Federal Court  Cour fédérale

Date: 20210924

Dockets: T-1147-19
T-1141-19
T-1150-19
T-1442-19

Citation: 2021 FC 990

Ottawa, Ontario, September 24, 2021

PRESENT: The Honourable Madam Justice McVeigh

Docket: T-1147-19

BETWEEN:

PEGUIS FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND MANITOBA HYDRO

Respondents

and

CANADIAN ENERGY REGULATOR

Intervener

Docket: T-1141-19

AND BETWEEN:

ROSEAU RIVER ANISHINABE FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA, CANADIAN ENERGY REGULATOR, AND MANITOBA HYDRO

Respondents

Docket: T-1150-19

AND BETWEEN:

LONG PLAIN FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA, CANADIAN ENERGY REGULATOR, AND MANITOBA HYDRO

Respondents

Docket: T-1442-19

AND BETWEEN:

CHIEF JIM MAJOR ON HIS OWN BEHALF AND ON BEHALF OF ANIMAKEE WA ZHING #37 FIRST NATION

Applicant

and

**THE ATTORNEY GENERAL OF CANADA,
CANADIAN ENERGY REGULATOR, AND
MANITOBA HYDRO**

Respondents

JUDGMENT AND REASONS

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I. Introduction

[1] This is an application for judicial review of Order in Council [OIC] PC Number 2019 – 0784 issued by the Governor in Council [GIC] on June 13, 2019. The OIC directed the National Energy Board [NEB] to issue a Certificate of Public Necessity and Convenience [Certificate] for the Manitoba-Minnesota Pipeline Project [MMTP or the Project]. The Project has now been built and in operation since approximately July 2020.

[2] The Applicants are Peguis First Nation [Peguis] (T-1147-19), Animakee Wa Zhing #37 [AWZ] (T-1442-19), Long Plain First Nation [Long Plain] (T-1150-19), and Roseau River First Nation [Roseau River] (T-1141-19). The Applicants are all "Bands" within the meaning of the

Indian Act, RSC 1985 c. I-5, and their members Aboriginal peoples pursuant to s. 35(1) of the *Constitution Act, 1985*. Peguis, Roseau River, and Long Plain are signatories to Treaty 1. AWZ is signatory to Treaty 3. The Applicants are each challenging the adequacy of Canada's consultation for the Project and the reasonableness of the GIC's decision.

[3] The Respondents are the Attorney General of Canada [Canada] and Manitoba Hydro [Hydro], the Project's proponent [proponent]. The Canada Energy Regulator [CER] is intervening in this application. The CER is the successor to the NEB, and appears in order to assist the Court as to the role of the NEB in the consultation process, but takes no position on the merits of the judicial review applications.

[4] Each of these applications are separate but were heard together. Given that they all relate to the same project, I am writing a consolidated decision.

II. Background

A. *The Project*

[5] The MMTP is an international transmission line operated by Hydro. It runs from Winnipeg to the Manitoba/Minnesota border, crossing Treaty 1 territory. The purpose of the MMTP is to deliver energy to Manitoba and surplus energy to Minnesota. The MMTP is 213 kilometers long, with 92 of those kilometers running on existing rights of way while 92 kilometers is on new right of way. Of those 92 kilometers, 85 are on privately held land and 36

kilometers are on provincial Crown land. Construction on the Project began in September 2019, and was completed in July 2020. The MMTP is currently in service and operating.

B. *Project Approval Process and Consultation*

[6] To proceed, the Project needed to be approved by both Manitoba and Canada. Hydro was required to get a provincial licence pursuant to Manitoba's *The Environment Act*, CCSM c E125 [*Environment Act*] and federal approval under both the *National Energy Board Act*, RSC 1985, c N-7 [*NEB Act*] and the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52[*CEAA*].

[7] The federal and provincial processes were coordinated. In 2013, Hydro began its environmental assessment process, including its First Nation Engagement Process [FNMEP], and in 2015 it completed its Environmental Impact Statement [EIS]. Hydro engaged with a large number of affected and possibly affected First Nations during its environmental assessment process in order to collect and listen to First Nations input and feedback.

[8] From Canada's perspective, consultation took place in three phases, following a similar process to other energy project approvals. Canada identifies the first phase as the provincial approval process, including the Clean Energy Commission [CEC] hearings and Manitoba's separate Crown consultation. The second phase was the NEB hearing and the third phase was Canada's supplementary consultation.

(1) Phase 1 - the Provincial Approval Process and Consultation

[9] Manitoba's approval process consisted of three parts: an environmental assessment, CEC hearings, and Provincial Crown-Indigenous consultation.

[10] Hydro submitted the EIS to Manitoba on September 22, 2015. On October 3, 2016, Manitoba wrote to the CEC advising that it had completed the environmental assessment process and that any concerns with the Project could be addressed using licensing conditions.

[11] On December 31, 2015, Manitoba wrote to the CEC asking it to hold hearings on the Project and providing terms of reference for the public review hearings. The terms of reference (revised on February 15, 2017) required the CEC to consider the Project-related impacts to Indigenous groups, per section 5 of the *CEAA* but noted that Manitoba would conduct consultation separately from the CEC process. The CEC process consisted of pre-hearing meetings, workshops, information requests, and 18 days of hearings. The CEC submitted its final report on September 12, 2017, recommending that the Project be approved subject to 17 licensing conditions.

[12] Manitoba conducted consultations with a number of Indigenous groups separately from the CEC process. The details of that consultation process are not on the record and the adequacy of Manitoba's consultation is not an issue on this judicial review.

[13] Manitoba granted an *Environmental Act* licence, with 64 conditions, on April 4, 2019.

(2) Phase 2 - NEB Hearing

[14] Pursuant to sections 45(1) and 58.11 of the *NEB Act*, Hydro filed a permit application with the NEB on December 16, 2016.

[15] On June 13, 2017, the NEB sent letters to 25 Indigenous communities and organizations that the NEB identified as being potentially affected by the Project. The letters advised the Indigenous groups about the permit process and invited them to participate in the process, noting that participant funding is available.

[16] On October 31, 2017, the NEB recommended to the GIC that the NEB proceed through the certificate process set out in section 58.16 of the *NEB Act*, instead of the permit process in section 58.11 of the *NEB Act*. The NEB reasons indicate that it made this recommendation for two reasons. First, because the CEC concluded that it did not need to assess whether the Project's effects might impact the exercise of Aboriginal or Treaty rights. Second, because of the Supreme Court of Canada's [SCC] two decisions in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Chippewas*], which provided guidance on the NEB's duties in Indigenous consultation.

[17] On December 15, 2017, the GIC accepted the NEB's recommendation, ordering the NEB to proceed via the certificate process.

[18] On December 21, 2017, the NEB released Hearing Order EH-001-2017 [Hearing Order]. The Hearing Order contained the list of issues to be addressed through the NEB hearing. It also incorporated the record of the CEC hearings and the CEC Reasons into the NEB record. The Hearing Order stated that all parties that applied to participate in the permit process were granted pre-decided standing for the Hearing. The Hearing Order also noted that interested parties could apply to participate in the Hearing.

[19] On February 14, 2018, the NEB released Ruling No. 4 [the Ruling]. This Ruling specified:

- the NEB's role in satisfying the duty to consult;
- clarified the scope of issues to be considered by the NEB; and
- listed the successful applications to participate.

The Ruling states that the eight parties who registered to participate in the permit process were granted pre-decided standing. Further, that NEB accepted all twelve applications to participate as an Intervener.

[20] On March 20, 2018, the Minister of Natural Resources advised the NEB that Canada would be relying on the NEB process to fulfill Canada's duty to consult. Canada's intent to rely on the NEB process was communicated to the Applicants in April and May of 2018.

[21] Throughout the spring of 2018, parties exchanged information requests. The NEB also sought the Interveners' comments on the CEC Reasons, draft conditions and potential mitigation

measures. Some of the participants (including some of the Applicants in these applications) sought to compel answers to information requests of Hydro, and when that motion was denied by the NEB, sought a variance of the NEB decision.

[22] The NEB Hearing took place in June 2018. Some of the Indigenous interveners gave oral traditional evidence in person from June 4 to 8, 2018. Later in the month, from June 18 to 22, 2018 oral submissions, cross-examination of Hydro's representations, and final argument took place.

[23] The NEB Reasons for Decision [NEB Reasons] were released on November 15, 2018. The NEB concluded that the Project is and will be required for the present and future public convenience and necessity. The NEB recommended that the GIC issue a Certificate, subject to 28 conditions.

(3) Phase 3 - Supplemental Consultation

[24] By letter dated August 14, 2018, Canada notified potentially effected Indigenous groups that it would conduct supplemental consultations. The purpose of the supplementary consultation was to identify any outstanding concerns regarding Project-related impacts to Aboriginal and Treaty rights that were not communicated to the NEB or not addressed by the NEB, and to discuss incremental accommodation measures if appropriate. The letter initiating supplemental consultation offered First Nations participant funding (between $5,000-$9,000) to those groups who wished to participate in supplemental consultation.

[25] A number of attachments were included with the August 14, 2018 letter that went to all of the First Nations. Included was the Project Agreement for the MMTP, which guided the coordination of consultation as between various federal agencies. Also attached was a document titled “Summary of Information Available and Preliminary Depth of Consultation Assessment” [DCA] for each First Nation. This document summarized the Aboriginal and Treaty rights, potential project impacts on those rights, and Canada’s preliminary assessment of the depth of consultation owed to each First Nation. Finally, an application for participant funding for supplemental consultation and a funding eligibility criteria document was provided.

[26] Canada’s evidence is that supplemental consultation took place with twelve Indigenous groups between August 2018 and June 2019. Pursuant to section 58.16(10) of the *NEB Act*, the GIC must decide whether to approve or not to approve the NEB’s recommendation and to issue a Certificate within three months of the release of the NEB’s Reasons. In this case, the NEB released its Reasons on November 15, 2018 and the original GIC’s deadline for decision was February 15, 2019. However, that deadline was extended twice through OIC, first to May 16, 2019 and then to June 14, 2019.

[27] On March 22, 2019, Canada sent a draft annex of the Crown Consultation and Accommodation Report [CCAR] specific to each First Nation for their review and comment. The covering letter to the draft CCAR invited the First Nations to provide written submissions directly addressing any outstanding concerns, issues or other views regarding the Project. The Indigenous groups were given until April 23, 2019 to provide feedback.

[28] On May 16, 2019, Canada sent a letter to the Indigenous groups they were consulting with indicating that Canada was prepared to propose amendments to the NEB Conditions after receiving the Indigenous groups' feedback. Additionally, the letter stated that Canada intended to share the text of the draft conditions. Finally, as a response to concerns identified, Canada indicated that it was proposing a Terrestrial and Cultural Studies Initiative [TCSI] to fund Indigenous-led studies.

[29] On June 3, 2019, Canada again wrote to the Indigenous groups they were consulting with indicating that consultation had ended. Canada attached a copy of the final CCAR and the First Nation-specific annex as well as the proposed amendments to the NEB's conditions.

[30] On June 13, 2019, the GIC issued the OIC, directing the NEB to issue a Certificate, subject to amendments to the NEB conditions. On June 14, 2019 Canada advised the Applicants of the GIC's decision.

[31] I will now summarize the details of consultation with each of the Applicant First Nations.

C. *Consultation with Peguis First Nation (T-1147-19)*

[32] Peguis first became involved in the Project in 2013 as part of Hydro's FNMEP. As part of Hydro's engagement, Peguis produced an Aboriginal Traditional Knowledge Study [ATKS]. Peguis also participated in Hydro's MMTP Monitoring Committee [MMTPMC]. The MMTPMC is composed of representatives from impacted First Nations and Hydro that meets regularly in order to provide updates and share feedback about the Project.

[33] Peguis participated in the CEC hearings and was granted Intervener status for the NEB proceedings. As an Intervener, Peguis submitted and responded to information requests, cross-examined Hydro's panel of witnesses, commented on the NEB's draft conditions, and provided oral traditional evidence and written submissions.

[34] Canada wrote to Peguis on August 14, 2018, inviting them to participate in supplemental consultation. In its preliminary DCA, Canada indicated that it owed Peguis a moderate level of consultation. Canada offered Peguis $9,000 in participant funding.

[35] The DCA was done unilaterally by Canada, but Canada's evidence is that it was a preliminary assessment and could change during the consultation process.

[36] Peguis responded to Canada's August 14, 2018 letter, submitting a participant funding application on September 12, 2018 for approximately $77,000. This included an application for funding an archeological study that it felt was necessary. Canada did not approve the application and between September and November 2018, representatives from Canada and Peguis discussed funding through email and meetings. On November 14, 2018, Peguis resubmitted its funding application, which had been put on hold because of the amount requested. On December 12, 2018, the parties participated in a teleconference where they discussed the activities eligible for participant funding. On December 19, 2018, Canada wrote to Peguis that it had increased the available funding from the initial offering of $9,000 to $27,000 and invited Peguis to submit a funding application form for that amount. On February 8, 2019, Peguis

submitted a participant funding application for $28,000 which was $1,000 more than the offering.

[37] On February 19, 2019, the parties participated in a teleconference where they discussed activities eligible for participant funding, particularly funding for an archeological study. The conclusion in the minutes from the meeting show that Canada's representative, Sebastian Labelle, indicated that "what Peguis was proposing in its revised application for participant funding sounded relatively reasonable." However, "he clarified that further due diligence was required prior to making a decision," and "added that he would discuss the proposal with Assistant Deputy Minister Labonté and would respond to Peguis shortly thereafter."

[38] Canada followed up the February 19, 2019 meeting by letter dated March 8, 2019. Canada responded to the study request by indicating that it would not fund studies that have already been undertaken by the proponent or Indigenous groups. Canada's understanding was that the proposed archeological study had already been conducted, at least in part, through the ATKS Peguis developed as part of its engagement with Hydro. Canada reiterated its offer of $27,000 for eligible activities.

[39] On March 5, 2019, Peguis inquired with Canada whether it would have to resubmit its funding application, and on March 13, 2019, Canada confirmed that they would. On March 22, 2019, Peguis resubmitted the funding application for $27,010.72.

