. Based on *Haida* and various lower court decisions, the Appellants say that deep consultation requires the imposition of various decision-making structures and trial-like procedures before the duty can be satisfied. In this case, the Appellants argue that they should have been given a greater opportunity to participate in the decision-making process and afforded the opportunity to present competing scientific evidence, present traditional knowledge, be entitled to full disclosure, cross-examine, and make oral submissions at a formal hearing.

127. The Proponents will not respond to these submissions in detail. With respect, as submitted above, there is no set menu for what constitutes a deep consultation process. Just because something might have happened in one case, doesn't mean that it needs to happen in another.

128. Equally fundamentally, if requests for further or different processes aren't raised during the consultation process there is no opportunity to consider and respond to those.

129. In earlier jurisprudence, this Court has declined to "draw a bright line" between the duty to consult and principles of procedural fairness. Indeed, as demonstrated above, there is a clear link between the duty to consult and administrative law procedures. An administrative process can readily make room to ensure that the duty to consult is fulfilled, and the courts can oversee that process through judicial review.

> *Beckman*, para 45-47 (**Appellants' Authorities, Tab 3**).

130. That being said, the requirements for procedural fairness and the duty to consult remain the subject of distinct analyses on judicial review.

> *Sipekne'katik v. Nova Scotia (Environment)*, 2016 NSSC 178, para 13 (**Proponents' Authorities, Tab 9**); *Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877, paras 102-109 (**Proponents' Authorities, Tab 1**)

131. However, unlike procedural fairness, the Crown's duty to consult is grounded in the process of reconciliation.

> *Haida*, para 17 (**Appellants' Authorities, Tab 18**).

132. In *Carrier Sekani*, this Court sought to juxtapose the duty to consult, which has a reconciliatory purpose, with the litigation process:

> [34] … The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation. [emphasis added]

133. Thus, it is far more likely that consultations with Aboriginal peoples that form part of a statutory process, rather than adversarial trial-like procedures, will fulfill the duty in administrative processes.

134. In this case, it is notable that a number of groups and communities requested consultations and at times expressed concerns about the consultations. However, at no point did any group, including any of the Appellants, request trial-like proceedings such as an oral hearing or cross-examination.

135. Further, at no point did the NEB decline to give additional time for public commentary. Nor did the NEB refuse to consider any submissions. In fact, there was ample time to provide other evidence had any party sought to do so.

AR, Vol IV, p 929.

136. The Proponents respectfully submit that additional participation or further procedural mechanisms were not necessary to fulfill the duty to consult in this instance.

C. THE HONOUR OF THE CROWN REQUIRED FURTHER CONSULTATION

137. In this part of its Factum, the Appellants make two further submissions. First, that the honour of the Crown requires respect for the modern treaty rights enshrined in the NLCA. The Proponents agree with this. However, with respect, the Proponents do not believe the Appellants' further submissions regarding the potential effects of the seismic survey accurately represent the NEB's findings. The Proponents respectfully believe that their submissions above have responded to the remainder of these submissions.

Appellants' Factum, para 131-135.

138. Second, the Appellants say that the honour of the Crown also requires an approach that is consistent with international human rights obligations and that the NEB's decision failed to respect Canada's obligations under International law. This issue is addressed below.

1. Did the Crown Breach its Obligations as a result of International Law Obligations?

139. The Appellants appear to expect the NEB or the Crown to have interpreted and applied certain International law considerations in addressing the GOA applications. In particular, the Appellants focus on clauses of the *UN Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**").

140. UNDRIP is an aspirational document, not a binding treaty. Unlike treaties, conventions and declarations are intended to be an expression of political aspirations rather than law. In relation to UNDRIP, Professor Joanna Harrington noted that, "unfortunately, it is too often the case, that the political output of the UN is cited to a Canadian court as if a source of international law." Although Canada now fully supports the UN Declaration, Canada continues to clarify that the UN Declaration, like other declarations, is not binding:

> A United Nations General Assembly declaration is a document expressing political commitment on matters of global significance. A declaration is not legally binding, unlike a treaty or a covenant. Declarations are not signed or ratified by states.