[40] On the same day, March 22, 2019, Canada sent the draft Peguis-specific annex of the CCAR to Peguis for review. In their letter, Canada noted that if Peguis provided comments by April 8, 2019, Canada could incorporate them and provide Peguis with the updated CCAR for review. The letter indicated that the deadline for providing comments is April 23, 2019. The letter also expressed that Canada's representatives were available to meet and that Peguis could provide independent written submissions.

[41] On April 10, 2019, a representative from Canada emailed Peguis inquiring about whether they intended to schedule community meetings. Peguis responded the same day, noting that they could not schedule meetings until the funding application had been approved. At the hearing, Peguis indicated that this position was based on the funding application, which stated that "**[i]f you are successful in receiving funding, you cannot request payment for any work done before you sign a Contribution Agreement with us and only work done after you sign an agreement with us is eligible for payment**" (emphasis added).

[42] On April 12, 2019, Canada wrote to Peguis that their funding application had been approved but for a slightly lesser amount of $26,960.72. The approval indicated that the next step was to sign a contribution agreement. The funding agreement was signed by all parties by April 29, 2019.

[43] On April 13 and 26, 2019, representatives from Canada followed up with Peguis about scheduling community meetings. The April 26, 2019 communication noted that given that the legislated deadline for the GIC's decision was May 16, 2019, meetings would have to occur by

May 3, 2019. Peguis understood they now had one week (until May 3, 2019) to hold the meetings. Their evidence is that one week was too short of a turnaround to do this given their reserve composition.

[44] No community meetings were scheduled. The next communication between the parties on the record is a May 17, 2019 letter from Canada. This letter states that the GIC's decision had been extended until June 14, 2019, that Canada was considering amending the NEB's conditions, and that Canada would be developing a TCSI. On June 3, 2019, Canada wrote to a very surprised Peguis indicating that consultation had ended, and that Canada would be amending some of the NEB's conditions. With that correspondence, Canada attached a final copy of the CCAR and the Peguis-specific annex.

[45] On June 5, 2019, Mr. Sutherland on behalf of Peguis wrote to Canada noting that a decision should not be made when the consultation with Peguis has not yet occurred. Peguis noted that they would be writing to request an extension for the decision. The extension request letter, dated June 6, 2019, was sent to Canada on July 11, 2019, almost a month after the GIC decision was made on June 13, 2019. No further response was received by Peguis in relation to their request for an extension.

[46] On September 6, 2019, Canada responded to Peguis' letter, inviting them to submit any expenses for reimbursement and apply for funding through the TCSI.

D. *Consultation with Animakee Wa Zhing (T-1142-19)*

[47] AWZ's traditional territory is located in Manitoba, Minnesota and Ontario. AWZ has used its territory to harvest wild rice, trap, hunt, and gather medicines. AWZ is a signatory to Treaty 3 and has over 400 registered members and 11 reserves in Ontario and southeastern Manitoba.

[48] Members of AWZ primarily reside at Windigo Island on Lake of the Woods [LOTW] and Regina Bay. Water levels on LOTW have historically fluctuated based on human development, and the resultant flooding has negatively impacted AWZ's reserve land and their ability to harvest wild rice. LOTW water levels are controlled by the Lake of the Woods Control Board [LOTWCB].

[49] Hydro did not identify AWZ as a potentially affected Indigenous group and therefore did not include AWZ in its FNMEP from 2013 to 2016. While AWZ asserts that they were first informed of the Project in 2017, Canada notes that AWZ received a letter from Manitoba about the Project in January 2016. Regardless, the NEB identified AWZ as a potentially affected group and directed Hydro to engage with AWZ. AWZ's active involvement began in June of 2017 after receiving letters from both the NEB and Hydro.

[50] AWZ met with Hydro representatives and participated in Hydro's MMTPMC. Hydro also provided funding to AWZ (together with another First Nation) to conduct a traditional

knowledge study. AWZ received a draft copy of that study in April of 2018. While there were discussions about conducting further study, no further study was conducted.

[51] AWZ was granted Intervener status for the NEB hearings. As an Intervener, AWZ made information requests of Hydro, brought motions to compel responses from Hydro and to review NEB rulings, filed affidavits, cross-examined Hydro's panel of witnesses, commented on the NEB's draft conditions and providing oral evidence and written submissions.

[52] Canada wrote to AWZ on August 14, 2018, inviting them to participate in supplemental consultation. In the letter, Canada included a DCA, which concluded that it owed AWZ a moderate level of consultation. Canada also offered AWZ $9,000 in participant funding.

[53] Officials from the MPMO met with AWZ on January 24, 2019. At that meeting, they discussed AWZ's outstanding concerns and potential accommodation measures. AWZ raised concerns about the Project's impact on moose and the possibility of developing a Moose and Moose Habitat Management Plan [MMHMP]. They also discussed concerns about the Project's impact on LOTW and funding for an advisor to attend and advocate at LOTW Control Board [LOTWCB] meetings. Additionally, there was discussion about the Project's impact on plants, the psycho-social impact of electromagnetic fields [EMF] and economic accommodation.

[54] On February 11, 2019, MPMO invited AWZ to a February 21, 2019 meeting with the LOTWCB already scheduled with another First Nation, and MPMO sent an agenda of the

meeting on February 20, 2019. AWZ did not attend the meeting because of the short notice and lack of funding for travel.

[55] On April 12, 2019, Canada offered AWZ an additional $14,500 in participant funding. Around this time, AWZ held elections, and the transition in governance interrupted their ability to engage with Canada.

[56] On March 22, 2019, Canada sent AWZ a draft of the CCAR and an AWZ-specific annex and requested feedback and written submissions. AWZ responded on May 3, 2019, requesting further engagement with Canada, and on May 17, 2019, expressing concerns with the consultation process and outlining their outstanding concerns.

[57] On May 9, 2019, AWZ and MPMO met again. They discussed water levels on LOTW, protecting moose habitat, capacity funding for AWZ to engage with Hydro, and economic accommodation.

[58] On June 3, 2019, Canada wrote to AWZ advising that the consultation had concluded and attaching the final CCAR and AWZ-specific annex and providing a copy of the proposed amendments to the NEB conditions.

[59] On July 24, 2019, after the Project had been approved, Canada wrote to AWZ inquiring about its interest in the TCSI through the program, AWZ applied for and received funding to complete a traditional knowledge study and develop a MMHMP.

E. *Consultation with Roseau River First Nation (T-1141-19) and Long Plain First Nation (T-1150-19)*

[60] Roseau River is a signatory to Treaty 1 and their traditional territory is located within Manitoba. Roseau River's reserves are located in southern Manitoba and they have a population of about 2,600 people.

[61] Roseau River has outstanding Treat Land Entitlement [TLE] interests in southern Manitoba. On March 27, 1996, Roseau River signed a TLE Settlement Agreement [TLESA] with Canada.

[62] Long Plain is also a signatory to Treaty 1 and their traditional territory is located within Manitoba. Long Plain has reserves near Portage La Prairie, Manitoba and a population of about 4,400 people.

[63] Similar to Roseau River, Long Plain has outstanding TLE interests in southern Manitoba. On August 3, 1994, Long Plain signed a TLE Settlement Agreement with Canada.

[64] Long Plain was identified by Hydro as a Treaty 1 First Nation potentially affected by the Project. Long Plain participated in the project through Hydro's FNMEP since 2013. Long Plain, through the Aboriginal Traditional Knowledge Study [ATKS] Management Team – a group of three potentially affected First Nations – produced an ATKS Report in 2015. This report was meant to inform the Project's route selection and the EIS.

[65] Roseau River was identified by Hydro as a Treaty 1 First Nation potentially affected by the Project. Roseau River participated in Hydro's FNMEP since 2013. Roseau River produced its own ATK Report.

[66] These two First Nations were represented by the same counsel, who provided mirrored arguments save the specific facts of each First Nation.

[67] In a June 13, 2017 letter, the NEB informed Long Plain about the hearing and invited Long Plain to participate, including noting that participant funding would be available. In an April 29, 2018 letter to Chief Meeches, Long Plain's Chief, Canada informed Long Plain that it intended to rely on the NEB's process in order to satisfy its duty to consult. However, citing funding concerns, Long Plain did not participate as an intervener in the NEB process.

[68] Canada submits that Long Plain's interests were nevertheless represented at the NEB hearings through the EIS, the CEC Record, and through the Southern Chiefs Organization [SCO], an independent political organization representing Treaty 1 and 3 First Nations.

[69] Roseau River applied and was granted Intervener status for the NEB proceeding. As an Intervener, Roseau River made information requests of Hydro, brought motions to compel responses from Hydro and to review NEB ruling refusing that motion, and was provided the NEB's draft conditions for comment. Canada also submits that Roseau River's interests were presented through the incorporation of the CEC record, and SCO's involvement.

[70] In their August 14, 2018 letter inviting Long Plain and Roseau River to participate in supplementary consultation, Canada included a DCA indicating that it owed Roseau River a moderate level of consultation and Long Plain a low level of consultation. Canada offered Long Plain $5,000 in participant funding and Roseau River $9,000.

[71] Long Plain's and Roseau River's experience overlap between November 2018 and January 2019 through their participation in the Treaty 1 Technical Team. In November 2018, Long Plain and Roseau River were one of six First Nations who formed the Treaty One Technical Team [TOTT]. During a November 16, 2018 call with the MPMO, these Indigenous groups advised Canada that they were intending to create the TOTT to engage in supplemental consultation. During a November 28, 2018 conference call, the TOTT advised that it intended to incorporate.

[72] Between December 2018 and January 2019, Canada and the TOTT discussed the details of funding and the legalities of consulting with a corporation, Anishinabe Nations Construction Inc. [ANCI]. It was the First Nations' position that ANCI would play a financial and administrative role, but that each First Nation would be responsible for carrying out its consultation obligations. Canada's position was that in order for it to provide funding to a corporation for consultation activities, the constituent First Nations had to provide band council resolutions confirming that that they had delegated their duty to consult to the corporation. The First Nations' response was that they could not legally delegate their constitutional rights and therefore they could not provide the requested band council resolutions. Ultimately, Long Plain

and Roseau River submitted independent funding applications in February 2019 and funding amounts were settled in April 2019.

[73] On March 22, 2019, Canada sent a draft of the CCAR and Long Plain-specific annex and Roseau-specific annex to the respective First Nations. Canada requested Long Plain's and Roseau River's comments and feedback and invited the First Nations to provide written submissions. Both Long Plain and Roseau River submitted independent submissions, on May 15 and 14, 2019, respectively.

[74] Around the same time, both First Nations initiated communications with Canada regarding TLE selections on land near or overlapping with the Project's proposed right of way. On April 6, 2019, Long Plain sent a letter to the Minister of Crown-Indigenous Relations [MCIR regarding land identified by Long Plain for TLE. On April 30, 2019, Long Plain sent this same letter to the Minister of Natural Resources Canada. On May 1, 2019, Long Plain again wrote the Minister of Natural Resources Canada and Manitoba to raise Long Plain's identification of land for TLE purposes.

[75] On May 1, 2019, Roseau River inquired with Indigenous Services Canada [ISC] about the availability of land located along the Project route for TLE purposes. On May 23, 2019, ISC replied to Long Plain's TLE inquiry and noted that the selected land was not for sale and that TLE acquisitions are made on a willing seller/buyer basis.

[76] On April 18, 2019, MPMO staff met with Roseau River leadership and TLE concerns were discussed. On May 2, 2019, MPMO staff met with Long Plain. At the meetings, the parties discussed funding, TLE, Manitoba's conduct in approving the Project, and the adequacy of provincial and federal Crown consultation.

[77] On May 2, 2019, MPMO staff also met with Roseau River and two other First Nations, and they discussed the adequacy of consultation with Manitoba and Canada, Canada's accommodation mandate, TLE, compensation and economic participation.

[78] On May 16, 2019, MPMO wrote to Roseau River indicating that the GIC's decision had been extended to June 14, 2019 and that Canada was considering amending the NEB's condition and introducing the TCSI Roseau River responded on May 24, 2019, requesting further dialogue and expressing optimism about the potential accommodation measures.

[79] There was no further communication between Canada and Long Plain or Roseau River until June 3, 2019, when Canada wrote to Long Plain and Roseau River advising that the consultation had concluded and attaching the final CCAR and Long Plain and Roseau River-specific annexes, and providing a copy of the proposed amendments to the NEB conditions.

III. Decision under review

[80] The decision under review is the GIC's June 13, 2019 OIC, attached as Annex A to these Reasons.

IV. Issues

A. *Preliminary Issues*

[81] The Respondent Hydro raises as a preliminary issue the admissibility of affidavit evidence and the cross-examinations in this judicial review. Canada also raises concerns about the admissibility of certain portions of the affiant's evidence as hearsay, opinion, or argument.

B. *Issues*

[82] These applications raise four substantive issues:

1. In T-1141-19 (AWZ), T-1141-19 (Roseau River), T-1150-19 (Long Plain), did Canada properly assess the scope of its duty to consult and accommodate the First Nations?
2. As a matter of constitutional law was it reasonable for the GIC to conclude that Canada's consultation with Peguis, AWZ, Roseau River, and Long Plain was adequate?
3. As a matter of administrative law, was the GIC's decision reasonable?
4. What is the appropriate remedy?

V. Standard of Review

[83] The parties do not dispute that the standard of review for whether there is a duty to consult, and the depth of consultation, is correctness. The standard of review for whether

consultation and the OIC was reasonable is reasonableness (*Coldwater First Nation v Canada*, 2020 FCA 34 at para 27 [*Coldwater*]).

[84] The Court in *Coldwater* also provided guidance on how to conduct reasonableness review in this context. The Court noted:

> [28] In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach…
>
> [29] Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.

[85] In that case, the Court, instructed that: the statutory scheme; the law regarding the duty to consult; post-approval consultation; and the importance of the matter to those directly affected, are the factors relevant to determining whether the decision was reasonable.

VI. Analysis

A. *Preliminary Issue – Admissibility of Affidavit Evidence*

(1) Hydro and Canada's Submissions

[86] Hydro submits that a judicial review should be decided based upon the record before the decision-maker. In this case, the record is the material before the NEB and the GIC, including the CEC record. This record includes the EIS, traditional knowledge studies, transcripts from the CEC hearings, the exhibits filed at both the NEB and the CEC hearings, the Information Requests that the NEB and the NEB participants made of Hydro and Hydro's responses, and documents generated during supplemental consultation.

[87] Hydro submits that the Record is found in the Affidavit of Sebastian Labelle (Canada's affiant) affirmed January 7, 2020 [Labelle Affidavit]. Hydro states that to the extent that the Applicants point to their own affidavits without an established basis in the Record, the evidence should be rejected.

[88] Hydro's position is that the cross-examinations should be inadmissible because they do not have a basis in the Record, and their use is limited to clarifying what was in or out of the Record. Hydro stated in their Memorandum of Fact and Law at paragraph 27:

> In addition, the cross-examinations too are inadmissible without a clear foundation in the Record. But more so, the cross-examinations should be for clarifying what was in or out of the Record. It is not the time to test people's views on consultation. It is not the time to get more facts about certain events on the

> Record. According to Hydro, the purpose of cross-examinations is not to test people's views on consultation.

[89] Canada objects because portions of the Applicants' affidavits include content that is hearsay, opinion, and argument and therefore offend Rule 81 of the *Federal Courts Rules*, SOR-98/106 [*Federal Courts Rules*]. Rule 81 provides that affidavits are confined to facts within the deponent's knowledge. Canada submits that this content is inadmissible and cannot be considered.

(2) Analysis

[90] I agree with Hydro that the evidence on judicial review is the information that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Association of Universities*] at para 19). Evidence not before the decision-maker which goes to the merits of the decision is not admissible on judicial review. Typically, the "record before a decision maker" is provided in the form of the Certified Tribunal Record [CTR], from the tribunal whose decision is under review. In this case, Canada claimed cabinet confidence over the material before the GIC, and no party has challenged that claim. Therefore, all the evidence is provided through the affiants, in particular through the Labelle Affidavit, but also through the Applicants' affiants. In my view, there is no basis for Hydro's submission that the Labelle Affidavit constitutes "the record" while the information provided in the Applicants' affidavits does not. That statement is not without a caveat.

[91] As Justice Stratas stated in *Association of Universities* at paragraph 20, there are recognized exceptions to the rule that the only admissible evidence is the record before the decision-maker. First, the Court can receive affidavit evidence that provides background on issues relevant to the judicial review. Second, affidavits may be necessary to demonstrate procedural defects that cannot be found in the record before the decision-maker. Third, sometimes affidavit evidence is necessary in order to highlight the absence of evidence on particular point before the decision-maker.

[92] While Hydro submits that the Applicants provide evidence that is not in the Record, they do not point to any specifics. Absent these specifics, in my judgment the Court should not ignore or disregard the affiants' evidence. As the Federal Court Appeal [FCA] stated in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraph 13, "a fuller and more accurate record will promote the proper determination of the applications on their merits."

[93] In my opinion, much of the content of the Applicants' affidavits overlap with the evidence in the Labelle Affidavit. Further, as discussed below, the requirements of consultation are procedural, and have been compared to the administrative law requirements of procedural fairness (*Coldwater*, at para 38). Therefore, to the extent that the affidavits speak to the process of consultation, this evidence may be admissible under the second exception dealing with affidavits that demonstrate procedural defects. Further, it is possible that some of the affiants' evidence highlights an absence of evidence – again, Hydro does not point to any specifics.

[94] Canada submits that certain portions of the Applicants' affidavits are inadmissible pursuant to Rule 81(1) of the *Federal Courts Rules* because they are opinion or argument.

[95] In particular, Canada identifies the following passages from the Applicants' records:

- T-1147-19, Affidavit of Mike Sutherland, the last sentence of paragraph 126, the first sentence of paragraph 138, and paragraph 158 (opinion/argument);
- T-1150-19, Affidavit of Chief Meeches sworn October 31, 2019 - paragraph 24 (hearsay) and paragraphs 4, 5, 7, 14, 24, 33 and 35 (opinion/argument);
- T-1150-19, Affidavit of Ralph Roulette sworn October 30, 2019 - paragraph 49 (hearsay) and paragraph 57 (opinion/argument);
- T-1150- 19, Affidavit of Patricia Mitchell sworn October 31, 2019 - paragraphs 36 (save for the first sentence), 37, 62 and 63 (opinion/argument);
- T-1141-19, Affidavit of Councillor Nelson sworn October 31, 2019 - paragraph 4 (save for the first sentence) (hearsay) and paragraphs 37, 40, 60, 61, 63, 66, 69, 71, 74, 85 and 87 (opinion/argument);
- T-1141-19, Affidavit of Patricia Mitchell sworn October 31, 2019 - paragraphs 35 (save for the first sentence), 36 and 65 (opinion/argument).

[96] Rule 81 of the *Federal Courts Rules* states that:

> 81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

[97] In *Canada (Attorney General) v Quadrini*, 2010 FCA 47, the Court held:

> [18] The question of the respondent's affidavit remains. As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389).
>
> [Emphasis in original]

[98] To the extent that the portions mentioned above are hearsay, opinion, or argument – in particular paragraphs that ascribe Canada's intent to delay or obstruct the process – the Court will give those portions little, if any, weight. Specifically:

- Affidavit of Chief Dennis Meeches: I agree that the portions identified as opinion are indeed opinion, however I do not think that para 24 is hearsay because Chief Meeches indicates at the beginning of the affidavit that be believes information to be true;
- Affidavit of Ralph Roullette: I believe the identified portions are hearsay/opinion;
- Affidavit of Patricia Mitchell sworn October 31, 2019, Long Plain: I agree that paras 37, 62 and 63 are opinion/argument;
- Affidavit of Patricia Mitchell sworn October 31, 2019, Roseau River: I agree that paras 36 and 65 are opinion/argument;
- Affidavit of Councillor Nelson sworn October 31, 2019 – I agree that para 24 is hearsay and the remaining additional identified paragraphs are opinion/argument.

[99] Regarding Hydro's submission on the role of cross-examination, once again, Hydro does not cite any legal basis for its argument that the role of cross-examination is to clarify what was in the Record. Rule 83 contemplates cross-examination of an affidavit made on an application and the Rule does not restrict the role or purpose of cross-examination in any way. Therefore, I will allow the cross-examinations to stand as part of the Record.

B. *General Legal Principles regarding the duty to consult*

[100] It is useful to start the analysis of the first and second issues – whether Canada correctly identified the scope of its duty to consult and whether Canada met its duty to consult – with a general overview of the law regarding the Crown's duty to consult and accommodate for resource-based projects. The SCC and the FCA has and continues to be a fertile ground for jurisprudential teaching regarding the duty to consult. Helpfully, the FCA has recently considered Canada's duty to consult in a similar context of approving energy projects.

[101] The duty to consult is grounded in the honour of the Crown. The obligation of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It is enshrined in s. 35 of the *Constitution Act, 1982*, [s. 35] which recognizes and affirms existing Aboriginal rights and titles. S. 35 requires that the Crown act honourably in defining the rights s. 35 guarantees and in reconciling them with other rights and interests. This implies a duty to consult and, if appropriate, accommodate (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] at paras 16–18, 20, 25, 32).

[102] The duty to consult arises when the Crown has actual or constructive notice of a potential Aboriginal right and contemplates the potential for conduct that may affect that right (*Haida* at para 35). The duty to consult derives from the imperative to protect Aboriginal rights and interests while land and resource claims are ongoing or when a proposed action may impact an Aboriginal right.

[103] The first stage of the analysis is to determine whether the duty to consult arises and if so where on the consultation spectrum Canada's duty falls (*Haida* at para 39). The Crown does not dispute that the duty to consult arises here.

[104] The task of conducting the often difficult determination of what constitutes the scope of the duty, is assisted by the SCC's analysis in *Haida*:

> 42 At all stages, good faith on both sides is required**. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns"** as they are raised (*Delgamuukw*, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. **As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation,** agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 2003 BCSC 1422 (CanLII), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.
>
> 44 At the other end of the spectrum **lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high**. In

> such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. **This list is neither exhaustive, nor mandatory for every case.** The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations**. Every case must be approached individually.** Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light**. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake**.
>
> ….
>
> [Emphasis added]
>
> (see also *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 at para 489 [*TWN*] and *Coldwater* at para 41)

[105] The FCA considered the duty to consult for resource-based projects in *Coldwater* and *TWN*. At issue in both cases was whether Canada satisfied the duty to consult when approving the Trans-Mountain Pipeline Extension Project.

[106] *Coldwater* held that "…. the precise content of the honour of the Crown … also turns on the circumstances of the particular case." The content of the honour of the Crown will depend on the circumstances of each case (para 45). However, the purpose of consultation is to prevent the Crown from acting dishonourably by acting "unilaterally in a way that could affect the rights of Indigenous peoples, without first engaging in meaningful consultation" (*Coldwater*, at para 46).

[107] The Court avowed that practical requirements of the duty to consult have been compared to administrative law standard of procedural fairness (*Coldwater*, at para 38). While noting that the subjects of consultation are complex, and that reasonable minds will often differ on the issues raised, ultimately consultation must be reasonable. This means that Canada has to show that it has considered and addressed the right claimed by Indigenous peoples in a meaningful way (*Coldwater*, at paras 39, 40).

[108] The Court then went on to explain how to make that assessment:

> [41] So what do the words "reasonable" and "meaningful" mean in this context? The case law is replete with indicia, such as consultation being more than "blowing off steam" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), 2005 SCC 69, [2005] 3 S.C.R. 388, para. 54 [*Mikisew 2005*]), the Crown possessing a state of open-mindedness about accommodation (*Gitxaala Nation*, para. 233), the Crown exercising "good faith" (*Haida Nation*, para. 41; *Clyde River*, paras. 23-24; *Chippewas of the Thames*, para. 44), the existence of two-way dialogue (*Gitxaala Nation*, para. 279), the process being more than "a process for exchanging and discussing information" (*TWN 2018*, paras. 500-502), the conducting of "dialogue […] that leads to a demonstrably serious consideration of accommodation" (TWN 2018, para. 501) and the Crown "grappl[ing] with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns" (*TWN 2018*, para. 6). In cases like this where deep consultation is required, the Supreme Court has suggested the following non-binding indicia (*Chippewas of the Thames*, para. 47; *Haida Nation*, para. 44; *Squamish First Nation*, para. 36; see also *Yellowknives Dene First Nation*, para. 66):
>
> > the opportunity to make submissions for consideration;
> >
> > formal participation in the decision-making process;
> >
> > provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and
> >
> > dispute resolution procedures like mediation or administrative regimes with impartial decision-makers.

> [42] Examples and indicia in the case law are nothing more than indicators. The Supreme Court, while providing us with many of these indicia, has made it clear that what will satisfy the duty will vary from case to case, depending on the circumstances (*Haida Nation*, para. 45). So where do we get guidance?
>
> [43] The Supreme Court has identified the concepts that animate the duty. In its view, the "controlling question" as to what is "reasonable" or "meaningful" consultation is "**what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake**" (*Haida Nation*, para. 45). [emphasis added]

[109] This passage indicates that while there is a certain checklist of activities required for consultation, the guiding question is whether, in all of the circumstances, consultation maintained the honour of the Crown and promoted reconciliation.

[110] In *TWN*, the FCA found that Canada's consultation process met the requirements of deep consultation (para 549). The Court was clear the Crown can rely on the NEB process to satisfy the duty to consult (para 530). However, the Court found that on the facts of that case, the supplemental consultation process, while in design capable of meeting the duty to consult, in execution consultation was not adequate. If any clarification was needed in prior jurisprudence to understand that a two way dialogue must take place it could not be set out more clearly in these paragraphs:

> [558] To summarize my reasons for this conclusion, Canada was required to do more than receive and understand the concerns of the Indigenous applicants. **Canada was required to engage in a considered, meaningful two-way dialogue.** Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. **For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.**

> [559] **On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants.** While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. **The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints…**
>
> [Emphasis added]

[111] In addition to the deficient dialogue, the Court held that Canada's consultation was unreasonable for two reasons. First, Canada was unwilling to depart from the Board's findings in order to genuinely understand the Indigenous parties' concerns. Second, it was deficient because of Canada's "erroneous view that it was unable to impose additional conditions" on the project proponent (*TWN*, at para 560).

[112] Regarding accommodation, the Court in *Coldwater* held that meaningful consultation may or may not result in accommodation. Importantly, the Court indicated that if there was a failure to accommodate it does not mean there was no meaningful consultation (para 51). The Court concluded that reconciliation does not dictate a particular outcome, and while it is preferable that the parties agree, Indigenous groups do not have a veto over projects (paras 52, 53). The two important ramifications flowing from this conclusion were that:

- Imposing too strict a standard of review for the process of consultation would effectively give Indigenous groups a veto; and
- Indigenous groups cannot bargain in bad faith in order to try to veto the project (paras 54, 55).

[113] Consultation does not guarantee outcomes, and a form of accommodation can be to impose conditions on the proponents. The duty to accommodate requires Canada to balance Indigenous concerns with the potential impact of the Project on Aboriginal and Treaty rights – a task that can be done by an administrative agency like the NEB (*Coldwater*, at paras 58, 59).

[114] The FCA in *Coldwater* concluded that the GIC's decision was reasonable and that consultation was adequate:

> [76] In this case, the Governor in Council's key justifications for deciding as it did are fully supported by evidence in the record. The evidentiary record shows a genuine effort in ascertaining and taking into account the key concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown.

[115] The legal issues and the consultation framework in these applications are very similar to what the Court considered in *Coldwater* and *TWN*.

C. *Issue 1: In T-1141-19 (AWZ), T-1141-19 (Roseau River), T-1150-19 (Long Plain), did Canada properly assess the scope of its duty to consult and accommodate the First Nations?*

(1) AWZ's submissions

[116] AWZ's position is that Canada incorrectly determined that the Project's impacts on AWZ were low and therefore AWZ was owed a moderate degree of consultation. AWZ stated that because their right to harvest moose and their right to enjoy its reserve lands both treaty rights were impacted they were owed a high level of consultation.

i. Moose

[117] AWZ submitted that when a First Nation has a treaty right to harvest mammals, the duty to consult falls at the high end of the spectrum (*Clyde River*, at para 43). AWZ's position is that they as a nation have harvested moose in Manitoba since time immemorial. While the moose population in southern Manitoba has declined significantly in the past decade for other reasons to the point of few remaining, AWZ has indicate that the moose are beginning to return. The Court heard information regarding the responsibility of a First Nation to the moose generally, and specifically the First Nation's responsibility to ensure the moose are able to return.