> Joanna Harrington, "Canada and the United Nations Human rights Council: Dissent and Division" (2010) 60 UNB LJ 78 at 108-109 (**Proponents' Authorities, Tab 16**); Indigenous and Northern Affairs Canada Website, "United Nations Declaration on the Rights of Indigenous Peoples", **https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958**

141. In some circumstances, such international political norms can be used to interpret *Charter* rights. In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, legislation precluding public servants from striking was tested against section 2(d) of the *Charter*, as informed by international conventions. However, in this case, it should also be noted that Canada's support of the UNDRIP is quite recent. Parliament and the legislatures have had little opportunity to adapt the myriad of administrative frameworks that potentially interact with Aboriginal peoples. With respect, it is premature to make prescriptions to consultation processes based on UNDRIP.

> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (**Appellants' Authorities, Tab 41**)

142. That does not mean that there is no role for international obligations in the duty to consult. First, these are presumably captured in this and other Court's decisions on the extent of the duty. However, if an Aboriginal group feels that either these or other international obligations are not being respected as part of the consultation process that can be raised as part of the process.

143. There was no attempt to raise international law obligations as part of this case. The NEB and the Crown did not fail because they failed to address international law obligations.

D. DID THE COURT OF APPEAL ERR BY HOLDING THAT THE NEB'S DECISION IS ONE STEP IN CONSULTATION?

144. At paragraphs 141 to 144 of its Factum, the Appellants try to characterize the GOA application as a strategic decision and the Court of Appeal's comment that if further activities are proposed these would be the subject of future consultation processes as not being appropriate. This was not an argument that was put to the Court of Appeal.

145. With respect, this isn't an accurate reflection of this Court's decisions. In *Carrier Sekani*, this Court rejected the view that one Crown action triggers a broad duty to consult on all potentially related issues.

> The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.
>
> 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. [emphasis added]
>
> *Carrier Sekani*, para 52-53 (**Appellants' Authorities**, **Tab 3**).

146. In paragraph 45 of its reasons, the Court of Appeal referred to the following paragraph of the *Taku River* decision:

> Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, “strategic” stage, opportunities existed for Haida input at a future “operational” level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

147. In that context, the Court of Appeal held that a seismic survey “is simply one step in the process by which the development moves forward.” Indeed, the seismic survey is the only step in development being proposed. This makes the logic in *Carrier Sekani* even more compelling; there is no contemplated resource extraction proposals that would make a broad consultation on that issue worthwhile.

FCA Decision, para 99.

148. When, or if, the seismic survey leads to further steps towards resource development, there is no doubt that the Crown will be required to consult based on the type and magnitude of the proposed activity. As indicated, seismic activity has taken place in Baffin Bay and Davis Inlet for decades. The GOA is not a strategic decision.

1. The GOA Conditions do not Undermine the Consultation Process

149. The Appellants also appear to complain about the “after the fact” reporting in the GOA.

150. Here, the NEB’s decision to impose conditions on the GOA that require ongoing consultation was not a means to defer the duty to consult. Rather, they emanated from the process of consultation and accommodation that had already occurred.

151. As seen, the NEB was alive to the fact that its statutory process was designed to integrate the consultation process. In the EA Report, the NEB found that the Proponents “made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised.”

AR, Vol I, pp 24-25.

152. The NEB then refers to the mitigations detailed in section 7.2 of the EA Report as addressing those concerns. Section 7.2 contains a four-page list of mitigation measures, including a lengthy list of measures designed to mitigate any adverse impact on marine mammals. Those measures are primarily concerned with the operation of the airguns, PAM, and sound modeling.

AR, Vol I, pp 29-32.

153. In summarizing the consultation process, the NEB notes that community members recommended "continuation of consultation and engagement measures" and an IQ study. The NEB included those as conditions of the GOA. In the EA Report, the NEB gives no suggestion that it imposed those conditions due to inadequacies in the consultation process to date. Rather, those conditions form part of the accommodations of Aboriginal interests in modifying the seismic survey.

AR, Vol I, p 21.

154. Given that during the consultation process the communities asked for community engagement to continue, and that the NEB provided that accommodation in the GOA conditions, the Proponents submit that it makes little sense to impugn the NEB's conclusions on consultations and accommodations as a result.

PART IV - PART V – COSTS & ORDER SOUGHT

155. The Respondents respectfully request that this Appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART VI - TABLE OF AUTHORITIES

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