[118] Canada acknowledges that, when plentiful, moose were of critical value to AWZ and concluded that the impact on moose was low and not significant. Canada's conclusion was based on the NEB's and EIS's analysis and conclusion about the Project's impact on the wildlife population, including moose.

ii. Use and Enjoyment of the Land (LOTW Water levels)

[119] Treaty 3 set aside land for AWZ's exclusive use, and the law recognizes that this interest in reserve land has the highest priority and protection (*Opetchsaht Indian Band v Canada,* [1997] 2 SCR 119 at paras 85-86; *Guerin v The Queen,* [1984] 2 SCR 335), AWZ submits that its ability to use and enjoy its reserve land is impacted by the LOTW's water level, because water levels affect its ability to fish, harvest wild rice, and travel. Therefore, the Project's impact on LOTW demanded deep consultation which is not what they were accorded.

(2) Roseau River's and Long Plain's submissions

[120] These two First Nations submit that Canada pre-determined the scope of their duty to consult without conducting any consultation with Roseau River or Long Plain. Further, they submit that Canada erred when it incorrectly determined that Roseau River was owed a "medium" level of consultation and Long Plain was owed a "low" level of consultation.

[121] Both First Nations state that the consultation that occurred was the bare minimum, such that it did not meet the requirements of consultation at the lower end of the spectrum, let alone at the higher level. Long Plain and Roseau River cite as *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paragraph 64, for the proposition that even at the lower end of the spectrum, the requirements could require the Crown to "provide notice to the First Nation, engaging directly with the First Nation, provide timely information about matters relevant to known First Nation interests, provide information about potential adverse impacts on those interests so that concerns can be expressed, listen to concerns expressed, consider those concerns, and attempt to minimize any adverse effects".

[122] The First Nations argued that because they provided the Crown with information of serious adverse impacts to their section 35 rights, including to its TLE interests, the Crown was required to engage in deep consultation. However, Canada did not alter its depth of consultation assessment. This incorrect depth of consultation meant Roseau River and Long Plain were "deprived" of the consultation process it was owed and that every decision that flowed from Canada's incorrect assessment tainted the consultation process.

(3) Analysis – AWZ, Long Plain, and Roseau River

[123] The scope and content of the duty to consult is reviewed on the correctness standard, while questions of the adequacy of consultation are reviewable on the standard of reasonableness (*Haida* at paras 61-62). In doing so, the substance of the consultation is more important than its form (as labelled by the parties). That is to say, the extent of consultation that actually occurred is more important than the depth it was labelled as being (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168; *Coldwater*, at paras 41-43). The substance of the consultation, rather than its form or label, is what should be reviewed.

[124] Canada acknowledges that it had a duty to consult each of the Applicants and that deep consultation requires the First Nations have the opportunity to make submissions, to formally participate in the decision-making process, and to be provided written reasons (*Haida*, at para 44). Canada submits that the guiding question is not the extent of the duty, but rather whether the consultation process, viewed as a whole, resulted in reasonable efforts to inform and consult (*Haida*, at para 62).

[125] For all the Applicant First Nations, Canada says that it did a preliminary depth of DCA for each Indigenous group at the start of supplementary consultations, and based on this applied a label of low, medium or high consultation required. However, Canada consulted with each of the First Nations as if they were owed a deep level of consultation no matter what label they had given in the DCA. Canada's position is that consulting every First Nations as if they were owed a deep level of consultation ensured that they met their duty to consult.

[126] AWZ's position that because their Aboriginal and Treaty rights to hunt moose and to enjoy its reserve lands may be impacted by the Project, they deserved a greater level of consultation and accommodation. However, as discussed further below, the studies and evidence all found that the Project would not affect water levels on LOTW. Further, it was found that any impact to moose population would be minimal given that there are very few moose. In other words, Canada found that the risk of non-compensable damage was not high.

[127] As set out above at paragraphs 123-125, the substance of the actual consultation is more important than the label. Canada owed AWZ a moderate to high level of consultation, and did not owe AWZ the deepest level of consultation given the assessment of how they were affected.

[128] The materials show that Long Plain and Roseau River's Aboriginal and Treaty rights may be impacted by the Project. In Canada's preliminary depth of consultation assessment, sent to Roseau River on August 14, 2018, Canada assessed Roseau River as being owed a moderate duty. However, the draft CCAR sent to Roseau River on March 22, 2019 assessed Roseau River at the high level. So it would appear that Canada and Roseau River ultimately agreed as to the depth of consultation Roseau River was owed.

[129] Similarly, Canada assessed Long Plain as being owed a low level of consultation in their preliminary depth of consultation analysis. In the draft CCAR sent to Long Plain on March 22, 2019, Canada's assessment had not changed; however the final CCAR states that Long Plain was owed a moderate level of consultation.

[130] As stated in *Yellowknives Dene First Nation v Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148:

> [53] I agree that little turns on the terminology used to describe the nature of consultation that was required. What is important is the determination of whether the level of consultation afforded was proportionate to the preliminary assessment of the strength of the claimed rights and the seriousness of the potential for adverse effects of the Proposed Development on those rights (*Haida Nation* at paragraph 35).

That is precisely the situation on these facts.

[131] The fact that the depth of consultation assessment changed as the matter progressed demonstrates a willingness to listen and to be flexible. Ultimately, regardless of the fact of the varying assessments between the three First Nations (AWZ was assessed as moderate to high; Long Plain was assessed as moderate; and Roseau River was assessed as a high level of consultation), the fact remains that all three First Nations were consulted on a deep level.

[132] The real question is whether Canada adequately met its duty to consult – which would involve the opportunity to make submissions, to formally participate in the decision-making process, to be provided written reasons – and whether there was a meaningful consultation process that maintains the honour of the Crown.

D. *Issue 2 - Constitutional law: Was it reasonable for the GIC to conclude that Canada's consultation with Peguis, AWZ, Roseau River, and Long Plain was adequate?*

(1) T-1147-19 – Peguis

i. Peguis' Submissions

[133] Peguis' submissions are that a review of the supplementary consultation process shows that the Crown failed to meet the requirements of maintaining the honour of the Crown and implementing reconciliation (citing *Haida* and *Coldwater*). Peguis argued that consultation needs to be meaningful, and in these circumstances Canada should have tried to secure Peguis' consent to the Project. If consent was not possible, then Peguis said Canada should have selected an appropriate framework, engaged and dialogued meaningfully, and then actually explored accommodation measures with Peguis instead of proceeding without their participation in the supplementary consultation. Peguis summarized their position as being that Canada failed to satisfy the requirements of the duty to consult. They state that Canada did not meaningfully consult with Peguis, prevented the conditions necessary for meaningful consultation, and purported to determine accommodation measures before consulting. Peguis says this decision affects Aboriginal and Treaty rights, which was made without adequate consultation. Therefore, they assert that it violates the duty to consult and should be quashed.

[134] Peguis also makes submissions about the adequacy of consultation. On this issue, they submit that as a matter of law, adequate consultation requires both the selection of a reasonable process, and the reasonable execution of that process. Specifically, Peguis could not set up community meetings without first finalizing funding and signing the funding agreement. Peguis

states that they did not prevent, nor did they try to hinder or slow the process in anyway, but were thwarted in their efforts to participate before the final decision.

ii. Canada's position

[135] Canada submits that the whole of the record needs to be considered when determining whether the duty to consult was satisfied. Peguis, however, focuses only on whether supplemental consultation was adequate.

[136] I agree with Canada that it is well established in the case law that existing regulatory processes like NEB hearings can satisfy Canada's duty to consult (*TWN*, at para 529), despite Peguis' stated position that the NEB hearing was not "s. 35 consultation".

[137] In this case, there is no direct evidence on the purpose of the supplementary consultation. Peguis submits that in initiating supplementary consultation, Canada was acknowledging that the NEB's process was deficient. However, Canada in response to that argument is that the August 14, 2018 letter initiating supplementary consultation stated that the purpose of supplementary consultation was, first, to identify any outstanding concerns regarding project-related impacts on Aboriginal and Treaty rights not communicated to the NEB, and second, to consider any incremental federal accommodation measure to address those concerns. Canada submits that nothing in this letter indicates that supplementary consultations were initiated because of concerns with the NEB process.

iii. Analysis

[138] I find that Canada failed to meet the substantive requirements of the duty to consult with Peguis. Similar to *TWN*, although the process established was capable of satisfying Canada's duty to consult, in execution it did not. This is why, as I noted earlier, it is critical to distinguish between the level of consultation identified in form, and the level of consultation undertaken in substance.

[139] If Canada is going to initiate supplementary consultation, then that process must meet the requirements of adequate consultation. This finding is supported by the Court's decision in *TWN*, where the Court considered the adequacy of the Crown's supplementary consultation after the NEB process. The FCA held that Canada was required to engage in meaningful consultation during this supplementary phase. If Canada is offering supplemental consultation, and the First Nations express interest in that consultation, it is not enough to simply say that because Peguis participated in the NEB process, the duty to consult was satisfied. That is not to say that the NEB process was deficient. Rather, Canada indicated it was initiating supplemental consultation and there is no indication on the record that Canada and Peguis engaged in substantive consultation with a two-way conversation.

[140] In this case, and similar to *TWN*, I believe that the consultation framework was capable of meeting the requirements of the duty to consult, however in substance the duty was not met. In terms of what would have been required, as discussed above, Canada states that it proceeded as if each First Nation was owed a deep level of consultation. The case law is clear that deep

consultation requires an exchange of information, the opportunity for Peguis to express its concerns, and there need to be written reasons demonstrating how those concerns impacted the outcome (*Coldwater*, at para 41). However, to the extent that Peguis submits Canada was required to obtain its consent, the Court in *Coldwater* rejected this submission, noting that a consent requirement would amount to a veto (para 194).

[141] Canada does not dispute that it never actually met and discussed Peguis' outstanding substantive concerns. Rather, Canada submits that Peguis had the opportunity to make submissions before the NEB. Further, Canada was willing to meet with Peguis, but did not because Peguis did not set up the community meetings. It also submits that Peguis had more than six days notice about setting up community meetings, because it was aware as of August and September 2018 that Canada was open to engage in supplemental consultation, including community meetings. Finally, Canada submits that it addressed Peguis' concerns that were identified in the NEB and CEC record and the CCAR. Canada said Peguis benefitted from the accommodation provided in the amended conditions, and in their view, all of this means in substance that the duty to consult with Peguis was met.

[142] Canada relied on *Bigstone Cree Nation v Nova Gas Transmission Ltd,* 2018 FCA 89 [*Bigstone*], where the Court held at paragraph 43 that the First Nations' submissions that consultation was left too late, when they did not take part during the first three months of a four-month consultation process, could not succeed. Similarly, in *Coldwater*, one of the applicants had submitted that they were not given an opportunity to comment on the updated CCAR. The Court held that while such an opportunity would have been desirable, because the

Squamish had an opportunity to, and did submit independent submissions, not being able to comment on the updated CCAR was not a serious breach of the duty to consult (para 144).

[143] Canada's submissions cannot succeed. I recognize that the MPMO and Peguis spent a significant amount of time discussing funding, particularly whether the participant funding could be used for an archeological study. Further, there is no evidence that these funding discussions were "bad faith bargaining" on Peguis' part. Peguis' evidence is that it could not proceed with setting up community meetings before it had finalized funding. Even if Canada's position was that Peguis could proceed with consultation-related expenditures before finalizing funding, it did not make that clear to Peguis and the funding application form stated that no expenditures could be made prior to approval. Until the agreement was signed, Peguis could not set up community meetings and then submit the cost of the expenditure to be paid (see above paragraph 41). I do not find that the delay attributed to Peguis was meant to thwart the consultation process.

[144] These cases relied on above at paragraph 142 are distinguishable on this point. This is because there was no opportunity for Peguis to express its outstanding concerns, through correspondence, teleconference, a community meeting, a meeting with leadership or otherwise. If the problem in *TWN* was that Canada did not meaningfully consider the First Nations' concerns, here there was no effort by Canada to ascertain Peguis' outstanding concerns, let alone meaningfully consider them.

[145] In *Coldwater*, the Court found that Canada satisfied its duty to consult because "the evidentiary record shows a genuine effort in ascertaining and taking into account the key

concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown" (para 76). Canada did not demonstrate such genuine consideration in the case at hand when it comes to their engagement with Peguis during supplemental consultation.

[146] Canada submits that because Peguis did not comment on the draft CCAR, it discerned Peguis' concerns from its submissions before the CEC and NEB and ensured they were addressed and accommodated.

[147] Recognizing that Peguis did not provide comments (for reasons discussed above), there are still a few problems with Canada's approach. Discerning Peguis' concerns from the NEB and CEC process flies in the face of Canada's stated purpose for supplementary consultation, which was to discern any **outstanding c**oncerns from the NEB process and propose additional or further accommodation measures. Further, the draft was distributed for comment in March 2019, and since Canada had not meet with Peguis up until that point, it had no way of discerning Peguis' **outstanding** concerns. Canada sent the draft CCAR to all parties on March 22, 2019, and as a result it appears that they were working on a uniform timeline. The problem is not that Peguis did not reply, but that Canada developed the CCAR without any further input and did not indicate this in the CCAR. Meaningful consultation which fulfills the duty to consult and accommodate must be a dialogue between the parties. **The problem, in short, is that in this case, Canada's consultation with Peguis was a monologue, rather than a dialogue.**

[148] As stated above, Canada's response to Peguis' concerns is that they were accommodated through the amendments to the NEB conditions. However, as the FCA held in *Gitxaala Nation v Canada*, 2016 FCA 187 at paragraph 308 [*Gitxaala*]:

> [308] In our view, it was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert the Project's impact would be mitigated without first discussing the nature and extent of the rights that were to be impacted. In order for the applicant/appellant First Nations to assess and consult upon the impacts of the Project on their rights there must first be a respectful dialogue about the asserted rights. **Once the duty to consult is acknowledged, a failure to consult cannot be justified by moving directly to accommodation.** To do so is inconsistent with the principle of fair dealing and reconciliation.
>
> [Emphasis added]

[149] In this case, there was no substantive consultation, even though Canada acknowledged that such a duty arose and the failure to consult cannot be remedied through accommodation.

[150] This is in contrast to Roseau River, Long Plain, and AWZ, the Applicants in the related files. In those cases, Canada met with the First Nations, either before the draft CCAR or before finalizing the CCAR and there was an opportunity for them to express their concerns. There was no such opportunity here. I do recognize that Canada made an effort to consult with Peguis. However, that does not mean they could not have made further efforts, for example by advising Peguis that the May 3rd deadline had been extended or following up on the draft CCAR. Further, a review of the Peguis-specific annex shows that there was no input from Peguis about possible accommodation measures, unlike, for example, the AWZ annex, which shows accommodation measures proposed by AWZ and Canada's assessment of those proposals.

[151] Based on the above, I find that Canada did not adequately discharge its duty to consult Peguis.

(2) T-1442-19 – AWZ

i. AWZ's Submissions

[152] AWZ submits that Canada failed to discharge its duty to consult and accommodate with respect to the Project's impact on Treaty rights to hunt, the Project's potential impact on its reserve land, and the First Nations' lack of benefit from the Project.

[153] AWZ's submissions are that the Crown failed to consult with AWZ about these three outstanding issues after the NEB process.

[154] Regarding AWZ's right to harvest moose, AWZ asserts that consultation failed for two reasons. First, Canada did not engage meaningfully but rather deferred to the NEB's assessment. Second, the Crown's incorrect impact assessment led it to conclude that no moose specific accommodation was required. AWZ submits that the Project's impact on moose was an "obvious and unresolved" issue from the NEB hearing. While both Hydro's EIS and Canada found that the Project will have negative effects on moose, the NEB held that the Project's impact on traditional lands and resources were insignificant. During supplemental consultation, AWZ explained their concerns and proposed possible accommodation measures. However, Canada deferred to the NEB's findings and offered no new information to address AWZ's concerns

[155] AWZ submits that Canada's error in assessing the Project's impact on moose led to Canada's conclusion that no moose specific mitigation or accommodation measures were warranted. AWZ argued that despite being owed a duty to consult at the highest end of the spectrum, the project was approved without any moose-specific conditions or accommodation. AWZ points to two cases, *Bigstone* and *West Moberly First Nations v British Columbia (Chief Inspector of Mines),* 2010 BCSC 359 [*West Moberly*] to support the proposition that reasonable accommodation required moose-specific conditions.

[156] Regarding water levels on LOTW, AWZ submits that the NEB was required to consider the Project's impact on water levels and that the NEB excluded this consideration without consulting AWZ. AWZ submits that the NEB's failure to consider this issue renders the NEB's report so deficient that Canada cannot rely on it.

[157] AWZ submits that the supplemental consultation failed to address the First Nations' outstanding concerns regarding water levels. At their January meeting, AWZ informed Canada that they wanted to understand for themselves how the Project would impact water levels, given the connection between water levels and their rights. However, while Canada conducted their own assessment by consulting Ministry of Environment hydrologists, and meeting with the LOTWCB, Canada did not share this information with AWZ or invite AWZ to participate. AWZ says that all Canada provided AWZ with was a technical note authored by Hydro assessing why the Project would not impact water level. However AWZ's position is they did not have the technical expertise to understand the briefing nor the resources to hire an expert. While the

honour of the Crown requires more than Canada's assurance that they looked into a concern, AWZ submitted that Canada did nothing more than provide conclusory opinions.

[158] AWZ submits that it had no opportunity to have an economic benefit from the Project despite the impact the Project would have on its rights. AWZ notes that it has to buy its electricity from Minnesota at a marked-up price while Hydro uses AWZ's territory to sell electricity at a profit. AWZ stated that, while it was Canada's position that it could not compel the proponent to offer economic benefit accommodation, the duty to consult lies with the Crown, and the Crown could effectively compel the proponent to offer economic benefits or accommodations by withholding approval until such offers are made.

ii. AWZ-Analysis

a) Moose

[159] AWZ focusses on specific issues that the Crown failed to consider. The first issue AWZ raises is regarding Canada's inadequate consideration of the Project's impact on moose and moose habitat, and the corresponding impact on AWZ's right to harvest moose. On this issue, AWZ submits that Canada did not engage meaningfully but rather deferred to the NEB's assessment, and that the Crown's incorrect impact assessment led it to conclude that no moose-specific accommodation was required.

[160] In support of their submissions, AWZ relies on a passage from *TWN* where the Court held that "reliance on the Board's process does not allow Canada to rely unwaveringly upon the

Board's findings and recommended conditions. When real concerns were raised about the hearing process or the Board's findings and recommended conditions, AWZ argued that Canada was required to dialogue meaningfully about those concerns" (*TWN* at para 627).

[161] Canada's submissions focus primarily on the process that took place. Canada responds that it genuinely considered AWZ's concern during supplemental consultation, but accepted the NEB's findings regarding the moose population. Canada submits, it met the requirements of deep consultation as described in the case law because: AWZ was provided all the necessary information; had an opportunity to make submissions; and was provided written reasons explaining how their concerns were taken into account. Canada's position is supportive of Hydro's submissions that flesh out in detail why the NEB's finding were reasonable.

[162] Canada states that the cases AWZ relies on to assert that a moose specific mitigation plan is necessary – *Bigstone* at paragraphs 15, 16, 52, and 54; and *West Moberly* at paragraphs 17, 51, 155-165, 264, 265, 275 – are distinguishable, because in those cases the regulatory body found that the project will have a significant impact on caribou and that was not the case on these facts.

[163] AWZ's position has always been that harvesting moose was critical to their traditional way of life, and therefore any impact the Project would have on moose would affect AWZ's s. 35 Aboriginal and Treaty rights. However, the parties disagree over the extent of the Project's impact on moose. Moose were considered as part of a broader wildlife study in the EIS, meaning moose were not identified as a "valued component," and there was no moose specific study conducted. However, Hydro and the NEB held that it was not necessary – the fact that moose

were considered as part of the Project's impact to wildlife more generally, and not as a "valued component," is consistent with federal guidelines. Ultimately, the NEB concluded that the Project's impact on wildlife, including moose, would be minimal.

[164] During supplementary consultation, AWZ raised the issue of the Project's impact on moose at a January 24, 2019 meeting with MPMO representatives. The meeting minutes reflect AWZ's concerns that "the proponent did not include moose as a valued component in its EIS" and that the Board did not consider moose during the NEB assessment. AWZ proposed three accommodation measures, in response to which MPMO staff indicated they would look into the type of study required and the possibility of economic compensation.

[165] At their May 9, 2019 meeting with AWZ, Canada's representative indicated that the EIS had studied the Project's impact on moose and it would be minimal given the limited moose habitat in the Project area.

[166] In the CCAR, the Crown representatives concluded that:

> Given the proponent's research on the decline of moose populations, the findings of the EIS regarding moose and the NEB's views that the EIS satisfied provincial and federal guiding documents, the Crown concludes that the potential impact of the Project on the ability of members of Animakee Wa Zhing to exercise their section 35 Aboriginal and Treaty rights related to moose will not be significant. Acknowledging Animakee Wa Zhing's concern regarding cumulative impacts to moose populations, NRCan will establish a Terrestrial and Cultural Studies Initiative to support Indigenous-led studies to improve understanding of land-based issues.

[167] AWZ disagreed with the findings in the EIS and the NEB's conclusion. The Crown found that any impact would not be significant. In contrast to AWZ's assertion that the duty to consult required a moose-specific stud and ultimately, accommodation measures based on the specific impacts identified for each project.

[168] I accept that Canada met the requirements of deep consultation as described in the case law, similar to how the Court in *TWN* found that the consultation framework was capable of meeting the Crown's consultation requirement. I also accept that there was "a genuine effort in ascertaining and taking into account the key concerns of the applications, considering them, engaging in a two-way communication, and considering and sometimes agreeing to accommodations", consistent with reconciliation and the honour of the Crown (*Coldwater*, at para 76).

[169] As the Court held in *Coldwater*, the requirements of consultation are often compared to administrative law requirements of procedural fairness. Here, it was reasonable for the GIC to conclude that Canada's duty to consult had been adequately discharged given my finding that the process was meaningful, not just the substantive outcome.

[170] In this case, there were two meetings between Canada and AWZ. AWZ had an opportunity to provide comments on the AWZ-specific draft CCAR. It is true that Canada did not provide any new information about the Project's impact on moose; however, neither did AWZ. This supplementary consultation afforded AWZ the opportunity to raise these issues, as their very purpose was to address issues outstanding from the NEB process.

[171] It is not the Court's role to weigh the scientific evidence or to prefer one of the First Nations' or Hydro's submissions; that is the role of the NEB's and the Crown. *Coldwater* supports that finding, as in that case, the FCA noted that it is not the Court's role to "'act as an academy of science' and decide whose view is correct". In that case, Canada indicated to the parties that it intended to rely on the NEB reconsideration hearing to fulfil its duty to consult, and that the NEB has expertise in assessing project impacts on Indigenous groups (*Coldwater*, at para 162). On that issue in *Coldwater*, the Court concluded that just because Canada's position was consistent with the NEB's, and the First Nations' view diverged, does not mean that consultation was deficient (*Coldwater*, at para 171). I find that with AWZ the consultation was not deficient, even though Canada's position aligned with the NEB's and not the First Nations'.

[172] I find that neither *Bigstone* nor *West Moberly* stand for the proposition that the duty to consult requires a species-specific study or mitigation plan. Further, the duty to accommodate only arises when a project's impact on Aboriginal or Treaty rights cannot be mitigated and in this case it was found that there was little if any impact in AWZ's case.

[173] Conversely, in *Bigstone*, the NEB had found that there were "already substantial ongoing cumulative effects on caribou in the region due to both direct and indirect habitat disturbance," and therefore "the Board required all residual effects on caribou habitat to be considered and compensated" (*Bigstone*, at para 15). This is different from the NEB's conclusion on these facts that the moose population was already quite low due to a variety of factors, and that the Project's impact on moose would be limited (only during construction) and minimal.

[174] Similarly, in *West Moberly*, a biologist with the Province's Ministry of the Environment had concluded that while the draft mitigation plans would minimize impacts to Caribou, mine development is inconsistent with maintaining or increasing caribou numbers (*West Moberly*, at para 58). There, the Court found that because no recovery plan was in place there was no reasonable accommodation (*West Moberly*, at para 59). In the AWZ situation the EIS concluded, and the NEB agreed, that the Project would not contribute to the other factors affecting moose population which is unlike *West Moberly*, where it was held that the Project would contribute to cumulative effects on caribou.

[175] The fact that Canada's and AWZ's views diverged does not mean the AWZ's views must be preferred or that Canada did not genuinely consider them. Canada and AWZ had a two way conversation about the moose, in which. Canada disagreed with AWZ – but there was a dialogue. On these facts I find that the Crown's consultation was adequate.

b) Water Levels on LOTW

[176] Regarding water levels on LOTW, AWZ submits that the NEB fatally erred in making the decision to exclude the Project's impact on LOTW water levels from its assessment. Canada submits that based on all the available evidence, that the Project would not affect water levels on LOTW.

[177] In support of its assertion that this scoping decision rendered the NEB's report so deficient that Canada could not rely on it, AWZ cites *TWN* at paragraph 201. There (*TWN*), the FCA held that while the NEB's reasons were not subject to judicial review, "under the legislation

the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon. The report is not immune from review by this Court and the Supreme Court."

[178] In *TWN*, the Court concluded that the Board erred in excluding marine-related shipping from the scope of the definition of the "designated project" that was to be assessed under the *CEAA*. The Board had held that it did not have regulatory authority over shipping, and the Court accepted this; however the Court held that "it was nonetheless obliged to consider the consequences at law of its inability to 'ensure' that measures were taken to ameliorate the Project's impact on the southern resident killer whale" (*TWN*, at para 455).

[179] In *TWN*, the NEB's scoping decision meant that it did not consider the marine-shipping related effects on the southern resident killer whale, an assessment that should have been within the scope of the Board's environmental assessment.

[180] I find that, the NEB's decision regarding LOTW water levels can be distinguished from the "fatal" scoping decision in *TWN*. In *TWN*, the NEB concluded that marine shipping was outside of its regulatory capacity, a legal conclusion, and therefore the NEB did not consider the effects of shipping on whales, an environmental effect that it should have considered as part of its environmental assessment. In this case, the NEB did not determine that it could not consider the Project's effects on water levels; rather it held that based on the application in this case – an application for a certificate for an international power line – it was not necessary to assess the

environmental and socio-economic effects associated with upstream or downstream facilities associated with electricity production.

[181] The NEB's reasons for decision show that it considered the Project's potential effects on LOTW and accepted Hydro's submissions that there would not be any because the Project relies on energy generated on Lake Nelson and Hydro does not control LOTW water levels. AWZ submits that because the Board considered this affect after excluding upstream effects from its list of issues means AWZ was denied procedural fairness. I do not agree with this submission because AWZ made submissions and cross-examined Hydro's witnesses on this issue, which demonstrates that they were afforded the requisite procedural fairness and just do not agree with the decision.

[182] In any event, AWZ expressed its concerns about water levels on the LOTW during supplemental consultations with Canada. Therefore, even if the NEB had impermissibly excluded the impact of LOTW water levels from consideration, Canada considered this concern during supplemental consultation and advised the GIC of its conclusions in the CCAR. The evidence is that AWZ shared its concern with Canada during the January 24, 2019 meeting. Canada invited AWZ to a meeting with the LOWCB that had been planned with another First Nation at the end of February, which AWZ did not attend. Canada also consulted with Ministry of the Environment and Climate Change Canada [ECCC] staff regarding water levels on LOTW.

[183] In the final CCAR, Canada recognized that the upstream effects were not considered by the NEB. But that the NEB accepted Hydro's position that the Project would not impact water

levels, and concluded: “On the balance of received information, the Crown concludes that the Project will not impact water levels in the Lake of the Woods and, as such, there is no corresponding obligation to provide accommodation.”

[184] It is clear that Canada heard AWZ’s concerns and made additional inquiries beyond accepting the NEB’s and Hydro’s conclusion. While it would have been preferable for Canada to give AWZ more notice about the February meeting with the LOWCB, or to inform AWZ that it was meeting with experts from ECCC, Canada is not be to held to a standard of perfection. It is not my role to hold them to what is preferable, but rather to consider whether they met their legal obligation. On that issue, Canada did provide AWZ with new information, in particular the briefing note. Canada genuinely considered the issue and based its conclusions on all of the evidence, including what was before the NEB and new information received from experts at ECCC. I find this conclusion reasonable, and consultation with AWZ on the issue to have been adequate.

c) Economic Accommodation

[185] AWZ asserts that given the Project’s effects on its rights, Canada should have compelled the proponent to provide economic accommodation to AWZ. AWZ submits that economic accommodation is particularly relevant because the Project will use AWZ’s traditional territory to export power to Minnesota, while AWZ must acquire electricity from Minnesota at a marked up rate.

[186] Canada submits that the duty to consult does not require the Crown to ensure that impacted First Nations benefit from the contemplated activity. Further, that accommodation is meant to ameliorate potential impacts to an Indigenous group's Aboriginal and Treaty rights. While AWZ did identify potential impacts, the reasonable conclusion following the NEB process and supplemental consultation was that those potential impacts were either adequately accommodated by Hydro's commitments and the amended NEB conditions, or were not significant. Canada submits that AWZ's assertion that Canada was obliged to offset AWZ's utility rates is without legal foundation. The proposed accommodation measure, although considered, was not appropriate because it would not mitigate or eliminate any potential Project-related impacts.

[187] I agree with Canada. There is no duty to accommodate independent from the duty to consult. As the SCC held in *Haida*:

> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. **Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm** or to minimize the effects of infringement, pending final resolution of the underlying claim….
>
> [Emphasis added]

[188] Further, as summarized by the FCA in *TWN*:

> [495] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require

> steps to avoid irreparable harm or to minimize the effects of infringement…

[189] The fact that AWZ does not benefit from the Project is not an infringement of their Aboriginal or Treaty rights. Further, the fact that AWZ proposed certain accommodations does not mean that the Crown must accept those accommodations (*Coldwater*, at para 58).

[190] In summary, based on the law and the record, I find that the Governor in Council reasonably concluded that Canada met its duty to consult and accommodate AWZ.

(3) T-1141-19 Long Plain and T-1150-19 Roseau River

i. Long Plain's and Roseau River's Submissions

[191] Long Plain and Roseau River submit that Canada's consultation failed in four ways. In this section I will refer to these two First Nations as the Applicants.

[192] First, the Applicants submit that Canada deferred direct consultations on outstanding project-specific issues until too late. The Applicants submit that consultation must be accessible, adequate and provide a meaningful opportunity to participate; in some circumstances, that can involve providing capacity funding. The Applicants argue that they worked with Canada for six months to try to settle participant funding and that they were not provided with resources to analyse gaps in the information or to undertake further studies. The Applicants provided a list of Canada's errors in the consultation including administrative burdens, lack of capacity funding, failure to engage on Canada's consultation framework, only superficially acknowledging their

substantive concerns and failing to engage in two-way dialogue, creating unnecessary delay, providing “glorified note takers” at meetings, unilaterally determining the TLE is outside the scope of consultation, and unilaterally determining that revised conditions would satisfy accommodation.

[193] Ultimately, they assert that Canada only met with Long Plain and Roseau River once, and that aside from correspondence and amending the NEB conditions, limited consultation and no accommodation took place.

[194] Second, in making the OIC, Canada failed to meaningfully consider Project impacts on s. 35 Aboriginal and Treaty rights. The Applicants rely on the FCA’s decision in *Canada v Long Plain First Nation*, 2015 FCA 177 [*Long Plain 2015*] for the proposition that when the Crown is considering disposing of Crown lands, it has a duty to consult.

[195] The Applicants submit that Canada did not consider the Applicants’ TLE interests. They stress that Crown land is limited and that further disposition of Crown land could prevent Canada from fulfilling its obligations under the TLESA. Further, they said Canada unilaterally determined that TLE interest were outside the scope of consultation.

[196] Further they argued, Canada did not indicate how the NEB conditions were responsive to the Applicants’ concerns. The Applicants submit that the NEB’s Condition 22, a requirement that Hydro develop a Crown Land Offset [CLO] plan, is intended to offset the use of use of

Crown land for the exercise of treaty rights, as opposed to offsetting the loss of Crown lands for TLE selection. The Applicants refer to this as a "approve first and consult later" approach.

[197] Third, the Applicants submit that Canada did not give reasons to show that the Applicants' Aboriginal and Treaty rights were considered and how they influenced the OIC. The Applicants note that Canada has claimed cabinet privilege over the documents that were before the GIC. They argue that the OIC mentions that the GIC considered the CCAR, however the Applicants submit that they were not given enough time to review the CCAR and because it contains errors that it should not be relied upon. Further, since the GIC does not specifically mention the independent submissions they provided, it is reasonable to assume that the GIC did not review them. The Applicants submit that if the GIC was provided these independent submissions, it could not have reasonably concluded that the Applicants were adequately consulted.

[198] The fourth error the Applicants assert is that Canada failed to accommodate the Applicants. The Applicants say that they did not receive any preferential hiring or contracting as a result of the Project agreement, and that while Hydro had initially offered Long Plain a project agreement, Hydro later rescinded the offer.

[199] The Applicants further submit that despite Canada having knowledge of the Project's impacts on their Aboriginal and Treaty rights, Canada did not discuss potential accommodation measures with them. The Applicants assert that their accommodation requests were reasonable and the result of good faith dialogue.

ii. Analysis

a) Consultation Too Late

[200] The Applicants submit that too much time was spent on administrative matters, such as funding, and that substantive consultation was left too late. Ultimately, they only had one meeting with Canada. Further, they submit that that they did not have enough time to review the draft CCAR and provide feedback.

[201] Canada and Hydro's position is that consultation was an ongoing process, beginning at the latest with the NEB hearings with Canada initiating consultation in August 2018. Further, they state that the GIC decision deadline was extended twice in order to incorporate the results of consultation.

[202] In *Bigstone*, the applicant submitted that it did not have enough time to review the draft CCAR. The Court first noted that the timeline for supplementary consultation was approximately four months, but that the first three months were "lost" because of Bigstone's lack of engagement (para 43). The Court also recognized that the MPMO gave the First Nations a tight deadline to provide feedback on the draft CCAR, but noted that the deadline was extended twice (para 42). The Court held that given the parties' conduct the timelines were appropriate.

[203] Similarly, in *Coldwater*, one of the applicants, Ts'elxwéyeqw, submitted that consultations were not meaningful because Canada spent too long establishing how consultation would occur and then rushed through the execution. Ts'elxwéyeqw further argued that imposing

the timeline ignored their capacity constraints (*Coldwater*, at para 231). The Court held that while it was reasonable to try to maximize efficiency, this must be done keeping the available time in mind and "[h]aving all the elements in place for effective consultations without any time left for the actual consultations was not the proper course in the circumstances" (para 242). The Court there rejected Ts'elxwéyeqw arguments, noting that "Canada made every effort to schedule the workshops and substantially engage with Ts'elxwéyeqw… but was consistently faced with refusals to set dates" (para 244).

[204] The facts in this case differ slightly from *Bigstone* and *Coldwater*. The parties spent a significant amount of time determining whether funding could be funnelled through ANCI like the First Nations wanted. However, contrary to the Applicants' submissions, I do not think this is evidence of Canada intentionally trying to delay or avoid consultation.

[205] Just as occurred in *Bigstone*, supplemental consultation was initiated early – in this case in August 2018, which was approximately 10 months before the GIC decision was made, in June 2019. As well, the parties are or should be aware that per the *NEB Act*, the GIC has three months from the release of the NEB Reasons to make a recommendation. This deadline was extended twice (from February to May, and then from May to June) and Canada communicated this extension to the parties. I would note that the deadline for providing comments on the draft CCAR was similarly extended, and that neither Long Plain nor Roseau River provided any comments or feedback but did correspond and provide independent submissions,.

[206] When it is viewed as a whole, I find that consultation was not left too late and any delay in getting to the substance of consultation is attributable equally to both parties.

b) TLE

[207] In summary, the Applicants maintain that the NEB did not consider their TLE, that Canada unilaterally excluded TLE from the scope of consultation, and that Canada failed to follow the guidance of the FCA in *Long Plain 2015*.

[208] In response, Canada submits that it considered Long Plain's and Roseau River's concern regarding the loss of Crown land during supplemental consultation. Canada notes that general TLE concerns were raised during the NEB hearing, and the NEB found that anticipated land requirements were reasonable and justified. The NEB also found that the route selection was meant to minimize the Project's impact on unoccupied Crown land. The NEB imposed Condition 22, which requires Hydro to submit a CLO plan outlining how permanent loss of Crown land would be offset or accommodated. Canada's position is that it considered the NEB's conclusions and Condition 22 to be a reasonable accommodation measure and therefore that no further accommodation was necessary. While Long Plain had identified parcels of land it claimed it was entitled to select pursuant to its TLESA with Canada, Canada informed Long Plain that the specific parcels were not for sale, and that TLE selections were only available on a willing buyer/seller basis. Further, Canada provided a response to Roseau River about the parcels of land it identified for TLE selection in a November 25, 2019 letter.

[209] I find that a review of the evidence and the case law does not support the Applicants' arguments.

[210] Here, the evidence is that Long Plain and Roseau River have outstanding TLE, in part based on the TLE Settlement Agreement signed with Canada. The Applicants assert that the Project's impact on their rights is that it will irreparably reduce the available Crown land for TLE.

[211] First, on a more general level, the NEB found that any impact to TLE or traditional use of land was minimal because of the route selection. The NEB also held that any loss of Crown land could be mitigated through Condition 22, which requires Hydro to develop a CLO plan. In the CCAR, Canada accepted these findings and also amended Condition 22 to specify that Hydro must consult Indigenous groups when developing the plan.

[212] Second, regarding the Applicants' specific TLE selection, I note that these selections were only made in May 2019, after Hydro's FNMEP and the NEB hearing process. During supplementary consultation, the Applicants raised their concern about TLE through communications with Canada, their meeting with Canada, and the TLE land selections made in May. Therefore, contrary to the Applicants' argument, the Applicants had the opportunity to make submissions. Further, Canada considered these selections but held that that "implementation of TLE as an issue distinct from the consultation process on the Project and notes that, pursuant to Long Plain's TLE agreement, CIRNAC and the Province of Manitoba will work together with Long Plain to determine the appropriate course of action".

[213] I agree that the TLESA means that Canada must consult with the Applicants when disposing of Crown land (i.e. when it is a "willing seller" per *Long Plain 2015*). However, the FCA has also held that "the consultation process…was not to be a forum for the final determination and resolution of Aboriginal claims to rights and title" (*Gitxaala*, at para 289). Not every proposed project can be subject to TLE selections, especially ones made so late in the process. To hold such would be to give First Nations a veto over the project and the case law emphasizes that consultation is not a veto (see, for example, *Coldwater*, at para 53).

[214] Further, Canada followed up with the Applicants about their TLE selections in May and then in November 2019. This to me shows that Canada did not ignore or dismiss the Applicants' concerns, but considered and responded to them.

[215] To the extent that the Applicants submit that consultation was not meaningful because of a lack of funding, I would note that in *Bigstone* the Court held that Canada is not under any obligation to provide funding and that funding is "but one factor to determine if the consultations were meaningful" (para 45). Similarly, Long Plain's evidence is that it did not participate in the NEB hearing because it felt the available participant funding ($80,000) was insufficient. Justice de Montigny for the FCA held that "Aboriginal groups have a responsibility to make use of such processes if they wish to voice their concerns" (*Bigstone*, para 52).

[216] Canada's evidence is that funding for supplemental consultation was not meant to cover the entire cost of consultation. The FCA in *TWN* also held that, absent evidence to show how that

the lack of funding was so inadequate as to render the entire consultation process unreasonable, this factor is not determinative (para 539).

[217] I find that while the amount of funding provided may not be as much as the Applicants would have wanted, they were provided funding and absent evidence of how it rendered the process inadequate I would agree that first it is not determinative nor does not make the decision unreasonable.

c) The GIC's reasons

[218] The Applicants submit that the GIC did not provide reasons for its decision and did not explain what material it relied on making this decision unreasonable. This issue will be considered under the third issue below (starting at para 228)

d) Accommodation

[219] The Applicants assert that Canada did not accommodate their concerns about TLE and economic participation. The Applicants submit that Condition 22 is insufficient because it only addressed the loss of land used for traditional purposes, not the loss of land for TLE selection.

[220] As noted above at paragraph 187 there is no independent duty to accommodate, rather, this duty arises out of the consultation process. The Court in *Coldwater* noted that "the duty to consult does not guarantee that a specific accommodation sought will be warranted or possible,

or that accommodation will result in agreement between the parties" (para 179). Both *Coldwater* and *Bigstone* held that imposing conditions on a project proponent is a form of accommodation.

[221] While the duty to consult requires the Crown to seriously consider accommodation, there is no guarantee of accommodation, or that the parties will agree on the appropriate accommodation. This serious consideration by the Crown may be reflected in their written reasons, like the CCAR, and proponent conditions can be appropriate accommodation.

[222] The Applicants assert that Condition 22 is a form of "approve now, consult later." The Court of Appeal (*Bigstone*) considered a similar concern about the future-oriented nature of conditions, but concluded that the Board's role is not only to approve, but also to supervise – it is a dynamic process that is not frozen in time (para 56). The Court also held that "the Crown's duty to consult and accommodate does not come to an end once the approval of a project has been given, but subsists at later stages of the development process" (para 59).

[223] Based on this decisions, I find that it was open to the NEB and the GIC to enact a prospective accommodation measure.

[224] Condition 22 is in addition to the NEB's finding that the route selection avoided land selected for TLE and as much Crown land as possible. Further, Condition 22(b), as amended, requires Hydro to provide "a list of the offset or compensation measures that will be implemented to address the permanent loss of crown lands". This would include permanent loss

of land for TLE selection, assuming that TLE is part of “traditional purposes” which in my view it is, since ownership of land is the most basic traditional use.

[225] Here, a review of the record shows that while the Applicants may not agree with the accommodation measures chosen, this does not mean that the Crown did not fulfill their duty to consult and accommodate. The Crown submits that the Applicants’ concerns about traditional land use were accommodated through the amended Condition 22 and that concerns about economic participation were accommodated through Conditions 3 and 15. Further, the Crown followed up on the Applicants’ TLE selection submissions – the fact that the land was not for sale does not mean that the Crown did not consider the accommodation. Finally, in the First Nation-specific annexes to the CCAR, the Crown listed the proposed accommodations and described why it did not feel these accommodation measures were necessary, demonstrating a serious consideration of accommodation measures in written reasons.

[226] Condition 22, as amended, requires Hydro to submit the CLO Measures Plan to the Board for approval 30 days before commencing operations. The Board therefore has an ongoing supervisory role to ensure that Hydro enacts this plan.

[227] While the Applicants may disagree with the accommodation measures, there is no duty to agree, and in my opinion the proposed accommodation measures reasonably responded to the Applicants’ concerns.

E. *Issue 3 – Administrative law: Was the GIC's decision reasonable?*

(1) Peguis' Submissions

[228] Peguis submits that the GIC's decision was unreasonable. Peguis stated that not only was consultation inadequate but the OIC decision is unreasonable given that shortfalls of consultation as reflected in the CCAR.

[229] Peguis defined the scope of the Record before the decision-maker but noted that they can only surmise it includes the CCAR, because the balance of the record is subject to cabinet confidence.

[230] Peguis submits that, based on the SCC's decision in *Vavilov*, there are two broad types of unreasonable decisions:

- decisions that are internally incoherent; and
- decisions that are untenable based on the relevant factual and legal constraints.

Peguis submits that the GIC's decision meets both of these criteria and is therefore unreasonable.

[231] Peguis argues that OIC lacks internally coherent reasoning. Specifically, they state that the conclusion that Canada adequately consulted and accommodated impacted First Nations cannot follow from the analysis. Peguis' position is that the fatal problem is that the GIC does not account for the substantive dimension of the duty to consult. Peguis argues that the missing link in the rational chain of analysis is that Canada failed to reasonably execute the consultation

process as it relates to Peguis. Peguis concludes that the OIC is silent about the substantive dimension of consultation, but that even the CCAR demonstrates the deficiency.

[232] Peguis states that concluding that concerns have been appropriately accommodated is internally incoherent because it skips execution of the set processes and goes straight to accommodation. Peguis submits that Canada cannot "abdicate its responsibilities" after creating a process, inviting Peguis to that process, but not actually engaging in consultation. Peguis contends that Canada is required to consider whether it reasonably implemented its constitutional duty.

[233] Peguis suggests that the decision is untenable based on the relevant legal and factual constraints, noting that a decision is unreasonable if it misapprehends or does not account for the evidence before it. Peguis contended that the finding that Canada reasonably executed the supplemental consultation is not supported in the evidentiary record. The First Nation notes that the evidence in the Peguis-specific CCAR demonstrates that between August 14, 2018 and April 23, 2019 the parties were concerned only with funding and there is nothing in the evidence demonstrating that they discussed the Project's potential impacts to Peguis' Aboriginal and Treaty rights. Peguis adds that the CCAR shows that there was one follow up email about substantive consultation indicating that it must take place within a week, and afterward no further communications until the Crown concluded consultation. Peguis concludes that the evidentiary record is devoid of a factual basis that the GIC could rely on to conclude that Canada reasonably executed the supplemental consultation phase.

[234] Peguis in argument advanced their position that the GIC applied its conclusions to all Indigenous groups without discretely considering the facts related to Peguis. They say that the GIC could have further extended the time limit for making a decision but does not provide any explanation for why it chose not to.

[235] Further, Peguis argues that the decision is based on a flawed reasoning process. They say that *Vavilov* requires special attention to the decision's reasons, and a reasonable decision must meaningfully account for concerns raised and the central issues (citing *Vavilov*, at paras 86-87). Peguis notes that no written reasons were provided that reveal the impact they had on the decision and that the recitals in the OIC are "sparse and perfunctory".

(2) Long Plain's and Roseau River's Submissions

[236] In addition to the submissions above on the adequacy of the GIC's reasons, these Applicants submit that "based on the long list of breaches," the GIC's decision cannot be considered justified, transparent, or intelligible. These breaches include:

i. that reasons were not provided;
ii. there is no indication what analysis was complete;
iii. there is no clarity about what documents the GIC reviewed; and
iv. there is no information linking the GIC's decision to any of the concerns raised by the Applicants.

(3) Analysis

[237] Canada distinguishes between the constitutional law issue – whether the GIC's conclusion that the duty to consult was satisfied was reasonable – and the administrative law issue – whether the OIC was reasonable from an administrative law perspective.

[238] In *Gitxaala*, the Court held that although the GIC's decision was reasonable on the basis of administrative law principles, the decision could not stand because Canada did not fulfill the duty to consult (paras 156 – 325).

[239] The Court distinguished between the administrative and constitutional law issues in *TWN*. At issue in *TWN* were certain aspects of the NEB's Report. The Court considered the deficiencies of the Report under the umbrella of administrative law and concluded that the Report was so flawed it was unreasonable for the GIC to rely on it (paras 228 -373).

[240] In this application, and unlike in *TWN*, the Applicants do not take issue with the NEB's Report. The issue is the adequacy of consultation, expressed in administrative law terms as whether the GIC's decision was justified in light of the underlying facts and law (*Vavilov*, at para 99).

[241] First, I will consider the Applicants' submissions about the inadequacy of the GIC's reasons. Peguis submits that that GIC was required to provide formal written reasons. But given that the only formal reasons are the OIC and it is sparse and perfunctory with no accompanying

explanatory note it was unreasonable. Long Plain and Roseau River submit that the GIC did not provide reasons for its decision and did not explain what material it relied on and therefore this is unreasonable.

[242] Although these cases predated *Vavilov*, the Court in *Bigstone* and *TWN* considered the adequacy of the GIC's reasons. In *Bigstone*, the Court held:

> [65] It is beyond dispute that deep consultation requires written explanations capable of showing that the Aboriginal group's concerns were duly considered and sufficient to reveal the impact those concerns had on the GIC's decision (*Haida* at para. 44; *Gitxaala* at para. 314). In the case at bar, this requirement was clearly met. **The GIC was entitled to rely on the NEB Report and the CCAR as an adequate basis for its decision. It is well established that an administrative decision-maker need not provide its own reasons on each and every issue raised by the parties, and may rely on and adopt the reports of other administrative actors** (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para. 16, [2011] 3 S.C.R. 708; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 44, 174 D.L.R. (4th) 193). In fact, the GIC referred explicitly to the NEB Report and the CCAR in the preamble of the OIC as a basis of its decision to authorize the Project.
>
> ….
>
> [70] In light of the NEB Report and of the extensive reasons of the Crown (through the MPMO), which the GIC expressly relied on in the OIC, it cannot reasonably be argued that the GIC failed to give adequate reasons. The decision made may not be to the liking of Bigstone, but this is not the test to determine whether the duty to consult has been fulfilled. Consultation cannot translate into a duty to agree, as this would amount to a veto power. As the Supreme Court emphatically stated in *Haida* (at para. 62), "[t]he government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty."

[243] Likewise, the FCA in *TWN* found :

> [479] Similarly, it would be unduly formalistic not to look to the content of the Board's report that informed the Governor in Council when rendering its decision. The Order in Council specifically referenced the Board's report and the terms and conditions set out in an appendix to the report, and expressly accepted the Board's public interest recommendation. This conclusion that the Order in Council may be read with the Board's report is consistent with this Court's decision in *Gitxaala*, where the Court accepted Canada's submission that the Order in Council should be read together with the findings and recommendations in the report of the joint review panel. This Court read the Order in Council together with the report and other documents in the record and found that the Governor in Council had met its statutory obligation to give reasons.

[244] On the facts, it seems to me that the only difference between these cases and the one at bar is that an explanatory note did not accompany the OIC's decision, like there was an explanatory note in *TWN* and *Bigstone*. However, the relevant provision of the *NEB Act* in *Bigstone* and *TWN* states that the GIC is required to give reasons when deciding whether or not to issue a certificate for a pipeline. But, there is no corresponding statutory requirement when considering an international power line. Further, the absence of an explanatory note does not detract from the findings above that the GIC need not provide its own reasons, but may rely on the reasoning in the NEB Report and the CCAR. In this case, the OIC specifically states that it reviewed the NEB Reasons and the CCAR Report.

[245] In the context of the duty to consult, it is established that deep consultation requires the provision of reasons explaining how the First Nations' concerns were considered and impacted the outcome. I find that, the NEB Reasons and the CCAR fulfill that requirement in this context.

[246] This finding is supported by *Vavilov:*

> [103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given**, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis**: see …. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration),* 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point …[citations omitted].

[247] The GIC properly considered Indigenous interests, consultation, and accommodation. The GIC considered the information obtained during consultation – particularly the CCAR which includes a summary of the consultation process, descriptions of Indigenous groups' views on how the Project may impact them and possible accommodation measures, and the Crown's conclusion on the adequacy of consultation. This is supported by the text of the OIC, which states:

> Whereas the Governor in Council, having considered Indigenous concerns and interests identified in the Crown's consultation report entitled *Federal Consultation and Accommodation Report for the Manitoba-Minnesota Transmission Project*, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated, including by amending some of the terms and conditions set out in Appendix III of the Board's Report;

It is a reasonable conclusion for the GIC to find that Canada adequately fulfilled its duty to consult.

[248] However, the CCAR does not show how concerns heard from Peguis were considered in and impacted the outcome during supplemental consultation because that process did not occur. Essentially, the CCAR as it relates to Peguis is the Crown's review of the NEB's conclusion. I would agree with Peguis that the CCAR does not reflect that there were substantive or meaningful consultations with Peguis, for the reasons discussed above in Issue 2. There is no indication in the CCAR that Canada actually met with Peguis to discuss their outstanding concerns. Therefore, the conclusion reached by the GIC that the Crown satisfied its duty to consult could not be based on the underlying facts with respect to Peguis. The GIC relied on the CCAR (without the DTC related to the supplementary consultation) in making its decision therefore making the decision unreasonable with respect to Peguis.

[249] I do find that the GIC was reasonable for the other Applicants. I find the decision reasonable for the reasons above (related to the other issues) regarding the Crown fulfilling its duty to consult with the Applicants other than Peguis. Thus showing they considered the submissions and concerns of the Applicants. There was a rational chain of events that can be followed showing how the concerns were met or otherwise dealt with. I find the reasons and record when read holistically to be transparent, intelligible and reasonable regarding the other First Nations. Separate reasons are not necessary as argued by Long Plain and Roseau River because the GIC relying on and adopting the NEB Report and the CCAR are as an adequate basis for its decision (*Bigstone*).

F. *Summary*

[250] The Application is dismissed against the Applicants: Long Plain, Roseau River and AWZ and Peguis's application is granted.

VII. Remedy

[251] Having found that Canada did not fulfill its duty to consult with Peguis, the question remains as to what the appropriate remedy is. Given that the MMTP has been constructed and has been in operation for a number of years now makes the remedy question more complex than most judicial reviews.

[252] Peguis submits that because the GIC's decision is unreasonable, the OIC should be quashed because the inadequacies flow from the fact that Canada failed to complete the supplemental phase with Peguis. Peguis declared that, as the FCA did in *TWN*, the Court should direct Canada to redo its supplemental consultation phase, and the Project can only be approved after this consultation is complete and any accommodation measures identified. Recognizing that the Project is complete, Peguis submits that Hydro's licence to export energy should be halted until the supplemental consultation process has been conducted.

[253] On the other hand, Canada submits that given the remedies sought, it is not practical to expect the responding parties to stipulate, in advance of the Court's reasons, what specific remedies would be appropriate and therefore requested a remedies hearing.

[254] Hydro submits that if the Court finds that Canada did not adequately consult with the Applicants, the remedy should not impact Hydro's ability to operate the MMTP. The MMTP is operating, subject to the NEB's continued oversight, so Hydro's position is that further consultation will not impact the route, or the terms of Hydro's export contracts. Hydro submitted that given my discretion, an appropriate remedy may be to issue a declaration of breach of the duty to consult.

[255] But first, as I believe was said at the hearing, I am not prepared to grant a further remedies hearing as suggested by Canada because it is not an efficient use of judicial resources in this situation. As presented by the parties, there are several options for me to consider in this situation. However, there are other options available to me which were not submitted by the parties.

(1) Quash the Decision

[256] In judicial review applications, the most common and just remedy ordered is to quash the decision and send it back to the decision-maker for redetermination. But on these facts given the line is constructed and operational, I will not grant this option as a remedy. Practically, that fact renders this remedy unworkable, and such that it does not truly fit why this Application is granted. My finding is that Canada did not adequately consult with Peguis and quashing the decision would unfairly halt the operations of Hydro, who is a party not at "fault" in this

application. To take it even further, to have the line now deconstructed would likely cause more harm than rectify the breaches in this Application. Accordingly, I will not grant this as a remedy.

(2) No Remedy

[257] The option of not granting a remedy has some merit since the Project is built and has been operating since July 2020. There is evidence that the habitat that was destroyed to build the line has started to re-new around the line and the land.

[258] The FCA has been clear that even if a party is successful in an application that the Court can decline to grant a remedy.

> [41] Judicial review is a discretionary remedy: see *Mission Institution v. Khela*, 2014 SCC 24 at para. 41, [2014] 1 S.C.R. 502; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3 at para. 30, 122 D.L.R. 4th 129. It is discretionary in that the Court can decide if an application will proceed where there is an alternate remedy. Even if the application proceeds and the applicant is successful on the merits, the Court has a discretion to decline to provide a remedy: see *Vavilov* at para. 139; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at 228, 111 D.L.R. 4th; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 52, [2010] 1 S.C.R. 6; *Canada (Attorney General) v. Philps*, 2019 FCA 240 at para. 40; *Krause v. Canada*, [1999] 2 F.C. 476 at 490, 1999 CanLII 9338 (F.C.A.).
>
> *(Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2020 FCA 122)

[259] However, to do so would imply that Canada could fail to meet its consultation obligations with impunity, if the Project is constructed before the matter is dealt with by the Courts. That

would be an injustice to Peguis, and unjustly harm the duty to consult and accommodate going forward

(3) Order Further Consultation

[260] A third option is that the Court could order that Canada conduct further consultation with Peguis. This is based on the jurisprudence that consultation is an ongoing process. An example of this option is *Bigstone.* There, the Court held that "Crown's duty to consult and accommodate does not come to an end once the approval of a project has been given, but subsists at later stages of the development process." Similarly in *Gitxaala*, the Court held that:

> [177] In *Taku River*, the Supreme Court also recognized that project approval is "simply one stage in the process by which the development moves forward": at paragraph 45. Thus, outstanding First Nation concerns could be more effectively considered at later stages of the development process. It was expected that throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to fulfil its duty to consult, and if required, accommodate.

[261] Because consultation is about a process, not necessarily a duty to agree, and because the NEB has an ongoing supervisory role, if ordered it may be possible for the Crown and Peguis to engage in further consultation to identify any continued concerns and if any accommodation is possible at this point.

[262] The problem with this remedy is that it may necessitate the Court's supervision and possible further Court orders to ensure reasonable deadlines are met, as well as a supervisory role in dictating what is reasonable. This is not appropriate or manageable in this case thought it may be in other situations.

(4) Declaration

[263] Declaratory relief is granted on a discretionary basis. The SCC held it may be appropriate when:

a) the Court has jurisdiction to hear the issue,.

b) the dispute is real and not theoretical,

c) the party raising the issue has a genuine interest in its resolution, and

d) the responding party has an interest in opposing the declaration being sought

(S.A. v Metro Vancouver Housing Corp., 2019 SCC 4)

[264] The parties did not argue that any of these factors have not been met, and in this case it is obvious that, on these facts, the test set out above for declaratory relief is met.

[265] The FCA in *Assiniboine v Meeches,* 2013 FCA 114 [*Assiniboine*], held that declaratory relief declares what the law is, without ordering any sanction or specific action that must be done. The FCA went on to say that issues related to the declaration become *res judicata* between the parties, as well as stating that compliance is expected.

[266] In *Assiniboine,* the FCA usefully elaborated on declaratory judgments as follows:

> 12 … [A] declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment become res judicata between the parties, **compliance with the declaration is**

> **nevertheless expected, and it is required in appropriate circumstances.**
>
> 13. Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities**, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary.** Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.
>
> 14 … [The] proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the Canadian Charter of Rights and Freedoms. ... **Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system**. ... The rule of law can mean no less.
>
> 15 … As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] 3 S.C.R. 3, at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, **the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order**. As noted by Iacobucci and Arbour JJ. at par. 67 of Doucet-Boudreau: "[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).

[267] The discretion I am charged with to grant a remedy will be best exercised by the granting of a declaration on these facts. While I am not prepared to order the long list of declarations

listed in Peguis' Notice of Application for Judicial Review, I do think in exercising my discretion that issuing a declaration is the most appropriate remedy in this situation.

[268] I am granting a declaration as follows: "In failing to substantively engage with Peguis during supplemental consultation, Canada did not adequately discharge its duty to consult."

[269] With this declaration, I would hope that Canada completes further consultation with Peguis and that one of the purposes of this consultation can be to determine if any accommodation is necessary. The FCA in *Assiniboine* (above) certainly supports that Canada will comply.

[270] I do not remain seized with the matter.

VIII. Costs

[271] At the conclusion of the hearing, I requested that the parties, if unable to agree on a lump sum figure for costs, to submit their bill of costs and short submissions the amounts sought if on lump sum awards were granted. No agreements were reached.

[272] Hydro produced a bill of costs using Column III for $33,150 with disbursements of $3,000 for a total of $36,150. In their submissions they ask that the amount be doubled given the sheer amount of paper involved with all four of these files. They ask that each First Nation pay a lump sum of costs to them in the amount of $16,000.00 for a total of $64,000.

[273] Canada's bill of costs was with respect to all of the Applications. Canada used Column III and had fees of $33,150.00 with disbursements of $33,439.19 for a total of $66,589.19. Canada asks that I award a lump sum of $16,000.00 from each First Nation. I do note that Canada responded to all of the applications and produced a significant amount of the necessary documentation. But vast quantities of material were produced by all the parties.

[274] Roseau River assessed their costs based on Column V with fees of $65,945.25, disbursements of $3,746.15 for a total of $69,691.14.

[275] Long Plain similarly assessed their costs based on Column V and had fees in the amount of $64,945.25, with disbursements of $3,746.15 for a total of $69,691.14

[276] AWZ did not file a bill of costs.

[277] Peguis submitted a bill of costs using Column V with fees of $60,795.00, plus disbursements of $7,890.75 for a total of $68,685.75. As well, they filed an affidavit that they had incurred professional services (legal) fees of $286,500.00 and disbursements of $7,890.75. Their submissions indicated that a lump sum of $150,000 or an alternative assessment using Column III would be an appropriate award in this case. Peguis asserted that this lump sum is warranted given the public interest and complexity of the Application, the non-monetary nature of the Application, and the resource imbalance between the parties,

[278] Given Canada's success in files T-1150-19 (Long Plain), T-1141-19 (Roseau River) and T-1442-19 (AWZ), I will award costs against those First Nations payable forthwith to Canada. I will order that Long Plain, Roseau River and AWZ each pay Canada a lump sum in the amount of $15,000.00 inclusive of fees, disbursements and taxes. (total $45,000.00)

[279] Hydro was also successful in three of the Applications. The burden is on the party requesting increased costs to demonstrate why the particular circumstances warrant an increased award (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 13). In my opinion Hydro has not done so. I will not exercise my discretion to double the amount of the bill of costs. Nor do I believe that their level of participation was as much as Canada's. Given those two issues and the fact their bill of costs (for all four First Nations' applications) was $36,150.00 in total (approximately $8,000 for each), I will award that Roseau River, Long Plain, AWZ each pay costs to Hydro in the lump sum amount of $5,000.00 (total for all three $15,000.00) inclusive of fees, taxes, and disbursements.

[280] In awarding the above costs, I cognizant of not wanting to put in place a "cost penalty" for attempting to uphold constitutional principles, especially one that is as core to our Canadian values as the duty to consult. Thus the awards are less than what was asked for in the Bill of Costs.

[281] Peguis was successful in its application and thus I will award costs payable to Peguis by Canada in a lump sum amount. The lump sum amount sought of $150,000 is not reasonable when compared against the other bills of costs. Though of course this factor is not determinative

it is a good measuring stick. Costs are also not awarded to compensate for the expenditure of legal fees which Peguis somewhat acknowledged when presenting the figure of $150,000.00, or half their billed costs.

[282] Further, Column V as sought by Peguis is not warranted in this situation especially since the Respondents were responding to four Applications at the same time and many of the arguments were duplicated. These efficiencies would make a Column III fee assessment more appropriate. Considering the other factors in *Federal Courts Rules* Part 11- Costs, specifically Rules 400 (3)-(7), as well as the award granted to Canada and Hydro in the other applications, a lump sum figure of $20,000, inclusive of fees, disbursements and taxes, is appropriate. $20,000 is equivalent to what Canada and Hydro are together awarded by each of the other First Nations making it an appropriate award.

[283] No costs are awarded to the Respondent, National Energy Board of Canada.

JUDGMENT IN T-1147-19, T-1141-19, T-1150-19, and T-1442-19

THIS COURT'S JUDGMENT is that:

T-1147-19

1. The application is granted in T-1147-19. A declaration is granted that in failing to substantively engage with Peguis First Nation during supplemental consultation, Canada did not adequately discharge its duty to consult.
2. Costs are awarded to Peguis First Nation in the amount of a lump sum figure of $20,000, inclusive of fees, disbursements, and taxes to be payable by Canada
3. No further costs are awarded against the Respondent, Manitoba Hydro, or Intervener.

T-1141-19, T-1150-19, and T-1442-19

4. The applications in T-1141-19, T-1150-19, and T-1442-19 are dismissed.
5. Costs are awarded against Long Plain First Nation (T-1150-19), Roseau River Anishinabe First Nation (T-1141-19), and Animakee Wa Zhing #37 First Nation (T-1442-19) payable to Canada in the amount of a lump sum figure of $15,000 each, inclusive of fees, disbursements, and taxes.
6. Costs are awarded against Long Plain First Nation (T-1150-19), Roseau River Anishinabe First Nation (T-1141-19), and Animakee Wa Zhing #37 First Nation (T-1442-19) to be paid to Manitoba Hydro in the lump sum amount of $5,000 each, inclusive of fees, disbursements, and taxes.
7. No costs are awarded to the Respondent, National Energy Board of Canada.

"Glennys L. McVeigh"
Judge

Annex A – Order In Council PC number 2019-0784

Whereas, on December 16, 2016, Manitoba Hydro applied to the National Energy Board ("the Board") pursuant to Part III.1 of the *National Energy Board Act* for a permit pursuant to section 58.11 of that Act to construct and operate an international power line within the scope of the Manitoba-Minnesota Transmission Project ("the Project") and for a variation of Manitoba Hydro's Certificate of Public Convenience and Necessity EC-III-16 with respect to the Riel International Power Line;

Whereas, by Order in Council P.C. 2017-1693 of December 15, 2017, the Governor in Council designated, pursuant to paragraph 58.15(1)(a) of the *National Energy Board Act* and on the Board's recommendation to the Minister of Natural Resources, the Dorsey International Power Line proposed in Manitoba Hydro's application regarding the Project as an international power line that is to be constructed and operated under and in accordance with a certificate issued under section 58.16 of that Act;

Whereas, on November 15, 2018, having reviewed Manitoba Hydro's application and conducted an environmental assessment of the Project, the Board submitted its report on the Project entitled *Reasons for Decision Manitoba Hydro EH-001-2017* ("the Board's Report") to the Minister of Natural Resources, pursuant to section 22 of the *Canadian Environmental Assessment Act, 2012* and subsection 21(2) and section 58.16 of the *National Energy Board Act*;

Whereas, by Order in Council P.C. 2019-90 of February 8, 2019, the Governor in Council, pursuant to subsection 58.16(10) of the *National Energy Board Act*, extended the time limit referred to in that subsection from February 15, 2019 to May 16, 2019 and then further extended that time limit by an additional period from May 16, 2019 to June 14, 2019 by Order in Council P.C. 2019-510 of May 15, 2019, to allow for supplementary Crown consultation with potentially affected Indigenous groups;

Whereas the Governor in Council accepts the Board's recommendation that the Project is and will be, if Manitoba Hydro complies with the terms and conditions set out in Appendix III of the Board's Report including those that are added or amended by this Order and set out in the annexed Schedule, required by the present and future public convenience and necessity under the *National Energy Board Act* and the project will not likely cause significant adverse environmental effects under the *Canadian Environmental Assessment Act, 2012*;

Whereas, the Governor in Council has been made aware of project-related concerns in the Crown's consultation report entitled *Federal Consultation and Accommodation Report for the Manitoba-Minnesota Transmission Project* dated June 3, 2019, raised by Indigenous groups during the consultations for the project that affect its assessment of whether Canada has fulfilled its duty to consult;

Whereas the Governor in Council is of the opinion that outstanding Indigenous concerns can be accommodated by amending some of the terms and conditions set out in Appendix III of the Board's Report;

Whereas the Governor in Council, having considered Indigenous concerns and interests identified in the Crown's consultation report entitled *Federal Consultation and*

Accommodation Report for the Manitoba-Minnesota Transmission Project, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated, including by amending some of the terms and conditions set out in Appendix III of the Board's Report;

And whereas the Governor in Council considers that the Project would increase electricity market efficiency, add greater flexibility for Manitoba's electricity system operator to meet changing energy needs, improve power system reliability, and provide benefits to Indigenous, local, regional and the provincial economy;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Natural Resources,

(a) in order to adequately discharge its duty to consult and to accommodate any outstanding concerns of Indigenous groups, adds or amends certain conditions that were set out in Appendix III of the National Energy Board's *Reasons for Decision Manitoba Hydro EH-001-2017* and sets out in the annexed Schedule, those conditions as added or amended;

(b) pursuant to section 58.16 of the *National Energy Board Act*, approves the issuance by the National Energy Board of Certificate of Public Convenience and Necessity EC-059 to Manitoba Hydro, in respect of the Manitoba-Minnesota Transmission Project, subject to the terms and conditions set out in Appendix III of the National Energy Board's report entitled *Reasons for Decision Manitoba Hydro EH-001-2017* including the added or amended conditions referred to in paragraph (a); and

(c) pursuant to subsection 21(2) of the *National Energy Board Act*, approves the issuance by the National Energy Board of Order AO-006-EC-III-16 to Manitoba Hydro.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1147-19
STYLE OF CAUSE:	PEGUIS FIRST NATION v THE ATTORNEY GENERAL OF CANADA AND MANITOBA HYDRO AND CANADIAN ENERGY REGULATOR
AND DOCKET:	T-1141-19
STYLE OF CAUSE:	ROSEAU RIVER ANISHINABE FIRST NATION v THE ATTORNEY GENERAL OF CANADA, CANADIAN ENERGY REGULATOR AND MANITOBA HYDRO
AND DOCKET:	T-1150-19
STYLE OF CAUSE:	LONG PLAIN FIRST NATION v THE ATTORNEY GENERAL OF CANADA, CANADIAN ENERGY REGULATOR, AND MANITOBA HYDRO
AND DOCKET:	T-1442-19
STYLE OF CAUSE:	CHIEF JIM MAJOR ON HIS OWN BEHALF AND ON BEHALF OF ANIMAKEE WA ZHING #37 FIRST NATION v THE ATTORNEY GENERAL OF CANADA, CANADIAN ENERGY REGULATOR, AND MANITOBA HYDRO
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	MAY 25, 2021 TO MAY 28, 2021
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	SEPTEMBER 24, 2021

APPEARANCES:

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Saul Joseph	
Luke Hildebrand Yana Sobiski	FOR THE APPLICANT CHIEF JIM MAJOR ON HIS OWN BEHALF AND ON BEHALF OF ANIMAKEE WA ZHING #37 FIRST NATION
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Mike McDonald Q.C. Saul Joseph	FOR THE APPLICANT LONG PLAIN FIRST NATION
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